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Environment Hawai'i
a monthly newsletter

Paradise Lost

Nearly two years after the *Pacific Paradise* ran aground just off Waikiki Beach, the federal government is coming after its owners for recovery of costs incurred in dislodging the burned hulk off the reef and into deep water, where it was sunk.

But what of the damages sustained to the state's resources?

As it turns out, the vessel owners and state attorneys quietly settled the Department of Land and Natural Resources' claim of more than $300,000 for about twelve cents on the dollar. Not included in this are response costs borne by other state and city agencies.

Maybe that settlement was the best that could be done under the circumstances. But if that is the best, then the framework under which the lucrative longline fishing industry is allowed to operate in Hawai'i needs to be changed.

IN THIS ISSUE

Settlement Lets *Pacific Paradise* Owner Pay DLNR Cents on the Dollar for Damage to Reef

At approximately 10:30 p.m. on October 10, 2017, the Commercial Fishing Vessel (CFV) Pacific Paradise, a 79' longline fishing vessel owned by TWOL, LLC, ran aground in shallow waters of the Waikiki-Diamond Head Shoreline Fisheries Management Area (FMA). Over the next several days, multiple towing operations proved unsuccessful and resulted in a fire on board that lasted for two days. The vessel was eventually removed 58 days later on December 7, 2017. Division of Aquatic Resources (DAR) biologist and technicians conducted a series of three different investigative surveys at the vessel grounding impact to carefully document the impact to the state's protected resources. Approximately 1,964 square meters of submerged lands were impacted during this event, including fully protected stony coral and live rock.

— Department of Land and Natural Resources Report

For nearly two months, the disabled *Pacific Paradise* was on full view of tourists and other members of the public who visited or worked in Waikiki. It had reefed just a quarter mile off the famed beach. Those who weren't in the area were still able to track the frustratingly slow progress of efforts to haul the damaged vessel out to sea, as the dramatic salvage attempts were the stuff of nightly news reports and daily headlines.

The Department of Land and Natural Resources' Division of Aquatic Resources was closely monitoring events. For more than a month, its biologists were unable to get a close look at the grounding site, deterred by fires, a deteriorating vessel, and rough seas.

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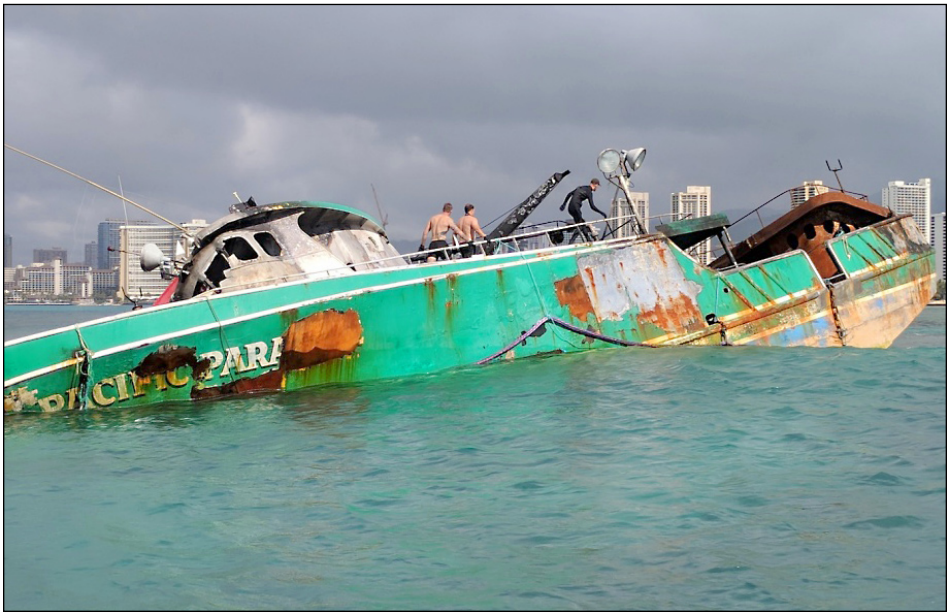

PHOTO: CHIEF PETTY OFFICER SARA MUIR

Responders work to salvage the *Pacific Paradise,* which grounded off Kaimana Beach, O'ahu, in late 2017.

