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Cap In Hand

The recent appeal by Alexander & Baldwin, Inc., and East Maui Irrigation Company for more water from East Maui has failed. An Environmental Court judge last month found that the diversion cap he set this past summer was more than adequate, given the evidence presented. Even so, he welcomed them to try again.

While the decision was a victory for the Sierra Club of Hawaiʻi, which for years has been calling for stricter management of the diverted water, the judge also denied the group's request for a court order requiring the companies to submit a fire protection plan to the state Land Board and to reduce water waste by lining one of their reservoirs.

He did, however, say that he planned to issue an order directing the parties to discuss firefighting needs.

IN THIS ISSUE

Judge Finds A&B, EMI Failed to Prove East Maui Diversion Cap Needs Lifting

Last month, Environmental Court Judge Jeffrey Crabtree denied a motion by Alexander & Baldwin, Inc., and East Maui Irrigation Company to revert the 31.5 million gallons of water a day cap he set in June on East Maui stream diversions back to 40.49 mgd. That higher number was the limit set by the Board of Land and Natural Resources when it voted last November to continue their water permits for another year.

Judge Crabtree's cap was part of his decision ordering the Land Board to grant the Sierra Club of Hawaiʻi's request for a contested case hearing on the permits. The non-profit organization had argued that the Land Board's limit was too high and that much of that water should be left in the streams. Crabtree agreed, noting in his decision that in addition to the water diverted under the permits, the companies can and do pump millions of gallons of groundwater a day to help meet their needs in Central Maui.

He reduced the board's limit to reflect the facts that A&B/EMI could pump 4 mgd of groundwater, that a 2.79 mgd 'cushion' the board had allotted was not a reasonable or beneficial use, and that the 2.2 mgd the board set aside for reservoir, dust control, fire, etc., could be taken from the unused portion of the 7.5 mgd allocation to Maui County. (Since January 2020, the county has used at most 4.83 mgd and typically uses much less.)

Two weeks after Crabtree's decision, A&B and EMI sought a revision. Their attorneys — Trisha Akagi, David Schulmeister,

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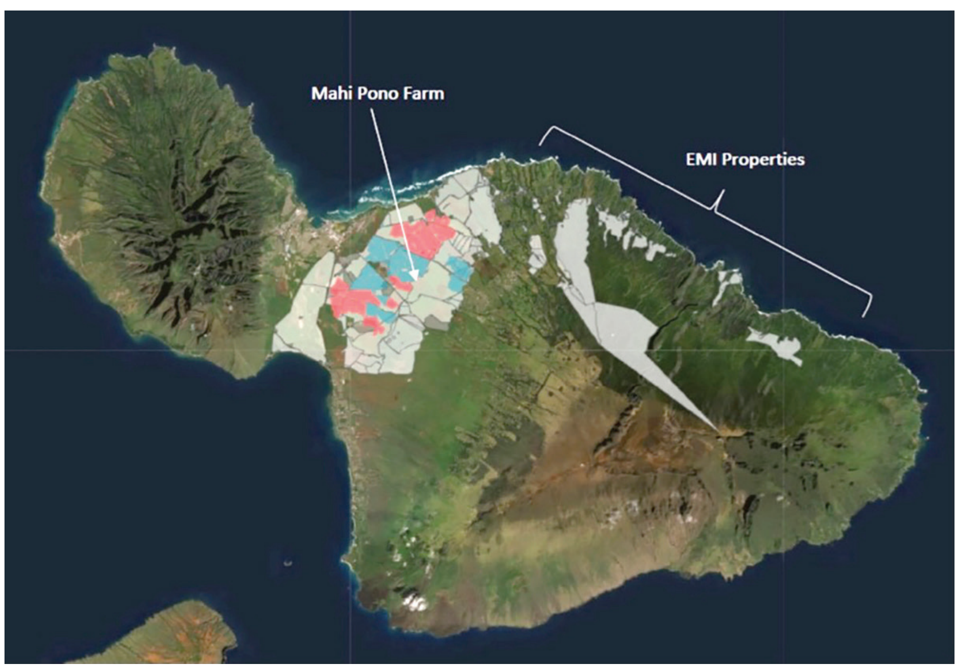

Mahi Pono claims it needs 5,089 gallons of water per acre a day for its orchard trees, which is more than twice the amount normally required for diversified crops. CREDIT: A&B/EMI.

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NEW AND NOTEWORTHY

No Sanctuary: For fifteen years, the Friends of the Mariana Trench had lobbied for the area offshore of the Commonwealth of the Northern Mariana Islands to be designated a marine national sanctuary. In 2017, the National Oceanic and Atmospheric Administration's Office of National Marine Sanctuaries placed it in nomination, opening a five-year review process that ended in April 2022.

Last month, NOAA announced that it was removing the nomination from consideration as a sanctuary. "NOAA has synthesized the information gathered through the public process, completed an internal analysis, and the ONMS director has made the determination that the Mariana Trench NMS nomination will be removed from the inventory."

The removal follows the request of the Friends of the Mariana Trench that the nomination be withdrawn.

Over the years, opposition – including strong statements from the fishing community allied with the Western Pacific Fishery Management Council (Wespac) – grew. Finally, in August, the Friends bowed to what it described as community opposition.

Sheila Babauta, chair of the group, told *Marianas Variety* that the "Mariana Trench is a national treasure, a great natural wonder of the world that is worthy of pride and protection. But in the 15 years that have passed since the Friends first requested a national marine sanctuary, and the six years since NOAA accepted our nomination, circumstances in our community have changed and we see the need for more dialogue and education."

Kahala Permit: Is the presetting of lounge chairs and tables on state land in front of the Kahala Hotel & Resort coming to an end?

This year's Act 227 prohibits the presetting of commercial beach equipment on public beaches on O'ahu and Maui.

On August 25, the state Board of Land and Natural Resources was set to renew a revocable permit to ResortTrust Hawai'i, LLC, for 1.28 acres of filled land fronting the hotel that allows for the presetting of up to 70 lounges and tables. The permit expires on December 31, but the Land Board chose not to take up renewing it because of ongoing litigation.

Attorney David Kimo Frankel is in the midst of appealing an October 2020 Environmental Court decision that upheld a previous renewal of the permit.

On August 1, the Intermediate Court of Appeals ordered the parties in the case to file briefs on whether Act 227 renders Frankel's appeal moot and, if so, whether any exceptions to the mootness doctrine apply.

Frankel has argued for years that the parcel is a public beach. "In 1963, the State of Hawai'i entered into an agreement with the Kāhala Hilton Hotel Company, Inc., Bishop Estate, and others, in which all the parties understood and agreed that the filled and reclaimed lands that now constitute Lot 41 '**shall be used as a public beach,**'" Frankel noted in his brief.

Frankel argued that Act 227 will apply to use of the property under future permits, but does not affect uses under the current permit. "By its terms, At 227 does not affect rights that matured," he wrote.

He argued that his appeal should proceed because the issue raised were "'capable of repetition, yet evading review'; the public interest exception applies; and the 'collateral consequences' exception applies as well."

