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Environment Hawaiʻi

a monthly newsletter

Agency Gives Shelter, But to Whom?

The Hawaiʻi County agency that is supposed to help the homeless find housing seems instead to have given cover to a scheme to line the pockets of as-yet unknown players.

Just how this happened, in the waning days of the administration of Mayor Billy Kenoi, can't be known from the records that the Office of Housing and Community Development has made public to date.

But while details remain murky, the fact that the current administration now has turned its back on the agreement the former administration signed in late 2016 with representatives of Waikoloa Highlands, Inc., and the later release of the company from the need to comply further with the county's affordable housing law point to a clear need for further investigation. The abrupt resignation from the OHCD of the employee who guided these agreements to final approval only adds to the need for a full inquiry.

IN THIS ISSUE

Hawaiʻi County Reverses Course On Affordable Housing Approvals

When the Land Use Commission approved the placement of more than 700 acres of Waikoloa land into the Rural district back in 2008, one of the conditions was that the landowner comply with County of Hawaiʻi requirements for affordable housing. As set forth in Chapter 11 of the County Code, developers are to earn "housing credits" equal to 20 percent of the total number of units or lots proposed.

With Waikoloa Highlands, Inc. (WHI) proposing to develop 398 single-family lots, it would need 80 credits.

As it turned out, however, the deal, struck with the county in late 2016 and calling for 11.7 acres of WHI land to be used for that purpose, fell far short of that. At most, the county may see 32 affordable units developed as a result of the affordable housing agreement signed by representatives of the administration of former Mayor Billy Kenoi just days before his term expired. (*Environment Hawaiʻi* reported more extensively on this in our September 2018 edition.)

At an LUC hearing on October 24, the question of whether the county's agreement with WHI was sufficient to satisfy the affordable housing condition arose. To allay LUC concerns about that, WHI attorney Steve Lim had Valery Grigoryants, the individual who has been identified as having ultimate authority over the company, address the issue.

Was the company "currently able and willing to see the project through to completion?" Lim asked.

"Yes," Grigoryants replied.

"Are you aware of recent discussions with the county" Office of Housing and Community Development (OHCD)? Lim asked.

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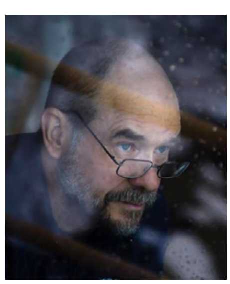
Treasures of Pristine Ocean Ecosystems Could Be Lost to Mining for Metal Nodules

For the better part of four decades, Craig Smith, a biological oceanographer with the University of Hawaiʻi's School of Ocean and Earth Sciences and Technology, has been studying the deep sea floor. Most recently, he has been investigating life in what might be the planet's most pristine, untouched environments: the abyssal plains of the eastern Clarion-Clipperton zone, an ocean region stretching from southeast of Hawaiʻi to nearly the coast of Mexico. That area has a high abundance of polymetallic nodules (also called manganese nodules) resting on the sea floor, which has caused it to be targeted for mining.


Craig Smith

Smith, who will be the featured speaker at *Environment Hawaiʻi's* dinner on January 18, spoke about his discoveries recently with editor Patricia Tummons.

Could you talk about what led you to investigate the deep ocean environment?

Well, I've long been interested in deep sea biology. In 1983, as a Ph.D. candidate at

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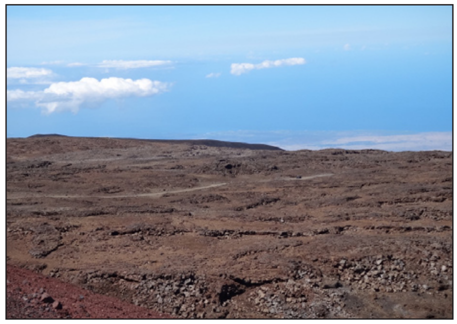
NEW AND NOTEWORTHY

Final Word on TMT? The Hawai‘i Supreme Court has refused to reconsider its majority decision, issued October 30, that upheld the Conservation District Use Permit allowing for construction of the Thirty Meter Telescope.

Several parties had asked the court to reconsider the ruling, which was joined in by four members of the five-member bench. Only Justice Michael Wilson dissented.

The court did amend its decision in response to an amicus brief filed by attorneys for Kua‘aina Ulu ‘Auamo, Colette Machado, and Dan Ahuna. As co-counsel Earthjustice states on its website, the decision included two footnotes "that dropped legal bombshells: one suggesting that Native Hawaiians must bear the burden to prove their rights, exactly opposite to settled precedent that developers and agencies bear the burden to justify any harm to Native Hawaiian rights; and the other endorsing a false and offensive distinction between 'contemporary' (read: fake) and 'traditional' (read: real) Hawaiian practices." The court deleted the footnotes and added one clarifying that impact analyses are not "limited to the project footprint," the website states.



The area proposed for the Thirty Meter Telescope.

What's next?

While opponents have indicated they will continue to protest, the process of setting out exact terms of what will be allowed has yet to begin. According to the Department of Land and Natural Resources' Office of Conservation and Coastal Lands, there will be two phases of permitting for the TMT: civil construction, which involves geotechnical studies, access improvements, and rough grading; and actual construction.

"Construction plans need to be approved by the DLNR … for consistency with the permit. We will also review the status of the required pre-construction mitigation measures contained in the permit.

"Examples of pre-construction mitigation measures include establishing full-day cultural training, funding for educational programs and the community benefits package, implementation of studies on wekiu habitat, and establishment of mentorship programs."

As of mid-December, no plans had been submitted for review.

If at First You Don't Succeed: On December 6, David Kimo Frankel filed a complaint in 1st Circuit Court seeking to invalidate the Board of Land and Natural Resources' November 9 decision to approve a revocable permit to the owner and operator of the Kahala Hotel & Resort for the use of a beachfront parcel of filled land.

The Department of Land and Natural Resources' Land Division had for years allowed what many considered to be commercial uses of the property, which previous revocable permits restricted to recreational and maintenance uses. Late last year, the agency recommended that the Land Board issue a new permit to Resorttrust Hawai‘i to officially authorize some of those uses, including the setting of cabanas and lounge chairs for rent.

Frankel has argued that such a permit requires, at the very least, an environmental assessment or impact statement be done beforehand. He requested a contested case hearing on the division's initial recommendation to approve the new permit, but the Land Board denied his petition on November 9.

In his complaint to the court, Frankel points out that the 1963 agreement between the state and the hotel's then-owner states that the parcel "shall be used as a public beach."

He also argued that by approving the permit before Resorttrust obtained a Special Management Area permit from the city, the Land Board violated the state's coastal zone management law "and its approval is void.

In addition to seeking to overturn the board's decision, Frankel is asking the court to require the board to adopt rules that govern its decision-making on the issuance of revocable permits.

Quote of the Month

"We think the commission has taken aggressive action against this project because they are from Russia, and we also think the commission was prejudiced from the very start of the proceedings due to some – I don't know what you would call it – by periodical reporting by Environment Hawai‘i."
— Steve Lim, attorney for Waikoloa Highlands, Inc.

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EDITORIAL

Oversight Required for Hawai'i County Housing Office

Due diligence.

That's what you do if you are buying or receiving property. And it's what you should do in spades if you are doing so on behalf of people struggling to find affordable housing in Hawai'i.

