Volume 34, Number 7, January 2024

Environment Hawai'i

a monthly newsletter

An Albatross Hangs On Developer's Neck

"With his cruel bow, he laid full low the harmless Albatross." – Samuel Taylor Coleridge.

Well, it wasn't a bow, it was a hoe – or some other garden implement – that, wielded by landscapers, led to the death of a harmless Laysan albatross on a seaside property along O'ahu's North Shore. As our cover article recounts, the bird had become entangled in a shoreline-area fence built without permits and given a pass by the Honolulu Department of Planning and Permitting.

The Fish and Wildlife Service may be investigating the death of the federally protected bird. That agency is just one of several that has recently been looking into actions along and within the Marconi Point development. Others include the Office of Conservation and Coastal Lands and the Historic Preservation Division of the Department of Land and Natural Resources, and the DPP.

That last agency is in federal court, defending its position that anticipated development there needs a Special Management Area permit. Yet the department has so far held back on enforcing what would seem to be SMA violations that have already occurred.

IN THIS ISSUE

Development at Marconi Point Conflicts With Resurgence of Albatross Nesting

In mid-December, the Laysan albatross known to resource managers as V967 returned to his Marconi Point nesting site to reunite with his mate and to take over brooding their recently laid egg. Instead, he found her and the egg gone. He has been searching in vain for her ever since.

While he was at sea foraging, his mate, named Ho'okipa (also known as V389), died after getting entangled in a wrought iron fence that had been installed around an agricultural condominium property regime unit owned by Yue-Sai Kan.

In 2015, they were the first breeding pair to begin nesting in the conservation easement area just makai of the Turtle Bay golf course that's been the site of extensive restoration by the North Shore Community Land Trust.

More recently, the pair chose to nest within the fenced portion of Kan's property, which abuts the golf course.

On December 2, Ho'okipa became trapped in Kan's fence, reportedly while trying to defend her egg from landscapers Kan had hired to weed-whack her property. The bird died on the way to the veterinarian.

Resource managers rescued the egg to be incubated elsewhere.

Laysan albatross are protected under the Migratory Bird Treaty Act, a federal law that makes it illegal, unless permitted by regulations, to pursue, capture, kill, transport, or sell the birds or any of its parts, their nest, or their eggs.

Violations of the act, not related to the taking of birds to sell or barter them, can incur maximum fines $5,000 and/or imprisonment for up six months for individuals, or a $10,000 fine for an organization. Taking the birds to sell or barter them is a felony and is subject to much larger fines.

The Pacific office of the U.S. Fish and Wildlife Service was not able to confirm by press time whether the death of Ho'okipa was

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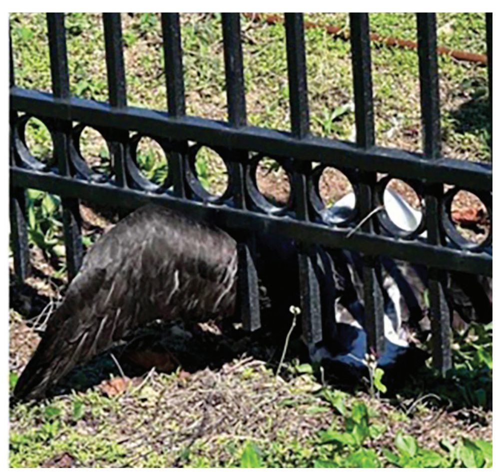

Ho'okipa, the first Laysan albatross to return to nesting within an ecological restoration area makai of the Turtle Bay golf course, died last month after getting stuck in an iron fence near her new nest at Marconi Point.

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NEW AND NOTEWORTHY

Preset Ban Ignored: “No commercial vendor shall preset commercial beach equipment on any beach … unless the customer is physically present for the immediate use of the commercial beach equipment.” So states Act 227 of the 2023 Legislature, which is intended to ban the practice of hotels and other businesses putting out dozens of chairs and umbrellas on public beaches on O‘ahu and Maui – a practice that effectively denies the use of the beach to the public, reserving it for the exclusive use of hotel guests, even when they are not present.

On January 1, Doug Meller toured Waikiki Beach around 8:30 in the morning and found commercial presetting of equipment continues over the public easements fronting the Royal Hawaiian, the Outrigger Waikiki, and the Moana Surfrider. Meller sent photographs of the hundreds of umbrellas and unoccupied chairs to the Department of Land and Natural Resources’ Office of Conservation and Coastal Lands, requesting that it level civil fines as allowed under Act 227. Those fines are $5,000 for a first offense, $10,000 for a second offense, and $15,000 for a third or later offense.

Preset beach equipment on the public easement on Waikiki beach in front of the Royal Hawaiian Hotel on January 1 at 8:27 a.m. CREDIT: DOUG MELLER.

Meller also discovered that two operators of concessions – Dive O‘ahu and Pacific Island Beach Boys – granted by the City & County of Honolulu were violating Act 227 as well as the city’s own policy against presetting. In 2022, the city Department of Enterprise Services informed Meller that it was department policy “not to allow umbrellas and chairs to occupy space outside the premises of city’s beach concessions unless those umbrellas and chairs are actively being rented.”

Kane‘ohe Base Live Fire: The Marine Corps is proposing to change the hours that it can fire weapons at the Ulupau Crater Weapons Training Range in Kane‘ohe Bay and, in keeping with that change, the U.S. Army Corps of Engineers has proposed amending regulations for the existing danger zone.

At present, weapons may be fired at the training range at any time between 6 a.m. and 11 p.m., seven days a week. The Marine Corps is proposing changing the hours so that weapons can be fired as early as 6 a.m. and as late as 2 a.m. the following day.

The danger zone is closed whenever weapons firing is scheduled or in progress.

The deadline for public comment on the proposed rule is January 8. For more information, visit the website Reguations.gov and search for docket number COE-2023-0010.

Quote of the Month

“If Plaintiffs’ position were law, every time a person or business sought state approval for a project and was told to comply with a legitimate, discretionary regulation, they could bring a federal takings case.”

— U.S. District Judge Jill A. Otake

Environment Hawai‘i
421 Ka‘anini Street
Hilo, Hawai‘i 96720

Patricia Tummons, Editor
Teresa Dawson, Managing Editor

Environment Hawai‘i is published monthly by Environment Hawai‘i, Inc., a 501(c)(3) non-profit corporation. Subscriptions are $70 individual; $120 non-profits, libraries; $150 corporate. Send subscription inquiries, address changes, and all other correspondence to:

Environment Hawai‘i
421 Ka‘anini Street, Hilo Hawai‘i 96720.
Telephone: 808 933-2455.
E-mail:ptummons@gmail.com
Web page: http://www.environment-hawaii.org
Twitter: Envhawaii

Environment Hawai‘i is available in microform through University Microfilms’ Alternative Press collection (300 North Zeeb Road, Ann Arbor, Michigan 48106-1346).
Production: Mark Taketa

ISSN 1050-3285

City Fines Marconi Point Condo Owners $200 For Illegally Grading Five Acres of Coastline

On December 4, the City & County of Honolulu's Department of Planning and Permitting finally issued a Notice of Violation for unauthorized clearing of coastal vegetation at Marconi Point on O'ahu's North Shore. The clearing, which the DPP notice says violated the city's land use ordinances regarding grading, soil erosion and sediment control, occurred in early October.

