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Going With(out) the Flow

Despite the fact that the state Commission on Water Resource Management in 2014 adopted agreed-upon minimum instream flow standards intended to ensure sufficient water for the farmers and others with rights to it, the Wailuku Water Company has apparently continued to divert water from the four great streams – Na Wai Eha – in amounts that regularly exceeded what the commission had allowed.

And the commission staff so far has done next to nothing about it, claiming it was helpless to enforce absent some time-consuming amendment to the rules under which it operates and improved streamflow monitoring.

The situation was finally brought to the commission's attention in a meeting last month. Commissioners seemed outraged, but will that be enough to put things right?

We're watching.

IN THIS ISSUE

Water Commission Struggles to Address Failure to Enforce Minimum Stream Flows

It's been more than a decade since the community group Hui o Na Wai Eha petitioned the state Commission on Water Resource Management to amend the interim instream flow standards (IIFS) of Waihe'e and Wailuku rivers and Waikapu and Waiehu streams. The streams (collectively known as Na Wai Eha or "the four great waters") have long been diverted for agricultural and other purposes, to the detriment of stream organisms, area residents and farmers with appurtenant water rights, and native Hawaiians wishing to exercise traditional and customary practices. With its petition, the Hui hoped to put an end to that.

It's been more than three years since the parties to the contested case that grew out of that petition agreed to a set of new IIFS for those streams that seemed to meet the needs of both instream and offstream users. But what seemed like a victory back then has turned out to be a letdown, to put it mildly. That's according to the Hui, Maui Tomorrow Foundation (MTF), and the Office of Hawaiian Affairs, which claim that Wailuku Water Company (WWC), which owns and operates the irrigation system that diverts water from those streams, has consistently and as recently as a few months ago failed to meet its commitments under the April 2014 settlement agreement, which the Water Commission made official in an order that same year.

PHOTO: HUI O NA WAI EHA

A photo of the closed, locked sluice gate along the Waikapu ditch.

In trying to address their complaints, the commission's staff has admittedly struggled in the face of limited data and staffing. Last month, it brought the general matter of monitoring and enforcing IIFS to the full commission for discussion. Having received recommendations from its hearing officer for new IIFS for dozens of diverted streams in East Maui and for Na Wai Eha, the commission is poised to issue decisions on them soon, bringing Maui's infamous, decades-long water disputes closer to a resolution. But as Hui president Hokuao Pellegrino told the commission at its December 19 meeting, "If we have these laws in place, the IIFS, but you can't enforce them, let's be honest, what's the point?"

'Shut, Locked and … No Flow'

Most recently, on October 9, Hui members hiked to the South Waikapu dam intake, ditch and reservoir to investigate the potential cause of the unusually low flows in Waikapu Stream that area taro farmers and residents had noticed throughout Septem-

continued to page 8

Environment Hawai'i
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NEW AND NOTEWORTHY

Hu Honua Challenge: The power plant being rebuilt along the Hamakua Coast just north of Hilo is facing yet another challenge, this time from an individual, Claudia Rohr. In late November, Rohr, representing herself, filed a complaint against the County of Hawai'i Windward Planning Commission and the county Planning Department, arguing that the county should have required Hu Honua to prepare an environmental assessment or environmental impact statement before the Public Utilities Commission considered the most recent power purchase agreement between Hawaiian Electric Light Company and Hu Honua.

According to Rohr, the 1985 Special Management Area permit that was issued to the previous plant operator, Hilo Coast Processing Company, allowing it to convert fuels from bagasse to coal, was amended after 2010, when Hu Honua began work on the plant. But, Rohr argues, since then, there have been several additional changes in the plant's operation, including a projected useful lifespan of 30 years now instead of 20, that should have caused the county to undertake a review as to whether Chapter 343, Hawai'i's environmental policy act, had been triggered.

"The A&R PPA [Amended and Restated Power Purchase Agreement] requires an essentially different action than the Hu Honua project that was proposed in 2010," she writes, resulting in "a greater possibility of significant environmental impacts arising from the substantial changes to the design and operating agreement of the Hu Honua project."

The PUC approved the new power purchase agreement in late July. A month later, Life of the Land appealed the PUC's decision to the Hawai'i Supreme Court. As described by Henry Curtis, the group's executive director, the PUC order approving the PPA was flawed by "the total lack of any analysis, let alone any mention of greenhouse gas emissions." As a party to the proceedings before the PUC, Life of the Land had attempted, unsuccessfully, to raise the issue.

A Landmark Decision: A recent decision by the state's highest court could have a bearing on that challenge to the Public Utilities Commission's decision on the Hu Honua agreement. Last month, a majority of the justices found that the PUC had violated rights guaranteed by the state Constitution when it refused to grant the Sierra Club intervenor status in a case involving approval of a power-purchase plan between Maui Electric (MECO) and the now-closed power plant owned by Hawai'i Commercial & Sugar Co. (HC&S).

"This case raises the issue of whether the protections of the [constitution's] due process clause apply to the right to a clean and healthful environment, as defined by laws related to environmental quality," the majority opinion stated. "We hold that, under the circumstances of this case, the petitioners asserted a protectable property interest in a clean and healthful environment as defined by environmental regulations; that the agency decision adversely affected this interest; and that a due process hearing was required given the importance of the interest, the risk of an erroneous deprivation, and the governmental interests involved."

In language that may bode well for the Life of the Land's chance of success in the Hu Honua case, the court specifically mentioned greenhouse gases as a factor in protecting the public's interest in a "clean and healthful environment." State law, the justices wrote, required the PUC to weigh "the hidden and long-term costs of energy produced at the [HC&S] plant, including the potential for increased air pollution as a result of greenhouse gas emissions."

A statement released by Earthjustice, which represented the Sierra Club, noted that the HC&S plant "was burning up to 25 percent coal over the course of a year to meet its power production obligations to MECO. In 2014, the state Department of Health assessed a $1.3 million fine against HC&S for more than 400 clean-air violations at the plant."

Given that the plant has already closed, what impact does the decision remanding the case to the PUC have? "The issue of what happens on remand is less important than the precedent we now have for future cases," said Earthjustice attorney Isaac Moriwake.

Quote of the Month

"The idea that the plantations still have control over these streams despite the [Water] Code … despite the efforts of the communities, it's unacceptable."

— Pamela Bunn, attorney for OHA

Environmental Council Rules: The state's Environmental Council has drafted revisions to the rules governing the preparation of environmental assessments and environmental impact statements. The public may comment on the proposed changes until January 12.

The revisions have been posted in Ramseyer-like format on the council's webpage. Comments may be made online directly from the draft rules or may be submitted in more traditional form to the DOH.

For more information and a link to the draft rules, see: http://health.hawaii.gov/oeqc/rules-update/

Environment Hawai'i
190 Keawe Street, Suite 29
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Patricia Tummons, Editor
Teresa Dawson, Managing Editor

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190 Keawe Street, Suite 29, Hilo, Hawai'i 96720.
Telephone: 808 934-0115. Toll-free: 877-934-0130.
E-mail:ptummons@gmail.com
Web page: http://www.environment-hawaii.org
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PHOTO: ROSE HART, UH HILO SPATIAL DATA ANALYSIS AND VISUALIZATIION LAB

Debris from the house at 78 Kahoa Street in Hilo lies at the base of the cliff.