State deputy attorney general Daniel Morris argued that the appeal was not moot. He stated that the property does not fall within the high wash of the waves and is, therefore, not a public beach. "While the premises were once submerged land and may originally have been treated like a beach, the premises are now urban-zoned and have been covered with grass since at least 1986," he wrote.

Regardless of what the court decides, written testimony to the Land Board from Honolulu resident Tyler Ralston suggests that there are other reasons why presetting should no longer be allowed.

Ralston provided the board with photographs that seemed to indicate that ResortTrust had violated the terms of its permit. He stated that the hotel had been presetting more than 80 lounges over the past year. He also testified that some of those chairs were placed on the beach outside the permit area, and that a hotel contractor was illegally renting kayaks and stand up paddle boards on the public beach.

Quote of the Month

"Wanting a 'cushion,' though understandable, cannot be justified if it means a foreseeable, preventable, and substantial waste of a public trust resource."

— Environmental Court Judge Jeffrey Crabtree

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Claim that Marconi Point Developer Is Exempt From SMA Permit Need Is Disputed by City

On December 1, U.S. District Judge Jill Otake will hold a hearing on the City & County of Honolulu's motion to dismiss a complaint from companies that allege public corruption is at the heart of why their plans to develop an agricultural subdivision at Marconi Point on O'ahu's North Shore have been stalled for years.

The companies — Makai Ranch, LLC; Marconi Farms, LLC; MP Unit 21, LLC; and RCA Trade Center, Inc. — are owned by developer Jeremiah Henderson III. Their complaint, filed in federal court on May 26, alleges that various city departments and personnel (in collusion with an outside consultant recently convicted on federal bribery charges) have illegally withheld subdivision and building permit approvals, while taxing their agriculture/preservation-zoned properties at rates comparable to those with houses on them.

The complaint claims that Makai Ranch has spent nearly $17 million in trying to develop the subdivision on 95.5 acres within the Special Management Area (SMA), adjacent to the Turtle Bay Resort and the Kahuku Point restoration area, which provides habitat to a number of federally protected native species.

Having been denied subdivision approval by the city, however, activities on the land continue to be governed by a condominium property regime.

While Henderson's companies own much of the land, more than a dozen units within the CPR have been sold since it was established a decade ago. Under the CPR's covenants, only a few units are allowed to have a farm dwelling. But that restriction would no longer apply if Makai Ranch were able to subdivide the units into individual lots.

Henderson's companies, as well as some of the other owners who are allowed a farm dwelling on their units, have applied for building permits from the city Department of Planning and Permitting (DPP). But the department has halted or effectively denied building permit and subdivision approvals within the Marconi CPR because the department determined that they are part of a larger development, triggering the need for the companies to obtain an SMA permit.

In their complaint, the companies argue that the DPP had assured them in a 2014 letter that no SMA permit would be required for dwellings within at least one of the four lots of record that make up the CPR. They allege that the department's about-face years later was somehow tied to corrupt actions by their consultant, William Wong, and DPP employees, including Kanani Padeken. Wong and Padeken both pleaded guilty to federal bribery charges and were recently sentenced to one year and ten months in prison, respectively.

Marconi Point property sold at auction in January 2022. CREDIT: CONCIERGE AUCTIONS.

The companies made this claim despite explanations from two different DPP heads that the companies' own publicly available plans and the scope of the activities for which permits and subdivision approvals have been sought had convinced them that a review of the impacts within the entire CPR area was necessary.

In addition to architectural drawings for a large two-story house with a pool (labeled sometimes as "aquaponics") on one of the oceanfront lots, promotional material for a January 2022 auction of four other oceanfront units within the historic Marconi Wireless Telegraph Station area also suggested that something more than a farming subdivision was afoot:

"Did you miss the opportunity to buy a beachfront O'ahu North Shore property when it was presented by Concierge Auctions back in July? And you missed the successful oceanfront North Shore auction in September? Then take note. Maybe third time's the charm.

"Previews have just opened for Marconi Station, another luxury beachfront property consisting of 28 oceanfront acres across four parcels. Of particular interest, four structures with historic designation potentially allow for flexibility in use beyond what zoning would otherwise permit," Concierge Auctions' announcement stated.

The city's motion to dismiss, filed on July 30, notes that the project area lies within the Agriculture and Preservation zoning districts, which "exist to limit development on certain parcels of land. … [T]he city zoned the property such that there would never be more than a limited amount of development, if there is any development at all."

"Act 16, passed in 2020, changed [Hawai'i Revised Statutes] Chapter 205A such that two farm dwellings per zoning lot would no longer be allowed without a SMA permit for shoreline lots," the city wrote. Nearly half of the units within the CPR are shoreline lots, although only two of them are currently allowed farm dwellings.

The city continued, "Makai Ranch now seeks to further subdivide the property and build multiple luxury farm dwellings. A subdivision by itself may not be considered a 'development' under HRS Chapter 205A. Under the previous version of HRS Chapter 205A, a single farm dwelling, by itself may not be considered a 'development.' However, Plaintiffs' combined aspirations demonstrate that there are plans which would have 'cumulative impact, or a significant environmental or ecological effect' and therefore the plans are a 'development' for purposes of HRS Chapter 205A. Thus, DPP has told Makai Ranch that it will need a SMA permit if Makai Ranch still intends to develop the Property."

In addition, the companies' own complaint exhibits show that with regard to Makai Ranch's agricultural subdivision application, the company missed the deadline to meet all of the requirements imposed by the DPP. In particular, the state Historic Preservation Division had asked the DPP to defer deciding on the application until a memorandum of agreement was finalized regarding work in and around the Marconi Wireless Telegraph Station, which is listed on the national and state historic registers. The deadline to satisfy the city's requirements — including the final MOA — passed in January 2021. The MOA was not completed until August of that year.

Assurances

The companies' complaint alleges several rights violations and claims that they have a vested right to the building permit and subdivision approvals they have sought.

In addition to the 2014 letter from then-DPP director George Atta, they list several other instances where the DPP, at the very least, gave the companies the impression that farm dwellings could be built without having to secure a SMA permit.

For example, their attorneys noted in one of their briefs that the DPP had advised the developer that their 2012 permits were "all approved," and one of the DPP's branches even provided Makai Ranch with an internal checklist indicating that farm dwelling construction on the property was being considered exempt from the SMA permit requirements.

They stated that the most notable assurance came from Atta's letter. They argued that the letter stated that certain activities, including construction of two farm dwellings per lot, would be SMA-exempt.

"Now, defendants claim that the 2014 letter, and all of the other communications described above, are not 'official assurances.' In defendants' view, even a building permit is not an 'official assurance,'" they stated.

They claimed that development plans were proceeding as expected until Makai Ranch hired architect and third party reviewer William Wong to assist with processing of certain permit applications submitted to DPP. According to the companies' complaint, however, development was not proceeding as expected. It states that Wong was hired because one of the unit owners was having trouble getting the necessary approvals for their farm dwelling and was threatening legal action against Makai Ranch.

Even so, Henderson's companies assert that their problems are somehow tied to Wong's involvement.