But due diligence appears to have been completely lacking when the Hawai'i County Office of Housing and Community Development (OHCD) was negotiating with a Waikoloa developer over terms that would lead to satisfaction of affordable housing conditions imposed by the state Land Use Commission as well as the County Council.

Here are the many ways in which the OHCD failed its clients – to say nothing of the taxpaying public of Hawai'i County – in its dealings with Waikoloa Highlands, Inc.

Transfer to a For-Profit Entity

The County Code requires any developer wanting to satisfy the affordable housing condition by a land transfer – instead of built units – to transfer title to either the county or a qualified nonprofit organization, such as Habitat for Humanity. In the case of Waikoloa Mauka, LLC, or its successor, Waikoloa Highlands, Inc., which was hoping to develop 398 single-family house lots on about 730 acres near Waikoloa Village, that transfer, involving about 11.7 acres of land, was made to a for-profit entity, Plumeria at Waikoloa, LLC.

Nothing is known as to who was behind this company, formed barely two weeks before the OHCD signed off on the deal. Paul Sulla, the Hilo attorney who registered the LLC with the state Department of Commerce and Consumer Affairs on November 16, 2016, would not answer any questions about the company posed to him by *Environment Hawai'i*. The registration indicates that there were two members in the LLC in addition to Sulla; their identity remains hidden.

Alan Rudo, late of the OHCD staff, seems to know the most about this case. He says it was the developer who proposed transferring the land to Plumeria at Waikoloa (now known as Peaceful Ventures, LLC).

Sidney Fuke, who at the time of the transfer was a consultant to Waikoloa Highlands, says that it was the OHCD that wanted the land to end up in the hands of Plumeria at Waikoloa.

With none of these parties having yet had to testify under oath as to the events surrounding this transfer, the mystery remains as to who is behind the scheme to violate the County Code and have the land end up in the hands of a private, for-profit entity. Worth noting also is the fact that Plumeria at Waikoloa seems to have paid a nominal $50,000 for the land, which it then resold for $1.5 million to Pua Melia, LLC, which is now attempting to put some affordable housing on the property, as well as a large True Value hardware store.

Suitability of the Land

The County Code requires also that any land conveyed to satisfy affordable-housing requirements has to be "without unusual site conditions that make it difficult to build a home" or "to accommodate the number of homes the developer would be required to provide if its required credits were earned by selling completed dwelling units."

Here, the 11.7 acres did not meet this standard. Practically since the first subdivision maps were proposed by the original developer nearly 30 years ago, and certainly in the 2006 environmental impact statement for the boundary reclassification, the particular area designated in 2016 for affordable housing was shown to be bisected by a "flood route," as the EIS described it.

At no point did the county Office of Housing and Community Development, charged with ensuring that the affordable-housing conditions imposed on the developer were met, bother to check that the land was suitable and "without unusual site conditions."

An unsigned memo to the files, apparently written well after the affordable housing deal was done, lists all the things that were ignored or overlooked in the affordable housing deal. Included among them was "significant flood route [runs] through parcel."

Sufficiency of the Land

The County Code stipulates that developers need to earn affordable housing credits equal to 20 percent of the number of market-rate lots or homes in their intended subdivisions. A credit is usually equal to one housing unit, but could be more or less, depending upon the level of affordability. For example, a rental unit that is affordable to a family earning 60 percent of the median income in the area is going to be worth more than one credit, while a unit offered for sale to a household earning 120 percent of the average median would be worth less.

In the case of Waikoloa Mauka, the 11.7 acres it transferred to Plumeria at Waikoloa would need to be sufficient to develop housing able to earn 80 credits.

OHCD records reviewed by *Environment Hawai'i* suggest that at no time prior to the office signing off on the affordable

Continued on next page

housing agreement, in December 2016, was any calculation made as to whether the area, burdened by utility easements and drainageways, would be able to accommodate the number of units needed to add up to 80 credits.

And, in fact, the current owner of the 11.7-acre parcel has acknowledged that if he is to build the hardware store, then he will be able to build at most 32 affordable units.

Existing Encumbrances

At the time the housing agreement was signed, Bureau of Conveyance records indicated that there was still at least one outstanding encumbrance on the land: a mortgage for $1.5 million. This fact alone should have caused someone at Housing to put the brakes on the transaction.

Yet no one checked.

In that same undated confessional memo, among the "challenging issues" associated with the Waikoloa affordable housing deal was the fact that it was "later discovered that the parcel had [redacted] encumbered against the bulk parcel."

(Joel La Pinta, who was the Hilo-based manager for Waikoloa Highlands, has said that in fact, the mortgage that was still on record as a lien against the property had actually been paid off, but no release had been filed owing to an oversight. *Environment Hawai'i* has been unable to verify this independently.)

Legal Review

The deputy corporation counsel assigned to the Office of Housing at the time was Amy Self. She was supposed to make sure that the affordable housing agreement as well as the release from the affordable housing requirement, executed by the OHCD in July 2017, was legal as to form and legality.

We understand that the Corporation Counsel's office is stretched thin, as are most other county offices and departments. Nevertheless, it is vital that the county corporation counsel's office – the county's (and the public's) last defense against entering into improper or even illegal contracts and agreements – exercise its responsibility with seriousness and care.

That did not happen in this case. On November 9, Mayor Harry Kim signed a letter renouncing the affordable housing agreement and subsequent release. On its face, the agreement contradicted the county charter, which deputy corporation counsel Ron Kim argues absolves the county from any liability.

Yet it would hardly be surprising if the county eventually does face legal jeopardy from Waikoloa Highlands. After all, to have it in writing that you've satisfied every legal requirement for affordable housing – and then, more than a year later, be told no, you haven't – would seem to open the door to litigation.

In sum, it should distress every resident of Hawai'i County that an office entrusted with developing housing for those most in need of it should have acted with such lack of care and caution in its negotiations to satisfy Waikoloa Highlands' affordable housing requirements.

One of the parties that played a key part in these negotiations has already left the Housing Office. But there remain questions as to how the rest of the staff, from the administrator on down, could have allowed the mistakes to multiply as they did.

What's more, the Waikoloa case raises the question of how many other times the Office of Housing failed to live up to its legal and moral requirements in settling with other developers.

As a result of the Land Use Commission's action in November, the Waikoloa Highlands project must now go back to the drawing board and the affordable housing requirements imposed by county zoning can be reconfigured should the owner seek to have the County Council pass a new rezoning ordinance.

In the meantime, the council might wish to take a close look at the circumstances that led to this debacle in the first place. We would strongly urge it to do so.

Housing from page 1

"Yes," Grigoryants answered, "and I would like to confirm that we have intention to start negotiation in good faith to transfer three or four acres for affordable housing," which, he said, would be in addition to the 11.7 acres transferred as a result of the 2016 agreement.

When Joel LaPinta, WHI's on-the-ground manager in Hawai'i, testified at that same October hearing, he disclosed that he had met with county OHCD staff and a deputy corporation counsel assigned to the agency earlier that month.

Lim told the commission that the meeting was requested by OHCD "to assist their project developer," the current owner of the 11.7 acres. "The developer needs more land area because there's a mauka-makai drainage that runs through the property, so there's not enough land to develop affordable housing. We're trying to show the commission that the petitioner is, in good faith and on a voluntary basis, trying to help the county."

