

# Environment



# Hawai'i

a monthly newsletter

## Finders Keepers...

The Agribusiness Development Corporation has a well-earned reputation for losing track of its property. Anyone who questions this need only refer to the 2021 report on the ADC by the state Office of the Auditor.

In the years since, the agency has made some changes. But, as our cover story points out, at least one property seems to have been lost. Pacific Biodiesel has been occupying it for the last five years under nothing more than a right-of entry. The state has received no rent on this property, bought at market rates, in the nearly 10 years it has owned it. The county has received no property taxes, since the land is not considered encumbered by a right-of-entry.

## Pacific Biodiesel Occupies ADC Land In Kea'au; No Lease, No Rent



Pacific Biodiesel tanks on the ADC lot.

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Less than 1 percent of the land nominally managed by the state Agribusiness Development Corporation is found on the island of Hawai'i, according to a pie chart in the agency's most recent report to the Legislature.

That fraction is all in one small, 1.5-acre parcel near the mauka end of the Shipman Industrial Park in Kea'au, just south of Hilo. The ADC purchased it in 2015 for \$500,000.

Whether this land has, in fact, been managed at all in the nine-plus years since that acquisition is open to question. In the entire time the ADC has owned the land, it doesn't seem to have collected any rent on it or leased it out to any party. County property tax records show the property is unencumbered.

Yet for years – at least seven, possibly more – the parcel has been used by Pacific Biodiesel Technologies, LLC, as a parking lot for its tanks.

*Environment Hawai'i* attempted to find out whether the private company pays rent for use of the state land and, if so, how much

and to whom. Inquiries to Pacific Biodiesel and ADC were unanswered.

Just as *Environment Hawai'i* was going to press, the ADC produced a copy of a right-of-entry agreement, signed in August 2020, giving Pacific Biodiesel use of the property for parking and storage purposes. For this, Pacific Biodiesel pays no rent but is supposed to insure the state. ADC was asked if proof of insurance was ever obtained; no response was received before we went to press.

Why did ADC acquire the land in the first place? Questions to ADC about the rationale behind the purchase were referred to Becker Communications. According to Scott Ishikawa, a senior account director with the company, Becker Communications had "just been awarded a state contract to assist ADC with media relations."

"The property had been purchased to house a proposed food waste treatment facility to handle items such as table scraps, outdated and off-spec produce, to create organic

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# Environment

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## NEW AND NOTEWORTHY

**East Maui Appeals:** On January 9, the Sierra Club of Hawai'i filed a notice of appeal to the Environmental Circuit Court of the state Board of Land and Natural Resources' December 13, 2024, decisions to grant a revocable permit to Alexander & Baldwin, Inc., and East Maui Irrigation Co., Ltd., for the continued diversion of East Maui streams, and to deny the group's request for a contested case hearing on that permit.

About a month later, on February 7, the Sierra Club filed an application with the Hawai'i Supreme Court for a writ of certiorari regarding similar permits the Land Board issued for the companies' stream diversions in 2021 and 2022.

Last December, the Intermediate Court of Appeals issued a summary disposition order finding that the Environmental Court had

erred when it ruled that none of the exceptions to the mootness doctrine applied to the Sierra Club's appeal regarding the permits for those years.

Even so, the ICA denied the group's request that the court address the appeal's merits rather than remand this case to the Environmental Court.

The Sierra Club now asks the state Supreme Court to consider whether the ICA erred in declining to address the merits and reverse the Land Board's decision.

Attorneys for the Land Board and for A&B/EMI argue that the ICA properly remanded the case to the Environmental Court and ask the high court to reject the Sierra Club's application.

**'Aina Le'a Loss:** The years-long, multi-party litigation over ownership of more than 1,100 acres of West Hawai'i land is winding down. In late December, 3<sup>rd</sup> Circuit Judge Wendy DeWeese approved the credit sale of the land to Bridge 'Aina Le'a, the same company that sold the land to 'Aina Le'a's predecessor company, DW 'Aina Le'a, in a series of transactions commencing around 2007.

'Aina Le'a, burdened with debt and unable to continue building the townhouses it had started to put up in 2010, filed for bankruptcy protection in 2017. It emerged from bankruptcy in 2018, but only thanks to an exit loan from a lender of last resort.

The company was unable to pay off any of its creditors under the agreement it had reached

with them under the jurisdiction of the bankruptcy court.

Consequently, creditors began legal action to foreclose on the company's property.

At a September auction of the two parcels that form the 1,100 acres at the heart of the development, Bridge 'Aina Le'a submitted a credit bid of \$30,356,000. It also will pay \$871,686 to Hawai'i County, satisfying the principal and accrued interest on the property tax bill, unpaid for years.

In addition to losing the land, 'Aina Le'a is on the hook to repay the tax bill and also to cover the \$431,000 in attorney fees and \$24,811 in legal costs that Bridge incurred in the foreclosure litigation.

There remain outstanding claims by junior creditors.

Romspen Investment Corporation, the creditor that took possession last year of the 38-acre site where 'Aina Le'a began construction of townhouses some 15 years ago, has already sold it off. The purchaser, Loa Lani, LLC, a Virginia company, paid \$14.35 million for the property in January 2024.

Jeff Darrow, planning director for Hawai'i County, said his office had received "calls from different people regarding the overall project in relation to the sale back to Bridge."

As far as the property with the townhouses is concerned, Darrow said he had heard nothing.

**A 'New Day' for Wespac:** The Western Pacific Fishery Management Council has welcomed the change in the White House, stating that the new administration "provides a chance to make U.S. fisheries in the Pacific great again."

A press release issued by the council December 18 states, "With a change in administration, the council plans to take the opportunity to write to the incoming administration and outline the issues with existing federal and international conservation and management measures. [Wespac executive director Kitty] Simmonds said that decisions from the federal government have continued to negatively impact the U.S. Pacific Island fishing communities."

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### Quote of the Month

“In my personal opinion, the whole state should have been designated.”

— *Lawrence Miike, Water Commission*

## Editorial

# In the Case of Kea'au Lot, ADC Owes Taxpayers an Explanation

The failure of the Agribusiness Development Corporation to collect rent on its Kea'au parcel represents the loss to the state of a significant income stream over the years. If the state were to receive a modest 6 percent return on its investment of \$500,000, that would pencil out to a rental rate of \$2,500 per month, or \$210,000 over the minimum seven years that Pacific Biodiesel, LLC, seems to have occupied the lot. If interest were to accrue on unpaid rent over time, the total owed by Pacific Biodiesel would be far higher.

The existence of a right-of-entry dating back five years is the only document the ADC has provided that gives some cover to the company's occupation of the ADC lot in Kea'au. But even that seems to have been made two years, or more, from the commencement of use of the property by Pacific Biodiesel. And it fails to explain why the ADC is giving a pass to a privately held company for all these years.

Another loss is to Hawai'i County. No property tax is collected on unencumbered state lands. But if the acre-and-a-half were under lease or permit, the county would have received tens of thousands of dollars in tax payments over the last 10 years. A neighboring parcel that is an identical size and also vacant has a 2024 tax bill of \$7,921. Since 2016, taxes on that parcel add up to \$55,193. Before the ADC purchased the adjoining lot, it was privately owned and the county would have been collecting property taxes on it of around \$5,000 a year.