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NEW AND NOTEWORTHY

Can't Cool Down: More than a decade ago at the Hawai'i Conservation Conference, Stephen Miller of the U.S. Fish and Wildlife Service office in Honolulu expressed his concern about the pace at which nighttime temperatures at high elevations were rising: .441 degrees centigrade per decade at upper elevation forests. "This will have a profound effect on plant and bird species. Most natural vegetation and agriculture crops in non-frost areas are negatively affected by higher nighttime temperatures, due to increased respiration. Increased temperature and stress on natives could favor invasives. Also, warm night temperatures will undoubtedly affect the distribution of malaria in Hawaiian forests and its impact on birds," he said in his 2008 plenary speech.

Now, according to Susan Cordell of the U.S. Forest Service, who is the science lead for the Hawai'i Experimental Tropical Forest (HETF) units in Pu'u Wa'awa'a and Laupahoehoe on the Big Island, research suggests that those higher nighttime temperatures are, indeed, harming the trees there. The 50,000-acre HETF was established in 2007 and has a 35-year permit to conduct research and education activities on state land.

In updating the state Board of Land and Natural Resources last month on research in the two forest units, Cordell said the data on nighttime temperatures show "that climate change is affecting our forests."

"As you increase minimum temperatures, which occur at night or the early morning, trees, which are normally resting during that time, are respiring higher. They're losing CO_2 (carbon dioxide) to the atmosphere rather than keeping it and turning it into sugars for growth. The phenomenon started in Costa Rica," she said.

Costa Rica has a 30-year data set. "We have 10 years, but we're starting to see a similar trend. They saw a strong relationship with tree mortality [and higher nighttime temperatures]. It's offsetting the carbon balance of the tree. I'm not sure what we can do about it. Documenting and understanding it is important," she said.

A Bat-Safe Wind Farm? The 21-megawatt Kaheawa Wind Power II wind farm on Maui received Land Board approval last month of a new Habitat Conservation Plan and Incidental Take License that allow the facility to harm or kill more endangered Hawaiian hoary bats (ope'ape'a) and geese (nene) than it was originally allowed to in 2012.

In 2014, modeling showed that the wind farm had reached its initial bat take limit of 11. To avoid further take, the facility stopped the turbines from spinning at night unless wind speeds exceeded 5.5 meters per second. The bats are known to prefer foraging at night in low wind. The company reports that it has not had any observed bat take since implementing its low wind speed curtailment program.

Even with zero observed take, there is a possibility some bats were killed and not found. So as of June 30, the facility's total estimated bat take was 13.

Under the new conservation plan and take license, the wind farm will be allowed to kill up to 38 bats during the license term, which ends in 2032. The allowable nene take would also increase, from 27 to 44.

To mitigate the increased take, the wind farm has already paid nearly $1 million for bat life history and ecology research on Hawai'i island. It may also fund the acquisition of bat habitat on Maui if take exceeds 30 bats.

Quote of the Month

"One may ask, is it a 'reasonable use of the land' during a time of sea level rise to develop it, to develop a parcel in a location where you know the parcel is not going to outlast the threats of sea level rise?"

— Chip Fletcher, Honolulu Climate Change Commission

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EDITORIAL

Longline Fishers Need Better Regulation

The pursuit of tuna can be profitable for holders of permits allowing them to catch prized bigeye in waters around Hawai'i. Here are a few of the benefits those permits confer to those who hold them:

- They can pay their foreign workers pennies an hour. A recent report found that these undocumented workers, such as those that were aboard the *Pacific Paradise* when it ran aground, earn on average $500 per year;
- They are allowed to avoid substantial penalties by pleading poverty. That's what the owners of the *Pacific Paradise* and *Pacific Dragon* did when the state tried to seek compensation for damage to the reef and also when the federal government sued them for violating the Clean Water Act;
- The messes they make are cleaned up at the public's expense. Again, to cite just the case highlighted in this issue, owners of the *Pacific Paradise* have argued in court that federal law limits their exposure should they eventually be found to be at fault.
- They are able to sell their fish at premium prices. According to one report, in May 2018, the average revenue just for ahi sales to each of the 114 boats that unloaded their catch that month was nearly $57,000. Over and above that were sales of non-target fish, such as mahimahi, ono, opah, and other species.