The OHCD, La Pinta said, "asked us to come and meet with them to acquire more land to accommodate 80 more affordable apartments. … We would like to accommodate them."

Lim asked La Pinta what "drivers" – incentives – were offered to WHI in return.

"Available tax credits," he replied.

Commissioner Dawn Chang was baffled by the discussion.

"With all due respect, I'm a little confused. Is this transaction related to the affordable housing condition in the matter before us, or is this a separate transaction?"

"We think it's a separate transaction," Lim said. "For the first time, we saw the county's position that the release of the housing requirement wasn't good. So that's why we're discussing why we feel that we satisfied the requirement. … If the county takes the final position that we haven't satisfied the agreement, then this becomes very relevant."

On October 25, Jeff Darrow, representing the Hawai'i County Planning Department, was questioned further on the affordable housing condition.

"Do you know the county's position on fulfillment" of the affordable housing provision? Darrow was asked by Ron Kim, the deputy corporation counsel advising the Planning Department?

"Our position is that they have not complied with the affordable housing requirement," Darrow replied.

Lim then bore down on Darrow under cross-examination.

Was Darrow involved in preparing the affordable housing agreement?

No, Darrow answered.

Was he involved in negotiating the agreement?

No, again, Darrow said. That fell to the OHCD staff, "as well as our corporation counsel," which approved the agreement, and the mayor's office.

Was Darrow familiar with the "affordable housing release" document, signed off on by the county in July 2017, which purported to release WHI from further need to comply with affordable housing conditions?

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Yes, Darrow was familiar.

"Why was this release agreement executed by the county?" Lim asked Darrow.

"I can't answer that question," Darrow said, adding that the OHCD administrator, Neil Gyotoku, and possibly the deputy corporation counsel, Amy Self, who signed the release, could shed light on that issue.

"Why the change of position?" Lim asked.

"A question has arisen on the transfer of the 11.7 acres to an entity that was not considered a nonprofit entity," Darrow answered. Under the County Code, the land has to be transferred either to the county itself or to a qualified nonprofit. The recipient of the land, Plumeria at Waikoloa, LLC, was a for-profit entity.

"The petitioner is concerned," Lim said. "We had an agreement. Now the county says, 'you didn't do what you needed to.' We're trying to determine what exactly they want us to do."

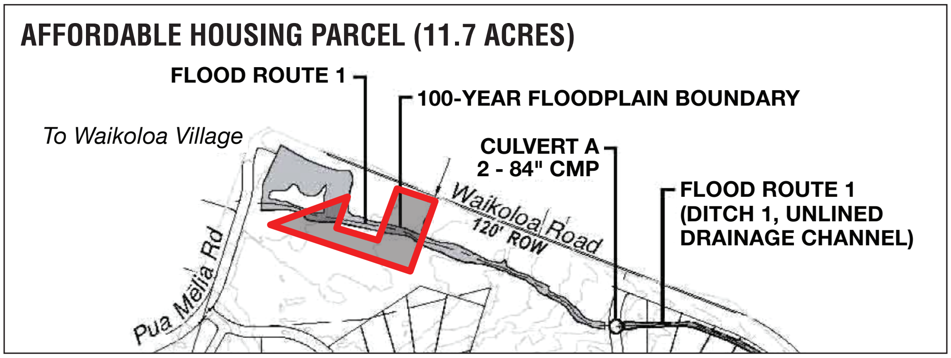
Kim, the county corporation counsel, explained to the LUC that there was no way the agreement and the release, although signed by county officials, could have ever bound the county. "The main factual problems with the agreement are that it doesn't comply with its own terms or the County Code," he told the commissioners. "The county cannot contract to trump its own code. Chapter 11-5 requires that if the developer is to donate land … in lieu of developing it itself, the conveyance must be to either the county or a nonprofit. In this case, the conveyance was to a for-profit, which turned around and sold the property for a reported $1.5 million.

"And the other problem with the property that was conveyed was that it is not supposed to have any unusual characteristics that would make it difficult to develop. Yesterday, Mr. LaPinta testified to the substantial drainage easement that made it difficult to develop, and also the unusual shape.

"Finally, the land donated is supposed to be sufficient to accommodate the number of affordable housing units which the developer is required to build, and in this case, the actual owner now of the property is saying he can only build I believe the number … was 32 affordable housing dwellings. So these are the problems I see."

There was one more thing Kim wanted the commissioners to know: The agreement on affordable housing claimed that Plumeria at Waikoloa was a nonprofit, "which was not true."

At the conclusion of the October hearing, the LUC instructed the parties to brief the commission before its final hearing on, among other things, the question of whether the affordable housing condition had been satisfied.



Original map is taken from the 2006 EIS for Waikoloa Highlands. The boundary of the affordable housing parcel is approximate.

Doctored Documents?

That final hearing, held November 28, saw Gyotoku, the county housing administrator, testify under subpoena as to his knowledge of the circumstances surrounding the two key documents that relate to the affordable housing condition. First, there was the December 2016 agreement, which called for 11.7 acres to be transferred to Plumeria at Waikoloa. Second, there was the release from the condition that was executed in July 2017.

The "Affordable Housing Agreement" was signed by four parties over about a two-week period. Natalia Batichtcheva signed on behalf of Waikoloa Highlands on November 18. Susan Akiyama, the county housing administrator at the time, signed on November 22. Deputy corporation counsel Amy Self signed her approval "as to form and legality" on November 30. Finally, Mayor Kenoi signed on behalf of the County of Hawai'i on December 1.

Gyotoku did not assume his position until December 5, as part of the new administration of Mayor Harry Kim. Asked by Lim if he could "speak to issues relating to the 11.7 acres conveyed," Gyotoku replied, "In part, I am." Under further questioning, it became clear that Gyotoku would admit to little knowledge of the details as to how or why Plumeria at Waikoloa had been chosen to receive title to the 11.7 acres designated for affordable housing.

"How did the county pick Plumeria?" Lim asked.

"I do not know," Gyotoku replied.

Lim then suggested that the county had altered documents. "You understand that the deed signed by my client for 11.7 acres was altered at some point in time at the county's level?"

Gyotoku replied, "I believe so."

Lim: "Without the consent of my client?"

Gyotoku: "Yes."

Ron Kim, the deputy corporation counsel representing the county, sought to clarify this point: "My understanding was, you said that the deed Waikoloa Highlands signed was altered at the county level. Did the county alter the deed after it was signed?"

Gyotoku: "By the time it was recorded at the Bureau of Conveyances, it does not say it was not a nonprofit. My understanding was, when it was at my office, Plumeria was a nonprofit."

In fact, documents that *Environment Hawai'i* obtained from the Bureau of Conveyances as well an exhibit offered by Lim reveal that there are discrepancies.

The warranty deed that conveyed the land to Plumeria at Waikoloa – signed June 1, 2017, by Batichtcheva, but not recorded with the state bureau until January 29, 2018 – identifies Plumeria at Waikoloa, LLC, as "a Hawai'i limited liability company," giving its address as a Post Office box.

A nearly identical document, which was forwarded to the Office of Housing by Sidney Fuke, a planner then working on behalf of Waikoloa Highlands, on June 19, 2017, is identical in all respects but one: on the second page of the warranty deed, Plumeria at Waikoloa is identified as "a Hawai'i nonprofit corporation" having a street address the same as that of Hilo attorney Paul Sulla. However, within that same document, on page 1, Plumeria at Waikoloa is said to be a Hawai'i limited liability company.