The department's penalty for illegally grubbing 4.93 acres — the equivalent of nearly four football fields — that was either adjacent to or included well-known habitat for protected migratory birds and endangered bees?

A mere $200.

Under the City & County of Honolulu's ordinances, a civil penalty of up to $100,000 may be levied for a violation within the county's Special Management Area, plus $10,000 for each day that the violation persists.

The entire 100-acre Marconi Point Condominiums project lies within the SMA and the City & County is, in fact, in the midst of a lawsuit over its position that the landowners must apply for a SMA permit for planned farm dwellings and subdivisions there.

Even so, the DPP has so far chosen not to issue a SMA violation notice for the unauthorized grubbing, which was apparently undertaken at the behest of the new owner of several of the agricultural CPR's units.

Rather, the department last month issued a violation notice for grubbing without a permit. Although the maximum fine for that offense is $1,000, the DPP chose to impose a $200 fine, with the possibility of additional fines of $100 a day if the violation was not corrected or a grading permit was not applied for by January 3. (The violation notice does not specify what corrective actions are required,)

On October 19, the state Department of Land and Natural Resources issued a notice of alleged violation to the CPR unit owners for the unauthorized clearing, and for tree removal, spreading of mulch and the construction of fence lines within the Conservation District.

Each violation could incur fines of up to $15,000 per day plus administrative costs, if and when the matter is brought before the state Board of Land and Natural Resources.

A Laysan albatross sits among the dense vegetation that owners at Marconi Point Condominiums illegally cleared last October. Nearby is a sign stating that nesting albatross are in the area.

"Of concern to the department is that habitat for the endangered yellow-faced bee and native birds has been altered. Mulch is a breeding site for the invasive Rhino Beetle that is infesting and killing palms," a DLNR press release stated.

The extent to which those same activities occurred in the adjacent SMA outside the Conservation District is unclear. As of press time, Shichao Li, a planner with the state's Coastal Zone Management Program was still waiting for more information from the DPP on any SMA-related enforcement actions for the work done.

The DPP did inform Li that any SMA violation would be tied to a shoreline violation or a building violation within the SMA. In the Marconi Point case, the grubbing NOV was not served to all of the CPR owners, but only those who owned units along the coastline. Still, the DPP enforcement officer told Li that they had not seen or come across any mention of a proposed SMA violation for the unauthorized grubbing.

Environment Hawai'i also did not receive a response from the DPP by press time to questions about whether it was considering issuing a SMA violation notice, and if not, why not.

Under Chapter 25 of the Revised Ordinances of Honolulu, development within the SMA requires a permit. Development includes, among other things, "[t]he placement or erection of any solid material, or any gaseous, liquid, solid, or thermal waste," "[g]rading, removing, dredging, mining, or extraction of any materials," as well as a "[c]hange in the intensity of use, ecology, or access to water."

Chapter 25 exempts several activities from the definition of development as it applies to the SMA. The only exempt activity that could possibly apply to the clearing work done last October is the use of land "for the purpose of cultivating, planting, growing, and harvesting of plants, crops, trees, and other agricultural, horticultural, or forestry products; animal husbandry; aquaculture or mariculture of plants or animals; or other agricultural purposes, subject to review by the agency in accordance with subdivision."

However, Chapter 25 also states that whenever the DPP finds that "a use, activity, or operation that is not otherwise considered development may have a significant adverse environmental or ecological effect on the special management area, that use, activity, or operation will be defined as development for the purposes of this chapter."

Whether the Marconi Point owners have argued that the clearing was not development that would require a SMA permit was unknown by press time. The DPP did not respond to *Environment Hawai'i's* request for correspondence with the property owners regarding the vegetation clearing along the coastline.

— Teresa Dawson

Marconi Point *continued from page 1*

being investigated as a possible MBTA violation.

Kan's fence has already been the subject of an investigation by the Honolulu Department of Planning and Permitting. When the fence construction first started more than a year ago, the DPP received complaints about unpermitted grading and fence construction within the county's Special Management Area and possibly the shoreline setback.

The violation notice that the DPP ultimately issued in January 2022, however, dealt only with the construction of concrete posts without a building permit. Those posts form the base of what later became a house-like structure. Although the entire CPR is within the SMA, no violation notice for unauthorized work within a SMA was ever issued.

Since then, the DPP has determined that what Kan had built doesn't require building permits because they are agricultural structures, according to Kan's consultant, Mark Howland.

The recent death of Ho'okipa, however, has spurred members of the public to renew their calls for DPP to do something about the fence.

Last month, Christine Tarski wrote to DPP deputy director Jiro Sumada, asking for "an inquiry into the illegal house and fencing on a lot on the subdivision at Marconi Point on O'ahu's North Shore that has **NO legal building permits and violates the land use.** This land is zoned agricultural and conservation.

"Yue-Sai Kan has built an elevated house that she calls a 'Barn' to get around housing permits. She has spoken to me and says she spends weekends living in the house when she is on that side of the island.

Yue-Sai Kan's Marconi Point property.

"She built two greenhouses in an attempt to say she is 'farming.' No plants have ever been put into these greenhouses. … There is no evidence of crops or gardening other than grass and ornamental plants around the house.

"Although Yue-Sai had been advised of the Laysan albatross colony on the land, she erected wrought iron fencing around her property and cross-fenced it with the same metal fencing."

Tarski added that the fence's spiked tops "are a dire **safety hazard** to the albatross that fly with a swooping motion" and that the fence itself has affected nesting albatross.

"For decades, these birds roamed freely on the Marconi land, easily passing under board fences that Turtle Bay built, nesting in the same area each year. Yue-Sai's fence has separated multiple nesting mates, with the nest and one parent on the opposite side from the other parent who, having flown over 1,000 miles, unsuccessfully walks over 100 feet each way to attempt to get to the nest and relieve the parent who has sat on the nest for weeks without food or drink. The two parents touch beaks, preen each other lovingly, and sit on opposite sides of the fence, unable to get to each other," she wrote.

The Laysan albatross V967 at his nest site, looking for his egg and his mate, Ho'okipa, who died while he was out foraging.

