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Bad Debt

When it comes to regulated utilities in Hawai'i, the state has laws. And the Public Utilities Commission is pretty strict about enforcing them.

That would seem to be the lesson imparted to the creditor in chief of Launiupoko Irrigation Company, Peter Martin. Because he did not bother to receive the PUC's advance approval when the company took out millions of dollars in loans – from him – the PUC has now deemed those loans void.

What happens next?

The PUC has asked all the parties involved in the company's rate hike request to weigh in by early this month on what information that the company has previously filed needs to be resubmitted in light of the loans being voided.

Meanwhile, the fate of the company's water use permit requests before the Commission on Water Resource Management remains pending. Whether the appointment of Martin's friend, Hinano Rodrigues, to the commission will speed that process along remains to be seen.

IN THIS ISSUE

PUC Voids Millions of Dollars in Loans To Laniupoko Irrigation Co. From Owner

In June 2020, Launiupoko Irrigation Company filed a request for a rate increase with the Public Utilities Commission. Among other things, it sought PUC approval for nearly $10 million in loans that it had received from Peter Martin, who holds a majority share of the company.

And that was a problem. By law, any loans to a utility with a payback term longer than one year have to be approved in advance by the commission. The PUC approved a temporary rate hike in 2022 but conditioned it on LIC not using any of the additional revenue "for any purpose other than restoring normal service to its customers, such as paying off unapproved loans." Before allowing those loans to be repaid, the PUC wanted LIC to brief it on what LIC believed to be the legal authority for it doing so.

Last June, the irrigation company withdrew its request for approval of the loans, stating it did not want to "unduly burden LIC's rate case. In the event that the commission deems the loans void, LIC submits that there is no impact to the rate case numbers as filed. LIC has not included interest expense for the loans in LIC's revenue requirement," it told the PUC.

Yet, as *Environment Hawai'i* reported in September, LIC continued to include its loan obligations in its regular profit-and-loss reports to the PUC. These obligations, amounting to around $50,000 a month, meant that month after month, year after year, LIC was reporting losses. Without the loan repayment set-asides, we reported, the company would have reported net profits.

When questioned about the set-asides, a company spokesperson stated that none of the additional revenues was used to pay loans or interest expense related to the loans. Inclusion of the loan obligation was an IRS requirement, the spokesperson explained.

The group of intervenors in the PUC case that represents Native Hawaiians who receive water from the irrigation company then filed a "motion to clarify" with the commission. Specifically, it asked the PUC to clarify whether the inclusion of unapproved loan interest in the profit-and-loss reports had an impact on the commission's consideration of the reasonableness of the requested rate increase and whether it spoke to the utility's "fitness as a water public utility." And, finally, it asked the PUC to order the utility to "adjust their general ledger and all financial reports submitted to the commission … that has included the unapproved interest as a liability."

On December 11, the commission issued an order responding to the clarification request. The request did not cite any PUC orders in need of clarification, it said. The profit-and-loss statements "adequately comply" with the PUC's order requiring the company to "provide reports that 'itemize money spent on fuel, water delivered to customers, and any instances of curtailment …' As LIC's profit-and-loss statements adequately comply" with this order, the commission denied the intervenors' request that the financial reports be revised.

But in the same order, the PUC deemed the Martin loans void. "Should LIC seek any prospective financing from the same lender or other lenders, LIC shall seek prior approval from the commission *before* incurring any loans or other evidence of indebtedness, in compliance with [Hawai'i Revised Statutes 269-17]."

The December 11 order also directed the parties to provide status updates by January 8. Among other things, the updates are to

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NEW AND NOTEWORTHY

More Protections for Cetaceans: At its recent meeting in Fiji, the Western and Central Pacific Fisheries Commission adopted a measure intended to provide some measure of protection to whales and dolphins that interact with longline fishing vessels throughout the vast international waters of the Pacific subject to the commission's regulations.

The text of the conservation and management measure states that the commission recognizes "the ecological and cultural significance of cetaceans" and further recognizes that "certain cetacean species and populations in the WCPFC Convention Area are threatened or critically endangered." It goes on to take note of "the adverse effects of fishing … on some populations of cetaceans … through capture, injury and mortality."

"Alarmed by observer reports … that indicate a number of instances of interactions with these species, and instances of misreporting of such interactions in logbooks," the commission adopted the measure that will require all longline vessels flying the flag of member countries "to release … any cetacean that is caught or entangled in its fishing gear … as soon as possible and in a manner that results in as little harm to the cetacean as possible."

The measure takes effect July 1, 2025.

Bottlenose Dolphin, one of the more than two-dozen cetacean species that interact with longline vessels in the Western and Central Pacific. CREDIT: NOAA FISHERIES.

Marconi Update: A 2021 memorandum of agreement meant to protect historic features of the Marconi Wireless Telegraphy Station on Oahu's North Shore will need to be updated since the deadlines to submit stabilization and protection plans have passed while unauthorized work led to further destruction of one of the buildings.

According to the state Historic Preservation Division, a signatory to the MOA that was included as a condition of a USDA-backed loan for the construction of several agricultural warehouses at Marconi Point, "The existing [MOA] between SHPD, USDA, and the property owner has yet to be amended on how to best memorialize the historic restoration work on the structures and finalize approvals for the restoration work in progress. SHPD is awaiting the draft from USDA to be able to offer comments and suggestions."

Whether a violation for unauthorized work done by current landowner, Greystone HI Investments, LLC, is forthcoming remains to be seen. According to SHPD acting architecture branch chief Mary Kodama, her department withheld records *Environment Hawai'i* requested regarding the agency's violation investigation as it is ongoing.

The agency did not respond by press time to a request for correspondence between SHPD and Greystone, its owner, its attorney, and any other representatives or consultants.

Quote of the Month

"The state of Hawai'i must stop approving shoreline easements, which is just a fancy, innocuous-sounding word for what it really is: selling off pieces of our public beaches to resorts, in this case, longer than a football field."

— Kai Nishiki, Maui activist

A Correction: In last month's article on oral arguments in a lawsuit over revocable permits to divert water from East Maui, we misquoted Hawai'i Supreme Court Justice Todd Eddins. We quoted him as saying to Sierra Club attorney David Kimo Frankel, "You actually argue for about 18 minutes, they say. I argue that was pretty effective." He actually said, ""You actually argue for about 18 minutes, they say, and I imagine it was probably pretty effective."

We sincerely regret the error.

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Marine Debris Removal Is Shown To Reduce Seal Pup Entanglements

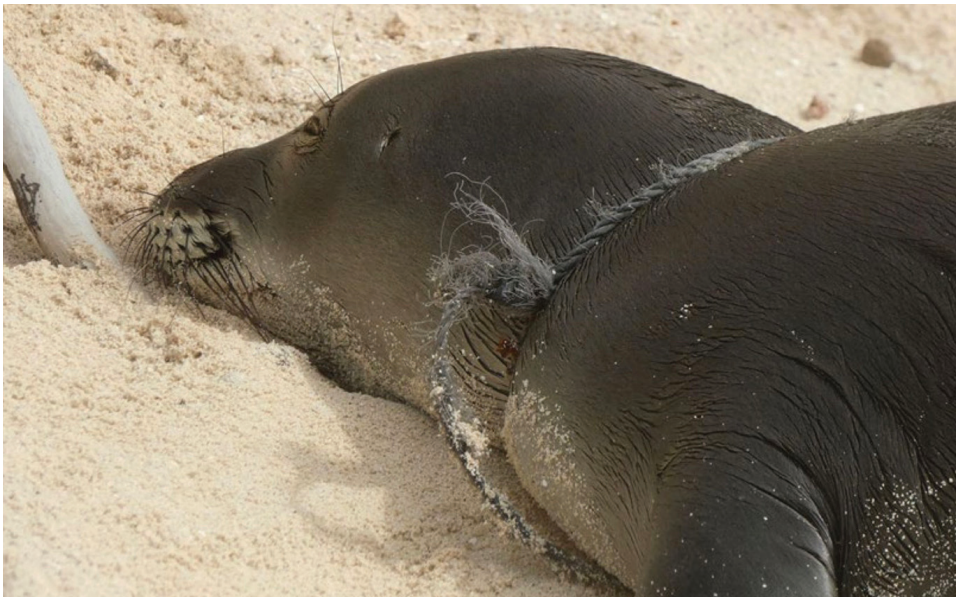
For nearly three decades, the National Oceanic and Atmospheric Administration has conducted or supported regular hauls of marine debris from the Northwestern Hawaiian Islands. Most of it is made up of derelict fishing gear, and most of that is non-biodegradable plastic.