The notarized signature page and the notary authentication are identical on both documents.

The "release agreement," which Fuke appears to have drafted and Batichtcheva also signed on the same day as the warranty deed, also identifies Plumeria at Waikoloa as a Hawai'i "non-profit corporation."

Continued on next page

Waikoloa Highlands Loses Effort To Avoid Land Reverting to Ag District

On November 24, the state Land Use Commission considered, as attorney Steve Lim described it, a "death penalty" case. Would the commission decide to revert more than 700 acres of land near Waikoloa Village to the Agricultural land use district? Or would it allow the land to remain in the Rural district, the classification it received in 2008?

That was the fundamental question when the LUC heard arguments on its order to show cause issued last May to Waikoloa Highlands, Inc., the owner of around 731 acres of land where a development of 398 lots for single-family houses had been proposed.

Despite Lim's representation of his client as having been subjected to anti-Russian prejudice on the part of the commissioners and his claims that it was defrauded by a former company director, his arguments were for naught. At the close of a full day of testimony, the commissioners voted, seven to one, to revert the land to the Agricultural district.

The vote was not taken lightly. The case was heard against the backdrop of a protracted court case involving another LUC vote to revert land – about 1,000 acres of it, just a stone's throw from the Waikoloa property – proposed for the Villages of 'Aina Le'a development. (That case, in which the state is being sued for around $50 million, is proceeding through federal district court in Honolulu, after the Legislature rejected a proposed $1 million settlement in 2017.)

'Substantial Commencement'

It was clear from the discussion that 'Aina Le'a was never far from the minds of the commissioners – or the parties to the hearing: Lim's client, Waikoloa Highlands, Inc.; the state Office of Planning; and the Hawai'i County Planning Department.

One of the topics the commission had specifically asked the parties to address on this day was the effect of the Hawai'i Supreme Court's decision in that case – ultimately favoring the developer – on the Waikoloa matter. Specifically, the commission wanted to know whether the developer had met the standard of "substantial commencement of the use of the land," which was a key factor in the 'Aina Le'a decision.

Lim argued that, indeed, that standard had been met by his clients, even though all parties acknowledged that the land itself had not seen so much as a shovel of earth turned in the decade since the LUC had reclassified the land. He pointed to language in the Supreme Court's decision that stated, "a determination of whether a party has substantially commenced use of the land will turn on the circumstances of each case, not on a dollar amount or percentage of work completed."

The third condition of the commission's order approving the redistricting states that the developer will be subject to having the land reverted if it does not complete buildout of the project or has not secured a bond providing for that. "This condition," Lim wrote in his brief to the commission, "implicitly recognizes that WHI [Waikoloa Highlands, Inc.] can attain 'substantial commencement' without breaking ground or constructing any improvements." ("Buildout" was defined in the second condition as "completion of the backbone infrastructure to allow for the sale of individual lots.")

He goes on to argue that "substantial commencement" could be said to include things such as obtaining subdivision approvals from the county, getting "competitive bids for the infrastructure improvements," and applying for and obtaining approval for the sale of lots from the Department of Commerce and Consumer Affairs. "All of these steps – none of which involve touching the ground, but all of which are very costly in terms of time, money, and resources – are actions taken in pursuit of 'substantial commencement,'" Lim writes.

For this reason, "WHI respectfully submits that *the preparation of plans and studies, the securing of entitlements and other governmental approvals, the subdivision of the land, and the irrevocable conveyance of land in satisfaction of a petitioner's affordable housing obligations ... are 'uses' of the land for the purpose of determining whether there has been substantial commencement,"* Lim argues.

In its own statement of position, the state Office of Planning relied on the plain language of both the statute and the 'Aina Le'a decision of the Supreme Court to argue that the phrase "substantial commencement of the use of the land" was a standard as yet unmet by Waikoloa Highlands.

"In sum, 'substantial commencement of use of the land' must be considerable in amount or value and large in volume or number, use or occupancy of the land as opposed to it remaining vacant and untouched, and determined on a case-by-case basis," wrote OP director Leo Asuncion.

The Hawai'i County Planning Department, in its brief on the issues before the commission, staked out a position on this point that mirrored that of the Office of Planning.

Plan B

Should the LUC not buy into his argument that WHI had "substantially commenced" work on the development, it would then need to determine whether good cause existed for that failure.

Ever since the LUC issued the order to show cause to WHI, Lim and WHI's current principals have argued that the lack of progress in the proposed development was the result of bad-faith actions by Stefan Martirosian, the former director of WHI who is now facing charges in Armenia, where the ultimate owner of WHI, Vitaly Grigoryants, has alleged that Martirosian

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The Last Word

In the end, Gyotoku shed no light on the confusion. Mayor Harry Kim did give finality to the matter when, on November 9, he signed a letter stating clearly the county's position:

"The official position of the county of Hawai'i ('County') is that Waikoloa Mauka LLC ('Petitioner') has not yet fulfilled Condition 9 (Affordable Housing) of the State Land Use Commission's Findings of Fact, Conclusions of Law, and Decision and order… At the present time, Petitioner is engaging in negotiations with the County towards fulfilling this condition, and the County will require Petitioner to fulfill its affordable housing requirements under the law."

With the LUC having reverted the classification back to Agricultural, there is no current housing requirement. If the landowner wishes to pursue county approvals for an Agricultural lot development, however, it will still need to satisfy the requirements of the County Code.

As to who nominated Plumeria at Waikoloa to receive the land and who took the $1.5 million in proceeds when the land was resold to the current owner, that remains a mystery. ***— Patricia Tummons***

Waikoloa from page 6

defrauded him of some $50 million.

Lim pointed out that the LUC doesn't have specific rules addressing what constitutes "good cause." Still, "WHI has submitted substantial evidence and elicited credible testimony that Mr. Martirosian's numerous bad acts resulted in the delay of the project being timely developed," Lim writes.

This argument was also linked to Lim's discussion of a question asked by commissioner Gary Okuda about whether "internal management issues" of WHI are at all relevant to the LUC's consideration of the Order to Show Cause.

After reciting the statements of Valery Grigoryants (Vitaly's brother who claims to hold power to make decisions involving WHI) as to the misdeeds of Martirosian, Lim concludes: "For these reasons *and* the significant steps WHI has taken to get the project back on track, WHI respectfully submits that good cause exists to excuse its failure to timely develop the project."

The Office of Planning agreed with Lim that, in fact, "internal management issues" were relevant to the LUC's consideration of the show-cause order, but noted that those issues were hardly beyond the control of WHI.

"The commission must determine whether the delay due to Mr. Martirosian's misdeeds is excusable," Asuncion stated. "'Good cause' may include circumstances that are unforeseeable and beyond the control of the petitioner, e.g., a turn in the economy or a natural disaster. … Here it is unclear that Mr. Martirosian's fraud and mismanagement were beyond the control of petitioner. Mr. Valery Grigoryants admitted that he was 'responsible' for the project and he completely trusted but was betrayed by Mr. Martirosian. … Mr. Grigoryants testified that he had oversight of Mr. Martirosian, including speaking to Mr. Martirosian every day while he was in charge of the project. Mr. Grigoryants' supervision, or lack thereof, over Mr. Martirosian may have had a role in the mismanagement of the project, which would be within the control of petitioner."