To support this enterprise, taxpayers spend millions of dollars a year in managing the Hawai'i-based longline fishery. This includes federal appropriations for the National Marine Fisheries Service's Pacific Islands Regional Office and its Pacific Islands Fisheries Science Center. The salary and benefits conferred on Kitty Simonds, executive director of the Western Pacific Fishery Management Council, as well as pay and benefits for her staff, fall into this category as well. There's the uncounted but substantial draw-down on the public purse when the Coast Guard responds to the distress calls of these vessels, which, as any stroll past the Honolulu harbor will reveal, can often be poorly maintained and barely seaworthy. Yes, they are required to carry observers at times – but they are reimbursed for that as well, again by taxpayers.

And the cost of these privileges to the permit holder?

The princely sum of $34 a year, if the permit is renewed online. Otherwise, it's a whopping $57.

Nor does there seem to be any penalty for permit holders whose actions come under repeated scrutiny. The owners of the *Pacific Paradise*, for example, were known to the Coast Guard to have a history of engaging in practices that led to oil pollution long before the events aboard another of their vessels, the *Pacific Dragon*, led to a Clean Water Act lawsuit. Yet the *Pacific Dragon* is still plying the seas, under a "new" owner – same people, just a different name.

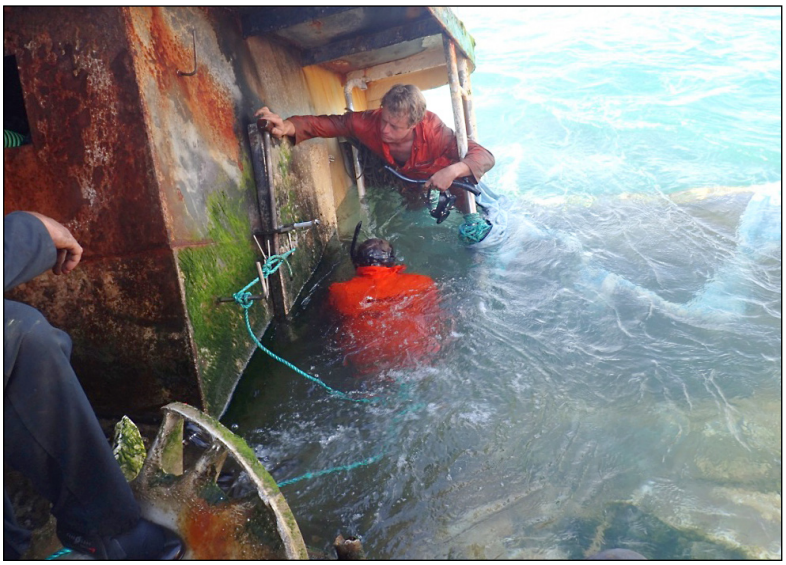

PHOTO: COURTESY OF U.S. COAST GUARD

Responders worked to ensure the *Pacific Paradise* was watertight before attempting to refloat the vessel off the reef in Waikiki.

No Indemnity

If you own a car, you must carry insurance. It's the state's way of making sure that if you damage people or property while driving, those who are injured aren't forced to pay the costs of being made whole.

But if you own a commercial longline fishing vessel, there's no similar requirement. The state Department of Transportation does require vessel owners who tie up at its piers to indemnify the department and its employees "against all losses, claims, demands, and suits for damages … incident or resulting from their operations" at DOT facilities – and only at DOT facilities.

(That hasn't always worked out well, as attests the DOT's 10-month-long effort in 2015 to remove a sinking, derelict, fishing vessel, the *Judy K*, from Pier 16 in Honolulu Harbor.)

The National Marine Fisheries Service, which grants fishing permits to the longliners, does not require them to carry any insurance, nor does the Coast Guard.

Moving Forward

To protect the state's reefs, it is vitally important that it have the ability to recover damages caused by groundings and other human-caused activities. The state's law requiring vessels moored at Department of Transportation facilities to have insurance adequate for damages *only at those facilities* should be changed to require that the state be indemnified against damages throughout state waters.