House on Hilo Cliff That's Falling Into Sea to be Partly Demolished

Last month, as angry swells carved steep scarps into the dunes on O'ahu's North Shore, threatening homes and other structures, on the Big Island, another, slower wearing away of the coast was prompting owners of a cliffside home in the northern part of Hilo town to take drastic measures to save their house.

Their residence, at 78 Kahoa Street, had been featured on local television news reports in 2016. A lifeguard at Honoli'i had alerted news media to the fact that parts of the house were shedding off and falling down the 80-foot-high cliff face to the ocean and on September 16, *Hawai'i News Now* reported on the problem, noting also that it had reached out to county and state agencies and found none willing to accept responsibility for addressing the problem.

The report apparently prompted the Hawai'i County Department of Public Works to take action and conduct an inspection of the home. On September 20, DPW building chief David Yamamoto issued a notice of violation to the homeowners, Joel and Karen Thompson. "The structure is hazardous and unsafe because it has partially collapsed and may continue to collapse and/or loosened parts of the structure may fall off of the embankment and injure you and/or others and/or damage property," Yamamoto wrote. He instructed them to "immediately cease the use of the master bedroom, master bathroom, covered patio, dining room, closet and bathroom" on the makai side of the house. In addition, they were to "obtain a demolition permit … within two business days of the receipt date of this notice" and complete demolition of the unsafe structure within 90 days of the notice.

Photos accompanying the letter showed a patio that had partly collapsed down the cliff face, rooms whose walls were pulling away from the rest of the house, and a dizzying view from the patio down the cliff face, where parts of the patio were resting on the rocks below.

Earlier Efforts

The Thompsons were apparently unaware that their house had been in the news, but when the DPW inspectors came and they got the notice of violation, it could not have come as a surprise. Seven years earlier, in 2009, they had worked with an engineering firm in an effort to stabilize their house. The plan called for installing reinforced concrete piles that would extend 50 feet down the cliff face "until contact with the competent blue rock." The piles themselves would be anchored to the cliff face by "grout injection rock anchors," extending 20 to 30 feet into the hillside.

Even earlier, previous owners had, in 1993, built a rock wall at the cliff base, along the shore, in the apparent hope that it might prevent waves from undercutting the face of the scarp. That was done without permits, and the county forced the then-owners to remove the wall. A few years later, the same owners had attempted to stabilize the cliff face by spraying it with shotcrete or gunite.

In connection with the Thompsons' Special Management Area application in 2009, their engineer, Paul Weber of Meta Engineering, stated that, "Recently, a chunk of the bank broke loose – shotcrete and all. This has exposed the house to a danger of collapse, and the rest of the face protected by shotcrete is at risk."

In a letter signed by then-planning director B.J. Leithead-Todd, the Planning Department stated that the proposed work raised "a number of great concerns." "There is also very little information provided in the application for us to make an informed decision as to the impacts of the project and its implication on the health and safety of the dwelling's residents, the long-term stability or safety of the dwelling itself, the long-term stability of the pali (cliff) below the dwelling, or what potential impacts all of these may have on the coastal resources," she wrote.

Planning Commission rules as well as Hawai'i's land use law, Chapter 205A, require the county to "reduce hazards to life and property from tsunami, storm waves, stream flooding, erosion, subsidence, and pollution" and to "control development in areas subject to storm wave, tsunami, flood, erosion, hurricane, wind, subsidence, and point- and nonpoint source pollution hazards," she pointed out.

"Bluff erosion is very difficult to control and may undermine structures built near the bluff edge…. [T]here may be few options in the construction stage that would mitigate the hazard once structures are placed too close to an eroding bluff," Leithead-Todd wrote, quoting Dennis Hwang's *Hawai'i Coastal Hazard Mitigation Guidebook.*

She pointed out the department's "serious concerns" over the project: "This cliff has been eroding for some time, causing the house to rest precariously over the pali. Recent erosion of the pali, including the sections that were supposed to have been reinforced structurally, have resulted in the loss of several feet of cliff. We have not been provided with information regarding the geology of the cliff, what its rate of erosion is, how the wave action below impacts the integrity of the pali, how the cliff geology will act under the engineered solutions (meaning, will the pali break off again under the new stress of drilling and anchoring into it), etc. … We would not want to approve a solution that is not safe."

Leithead-Todd also said that she wanted to see comments from the Department of Land and Natural Resources' Office of Conservation and Coastal Lands as well as the U.S. Army Corps of Engineers.

While the Thompsons desired to have the requirement for a certified shoreline survey waived, Leithead-Todd rejected this. "It is clear that the work being proposed is at a minimum within the shoreline setback area," she stated. "Thus the requirement for a certified shoreline survey is not waived and must be included" in the complete application.

Finally, since the cost estimate — $250,000 — exceeded what at the time was the maximum allowed for a minor SMA permit, a SMA Major Use Permit and shoreline setback variance would have been required.

The Thompsons replied, stating that the cliff failure beneath their house was the result of a "100-year storm." "This erosion wasn't due to the failure of the shotcrete to protect the surface of the cliff face, but rather to the saturation of the entire pali due to hours of intense rain. The pali literally blew out from the inside, a phenomenon we observed at the time at two other spots along our street."

This concerned them, they wrote, but "seemed at the time to pose no imminent threat to the safety of our home or the shore below it. And it was, after all, due to an alleged '100-year storm.' It appears now, however, that this erosion exposed the underpinnings of the shotcrete and led to corrosion of the underlying structure. This year … large chunks of the shotcrete began to break off and fall to the shore below." This, they said, was what prompted them to seek out an engineering firm and move forward with the proposed project.

To further assuage the county, and in an effort to qualify for an SMA minor permit, the Thompsons were now proposing only the vertical piles to anchor the house to bedrock and not the grout injection ribs extending horizontally into the cliff.

On December 22, 2009, Leithead-Todd rejected the proposed changes and once more insisted that the Thompsons obtain an SMA major use permit for the work. "[T]he proposal to only anchor the house without stabilizing the bank would pose a risk of hazard to life and property," she wrote. "We find that the proposal may also have a significant adverse impact on the SMA and that the proposal could not be considered a minor structure or activity. For all of these reasons, you will need to submit both a SMA Major Use Permit Application and a Shoreline Setback Variance Application for the proposed project. In addition, the proposed project must include both phases of stabilization in order to reduce the risk to life and property."

There is nothing further in the file after this. The Thompsons appear to have dropped the idea of working on their house or stabilizing the cliff face.

A Slow-Walking Cliff

The Thompsons may have backed off their proposal, but the erosion of the cliff face continued. In 2013, a kayaker happened to notice what seemed to him to be fresh evidence of another landslide. He emailed a photo — showing red, exposed earth from the house down to the water, with nary a blade of grass to be seen — to a friend who worked at the Department of Public Works.