Affordable Housing

One of the major supports that WHI relied on for its claim that it had substantially commenced work on the development involved its purported compliance with the affordable housing requirement imposed by the LUC in its 2008 decision. The LUC had required that the company satisfy the affordable housing requirements of all new developments as set forth in Chapter 11 of the Hawai'i County Code.

In satisfaction of that requirement, WHI agreed in late 2016 to transfer more than 11 acres of its land for an affordable housing development.

Despite a July 2017 release from the county Office of Housing and Community Development (OHCD), which stated that WHI had indeed complied with that condition, the Office of Planning and the county Planning Department contended that the land transfer failed to meet the clear requirements of the county's law.

At the October 25 hearing on the show-cause order, the county's deputy corporation counsel Ron Kim stated that the release – signed by the director of the OHCD Neil Gyotoku, deputy corporation counsel Amy Self, and deputy mayor Will Okabe – could not possibly be binding on the county since on its face it violated Chapter 11. That violation was to be found in the fact that the land was not transferred either to the county or a county-approved nonprofit, as Chapter 11 anticipates, but in fact was deeded over to a for-profit limited liability corporation, Plumeria at Waikoloa, LLC. (Last August, it changed its name to Peaceful Ventures, LLC.)

Even if the LUC were to agree with Lim's argument that the land transfer did satisfy its affordable housing condition, the Office of Planning argued that this did not meet the "substantial commencement" standard. "The transfer of the 11.8 acre lot amounts to merely 1.6 percent of the total 731.581 acre petition area. The 11.8 acre lot remains vacant, without any affordable housing units developed thereon, and has not been graded or otherwise 'used,'" the OP stated.

Discrimination

One of the claims Lim made was that his client was the subject of discriminatory treatment at the hands of the Land Use Commission, violating the constitutional guarantee of equal protection.

Commissioner Gary Okuda questioned him at length on this claim, noting that a Hawai'i Supreme Court decision, *Mahiai v. Suha*, set forth the standards for making a valid claim of discriminatory enforcement. Among them, the alleged victim must show that the action against them had to be "deliberately based on an unjustifiable standard such as race, religion, or other discriminatory standard."

"I'm very conscious for many reasons of claims of discrimination," Okuda stated. "We must be vigilant. … All people should be treated equally under the law." But, he went on to say, claims of discrimination had to show how enforcement was based on an unjustifiable standard.

"So," he said, "is it petitioner's contention that the Order to Show Cause was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification?"

Lim: "That's the elephant in the room. We think the commission has taken aggressive action against this project because they are from Russia, and we also think the commission was prejudiced from the very start of the proceedings due to some – I don't know what you would call it – by periodical reporting by *Environment Hawai'i*."

Okuda then asked what evidence in the record supported Lim's claim that there was any discrimination based on race, ethnicity, national origin, or the language anyone spoke.

"The fact that we have an order to show cause issued against this project," Lim replied.

Okuda was not convinced: "Based on the response, it does not satisfy *Mahiai v. Suha*. Based on that, the evidence is irrelevant."

— Patricia Tummons

For Further Reading

Environment Hawai'i has published several articles on the Waikoloa Mauka/Waikoloa Highlands project. Among them:

- "Original Waikoloa Partners Share History of Cocaine Trafficking," November 2016:
- "Waikoloa Highlands Development at Standstill, Eight Years After LUC Action," November 2016;
- "As Owner Is Held in Moscow Jail, LUC Mulls Reverting Waikoloa Land," July 2018;
- "Bankruptcy Court Dismisses Petition of Early Partner in Waikoloa Project," July 2018;
- "Waikoloa Highlands Told to Defend Project at October LUC Meeting," October 2018;
- "Financing, Affordable Housing Take Center Stage at Waikoloa Hearing," November 2018.

All are available on our website, www.environment-hawaii.org. (Articles published within the last 12 months require a subscription or purchase of a two-day pass.)

Smith from page 1

Scripps, I started studying sources of food for the deep sea – what is getting down from the surface ocean to feed the deep-sea animals.

But even then, there was interest in mining the deep sea, particularly nodules on the abyssal plain. It was natural for me to study that. In the 1980s, I did some work with NOAA [the National Oceanic and Atmospheric Administration] to look at the nature of abyssal impacts from mining.

Didn't you also pioneer research on whale falls?

When I was a grad at Scripps, I actually tried to sink a whale. We weren't able to sink one. Not enough ballast. But in 1987, we happened upon a 20-meter-long blue whale fall. That's what got me started. There was a giant whale skeleton with a rich community of animals similar to those found on hydrothermal vents. I still work in this area, whale falls, wood falls in the deep sea. But now there are hundreds of papers on whale falls and many groups of scientists around the world studying them.

The abyssal plain was long thought to be pretty much devoid of life. But you seem to have found plenty – although not, perhaps, in forms that many of us would recognize.

Yes. Interestingly, if you go back to Challenger reports from the late 1800s, they got a high diversity of animals from their abyssal samples. A lot of that was ignored. [The *H.M.S. Challenger* explored the oceans from 1872-1876, identifying nearly 5,000 new species.]

It was long thought that the abundance of life and biomass is low. And this is true. Food is attenuated as it comes down from the surface ocean. But even though the availability of food is low, biodiversity is quite high. We're finding in the eastern Clarion-Clipperton Zone some of the highest diversities ever found in the deep sea, from megafauna (large animals) to microbes.

There's high diversity of animals that are found only on the nodules – an obligate nodule fauna. We have found about 100 species that live only on nodules in the eastern CCZ. And there are probably many more that have not been identified. We have seen them in photographs but have not collected them for identification.

Could you describe some of the creatures you have found in the Clarion-Clipperton Zone?

Some of them are huge. A new order of cnidarians lives on glass sponge stalks, with tentacles up to 15 feet long trailing in the weak currents. There are lots of sea cucumbers. One of them – the gummy squirrel, we call it – is a fluorescent yellow sea cucumber about three feet long with a tail that sticks up in the water. We think the tail might be used as a sail to navigate to food sources. Other sea cucumbers are purple, red, yellow, green.

There are corals that can grow a meter or more high. All kinds of worms – hundreds and hundreds of species of bristle worms, all kinds and sizes, including a squid worm. It's about a foot long and swims in the water column, looking like a squid. No one had ever seen these below 2,000 meters, but we found one at nearly 5,000 meters.

Lots of interesting fish. Rattail fish. Eels. Giant amphipods. Big crustaceans. Shrimp 30 centimeters – a foot – long.

Xenophyophores, kind of like monster amoebas from sci-fi films of the 1960s. They're giant, one-celled animals, 20-30 centimeters across that live inside houses made of sediments. There's a huge variety of them. We found more than 30 species of these in one small area. They seem to particularly like the abyssal Clarion-Clipperton Zone. One-third of the total known global diversity of these animals is found there.

Of course, this may be because we have looked for them there more than anywhere else. Their tissue is soft and amorphous. But the shell they form from sediments, their 'house,' is kind of rigid.

They're amazing. Lots of different kinds of xenophyophores, each with a different shape. They can look like big, black baseballs or golf balls. Some have ruffled patterns, like a ruffled skirt. Some are fan shaped.

You also came upon metal-plated fossilized whale skulls That's an amazing find.