"Wong is a convicted felon who was recently sentenced to prison. As is now known, Wong was the architect (literally) of a pay-to-play corruption scheme that ended with the conviction of Wong and multiple DPP employees," they wrote. "Makai Ranch believes that its permitting woes were initially the result of Makai Ranch's refusal to participate in Wong's pay-to-play scheme. When Makai Ranch refused to pay unnecessary consulting fees to Wong, Makai Ranch believes that Wong influenced the corrupt DPP officials who were under Wong's influence to halt processing of Makai Ranch's permit applications and reverse the assurances previously given to Makai Ranch. These officials include, without limitation, Kanani Padeken and [former chief building inspector] Wayne Inouye," who have also been convicted of federal bribery charges.

The city, in its motion to dismiss, argues that the DPP has always maintained discretionary authority to determine whether a SMA permit is required or not. Henderson's companies, however, argue that the DPP's decision to consider the work planned within the Marconi Point Condominiums property as "development" requiring a SMA permit "was either not based on the merits of plaintiffs' application but instead based on plaintiffs' refusal to participate in Wong's corruption, or that this decision treated plaintiffs as a 'class of one' thereby violating equal protection.'"

Their attorneys added that the plaintiffs bought the property "with certain distinct investment-backed expectations consistent with the allowable uses, and Director Atta and DPP officials have further confirmed these uses. Plaintiffs incurred millions of dollars of expenses to prepare development in reliance on these assurances. However, the City extinguished these long-standing expectations without affording due process or just compensation, either because of Plaintiffs' refusal to participate in the pay-to-play corruption, or otherwise."

They noted that the city's own brief acknowledges that according to a 2010 DPP policy, the department believed that the construction of two dwelling units on a single zoning lot within the SMA would not be considered 'development' that would trigger the need for a SMA.

"This opinion, which DPP confirmed in writing to Makai Ranch in the 2014 Letter, created one of several vested property rights that Makai Ranch is seeking to protect in this lawsuit. The fact that DPP's opinion or the law may have later changed does not matter, because Makai Ranch's property rights already became vested and the City could not take away those rights without just compensation," they wrote.

Discretion

In responding to the Henderson companies' allegations that the DPP gave them multiple assurances that their development could proceed without a SMA permit, attorneys for the city focused mainly on the 2014 letter from Atta.

"[T]he 2014 letter informed plaintiffs that (based upon DPP's current policies, which were based upon the law at the time) plaintiffs could seek 'a building permit for a farm dwelling' without seeking a SMA permit, 'provided that all [land use ordinance] and other development standards are met,'" the city's attorneys wrote.

In situations where the DPP finds that any excluded use might have a cumulative or a significant environmental or ecological effect, "that use . . . shall be defined as 'development' for purpose of this part,' Thus, DPP always retained discretion to require a SMA permit and plaintiffs do not have a protected property right to building and subdivision permits," they continued.

While Henderson's complaint seeks declaratory and injunctive relief that would force the DPP to issue building, roadway subdivision, and subdivision permits, the city argued that the law requires them to have exhausted any administrative remedies first before seeking a court-ordered one.

The city argued that the companies could have brought their complaints about the city's lack of action on their subdivision permit applications to the Zoning Board of Appeals. And their complaints about the stalled or denied building permits could have been raised with the Building Board of Appeals.

In addition to not seeking relief from either the ZBA or BBA, the city noted that Henderson's companies never applied for a SMA permit and "thus, they have never received a final, authoritative decision regarding the use of the land. Therefore, their inverse condemnation claim is unripe."

Although Henderson's attorneys argued that the DPP treated his companies' proposed agricultural subdivision differently from other similarly zoned CPR properties on the North Shore, the city claims that no facts were presented to the court to substantiate those claims.

"The most specific facts alleged in the Complaint are that 'the Waialee condominium project near Kawela Bay, which like the Property, is located within the SMA, and contains several zoning lots and multiple condominium units, with five (5) farm dwellings.' This single vague assertion, which does not even give the Waialee project's precise location, zoning, or the date of development, is not enough to sufficiently plead a claim," the city's attorneys stated. (The companies' attorneys asked the court for permission to amend its complaint to include more detail, but no amendment had been filed by press time.)

The city's attorneys pointed out that the DPP never stated that Henderson's companies could not build some amount of farm dwellings or a road; it only found that "an additional permit is necessary because of the location and breadth of plaintiffs' development aspirations. Thus, each of plaintiffs' claims against DPP defendants is unripe because this court cannot determine if the regulation has gone too far until plaintiffs have actually meaningfully sought the SMA Permit. … Plaintiffs seek to avoid the SMA permitting process entirely."

Addressing the corruption claims, the city's attorneys admitted, "It is undeniable that DPP has been the subject of a lot of scrutiny because of the alleged conduct of some employees." However, they called the corruption claims by Henderson's companies dubious.

"[T]he plaintiffs are claiming that the third-party reviewer (who was not an employee of DPP) extorted plaintiffs with the threat of slowing down the permitting process intentionally. Other claims against DPP employees involves the prioritization of certain permits, not the deprioritization of certain permits," they wrote.

They added that to prove that their due process rights were violated, the companies "must show that there was no legitimate purpose to the SMA permit process. However, the SMA permit process was specifically enacted to protect the shoreline and other natural resources, which is a legitimate purpose."

— Teresa Dawson

East Maui *continued from page 1*

and Mallory Martin — argued in a motion to modify the permits that his cap was too low to meet Maui County's needs and those of Mahi Pono, which co-owns EMI and has been working for years to fill A&B's former sugarcane fields in Central Maui with diversified agriculture.

They noted that Mahi Pono has 62 more planted acres now than it had when the Land Board voted to continue the permits. What's more, they stated that Mahi Pono intends to plant an additional 1,568 acres of orchard trees in its East Maui fields this year.

They included a chart prepared by Mahi Pono VP Grant Nakama of anticipated water needs of Mahi Pono's various crops for 2023, some of which would reportedly require as much as 5,089 gallons per acre per day. In total, he determined that the crops would require 31.53 mgd this year.

With an additional 6 mgd going to the Maui Department of Water Supply, 1.5 mgd going to the county's Kula Agricultural Park, .07 mgd going to historic/industrial uses, and 2.22 mgd going into reservoirs, or used for fire protection, dust control and/or electricity generation, the attorneys argued that A&B/EMI would need to divert 41.32 mgd from the watersheds in East Maui covered by the permits.

Even though they asked to divert 40.49 mgd, they recognized that that lower amount may still exceed actual need at times. "EMI will only divert what is needed on any given day to deliver sufficient water to meet the needs of the County, historic/industrial uses, and Mahi Pono's diversified food crops," they promised.

"Because the cap imposed on the [revocable permits] is defined and calculated on a monthly average, the cap must be able to accommodate the month with the highest anticipated need, even though that amount of water may not, and likely will not, be diverted every month," their attorneys wrote.

Maintaining a cap that exceeds actual need would give Mahi Pono some flexibility. "EMI must be able to divert up to the amount of the monthly cap to make up for days where there was insufficient surface water. Because EMI has little to no notice when drier weather conditions will abate and more surface water will become available, reducing the cap during drier seasons would eliminate much needed flexibility in EMI/Mahi Pono's water planning," they wrote.