But what effect has the removal had on the protected species that call the Papahanaumokuakea Marine National Monument home? There is plenty of photographic evidence of the harm that entanglement poses to the corals, green turtles, monk seals and seabirds. Until recently, though, no quantitative study of the impact of debris removal had been done.

But in September, the journal *Science* published a report that details the positive benefit on monk seal pups that debris removal has had, especially at Pearl and Hermes Reef, the source of more than half of the 945 metric tons – more than two million pounds – of marine debris collected between 1996 and 2022 by NOAA and its partners. The study, "Four decades of Hawaiian monk seal entanglement data reveal the benefits of plastic debris removal," was authored by researchers at the Pacific Islands Fisheries Science Center, an agency of the National Oceanic and Atmospheric Administration, the University of Hawai'i School of Ocean and Earth Science and Technology, and personnel affiliated with the Papahanau Marine Debris Project, a non-profit group founded by former NOAA researchers in 2020 that is dedicated to debris removal from the area.

A monitoring program for monk seal entanglements launched in the 1980s, but even before that, entanglements were recorded "opportunistically," the authors write. Altogether, from 1974 to 2022, 474 monk seals, representing both sexes and a wide range of ages, were seen entangled in marine debris. "Plastic derelict fishing gear (net, line, and trap components) accounted for 76 percent of the items observed entangling seals. Only one non-plastic entangling item (a loop of copper wire) was observed," the report states.

The number of seals observed to be entangled does not reflect the total number of seals caught up in debris: "Documented incidents represent only a subset of the actual number of seal entanglements as entangled seals are not always observable… Seals alternate time at sea with periods ashore but are practically only available for detection of entanglement when on land. For example, seals entangled in debris anchored to offshore substrate or in debris that limits their ability to swim to shore are essentially unavailable for detection and almost certainly perish unseen and undocumented. Further, field staff are only present for part of the year at most sites where monk seals reside."



Endangered Hawaiian monk seal entangled in fishing gear. CREDIT: NOAA FISHERIES.

In an effort to quantify the effect of debris removal, the team reviewed data from 1996 to 2022. NOAA began a large-scale debris removal program in 1999 but had begun to haul off debris and weigh it three years earlier. The authors used statistical modeling to determine the relationship between removal of debris and survival of monk seal pups. They found that after considering the effect of debris removal for each subpopulation of seals, "estimated entanglement rates were lower at five of the six seal subpopulation sites after large-scale debris removal began."

At Pearl and Hermes Reef (also called Manawai), where a total of 505 metric tons of debris was removed over the study period, the entanglement rate declined by 71 percent. This site was also where debris removal was highest, amounting to between more than 13 times the amount collected at Kure Atoll, where the least debris was removed, to more than twice the debris removal at Midway, where around 200 metric tons were collected.

Pearl and Hermes Reef was the only subpopulation site where the rate of entanglement of weaned pups was found to be statistically significant following debris removal. This, the report says, is linked to three factors: "First, this subpopulation had a relatively high 'baseline' entanglement rate prior to debris extraction efforts. Second, the amount of debris removed from Pearl and Hermes Reef was higher than that of any other location. Lastly, the rate of debris removal was very high in the early years of the debris cleanup program, resulting in more numerous subsequent years when entanglement hazards were reduced as compared to other sites where debris removals accrued more gradually." Still, at five of the six subpopulation sites, post-removal entanglement rates decreased.

Laysan Island was the only site where entanglement rates increased, a fact the authors explain by noting the rates at Laysan were relatively low to begin with, "leaving little room for detection of statistically significant improvement." At French Frigate Shoals, where the pre-entanglement rate was even lower than that at Laysan, the entanglement rate decreased, but not in a statically significant quantity.

At other sites – Lisianski Island, Midway Atoll, and Kure Atoll – reduced entanglement rates were seen and seals may have benefited from the debris removals, but "the intensity of removal efforts may have been insufficient to result in statistically significant findings at each location," the report states.

The authors see the benefits of debris removal on monk seals as a "proxy for many undocumented benefits to other Northwestern Hawaiian Island species as well as ecosystem

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U.N. Talks on Plastic Pollution End With No Agreement on Binding Measures

The United Nations Intergovernmental Negotiating Committee on Plastic Pollution gathered recently in Busan, Korea, in what was supposed to be its fifth and final meeting in an effort to come up with a treaty to reduce plastic production.

On December 1, the meeting adjourned with no agreement. Delegates from 177 countries supported strong measures to reduce plastic production, but opposition from a small group of delegates from oil-producing nations blocked adoption of any binding policy.

The meeting concluded with representatives from 85 countries signing onto a declaration calling for legally binding provisions in any final treaty, including a target to reduce plastic production, phase-out of some of the most harmful plastic products, and financing.

Just weeks before the INC meeting, Azerbaijan hosted the 29th Conference of the Parties, the United Nations panel on climate change. There, delegates were informed that plastic production is responsible for four times more greenhouse gas emissions than the aviation industry, although it is not included in climate negotiations as a source of emissions.

A study by the Lawrence Berkeley National Laboratory found that in 2019, production of virgin plastic generated 2.24 billion metric tons of carbon dioxide equivalent into the atmosphere – more than 5 percent of total greenhouse gas emissions. That same year, emissions from aviation and shipping amounted to 1.32 billion tons.

Plastic production is predicted to triple by 2050. In addition to the visible plastic materials found in marine debris, microplastics have been found in the ocean, air, produce, and breast milk, among other things.

The head of Panama's delegation to the Korea talks, Juan Carlos Monterrey Gomez, said at the conclusion of the meeting, "Every day of delay is a day against humanity. Postponing negotiations does not postpone the crisis. When we reconvene, the stakes will be higher."

The meeting concluded with an agreement to continue talks at a date yet to be determined.

— Patricia Tummons

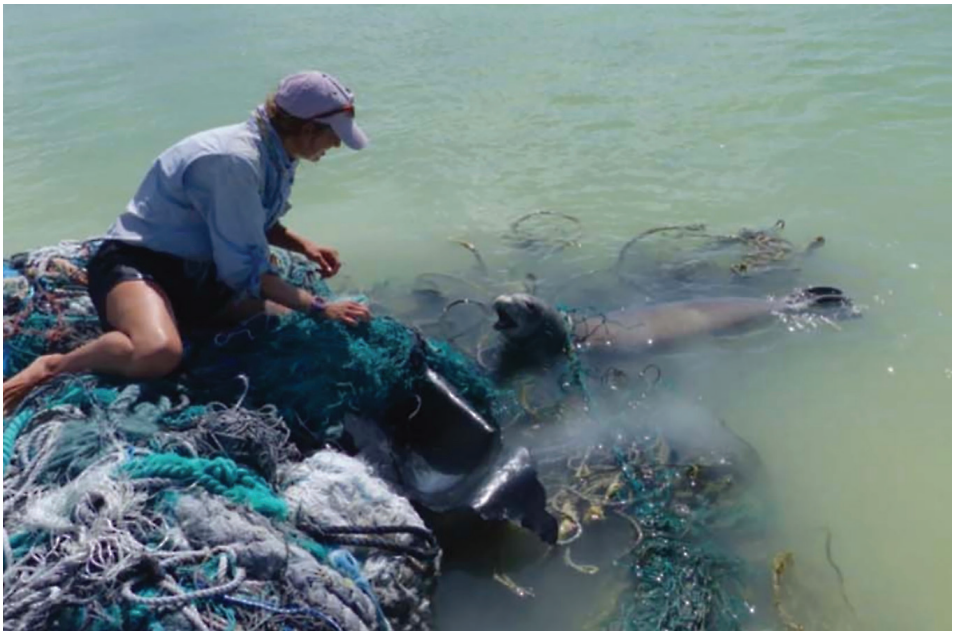
Marine Fisheries *continued from page 3*

function, health, and resilience. That we were able to detect a signal in seals suggests that the impact of plastic debris on many other reef-associated species may have also eased." They note that fish, turtles, seabirds, and corals are all harmed by plastic debris.