The January 2021 report of the Office of the Auditor on the Agribusiness Development



An aerial photo from 2018 shows the ADC property (outlined in blue). Below is the property where Pacific Biodiesel has its Big Island refinery. To the right of that is property where Imua Energy, affiliated with Pacific Biodiesel, has its operations. CREDIT: HAWAII COUNTY REAL PROPERTY TAX OFFICE.

Corporation pointed out the laxity in the ADC's record-keeping. "For instance, when we requested documents we believed would be essential to the day-to-day operations of a corporation that manages land and properties ... we were informed that the requested materials did not exist... In addition, we found that ADC's recordkeeping is inconsistent, incomplete, and in many cases, non-existent."

In the case of the Kea'au property, *Environment Hawai'i* asked ADC asset manager Lyle Roe whether the ADC was receiving any rent from the Kea'au property. Instead of a straightforward reply, Roe turned the question into a formal Uniform Information Practices Act request, to which he then replied.

According to that reply, "Agency requires additional time to respond to the request in

order to avoid an unreasonable interference with its other statutory duties and functions."

Not until we were hours away from going to press did the ADC provide the right-of-entry.

Pacific Biodiesel has enjoyed an excellent reputation over the years as a leader in waste-oil recycling and a champion of developing alternative fuels. That it has not paid rent to the state for nearly a decade is a black stain on that reputation.

The ADC should immediately explain how this rent-free occupation of state-owned land came about and why it should not cease at once. If it does not, then the Department of Business, Economic Development, and Tourism, to which the ADC is administratively attached, should demand an explanation.

## Kea'au *continued from page 1*

fertilizer," Ishikawa replied. "However, project funding lapsed several years ago and has not been reappropriated."

### An Ambitious Project

More than a decade ago, the state, under the leadership of Governor Neil Abercrombie, was championing the idea of using crops and waste produce for biofuels. In April 2013, the governor's office issued a press release announcing the award of \$200,000 from the state Department of Agriculture to the Pacific Basin Agricultural Research Center, an agency of the U.S. Department of Agriculture. The award was to support PBARC's "zero waste biofuel and high protein feed program," the press release stated. (The award was actually

made by the ADC.)

"Aside from the benefit of producing biofuel," the press release said, "this technology has the ability to create another revenue stream for papaya and other tropical agricultural farmers... At full scale, more than 1,000 jobs are projected.

"While papaya was chosen as the initial feedstock, this technology can be applied to any plant material as a carbon source. In Hawai'i, other identifiable feedstock are unmarketable sweet potato, sugar cane, mango, albizia, and glycerol."

Jimmy Nakatani, then head of the Agribusiness Development Corporation, is quoted as describing the project as "a major breakthrough that focuses on key components

hampering the sustainability efforts of other micro-organism based fuel projects. ... Using unmarketable plant and other waste materials drastically reduces this cost driver."

A year later, in August 2014, Abercrombie's office issues another press release, this time announcing the award of \$1.6 million from ADC to PBARC.

On April 22, 2015, the ADC board heard a presentation urging approval of the Kea'au parcel. Staffer Ken Nakamoto described this as an acquisition "needed in conjunction with our zero waste project." According to ADC minutes, he told the board that the Legislature last session had allocated funds "to establish a zero waste demonstration facility on

*continued on bottom of page 4*

## Department of Education Agrees to Surrender \$6 Million Building It Never Used to ADC for \$1

**O**n April 27, 2022, at 1:30 in the afternoon, 25 members of the Hawai'i Legislature – 14 representatives, 11 senators – gathered to decide on the final budget of the state for the 2022-2023 fiscal year. Since it was a decision-making meeting, no public testimony was allowed.

The meeting was to thrash out differences between the spending priorities of the two chambers and come up with a conference draft of House Bill 1600. Yet if anyone watching the proceedings expected to witness debate or even discussion on the changes, they would have been disappointed.

Everything had been decided in advance. Legislative staff handed out summaries of the changes that had been agreed to. Members took turns quickly reading aloud through “highlights” of the final document.

Not even meriting mention among those highlights was a new appropriation for the Department of Education. Snuck into the capital budget for the repair and maintenance of DOE facilities was \$6 million for the “Kekaha [Kaua'i] Agriculture Innovation Center,” including land and building acquisition “and all related work including new work and refurbishment/repair/renovation.”

This had not been included in the DOE's

proposed budget. Nothing like this had ever been floated as a possibility to the Board of Education at any public meeting.

A year later, the deal was done and Beck's Superior Hybrids was able to leave the state without taking a bath on the property it had itself purchased for nearly \$6 million in 2016.

By January 2025, the Department of Education agreed to surrender the building and 10-acre lease back to the ADC for \$1.

What happened?

### Ambitious Plans

While the Board of Education was in the dark about the plans, the governing board of the state Agribusiness Development Corporation was well aware of this proposal. At a meeting eight months earlier, on August 25, 2021, board members had received a power-point presentation from Randall Tanaka, at the time the assistant DOE superintendent for facilities and operation.

Tanaka explained that the DOE was intending to take over the lease from Beck's Superior Hybrids. On-site improvements included a building that housed labs, refrigeration, bays for farm implements, and offices, as well as sheds and other outbuildings.

Tanaka was asked if the DOE intended to

use the facility as classrooms, for food prep or food processing, or some mix thereof.

According to meeting minutes, Tanaka replied that it would be all of the above. “They have lab space, refrigeration space,” the minutes report him as saying. The DOE's long-range plan, he continued, “was to start on Kaua'i at Waimea High School, which will be the quasi-owner of this classroom. They will expand to all the schools on Kaua'i.”

“In the long term,” the minutes report him as saying, the DOE “plans to do cohorts on an international level, bring in like-minded students to Kaua'i to see the innovation being done there.”

Tanaka described how a robotics teacher had mentioned that in Japan, “they have robots that can pick a ripe tomato, a ripe strawberry, every Ag robot you can imagine. ... The labor force is maturing; this is not your grandfather's form of ag.”

He referred to a “mega-kitchen” proposed to be built in Wahiawa, which would serve between 15 and 20 schools, suggesting that this facility would serve a similar function on Kaua'i.

Would local farmers be able to sell their products to the DOE? Tanaka was asked.

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### Kea'au *continued from page 3*

Hawai'i island for the purposes of scaling up the mini pilot project to determine if the heterotrophic algae/fungi can be produced on a commercial scale.

“ADC entered into a [memorandum of agreement] with Pacific Biodiesel to establish a temporary demonstration on PB's property to work on the specialized equipment which may take months to assemble. ADC identified land in the W.H. Shipman Business Park to construct the permanent zero waste demonstration facility. The property is an ideal location to construct the facility because of



A Pacific Biodiesel truck enters the state-owned lot in Kea'au.

its industrial zoning and its proximity to the PB facility.”