With regard to the death of Ho'okipa, she added, "This pair of mated albatross had nested in this area for at least six years, successfully raising chicks, returning each year to start a new family. They should have been able to nest for 50 more years."

Kan has long planned to build a larger house on the parcel, but the city's insistence that development at Marconi Point requires a SMA permit has stalled that effort. The DPP rejected her initial application for a SMA permit for development of just the coastal CPR units last year. Then unauthorized clearing of vegetation along the coastline — which has garnered violation notices from the DPP as well as the state Department of Land and Natural Resources — has also complicated matters.

"The SMA application has been placed on hold until the other CPR owners correct their violations of the shoreline intrusion. One cannot get a SMA permit with violations active," Howland stated.

Howland added that when and if the project resumes, he will ask the FWS for mitigation recommendations and may suggest several of his own to prevent further bird takings.

The Ko'olau-Waialua Alliance, a grassroots network of residents and community groups, is calling for more state protection for albatross and other seabirds and shorebirds now, as well as proper enforcement laws designed to protect native species and habitats.

"For more than 15 years the community has watched with great sadness as the negative impacts of unpermitted habitat clearing and construction on the historic Marconi property have increased," the group stated.

— Teresa Dawson

Automatic Subdivision Approval Claims Survive City's Motion to Dismiss Marconi Point Lawsuit

A federal lawsuit over whether development planned for a condominium property regime at Marconi Point requires a Special Management Area permit is still alive, but much narrower in scope.

On December 20, U.S. District Judge Jill A. Otake granted in part and denied in part the City & County of Honolulu's motion to dismiss a complaint filed last May by companies owned by developer Jeremiah Henderson III. The companies hold title to several units within the Marconi Point Condominiums on O'ahu's North Shore.

Henderson — through his companies Makai Ranch, LLC; Marconi Farms, LLC; MP Unit 21, LLC; and RCA Trade Center, Inc. — argues that they are entitled to declarations that the Honolulu Department of Planning and Permitting cannot withhold approvals for roadways, an agricultural subdivision, and buildings since the agency had assured Henderson years ago that no Special Management Area permit would be needed for development within the condominium property regime.

Henderson also claims the companies are entitled to declarations that the DPP had taken the companies' real property rights, deprived them of their due process rights, and violated their equal protection and civil rights.

In addition to the declarations, Henderson is asking for an order forcing the DPP to approve the subdivision applications and building permits.

He wants compensation for the real property taking and damages.

His complaint also accuses the DPP of illegally withholding public documents regarding investigations into corruption within the department. And he alleges that the city's Real Property Assessment Division has been improperly taxing the Marconi Point Condominiums property.

"Defendants have violated plaintiffs' constitutional rights by on one hand preventing plaintiffs from using their property for lawful agricultural purposes, while on the other hand simultaneously taking the position that the City is entitled to greater real property tax revenue because plaintiffs' properties are not in active agricultural use," his complaint states.

With regard to the DPP-related counts, Otake denied the city's motion to dismiss the ones seeking declarations and an order regarding Makai Ranch's application for an agricultural subdivision. She did dismiss those same counts as they applied to the roadway subdivision application and buildings permits. Even so, she gave the companies until January 31 to amend their complaint to address deficiencies regarding those counts.

Honolulu ordinances require a Special Management Area permit for any development proposal that "may have significant adverse environmental or ecological effects, taking into account potential cumulative impacts and significant effects." Here, a fence erected on one of the Marconi Point lots has been separating nesting Laysan albatrosses from their mates, has contributed to the recent death of a female and resulted in the loss of a number of eggs.

Some Background

More than a decade ago, Henderson established the agricultural CPR on property that includes the old Marconi Wireless Telegraph Station and sits between two conservation areas: the ecological restoration project makai of the Turtle Bay golf course to the north and the Campbell National Wildlife Refuge to the south.

According to court documents, Henderson had planned early on to mine the property of as much as 78,000 cubic yards of sand (estimated by him to be worth $11,700,000) and use profits to establish a casualty insurance company that he would run with his uncle, Tim Reynolds.

While Henderson did manage to sell some sand mined on the property about a decade ago, that venture fizzled out and failed to generate anywhere near the hoped-for revenue.

Henderson planned to build a solar photovoltaic project, get entitlements to build several farm dwellings, and get the telegraph station's dilapidated buildings listed on national and state historic registers so a hotel could be redeveloped within the agricultural zone. While the historic buildings are listed, Henderson's efforts to further develop the CPR — and ultimately sell it — have not gone as planned.

In a March 3, 2014, email to his uncle, Henderson wrote, "Here's the trouble we're having re real estate sales after going to market:

"Wholesale Market (Developer Buyers):

"They won't put a value on Future Building Sites until Tentative Subdivision Approval. … They don't see value in non-buildable vacant farm sites. … We don't have enough buildable CPR Units to attract a developer right now … The infrastructure costs are difficult to determine …

"In sum, the market has changed and those who survived the down market want properties with entitlements in-place. They are not willing to take risks on entitlements dependent.

"Retail Market (End User Buyers):

"1. They want to see paved streets, utilities installed, green grass, and palm trees in the ground.

"2. They want to see final documents v. drafts. This should be resolved when public report review is over.

"3. Some have been concerned about

safety and the ability to enjoy the ocean."

By establishing the CPR that included a handful of allowable farm dwellings, Henderson was able to begin selling units in late 2014. To date, more than two dozen units have sold for a total of more than $22 million. But efforts by unit owners to obtain building permits have been stalled, with the DPP's insistence on the submission of agricultural development plans.

And when Makai Ranch submitted an application for a roadway subdivision in 2017, and an agricultural subdivision in 2020, the DPP informed the company that given all the planned development in the area, it had determined that a Special Management Area permit needed to be applied for before any more development could proceed.

When Henderson's companies sued the city last May, they pointed to DPP documents that they claimed assured them that no SMA permit was needed for the planned farm dwellings within the CPR. They included a 21014 letter from former DPP director George Atta, internal department checklists, and a 2010 internal memorandum that indicated that the construction of up to two farm dwellings per tax map key lot was not considered development subject to SMA rules.

In the city's motion to dismiss the complaint, it argued that despite the documents Henderson cited, the DPP always retained the discretion to determine that an otherwise exempt activity requires a SMA permit because it may have a significant environmental or ecological impact on the area.

The city also pointed out that Henderson's companies failed to exhaust their administrative remedies before heading to federal court.

Otake Order

For the most part, Judge Otake agreed with the city.

"Plaintiffs creatively plead that 'DPP's decision to renege on its past official assurances' that plaintiffs did not need an SMA permit constitutes the final decision ripe for review. … [P]laintiffs' assertion merely amounts to frustration that DPP has decided to exercise its statutory discretion to require Plaintiffs to seek an SMA permit. And that decision cannot constitute a final regulatory action that effects a potential taking. … If Plaintiffs' position were law, every time a person or business sought state approval for a project and was told to comply with a legitimate, discretionary regulation, they could bring a federal takings case," she wrote.