"Our findings suggest that if the level of debris removal achieved at Pearl and Hermes Reef were attained at subpopulations where monk seal entanglement rates remain relatively high, benefits to monk seals and the ecosystem at large could be maximized," they write.

In addition to debris removal, the authors conclude by noting the problem still needs to be addressed at its source: "[R]educing environmental plastic inputs is preferable to only mitigating their damage after the fact. The entangling plastic debris on Hawaiian reefs and beaches largely originates from multinational regulated fisheries throughout the Pacific, as well as illegal, unreported, and unregulated fishing activity…. Efforts to reduce inputs from fisheries coupled with ambitious removal programs … will likely be required to minimize the damage wrought by abandoned, lost, or otherwise discarded fishing gear."

Just this year, field camp teams "disentangled two turtles (one fully submerged) from a net mass anchored on a reef at Manawai," according to a recent Pacific Islands Fisheries Science Center report.



Endangered Hawaiian monk seal entangled in fishing gear. CREDIT: NOAA FISHERIES.

Meanwhile in Hawai'i

The state Department of Land and Natural Resources' Division of Aquatic Resources has supported marine debris removal efforts through its Marine Debris Rapid Response program. A hotline – 833-4-DA NETS (833 432-6387) – allows members of the public to report sightings of marine debris too large to collect by hand. The reports are transmitted to organizations that partner with the DLNR on all islands except Lana'i and Ni'ihau.

Through this program, more than 100,000 pounds of marine debris have been collected since its start in 2020.

One of the partners, the Hawai'i Wildlife Fund, has been undertaking beach clean-ups on Maui and the Big Island since the early 2000s. According to its president, Megan Lamson, it has collected roughly 350 tons of debris – almost all plastic – from the Big Island, with almost all that gathered from the district of Ka'u.

— Patricia Tummons

Encounters with Nearshore Fishing Gear Likely Drive False Killer Whale Population Loss

What is driving down the population of false killer whales around the Main Hawaiian Islands?

A paper just published in the journal *Endangered Species Research* suggests that the fishing activities of thousands of commercial and recreational fishers operating in nearshore waters may be responsible. At the very least, it almost certainly has made a non-trivial contribution to the decline of the endangered MHI population of false killer whales, which now numbers around 139 individuals. That's more than a 50 percent decline since the late 1980s. The population continues to fall at the rate of 3.5 percent a year.

The Honolulu-based fleet of around 150 longline vessels that fish for bigeye tuna engages with false killer whales, but almost all of those animals belong to the pelagic FKW population. For the last 30 years, the ocean from shore out to 50 nautical miles has been off-limits to longliners, which makes the likelihood of longline vessels hooking a false killer whale from the MHI population unlikely (although it does rarely occur).

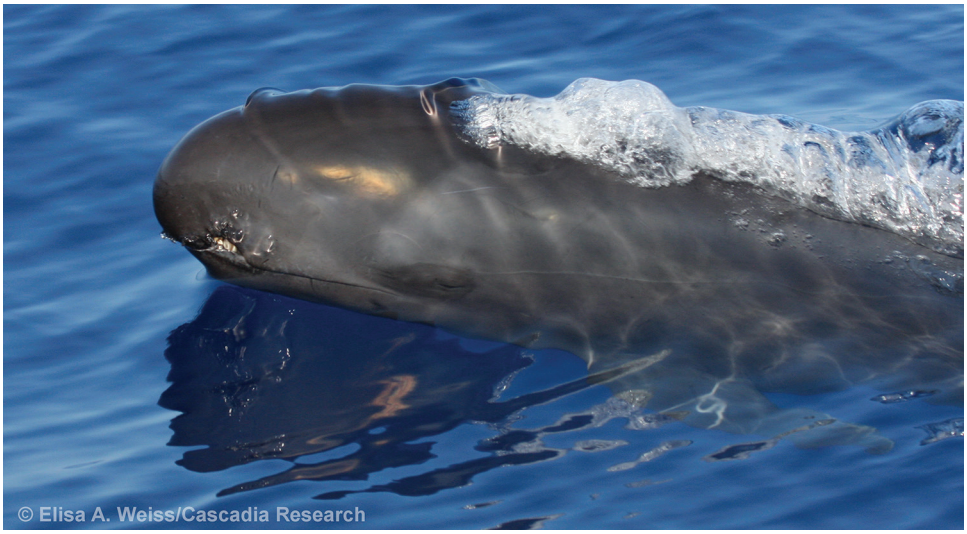
Estimating the rate of interaction between the longliners and pelagic population has been based on reports from human observers, placed on a certain percentage of vessels at sea at a given time. In the past, about one in five vessels carried observers, but that percentage has declined recently, to the point that for this year, it is anticipated to be no more than 7 percent.

The interactions of the nearshore fishing vessels with the MHI population of false killer whales lack even that level of monitoring. But there is a photographic record, going back more than 20 years, that the authors of the recent scientific paper have mined to determine the extent and severity of harm caused by the nearshore fishing vessels to the MHI false killer whales.

The photographs that show injuries to dorsal fins and mouthlines support the finding that 28.7 percent of individuals in the MHI population have interacted with nearshore fishing vessels. Among the animals showing dorsal fin injuries, females were much more likely to have evidence of such injuries (17.4 percent) than males (5.3 percent).

"Such injuries, typically to the leading edge of the dorsal fin, presumably originate when an animal is hooked in the mouth and struggles against the taut line," the study says, "although injuries to other areas of the body can also occur if an animal becomes entangled during the process."

But the photos show only the survivors, notes Robin Baird, one of the authors of the paper who practically pioneered the close study of false killer whales in waters around Hawai'i. "We are definitely only getting photos of those that survive fishery interactions," Baird stated in comments to *Environment Hawai'i*. "I'm sure there are many that are not surviving. In addition, some of those that we are getting photos of could still have ingested hooks that may eventually kill them."



A Hawaiian false killer whale with scarring from an interaction with fishing gear.

Baird noted that a study of bottlenose dolphins showed that the animals that ingested gear often died later.

"In the case of the longline fishery, about 85 percent of the observed interactions either result in death or serious injury," he said. "I suspect the rate is much lower for the lighter gear that is used around the Main Hawaiian Islands, but obviously we don't know what the rate is."

Overall, he said, "I think that fisheries interactions are the most likely cause of the decline in the population since 2013."

All three of the false killer whale populations in Hawaiian waters – the Northwestern Hawaiian Islands population, the pelagic population, and the MHI population – enjoy protection under the federal Marine Mammal Protection Act. The MHI population, which is critically endangered, is also protected under the federal Endangered Species Act.