"There's a house at Honoli'i that's very close to the edge of the pali," he wrote in his email to Noelani Whittington, the information and education specialist at the DPW. "I was out paddling yesterday and noticed a recent landslide bringing the house even closer to going over. Notice the concrete rubble at the base of the pali. It used to be gunite that the owner had sprayed on the pali to prevent erosion — it worked for a while. I loathe to be a squealer, but it does look a little scary for the homeowner. Thought I'd better tell somebody."

Whittington forwarded the email and accompanying photo to the Planning Department, along with the query, "Does Planning inspect this type of erosion problem?"

Apparently not. Nothing further is in the Planning Department file until October 12, 2016, when the Thompsons' agent submitted a Special Management Area Use Permit assessment application.

A Two-Stage Process

It took more than a year for the Planning Department to process the permit application, with questions over just how the work would be done and how much it would cost.

Jo-Anna Herkes of SSFM International was leading the permitting effort, working closely with general contractor Jas. A. Glover, Ltd. In correspondence with the Planning Department, she indicated the work would be done in two phases. The first would be to clean up debris at the bottom of the cliff face, at a cost of $70,000. Second would be to demolish the unsafe portions of the house, with a total cost of $150,000.

On September 26, in a letter signed by staffer Jeff Darrow for planning director Michael Yee, Herkes was notified the department had granted a minor SMA permit for the proposed work. Because no "development" was involved, it qualified for a minor permit, and because the work was a "minor activity" under departmental rules, no shoreline survey would be required, either.

But the site plan accompanying the letter, showing the areas slated for demolition, does not include several of the rooms that had been called out in the Department of Public Works' notice of violation issued in 2016. Specifically, the master bedroom and bath, the dining room, and the closet and bathroom makai of the carport, were not included in the proposed "work area/limits of demolition." The only area of overlap between the two site plans was the lanai.

Bethany Morrison, the planner handling the permit, was asked about the discrepancy. "My recollection was that there was some discrepancy about the floor plan used in the [notice of violation] and the most current configuration of the building. However, since the requirement for the partial demolition was from DPW we would defer to them about how much demolition of the structure is required," she replied.

Work Begins

The Department of Public Works issued a permit for the demolition on October 9, describing the authorized work as "partial demolition of existing dwelling to rectify DPW complaint." The cost of the work was pegged at $70,000, which varies from the cost stated in the Planning Department's SMA permit. Morrison explained this discrepancy as the result of the DPW permit not including the clean-up work.

The December 3 edition of the *Hawai'i Tribune-Herald* carried a notice that the road fronting 78 Kahoa Street would be closed on weekdays to allow for the demolition work, beginning as early as that date and continuing through December 29.

By mid-month, no work was in evidence. On December 22, a cherry-picker had been placed on the driveway. ***— P.T.***

A cherry-picker parked in the drive of 78 Kahoa Street.

GEMS Authority, Hawaiian Electric At Odds Over On-Bill Financing Plan

Practically since the day life was breathed into the Green Energy Market Securitization (GEMS) program in 2013, its advocates have argued that for it to be successful, recipients of GEMS loans – intended to help lower-income families benefit from expensive, energy-saving technologies – would need to be able to pay for their energy-saving equipment with what's been called on-bill financing or on-bill repayment.

To this end, the Hawai'i Green Infrastructure Authority (HGIA), which manages the GEMS funds, budgeted nearly a quarter of a million dollars to support work last year on an on-bill financing scheme, which it called the Green Energy Money $aver program, or GEM$. Now, however, it seems as though the agency has struck out.

Starting in 2014, the state Public Utilities Commission had tasked Hawaiian Electric utilities and a host of other interested parties to develop a means to include on customers' bills charges for third-party loans — principal, interest, and other fees — that were taken out to pay for rooftop solar arrays and possibly other energy-saving technologies, regardless of whether those loans were underwritten by GEMS funds. For two years, the utilities had worked with a contractor to develop a system to accomplish this, and had even published a draft "Bill $aver" manual, but when the primary vendor for the financing service dropped out and no other vendor came forward, the PUC shut down the effort.

In the PUC order closing that docket, however, the agency instructed Hawaiian Electric to continue working with HGIA to attempt to work out an arrangement for recipients of GEMS loans to be able to pay their loans off through add-ons to their monthly electric bills, relying heavily on the work products developed over the previous two years.

Ever since, representatives of Hawaiian Electric and HGIA have been meeting or participating in conference calls weekly to figure out how on-bill financing should work, according to a November 24 letter to the PUC from Daniel Brown, manager of regulatory non-rate proceedings for Hawaiian Electric Industries.

Brown describes four unresolved issues and asks the commission for guidance as to how the parties should proceed. Those issues concern:

- Disconnection;
- Payment priority;
- Coordination with GEMS loan servicer; and
- Cost recovery.

Disconnection

When Hawaiian Electric customers are in arrears on their bills, the recourse is disconnection. The "Bill $aver" program manual called for disconnection of customers who did not fully repay both the electricity charges and loan charges. Brown informed the PUC that the HGIA proposes identical language for the manual describing procedures for GEMS on-bill repayment.

However, he continued, "The companies are cognizant that potential disconnection for non-payment of an on-bill financing program charge was incorporated into the [Bill $aver] program to facilitate better market interest and rates for that program. However, especially considering that the GEMS program is focused on the hard-to-reach market (i.e., low-income and rental customers), the companies are concerned that potential consumer protection issues may arise."

In a response filed December 4, deputy attorney general Gregg Kinkley, who advises HGIA, pointed out that Hawaiian Electric had no problem with the potential disconnection of its customers when they were in arrears on payments made under two earlier utility programs, SolarSaver (2007-2009) and a "Simply Solar Pilot Program" (2011), both of which were intended to support purchases of solar water heating equipment.

Kinkley went on to note that the GEM$ program was requiring not just bill neutrality – meaning that the monthly bill including GEM$ charges is no greater than the monthly bill without them – but at least an overall savings of 10 percent on energy charges. Further reducing the monthly charge, he said, is the proposal to amortize financing over 18 to 20 years as opposed to 12 in the Bill $aver program.

Senior Status

Under the Bill $aver program, priority for payment would have gone to loan repayments over electricity charges. The HGIA is proposing a similar system for GEMS loans. As Brown described it, "The disconnection concern stated above is compounded by the issue of GEMS loan repayments receiving senior status over payment for usage of electricity. Under this arrangement, payments received from customers are first credited toward repayment of their GEMS loans, and only once a GEMS loan amount is fully covered will payments be credited toward that customer's monthly electric usage."

"The companies are concerned that giving senior status to GEMS loans increases the risk of disconnection even where the customer is able to pay for their entire electric usage and pay a majority of their GEMS loan. Under such a construct, even a minor underpayment could ultimately result in the disconnection of electric service for a participating customer," Brown wrote.

In addition, he continued, should the loan be assigned to another customer, that customer "would not need to fulfill any of the requirements for loan eligibility. Therefore, the companies would bear increased risk both from the potential for non-payment (or partial payment) of their bill, and also from an assignee who may not otherwise qualify for such a loan. Under the current proposed approach, the companies would be subject to increased write-off risk for partial payments, versus the GEMS program, whose loan payments are senior to the companies."

In response, Kinkley stated that the requirement for a 10 percent bill savings should ensure that customers are able to pay their full bill, including financing charges. "Incorporating a minimum required bill savings (program charge plus electricity charges) will increase the probability of the participant's repayment ability and will thereby decrease the risk of disconnection," he wrote.