They argued that Crabtree had improperly deducted from the Land Board's cap the amount of groundwater available to Mahi Pono. Although the company has pumped about 4 mgd at times, they pointed out that because the well water is brackish, it has to be mixed with surface water, so it's not a 1:1 replacement. They added that on average, Mahi Pono pumps only 2.16 mgd of groundwater.

They also argued that "the numbers just do not add up" when system losses are considered. Based on a Commission on Water Resource Management determination that 22.7 percent of water diverted from East Maui is lost to leaks, seepage, evaporation, etc., the attorneys pointed out that system losses alone from a diversion of about 40 mgd would exceed the county's 7.5 mgd allocation.

Rebuttal

In its response, the Sierra Club began by disputing Nakama's claimed water requirements for Mahi Pono's various crops.

"This court should not find Mr. Nakama's opinion to be reliable given (a) the self-interest involved, (b) his past inaccurate predictions, and (c) the inflated estimate of water demands per crop. In August 2020, Grant Nakama claimed that a cap of 25 mgd 'would have a high detrimental impact on the expansion of our farming operations.' Yet, Mahi Pono suffered no hardship from the cap imposed by the court on July 31, 2021," the Sierra Club's attorney, David Kimo Frankel, wrote. He added that Nakama had also presented an inaccurate estimate of how much water was needed for historic/industrial uses that year. He estimated that 1.1 mgd was required.

"Yet, when Mahi Pono finally installed meters, the data revealed that Nakama had wildly exaggerated how much water was needed for so-called 'historic/industrial' uses. These uses did not require 1.1 mgd. They did not even require 100,000 gallons. They needed less than 50,000 gallons," Frankel wrote.

The chart Nakama provided to the court estimated that at full maturity, some crops would require 3,392 gallons per acre per day. Most would require 5,089 gpd at first planting AND at full maturity, according to Nakama.

In the second quarter of this year, Mahi Pono's orchard crops used 1,930 gallons per acre per day and its row crops used only 1,287 crops per acre per day, Frankel noted.

"It is generally understood that in Hawai'i diversified agriculture requires no more than 2,500 gallons per acre per day," he stated, noting that A&B's own executive VP Meredith Ching had basically testified to that in court.

"If Mahi Pono has 10,430 acres in cultivation by the end of 2023 (and those crops required 2,500 gallons per acre per day, which is more than they have ever needed), Mahi Pono would need 26.07 mgd – which is still less than A&B requested for irrigation just a few months ago, and less than what this court allocated," he continued.

To determine their daily crop water requirements, the companies considered reports prepared by the University of Hawai'i, one on growing alfalfa and another that applied the Irrigation Water Requirement Estimation Decision Support System (IWREDSS) to various crops.

The IWREDSS is a GIS-based simulation model that can estimate irrigation requirements for crops grown in different areas throughout the state, using different irrigation methods and practices.

A&B/EMI's attorneys explained that "the crop coefficients taken from the Producing Alfalfa in Hawai'i report were the reference point and then adjusted based on the crop coefficients in the IWREDSS report." Alfalfa was chosen as the reference crop because its root system is similar to citrus trees and other "permanent-type crops," according to Mahi Pono's Ceil Howe III.

Frankel pointed out that the company had stopped short of actually using the model, and chose to just rely on the UH report. "It cherrypicked one set of data," he argued.

"But," he continued, "CWRM's Ayron Strauch actually used the IWREDDS software. CWRM calculated Mahi Pono's surface water irrigation needs at full build-out. It estimated that citrus would require 2,541 gallons per acre per day, half of what A&B and Mahi Pono claim."

The crop water requirement numbers Nakama presented, as well as his declaration, contained speculative opinions that were inadmissible under Hawai'i Rules of Evidence, he added.

Whatever the requirements are, the Sierra Club argued that Mahi Pono can pump as much as 14.5 million gallons of groundwater a day to help meet its needs: It has a 10 mgd capacity well above the Ha'ikū aquifer, and the Water Commission has determined that Mahi Pono could feasibly pump about 4.5 mgd from its wells in the Paia aquifer.

As recently as June, Mahi Pono pumped 7.45 mgd of groundwater, according to A&B's quarterly reports.

Frankel noted that A&B's own exhibit on the salinity of the well water showed that it's relatively fresh. Between the third quarter of last year and the second quarter of this year, the three wells used had chloride levels ranging from 151 mg/L to 300 mg/L. His brief observes in a footnote that water with less than 250 mg/L of chloride is not considered brackish.

"A&B's [final environmental impact statement for a long-term lease for the water] calls for mixing 1 mgd of groundwater with 2.33 mgd of surface water (essentially a 30:70 mix) based on an assumption that groundwater is composed of 703 mg/L of chlorides. The groundwater is nowhere near that salty. … If Mahi Pono were to use 21 mgd of surface water, it could easily mix in an additional 9 mgd of groundwater for 30 mgd of irrigation water," Frankel argued.

A&B and EMI also have access to streams that are outside the permit areas but feed into EMI's diversion system, he wrote, adding that in October 2022, the companies took 4.79 mgd from these streams.

"A&B's quarterly reports reveal how much water A&B has taken from these streams; they say nothing about how much more water A&B could have taken from them. A&B cannot beg this court for more water while failing to disclose that it has additional surface water available as well," he argued.

And then there's the unused water the companies divert to unlined reservoirs.

"In 2022, A&B estimated that 2.22 mgd would remain in the 'catch-all' category for 'reservoir, fire protection, evaporation, dust control and/or hydroelectric uses.' Far more than that, however, winds up in the reservoirs. … April 2023: 6.36 mgd. May 2023: 5.25 mgd. June 2023: 4.99 mgd. … If there is any shortage of water, A&B can use more than 4 mgd that routinely go unused," Frankel stated.

The Ruling

After two hearings on the motion, Judge Crabtree issued an informal ruling on September 8. (He had not signed a final order by press time. As of late September, attorneys for A&B/EMI, the Land Board, and the Sierra Club were still in disagreement over the order's proposed language.)

Crabtree found that A&B and EMI had failed to meet their evidentiary burden to demonstrate their actual stream water needs.

He wrote that the most recent nine months of water use data confirm that Mahi Pono has been using substantially less water than the 27.91 mgd he allocated for diversified agriculture under his cap. Just in the second quarter of this year, the cap allowed for the diversion of 30 mgd more than what Mahi Pono used, he noted.

With regard to the argument by A&B and EMI that the cap needs to be increased to account for water wasted via leaks in the diversion system, Crabtree stated that he would not agree to do so easily.

The well-known need to reduce waste in the irrigation system "must be addressed at some point rather than continuing to kick the can down the road," he wrote. However, he continued, "increases in water diversion will not automatically be granted for millions of gallons per day of system waste absent evidence that X amount of system waste cannot reasonably be avoided, and absent evidence that the court's current cap is not working — as opposed to claims that the cap will not work for unscheduled future planting that may not occur for months. The current information provided to the court on system waste does not explain the large gap between the current cap and actual use. In the Second Quarter of 2023 example used above, and even applying CWRM's estimate of 28 percent in system losses (which does not completely and always apply), the court's cap is still significantly higher than the combined amount of the water actually used for crops and the estimated water lost to system waste," he wrote.