Scott Enright, chair of the Department of Agriculture, “commented that the land adjacent to Pacific Biodiesel in Kea'au allows ADC to move forward. The original work was done by PBARC so now that we are taking it to commercialization but still in the demonstration phase this allows us to tie it in. The thought is that Pacific Biodiesel has the best track record to allow us to move forward just short of commercialization.”

The board approved of the purchase. The sale was recorded December 4, 2015.

### Petering Out

The big plans to turn unsellable papayas, other produce, albizia, and who knows what else into fuel or feed seems to have fizzled.

In 2016, the Legislature appropriated \$1.5 million for “plans, design, construction, and equipment for the Kea'au facility to develop biofuel and animal feed in Kea'au, Hawai'i.”

ADC's reports to the Legislature for 2018

and 2019 report its expenditures on the zero waste project.

In fiscal year 2018 it had a budget of \$25,000 for zero waste but spent \$42,924. In 2019, the budget was again \$25,000, but it spent \$64,173.

Both reports contain an identical description of the accomplishments toward zero waste:

Reducing food waste, the reports state, is a strategy championed by UDSA PBARC. The ADC, PBARC, and Pacific Biodiesel Technologies “currently are engaged in a project regarding the development of algae grown on papaya waste as a biofuel and livestock feed.”

The sole achievement noted is the completion of plans and design for project-build out “in the adjacent lot to Pacific Biodiesel. The construction phase was put out to bid and did not receive any offers. As a result, the funds received for construction (\$1.5 million) lapsed on June 30, 2018.”

— Patricia Tummons

"Absolutely," he responded.

Rep. Amy Perruso said she had heard Tanaka speak at length about mega kitchens, referring to the Zippy's model, where food cooked at a large central kitchen can be distributed and quickly reheated at schools. Was this what the DOE was moving toward with the Kaua'i model – both an instructional space as well as a food hub?

Tanaka said it was both. He added that school kitchens are "antiquated" and, since COVID, schools also need to be able to serve communities, not just students.

Perruso said she just wanted to clarify that the DOE doesn't want to renovate school kitchens but instead wants to build mega kitchens. Yes, Tanaka said. According to the minutes, Tanaka said that to renovate some of these kitchens would take from \$10 million to \$15 million each, but the mega kitchen would cost from \$35 to \$40 million, or about the same cost as renovating just five kitchens.

The ADC board approved the transfer of the Beck's license to the DOE on a vote of 10-0.

Beck's itself had taken over the lease and purchased the improvements in 2016 from BASF Plant Science, which had obtained a 25-year lease from ADC in 2012. That year, BASF had begun construction on the main facility, which, according to Kaua'i County records, had a value of \$6 million.

### An Unused Facility

For the land itself, BASF, and later Beck's, paid rent of just \$710 a year. Yet for the Department of Education, the ADC appears to have increased the rent to ten-fold, to \$7,100 a year, or \$592 per month.

And while that might seem to be a fairly modest rental for 10 acres of land with improvements, the DOE apparently never paid so much as a month of rent.

Within a year of the DOE assuming the lease from Beck's, the DOE was in serious default. By January 2024, the ADC was sending demand letters to the Department of Education.

Nor was that the only problem. Terms of the lease require the lessee to obtain approval from the ADC before subleasing any portion of the property. According to an ADC staff report on the delinquency, since August 2023, the Department of Education had allowed the Kekaha Agricultural Association (KAA) to use the facility for seven months. Although the agreement had expired by February 2024, the DOE "continues to allow the use of the grounds and facilities without an agreement," ADC staff found.

For months, the ADC staff had recommended the board refer the delinquency to



The \$6 million building, unused by the Department of Education but, in August 2024, occupied by the Kekaha Agricultural Association. CREDIT: ADC.

the Department of Attorney General for enforcement. In March 2024, staff informed the board that despite numerous demands for payment, "no communication or payment has been received from HDOA and they maintain a \$9,294.94 unpaid balance."

At the ADC board's meeting that month, Dane Wicker, the delegated representative of James Tokioka, head of the Department of Business, Economic Development, and Tourism, informed the board that the Legislature was discussing what should be done with the underused facility. According to the minutes, "Mr. Wicker stated that HDOE was able to get the funds to acquire the facility through the Legislature. The Legislature is in discussions with HDOE to have this facility returned back to ADC but we need to discuss more. There's going to be a benefit to ADC by receiving a nice facility at little to no cost."

Wicker said that legislators were discussing converting the building into a "food innovation facility for ADC" and suggested the board hold off any move to involve the attorney general. "The Legislature visited the site a couple of months ago," Wicker is reported to have stated. "There are a lot of moving pieces that the Legislature is still entertaining. There's talk about a potential innovation facility or making it a processing facility. This should properly be agendized at a later date." He said that the amount owed "is not a substantial amount" and suggested "pausing it" to further consider what the "pathway" should be regarding the future of the facility.

In April, the matter was taken up once more. This time, the DOE's Jadine Urasaki asked for another 30-day delay. Urasaki had replaced Tanaka at the DOE after he was forced out when it became known he had allowed nearly half a billion in capital improvement funds to lapse. (Tanaka went on to work as an aide to Sharon Moriwaki, vice chair of the Senate Ways and Means Committee, whose chair, Donovan Dela Cruz, has taken a keen interest in the affairs of the ADC.)

By June, the Legislature had apparently decided on a course of action. The 2024-

2025 budget included \$2 million to the ADC for "plans, design, and construction for a post-harvest processing center in Kekaha."

At the June meeting of the ADC board, executive director Wendy Gady was given authority to negotiate a path forward with the DOE.

By December, the ADC was presented with a draft memorandum of agreement, calling for the DOE to surrender the land and buildings under the lease and for the ADC to forgive all arrearages and, in return, the ADC would work with the DOE to provide educational opportunities to students, using the formerly leased land and buildings.

In January, the ADC board approved terminating the lease, approved a bill of sale of the premises for \$1, and a final memorandum of agreement.

"ADC will collaborate with HDOE in developing and implementing a strategy to advance agricultural education and the pursuit of agricultural enterprises amongst HDOE students, by providing industry-wide services that include training and new market opportunities," the MOA states. It goes on to describe a program of collaboration in workforce training and joint promotion of agricultural infrastructure improvements on the island.

The staff submittal accompanying the MOA suggests what the ADC anticipates doing with the building. "ADC intends to fully license the premises to various farmers and agricultural-related entities for office and storage space, and processing facilities.

As of press time, the property still had not been transferred to the ADC. According to Ishikawa, "We are not yet in receipt of all fully executed transfer documents." As to the tenancy of KAA, he stated: "We will inherit and honor whatever agreement(s) DOE has with KA as an existing tenant. ADC has already reached out to KAA to notify them of the impending change of ownership and have requested they submit in writing any request to utilize the premises."

— Patricia Tummons

## Black Sand Beach Utility Struggles To Stay in Business

The plan of a developer to breathe new life into the long neglected Sea Mountain resort on the east side of the Big Island has run into little but opposition since it was made public just about a year ago.