What's more, she found that the companies' complaint about being "placed in the procedural doldrums of the City's permitting scheme" is also not an appealable decision by the DPP. "Plaintiffs are the cause of their own procedural doldrums—they refuse to apply for an SMA permit because they claim that they 'maintain their vested rights to develop the property without an SMA permit,'" she wrote.

With regard to the DPP documents that Henderson's companies say were official assurances, Otake pointed out that the 2014 letter from Atta "was in response to a specific question: whether the status of the existing historical structures would impact plaintiffs' ability to construct a farm dwelling on the property. Plaintiffs did not ask whether DPP would consider the entirety of the project as exempt from SMA permit requirements, and it is undisputed that the letter does not address the agricultural and roadway subdivision applications."

She continued that while the internal checklists and an advisory entry were "probative of DPP's approach to the discrete building permits, they similarly do not address the subdivision applications, nor do they amount to the kinds of official assurances 'that necessary approvals will be forthcoming in due course' as to the entirety of the project. Moreover, the advisory entry was within DPP's own permitting system. At the time they expended effort and money, Plaintiffs could not have relied upon an internal advisory notice. Finally, the 2010 DPP memorandum is a statement of DPP's interpretation of 'existing zoning law'— exactly what the Hawai'i Supreme Court has said is legally insufficient to induce reliance that would estop the City from requiring an SMA permit."

She concluded that the companies have no vested rights to building permits or a roadway subdivision without obtaining an SMA permit and, therefore, they "did not suffer an injury to a legal cognizable right."

While Otake dismissed all of the counts regarding building permits and the roadway subdivision, it was with leave to amend to include any further official assurances that would "give rise to vested or estopped rights to proceed without an SMA permit."

"[A]ny amendment must show that Plaintiffs have obtained a final, discretionary decision from DPP Defendants regarding their ability to obtain an SMA permit. Alternatively, Plaintiffs could cure the jurisdictional problems in Counts I and II by providing sufficient official assurances from DPP Defendants that no SMA permit was required for the building permits to issue and the subdivision plans to be approved. … Curing the jurisdictional problems in Counts I and II by demonstrating a legal entitlement to proceeding without an SMA Permit would also likely cure the jurisdictional problems in Counts III (inverse condemnation), IV (due process violation), and XI (civil rights violations)," she wrote.

'A Wrinkle'

When it came to Makai Ranch's application for an agricultural subdivision, the city's delayed response may have constituted a final, appealable action, Otake found.

"DPP Defendants have not reached a final decision that would make Plaintiffs' claims against them in Counts I and II ripe, at least as to the building permits and the roadway subdivision application. But the agricultural subdivision application (Counts I-C and II-C) has a wrinkle," Otake wrote.

Under Hawai'i Revised Statutes Chapter 91-13.5(c), agencies "shall take action to grant or deny any application for a business or development-related permit, license, or approval within the established maximum period of time, or the application shall be deemed approved."

And the City & County of Honolulu's rule 2-202(b) establishes a 30-day window for the DPP director to act on a preliminary subdivision map.

On February 14, 2020, Makai Ranch submitted its subdivision application to subdivide the Marconi Point CPR into four agricultural lots, ranging in size from around 20 to 23 acres, plus a fifth lot for a roadway. The new configuration would allow more farm dwellings to be built much closer to the shoreline.

The DPP did not respond with its deferral letter until April 24, more than two months after the application had been submitted.

Part of the reason for the delayed response may have been that the DPP had been waiting on comments from other agencies. The DPP had asked the state Historic Preservation Division on March 3 to comment on the application. SHPD eventually replied, asking that the DPP postpone Makai Ranch's subdivision request until after a "Memorandum of Agreement to address adverse effects to historic properties has been completed and executed." That response did not come until April 20.

Even though the DPP director at the time, Dean Uchida, did not act on the preliminary subdivision map within 30 days of the application's filing, Makai Ranch still tried to meet the 14 conditions the DPP said needed to be met before it would act on the application.

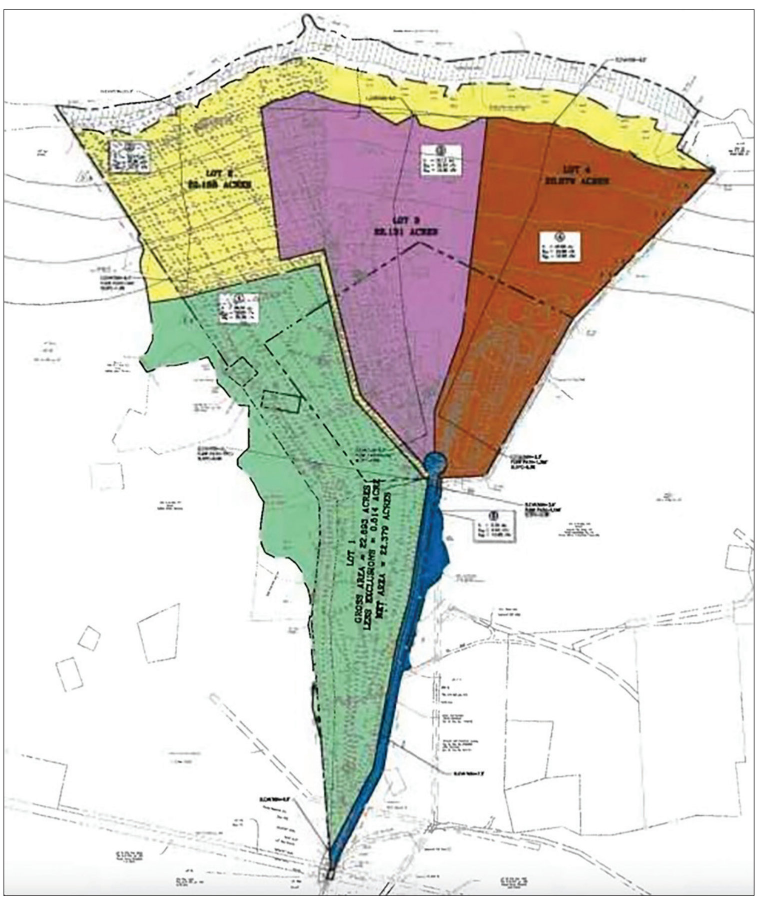
When the DPP did not respond for months to Makai Ranch's revised preliminary maps and other documents meant to satisfy the DPP's conditions, the company's attorney, Greg Kugle, wrote to Uchida in January 2021, arguing that the preliminary maps should have been automatically approved.