Bryan Ho, attorney for the *Pacific Paradise* owners, argued that by statute, the Department of Land and Natural Resources was limited to collecting fines for damage to corals and live rock and is barred from seeking recovery of the value of the resources themselves. While the Supreme Court's decision in the Pfleuger case would seem to argue against this position, it might not be a bad idea for the Legislature to consider amendments to statutory language that make it crystal clear that people or companies that destroy natural resources valued for their utility, their economic benefit, or their sheer beauty, will be held liable for the full loss.

Finally, the ability to hold anyone liable for damages requires that the state or federal government be able to identify the responsible party. Yet several of the 140-plus holders of federal longline permits are companies that have been dissolved or otherwise have no traceable registered agent. The Pacific Islands Regional Office of NMFS has a lot on its plate, to be sure, but it is a straightforward matter to double-check information provided by permittees against records maintained by the state and the Western and Central Pacific Fisheries Commission. Discrepancies need to be resolved immediately.

DLNR from page 1

Finally, on November 29, while the crippled boat was still firmly lodged in the coral, the DAR biologists got their first look at damage caused by the vessel itself as it ran aground, removal efforts, and debris. Subsequent surveys were made in December and in January and February of 2018.

Damage to live rock and coral was conservatively estimated by DAR at more than a quarter of a million dollars.

Despite the massive publicity given to the grounding and following events, the state's settlement of damages with the vessel owner received none at all. Instead, the Board of Land and Natural Resources agreed to settle for pennies on the dollar.

The Report

The results of the DAR biologists' analysis were written up in a March 2018 report. Among other things, they found that the extent of damage to the sea floor was more than half an acre, not counting areas scarred as the vessel grounded and the full 400-meter length of the egress scar created as the vessel carcass was hauled off. "Fish density, algal biomass, reef accreting substrate, and coral species were all found to be less in the vessel grounding impact site versus reference sites on the adjacent reefs," they found.

The report's authors had to estimate the extent of corals lost as a result of the grounding, since, "primarily only bare substrate remained at the primary/secondary and tertiary impact areas." (The primary area was where the vessel first hit the reef; the secondary area refers to a site about 30 meters away, where it landed after initial efforts to haul it off failed; the tertiary impact area is about 75 meters distant from the second, and it is where the vessel ran aground after a third removal effort was made on December 6.) Altogether, DAR concluded that most likely, 1,720 coral colonies were damaged, but acknowledged that the actual number could be as low as 18 or as high as 2,400. A total of 1,362 square meters of live rock was damaged, including 301 square meters of high-value live rock – rock that includes more organisms attached to it and a more complex three-dimensional structure.

The Recommendation

While the report – marked "Attorney-Client Privilege Draft" – was finished in March 2018, it wasn't until that following December that the Board of Land and Natural Resources took up the DAR staff's recommendation for fines and penalties against the vessel owner, TWOL, LLC.

DLNR rules set out fines for damages to aquatic resources, including corals and live rock. Fines for first-time violators are $1,000 per violation, plus $1,000 per coral specimen injured. For live rock – defined as "any natural hard substrate to which marine life is visibly attached" – a specimen is either an individual live rock or, if the violation involves an area larger than one meter, each square meter of live rock.

On the basis of those rules, DAR staff calculated that with 18 coral colonies damaged (the low-end estimate), plus the per-incident fine, an administrative fine of $19,000 was warranted.

For damage to 1,361 square meters of live rock, the fine would come to $1.362 million.

However, the staff went on to provide a breakdown of the coral and live rock values based on "penalty matrices" the DAR has recently developed. Based on those matrices, the revised stony coral value comes to just $2,015, while the revised value of damaged live rock was placed at $266,200.

The recommendation also included a tally of staff hours and costs for the surveys done by DAR. Those costs came to $14,443.59.

Finally, staff proposed a fine of $17,835 as a result of the public's loss of use of the area.

Total penalties and costs amounted to $300,493.59.