Coordination Agreement

The HGIA has contracted with Concord Servicing Corporation to manage GEMS loan repayments. But Concord, wrote Brown, is reluctant to come to an agreement with Hawaiian Electric for oversight of GEMS loan repayments, since it claims that doing so would entail assuming additional risk without any additional compensation.

Without a contract that includes terms of "contractual privity … for purposes of indemnification," Hawaiian Electric would face exposure to litigation, Brown argued. "[I]f any claim were to arise from the GEMS program based on Concord's conduct and the companies were subject to a lawsuit or other complaint, the companies (and by

Panel Defers Ko'olau Loa Plan Vote To Discuss Easements for Malaekahana

At the November 29 meeting in Hau'ula of the Honolulu City Council's Committee on Transportation and Planning, Hawai'i Reserves, Inc. (HRI), the local land management arm of the Mormon church, unveiled a new, drastically downsized housing plan to relieve at least some of the rampant overcrowding in La'ie. Whether it will — if ever built out — actually achieve that goal remains to be seen.

Gone is the proposed workforce housing, which was part of the original Envision La'ie plan floated by HRI several years ago and incorporated by the Department of Planning and Permitting into its draft of the Ko'olau Loa Sustainable Communities Plan (KLSCP) update. Instead of adding hundreds of affordable units, HRI manager Eric Beaver estimated that fewer than 100 would be built under the new plan, that is if the city's affordable housing ordinances remained unchanged.

Most of the 300 proposed new units would be sold at market rates and all of them would be built in La'ie, he said.

Beaver testified that the new plan was meant to be a compromise to address concerns raised by the community — about increased traffic, a lack of infrastructure, and the loss of agricultural land and open space — ever since the DPP released its version of the KLSCP in 2012.

The Envision La'ie plan included at least 875 new housing units on 300 acres of ranch land in Malaekahana, as well as a new school and commercial development.

Seeking to address the concerns raised, Beaver said HRI met with city council members and their staff, as well as community leaders Dee Dee Letts, Tim Vanderveer, and Ben Schafer, who toured La'ie with him to explore possible housing alternatives, including increased density.

HRI currently has the ability under the current KLSCP (approved in 1999) to build 550 units behind the Brigham Young University-Hawai'i campus. However, Beaver said the company would rather not pursue that option. Instead, HRI proposes to build 250 units on land in north La'ie directly adjacent to Malaekahana. The remaining 50 units would be built on the sprawling BYUH campus.

The north La'ie houses would be set back more than 300 yards off Kamehameha Highway and be partly tucked behind ridges to protect viewplanes, he said.

No retail is being proposed, and "at this smaller number of units, the workforce leasehold housing … is not feasible," he added.

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extension, their customers) may be forced to pay litigation costs instead of Concord, even if the issue arose from Concord's conduct," Brown stated. Nor could Hawaiian Electric seek to recover costs in that event from HGIA since, he noted, as a state entity, it enjoys sovereign immunity.

Kinkley's response notes that Concord's agreement to service loans is with HGIA and that Hawaiian Electric need not have any agreement with Concord.

Concord already services loans for 12 utilities, he said, none of which has required Concord to sign an agreement along the lines Hawaiian Electric is proposing. If Hawaiian Electric is concerned about losses associated with Concord's services, it could purchase insurance against that, he suggested.

Finally, he noted that the on-bill repayment program in Hawai'i is limited now to GEMS loans, which limits Concord's profits. "[P]erhaps expanding the capital sources might help Concord justify a business decision to absorb additional risks in return for potentially increased on-bill servicing opportunities," he wrote.

Cost Recovery

This issue is particularly thorny. Under state law, Hawaiian Electric companies are allowed to recover costs associated with developing the on-bill financing program. In the earlier docket for Bill $aver, the company has stated it incurred more than $2.3 million in non-labor costs from August 2013 to June 2016, for which it is seeking reimbursement through the Public Benefits Fee levied on customers' monthly bills. (The PUC had not issued a decision on this request by press time.)

In the case of further on-bill financing work related to GEMS loans, Brown wrote, Hawaiian Electric is seeking reimbursement directly from HGIA. "HGIA does not agree with this suggestion," he noted. "However, the companies are wary of recovering such implementation costs and ongoing costs via their broader customer base for a program that will only be utilized by customers participating in HGIA's GEMS program."

Kinkley responded by stating that HGIA has just two options to cover Hawaiian Electric's charges: it can dig into the GEMS fund, or it can increase the interest rate charged to loan recipients.

As to the first option, Kinkley stated that this "would require the Hawai'i State Legislature and the [Public Utilities] Commission to approve an increase to the administrative budget for the authority." And in any event, he claimed, GEMS doesn't even have that much money left to loan out, with "only an estimated $50.0 million available to lend."

According to the most recent HGIA quarterly report to the PUC, just under $7 million in loans had been issued from the GEMS fund, with more than $140 million left to distribute. So how did Kinkley arrive at the $50 million figure?

That question was put to Gwen Yamamoto Lau, HGIA's executive director. She answered by providing a total of GEMS loan commitments – including a $46.4 "commitment" to the state Department of Education for energy-efficiency improvements and a nearly $10 million loan to be distributed to Moloka'i residents for solar water heaters. Altogether, "approximately $77.8 million of the GEMS funds have been committed to date," she stated.

Furthermore, a recent PUC order requiring HGIA to use loan repayments to replenish the Public Benefits Fee before paying HGIA's administrative costs (running lately at more than $1 million a year), has added to the obligations on the GEMS funds, she said. "As HGIA is not supported by general funds, and as loan administration and servicing will continue for 20+ years, this order requires HGIA to set aside and reserve a portion of the loan funds to ensure proper administration and servicing until the loans are paid in full." When that reserve is added to the commitments made to date, what's left is "approximately $50.0 million in GEMS funds available to lend."

(As to the DOE commitment: although the loan ceiling is $46.4 million, as of September 30, less than a quarter million dollars had been given out. Per Yamamoto, any amount that hasn't been committed by June 30, 2018, "will be added back to the GEMS loan fund and will be available for other borrowers.") ***— Patricia Tummons***

Given that some of the lands HRI wants to develop fall outside of the community growth boundary in the current KLSCP, as well as the version proposed last January by council member Ikaika Anderson in Bill 1, Beaver said he opposed the bill's adoption. Bill 1 does not designate any more lands for housing, which is "our community's greatest need," he said.

Should the bill be amended to accommodate HRI's new proposal, Beaver estimated that under existing laws, 30 percent of the 300 units would need to be affordable.

"Ninety units, potentially, and 210 would be market?" Martin asked.

"The goal would be to maximize the number of affordable units. Whatever is possible is what we would work to do," Beaver replied.

"And the affordable units would be marketed to those earning 140 percent of the median income or less," Anderson asked.

"That's my understanding," Beaver replied.

During public testimony, most attendees urged the council members to go ahead and approve Bill 1 unamended, regardless of HRI's attempt at a compromise. Several of them argued that the city could free up more housing if it cracked down on the rampant illegal vacation rentals throughout the region.