Crabtree also found that Mahi Pono's plans to plant 230,000 trees on 1,568 acres in the third and fourth quarters of this year are not firm enough to warrant the cap increase that A&B and EMI had requested.

"The court is not willing to increase the cap for September, October, and November if the new trees will not be planted until December. That would be an enormous waste of water unless an explanation is given why (and how much) the empty acres need to be watered before the trees are actually planted. Are the new trees 'in a nursery' in upcountry Maui being watered from a source the court has already allocated water for? Did the devastating fires on Maui in August push back Mahi Pono's timetable? The court does not know one way or the other; however, when a party has the burden of proof to justify using a limited public trust resource, this lack of information means the court cannot justify increasing the cap at this time," he wrote.

He added, "Even if seepage or system loss is as much as A&B argues, there is still no evidence the cap is not high enough now. There are no pictures of wilted trees, there is no filed Declaration that Mahi Pono decided not to plant more crops because of an *actual* water shortage. There is no evidence that the reservoirs are dry and the ground water is insufficient to sustain the crops until rainfall comes. Bottom line, the evidence in the record supports the court's conclusion that the court's cap is sufficient to support Mahi Pono's diversified agriculture venture to date."

Nakama's estimates of daily water requirements for the trees to be planted also confounded Crabtree. Nakama had asserted that the trees would need 5,089 gallons per acre per day (GPAD) in the first six months of planting, then a reduced amount after 18 months, then back up to 5,089 some four and a half years after planting, when the trees should be fully mature.

"Whether or not this information is accurate is material to establishing a reasonable stream diversion cap. No industry standard or other established authoritative source was given for this data. Since the GPAD/[stage of maturity] data would be applicable to hundreds of thousands of new trees and at least 1,630 newly planted acres, it is a significant number.

"As near as the court can tell, Mr. Nakama's Exhibit A makes no allowance for time of year. It concludes that 5,089 GPAD is necessary per acre for newly planted acres (but varying based on tree maturity), and that amount of water should be allocated every month of the year. …

"The court is no agricultural expert, so if in fact there is a recognized industry standard applicable to Maui showing these newly planted trees need as much water when first planted as when they are 5+ years old, certainly the court will consider such evidence. But it is definitely not proven by Mr. Nakama's chart or Declaration," Crabtree wrote.

Despite A&B's and EMI's promise that they would only divert the amount of water that will actually be used, even if the cap is set at the maximum amount needed in a given month, Crabtree was not convinced. Setting a static cap that would allow the companies to divert the "high need" amount every month for the entire year "virtually guarantees that millions of gallons per day will be wasted during the wetter months. … Wanting a 'cushion,' though understandable, cannot be justified if it means a foreseeable, preventable, and substantial waste of a public trust resource," he wrote.

He argued that the cap should reflect the reality that water needs vary during the course of a year.

"Allowing the same maximum amount *every* month ignores this reality. If adjustments cannot be made every month, why not each quarter? Every six months? … A monthly cap may be justified historically, but better strategies are needed to both conserve resources and cover additional beneficial uses. … A sliding cap could be proposed, such as X (a higher) amount can be diverted when the stream is running between stream volumes of A and B (higher stream volume in wetter months), and only Z (a lower amount) can be diverted between specific lower stream volumes in drier months," he wrote.

Crabtree also agreed with the Sierra Club that alternative sources of water (groundwater, other steams, reservoirs) are available to A&B and EMI (and Mahi Pono).

Despite his denial of A&B's and EMI's motion, he invited them to return to court with better data on Mahi Pono's needs, as well as a proposal for a more adaptive diversion schedule. He also ordered the parties to try to mediate these matters with help from retired Environmental Court Judge Joseph Cardoza, if he was willing.

— Teresa Dawson

Judge Decides Against Ordering Maui Fire Plan, Reservoir Lining

Last month, Environmental Court Judge Jeffrey Crabtree held a hearing on an August 17 motion by the Sierra Club of Hawai'i to require Alexander & Baldwin and East Maui Irrigation Company to submit a fire protection plan to the state Board of Land and Natural Resources and to line at least one of their reservoirs within six months.

The Sierra Club filed its motion about a week after attorneys for the state claimed in a petition to the Hawai'i Supreme Court that Judge Crabtree's June 16 order capping the amount of water A&B and EMI could take from East Maui streams to 31.5 million gallons a day did not provide enough water to fight the wildfires that swept through parts of Maui that month.

The state's petition — supported by A&B and EMI — sought a stay of Crabtree's order, despite testimony from Maui County counsel that ample water was available for firefighting under the cap. The petition was ultimately denied.

While the attorneys for the state and Maui County did not oppose the Sierra Club's motion to require the fire plan and reservoir lining, those for A&B and EMI did, arguing that it's the Land Board's role, not the court's, to attach those kinds of conditions to the permits that allow them to divert water from state lands in East Maui.

The June order required the Land Board to hold a contested case hearing, which the Sierra Club had requested last November when the board voted to continue the companies' water diversion permits.

Early last month, a deputy attorney general for the Land Board indicated that it was finally taking steps toward convening a hearing on the permits for this year and for the coming year.

Given that, the A&B/EMI attorneys warned that a court order granting the Sierra Club's motion might conflict with conditions on fire protection or reservoir lining that the Land Board might impose as a result of that hearing.

The Sierra Club's motion asked A&B and EMI to prepare a fire plan "that identifies the volume of water that needs to be available for firefighting, the identity of those reservoirs best suited for firefighting, the minimum depth of water needed in the reservoirs that would be used, the minimum number of reservoirs that are needed, and the maximum appropriate distance separating the needed reservoirs."

In addition to not being the court's jurisdiction to order such a plan, A&B's attorneys argued, "[t]his request requires A&B/EMI to be the firefighting/fire predicting expert for Maui, when the [Maui Fire Department] itself has said it is unable to provide this kind of information."

They also pointed out that the diversion permits will expire well before the reservoir could be lined.

"Given the short-term authorizations

provided by the RPs, it would be unreasonable and impracticable to require A&B/EMI to incur the time and expense of lining at least one reservoir," they wrote. They estimated that it would cost $3.85 million to line a reservoir with a 10-acre surface area.

The Sierra Club's attorney, David Kimo Frankel, countered that the Land Board had abdicated its responsibility to address the water needs for firefighting, having largely ignored the organization's pleas since over the past few years to assess firefighting needs.

He added that it would likely be months before the Land Board issued a decision in the contested case. A hearings officer had not yet been appointed as of press time.

In a previous contested case hearing, the Land Board did order A&B and EMI to work with the Maui Fire Department to determine what its exact needs are, but the department explained that its needs vary depending on the circumstances.