In his reply, which came six months later, Uchida argued that the automatic approval provisions for subdivision applications don't apply to those that have not progressed beyond tentative approval.

In her order, Otake found that the Henderson companies plausibly alleged that the DPP was required to act on Makai Ranch's agricultural subdivision application within a set time and had not done so "which should result in automatic final approval."

"DPP Defendants do not appear to respond to this contention," she continued. "Assuming the truth of the allegations in the complaint, automatic approval would constitute a final decision that DPP Defendants are unlawfully withholding from Plaintiffs. …

"Plaintiffs have plausibly alleged that they have a vested right to approval of the agricultural subdivisions under Hawai‘i law because they were entitled to automatic approval of those plans. … The court concludes that plaintiffs have alleged sufficient facts as to Counts I-C and II-C to survive a motion to dismiss," she wrote.



The four new lots and roadway that Makai Ranch is seeking to create with its subdivision application.

Other Claims

In their complaint, Henderson's companies alleged that the main reason why the DPP halted development at Marconi Point was because of the influence of a corrupt consultant.

Architect William Wong, who has been convicted of federal bribery charges, was hired by Makai Ranch to help advance a stalled farm dwelling building permit. Henderson's complaint alleges that because Makai Ranch chose not to pay Wong for a new archaeological survey, Wong had the DPP kill some building permit applications.

Even assuming that the Wong allegations were true, Otake did not find they amount to a constitutional violation or displace "the uncontroverted, discretionary authority DPP always maintained to require an SMA permit based on the cumulative impact of the project."

The companies also alleged that the DPP treated the development of Marconi Point differently from other CPR development projects on agricultural lands, and that this amounted to an equal protection violation under the Fourteenth Amendment of the U.S. Constitution.

Otake wrote, "Plaintiffs elaborate only that '[o]ne such example is the Waialee condominium project located near Kawela Bay, which like the property, is located within the SMA and contains several zoning lots and multiple condominium units, with five farm dwellings.' The court agrees with Defendants that '[t]his 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" that plaintiffs have been arbitrarily treated differently than similarly situated developers and development projects.'"

She, therefore, dismissed the companies' equal protection claims with leave to amend.

In its motion to dismiss, the city tried to bolster its case by pointing out that Act 16 of the 2020 legislative session amended the state's Coastal Zone Management law to require an SMA permit for any farm dwellings proposed to be built on a zoning lot, not just when three or more are proposed.

To this, Otake stated that she agreed with Henderson's companies that the DPP cannot rely on Act 16 to defend its actions because it "specifically provides that it 'does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date' of September 15, 2020. Here, the building permits and subdivision applications were sought well before the effective date of Act 16. However, the discretionary exception to SMA permit-exempt development still applied at the time plaintiffs sought their permits and subdivisions, so the court is not persuaded that Defendants' purported reliance on this argument substantially affects this case."

— Teresa Dawson

For Further Reading

For more background, see the following on our website, www.environment-hawaii.org:

- "Condominium Regime at Marconi Point Complicates Construction, Enforcement," November 2022;
- "Developer Sues City for Holding Up Permits, Subdivision at Marconi Point," July 2023;
- "Claim that Marconi Point Developer Is Exempt From SMA Permit Need Is Disputed by City," October 2023;
- "New Owner at Marconi Point Decimates Coastal Habitat for Native Bees, Birds," November 2023;
- "City Planning Department Considers Potential Violations at Marconi Point," December 2023

Contested Case Staves Off Fine Over Sunset Beach Erosion Control

"I'm hearing a lot of shirking of responsibility," board member Aimee Barnes said on December 7, after the Board of Land and Natural Resources heard from Sunset Beach homeowner Eric Freeman and his attorney, Bernard Bays.

Freeman had just claimed he purchased his eroding shorefront lot in 2020 for $2.5 million sight-unseen and was unaware of just how close the house was to falling into the sea. He then allowed for extensive erosion control measures to be placed on the public beach, despite being warned repeatedly by the Department of Land and Natural Resources' Office of Conservation and Coastal Lands that the work being done was illegal.

Bays told the board, "The Freemans are not bad actors. … They see a generic shoreline disclosure, they don't think anything of it. The next thing they're trying to do is preserve their house."

The OCCL's report to the board told a different story.

"Despite receiving verbal and written notice of their unauthorized activities from the OCCL starting in January 2022, the Freemans have failed to remove debris and past unauthorized erosion control structures… and they have willfully continued to allow unauthorized work within the Conservation District in the subject area on at least twenty-two separate days or occasions," the OCCL report stated.

At the Land Board's December 7 meeting, the OCCL recommended Freeman and his wife, Moniza, be fined $937,000: $15,000 for the initial Conservation District violation, $330,000 for the 22 days of willful violation, and $592,000 for failure to remove the encroachments from state land after receiving an order to do so on February 7, 2022.

"At some point someone needs to take responsibility," Barnes said. She also indicated that Freeman's excuse that he didn't know how bad the erosion was "didn't sit great" with her.

The property's previous owners, Gary and Cynthia Stanley, had also incurred fines for violating Conservation District rules by installing unauthorized sand-filled geotextile tubes (also known as burritos) on the beach fronting the house, which they, and later the Freemans, used as a vacation rental.

The DLNR entered into a settlement with the Stanleys that required removal of all but one burrito and payment of a $3,000 fine. In September 2020, they obtained an emergency Conservation District Use Permit for the remaining burrito and a tarp 2020 and sold the property three months later.

That permit required the landowner to secure a right-of-entry permit from the DLNR's Land Division for the use of public land, to not add any new erosion control measures, and to remove the erosion control structures by the permit expiration date of September 3, 2023.

By January 2022, however, investigators observed white polypropylene bags around the burrito, OCCL administrator Michael Cain told the board. He added that the OCCL would never authorize the installation of such bags because "they break apart and end up in the environment."

Even so, more bags were seen later, and eventually a "whole pyramid of tubes" was installed, Cain said. Some were apparently deflated and in the water, he said.

He recommended that the fines be paid within 90 days of the board's action and that all unauthorized material be removed by July 1.

The OCCL also asked the board to authorize the Attorney General's office to file a notice of pendency of action. Based on Act 236 of the 2023 Legislature, the DLNR has the ability to attach a lien on a property for failure to comply with enforcement actions related to unauthorized structures on public lands.

"I believe this is the first item brought to the board where we're using this tool," Cain said.

Bays stated that the Freemans plan to relocate the house about five feet further inland and raise it on posts. To do that, they are going to need, among other things, approval from the state Department of Health for a new septic system.

"As soon as we move this house back, we're going to restore the shoreline as you requested," he said, adding that their goal was to restore the beach at the end of the summer.