The longline fleet cannot legally fish inside of 50 miles of the Main Hawaiian Islands, which effectively prevents it from interacting with the MHI population. Nor can it fish in the Papahanaumokuakea Marine National Monument, which protects the NWHI population of false killer whales. The presence of observers monitoring interactions with the pelagic population, as well as sanctions should the number of animals seriously injured or killed by interactions with fishing gear reach a certain level, means that the pelagic population has some protection.

But the non-longline commercial vessels that fish in Hawaiian waters, in addition to hundreds of recreational fishers, are not monitored. Nor is there any rule, federal or state, that requires them to adopt gear or accept observers to monitor interactions with animals belonging to the Main Hawaiian Island population.

"Observer coverage over most of the range of the endangered MHI stock – the population with the highest rates of injuries consistent with fisheries interactions – is nonexistent, which creates a barrier to understanding the full extent of risk that fisheries pose to the declining population," the authors of the paper write.

They suggest some form of monitoring be adopted, including electronic monitoring. So far, they note, "fisheries-related efforts have been limited to outreach and education, providing information to help fishers discriminate between false killer whales and other similar species … and encouraging fishers to move out of the area when false killer whales are present.

"In spite of these efforts, we have demonstrated that fisheries interactions are ongoing for the endangered MHI population and a

large proportion of the population appears to interact with fishing gear."

The authors note that the measures adopted for the deep-set longline fishery have been largely ineffective, and that, given the wide variety of fishing methods used by nearshore fisheries, adopting effective measures to reduce interactions with false killer whales is even more complex.

"Novel targeted measures should be developed to either effectively reduce the rate of interactions or reduce the likelihood of injury or mortality, ideally through collaborative efforts with stakeholder communities," they conclude.

(The study, "False killer whales and fisheries in Hawaiian waters: evidence from mouthline and dorsal fin injuries reveal ongoing and repeated interactions," was published December 12 in *Endangered Species Research.* Authors are Annette Harnish, Robin Baird, Sabre Mahaffy, Annie Douglas, Michaela Kratofil, Jacquelyn Shaff, Tori Cullins, Stephanie Stack, Jens Currie, and Amanda Bradford.)

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Electronic Monitoring For Longline Fleet

As noted above, the rate of observer coverage for longline vessels in the Hawai'i fleet has dropped, from an average of around 20 percent, to around 17 percent, then 13 percent in 2024, and 7 percent in 2025. The National Marine Fisheries Services cites budgetary constraints in its efforts to explain the cuts, which come close to the minimum level of 5 percent required by the Western and Central Pacific Fishery Management Commission, the international organization that governs fishing in most of the region fished by the Hawai'i fleet.

Instead of human observers, now the push is to adopt systems of electronic monitoring. Yet this, too, is expected to be costly.

At the meeting of the Western Pacific Fishery Management Council's Scientific and Statistical Committee last month, T. Todd Jones, representing the Pacific Islands Fisheries Science Center, said that adoption of electronic monitoring systems fleet-wide would cost more than $2 million. By 2026, he said, it is hoped that some system will have been installed on some of the boats. By 2027, full fleet coverage is expected to occur.

But no matter the cost, don't expect the fishers to pay. Eric Kingma, executive director of the Hawai'i Longline Association, told the group that longliners are hurting economically. "Profitability is the lowest it has been in the last 20 years in the industry," he said. "You wouldn't get any vessels to sign up if they had to pay for it."

— Patricia Tummons

Laniupoko *continued from page 1*

discuss whether LIC "must refile any working papers or other material submitted in this docket, in light of this order voiding LIC's unapproved loans."

They may make "procedural requests" to the PUC, such as a request for a contested case or additional briefings, additional discovery, "and/or any other procedural requests or suggestions."

Parties are also invited to make "any updates to the party's statement of position, in light of … any new information learned since the statements of position were filed, or because of this order deeming void LIC's unapproved loans." In a footnote, the PUC states that the Native Hawaiian intervenors "filed direct testimony" in their motion to clarify, "in lieu of a statement of position. The commission directs the Kapu Intervenors to file an update styled as a statement of position … as the commission finds it more efficient to review a concise statement organized by the discrete issues outlined" in the order setting forth issues to be considered in the LIC's request for approval of a general rate increase.

With respect to the held-back funds to repay the Martin loans, the PUC order asks the parties to state their position "on whether any temporary rate revenues are in excess of the rates, fares, or charges the commission deemed just and reasonable … and must be returned to ratepayers." In another footnote, the PUC states, "The commission understands that it may be difficult to calculate any such amount, based on the information currently in the records. At this time, the commission only seeks each party's position on whether the return of ratepayer funds may be necessary."

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Yet More Questions

On December 18, the Public Utilities Commission brought forward yet more requests for information from LIC. The questions arose from filings that LIC and its sister company, Launiupoko Water Company, made as part of hazard mitigation planning for all regulated utilities.

Part of the companies' plans for dealing with hazards call for replacing diesel pumps on wells with electrical power. According to the filing made April 18, "Infrastructure is in place for LIC 1 [well] and HECO is actively pulling the lines. LIC 1 should have permanent power before the end of the year. Power to the A Pump is stalled with [the State Historic Preservation Division] review of the pole installation."

Four months later, in August, the companies updated the status of the wells and pumps. As for LIC Well 1, the electrical systems were reported to be complete. "All that remains is funding to pay for electrical installation by LIC's contractor.

"However, because LIC is in debt and operating at a loss, LIC first needs the commission's approval of LIC's pending rate request in order to seek financing."

In the company's response to the PUC's information request of September, LIC reported the following in October:

"Before HECO will install a meter, the LIC Well-1 Electrical Service Equipment … must be installed. This was estimated to cost $196,619.52 on July 22, 2024. LIC lacks the funds to complete the work and is unable to seek financing with current losses."

As for A Pump, the company stated that HECO plans "are complete and approved" and the company has applied to Maui County for a grading permit. "The county requested a 6E review by SHPD. SHPD is requiring a complete Archaeological Inventory Survey … LIC lacks the funds to process the AIS or complete the work once all permits are received."

Following up on those statements, the PUC is now asking the company to "identify any lawful debts LIC has incurred that may stall or prevent LIC from obtaining any financing" and to "provide a copy of any loan applications or related correspondence submitted to any professional lenders regarding LIC Well 1 or A Pump."

The PUC also is asking LIC to explain an oddity on the company's financial reports. From January 2024 through September 2024, there were zero expenditures in the category "Diesel Fuel Only – Generators," the PUC notes. In October, however, expenditures under this category totaled $11,7465.64, while in November, the total was $19,597.61.

"Please explain, in detail, the reason for this discrepancy," the PUC asks. Also, "Please explain, in detail, whether and how the quality of LIC's service to customers has been impacted during the time that LIC chose not to operate diesel fuel generators to pump groundwater."

Responses to this latest round of information requests are due January 3.

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Launiupoko Water Co. Answers PUC Questions on Excess Water Use

The Public Utilities Commission wants to know why customers of the Launiupoko Water Company are using so much potable water. In October, it asked the company, which filed a rate increase application with the PUC nearly a year ago, to explain why average customer usage rose from 496 gallons per day in 2007 to 1,766 gpd in 2022.

"LWC does not know the exact reasons for the increased average customer potable water demand during the span from 2007-2017 (496 GPD to 705 GPD) but believes that it could be attributable to several factors," the company responded on November 8. It proceeded to offer some possible explanations:

In that period, the company added 150 new customers, who "may have had increases in household size (e.g., children, pets), fixture units [sic], number of days home per year, sub-metered farm dwellings, and irrigation use."

Also, "a few large volume users with a main home plus a second farm dwelling on one meter may have skewed the averages." (Because all of the area served by LWC is in the state Agricultural land use district, all of the residences, no matter how lavish and no matter whether there is any agricultural production at all, are pretty much by definition, if not in fact, "farm dwellings.")