Frankel conceded that a precise assessment might not be practical, but argued that the court should not allow the companies and the Land Board "to make the 'perfect' be the enemy of the 'good.' At a minimum, everyone needs to understand the orders of magnitude involved. For years, A&B has misled BLNR and the public by insisting that millions of gallons were needed to flow into reservoir every single day for fire protection. We now know that is not true. A single fire may require tens of thousands of gallons of water from the Central Maui reservoirs. Maybe hundreds of thousands of gallons are required. But not millions of gallons. And not millions of gallons every single day of the year. …

"How hard could it be to determine whether there needs to be at a minimum, one foot, or a meter, or more of water depth in a reservoir for a helicopter to successfully scoop up water? How many yards or miles apart are the reservoirs currently being used from each other? Which reservoirs have been used in the past two decades to fight fires? If A&B needs to hire an expert who can crunch numbers and make a reasonable projection, so be it. It can start by consulting the Hawai'i Wildfire Management Organization. But A&B cannot continue to justify pouring millions of gallons of water daily from east Maui streams to fight fires when it has made no substantive effort to get the answers to basic questions," Frankel wrote.

With regard to the concerns A&B and EMI raised about the time and expense it would take to line one reservoir, Frankel pointed out that the companies did not object to the Land Board's June 2022 decision to require them to submit a revised diversion system upgrade plan by December 1 of that year.

Some of Mahi Pono's reservoirs on Maui. CREDIT: DLNR.

"If BLNR can require an upgrade plan that will require implementation over the course of future years, it is arbitrary to use the duration of the permit as an excuse for not ordering the lining of a reservoir that might take longer than this year to complete," Frankel wrote.

He added that EMI co-owner Mahi Pono, which uses water diverted under the permits for its diversified crops in Central Maui, "has spent more than $30 million planting trees. It spends $6-8 million on water annually, which is only 18-30 percent of its annual operating budget. Mahi Pono spent $20 million on its irrigation system. A&B sold water from east Maui streams to Mahi Pono for $62 million. While you might not be able to find $3.85 million under the sofa cushions, such an expense is relatively insignificant when compared to A&B's profits on the sale of the water and Mahi Pono's expenditures."

Crabtree ultimately decided not to grant the relief the Sierra Club requested.

According to Frankel, Crabtree said he would issue a written ruling that simply asked the parties to talk about firefighting needs.

"We will have to see what his written ruling actually says," he stated in an email.

Sanctions

"A&B and its counsel took advantage of a tragedy to take more water from our streams," Frankel alleged in a September 28 memorandum supporting a motion by the Sierra Club to sanction A&B, EMI, and their attorneys Trisha Akagi and Mallory Martin and/or the law firm they work for, Cades Schutte, LLP.

Starting the morning of August 9, to ensure that ample water was available to fight wildfires that were raging on Maui at the time, Judge Crabtree repeatedly suspended his 31.5 million gallons a day cap on the amount of water A&B and EMI could divert from East Maui streams.

The court had reached out that morning to the parties in the case to see if the cap was posing any problems with ongoing firefighting efforts.

Akagi replied that Maui Fire Department has asked EMI/Mahi Pono to bring more water to Central Maui to fight the fires. She reported that EMI had "already begun the process of delivering additional, much needed water to Central Maui so that the Maui Fire Department can continue to fight these devastating wildfires. …

"A&B/EMI ask that the Court temporarily suspend its imposed cap of 31.50 mgd so as to allow EMI/Mahi Pono to continue to support the effort to contain these devastating wildfires. To be clear, given the seriousness of this emergency, even if the Court declines this request, EMI will continue to provide to the Maui Fire Department the water that is needed to fight the ongoing wildfires."

The next day, Martin emailed the court, reporting that the fire department was continuing to drop water onto the fires and asking Judge Crabtree to continue the suspension of the cap.

On August 14, Akagi reported that air

drops to fight the fire in Kula/Upcountry continued and the fire was only 60 percent contained. She asked for another 24-hour suspension of the cap.

Crabtree issued minute orders suspending the cap each time he was asked by the attorneys for A&B and EMI.

But after Akagi's August 14 request, Frankel suggested in an email that the court should require A&B to provide more information. What it had provided, he stated, was "terribly misleading. If the reservoirs are empty — which would be unprecedented — it should say so."

Crabtree nonetheless granted another 24-hour suspension, and then another after Akagi asked for one the next day.

"A little over an hour later, however, A&B withdrew that request. Based on conversations with Maui County's corporation counsel, it is the Sierra Club's understanding that A&B withdrew its request because the County had raised concerns with Ms. Akagi that A&B was misrepresenting the facts to this court," Frankel wrote last month.

What's more, Frankel noted that in a declaration to the Hawai‘i Supreme Court filed in response to a petition for writ of mandamus and prohibition from deputy attorneys general representing the Land Board, Mahi Pono VP Grant Nakama never stated the Fire Department asked that more water be brought in. Nakama stated only that the department did ask to use the company's trucks.

Nakama also admitted to being unsure of whether the water in the company's reservoirs would be sufficient to fight the fires and whether the 31.5 mgd cap would be exceeded if EMI brought more water in.

Maui County Corporation Counsel Mariana Löwy-Gerstmar testified before the Hawai‘i Supreme Court in August that only 37,000 was needed by the fire department to fight the fires in Upcountry. She also testified that the 31.5 mgd cap provided enough water to fight the fires.

Frankel pointed out that based on use data provided by the companies, millions of gallons of diverted water a day, unused by the county or Mahi Pono, accumulates in the company's reservoirs. He also listed the many times that Mahi Pono overestimated its water needs.

He argued that Akagi and Martin failed to investigate the basis of the companies' claims — despite their history of inaccurate water needs estimates. He added that the attorneys' emails to the court that were misleading, inaccurate, and lacked evidentiary support. He noted that the attorneys digitally signed their emails and did not object to them being included in the court record. Given all of this, he argued, they should be sanctioned, under the Hawai‘i Rules of Civil Procedure.

In a September 8 ruling on a motion by A&B and EMI to increase the cap, Judge Crabtree ordered that in cases of a fire-related emergency where the parties cannot obtain a suspension of the cap in time, the parties are pre-authorized to divert more water than the current cap allows.

"This pre-authorization will remain in effect until any such emergency has passed according to public authorities. We will sort out later, if necessary, whether the extra taking was reasonable and necessary. The pre-authorization in this paragraph shall remain in place until further written order of the court, or until other lawful order from public safety officials," he wrote.

In his motion for sanctions, Frankel asked that the court set aside its previous orders suspending the cap and order A&B, Martin, Akagi and/or their law firm to pay for the time he spent on August 14 drafting his response to their emails. He also asked that they pay the Sierra Club's fees for the time spent on its motion for sanctions.

— Teresa Dawson

For Years, Scientists Predicted Increase In Wildfires; They Were Mostly Ignored

"People in Hawai‘i do a great job of coming together after these disasters," Jeremie Makepa said, referring to the Maui conflagrations, the most recent disaster. "But we don't do very well before them. We do a lot of stuff in defense. … We don't do enough to be pro-active."