The proposal of Black Sand Beach, LLC, to refurbish a golf course, build more than 200 vacation and residential units, rehabilitate a conference center, and develop a wellness center and a small commercial area, among other things, ran into headwinds as soon as the county Planning Department brought the proposal to the Windward Planning Commission. The award of a Special Management Area permit and other county approvals to the developer are now subject to a contested case hearing, a process that can last a year or more.

Now, however, it seems as though the financial situation of Black Sand Beach is so dire that it may not be able to move forward at all with its redevelopment, estimated to cost up to \$350 million. It even fell behind in monthly payments to the company that operates the utility it owns, Punalu'u Water and Sanitation, LLC (PWS) – payments that are around \$7,330 a month.

The fragile financial situation of the developer has been laid bare in filings with the Public Utilities Commission, with which the utility filed a rate request June 28. At that time, PWS was seeking a rate hike of more than 1,200 percent, noting that the current rates reflected a tariff approved in 1977. A recent financial statement shows that the utility received \$25,006 in income for all of 2024, while having operating expenses of \$405,758.

The customer base of PWS is small. In filings with the PUC, attorneys have said the utility serves 75 condominium units and as many as 33 single-family homes as well as the county's Black Sands Beach Park. The sewage treatment plant is sized to process up to 20,000 gallons per day of wastewater.

On August 1, the PUC notified PWS

that the application was incomplete. Months passed without any effort to file the information needed to complete the application and allow the rate case to move forward.

During that time, unconfirmed reports reached the commission that the company was having trouble paying its bills. In response to the lack of action on the application and the rumors of insolvency, on January 23, the commission called a status conference for February 7.

On February 5, attorneys for PWS provided written "preliminary responses" to the PUC's questions. The company's financial circumstances "have affected its ability to pay its vendors, consultants, and counsel on a timely basis," they wrote, and also have "impacted PWS's ability to obtain additional financing."

The rate application had been "paused" for months so that the company could avoid incurring legal and consultant expenses while it sought additional financing or other solutions, they wrote.

The company's financial difficulties were "hindering its ability to provide reliable water and wastewater services to its customers," they continued. "PWS has informed us that it no longer has the financial capability nor financing to continue to cover the expenses to operate after February 28, 2025."

At some point, the letter stated, "a representative of PWS's financing company apparently corresponded with the commission via email and phone to briefly describe PWS's financial circumstances and discuss possible solutions as well as to inquire about what would happen if PWS was forced to shut down or declare bankruptcy.

"Thereafter, PWS sought to re-engage counsel to address this matter, scheduled a meeting with said counsel, and was in the process of gathering information to bring counsel up to speed on the matter. It was at or around this time that PWS's counsel received the commission's Notice of Status Conference."

The utility was able to work out an arrangement with the company that operates its water system and wastewater plant, Big Island Water and Sanitation, LLC, allowing the utility to remain in operation beyond February 28. In addition, it assured the PUC that it would submit a temporary rate increase application, with the temporary rates "to be in effect until such time that (1) a general rate case review can be completed; or (2) PWS's owner is able to sell PWS to a new owner."

On February 14, the utility submitted the promised application for a temporary rate hike of 2,457 percent over the current rates, or roughly double the rate proposed last June. This, the application states, would increase its overall revenues to \$639,505, from last year's \$25,006.

Included in the application was documentation of a short-term, zero-interest loan of \$65,000 from Black Sand Beach, LLC, to PWS, with Xiaoyuan Liu as co-signer. Liu, who also goes by the name Eva Liu, is the ultimate owner of Black Sand Beach and its subsidiaries.

Maintenance of the infrastructure has been long delayed. Urgent needs identified by PWS include the repair or replacement of four fire hydrants, at a cost estimated at \$167,500. An inspection by the county Fire Department in 2023 of all 16 hydrants found all needing some level of repair or servicing and some actually missing. First priority should be hydrants 1-3, the report stated, with "life safety a top priority." In hydrant 2, the inspector found metal shavings and heavy debris. Hydrants 4-8 serve the area of the condominiums. "These condos also have wooden shingled roofing near the brush fire zone and are a high fire hazard area."

As a condition of Big Island Water and Sanitation continuing to work at the site, the utility has agreed to make certain improvements, including purchase of chlorination pump parts, a new effluent pump for the wastewater treatment plant, at a cost of \$2,132, and repair of the electrical panel at the wastewater pump station, at a cost of \$19,450. The repair "is needed to prevent pump burnout of the [wastewater pump station]," according to the agreement memorializing the terms of Big Island Water and Sanitation's continued work at the site. Should pump burnout occur, "the sewer influent will need to be manually trucked from the [wastewater pump station] to the [wastewater treatment plant], a very costly and labor-intensive problem."



The hawksbill turtles that frequent the black sand beach at Punalu'u draw busloads of tourists daily.

CREDIT: TRIPADVISOR.

*continued on the bottom of page 7*

# Loan from State to Launiupoko Water Company Bears No Interest and May Even Be Forgiven

The utility that provides potable water to the fancy, multi-million-dollar homes in the Launiupoko, Maui, subdivisions sets aside a part of its income every month to pay off more than a million dollars in loans from its owner, Peter Martin. The interest rate on those loans is 8 percent, according to information filed with the Public Utilities Commission.

The PUC has disallowed those loans and instructed the utility to prepare a new rate request that doesn't include repayment of the loans. Yet month after month, the company's financial statements show that it is salting away money towards the eventual repayment of the loans.

But that's not the full range of indebtedness the company has taken on without prior PUC approval. As *Environment Hawai'i* reported last month, the company has also taken on a loan of more than \$400,000 from the state Department of Health's safe drinking water revolving fund.

Documents provided to *Environment Hawai'i* in response to a Uniform Information Practices Act request show that the state is not charging any interest on the loan. What's more, the loan may be forgiven, up to the full amount of funds loaned.

Or, as the loan documents say, "the total principal forgiveness portion of the loan will not exceed \$401,834.46."

As for the amended rate hike request, in

February, the PUC set out a procedural schedule in order to allow it to arrive at a decision within six months of the acceptance of a complete application, as the law requires. In this case, that means the PUC has to decide on the rate hike by June 20.

On March 3, the PUC held a public hearing in Lahaina on the rate hike request. It was described by one attendee as "fairly subdued."

However, in advance of the hearing, Jeff Anderson, owner of Two Dog Farm in Makila Plantation, submitted testimony noting that the rate case is "closely linked to the outstanding rate case for the sister company, Launiupoko Irrigation Company." Anderson said his farm supplies fruit – "mostly citrus, but also avocado, mango, breadfruit, guava, dragon fruit, loquat" – to local restaurants. "Any increase in water costs affects the viability of our farm as water is now our biggest recurring cost," he stated.

His farm is a customer of Launiupoko Irrigation Company as well as Launiupoko Water. "Right now, as I write this, we have no ag water from Launiupoko Irrigation. This happens often. This last summer there were periods where we had no ag water for over a month!... By dramatically increasing the cost for large potable water usage, you would be penalizing small farmers for the unreliable water supply from Launiupoko Irrigation. In fact, it would incentivize Launiupoko Irrigation to cut ag supply even more often to force

users to use more potable water at a super high rate... Talk about driving the wrong behavior!"