Hau'ula resident Maureen Malanaphy pointed out that the lack of adequate housing is an island-wide issue. One solution would be to reduce the glut of vacation rentals, she said, adding that she sees a lot of tourists, as well as BYU students, in her neighborhood these days.

More development was not the answer, she suggested. "I don't want to look around … like Kailua and the North Shore and say, 'What happened? What happened?' Because once it's gone, it's gone," Malanaphy said.

BYU teacher Rebecca Walker, also a Hau'ula resident, echoed her sentiments.

"I don't think we have the right solution for what the real problem is — over 1,000 illegal vacation rentals in Ko'olau Loa. And that's only those on Airbnb," she said. And given that so many homes are being rented to tourists, she asked, "How do we guarantee our friends [who have left the area, but want to return] that they're going to be guaranteed these homes? Ninety of 300 homes would be affordable," she said of HRI's new plan.

"We have to clean our house first before we can move forward," she said.

Some of those opposed to HRI's development proposals at the meeting were actually Mormon church members. Christopher Milsteen of La'ie identified himself as an

PHOTO: LESLIE KUBA

The Mormon temple in La'ie.

LDS [Church of Jesus Christ of Latter-day Saints] member and offered his support for Bill 1.

"I've seen what the church has done in Utah with development projects and I don't want to see that here. I want to see the natural places preserved. I want to see a true compromise from HRI. I don't think this is a true Christian compromise," he said.

North Shore resident Larry McElheny began his testimony by displaying blown-up photos of the verdant, relatively untouched Kahana Valley a few minutes south of La'ie and calling the region's natural resources "some of the most beautiful anywhere on the planet." He then held up another photo showing the church's recently expanded Polynesian Cultural Center (PCC) in La'ie.

"It's hard for me to say this. When we're talking about the entities we're dealing with — HRI, PCC, BYU — I just can't trust these people. How can they think that what's happening at PCC is compatible with our ecological treasure? They've basically put an amusement park in the middle of it. I can see their vision. … It's just very, very troubling," he said.

Finally, McElheny questioned whether the decision-makers in Salt Lake City were aware of the prognosis for Kamehameha Highway, where waves regularly overtop the road. "DOT [Department of Transportation] puts rocks and they wash away," he said.

While most of the testimony that night came from people opposed to more development in the region (due, according to some, to coincidental Christmas festivities that kept many Bill 1 opponents away), several others urged the committee to amend Bill 1 to allow some additional housing.

La'ie's Elizabeth Logan Levy, for one, testified that she has friends and family on both sides of the issue and admitted that there were no easy solutions to the housing crisis. But, she said, it's the people, not just the area's natural beauty, "that make this place special. … Yes, we should take measures to protect it [but also] make sure people have opportunities to stay."

Crying Wolf?

BYUH president John Tanner also asked the committee to consider adding more housing opportunities in the area. "We want employees to stay here. They're living on top of each other," he said.

Then he said something that seemed to contradict arguments university representatives made in the past to coerce the city to support of the level of development proposed in the Envision La'ie plan.

"We don't have plans to grow the university in a major way at all," he said, noting that current enrollment is about 2,900 and the school's board of directors have capped it at 3,200.

"Once the cap is met, can the board increase it?" asked Anderson.

Tapper said it could, "but small is beautiful [and] it's very expensive to be educated here and there isn't housing."

"The reason I asked is, this council has heard before in the past that there have been discussions, 25, 30 years out, plans to increase campus size to 5,000," Anderson said.

Tapper, who has been the university's president just since 2015, said that there have been no discussions or plans for that. "The cap is 3,200," he reiterated.

DPP head Kathy Sokugawa later testified that BYUH representatives have, indeed, changed their tune with regard to its needs for additional student housing. Back when the KLSCP update was being drafted, "BYU specifically told us if they did not grow, they would have to relocate out of La'ie. Now they say they have a cap of 3,200. They told us they wanted an expansion to 5,000," she said.

"You're saying in 2009, 2010, BYU had explained to the community that they planned to increase their enrollment to 5,000?" Anderson asked Sokugawa.

"I believe that was public knowledge," she replied, adding that the 5,000-students projection is included in the DPP's draft bill on the KLSCP that went to City Council.

"When 5,000 was presented to a committee, was it presented as a final number?" Anderson asked.

"[It was] just a planning horizon for the long-term viability of the campus. How it jibes with the administrative cap, that was not explained to us," Sokugawa said.

An Easement

Whatever the housing needs of BYUH — or Ko'olau Loa in general — actually are,

Water from page 1

ber. Under the settlement agreement and commission order, WWC must release enough water to the stream to meet an IIFS of 2.9 million gallons a day (mgd). That, apparently, wasn't happening. What the Hui found instead was that the sluice gate where water is to be released back into the stream was "completely shut, locked and that NO (0%) flow was returning to the Waikapu Stream below to meet the IIFS. Furthermore, the South Waikapu Intake Dam was diverting 100 percent of the Waikapu Stream. … The stream was dead between the Dam and Kalena Tributary," Hui board members wrote in an email that same day to Dean Uyeno, head of the commission's stream protection and management program.

"Hui o Na Wai Eha would like to kindly ask CWRM to address this issue with WWC immediately," they wrote.

Commission staff apparently spoke with and emailed WWC president Avery Chumbley about the Hui's claims. Chumbley's response: the low flows were due to low rainfall, not excessive water diversion.

Unswayed, attorneys for the Hui, MTF, and the Office of Hawaiian Affairs followed up with a November 6 letter to the Water Commission noting that the Hui had raised similar concerns in August 2016 about WWC's apparent failures to meet the IIFS and even filed a formal complaint. They also included some of the commission's own graphs of stream flows that showed when and how long the IIFS had not been met in 2016.

"While the commission and stakeholders have acknowledged the value of settlements like the 2014 IIFS order to resolve streamflow disputes, the commission can undoubtedly appreciate the viability of such agreements now and in the future critically depends on diligent compliance, monitoring, and enforcement. … [I]t should be clear that the current practice of no enforcement at all provides *zero* incentive to comply and *zero* consequences for violations — and directly results in the poor compliance record seen today," attorneys Isaac Moriwake and Pamela Bunn wrote.

Weeks later, on November 29, Water Commission director Jeffrey Pearson wrote Chumbley a three-page letter that acknowledged WWC's position and evidence suggesting that low rainfall in 2017 was the reason why Hui members saw low flows in Waikapu.

Pearson admitted that his staff has had difficulty monitoring flows in the stream following a September 2016 flood that washed away its gage. It installed a new one only last October.

While he noted that gage data suggests low rainfall was responsible for low flows in some cases, he added, "there is an unexplained low-flow period from late April to early May when streamflow drops below the 2.9 mgd IIFS. The 2016 streamflow record, in conjunction with the photographs

PHOTO: LESLIE KUBA

Malaekahana.

council member Ernie Martin, who represents the area, has proposed that the agricultural lands at Malaekahana be protected by means of a conservation easement. This despite the facts that 1) Bill 1, if approved unamended, would bar urban development there and 2), HRI just announced it has no plans (at least not right now), to build there. Martin said an easement would protect the land in perpetuity, regardless of whether the church sold its lands at Malaekahana.