The remarks of Makepa, a fire captain on Kaua‘i, were made during his presentation in a "talk-story" webinar sponsored by the Pacific Fire Exchange, a joint program of the University of Hawai‘i at Manoa and the Hawai‘i Wildlife Management Organization (HWMO). The organization he helped establish on Kaua‘i, ‘Aina Alliance, has initiated a wide-ranging fire-hazard reduction project on nearly 500 acres of Hawaiian Homelands at Anahola, involving trash removal, fuel load reduction, and building firebreaks.

Robbie Justice, another participant in the webinar, described how a consortium of organizations established a two-mile-long firebreak in the Big Island district of South Kohala along Highway 19, which links the towns of Waimea and Kawaihae. Justice works for Forest Solutions, a company that manages thousands of acres of land on the Big Island. Other participants in the effort were the Queen Emma Land Company and Parker Ranch.

The firebreak followed along a utility access roughly parallel to the highway. It was cleared of invasive grasses and koa haole and widened to 30 feet, then treated with pre-emergent herbicide to suppress regrowth.

Clearing involved the use of cord trimmers, since any blade hitting the rocks could have caused sparks, Justice said. No heavy equipment was used to avoid any sediment running into Pelekane Bay, he added.

In August, as wildfires were forcing evacuations in residential subdivisions in Kohala, the Queen Emma lands were spared – although Justice says flames came as close as half a mile.

The efforts of Justice and Makepa and dozens of other landowners, communities, and groups across the state owe much to HWMO, which for years has found grants and fostered alliances that, it is hoped, mitigate or reduce the effects of wildfire.

One of the organization's fire-pre-emptive projects is advising communities on how residents can reduce wildfire risks and earn "Firewise" designation from the National Fire Protection Association. Across the state, 14 communities or neighborhoods have earned Firewise status, with five more either pending renewal or still completing the process. Three of the communities are on Maui: Launiupoko (near Lahaina), Kahikinui (on the dry south side of the island), and Waiohuli (in the Kula area), all of them having earned Firewise status in 2016. On the Big Island, several of the Hawai‘i island Firewise communities were near the August fires, including some of those under evacuation orders. None of the homes in any of the Firewise areas were burned.

Several years ago, HWMO undertook a rapid mapping assessment of all the inhabited Hawaiian islands except Ni‘ihau, looking at wildfire hazards and fuel reduction efforts and developing lists of priorities to reduce the likelihood of wildfires or mitigate the damage from them.

Across the board, HWMO found policies and funding related to fire infrastructure and vegetation management were insufficient. Participants in the island-specific planning workshops "overwhelmingly" identified as their top priority the need for the Legislature to create a program providing "consistent funding for projects on a longer-term basis that are reflective of Hawai‘i's multiple growing seasons."

In the 2023 session, the Legislature failed to approve a measure that would have allowed the Division of Forestry and Wildlife to establish a community fuels reduction project. The measure, Senate Bill 409, was effectively killed by Rep. Kyle Yamashita, chair of the House Finance Committee.

Environment Hawai‘i asked Yamashita why he killed the bill.

SB 409, he said in a written response, would have "appropriated an unspecified amount of general funds to … DOFAW for a community fuels reduction project" and also require DOFAW to account for the program "as a separate line item in its budget."

But, he went on to say, that "would have limited departmental flexibility in allocating funding provided by the Legislature.

"In most cases, the House Finance Committee supports allowing departments whose staff hold expertise in running effective programs the flexibility to allocate financial resources as deemed most appropriate."

As for the funds, the original measure did specify $1.5 million in general funds to go toward the fuels reduction project. But "a simple appropriation to the program is more appropriately addressed via the budget to assure continued funding."

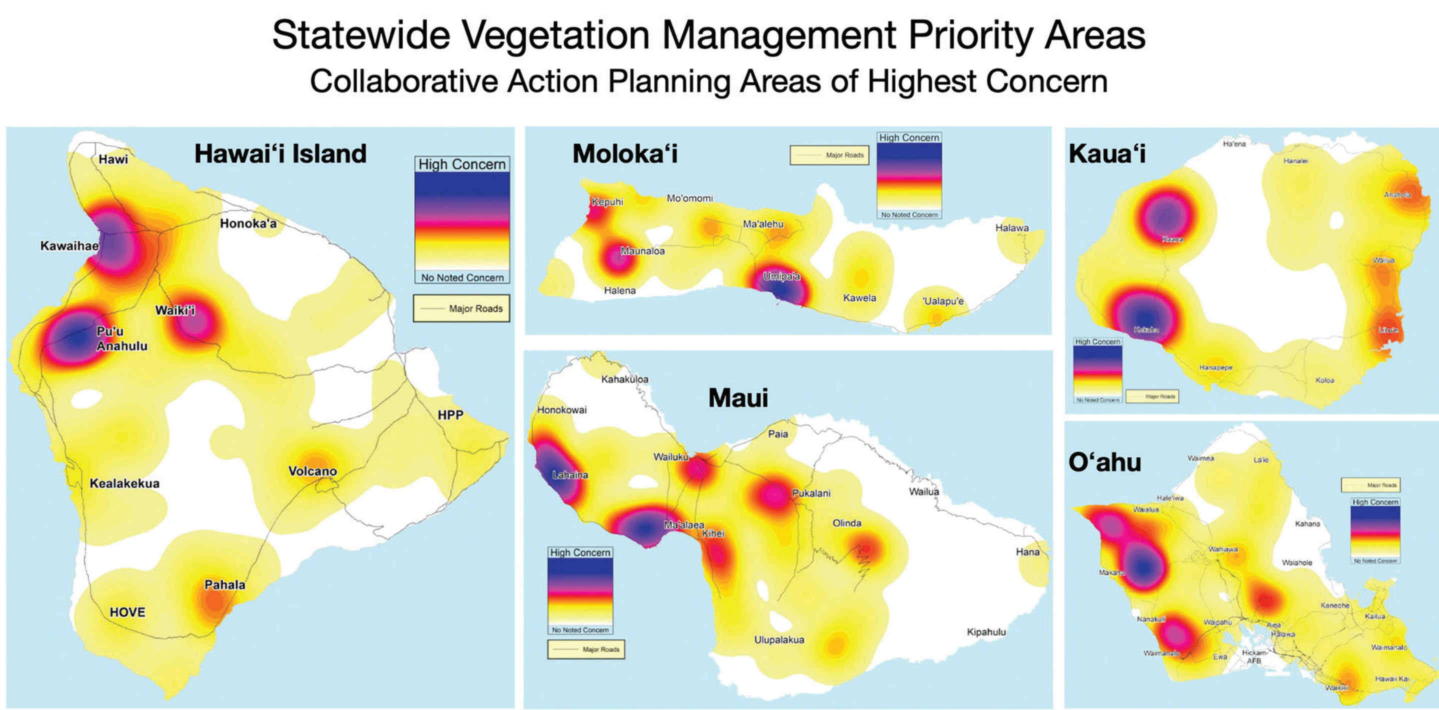
The Legislature has supported fire prevention activities, he went on to say, as reflected in budget allocations to the Department of Land and Natural Resources' account for native resources and fire protection, known in the budget as LNR402.