He concluded by urging that the irrigation company rate case be resolved in a manner that fairly compensates LIC "while providing the assurance of consistently available ag water for farming. Once that is done, a review of this case would be appropriate."

## Forgiveness?

If the revolving fund charges no interest and forgives up to 100 percent of the total amount it lends out, how can it be sustainable?

Judith Hayducsko of the Department of Health Safe Drinking Water Branch replied to our question. The revolving fund program "has many intricacies," she said. "At this time, there are federal funds available for public water systems that *must* be distributed as additional subsidies, which we distribute as principal forgiveness dollars. ... Launiupoko was one of the [public water systems] who received funding from the program. ...

"Staff are very concerned about ensuring the fund is available in future generations. We do take advantage of all federal funds available that can grow our revolving fund. We do model expected disbursements from the fund against repayment dollars to ensure all loans obligated will have funds available when we reimburse the [public water systems]."

— Patricia Tummons

## Punalu'u *continued from page 6*

The application for a temporary rate hike mentions another loan – this one having a maturity date of December 31, 2037, made by "an affiliate company," Black Sand Beach, LLC, January 2, 2023, in the amount of \$750,000. As with the smaller, more recent loan, this one is said to be non-interest-bearing. Loans of this size and duration require advance PUC approval, a fact that is noted in the application. "PWS did not request or obtain approval by the commission," the application states. "PWS sincerely apologizes for this inadvertent oversight and respectfully requests, concurrently with this application, that the commission approve this long-term financing."

The temporary rate hike, the application states, will cover expenses and pay for the repair of the fire hydrants, but will not provide any rate of return to the owner. "Additionally," it continues, "the requested temporary rate increase could serve as a stopgap measure

while applicant seeks to find a purchaser for the system who may be able to continue applicant's water and sewer utility operations more efficiently, thus potentially resulting in minimal utility rate increases."

On March 3, the PUC issued an order that responded to the dire circumstances described in company filings, stating: "The commission takes seriously PWS's claims that it will be unable to maintain continuous service without a temporary rate increase. In light of the seriousness of the PWS's current financial situation, the commission finds it necessary to take immediate steps." Those steps include convening a public hearing, via Webex, on March 20 at 6 pm.

## A Stalled Contested Case

The decision to hold a contested case hearing on Black Sands Beach's application for a Special Management Area Use Permit was made by the Hawai'i County Windward Planning

Commission last summer.

Three parties were granted standing to challenge the application: the Center for Biological Diversity, 'Iewe Hanau o Ka 'Āina, and the Association of Apartment Owners of Colony 1. Their involvement reflects concerns over historic and cultural sites, natural resources, and impacts to owners of properties at the site.

Yet to date, no hearing officer has been appointed and no schedule set for the contested case hearing.

Jeff Darrow, Hawai'i County planning director, told *Environment Hawai'i* that his staff was "actively working on securing a hearings officer at this time."

In the meantime, property taxes on the land owned by Black Sand Beach have not been paid for the last 18 months. As of late February, more than \$91,000 was owed in taxes, interest, and late fees.

— Patricia Tummons

# Honolulu Board of Water Supply Petitions CWRM To Designate Wai‘anae a Water Management Area

This month, the state Commission on Water Resource Management is expected to decide whether or not to accept or reject a petition from the Honolulu Board of Water Supply to designate the Wai‘anae aquifer sector as a groundwater management area.

Wai‘anae is the only region on O‘ahu that is not a designated water management area, where the Water Commission decides who gets water and how much.

A decade ago, the BWS sent a letter to the Water Commission asking the agency to initiate the designation process for the Wai‘anae area, which has long lacked the developed water resources to meet its needs. When that did not happen, the BWS last year drafted a petition to designate, which it formally submitted in January.

According to the petition, the BWS believes at least three of the commission’s criteria for groundwater management area designation have been met: Criterion 1, existing and future withdrawals meet or exceed 90 percent of the sustainable yield; Criterion 3, ground water levels are declining; and Criterion 7, serious disputes are occurring.

The Wai‘anae aquifer sector includes five aquifers: from south to north, they are Nanakuli, Lualualei, Makaha, Wai‘anae, and Kea‘au.

Nanakuli’s sustainable yield is 1 million gallons a day; the other four aquifers each have a sustainable yield of 3 mgd, for a total of 13 mgd for the entire sector.

For years, more than half of the water consumed in the Wai‘anae sector has been imported by the BWS from wells in Kunia and Waipahu that tap into the Pearl Harbor aquifer. The rest comes from sources within the sector.

Although the Wai‘anae sector has a sustainable yield of 13 mgd, tapping all of that is impracticable, the BWS argues.

“While undeveloped portions of [sustainable yield] exist in the Wai‘anae aquifer sector, it is not practicable to develop it. The 2009 BWS Wai‘anae Watershed Management Plan noted a ‘significant portion of the remaining untapped supplies exist in remote areas of the island where growth is limited, infrastructure does not exist or pumping may affect stream flows and will be subject to future measurable [interim instream flow standards].’ Development of further water sources in Nānākuli, Lualualei, and Kea‘au is not practicable due to the economic cost of developing these sources

Aquifer system	2021 SY (mgd)	2020-21 pumping (mgd)	DHHL Unmet Needs (mgd)	Other APU (mgd)	2020-21 pumping + APU	2020-21 pumping as % SY
Nānākuli	1	0	1.307	0	1.307	131%
Lualualei	3	0.724	0.396	0	1.12	37%
Wai‘anae	3	2.899	3.16	0.106	6.165	206%
Mākaha	3	1.596	0	0.757	2.353	78%
Kea‘au	3	0.004	0	0	0.004	0%
<b>Total</b>	<b>13</b>	<b>5.223</b>	<b>4.863</b>	<b>0.863</b>	<b>10.949</b>	<b>84%</b>

APU is authorized planned use. SY is sustainable yield. CREDIT: HONOLULU BWS.

as well as hydrogeological factors,” the petition states.

What’s more, nearly 97 percent of the Wai‘anae aquifer’s sustainable yield is being pumped and water levels in the Makaha aquifer are declining.

“Pumping in Mākaha in 2016 was nearly at the Criterion 1 threshold. Historically, it has been possible to pump Mākaha to nearly the current SY of 3 mgd. However, due to declining water levels, BWS has reduced pumpage,” the petition states.

“If Makaha SY is reduced due to declining rainfall and recharge, pumping would certainly exceed 90% of SY,” it adds.

Using groundwater recharge estimates released by the U.S. Geological Survey last year, the Makaha and Lualualei aquifers are two of the three on O‘ahu that are predicted to see declines in recharge under the most favorable climate change models that predict a slightly wetter future for most areas across the Hawaiian islands.

According to other models that project reduced recharge in all aquifers on the island, the USGS determined that Nanakuli and Lualualei aquifers would suffer the most, with declines of more than 60 by mid-century and more than 80 percent by 2100.