Before the meeting, Martin had proposed an amendment to Bill 1 to place the lands at Malaekahana under some sort of protection. At the meeting, he clarified that that protection would come in the form of a conservation easement, adding that he said he hoped HRI would be willing to enter into one.

Beaver said he was open to discussing the matter.

The committee ultimately deferred action on Bill 1 and on Martin's amendment so that HRI, Martin, and Anderson could further discuss options to preserve Malaekahana.

"I would like to have a decision on this rendered in February. One way or the other, going forward with an amendment or no amendment," Anderson said.

With regard to HRI's new development plan, council member Ron Menor said he was skeptical that the affordable housing would be truly affordable under the city's current standards. He said the council needed to take a much closer look at its affordable housing requirement.

At present, a house that's affordable to someone making 140 percent of the island's income is considered affordable. "That's $700,000. That's not affordable, that's market housing," he said.

Council member Joey Manahan added that adequate infrastructure must also be provided to meet the needs of any future development.

"As somebody who represents the urban core, we're playing catch-up [with regard to infrastructure, particularly sewage systems]. It's really quite difficult. If you're going to ask me to move the growth boundary, what I would like to know is what kind of infrastructure improvements are we going to need," he said.

"To build nothing is also not a solution. We did that in the urban core and we're really struggling," he added.

(For more background on this issue, see our May 2013 cover story and "Committee Tables Malaekahana Development, City Council Chair Awaits a New General Plan," from our April 2015 issue. Both and more are available at environment-hawaii.org.)

— T.D.

provided by Earthjustice [Moriwake's firm] and the Hui, shows that Wailuku Water Company continues to take water at the South Waikapu Ditch diversion despite periods of low streamflow. This is in opposition to the IIFS agreed upon by the parties and approved by the commission."

Pearson stopped short of calling it a violation. Instead, he simply reminded Chumbley that the 2014 agreement and order requires WWC to release water at the South Waikapu ditch sluice gate when flows in Waikapu Stream fall below 2.9 mgd.

"During periods of low rainfall, there should be no water flowing into Reservoir #1," Pearson wrote.

'Flabbergasted'

To Pellegrino, a Waikapu taro farmer who said he relies on the IIFS being met at all times, the commission staff's response to the Hui's concerns was disheartening. At the Water Commission's meeting last month, he argued that, "from the get-go, there were challenges with Wailuku Water Company not meeting the IIFS." He claimed that WWC repeatedly failed to meet the IIFS for Waikapu Stream. "Not for a week, not a month, but for four months in 2016 alone," he said.

Part of the problem, he said, was that the commission's streamflow monitoring gages were installed on Chumbley's private property, leaving the community with no way to ensure on its own that the IIFS were being met. Because the commission only checks the gages and uploads the data to its website quarterly, the community is left in the dark for months, Pellegrino added.

When he or others notice low stream flows, "we contact staff. Rarely do we get a response," he said.

Pellegrino said that when he broached the Waikapu Stream issue with CWRM staff at a recent meeting on Maui, the response he got was, "I called Avery and he said there's water in the stream."

"For all the work we do in the community, that to me just wasn't right," Pellegrino told the commission.

Pellegrino went on to say that at a later meeting with several other concerned members of the public, Pearson said that there was no way to enforce the IIFS, no process in place to address situations of non-compliance, and no ability to impose fines or a violation.

"I along with 20 other people were flabbergasted at this honest response," Pellegrino said. "I like to work in collaboration. I don't like to scream and yell and make waves … It's disheartening when the type of responses come back: 'Hey, I know you collected pictures and video and data. I talked to the president of Wailuku Water Company and he calls you a liar.' … That's the kind of responses we're getting from the staff," he continued.

"I will tell you, if it was any of us doing anything illegal or not pono to these resources, I would be certain the table would be flipped and we would be fined to the greatest amount. The Duey issue last year is a perfect example of that," Pellegrino said, referring to an August 2016 enforcement case the commission staff brought against Hui members John and Rose Marie Duey for failing to obtain a permit for a pipe that fed their lo'i in a timely manner. (The commission rebuffed the staff's effort.)

"We almost have seven months in two years that Wailuku Water Company was supposed to comply and they weren't. Seven months. I don't know what else needs to be said in regards to that," Pellegrino said.

He conceded that the practice of enforcing IIFS was fairly new for commission staff, "but that still doesn't justify the lack of enforcement and inability to impose something other than a three-page letter reminding [WWC] there is an IIFS," he said.

Pellegrino offered some solutions: Make the diverters contribute to streamflow monitoring equipment and pursue community-based management with the Hui.

"We have an amazing board," he said, adding the Hui had just received a grant through the Office of Hawaiian Affairs to explore creating its own monitoring program for the streams.

"If we can't rely on you as enforcers, what else can we do? … We can't wait for somebody to fly over from O'ahu after two weeks following a formal complaint. … We need somewhat more immediate attention,"' he said.

He stressed how uncomfortable he was complaining to the commission and that he offered his criticisms "with the utmost respect for all of you."

"I know they're not fooling around," he said of staff. "They have one hydrologist for all Hawai'i streams. We want you to be staffed. We want you to have the budget," he said.

Questionable Authority

Before Pellegrino had testified, CWRM's Pearson and Uyeno briefed the commission on the staff's IIFS monitoring practices and enforcement abilities. Earlier in the meeting, the commission approved a request from Uyeno to purchase software that he said will lay the groundwork for real-time monitoring of streams statewide.

"Enforcement relies on adequate monitoring. We can't regulate if we can't measure," Uyeno said.

With regard to having a regulatory framework to enforce IIFS, he argued that the state Water Code "is not set up for that" and the commission's administrative rules are "pretty much silent" on the matter. "It says IIFS should be met. That's it," Uyeno said. He and Pearson later added that recent rule changes to increase the total allowable fines from $1,000 per violation to $5,000 per violation applied to permits, not IIFS.

When asked by commissioner Neil Hannahs how it enforces IIFS, Uyeno replied that he tries to work with the diverters. For example, if there is evidence that the East Maui Irrigation Company was not releasing enough water from its system to meet IIFS in East Maui, commission staff would call EMI manager Garret Hew (now retired) and ask him to open a sluice gate a little further.

"You work to cure, but there's not penalty," Hannahs said.

Eventually, Uyeno said the stream monitoring system should get to a point where diversion data provided by WWC or EMI could feed into an online system where staff and others can compare reported water diversions with what's in the stream.

Should staff find that an IIFS violation has occurred, commissioner Mike Buck asked whether water use permits could somehow include a condition that would allow penalties to be imposed for failure to comply with IIFS.

"I'm trying to link permits to the existing rules. I haven't heard if we can do that," Buck said.

"We can look into it. There's no answer now," commission chair Suzanne Case replied.

When it came time for members of the public to weigh in, Bunn, who has been representing the Office of Hawaiian Affairs in the Na Wai Eha case for more than a decade, said, "I'm sort of appalled at what I'm hearing today."