My post-doc Diva Amon and I discovered that together. We found quite a few whale bones out there and recovered some initially. Diva has been working up photo surveys we've done from the area and has also obtained photographs from other scientists. She is counting the number of whale fossils. Most of the recognizable bones we see are jawbones and skulls.

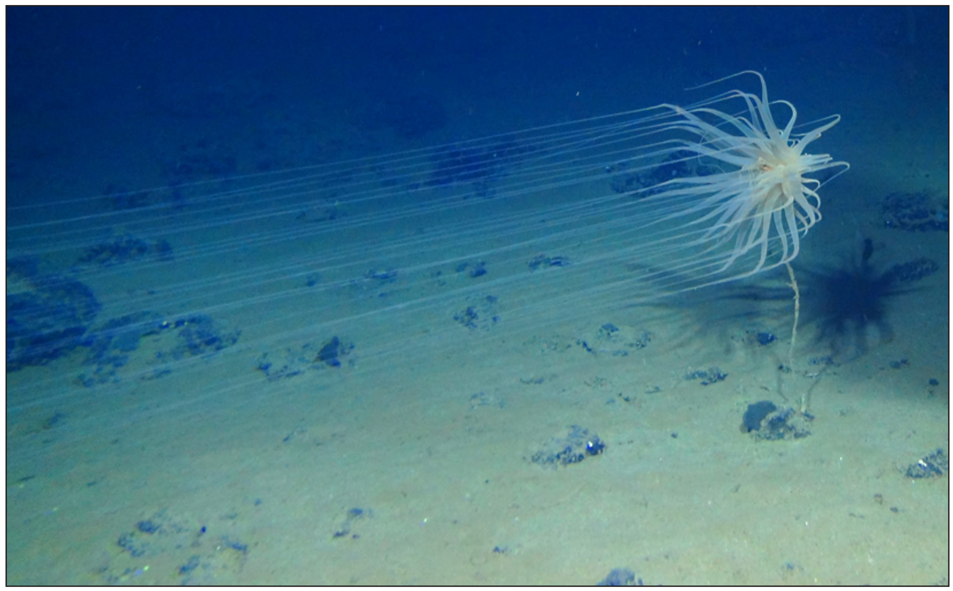

PHOTO: CRAIG SMITH AND DIVA AMON

One of the newly discovered species in the Clarion-Clipperton Zone is a type of jellyfish that lives on stalks of glass sponges, which are in turn tethered to manganese nodules.

They're incredibly abundant, especially for beaked whales. I'm not sure if this is just because this area is more studied than anywhere else, but beaked whales are known to feed in the eastern Clarion-Clipperton Zone.

This is also potentially interesting from a paleontological perspective. More fossils, especially of beaked whales, are available here than anywhere else. Many thousands of them.

Do you see evidence of 21st century life at these depths? When the Mariana Trench was explored a few years ago, a Budweiser can was found on the ocean floor. Have you seen anything like that here?

We do find trash occasionally. But this area is probably the most pristine ecosystem in the ocean – probably on the whole planet. Even the South Pole has lots of evidence of human occupation.

Here we do occasionally see trash, but it's very rare. We can go for hundreds of kilome-

Continued on next page

ters but see no evidence of human activity.

There are some tracks created from test mining decades ago. They look fresh, like they could have been created yesterday.

But in general, it's a very pristine environment.

And this is an important thing for people to recognize. Some of those who have promoted ocean mining argue that deep sea ecosystems have already been impacted by humans. But these are the most intact ecosystems on the planet. They're thousands of miles away from human activity on land, and thousands of meters below shipping activity.

In all the photo surveys we've made of the area, over three cruises, we've taken tens of thousands of images of the sea floor – and have seen just two or three pieces of trash. And some of that probably came from research vessels exploring for minerals.

Could other regions be equally biodiverse?

We think the eastern Clarion-Clipperton Zone may be particularly diverse for a number of reasons. There's greater habitat heterogeneity because there are hard substrates, with the nodules, and also soft sediments. Also, there is more food coming down in the eastern zone than in the west or north, or even north of Hawai'i, where there are nodules but the food sources are extremely poor. The eastern Clarion-Clipperton Zone conditions combine to create higher biodiversity. Also, it's close to the equator, where there's a high diversity of sediment-dwelling animals. So there may be some influence from equatorial high productivity areas.

I think the eastern Clarion-Clipperton Zone may hold up as one of the most diverse ecosystems in the ocean – but there are still lots of places we haven't studied.

The effects of ocean mining would clearly be devastating to the animals in the areas directly disturbed. But would there be other consequences?

On a local scale, where direct mining occurs, it will be very destructive. Everything in the path of mining will be killed. But mining will also inevitably create a sediment plume that will disperse some distance. The best modeling suggests the plumes will disperse at least 10 kilometers, creating higher sediment and turbidity levels.

In the Clarion-Clipperton Zone, there are the clearest bottom waters – clearer than the clearest surface waters, actually, with very few particles suspended in the water column. Currents are slow. The mining plume will have major impacts on the animals living there.

This is a controversial topic. Some mining contractors argue that the impacts will be much smaller, but my best guess is that a single mining operation will impact directly 500 square kilometers per year, while the plume will impact five times that, or a total of 2,500 square kilometers per year. A mining operation that lasts 30 years could therefore impact 75,000 square kilometers, a large area.

The Clarion-Clipperton Zone is also a large area, about the same size as the 48 continental states of the U.S. And a lot of animals are probably widely distributed. So my gut feeling – not based on data, but a gut feeling – is that one mining operation, even carried out for 30 years, isn't going to cause any species extinction. But many more mining operations, and you'll begin to pose the risk of altered ecosystem functions and extinctions.

We're not really going to know about the scale of impacts until real mining occurs. My feeling is, it ought to be allowed to occur incrementally. Have one mining operation that's studied over a long time. Look at how it's impacting things and then see whether we can allow more.

One reason it's important to proceed incrementally is that the removal of nodules is permanent. They're gone for millions of years. No area that's impacted by nodule removal can possibly recover ecologically before the last area is mined.

The nodules grow at a rate of a couple of millimeters per million years. So one nodule can be 10 million years old.

Is this area insulated from the impacts of climate change, or do you suspect that changes in ocean chemistry will sooner or later affect this environment as well?

Climate change and ocean warming is now penetrating into the abyssal ocean. It's probably not an ecological impact yet at these depths, but you can see a warming signal in the ocean already, at depths of 2,000 meters or more. I do think, in terms of anywhere in the ocean, these may be the areas most insulated from climate change effects. But they are very stable places, so even small changes may affect the ecosystem.

One thing that is expected to change is the pattern of primary production in the overlying water column. Fewer nutrients will be upwelled and less food will sink to these abyssal areas. It's quite likely that the flux of food to these areas will stress these communities. Mining on top of that will only add to the stress.

Why are these organisms important? What would we stand to lose if they were wiped off the face of the Earth?

Biodiversity is the raw material for evolution. If we cause species extinctions, we are changing the course of life on earth from this point onward.

I think causing species extinctions is immoral and is not what we should be doing to this planet.

We don't know what many of these consequences will be, because we don't know what these species are doing. Some may be really important in the future, in terms of biotechnology. Deep-sea organism physiology is quite different from that of shallow-water organisms. There's a great potential for new discoveries in biotechnology.