Another point: "lot sizes increased." When the "agricultural" subdivisions were first built out, lot sizes were between and two and five acres, LWC informed the PUC. Later subdivisions had lot sizes ranging from 15 to 25 and more acres. The PUC had reminded the utility that when it applied for a license in 2003, the company said it expected "the same number of people will live on a lot, regardless of its size, and a "typical single-family home is estimated to average between 500-600 gallons per day without irrigation use." But evidently that statement, to the effect that anticipated potable water usage was indifferent to lot size, had no basis in fact.

Launiupoko Water Company then hints at the role its troubled sister company, Launiupoko Irrigation Company, may have in driving increased demand for potable water. Most of LWC's customers also are connected to LIC, which provides – when it can – non-potable water for most agricultural uses. The potable water is sourced from wells, while the irrigation water these days is drawn almost entirely from Kaua'ula Stream.

"Other than the stream [interim instream flow standard] determinations and LIC's operational challenges, the factors that may have led to an increase in LWC customer water demand from 2017 to present, in addition to the factors mentioned … above, include increases in the use of potable water for new agricultural uses that require potable water (e.g., farming, cattle, horses) and irrigation. … The irrigation of green space for wildfire irrigation may be also a contributing factor."

A few paragraphs later, Launiupoko Water Company again refers to the difficulties of the irrigation company and the part they may have played in increased demand for potable water. "It is hard to say to what extent" the increases in potable water consumption from 2016 to 2022 are due to "LIC's operational challenges" rather than "changing dynamics in customer demand," the company says.

"Nevertheless," it concedes, "there appears to be correlation between the increase in LWC consumption and decrease in LIC consumption during this period."

"LWC believes that the primary operational challenge for LIC was due to [the Commission on Water Resource Management's] enactment of [interim instream flow standards] in 2018, which materially reduced the main source of LIC's non-potable water, causing customers to use LWC's non-potable water for irrigation and other non-potable uses," the company says.

True, in 2018, the Commission on Water Resource Management changed the interim instream flow standards for West Maui streams, including Kaua'ula, limiting – in theory, at least – the volume of water Launiupoko Irrigation Company could divert to its customers. Yet shortly after the new restrictions were approved, LIC received permission from CWRM to exceed them, permission that is renewed every six months.

For a while, LIC supplemented low stream flows with potable well water. But this stopped in November 2020. At that time, the irrigation company notified the Public Utilities Commission that pumping "not only increased operating costs (and losses), it has resulted in an unacceptable increase in the chloride content of water from the potable wells."

At the same time, flows in Kaua'ula Stream have decreased to the point where the irrigation company is often unable to deliver water to its customers, notwithstanding the special dispensation from CWRM.

Even with the large increases in potable water consumption, LWC contends that the average usage is reasonable.

In response to the PUC's question as to what the company generally believes to be reasonable consumption levels, both with and without the irrigation company returning to full operational capacity, LWC claims that "actual consumption is a reasonable estimate of reasonable consumption levels."

In 2023, when the irrigation company pumped well water the entire year, the average customer's daily consumption of potable water was 1,534 gallons. "LWC believes this … represents normalized consumption," it says. It goes on to note that its pending application before CWRM for an existing use permit for groundwater seeks 675,000 gallons per day, or 1,800 gpd per metered customer. This is more than three times what the utility expected average customer usage to be when it applied for a license from the PUC in 2006.

If the irrigation company has to rely on surface water alone, with no pumping, LWC "believes that average consumption would be approximately 2,093 gpd."

The PUC wanted to know if the water company had sent notices to its customers to reduce the use of potable water for irrigation. Also, what, if anything, had the company done to encourage or force water conservation.

The company replied that in July it had sent notices to its 60 highest water users (out of 395 total), asking them to cut back on their use of potable water for irrigation purposes.

As to what the company has done or is doing to advance water conservation, it says it is in the process of replacing its meters with "smart meters." This will allow customers "to view and modify their water use behavior in real time rather than waiting for their next bill, which encourages confining use to within the next lowest price tier," the company says.

It is also "considering the use of penalty provisions … to facilitate enforcement of mandatory conservation measures" if such measures are imposed or a shortage emergency is declared.

The PUC noted that based on the information the water company provided on usage for each property it serves, "many individual customers use less than 1,200 gpd of potable water." But consumption at five properties exceeds 10,000 gpd, "with the top water

continued on the bottom of page 8

BOARD TALK

Board Denies Permits For Hololani Revetent

In a 4-3 vote, the Land Board denied a recommendation to amend a 2018 board action to include approvals of a construction right-of-entry permit for a rock revetment fronting the Hololani Resort Condominiums in West Maui, as well as a revocable permit for the use of state land.

Back in May 2014, the Land Board voted to approve a Conservation District Use Permit for a sheet metal/revetment project to protect the two eight-story buildings that make up the resort. Although the board had a policy against shoreline hardening, a report by the Department of Land and Natural Resources' Office of Conservation and Coastal Lands stated that the north tower would likely be uninhabitable in the near future without protection.

The quality of the beach also played a factor. "If this was a dune system, I would not be sitting here," then-OCCL administrator Sam Lemmo told the board at the time.

On January 12, 2018, after the condo secured a Special Management Area permit and a shoreline setback variance from Maui County, the Land Board approved the issuance of a 55-year non-exclusive easement for the planned seawall and revetment, as well as a management right-of-entry permit for the structure.

"However, due to staff oversight and inadvertence, staff did not specifically include a recommendation for a construction type of [right-of-entry]. Due to the timing of the high surf season, Applicant had planned and wanted to start construction of the revetment no later than May 10, 2018, well before any easement could be executed. Staff respectfully apologizes to the Applicant and this Board for this oversight, which has resulted in an undue 10-year or so delay in the project," a December 13 report to the board by the DLNR's Land Division states.

The board deferred taking action on a recommendation for a construction ROE permit at its March 23, 2018 meeting after failing to secure a majority decision to approve or deny.

"The Applicant has been unable to obtain legislative approval for the easement. At least one of the comments from a member of the Water and Land Committee overseeing the legislative approval of submerged lands dispositions was that they had wanted the Land Board's approval of the construction ROE and easement before the Legislature decided on whether to approve or disapprove the easement request," the Land Division report states.

With the future of the revetment in limbo, the Hololani decided in 2019 to construct the revetment on its own property, just inside a temporary sandbag revetment. With the county Planning Department's blessing, a sheet pile bulkhead was installed. Community groups sued in Circuit Court. After a court-ordered mediation, the parties reached a settlement resulting in the delay of revetment construction for five years to allow for the environmental review and permitting for a regional beach nourishment project. Under the settlement, the community groups agreed not to oppose Hololani's efforts to extend its CDUP, which it did on May 8, 2020.

"The Applicants five-year deferment period for the Revetment expired in February 2024, without significant progress made on the beach nourishment project. According to the Applicant, there is disagreement between the State, County and private condominiums regarding who will be responsible for the ownership and maintenance of the T-groin structures that will serve to hold the sand in place. Applicant is requesting approval of a construction and management right-of-entry and revocable permit to allow them to start construction of the Revetment before May 2025 in order to complete construction before the winter swells arrive," the Land Division report states.

A Second Attempt

At the board's December 13 meeting, the Land Division again brought forth a recommendation to amend the right-of-entry permit to allow for construction. It also recommended approval of a month-to-month revocable permit for the use of state land.

"[I]f the ROE and RP are approved, Applicant may proceed with construction of the Revetment at its own risk, and the Board may require removal the Revetment if the Applicant does not obtain legislative approval of the easement," the division's report states.

"They're going to pay rent and provide a removal bond," Ian Hirokawa, special projects coordinator for the Land Division, told the board. "The desire is to get the sandbag revetment out. It's not good for the shoreline," he added.