The Discussion

At its December 7, 2018 meeting, just moments before the Land Board took up discussion of the proposed penalties and fines for TWOL, deputy attorney general William Wynhoff informed the board that a contested-case hearing had been requested by attorney Bryan Ho, representing the company and its principals, Loi Hang and Nguyen Ngoc Tran.

But on learning that by filing a request, the board would effectively be precluded from discussing the matter, Ho requested that the request be withdrawn without prejudice.

Ho went on to state that the proposed fines were "penal and not compensatory" and "are not awardable." The damage to live rock made up the largest part of the proposed fine, he noted, but "live rock is not considered aquatic life."

Brian Nielson, then acting head of DAR (since appointed to the position), explained that live rock supports crustose coralline algae, which are precursors to corals. He also provided details on the DLNR's actual out-of-pocket costs of investigating the damages.

Board member Stanley Roehrig asked why the division was going after just this one boat. "It's small money," he said, then asking "why haven't we gone after the association? They got money… The deep pocket is the association."

Ho, however, noted that the workers who were being brought to Hawai'i on the *Pacific Paradise* when it ran aground "were not brought on for an association. They were brought up [from American Samoa] for certain other vessels in the longline industry… I don't even know what association member Roehrig" was referring to. If it was the Hawai'i Longline Association, he said, that "is organized solely for lobbying."

The penalties proposed "vastly exceed what's allowed by law or what they can prove to the requisite degree of certainly," he continued, and the board should deny the proposed fines "as a practical matter. The respondent's financial ability is a consideration that has to be considered. I provided the deputy attorney general all tax returns for 2015, 2016, and 2017.

Continued on next page

They" – the company – "are existing solely for the purpose of responding to inquires like this and possibly an inquiry by the Coast Guard to be reimbursed for their expense. That's why we have not voluntarily dissolved already."

"This was an accident. Nobody wants their boat to go on the reef.... My clients did a Herculean effort and spent more than $1.5 million to get the boat off the reef," he said.

Then-board member Keone Downing responded, "Yes, it's an accident, but at the same time, for me, somebody fell asleep on the job," referring to the fact that there was no one on duty in the wheelhouse when the vessel ran aground.

With respect to fines, he went on to say, "you're saying that basically it should only be $1,000 here or there.... I guess from my side, I get the hard part. There was negligence. Is there a fee for negligence?"

"I personally don't think so," Ho replied. "Whether you want to call it criminal or civil in nature, [the proposed fine] is still penal."

Board chair Suzanne Case then noted, "It's a sanction."

Board member Chris Yuen pointed out that the Hawai'i Revised Statutes provide for a fine of $1,000 per specimen for coral, and DAR has proposed fines based on the low end of its estimate of damage to corals. Damage to live rock is measured on each square meter taken.

"That is DAR's argument," Ho responded. But, "the legal definition of aquatic life does not include coral." As for damaging live rock, the maximum fine, Ho said, is $1,000.

Board member Downing said he had dived in the area, where "live rock stands up 3-4 feet like a tree, so when you break it, you break the habitat of a lot of things, from top to bottom.... It could make sand, eventually. [The grounding] destroyed an area, changed the demographics of an area."

The board entered into executive session. On reconvening in public, Board member Tommy Oi moved to approve the fines as recommended by DAR. Downing proposed an amendment, to eliminate the penalty associated with depriving the public of the use of the area. "I don't think there was much public use at that time. ... It was closed off for diving, and it was winter time, so there was no surf."

Roehrig noted that paddlers were inconvenienced, and Case objected to the idea of eliminating the penalty associated with public use altogether. In the end, the board reduced the public-use penalty by $10,000, leaving it at $7,835 and reducing the total fine to $290,493.59.

At that point, Ho renewed his request for a contested case hearing.

The Outcome

In a normal contested case hearing, there's a hearing officer who hears witnesses, reviews records and evidence submitted by the parties, and issues a proposed decision. A court reporter prepares transcripts. On rare occasions, the full board might hear the proceedings.

None of that seems to have occurred in this case.

Instead, as reported in a "proposed stipulated judgment and settlement agreement," after the contested case was requested last December, the state and TWOL "have engaged in subsequent settlement discussions to attempt to resolve the matter prior to a contested case hearing."