Under the water-restricted paradigm, the Department of Hawaiian Home Lands has development plans that will require 4.863 mgd. The BWS also identified 0.863 mgd of other authorized planned use within the sector.

Not accounting for any declines in aquifer recharge due to climate change, recent pumping and authorized planned uses total nearly 11 mgd, or 84 percent of the sector’s sustainable yield.

“Wai‘anae, Mākaha, and Nānākuli aquifer systems should be deemed to meet Criterion

1 based on historical and ongoing pumping and [authorized planned use], while other systems do not. Historical and ongoing pumping and [authorized planned use] across the sector are approaching 90 percent of SY before analyzing whether SY can be properly applied in Wai‘anae. Developable yield in other parts of the Wai‘anae sector is likely far below sustainable yield, and current development already represents a significant portion of developable yield in those areas. ...

“The observed, existing decline in Mākaha water levels may indicate further water level declines across Wai‘anae. Both statistical and dynamical climate change predictions caution against relying on a wetter climate future. This means less rainfall in Wai‘anae, less recharge of Wai‘anae aquifers, and therefore a likelihood for a reduced sustainable yield. CWRM could appropriately find decline in Mākaha ground water levels requires Wai‘anae sector designation,” the petition states.

With regard to whether serious disputes are occurring in the area regarding groundwater, the BWS first points to the spillover effects of the repeated leaks from the U.S. Navy’s Red Hill underground fuel tank system, which sits above the Pearl Harbor aquifer.

“BWS shut down three pumping stations (Halawa Shaft, Aiea Wells and Halawa Wells) as a preventative measure against pulling fuel contaminants into the BWS water system from the contaminated aquifer. ... BWS is compensating for the shutdown by transferring more water from sources tapping the Waipahu-Waiawa aquifer to Honolulu systems and accelerated its water conservation messaging, Water Sensible rebate, and leak detection programs. The transfers of water from the Waipio water system reduces the available water supply for the Waipahu, ‘Ewa, and Wai‘anae water systems, although not to

the extent where mandatory conservation and building restrictions are necessary.

“Though the Pearl Harbor aquifer does not underlie Wai’anae moku, it is connected to water sources used to supply areas from Nānākuli to lower Wai’anae. ... Serious disputes over contamination of sources in Pearl Harbor could affect the availability of water resources for Wai’anae, particularly as climate change modeling predicts a drier overall future for leeward O’ahu,” the petition states.

In addition, the BWS notes that over the years, community members and organizations — including the Wai’anae Neighborhood Board and the Association of Hawaiian Civic Clubs — have called for the restoration of flow to streams and other natural waterways that have suffered, in part, due to the development of water sources.

One of those developments includes the Navy’s drilling for water in Lualualei. The BWS cites a “well-known controversy” over the depletion of a culturally important spring, Pūhāwai. A tunnel drilled about a century ago cuts through several springs, leaving Pūhāwai dry.

“Since the 1930s when the Navy drilled its water sources in Lualualei, many of the military operations at Lualualei have downsized to a staff of thirty-five, and families have long moved away. Lualualei tunnel continues to remove water resources. Currently, the Navy obtains approximately 380,000 gpd from Lualualei sources. That amount would provide enough water for 950 single family homes at a relatively high duty of 400 gal/day-unit. A recent aerial inspection of the Naval magazine disclosed about 20 single family homes, a few large buildings with irrigated areas and approximately 18 miles of water pipeline.

“Many in the community, including area elected representatives and other officials, assert water is being wasted or dumped by the U.S. Navy on Lualualei lands. State Senator Shimabukuro observed ‘large pipes close to the Navy land, where freshwater was gushing out’ and was ‘concerned about them wasting water. Also, since there are historic lo’i on the Navy lands, restoring these would require some of this water.’ Similar to Senator Shimabukuro, longtime Wai’anae resident William Aila also referred to ‘Navy water pipes, which are supposedly leaking/ ‘dumping excess water’ and expressed that he ‘wanted to know where the Navy is dumping all the water,’” the petition states.

Criterion 6 for groundwater designation is whether excessive preventable waste is occurring. The BWS stated in its petition that while it lacks evidence that water is being wasted, “this may be due to a lack of information on preventable wasting from private or



The BWS discharges about 300,000 gallons of water a day diverted by an old plantation tunnel into a Wai’anae Valley stream. CREDIT: HONOLULU BWS.

military water systems in Wai’anae and Lualualei that could indicate Criterion 6 is met.”

Last month, the Water Commission voted to extend the 60-day deadline for the chair to make a recommendation on the BWS petition. The extension was to allow more time for the mayor, City Council, and BWS to comment on the petition.

If the chair recommends accepting the petition and the Water Commission agrees, a public hearing will be held. The Water Commission will also gather the scientific and other information necessary to determine whether or not to designate. After further consultation with the mayor, City Council, and the BWS, the commission chair will make a recommendation on whether or not to designate. The

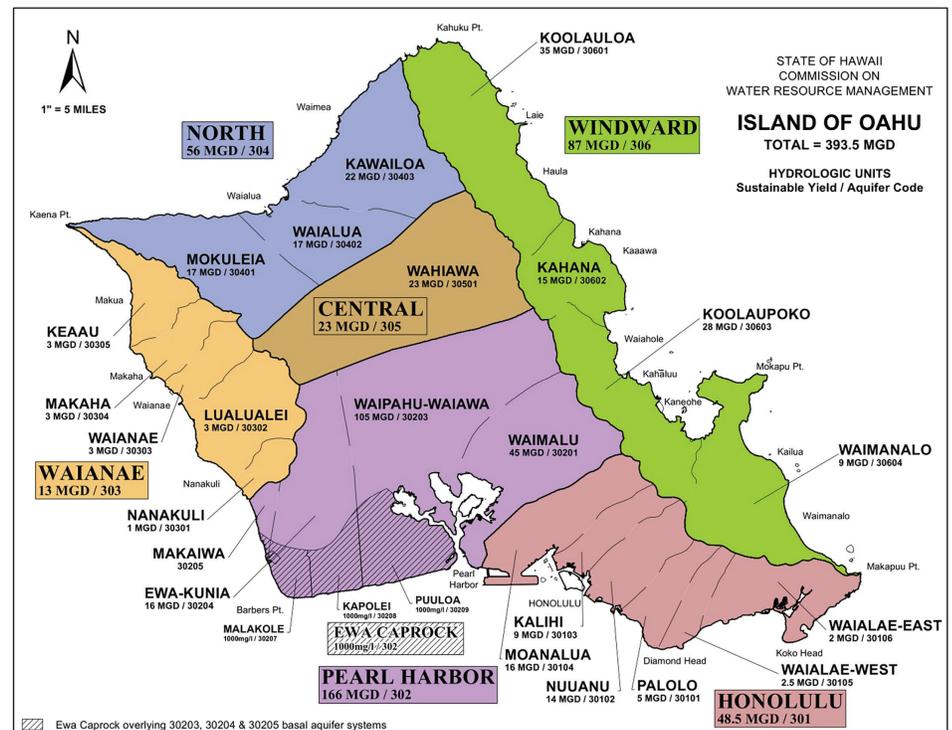
commission would then have 90 days to act on that recommendation.