Board member Kaiwi Yoon asked whether allowing construction of a rock revetment before legislative approval of an easement for it wasn't putting legislators in an untenable position. "Otherwise, you gotta rip everything out. It's messy," he said.

"It is," Hirokawa replied, then repeated that "the applicant bears the risk."

Yoon said that in addition to the mess, he was also concerned about how the board's approval of the division's recommendations would look.

"We fined owners a considerable amount of money for armoring their properties. I

Laniupoko *continued from page 7*

user reporting 19,076 gpd." The PUC then asked the utility to analyze the usage of these customers and to "please explain" factors that contribute to the high rate of consumption, including pools, landscaping, agricultural uses, or other features "that distinguish these parcels from more modest water users."

The company replied that it had sent requests for information to the top five users and had received three responses. One was from a farmer who grows ulu, taro, citrus, bananas, and other fruit and produce, the company said, while "another user uses potable water to keep the land from becoming dry for wildfire mitigation and has a pool/spa, and another user breeds horses and has an ohana unit."

— Patricia Tummons

For Further Reading

Environment Hawai'i has published these reports that discuss Launiupoko Irrigation Company and Launiupoko Water Company:

- "Launiupoko Irrigation Co.'s Reports to PUC Show Income Set Aside for Loan Repayments," September 2024;
- "In West Maui, the Fight over Water Reveals Deep Social, Economic Rifts," July 2024;
- "Editorial: Those Launiupoko 'Farms,'" July 2024.

think this sends a schizophrenic or unclear message," he said.

Board member Riley Smith agreed about the messy appearance, but added that the Hololani situation was different from shoreline hardening violation cases that the board has dealt with, in that the condo had obtained necessary approvals.

Board member Vernon Char also noted that the revetment was expected to help protect the adjacent Honoapi'ilani Highway from erosion.

'Things Changed'

Testifying in support of the Land Division's recommendations, attorney Pamela Bunn, representing the Hololani, explained that the condo is merely "looking to replace one armoring structure with a smaller, more benign, safer structure. Right now there are massive sandbag revetments in front of the property. They are bigger than what the rock revetment will be. They are harder to remove. They are less safe for public access up and down the shoreline."

Jim Barry of Sea Engineering, which designed the proposed rock revetment, added that it would help protect the highway, which curves very close to the erosion scarp. Also, a drainage easement just north of the condo has a history of clogging with sand and causing the highway to flood.

He said the revetment design, which includes a new drain, would solve that problem. He added that critical infrastructure at stake includes more than the road. It includes drainage, sewage, and water lines, as well as electric and telecommunication poles along the highway.

"All of that is at risk if this area is allowed to erode," he said.

Board chair Dawn Chang said that her department wants private landowners to consider building their shoreline hardening structures on their properties, not on public beaches.

Barry replied that the Hololani was not allowed to protect its property until the shoreline got to within 20 feet of the buildings, which was the OCCL's threshold at the time for allowing emergency sandbags.

"As a coastal engineer, it's really hard to do anything within that 20 feet. … Our structure is pushed back as far as it can. There's an underground parking garage there that is just barely not at risk because of what we've done. So our hands are tied. … The only thing you can build by the way this came about on private land is a vertical wall, which is not what we want to do," he said.

"That's a fair statement," Chang replied. Still, she continued, "the problem is many landowners knew more than 20 years ago that this was inevitably going to happen. So you wait until prices, yes, you have very few options. … We see what's happening at Ka'anapali, Kahana, actually, statewide. … We would ask that all landowners start looking in a proactive way rather than waiting for a crisis to occur."

Barry pointed out that on the shoreline fronting the Hololani, "things happen quickly. It may go for years without a lot of change. All of a sudden over a weekend you lose five feet of property. And Hololani, in one area, it was 10 feet, essentially over nine. It happened very quickly. You have do something."

OCCL administrator Michael Cain ran through the history of the project, noting that the Land Board approved it before the recent passage of Act 16, which prohibits private shoreline hardening structures in areas with sandy beaches.

"I just wanted to clarify that we are operating under a permit that was passed under previous rules, previous statutes. I hear the concern about the board sending a double message, but sometimes we do have to act on permits that we wouldn't have recommended today," he said.

"Yeah Michael, but smoking was allowed indoors. Things changed. So things change," Yoon replied.

Board member Char asked whether the Land Board, in approving the amendments, would be "creating any precedents for you on any other matters that would come back to us."

Cain said he didn't think so.

Yoon later asked Cain, "Can you please remind us why the state no longer supports armoring the coast?"

"We've known for over 100 years that shoreline armoring can negatively impact beach properties by impounding sand and by inhibiting the natural motion of sand. Beaches are dynamic. They're meant to move. … The territorial government actually banned shoreline armoring in 1917," Cain explained.

"Somebody forgot to tell this board in 2018," Chang quipped.

Several unit owners at the Hololani testified in support of the Land Division's recommendations. They described how the sandbags are deteriorating and are a danger to people who attempt to walk on them and marine life that gets entangled in them.

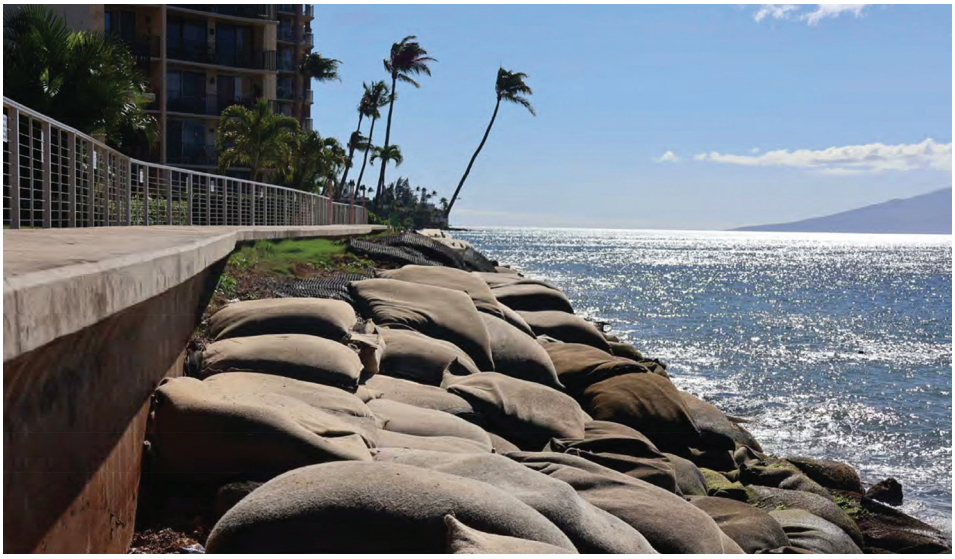
Several members of the public, including representatives from the Maui chapter of the Surfrider Foundation and the non-profit Kamalu o Kahalawai, testified in opposition.

Hannah Lilley, Hawai'i regional manager for the Surfrider Foundation, testified, "Shoreline armoring like the proposed 400-foot rock revetment at Hololani exacerbates erosion on an already chronically eroding shoreline." She said that the structure would, contrary to what proponents say, impede beach access.

Granting the construction ROE permit would fly in the face of the purpose and principles of Act 16, she continued. "Yes, the seawall and sandbags were approved prior to Act 16, but replacement and construction of new rock revetments would continue prevention of lateral public access and continue to accelerate erosion," she said. "Granting this ROE and RP could set a really dangerous precedent for private ocean front landowners to follow suit."

Community activist Kai Nishiki, added, "The state of Hawai'i must stop approving shoreline easements, which is just a fancy, innocuous-sounding word for what it really is: selling off pieces of our public beaches to resorts, in this case longer than a football field."