Also, we need to be careful we don't alter ecosystem functions. One of the potential consequences of mining that we need to be aware of also will be midwater sediment plumes. A lot of the fish species that we harvest in the open ocean feed on vertical migrators that migrate to depths of 1,000 meters or greater. If we create sediment plumes that cause problems at this depth, it could affect the food supply of commercially fished species that feed on these vertical migrators.

The deep sea is also an important repository for organic carbon. It's part of the biological carbon pump, with carbon being buried in sediments. Deep-sea sediments help buffer the pH of the ocean.

We would have to mine an awful lot of the sea floor to affect the carbon cycle, but we should be aware of the scale.

I find it interesting that people have no trouble understanding why destroying biodiversity in the Amazon rain forest is a bad thing. But it's equally bad to do it in deep-sea systems, where there are such unusual suites of organisms.

Dr. Smith will be speaking in Hilo on January 18 at the annual dinner of Environment Hawai'i. Reservations are $70 (which includes a $35 donation). To make a reservation, call (808) 934-0115.

A video about the work of Smith and his colleagues is at: https://oceanexplorer.noaa.gov/explorations/18ccz/logs/logs.html

Environment Hawai'i reported on Smith's work on whale falls in April 2002. See "Contact – at 700 Fathoms," available at www.environment-hawaii.org.

BOARD TALK

Board Denies Contested Case On Permits for East Maui Water

On December 14, the Board of Land and Natural Resources denied a request by the Sierra Club of Hawai'i for a contested case hearing on the renewal of four permits that allow Alexander & Baldwin, Inc. (A&B) and its subsidiary, East Maui Irrigation Company, to divert tens of millions of gallons of water a day (mgd) from East Maui to agricultural lessees in Central Maui and to the county Department of Water Supply's Upcountry system.

At the board's November 9 meeting, the group had urged the board to impose stricter conditions on the permits to ensure that the company was meeting its obligations to not waste water, to clear junk from the permit areas, and to take steps to allow stream animals to migrate.

Sierra Club representative and East Maui resident Lucienne de Naie had testified that she had seen first-hand evidence that the companies had failed to comply with previous permit terms imposed by the board. The group also presented photos supporting her claims.

The board chose, instead, to approve the permits on the condition that a stakeholder advisory group be created to facilitate discussion of permit compliance over the next year. The group would have included representatives from the Office of Hawaiian Affairs, the Native Hawaiian Legal Corporation, the Maui Farm Bureau, A&B, and the county, but not the Sierra Club.

In defending the Sierra Club's request for a contested case, attorney David Kimo Frankel told the board last month that it didn't have enough information to properly decide whether to continue the permits for another year.

"While A&B says it is taking no more than 20-25 mgd, no one knows how much it will take next year," he said. A&B representatives had informed the board in November that it was working on a deal with a California company that was interested in taking over and farming nearly all of A&B's agricultural lands in Central Maui.

Frankel also noted that the permits would appear to allow unlimited diversions from a number of East Maui streams that were not part of a recent decision by the Commission on Water Resource Management on new minimum stream flow requirements.

Frankel argued that the board could require A&B to install flow meters to give the board the data it needs to determine how much water should be diverted.

Board member Stanley Roehrig seemed open to the idea, but told Frankel that the board didn't need to convene a contested case hearing just to get meters installed. And Suzanne Case, who chairs both the Land Board and Water Commission, questioned Frankel about why the Sierra Club's concerns couldn't be addressed in the environmental impact statement A&B is preparing for a long-term water lease.

"Because it should be done now," he replied.

When Case pointed out that the permit conditions would only be applicable for another year (compared to those for the lease, which could span decades), Frankel countered, "these one-year things have gone on since 1985." (A&B vice president Meredith Ching told the board in November that the company will likely not be able to secure a long-term lease for at least another year.)

To avert the need for a contested case, Roehrig asked Frankel if the group would withdraw its request if the Land Board required meters to be installed. "It's small potatoes. … If you want to make us go lift heavy weights for the next year, everybody's going to suffer," Roehrig told Frankel.

"The point of a contested case hearing is not to delay things, not to make everybody's life miserable," Frankel replied. That being said, "we need to know how much water is going to be taken from the streams for the next year. … What are the alternative sources? What are the impacts? Aren't these reasonable questions that should be answered?" Frankel asked.

Board member Chris Yuen asked whether the Sierra Club's request was limited to those streams that were not included in the Water Commission's June decision on interim instream flow standards (IIFS).

No, Frankel replied, but added that it would be reasonable for the board to have a contested case hearing on the license area that included those streams.

He added that with regard to the two dozen or so streams for which the Water Commission has recently reset the IIFS, the Land Board must still make its own determination of whether or not it's appropriate for A&B to divert water out of East Maui.

"They cannot take water out [if it] adversely affects the rights of others. …That's the law," he said.

Case noted that the Water Commission took into account the rights of East Maui water users when deciding how much water should remain in the streams.

Frankel countered that the commission did not consider whether "there's a bunch of garbage in the area," or direct A&B to modify its diversions so that they don't interfere with the migration of aquatic species.

"The Water Commission, I think, has been hesitant to do anything on those structures because their focus is on quantities of flow," he said.

Case, however, argued that the Water Commission's decision did, indeed take into account the diversion structures' impacts on species migration and "having done that, there is an amount of water available for off-stream use."

"I understand. I disagree. I don't think I'm going to convince you. You're not going to convince me," Frankel said.

Attorney and former Water Commission executive director Yvonne Izu, representing A&B, argued that the Sierra Club was not entitled to a contested case. "You have to establish that you do have a constitutionally cognizable … property right," she said. The Sierra Club stated in its contested case

PHOTO: COURTESY OF SIERRA CLUB OF HAWAI'I

The Sierra Club called this an example of some of A&B's "garbage littering state land."

hearing petition that it has members who "live next to, use or enjoy streams. That is not sufficient," Izu said.

"They infer these people have riparian rights. … What kind of property rights do they have? … They mention Hanehoi and Makapipi [streams]. Those streams are to be fully restored. … How are their property rights being deprived?" she asked.

She noted that the Sierra Club cited a recent Hawai‘i Supreme Court decision that upheld a person's right to make a constitutional claim to a clean and healthful environment, but argued that the group was applying the decision too broadly and claiming that the law concerning public land, Hawai‘i Revised Statutes Chapter 171, creates a property right.

The high court's decision dealt with the state Public Utilities Commission's denial of a request by the Sierra Club to participate or intervene in a case regarding a power purchase agreement between Hawaiian Commercial & Sugar (an A&B subsidiary) and Maui Electric Company.

The PUC process does not allow for testimony from the general public. The Land Board's permitting process does. Given that, Izu said, "We contend there has been more than ample due process to date." She noted that Sierra Club members have participated in litigation over A&B's proposed long-term lease and have testified at hearings for the IIFS, legislative hearings, and Land Board meetings.

The board sided with Izu and denied the group's request. Kaua‘i Land Board member Tommy Oi recused himself from voting because he works for a consultant to A&B.

Marti Townsend, executive director of the Sierra Club of Hawai‘i, said that the group plans to appeal the board's decision to grant the permits in Circuit Court, but no complaint had been filed as of press time.

On December 20, A&B announced that it had sold 41,000 acres in Central Maui to Mahi Pono, LLC for $262 million. "Mahi Pono is a farming venture between Pomona Farming, LLC, a California-based agricultural group, and the Public Sector Pension Investment Board, a long-term investor and one of Canada's largest pension investment managers," an A&B press release states.