On June 17, Brian Ho and DLNR deputy director Robert Masuda signed the agreement, which knocked down the total penalty to about an eighth of what DAR had proposed – from $300,493.59 to $37, 603.59.

On June 28, at a "settlement approval hearing" held moments before the Land Board began its regular, publicly noticed meeting, the agreement was approved with the consent of four board members: Case, Roehrig, Yuen, and Jimmy Gomes.

The payment reflects the full cost of investigation ($14,443.59) and the public loss of use (proposed by DAR at $17,835 but reduced at the December meeting to $7,835). The loss of stony coral was valued at $2,015, mirroring the recommendation of DAR.

Where the settlement diverged was in the assessment of damage to live rock. Where DAR had proposed fines of $266,200, the settlement pegged damage at just 5 percent of that: $13,310.

The settlement notes that TWOL claimed that "DAR's request to be compensated for the alleged value of natural resources lost is not a viable claim as a matter of law," since the remedies authorized by law "are penal, not compensatory, in nature." At most, "for any proven violation" of DLNR rules relating to damage to coral or live rock, the most the Land Board can fine TWOL is $1,000, it maintained.

TWOL raised the same argument with respect to DAR's proposed claim of damages resulting from the loss of public use.

Finally, there was the matter of the company's ability to pay restitution. "In deciding whether to settle a case, the board must consider not only the likelihood of prevailing on its claims, but also the likelihood of recovery in the event of a favorable judgment," the settlement states.

"One important factor in reaching the proposed settlement was TWOL LLC's insolvency and inability to pay a fine. TWOL LLC's primary asset, the [commercial fishing vessel] *Pacific Paradise*, was disposed of at sea after removal. TWOL LLC has not generated any revenue since the grounding.... On March 8, 2019, TWOL provided DAR with a letter the company received from the U.S. Coast Guard National Pollution Funds Center (NPFC) setting forth a demand for TWOL LLC to reimburse the NPFC $1.7 million... Based on DAR's investigation of TWOL LLC's financial capability and resources to date, if the board did continue to pursue this action, any penalty awarded by the board or any judgment on appeal would likely be unenforceable."

According to the DLNR's public relations office, the settlement payment was made to the DLNR in July.

— Patricia Tummons

Feds Seek Reimbursement of Costs To Salvage Grounded Fishing Vessel

The federal government is suing the owners of the *Pacific Paradise* for at least $1.66 million in an effort to recover costs associated with removing the fishing vessel from the reef off Waikiki where it ran aground in October 2017.

The claim was filed in U.S. District Court in Honolulu on October 17, two years and a week to the day that the 79-foot longline vessel drifted onto the reef, carrying 20 individuals, nearly all of whom were foreigners being brought to Hawai'i from American Samoa to work on other vessels in the Honolulu-based longline fleet.

But whether any of this claim will be repaid, much less all of it, is not at all clear.

For one thing, the company that owned *Pacific Paradise* appears to have no assets at this time. That company, TWOL, LLC, had owned two longline vessels, *Pacific Paradise* and *Pacific Dragon*. *Pacific Paradise* was burned and damaged beyond repair as a result of the grounding, and now sits on the seafloor some 13 miles offshore of O'ahu.

For another, the owners of TWOL – Loi Chi Hang and Nguyen Ngoc Tran – were determined in another federal action settled last August, to be virtually indigent. In that case, involving significant violations of the Clean Water Act, civil penalties were proposed totaling several hundred thousand dollars. After reviewing tax and other financial records of Hang, Tran, and TWOL, the Justice Department allowed them to settle for a total of just $13,000.

On February 15, 2018, barely two months after the *Pacific Paradise* was sunk, Hang and Tran formed a new company, LNK Fishery, LLC, and transferred ownership of the *Pacific Dragon* to this entity. That leaves TWOL without any apparent assets that could be attached to satisfy the Justice Department's claim.

Oil Pollution Act Claims

The Oil Pollution Act of 1990 allows the government to recover any and all removal costs incurred by the Oil Spill Liability Trust Fund. In the case of the *Pacific Paradise* grounding, the fund was tapped to pay for costs of removing the vessel from the reef.