He warned that it can take a year and a half to get a building permit from the City & County of Honolulu and said he was trying to meet with the mayor and managing director to expedite that.

He added that the Freemans will contribute $150,000 to help fund studies of ways to save the beach.

"I'm incredibly sorry we're all sitting here. I'm a huge environmentalist… I'm usually on the other side of this. I really am," Eric Freeman added. Given all the work that needed to occur before he could move his house, he asked that the Land Board defer the matter until the end of next year.

Board member Kaiwi Yoon pressed him on what he knew before he bought the property. Noting the $2.5 million purchase price, Yoon told Freeman that he must be a smart businessman, yet he bought the lot without doing due diligence.

"Honestly, erosion never crossed my mind," Freeman replied. "I know this house now is toast. … It's such a burden now."

Randy Meyers, a retired school teacher who lives nearby, said that the tarps that some of the owners have placed along that stretch of beach have already endangered lives. "There was a surfer that was almost killed by one of these tarps," he said. "[It] wrapped around him and took him to the shorebreak. A lifeguard cut him out."

When Land Board chair Dawn Chang asked Freeman whether he was acknowledging that he put anything on the beach, he denied it.

"You hired a contractor," Chang replied.

In the end, the board approved the OCCL's recommendations, with amendments that allowed the cost of any remediation work done in the next four months (not including moving the house) to be credited against the fine and required the landowners to notify the community of the work being done and to restore the public right-of-way.

Bays then requested a contested case hearing, which the board quickly granted.

The Freemans will need to return to the Land Board with a request for a right-of-entry permit for the continued use of state land. The OCCL had asked the board to approve a right-of-entry permit over the state land, but the contested case request puts that on hold.

—Teresa Dawson

Hawai'i County Council OK's Funds To Fight Lawsuit Over Kealakehe STP

On September 25, the County of Hawai'i was sued in federal court over the operation of its Kealakehe sewage treatment plant. That facility disposes of treated effluent by pumping it uphill to a disposal pit, where it then percolates through the porous lava into the groundwater. From there, it flows the short distance – about two-thirds of a mile – into Honokōhau Harbor, the busiest harbor for commercial ocean recreation vessels and charter fishing boats on the island's western coast.

Over the three decades of operating the plant, the county has not applied for a National Pollutant Discharge Elimination System (NPDES) permit, which the federal Clean Water Act requires for any discharge of pollutants into navigable waters. Over that time, several individuals and groups had objected to the practice, to no avail.

But in 2020, the U.S. Supreme Court, in a case brought by Earthjustice over the operation of the Lahaina, Maui, sewage treatment plant, held that such discharges need to be permitted if, after traveling through groundwater and entering navigable waters, they are found to be functionally equivalent to discharges made directly into the ocean. The federal district court in Honolulu, when confronted with the question of whether the Lahaina discharges met this test, determined that they did.

On May 24, Earthjustice, representing Hui Mālama Honokōhau, sent to the county a 60-day notice of intent to sue over violations of the federal Clean Water Act. "We hope that this letter will convince the county immediately to investigate and correct these ongoing violations," the letter stated. "Until the county obtains an NPDES permit, discharging treated sewage to the ocean via groundwater subjects the county to civil penalties under" the Clean Water Act.

"While the Hui need not prove adverse impacts to establish the county's CWA liability here, the county's failure to obtain and comply with an NPDES permit for its discharges has had – and continues to have – significant, detrimental effects on water quality and health of the nearshore ocean waters and ecosystems in and adjacent to Honokōhau Harbor and on public health," the notice of intent stated. "The county should take prompt action to prevent additional harm."

With no action by the county to address the problems, Earthjustice filed its lawsuit in late September.

The County Response

On December 6, the County Council was asked by Corporation Counsel Elizabeth Strance to adopt a resolution authorizing her office to pay the Honolulu legal firm of Schack Ito up to $200,000 to defend the county in the litigation.


Elizabeth Strance

Before the council entered into executive session to hear details of the county's position from Strance, several members of the public weighed in on the resolution. All opposed Strance's request, arguing instead that the county should fix the problems identified in the lawsuit.

Among those testifying was Mike Nakachi, one of the members of the Hui and a longtime boat captain, dive instructor, and cultural practitioner in the Honokōhau area. Using public funds to hire outside counsel "is a disgusting way to spend taxpayer dollars instead of doing the kakou thing and fix our wastewater treatment system."

Before the council went into executive session, Strance made general statements about the case.

"We are seeing this case because of the Maui decision," she said, referring to the litigation over the Lahaina sewage treatment plant, "and the gray areas left by that decision."

Her office, she said, had "engaged in good-faith negotiations with the Earthjustice legal team to avoid this lawsuit to no avail." After the lawsuit was filed, she said, "we made the decision that we felt we needed additional resources and expertise."

Strance said the county had to defend itself against the lawsuit, given that Earthjustice had threatened to seek penalties for each day of violation. "Given the amount of time required to make any improvements to the Kealakehe wastewater treatment plant, this means the county could be forced to choose between $64,000-a-day fines or closing the wastewater treatment plant, or both," she said.

She went on to cast shade on Earthjustice:

"Earthjustice … possesses national resources and specializes in environmental impact litigation. Its intention appears to be to make this a high-profile case. For example, we've learned of both the demand made on the county and the lawsuit through the media. This is unusual in normal litigation where rules of courtesy often prevail and courtesy copies are provided simultaneously with filing."

In any case, she said, "the landscape of wastewater permitting is evolving. The state Department of Health has not made revisions to its NPDES permit process since the Maui case although we understand there are efforts in progress. The EPA has made some changes to its rules and advisement but they don't appear to apply to the Kealakehe wastewater treatment plant. Having legal expertise in the area of environmental law and specifically the Clean Water Act will help the county navigate changes should they occur during the course of the lawsuit."

She continued: "There have been some statements made about the desire to see negotiations. The county has always been open to negotiations. We have never refused to negotiate, and the lawsuit was filed regardless."

Following an executive session, council members discussed their views publicly. Cindy Evans opposed the resolution, stating that in her view, the money could be better spent by developing the corporation counsel's in-house expertise in matters of environmental law.

"I don't support the resolution. I would like to see us go out and hire more people on your litigation team," she said, addressing Strance. "This particular lawsuit is on the cusp of other things going on around the island. When it comes to stormwater runoff, what's going out into the ocean, a lot of people are very upset. It's an area of law that's just going to keep moving. It's not going to retreat."

Council member Holeka Goro Inaba, representing most of the area served by the Kealakehe plant, also opposed the resolution. "I have not seen updated or clear plans" to address problems at the Kealakehe plant, he said. Proposals to upgrade treatment to R-1 levels he described as "outrageous in terms of cost," but he added he had not seen where the county administration had looked at other options, such as using R-2 treated water at construction sites to keep dust down. "I want to see options," he said, stating he would vote no "with reservations." In addition, he voiced his concerns that the $200,000 initial expenditure might not be sufficient to last the duration of litigation. "How many more resolutions is it going to take for us to address this issue?"