At the commission’s February meeting, commissioner Lawrence Miike said, “In my opinion, the whole state should have been designated.”

Commissioner Aurora Kagawa-Viviani said she appreciated the BWS petition, because it may help the commission manage resources “in the most water-limited region on our island.”

Commission deputy director Ciara Kahane added that despite the time extension to allow for more comment from the city, “To be frank, I think there is ample information in the petition on which to proceed.”

— Teresa Dawson



BOARD TALK

# Board Grants Permit to Former Tenant To Close, Remediate Moloa'a Well Site

On February 14, the state Board of Land and Natural Resources granted a right-of-entry permit to allow Jeffrey Lindner to finish capping a well, remove any pipelines and transmission facilities he installed, and complete a Level One hazardous waste evaluation, "as well as complete abatement and disposal, if necessary," on a state parcel in Moloa'a, Kaua'i.

For decades, Lindner held a revocable permit that allowed him to operate the well, which served surrounding agricultural properties that eventually became developed with a number of residences. Unwilling to upgrade and maintain an agricultural water system that needed to meet the state Department of Health's standards for potable water, Lindner allowed his permit to expire at the end of last year.

The permit the Land Board granted him last month gives him time to complete the closure process.

"It should be noted that the well will be deemed 'closed,' but it is not being abandoned since there is interest from the permittee, the County of Kaua'i, and even the state's Division of Forestry and Wildlife that the well be available for possible use in the future," a report from the Department of Land and Natural Resources' Land Division states.

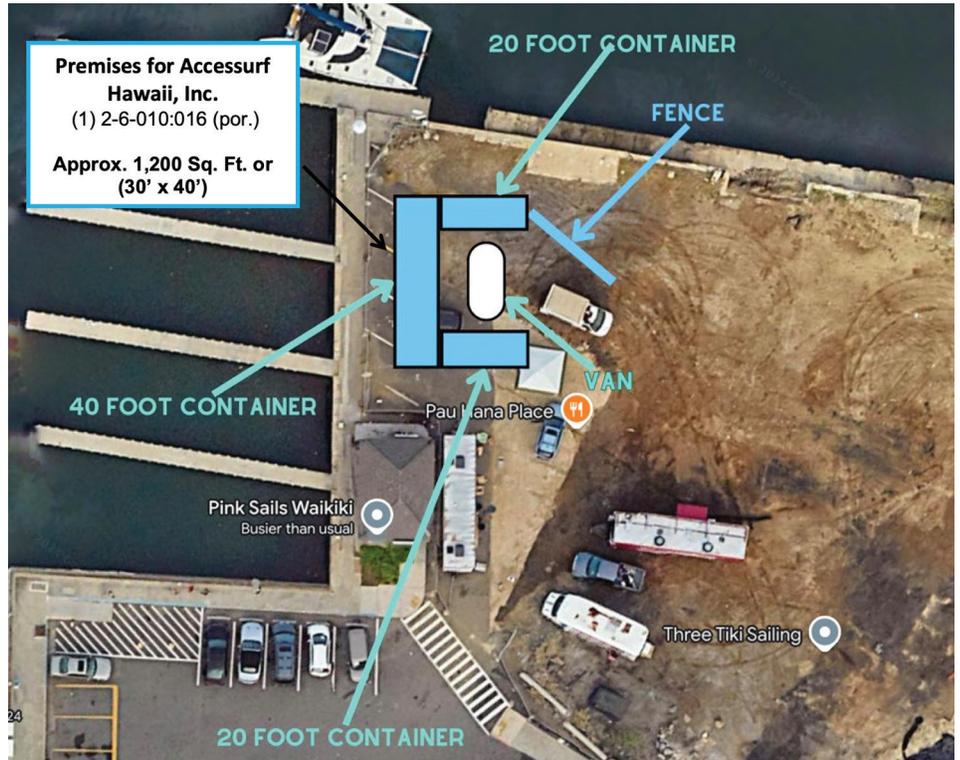
Kaua'i land agent Alison Neustein told the Land Board that Lindner had already removed pipes that were transmitting water from the well to his delivery system on his own lands. "Anything pre-existing belonged to the state," she said.

"From what I observed, they're heavy-duty metal pipes," she said of the state's portion of the system. "They looked like they were in fine shape, the portions I saw," she said.

Last year, before Lindner's original permit expired, agricultural tenants on adjacent properties served by his well sought to have him be forced to continue water deliveries in October and warned that losing their source of water before they could get an alternative source online would be devastating to farms and businesses.

At the Land Board's meeting last month, Lindner reported that the tenants on Moloa'a Hui lands that used to be served by his well were able to get their system online. "We gave them an extra month," he said.

Kaua'i board member Karen Ono moved to approve the recommendation with an amendment that the division complete a final site inspection report. The motion passed unanimously.



CREDIT: DOBOR.



## Land Board Grants Permit To AccesSurf for Ala Wai Lot

AccesSurf, a non-profit organization that provides water programs to people with disabilities, now has a central location to store its equipment.

At its February 14 meeting, the Land Board approved a recommendation from the DLNR's Division of Boating and Ocean Recreation to grant a revocable permit to the organization to allow it to place storage containers and a vehicle on a 1,200-square-foot parcel at the Ala Wai small boat harbor. Rent will be \$40 a month.

Meghan Statts, DOBOR administrator, told the board that the division may look to provide space for the organization at other locations in the future.

"We're happy to be doing this partnership with them," she said.

"Founded with the vision of fostering inclusivity and breaking barriers, AccesSurf offers adaptive surfing, shoreline activities, and therapeutic programs that promote physical and emotional well-being. One of its flagship initiatives, the Waterman's Program, focuses on creating meaningful ocean experiences for people with disabilities. Through this program, participants build confidence, improve physical mobility, and develop a sense of community while engaging in water sports and ocean safety education," a DOBOR report to the board states.

Cara Short, executive director of AccesSurf, reported that the group serves 1,500 individuals annually, many of whom participate in multiple "experiences" in a given year.

Ann Yoshida, AccesSurf's training and innovation specialist, testified that she has "personally been affected and have seen the effects of our organization for the past 18 years, being a person in a wheelchair, understanding the challenges we have in accessing the ocean. ...

"Since getting back into the ocean, that allowed me to feel like I had a choice in life. I went to school. Traveled around the world ... representing Hawai'i as a para-Olympian, also an inductee into the Waterman Hall of Fame. The impact that I have is worldwide. I got a doctorate in occupational therapy. This is the power that the ocean has. The power of surfing, paddling, fishing, being able to be connected in that space and how it can affect your family. And practicing the culture ... has a huge impact in a person's life."

"These are the things that I got from

AccesSurf,” she went on to say. “I hope to see that grow in the state of Hawai'i.”

Short said that until now, AccesSurf has had to store all of its equipment in “a ton of different places,” including people’s vehicles, homes and storage containers.

“It takes a lot of time and energy to go back and forth. Our office is now in Waikiki. ... The thing about Ala Wai, it’s close to where we work. We also go often to Rock Piles and Bowls ... It checks all the boxes,” she added.