After hearing from the public, board chair



A temporary sandbag revetment fronting the Hololani Resort Condominiums on Maui. CREDIT: DLNR.

Chang continued to press Barry about the possibility of keeping the revetment on Hololani's land.

Barry said that an earlier design included a vertical seawall on private land. "We could have done that from the beginning, but we discussed with OCCL the advantage of adding the lower rock revetment [to] reduce reflection of the shoreline and, thereby, help promote beach accretion. Just a vertical sheet pile has twice the amount of wave reflection. …

"OCCL preferred this [current] design. And we knew from the outset that the revetment would be on state land. It has to be. The wash of the waves, no matter where we put it, the wash of the waves is at the vertical wall," he said.

Despite the close proximity of the metal sheet to the Hololani's underground parking garage, board member Yoon, an architect, was not convinced that the revetment could not be moved inland. He suggested that the condo would just have to sacrifice parking stalls.

"It would flood," Barry replied.

"You would lose the buildings. The parking garage holds one of the buildings," Bunn added.

"There are ways. It would cost money. You could do it," Yoon said.

Barry disagreed.

"This is obviously a very different board from 2018," Chang later said. "Our mission is really to preserve and protect natural and cultural resources, public access. And I'm always struggling with how do we find that balance. …

"I don't want to belabor this. We're very challenged here, looking for longer-term solutions, rather than this piecemeal," she said.

Barry said that the number of solutions is limited, noting that even a beach nourishment project would require "stones going in."

Bunn added that long-term solutions "cannot be one size fits all."

"We all know Sam Lemmo was no pushover. He specifically sited things unique to the property. Even if you took away the buildings, you took way the sandbags, there's not going to be a beach there. …. The alluvial soil just calves out and dissipates. It's very unlike, say, the North Shore of O'ahu, where the shoreline recedes, there's sand behind it," she said.

In the end, Maui board member Doreen Canto made a motion to deny the Land Division's recommendations. Yoon seconded the motion.

After an executive session to discuss legal matters with its deputy attorney general, the board voted to approve Canto's motion. Board members Smith, Char, and Kaua'i's Karen Ono voted in opposition.

"I know this was not what you had hoped for or anticipated. I'm hoping you'll come back with some creative solutions for us," Chang told Barry and Bunn.

To which Bunn replied, "The next time we'll be back will be for more sandbags."

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Board Denies Contested Case On 2024 Stream Division Permits

On December 13, about a year after the Sierra Club of Hawai'i requested a contested case hearing on revocable permits allowing Alexander & Baldwin, Inc., and East Maui Irrigation Co., LLC, to divert East Maui streams to Central and Upcountry Maui for agricultural and domestic uses in 2024, the Land Board finally took up the matter of whether the conservation organization should be granted one.

The group has long argued that the Land Board allocates more water than is necessary and allows the excess diverted water to be wasted while leaving several East Maui streams dry for most of the year.

The Hawai'i Supreme Court heard arguments in November over whether the board should have granted the Sierra Club's contested case hearing request over permits granted to the companies in 2020. The court had not issued a decision by the time the Land Board met to decide — belatedly — on the Sierra Club's contested case hearing request made in 2023, as the board considered the permits for the following year.

Ian Hirokawa, special projects coordinator for the DLNR's Land Division, recommended that the Land Board deny the request. He made some of the same arguments the state's attorney made before the Supreme Court. He said that many of the issues the Sierra Club raise fall under the jurisdiction of the Commission on Water Resource Management, not the Land Board. Also, he added, "the history shows has there's been extensive due process on these issues, going back, really, decades."

Before addressing the Land Division's statements, David Kimo Frankel, the attorney representing the Sierra Club, took issue with the timing of the agenda item.

"A little bit of bad faith. Actually, not a little, but a lot of bad faith for you folks to wait a year to take up this agenda item. That's not cool. 2024 is about to end. This is a request for a contested case hearing for the 2024 revocable permit. That's bad faith," he said.

Addressing the Land Division's version of past efforts to deal with the concerns surrounding East Maui water diversions, Frankel called it "false, revisionist history."

"Let me deal with Ian's main point, which is this board's authority. It's actually false. First of all, the Legislature gave you the authority in [Hawai'i Revised Statutes Chapter] 171-55 to condition your approval with the best interest of the state." He pointed to a Hawai'i Supreme Court decision on a case involving challenges by East Maui residents to the revocable permits issued to A&B and EMI. In that case *(Carmichael v. Board of Land and Natural Resources),* Frankel said, the court recognized that the Land Board's duties include protecting streams.

He added that a decision made decades ago by 1st Circuit judge Eden Hifo regarding East Maui stream diversions determined that the Land Board cannot simply rubber stamp everything the Water Commission does.

"You are not a) bound by that and b) you have a public trust duty that's imposed," he said.

"Moreover **you folks** decided, before any of you were members of this board, that [for] Honomanu stream … no water can be diverted. You already voted to protect one stream before. In 2007, you did the same thing with Waiokamilo [stream]. You can't say you have no authority when you've exercised that authority before.

"In any case, you certainly have the authority to ensure that water is conserved, that it's not wasted. That is your authority," he said.

He said it wasn't worth it now to recount the reasons why a contested case hearing was required for the 2024 revocable permits, but that he hoped board members had a chance to listen to the recent oral arguments before the Supreme Court.

"It should be abundantly clear to all of you that a contested case hearing is required," he said.

"To your opening comment about the board, bad faith, waiting a year to agendize, the chair sets the agenda, not the board. Let's just get that clear. … I'm not throwing her under the bus. It's a fact," board member Kaiwi Yoon told Frankel.

"He's throwing me under the bus," Chang interjected.

After the board had a good laugh, Yoon asked Frankel his opinion on the Land Board's authority and how it relates to the Water Commission's.

Frankel explained that the Water Commission has exclusive authority to determine instream flow standards. In the case of East Maui, the Land Board "can say, 'We want more water left in the stream because it's not justified to take out' or you can say, 'We want this water used more efficiently than it is.' You have that authority. The Water Commission

does not have that authority at all. In fact, right now, the Water Commission completely lacks the authority to require that reservoirs be lined. You folks have that exclusive authority. You folks set how much water can be taken per day for various uses. Not the Water Commission. All the Water Commission decided in this circumstance is how much water, at a minimum, should be left in each stream."

Despite Frankel's arguments, the Land Board approved a motion by member Vernon Char, seconded by Doreen Canto, to accept the Land Division's recommendation. Board member Aimee Barnes voted in opposition. Yoon abstained.

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Board Denies Sierra Club a Contested Case, Renews East Maui Water Diversion Permits

"I just like to tell one short story. Gon' be real short. So back in the early '90s, had this one old man that used to work for EMI. He used to come into our village every week, every other week. And we get one waterfall called Waikane in our village. And every week, he come in, and we was always wondering like, 'Eh, how come? How come he stay over here?' And then finally, maybe after six months, we never seen him again. We also never see our water come down that waterfall again. So you know, putting into perspective the harm and the hurt we had to live through, whatever decision you guys make, I hope you guys keep the people of Ke'anae and Wailuanui in you guys' thoughts. We the ones who had to suffer through all these years and we no like suffer again. Thank you guys for you guys' time. I appreciate it."

With that, Jerome Kekiwi, Jr., president of Na Moku Aupuni O Ko'olau Hui, ended his testimony before the Land Board at its December 13 meeting. At that meeting, the board took up a recommendation from the DLNR's Land Division to issue a permit to Alexander & Baldwin, Inc., and East Maui Irrigation Co, LLC, (EMI) for the continued diversion of millions of gallons of water a day from East Maui streams for agricultural, domestic, and other purposes in Central and Upcountry Maui.