Council member Rebecca Villegas wanted to know whether the lawsuit might result in a moratorium on further connections to the sewage treatment plant, including connections needed to develop a long-stalled housing subdivision in her district. Referring to an article published in the November edition of *Environment Hawai‘i,* which mentioned this in relation to a time extension for the proposed Kona Three development in Holualoa, Villegas noted that the lawsuit could obstruct "future development, large zoning changes, because the new requirements are to connect to the wastewater treatment plant."

"Is that in fact the case?" Villegas asked Strance. "Any future developments that need to connect to this wastewater treatment facility, can they connect to a wastewater facility that is currently in litigation?"

Strance acknowledged that could be the case. "One of the requested reliefs is for injunctive relief. … I don't want to say yes and I don't want to say no. It depends. I think that one of the concerns raised in the case is that the plaintiffs are concerned that things haven't been taken care of to their satisfaction … and there are plans to expand, and so a goal of the case would be not to allow expansion unless or until there are upgrades to the treatment plant. There's not something in place right now but I think that's part of the impetus for the case. That would be something that would be worked out in the relief if they're successful."

On a 7-2 vote, the resolution passed.

Earthjustice Responds

On December 19, David Henkin, lead counsel for Hui Mālama Honokōhau, addressed several of the claims and comments made by Strance in a letter to County Council Chair Heather Kimball and other council members.

After watching the council's December 6 deliberations, Henkin wrote, "I have concerns that you and the other members of the County Council may be unaware of our efforts to resolve this case without the need for time-consuming and expensive litigation."

Henkin noted that Earthjustice notified the county on May 24, giving the county 60 days to respond before any federal lawsuit could be filed. In that letter, "we expressly invited the county to engage in talks to seek a resolution of this matter without the need for litigation."

"We did not hear back from Corporation Counsel until June 20, 2023. … We nonetheless welcomed the opportunity to discuss settlement and engaged in good-faith negotiations, which included sending a formal, written offer of settlement on September 6, 2023, that would have resolved this matter. Our offer of settlement focused on fixing the problems at the Kealakehe facility and ensuring protection of the marine waters into which the facility discharges, along with the health and safety of the community that uses those waters.

"If we were eager to litigate rather than find solutions, we would have filed suit on the 61st day after sending our notice letter. … Instead, we continued settlement discussions, despite Corporation Counsel's refusal to make any meaningful commitments to address the harm that operations at the Kealakehe facility inflict on the environment and the community. It was not until we received Corporation Counsel's September 20, 2023, letter rejecting our good-faith settlement offer and offering nothing meaningful as an alternative that we concluded that we had no choice but to go to court. We filed suit on September 25, 2023, over four months after sending our notice letter."

The council's December 6 discussions, Henkin added, "suggest that the debate on [the resolution] was the first time that the council was made aware of this lawsuit. If that is correct, that would mean that the council had not previously seen our September 6, 2023, written settlement offer, which at the very least would have been relevant information and context for corporation counsel to share with the council. We reached out to corporation counsel over a week ago to ask if that was the case, but they have not yet responded."

Henkin concluded by asking council members to request a copy of the offer from the corporation counsel. "We stand by that offer," he said, "which would allow the county to bring this litigation to an early resolution and focus its energy and resources instead on addressing the pressing problems with wastewater disposal at the Kealakehe Wastewater Treatment Plant."

Environment Hawai‘i asked Henkin about several of the other claims that Strance made.

As to her statement that the Department of Health was still developing rules for issuing permits of a type that would address the issues in the Lahaina case, Henkin said that it's true the DOH had not revised its NPDES permit process following the decision in the Lahaina case. But, he said, "for decades, U.S. EPA has issued permits for discharges via groundwater, using the same regulations that apply to NPDES permits involving direct discharges into navigable waters. U.S. EPA also recently issued a draft guidance that makes clear that state regulators like DOH have existing authority to require the information needed to develop a permit for discharges via groundwater."

Strance mentioned that the DOH had not yet issued an NPDES permit for the Lahaina plant. Henkin acknowledged this, but, he added, the DOH did put a draft permit out for public comment at the end of June. "In the wake of the Lahaina fire," he said, "we asked DOH to put the permitting process on hold because the community clearly was not in a position to participate at that time. We are hopeful that the process will resume in the near future, once the Lahaina community is again able to engage."

— Patricia Tummons

For Further Reading

Environment Hawai‘i has published several articles relating to aspects of the Kealakehe sewage treatment plant over the last three decades. Here is a selection:

- "Lots of Pork, Little Sewage at the New Hilo Treatment Works," November 1990;
- "At Kealakehe, Kona, a Deathwatch as Native Species Slide into Extinction," February 2006;
- "Hawai‘i County Faces Lawsuit Threat over Kealakehe Sewage Treatment Plant," July 2014;
- "Kealakehe Pilikia," in New & Noteworthy column, September 2014;
- "LUC Grills Kona Developer on Compliance with Environmental, Cultural Regulations," May 2023;
- "Myriad Concerns Stall Progress on Planned Holualoa Development," November 2023.

Defendants in Hawai'i County Housing Fraud Lose Challenges to Superseding Indictment

The wheels of justice turn slowly, it is said. In the case of the federal criminal charges that have been brought against Hilo attorneys Gary Zamber and Paul Sulla Jr., and their business partner, Rajesh Budhabhatti, those wheels are turning at barely noticeable crawl. And, with an interlocutory appeal of an order dismissing challenges to a superseding indictment, movement is practically at a standstill.

The charges were brought against the three after Alan Scott Rudo, a former employee of the Hawai'i County Office of Housing and Community Development, pleaded guilty to charges relating to his involvement in schemes to use county affordable housing credits to enrich himself and the three co-defendants.

On November 15, Honolulu federal district Judge Jill A. Otake held a hearing on motions from attorneys for the three defendants awaiting trial, asking that the superseding indictment against them be tossed out. In advance of the hearing, Otake had indicated her inclination to grant the motions, which argued, among other things, that, unlike Rudo, the three defendants, all private citizens, had no fiduciary duty to the county. Another motion, from Zamber, sought to unseal grand jury proceedings and gain access to evidence of bribes and kickbacks, while Budhabhatti asked to have his trial severed from that of the two other defendants.

Judge Otake released her order on November 28, denying the motions. Citing a 9th Circuit precedent, *United States v. Awad,* Otake noted that in an indictment, the government is "required to state only the essential facts necessary to apprise [a defendant] of the crime charged; the government [is] not required to allege its theory of the case or list supporting evidence to prove the crime alleged."