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Holdover Granted for Blue Hole Diversion

Similar to the East Maui case, the Land Board last month renewed several permits allowing for the diversion of water from streams on Kaua‘i and Hawai‘i island. Most passed unopposed, but the permit for the Kaua‘i Island Utility Cooperative's (KIUC) diversion of Wai‘ale‘ale and Waikoko streams to power the utility's two hydroelectric plants along the Koke‘e and Kekaha ditches garnered significant opposition from members of the public seeking greater stream restoration.

Again, the Land Board sought to ameliorate some of the tension by drawing stakeholders into a discussion group. When the board voted to approve the permit on the condition that KIUC, Earthjustice, the community group Kia‘i Wai O Wai‘ale‘ale, and others enter mediation, no one requested a contested case hearing.

The Department of Land and Natural Resources' Land Division had recommended allowing KIUC to divert up to 8 million gallons a day from Wai‘ale‘ale Stream and 1.6 mgd from Waikoko during median flows and more during higher flows if a sufficient amount remains in the streams. Those recommended amounts would provide the utility with nearly 4 mgd less than it has diverted on average over the past 14 years but reflect what would be available for offstream use if the Water Commission had approved its staff's recommendations in August on interim instream flow standards for those streams. A contested case hearing request by KIUC scuttled a decision on those recommendations and the commission has yet to determine whether or not it will grant a contested case.

In the meantime, the utility's diversion permit would have expired without action by the Land Board to renew it. While the Water Commission may ultimately require more water be kept in the streams than was originally recommended, the DLNR's Land Division chose to base its allocation recommendations on those of the commission staff. KIUC testified that if the board approved the Land Division's recommendation, the hydroelectric facilities would produce 22.4 percent less power. (The plants together have the ability to generate 1.5 megawatts.)

Utility representatives testified to the board that the diversions don't just serve the hydropower plants but also provide water for agriculture, ranching, drinking, ecotourism, and the Department of Hawaiian Home Lands. The water serves nearly 10,000 acres controlled by the state Agribusiness Development Corporation (ADC) and Grove Farm and occupied by dozens of ranchers and farmers, the utility stated in a presentation to the board.

They also assured the board that the utility has met the Land Board's previous permit condition to partially restore the streams (although vandals had already achieved that in 2016). KIUC consultant Jason Hines said that the utility has placed boards on its diversions to limit the amount of water flowing into the ditches during high stream flows and also cut a notch in another diversion to return water to the stream. He also said long-term modifications are in the design phase.

"Water is in the streams at all times now," he said. He also reported that the utility had increased the number of gauging sites along the systems "so we can understand trends and behavior at different flow levels."

Scott Enright, director of the state Department of Agriculture, testified in support of the permit to KIUC, noting that

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KIUC has committed to helping maintain the Kekaha and Koke‘e irrigation ditches, which serve the ADC's lands.

"Maintaining ditch systems is exceedingly expensive," Enright told the board.

Several Kaua‘i residents, however, flew to the Honolulu meeting to testify in strong opposition to the permit. Some testified that the diversions affected their families' taro farms or their traditional cultural practices.

"When I see the blatant manipulation of something so good and pure, here to give us life, it feels much like I would imagine being forced to watch the physical abuse of a loved one," wrote Sommer Kauakahi in her testimony to the board.

Earthjustice attorney Leinaala Ley also pointed out that there are at least four other streams diverted by the ditch system that have not been assessed as part of the staff's recommendation and information on alternative water sources has never been presented.

Sierra Club representatives argued that KIUC needed to apply for a Conservation District Use Permit and have an accepted environmental impact statement, habitat conservation plan, and incidental taken permit for the diversions.

Unlike A&B, which plans to prepare a full environmental impact statement for its lease, KIUC's attorneys have suggested that it may do only an environmental assessment, which is far less thorough.

In KIUC's defense, biologist James Parham, who conducted surveys of stream fauna in the area, testified that some portions of the streams were flush with native shrimp and gobies. Even diversion tunnels contained a lot of the shrimp, or ‘opae. Any areas where gobies, or o‘opu, were absent, he said, were that way not because water quality or quantity is poor, but because the gobies had been wiped out by introduced smallmouth bass.

"[Having] water returned to the stream is not going to benefit o‘opu," he said.

Land Board and Water Commission chair Suzanne Case suggested it would have been better if the commission had established meaningful IIFS that could inform the board's decision.

"In my view, since I walk on both sides of this, this is a solid proposal for an interim use pending the rest of those decisions," she said, noting that Earthjustice and KIUC are still in mediation over the IIFS issue.

Board member Stanley Roehrig suggested that interested members of the community meet with KIUC to discuss matters and report back to the board in a few months. KIUC president David Bissell and Earthjustice's Ley seemed willing. Isaac Moriwake, also an Earthjustice attorney, recommended that the board provide some kind of direction to participants first.

"Mediation has worked in some contexts. … I wanted to emphasize, it has to be more than punting to parties, expecting the magic to happen," he said.

Board member Chris Yuen made a motion to approve the permit on the condition that interested members of the community enter mediation and report back to the board in three months.

With regard to the membership of the mediation group, Yuen chose to leave it open-ended. "Last time we specified who was going to be in on discussion, we left somebody out and somebody got really, really mad," he said.

Board member Keone Downing, however, worried that leaving it open could be a disaster.

"To make KIUC or Earthjustice pick the people, I don't think it's fair to them. Guess what? People go home and the phones are going to ring and everyone is going to want to be on it. … You're going to have a line out the door," Downing said.

In the end, the board named KIUC, Earthjustice, Kia‘i Wai O Wai‘ale‘ale, the Sierra Club, DHHL, and Grove Farm, but still allowed for others to join. The board did not, however, set any parameters on the mediation.

Before the vote (favored by all members except Kaua‘i member Tommy Oi, who recused himself), Yuen said he was satisfied from looking at tax maps that there were no North Fork taro growers being affected by the diversions. Also, he said he's seen photos of what Wai‘ale‘ale Stream looks like when it has the amount of water commission staff has recommended be allowed to remain in it. "At 4 mgd, it's a stream. I grew up on a stream. I love streams. It has the basic attributes of a stream," he said.

"I feel the allocation recommended by staff takes care of public trust purposes," he added.

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Dogs to the Rescue

More and more, natural resource managers seem to be looking to canines to help keep areas free of potentially damaging invasive species.

The state Department of Agriculture recently announced that its dogs are being trained to detect brown tree snakes, which have decimated bird populations on Guam. Earlier this year, the Lehua Island Restoration Project Partnership employed dogs to survey the island for rats following an eradication effort. In the near future, dogs may also be used by land managers to locate animals that prey on rare native tree snails that are disappearing from forests across the state.

At its December 7 meeting, the Land Board approved a request from its Division of Forestry and Wildlife to solicit proposals from qualified tracker-dog teams to conduct a feasibility study to determine the efficacy of using dogs to detect rosy wolf snails, Jackson's chameleons, and rats. The board also granted the board's chair to award a contract to the team selected by an evaluation committee.

DOFAW reported that it takes hundreds of hours for staff to clear a fenced area of the tiny predators, especially the rosy wolf snails, which are about as long as a pinky finger.

— ***Teresa Dawson***