Decades years ago, Na Moku and other native Hawaiian kalo farmers from East Maui requested a contested case hearing on permits that, at the time, were annually renewed to allow A&B and EMI to keep diverting water. They also petitioned the state Commission on Water Resource Management to amend the interim instream flow standards of 27 East Maui streams upon which they relied.

At the Land Board's December meeting, attorneys and representatives of Na Moku and the Sierra Club of Hawai'i complained that the proposed permit would allow EMI co-owner Mahi Pono to take more water than it needed and to increase its water use for diversified agriculture in Central Maui over the course of the permit term. Meanwhile, requirements imposed years ago by the Water Commission to modify diversions to allow for restoration of certain streams have gone unmet. They also complained that the amount recommended to be diverted to Maui Department of Water Supply — at least 5 mgd — was also excessive.

The Land Division had proposed allowing Mahi Pono to divert a monthly average of up to 3,263 gallons per acre per day for diversified agriculture. The amount was based on a three-month average of the company's irrigation needs last year.

"Nā Moku opposes any proposal allowing further increases in the water diverted out of East Maui for diversified agriculture without proper vetting by the Board at a public meeting and unless and until A&B/EMI can show they have complied with prior orders of CWRM by physically addressing diversion modifications and system losses," wrote Native Hawaiian Legal Corporation attorney Ashley Obrey on behalf of Na Moku.

She added, "To allow automatic upward adjustments in allocations based on reported acres planted by a third party without further scrutiny of the Board is not only irresponsible resource management but is also an unconstitutional abuse of the Board's vested power, especially where there is no set cap on the total amount of water allocated."

She also argued that the Land Division had failed in its duty to analyze how the proposed permit affected native Hawaiian practices.

At the board meeting, Land Division special projects coordinator Ian Hirokawa explained that by his calculations, the system loss rate is 20.9 percent, which is lower than the 22.7 percent rate recommended for the permit.

He added that reducing the amount allowed to be diverted to the Maui Department of Water Supply from 7.5 mgd in 2024 to 6 for 2025, "that would lower the system loss rate even further."

Board member Vernon Char said he did not think the board should engage in "further tinkering" to address the concerns raised. He preferred to just keep the status quo and allow the county's new East Maui Water Authority to iron things out.

"Those are issues beyond us," he said. He added that he thought the accusations of water waste were unjustified and based on "bad evidence."

Mahi Pono senior vice president Grant Nakama testified that he thought the per-acre-per-day cap should be an annual average, not a monthly one, to allow greater flexibility. He also thought the cap should be higher — at least 3,764 gallons per acre per day — as the Land Division's proposed cap was not based on the months in 2024 with the highest irrigation needs.

He also said that a proposed condition requiring Mahi Pono to test how long it takes one of its reservoirs to lose all of its water was "highly impractical."

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When it was the Sierra Club's turn to testify, its attorney, David Kimo Frankel, shifted the focus to water needs in East Maui. He held up a large photo of a bone dry East Maui stream, Ho'olawali'ili'i.

"It still looks like this 70 percent of the time. All of the water from the stream is taken 70 percent of the time. When it rains a lot, the stream could pass through these gates," he said, referring to slats in a grate covering a diversion in the stream that drains into EMI's ditch system.

The Water Commission ordered years ago that the diversion, along with dozens of others, be fixed, he continued. "They have not been. … There are people who live and depend on these streams. They can't take any water most of the time. … people who would like to be growing kalo who have no water," he said.

Regarding Mahi Pono's requests, he told the board — and specifically, member Char, "They want to expand their operation while people are suffering. That is wrong. Vernon, that is wrong. Not only are people deprived of water … they [Mahi Pono] are wasting millions of gallons a day and we can prove it."

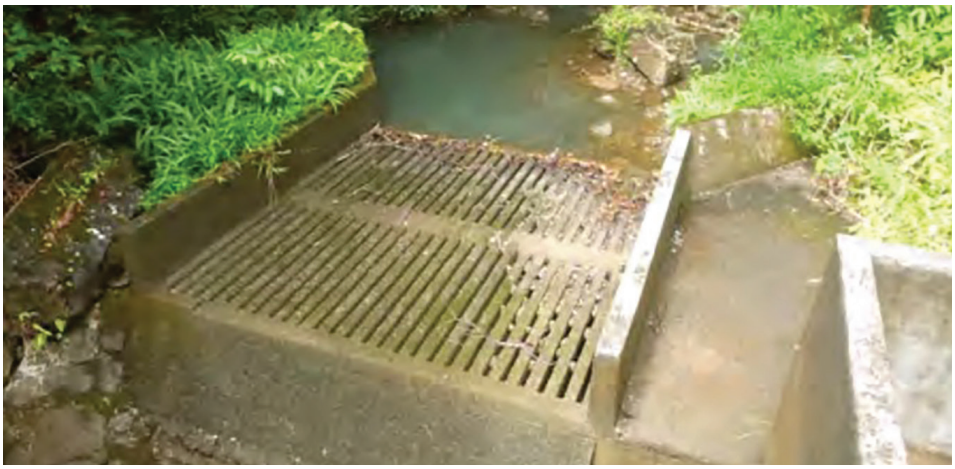
He noted that the Sierra Club and the Maui DWS came to an agreement to support a condition amendment that would cap the amount of water delivered to the DWS at 5 mgd, with occasional exceptions.

"That saves a million gallons a day," he said.

Debates over whether groundwater use should be encouraged and how its use should or should not affect Mahi Pono's water allocation ensued. Frankel also pushed for a condition requiring the lining of at least one reservoir by the end of November.

"If you folks don't take these issues seriously, we will request a contested case hearing before you vote," Frankel said.

Sierra Club chapter director Wayne Tanaka later added, "Kupuna that started this all have passed away," referring to the East Maui taro farmers who petitioned the Water Commission and Land Board decades ago for stream restoration. "Their rights have been vindicated, but they're gone. … There is a real reason why people feel that this is an unfair situation," he said.



The intake and diversion at Ho'olawali'ili'i stream. CREDIT: CWRM.

Gina Young, director for the East Maui Water Authority, testified that her agency has convened negotiations with the parties involved. She asked the Land Board for patience. "We're not experts … We're just people," she said.

"Your end goal is to come up with a joint agreement … that you bring back to the board?" board chair Dawn Chang asked.

"It may not be one agreement. We would have to figure out how it works best for the state," Young replied. She added that EMI has the expertise to operate the diversion system. "At this point it's important they remain in control of the delivery system. We would like support them," she said.

Before the board's vote, Ayron Strauch, a hydrologist with the Water Commission, tried to explain why the fixes to the diversion system are still undone.

"Mahi Pono has to apply for stream diversion works permits [from the commission]. We're not the only agency that regulates things that happen in the stream. Any activity in the Conservation District needs a [permit]. [The State Historic Preservation Division] actually has to concur with whatever CWRM's orders or decision are. We've waited years for SHPD approvals," he said, adding that the U.S. Army Corps of Engineers also has to opine.

Frankel pointed out, however, "They waited a year or so before applying to SHPD. That's on them."

In the end, Maui board member Doreen Canto made a motion to approve the permit, with the Sierra Club's proposed amendment regarding the allocation to Maui County, and Mahi Pono's proposed amendment to make the cap an annual average. Her motion also included a deduction of 1 mgd from the allocation to Mahi Pono, which was a "compromise" that the company agreed to in exchange for the change to an annual cap. Finally, her motion included an amendment adding the Department of Hawaiian Home Lands and the state Aha Moku advisory council to a list of parties involved in stakeholder meetings, which would be convened by the county water authority.

Before the board could vote, Frankel requested a contested case hearing. After an executive session to discuss matters with its attorney, the board voted to deny the request, and then voted 5-0 to approve Canto's motion. Board members Kaiwi Yoon and Aimee Barnes had left the meeting by then.

— Teresa Dawson