Although the permit expires June 30, Statts said that DOBOR is considering including a space for an organization like AccesSurf in its request for proposals to develop the entire small boat harbor.



### Community Group to Build \$1.7M ‘State of the Art’ Restroom at Ha’ena

“[T]his is pretty much unprecedented ... for a non-profit group like ours to take on this level of capital improvement. ... It’s not just the money. We worked literally for two years planning ... You name it, we did it. We went through the whole [Special Management Area] process with the county. It was a huge undertaking. I think when this is all done, you will be very happy to accept this facility,” Chipper Wichman, secretary of Hui Makāāinana o Makana, told the Land Board at its February 14 meeting.

At that meeting, the DLNR’s Division of State Parks recommended that the Land Board authorize the construction, by the hui, of a new comfort station within Ha’ena State Park on Kaua’i – one that will eventually be turned over to the state. The hui, which has long been a steward of the area, was granted a revocable permit a few years ago by the board to expand its management activities within the park, including collecting visitor fees.

“It’s a monumental achievement,” the division’s Alan Carpenter said of the proposed new comfort station. “Coming from a group that only has a month-to-month permit, which is insane. The dollar value is north of \$1.5 million. This group has banked that kind of money on a month-to-month while also paying the state over a million dollars a year. ... This model just continues to break new ground, literally, in this case.”

A long-term lease to the hui has been years in the making. Carpenter reported that his division has a draft submittal for a lease “in its umpteenth form” that will come to the board very soon.

In the meantime, hui executive director

Pua Chin told the board, “we’re so excited the project is moving. ... We’ll be super grateful when we’re able to turn it back over to Alan when we’re all done.”

Wichman added that the station’s wastewater system was “state of art,” and included a triple digester, the effluent from which is considered potable water.

“It goes through a UV light filter. ... Literally, drinking water comes out of this thing. You may say it’s overkill, but we are in a very sensitive cultural area. Our lo’i kalo is not too far from this. There is no real possibility that anything from the leach field will make its way into the lo’i kalo system. We wanted to be double, triple sure,” he said.

He explained that the hui has been able to fund the \$1.7 million project by “scrimping on our end in terms of staffing. ... We felt this was such an essential improvement. ... Once this is behind us, we’ll be able to do an even better job of stewarding this landscape.”

Wichman credited Carpenter with being the hui’s “partner in crime” regarding the project.

Board chair Dawn Chang also acknowledged Carpenter’s work. “It does take a staff [member] to have a mission, to be a champion within the department. ... There are those that push the limits,” she said.

Wichman said that completing the new comfort station will allow the department to address the existing cesspool-based comfort station at Ke’e beach, “which is literally on top of iwi kupuna.”

In a press release following the board’s approval, State Parks Division administrator



Lo’i kalo at Ha’ena State Park. CREDIT: DLNR.

Curt Cottrell said, “Over the years, many people have commented on the lack of restroom facilities at the parking lot. It’s a five-to-15-minute walk to the comfort station near the beach. Moreover, the new station should reduce the number of people who head into the trees to relieve themselves, which will help protect the natural and cultural resources of Ha’ena. While the number of parking spots will be reduced during construction, it’s anticipated residents and visitors can be accommodated via the modified parking plan and increased shuttle capacity.”

— Teresa Dawson



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## Marconi Developer Claims New Evidence Supports Amending Federal Complaint

In their ongoing federal lawsuit against the City & County of Honolulu, companies owned by the developer of the Marconi Point Condominiums on O'ahu's North Shore now argue that a 2017 email among Department of Planning and Permitting staff that they discovered late last year justifies the filing of a third amended complaint.

Attorneys for the city and DPP disagree.

The companies owned by developer Jeremiah Henderson III argue that the DPP improperly denied or otherwise stymied the approval of building permits within the 96-acre property that lies entirely within the city's Special Management Area.

The DPP informed the companies years ago of the need for development within the agricultural CPR to be reviewed in accordance with SMA rules. The companies, however, have insisted that no special management area permit is required for development to proceed.

In December 2023, U.S. District Judge Jill A. Otake dismissed the companies' claims that building permits should have been issued to unit owners and a roadway subdivision permit the developer sought granted. She determined that despite the companies' claims that they were given assurances by the DPP that no SMA permit was needed, the department always retained its authority to decide whether or not an SMA permit was required. She did, however, keep claims regarding the developer's attempts to obtain agricultural subdivision approval alive.

The companies filed an amended complaint, hoping to revive their dismissed claims, but on June 24, the city and the Henderson companies filed a stipulation regarding the city's motion to dismiss the amended complaint.

The companies agreed to the voluntary dismissal of their claims regarding building permits and to not re-file them unless they discovered new evidence that showed "unlaw-



Marconi Point Condominiums. CREDIT: PETER FOWLER/ENDURE FILMS.

ful or illegal conduct of the city" and "would be probative of the claims being dismissed by th[e] stipulation."

Amongst the thousands of pages of documents that the DPP provided to the companies as part of discovery, they found a November 2017 email exchange between then-DPP director Kathy Sokugawa and DPP branch chief Mario Siu-Li that the companies' attorneys argue supports the refiling of the building permit counts, even though the court determined that the window to amend the complaint closed last year.

Still, the companies' attorneys argue in filings last month, "In the e-mail, Defendants' discuss interpreting a provision of state law to require condominium property regimes on agricultural-zoned property to comply with subdivision requirements as a prerequisite for issuing building permits. The same email then expressly *names* Plaintiffs' project as a target of this new rule. Later internal correspondence among Defendants' employees refer to Plaintiffs' project and the DPP Director's 'new approach to ag condo projects. ...

"Defendants' 'new approach' constitutes a rule, which is defined as an agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency.' Defendants did not follow the formal rulemaking requirements of the Hawai'i Administrative Procedure Act. Defen-

dants used this 'new approach' to wrongfully withhold building permits from Plaintiffs. Because Defendants adopted and enforced this rule without formal rulemaking, the rule is invalid, and Defendants could not use it as a basis to withhold Plaintiffs' building permits.

... "Defendants' Supplemental Production reveals that their 'new approach' to withholding permits, absent formal rulemaking, is arbitrary and likely unlawful."

In addition to arguing that the companies missed their window to amend their complaint and failed to demonstrate good cause for an exception, deputies corporation counsel for the city state in their opposition for leave to amend, "The Court should reject Plaintiffs' proposed amendments as futile because they neither correct the jurisdictional defects fatal to the dismissed claims nor establish 'New Evidence' under the Stipulation. DPP employees sent the internal emails *after* Plaintiffs had already received notice of their need to comply with SMA permitting requirements and roadway and agricultural subdivision approvals.

"Thus, Plaintiffs' allegations of a pretextual 'new approach' do not plausibly show that DPP lacked discretion to require Plaintiffs to obtain an SMA permit, and Plaintiffs, which have not applied for an SMA permit, still have no vested rights to the building permits or roadway subdivision without the required SMA permit."

— Teresa Dawson