She disputed CWRM staff's claims that they can't enforce IIFS because its rules are silent on penalties for non-compliance, citing the commission's administrative rule 13-169-3(a), which deals with penalties. It states: "Any person who violates any provision of this chapter or any permit condition or who **fails to comply with any order of the commission** [emphasis added] may be subject to a fine imposed by the commission. … For a continuing offense, each day's

continuance is a separate violation."

This provision is why, when parties to the Na Wai Eha contested case reached the mediated agreement in 2014, the commission enacted an order adopting all of the agreement's findings of fact, Bunn said.

"So there is an order of the commission establishing the IIFS. It may not be the neatest thing, like enforcing a permit, but it's doable. I'm not sure where the idea is coming from that it's not enforceable, and frankly, I think if the commission staff believes that it's not enforceable, the commission has a public trust duty to change that," she said.

For Further Reading

Environment Hawai'i has published many articles, all available at environment-hawaii.org, that will provide additional background to the dispute over West Maui surface water. The following is an abbreviated list:

"Commission Struggles with Conflicting Claims Surrounding West Maui Stream Diversions," February 2006;

"Hearings Begin in Contested Case over Diversion of West Maui Streams," "USGS Seeks Temporary Releases For Study of Instream Values," and "Wailuku Water Co. Sells Ditch Water Without Consent of Utilities Commission," December 2007;

"Commission Tightens Grip on Waters of Central Maui," May 2008;

"Commission's Order on Na Wai 'Eha Baffles Its Most Experienced Member," "The Water Commission: An Idea Whose Time Has Passed (Editorial)," "Maui Agency Is Sued Over Plan to Have A&B Put Stream Water in Municipal System," "*Environment Hawai'i* Questions Miike On Dissent in Na Wai 'Eha Decision," July 2010;

"Supreme Court Weighs Jurisdiction In Appeal of Decision on Maui Water," and "Supreme Court Dissects Arguments In Appeal of Maui Stream Standards," July 2012;

"Supreme Court Orders Water Commission to Revisit Decision on West Maui Streams," September 2012;

Impending HC&S Closure Raises Questions About Future of East, West Maui Diversions," February 2016.

"You can either try to enforce [IIFS] given these provisions, and if the diverter appeals it, see what the Supreme Court says. I think based on Waiahole [a seminal water rights case on O'ahu], we have a pretty good idea of what they would say about the enforceability of the IIFS. They called it basically the linchpin of the commission's fulfilling its public trust obligations," she continued.

While she didn't think any additional rulemaking was necessary, she suggested that the commission could decide to add some kind of penalty provision in its upcoming IIFS orders.

"The idea that the plantations still have control over these streams despite the code, despite the efforts of the commission, despite the efforts of the communities, it's unacceptable," Bunn said.

When commissioners asked whether staff still claimed it was unable to levy a fine for IIFS violations, Pearson suggested that his and Uyeno's positions were perhaps being misunderstood and that while current rules may be sufficient to pursue an IIFS fine, crafting a solid case would still be difficult.

"We can levy a fine and fight through the courts. We can do that. Our struggle is, do we fine for one day? Do we fine for one day it wasn't raining, when there may have been inadequate rain?" he said.

When commissioner Buck pointed out that they had just been presented with a graph showing when and for how long stream flows in Waikapu dipped below the IIFS, Pearson suggested that what was missing from the equation was data on how much water, if any, was also being diverted by WWC.

"What were the flows above the diversion? Were they diverting or not diverting?" he asked. He said the commission needed a gage above the diversions to help staff determine whether or not failures to meet the IIFS were WWC's fault.

"I'm sitting here and I can't come up with a way to bring a finable action," he told the commission.

That being said, he acknowledged that the commission needed to work harder to find a way to get a handle on IIFS enforcement and get it quickly.

Buck suggested that staff not wait until they have the perfect monitoring and enforcement scheme in place to go after potential IIFS violations.

"It's hard to bring the water diverters to the table. They'd rather not show up… I sense we kind of erred on 'Let's just try to do it voluntarily.' This is not just seven days. This is seven months [of potential violations]. … If we don't even try, it sends a real message," Buck said.

"It's time to bring some people to the table. If we're not successful, we're successful in letting them know we're trying," he said.

Pearson expressed some reticence to hanging a violation case on data from monitoring stations located on private land that would require trespassing to read them.

To this, Buck countered, "If we issue an order or permits, there's got to be a stipulation for access. It's a privilege to divert water."

'Getting Away with Murder'

To staff's claim that it lacked the data to discern whether low flows were the reason IIFS were not being met, Bunn told the commission she believed that was "something of a red herring" in the Waikapu case. Pearson's November 29 letter to Chumbley included a chart showing that WWC diverted 37.3 million gallons into Reservoir #1 during September, the same month Chumbley claimed the low flows were due to low rainfall.

The entire time the Hui was being "brushed off," CWRM staff had the data proving that a violation occurred, she argued. A monthly diversion of 37.3 million gallons works out to a diversion of 1.2 mgd at a time when there shouldn't have been any diversion, she argued.

Commissioner William Balfour, at least, was convinced by the Hui's arguments.

"I cannot understand how Wailuku Water Company gets away with what they get away with," he said.

The company controls the water, but what do they use it for? he asked.

"They give it to basically the farmers, kalo primarily, and it goes to the County of Maui for potable water. Beyond that … I grew up in Waikapu. This reservoir [WWC's Reservoir 1], what in hell does it feed?" he said.

"Wailuku Water Company has an obligation first of all to install mechanisms for measuring, to monitor and report it. Plain and simple. You're talking to a plantation boy, 40-plus years. Right is right. Wrong is wrong. As far as I can figure it out, they're getting away with murder," Balfour said.

Moriwake warned the commission that the Waikapu case was 'just the tip of the iceberg," given the impending IIFS decisions. "We have every opportunity to get this right. … This is a golden opportunity," he said.

Moriwake noted that the state Agribusi-

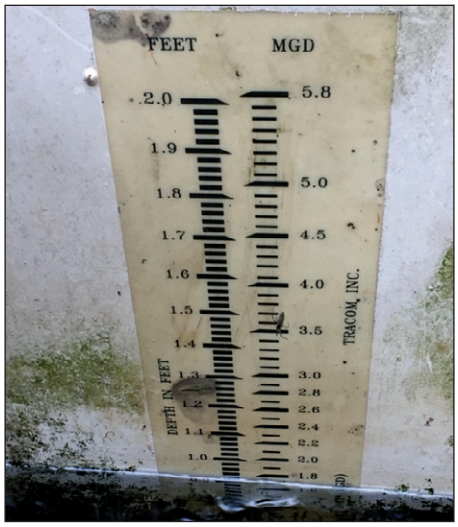

PHOTO: HUI O NA WAI EHA

This photo of the stream gage in Waikapu Stream shows flows were well below the interim instream flow standard of 2.9 million gallons a day (mgd) in October.

ness Development Corporation and the Kekaha Agriculture Association had not yet complied with IIFS for Kaua'i's Waimea River and its tributaries, eight months after reaching a settlement agreement, "which we heralded as groundbreaking."

"We're just pulling teeth on the implementation details," he said, adding that as hard as it is to get diverters to agree to new IIFS, "we're having a whole new mountain to climb on the back end, implementing and enforcing the law."