The contractor Resolve Marine undertook most of the removal efforts. The claim for its work comes to $902,350.17. All other claims are to reimburse the Coast Guard for contracts ($47,169.08), equipment ($282,453.31), personnel ($351,271.45), travel ($73,648.23) and civilian overtime ($475.93). In addition, the lawsuit says the government will seek to recover "interest, administrative and adjudicative costs, disbursements, and statutory attorneys' fees recoverable" under the Oil Pollution Act. What's more, "the United States expressly reserves the right to amend this complaint to add … claims for natural resource damages."

According to the claim, the lawsuit was filed only after demand for payment was made upon the defendants: "The United States has made demand upon Defendants for reimbursement for all the outstanding response costs and damages owed by Defendant as a result of the [Oil Pollution Act] Removal and Response Action, and said monies remain unpaid."

The complaint also alleges that the defendants are in violation of the Federal Debt Collection Procedures Act. Instead of "discharging debts owed to the United States," the complaint says, defendants "transferred, sold, spun off, and assigned assets so as to prejudice and cause irreparable harm to the United States."

The Response

On November 13, attorney Bryan Ho filed an answer to the complaint, which, he says, "fails to state a claim or claims … upon which relief can be granted."

If the Coast Guard "sustained any damages as alleged … which is denied, defendants are entitled to limit their liability" under the Oil Pollution Act limits on liability, Ho claims.

Ho also denies that Tran and Hang were vessel owners and argues that, in any event, the government's claims are "time-barred by the applicable statute of limitations."

The government also proposes to fine the vessel master, Cong Van Nguyen, $5,000 for "operating a vessel in a negligent manner so as to endanger life, limb, and property." No filing on Nguyen's behalf was made by press time.

A scheduling conference has been set for December 16 before Magistrate Judge Rom Trader.

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The Clean Water Act Violations

Continued on next page

Discrepancies in Records of Vessel Owners

Michael Tosatto, administrator of the Pacific Islands Regional Office (PIRO) of the National Marine Fisheries Service, says his office requires holders of longline permits "to list the business and to declare (under penalty of perjury) that the information is true. We exercise due diligence in all cases and will routinely inquire further for a first-time applicant or when there is some reason (such as a different owner listed on the U.S.C.G. document). Any apparent issues will be clarified or provided to the [Office of Law Enforcement] for investigation. There is some expectation that the owner will maintain good business standing … and any change in the submitted application information must be reported to PIRO in writing within 15 days of the change. Failure to report such changes may result in a permit sanction."

There are 149 permits listed on PIRO's website, including one, *Miss Emma*, that burned at sea in September. *Environment Hawai'i* reviewed records for the 148 remaining and found 20 instances of permits held by businesses that were not in good standing with the state Department of Commerce and Consumer Affairs (DCCA). Three had been administratively dissolved.

In the case of 12 permits, ownership records provided to the Western and Central Pacific Fisheries Commission (WCPFC) diverge from those on the PIRO list. Four vessels on PIRO's list do not appear on the WCPFC registry, while the WCPFC registry lists one Honolulu-based vessel that does not appear on PIRO's list.

Twenty-nine of the permits are held ultimately by one of four companies: Dang Vessel Holdings, LLC; Dang Fishery, Inc.; Nguyen Fishery, Inc.; and Pacific Fishing and Supply, Inc. Those companies, in turn, have the identical roster of officers or members: Hanh Thi Nguyen, Minh Hoang Dang, Sean Dang, and Kang Dang.

Five vessels are held by Vessel Management Associates, Inc., whose owners – Sean Martin and Jim Cook – have been leaders of the Hawai'i Longline Association and who have frequently served on the Western Pacific Fishery Management Council. ***— P.T.***

Parties Offer Final Arguments In Na Wai Eha Contested Case

"No pressure, but history is in your hands," attorney Pamela Bunn told the Commission on Water Resource Management during oral arguments in the Na Wai Eha contested case hearing, held November 19 in Wailuku.

Fifteen years after Earthjustice, on behalf of the community group Hui o Na Wai Eha, filed petitions to amend the interim in-stream flow standards for Wailuku, Waiehu, and Waihe'e rivers and Waikapu Stream, all in Central Maui, and 13 years after the commission designated the watersheds feeding those streams as a surface water management area, a decision on who gets what and how much water will remain in the streams is near.