Otake went on: "Because the bar for a sufficient indictment is so low, the 9th Circuit has characterized dismissal of an indictment as a 'drastic step' and 'disfavored remedy.'"

"So, the question becomes whether the superseding indictment sufficiently states the elements of the crime alleged to provide enough notice of the charges against defendants," she wrote, going on to enumerate the six elements of the charge of honest-services wire fraud, which the defendants all face: (1) a legally based, recognized enforceable right to the services at issue; (2) "the value of the particular services … depends on their being performed honestly…;" (3) "deprivation of those services must be in breach of a formal or informal fiduciary duty;" (4) the defendant intends to defraud; (5) the defendant "must misrepresent or conceal a material fact;" and (6) "wires must be used to further the scheme."

Otake quoted from the superseding indictment paragraphs that "contain statements of these elements" sufficient to survive legal challenge. The defendants, "together with Alan Scott Rudo … and others, did knowingly and intentionally conspire to devise a scheme and artifice to defraud and deprive the OHCD, the county and its citizens of their intangible right to the honest services of Rudo through bribery and kickbacks," the indictment states.

Also, "The object of the conspiracy was to make it appear that Rudo was faithfully discharging his duties of honesty and loyalty to provide affordable housing to the county and its citizens, when in fact his official acts were influenced by an agreement to take bribes and kickbacks.

"To accomplish their objectives, Sulla, Zamber, Budhabhatti and Rudo made, or caused to be made, various interstate wire communications, including emails concerning the approval of [affordable housing agreements], the sale of both land and [affordable housing credits], and the wire transfer of the proceeds of various transactions."

Otake acknowledged that in this order, she was going against her original inclination. "The court acknowledges that this conclusion" – that the superseding indictment provides sufficient notice to defendants of the charges they face – "departs from its initial inclination. But the court is persuaded that the procedural posture of the case controls here. And at this stage of the proceedings, the 9th Circuit has set the bar so low that the government need only worry about tripping over it."

She dismissed Budhabhatti's efforts to sever his trial from that of Zamber and Sulla, arguing that his speedy trial rights are being violated. She observed that Budhabatti had earlier joined Zamber in a motion to continue trial, "which sought a lengthy continuance. … The court therefore considers this argument waived."

Budhabhatti had argued that he would suffer prejudicial "spillover" when it comes to the dealings involving property at Waikoloa, in which he contends he had no role, the silence of the superseding indictment as to his connection, he argues, "means that he did not engage in the same series of acts or transactions underpinning those charges," Otake writes.

"The court is satisfied that, as the govern-

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Hawaiʻi Longliners Get Increased Quota For Bigeye – at the Cost to Territories

For years, the Honolulu-based longline fishing fleet has been lobbying for an increase in the bigeye tuna allotment it has in that part of the ocean under the jurisdiction of the Western and Central Pacific Fisheries Commission. Finally, last month, the WCPFC granted the fleet its wish, increasing the fleet's allocation by 3,000 metric tons for an annual allotment of 6,554 metric tons.

At the same time, the commission dropped a provision in its tropical tuna measures that had allowed the U.S.-flagged Pacific territories to sell a portion of their allowed catches to the Honolulu-based longliners. For years, the longliners had paid hundreds of thousands of dollars into the Sustainable Fisheries Fund to support marine conservation plans (MCPs) for each of the territorial governments, in return for increasing their haul of bigeye. Those payments allowed the Honolulu fleet to continue catching bigeye through the end of the calendar year, long after its WCPFC quota had been met.

During the meeting of the Western Pacific Fishery Management Council (Wespac) last month, council members harshly criticized some members of the U.S. delegation to WCPFC for not including territorial representatives in discussions over tuna allocations. The council approved a measure directing staff to convey to the head of the National Marine Fisheries Service the "shortcomings" of the U.S. delegation on this matter.

In addition, the council voted to have its staff request from NMFS and "other federal agencies" funding to the territorial governments to make up for the income stream lost now that the Honolulu longliners no longer need to purchase part of the territorial bigeye quotas.

Also fueling the council's anger was the handling of a proposal that would have exempted some of the U.S.-flagged purse seine vessels from the limits on fishing efforts on the high seas. American Samoa pushed for this as a measure that would encourage more purse-seine visits to its sole cannery.

In her report to the council, Simonds said she regretted that this measure wasn't adopted, but said that it had been brought up "late in the process." One of the actions the council took was to urge the National Marine Fisheries Service to "proceed with rulemaking to recognize a distinct American Samoa purse seine fishery." Also, the council directed staff to coordinate with the territorial governments, NMFS, and the general counsel of the National Oceanic and Atmospheric Administration on the "exploring the possibility of Pacific Insular Area Fishing Agreements." PIAFAs, which allow foreign-flagged vessels to fish in U.S. waters, could be one way of the territories recouping the revenue lost now that the Honolulu longliners no longer need to purchase part of the territorial quotas.

— Patricia Tummons

Hawaiʻi County Housing Fraud *continued from page 11*

ment asserts, '[t]he evidence on the counts and transactions in which Budhabhatti was not directly involved would still be admissible as to the conspiracy charge, as it would prove the nature and scope of the agreement between multiple participants, as well as the fact that Budhabhatti never withdrew from the conspiracy,'" Otake wrote.

Regarding the risk that the jury might allow evidence of the Waikoloa project and money-laundering (the latter charge faced only by Sulla) to "spillover" to Budhabhatti, Otake said that Budhabhatti "may propose limiting instructions regarding the evidence."

She likewise made quick work of the allegation that the charges were vague and/or unconstitutional.

Finally, as to Zamber's motion, joined by the other defendants, to unseal the grand jury proceedings, Otake wrote:

"[Defendants] claim that 'it is possible that the grand jury was provided evidence of self-dealing with the *label* of bribe or kickback' and that, given developments in the caselaw, '[i]t is very possible – if not likely – that the government presented an invalid legal theory to the grand jury regarding the scope or timeliness of Rudo's fiduciary duty to the County of Hawaiʻi.'"

But, she wrote, "These are not sufficiently particularized grounds to overcome the strong policy interest in grand jury secrecy."

After denying the various motions to dismiss, sever, strike counts, and unseal grand jury proceedings, Otake directed the parties to submit proposed jury instructions by April 22, 2024. Jury selection is set for September 16, 2024.

That schedule, of course, was before the public defender representing Budhabhatti, Salina Kanai, appealed the order to the U.S. Court of Appeals for the 9th Circuit.

Specifically, he is appealing her denial of the motion to dismiss the superseding indictment and asserting "that he has a right not to be tried and subjected to federal prosecution for honest services fraud."

— Patricia Tummons