Hannahs, like Buck, seemed eager to pursue some kind of enforcement in the Waikapu case, at least. "Let's try things. The party can come and argue against it. Why is this so difficult here? … The patience of a community, they come to us with evidence in a reasonable and rational way, how do we make this a priority?" Hannahs asked.

Aaron Strauch, also with the stream protection and management program, replied that the matter should be the commission's highest priority and that it will be for the new staff member that the commission expects to hire. Also a priority: developing a mechanism for reviewing data from diverters. "It's only because the community brought this to us we have this before us," he said.

Uyeno added that the data analysis software whose purchase the commission had just approved should also help.

In the end, the commission resolved to require staff to provide an outline of terms setting forth the conditions in proposed permits or orders regarding streamflow measurements and penalties. As attorney David Frankel noted earlier in the meeting, state law grants the commission the power to require the diverters to install streamflow monitors.

"You've noted the problem. … You need to be requiring the folks who have these permits to tell you how much they're diverting every day. It's distressing that's not often a condition," he said.

He also urged the commission to ask the state Board of Land and Natural Resources — which grants annual revocable permits to EMI and its parent company, Alexander & Baldwin, for the diversion of dozens of East Maui streams — to make it a permit requirement that A&B/EMI install meters to monitor streamflow.

"Do that when they [A&B/EMI] come in for their RP [revocable permit] renewable every year," he suggested before adding that the commission should also require its staff to provide annual reports on IIFS compliance. ***— Teresa Dawson***

Recommended Amendments To Na Wai Eha Flow Standards

On November 1, hearing officer Lawrence Miike issued his recommendations to the Commission on Water Resource Management for surface water use applications, integration of appurtenant rights, and amendments to the interim instream flow standards (IIFS) of Na Wai Eha.

For Waikapu Stream, he recommended that the IIFS below the South Waikapu Ditch diversion remain the same as it was set in a 2014 settlement agreement and Water Commission order: 2.9 million gallons a day (mgd).

For Waihe'e River, the IIFS would be increased from 10 mgd to 14 mgd just downstream of the Spreckels Ditch diversion, "unless the flow at about 605 feet elevation is less, at which time the flow will be the corresponding amount." And at the river mouth, the flow would be increased from an estimated 6.0 mgd to an estimated 10.0 mgd "when reduced by losses into the streambed that are estimated as averaging 4 mgd, with estimates ranging from 2.1 to 5.9 mgd," he wrote.

The IIFS for North Waiehu Stream should be as established in the 2014 Mediated Agreement, at 1.0 mgd, "unless the flow at altitude 880 feet is less, at which time the flow will be the corresponding amount after subtracting for estimated losses," he wrote.

In the South Waiehu Stream, he wrote, the IIFS would be maintained at the status quo above all diversions near an altitude of 870 feet. Just below the Spreckels Ditch and at the stream mouth, the IIFS should be "as established in the 2010 Decision and Order," which is 0.9 mgd and 0.6 mgd, respectively.

Finally, the IIFS for Wailuku River should be 10 mgd just below the diversion operated by Wailuku Water Company above the 'Iao-Waikapu and 'Iao-Maniania Ditches, and 5 mgd at the mouth, he wrote. ***— T.D.***

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Aquarium Industry Group Loses Effort to Stay Fishery Injunction

PHOTO: NOAA

Yellow tang are a primary target of collectors in the aquarium fish trade along Hawai'i's Kona Coast.

On December 4, 1st Circuit Judge Jeffrey Crabtree denied a motion by the Pet Industry Joint Advisory Council (PIJAC) seeking a stay of his October 27 order halting the collection of marine life for the aquarium trade until an environmental assessment or impact statement is conducted.

In a November 8 motion, attorneys for PIJAC claimed that Crabtree's order — which merely implemented an earlier ruling by the state Supreme Court that all commercial aquarium collection permits issued by the Department of Land and Natural Resources were illegal and invalid — "caused, and is causing, devastating harm to participants in Hawai'i's commercial aquarium fishery."

O'ahu resident John Fernley's aquarium fish store, for example, is 40 to 50 percent dependent on locally sourced Hawaiian saltwater fish collected by five local divers, "none of whom can fish after the Court's October 27 ruling," the motion stated.

"Without these fish, Mr. Fernley says he will 'be out of business and will have to lay off [his 12] employees.' As he says, 'closing my business of over 40 years would cause immense hardship for not only me and my family, but also my employees and their families, as well.' Given the length of time Mr. Fernley has been in the tropical fish business and his advanced age, he would likely be unable to find another job. It is virtually inevitable that he will lose his business and, therefore, his home as a result of the court's October ruling," it stated.

Kailua-Kona aquarium collector James Lovell, "a single father with a teenage daughter and another child who is in college, … will be unable to pay his bills, including his mortgage. He will be forced to sell his aquarium collection equipment and deplete his savings, making it nearly impossible for him to start over after the Hawai'i Environmental Policy Act review is complete," the motion continued, adding that hundreds of others in the aquarium fish trade will "suffer very real and very acute harm."

The group's attorneys argued that the aquarium collection permits, good for one year, issued by the DLNR's Division of Aquatic Resources conveyed constitutionally protected property rights and that any decision to not renew them would require cause and a hearing. Crabtree's order preventing any permit renewal, therefore, violated the U.S. Constitution, they argued.

"No due process has been afforded here, and no just compensation has been offered or provided. Thus, regardless of what the court, plaintiffs, and even the Supreme Court may believe state law requires, **federal law explicitly prohibits actions required by the court's October 27 order.** Under the Supremacy Clause of the United States Constitution, federal law must prevail," the motion stated (emphasis in original).

Should Judge Crabtree decide not to grant a stay, PIJAC asked that he allow the group to appeal directly to the Hawai'i Supreme Court.

In their memorandum in opposition to the motion, attorneys with Earthjustice, representing plaintiff Rene Umberger and others, argued that PIJAC's members have "no property interest in voided permits, no property right in public trust resources, and therefore were not entitled to due process prior to the injunction."

"Aquarium fish collection permits … are discretionary permits, which means the state could deny issuance or renewal at any time," they added.

Any harm to PIJAC's members' financial interests are not irreparable and the public has long suffered due to the commercial capture of fish and other wildlife "in unlimited numbers," they continued.

"PIJAC does not, and cannot, articulate how allowing a small group of individuals to continue to illegally extract public reef resources in unlimited numbers, for private profit, serves the public interest. … The industry can bear — indeed, it owes it to the public to bear — temporary economic inconveniences for the next several months while DLNR and commercial collectors complete the environmental review they refused to complete earlier," they wrote.

After hearing oral arguments on December 4, the judge denied PIJAC's motion, noting that the court's October 27 order is merely "implementing what the Hawai'i Supreme Court already ruled," hearing minutes state.

"There is nothing that this court is aware of in the rules of interlocutory appeals that permits the trial court to send this issue back to the Hawai'i Supreme Court when the trial court implements exactly what the Hawai'i Supreme Court ordered the trial court to do, and finds no support to send this case back to the Hawai'i Supreme Court at this time," the minutes state.

Crabtree also found that PIJAC was not likely to prevail in its arguments that due process had been violated. ***— T.D.***