"Over the years, LNR402's general fund budget has increased from $4.7 million in 2015 to $17.4 million in 2024, an increase of roughly 270 percent in less than a decade," Yamashita stated. "The Legislature also increased the base budget for fire resources in the Division of Forestry and Wildlife by $1.8 million in 2022. Additionally, the state is expected to receive more federal funds for fire prevention, including the Community Wildfire Defense Grant, which recently awarded DLNR about $350,000 for fire prevention activities.

"The disastrous wildfires on Maui make it clear that even greater attention needs to be paid to mitigating fire risks in and around our communities, especially as climate factors make these types of storm events more and more likely. We are committed to continuing to strengthen fire prevention resources for the state."

Yamashita represents House District 12, which includes Pukalani and Olinda, two of the Upcountry Maui communities devastated by the August fires.

— Patricia Tummons



CREDIT: HAWAI‘I WILDFIRE MANAGEMENT ORGANIZATION.

BOARD TALK

Board Approves 25-Year Easement For Temporary Sandbag Revetment

On September 22, the state Board of Land and Natural Resources did something unusual. But it was an unusual situation.

A decade ago, then-Department of Land and Natural Resources director William Aila granted Graham and Marisa Chelius a five-year emergency Conservation District Use Permit to install a sandbag revetment makai of their eroding beachfront property in West Kaua'i, near Kikiaola Small Boat Harbor. Aila also issued a right-of-entry permit for the same period to install the bags.

By all accounts, the harbor was built in the late 1950's and early 1960's in such a way that it interrupts the natural flow of sediment along the coastline, causing the beach east of it to erode.

The erosion problem was well known before the Cheliuses bought their home in 2010. But they say that they relied on the state's recognition beforehand of the harbor's role in the erosion of adjacent properties and promises that it would regularly transport the sediment that accumulated on the west side of the harbor 1,000 feet to the east side.

Although the DLNR's Division of Boating and Ocean Recreation transported some sediment over the years, it was nowhere near what was expected or necessary to stop the erosion. As a result, the Cheliuses requested and received a five-year extension of their emergency CDUP in 2018 from then-DLNR director Suzanne Case.

On May 6, they asked for another extension and permission to repair the revetment, which DLNR director and Land Board chair Dawn Chang approved.

Chang's approval was based on recommendations from the DLNR's Office of Conservation and Coastal Lands.

OCCL administrator Michael Cain explained to the board on September 22, "The fact that the natural system is broken by human development is what made our office comfortable with recommending the sandbag walls here and not in other places."

Chang's approval letter noted that the erosion in the area was due in large part to the boat harbor. She also acknowledged that the CDUP under which the DLNR's Division of Boating and Ocean Recreation manages the harbor was amended in 2013 to include an initial transport of 80,000 cubic yards of sand and the annual maintenance transport of 5,000 cubic yards. However, DOBOR only transported 40,000 cubic yards in 2014 and 14,000 more in 2019.

> *"The shoreline along this region should be naturally accreting."*
> — Dawn Chang

"The shoreline along many of Hawai'i's carbonate sand beaches are retreating due to natural wave dynamics and sea level rise. However, the sand in the subject area originates from volcanic sediments transported by the Waimea River. The shoreline along this region should be naturally accreting due to the steady source of sand from the river," she wrote.

She added that the revetment would be necessary until DOBOR establishes a regular program of sand bypassing.

She then directed the Cheliuses to contact the DLNR's Land Division about any land disposition that might be required. They did, and they did not like what the division had to say.

The Cheliuses' revetment has been sitting on state land for nearly a decade, for free. In reviewing their request for permission to repair the revetment and retain it for another five years, the Land Division decided it was well past time that rent be paid. Failure to secure rent for their use of public land would be "an abrogation of the state's right to regulate public resources and of the state's responsibility to beneficiaries of the public land trust," Land Division staff wrote in a September 22 report to the Land Board.

"The applicants contend that the erosion affecting their property is caused entirely by the existence of the Kikiaola Small Boat Harbor [and therefore they] should not be required to pay for and obtain a long-term disposition from the state for their shoreline protection structure," the report stated.

Land Division staff argued that because the Cheliuses knew of the ongoing erosion conditions when they bought their property, they are responsible for mitigation measures undertaken "for the benefit of the fragile asset they knowingly purchased."

The division recommended that the board do one of two things, given the Cheliuses' adamant opposition to paying market rate for a long-term easement:

The board could authorize the repair and maintenance via a right-of-entry permit for six months, a revocable permit, and

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a 25-year easement (the last being subject to approval by the state Legislature and the governor). The revocable permit would allow the DLNR to impose rent while the easement approvals are obtained and documents prepared. It would also require the Cheliuses to post a removal bond in case the Legislature refused to authorize the revetment.

"[I]f we waffle on these things, I think our resolve becomes minimized."
— Kaiwi Yoon

In the alternative, the board could require immediate removal of the structure via a right-of-entry permit.

Despite the harbor's role in the erosion problem, Land Division administrator Russell Tsuji told the board that the department simply lacks any legal basis to allow the revetment to stay there rent-free.

If it were found that the revetment somehow served the best interests of the state, perhaps a nominal rent — rather than market rent — could be charged, he said. "Here, we just don't see that. We see a structure protecting private property," he said.

Tsuji noted that the original emergency CDUP contained a five-year deadline for the couple to either remove the sandbags or apply for a non-emergency Conservation District Use Permit, which would require Land Board approval.

"They never did come in for a CDUA," he said.

Should the Legislature approve the easement, the Cheliuses would have — and would have to pay for — a 25-year land disposition, with an emergency CDUP that expires in a few years and no guarantee that they would receive another extension or Land Board approval of a non-emergency CDUP.

Even so, the majority of the Land Board voted to authorize the permits and long-term easement. Board members Aimee Barnes and Kaiwi Yoon opposed the motion. Both were dubious about DOBOR's planned long-term sand bypass program, which has received a $2.1 million appropriation from the Legislature.

Yoon said the idea sounded bonkers and like a waste of money. "It's like digging a hole in the sand and watching it fill up over and over and over again," he said.

Despite Graham Chelius' arguments that the U.S. Army Corps of Engineers had determined in 2008 that a long-term bypass should solve the erosion problem, Barnes countered that the Corps' job is to turn natural places into unnatural ones and its point of view may not be shared by everyone.

After the vote, Yoon expressed his disappointment with the board's vote.

"As a matter of consistency, this board has had to make very, very difficult decisions about armoring [the shoreline] and people that have chosen to arm their shorelines to protect their homes. I think we're on the right trajectory of being fair and equitable to everybody … but if we waffle on these things, I think our resolve becomes minimized," he said.

"We've told others armoring is not the way to do it," he added.

"I don't see sandbags as armoring. … I see sandbags as temporary," Chang said.

Barnes said she shared Yoon's concerns and added that she considered a sandbag revetment to be armoring of the shoreline, especially if it's been there for 10 years.

Given the concerns they raised, Chang said it was clear that she should not be unilaterally making decisions to extend the emergency permits.

"I realize now that we are going to bring all of those matters back to the board for action," she said.

— Teresa Dawson

The Cheliuses property in West Kauaʻi. CREDIT: DLNR.