But at the November hearing, it became clear that the commission's task won't be as simple as approving the 500-plus-page proposed findings of fact, conclusions of law, and decision and order (D&O) issued two years ago by hearing officer and former Water Commissioner Lawrence Miike.

Hawaiian Commercial & Sugar (HC&S), to which Miike proposed allocating 15.65 million gallons of water a day (mgd), received commission approval in September to transfer control over its water use permit application to Mahi Pono, LLC. Mahi Pono, which also receives diverted stream water from East Maui, is still in the nascent stages of growing diversified food crops on a portion of HC&S's former sugarcane lands.

At the start of oral arguments, commission chair Suzanne Case noted that Mahi Pono, the Office of Hawaiian Affairs (which Bunn represents), and Earthjustice's clients (the Hui and Maui Tomorrow Foundation) had agreed to a stipulation and order under which Mahi Pono would receive an existing-use water permit for just 11.22 mgd. The company would be given an initial allocation of 9.35 mgd, and would receive an additional 1.87 mgd if and when it met the following conditions:

1) a licensed surveyor confirms that Mahi Pono has planted 1,850 acres of food crops in the Waihe'e-Hopoi fields before December 31, 2021;

2) the company consistently uses 4.5 mgd from its Well 7 for reasonable-beneficial agricultural use;

3) the company has an actual need for the additional water;

4) the company develops and implements a plan to minimize system losses; and

5) the company provides the community groups, OHA, and the commission with the information necessary to verify that the conditions have been met.

Among other things, the company also agreed to invest $250,000 in the plan to address system losses, to fully close a low-flow intake on Spreckels Ditch on Wailuku River that had been partially sealed by HC&S, and to not transfer the permit or use its water allocation for anything other than agricultural use.

"Mahi Pono raises the standard for a new chapter in the history of agriculture for this region," Earthjustice attorney Isaac Moriwake told the commission.

"Through this long process, there have been community members that have actually passed on. This has been a long process and people have been very patient. … They will finally have an adjudication of their water rights," he said.

The commission is expected to issue a decision some time next year.

Continued on next page

Paradise from page 6

A federal lawsuit alleging violations of the Clean Water Act was filed June 21, 2018, and concerned illegal discharges of oily bilge water from the *Pacific Dragon* that occurred in early 2017.

"The *Elizabeth* has a history of violations of the Coast Guard's pollution control regulations," the Justice Department alleged early on in the complaint, although it does not provide any details of that history.

"Loi Hang and Nguyen Tran knew before December 1, 2016, that the *Elizabeth"* – now renamed the *Pacific Dragon* – "lacked the equipment and capacity to retain oily mixtures generated while underway and that the *Elizabeth* regularly discharged oil overboard during voyages," it went on to say. Nonetheless, it continued, they "directed the *Elizabeth* to get underway for fishing voyages between December 1, 2016, and March 2, 2017."

As described in the complaint, conditions in the vessel were not just in violation of federal law with respect to oily wastes, but unsanitary and unsafe as well: "Pathways for excess water to enter the engine room included a corroded and deteriorated metal bulkhead and a faulty shaft seal that allowed free flow of fluids between the engine room bilge and the fish hold. When ice melted in the vessel's fish hold, water flowed through the unsealed shaft fitting and other holes in the bulkhead into the engine room bilge. Bilge water containing oil waste and other bilge contaminants could also flow from the engine room into the fish hold."

These were the conditions found when, on March 2, 2017, a law enforcement team from the Coast Guard boarded the vessel as it was returning to port in Honolulu.

"TWOL LLC, Loi Hang, and Nguyen Tran are each liable for civil penalties of up to $46,192 per day of violation or $1,848 per barrel discharged" under the Clean Water Act, the complaint noted. And if those violations are proved to be "the result of gross negligence or willful misconduct," the fines would rise to a minimum of $184,767, and up to $5,543 per barrel discharged.

In addition, the *Elizabeth* had no capacity to retain oily mixtures on board, making the defendants liable for penalties of up to $46,192 per day of violation, and it also did not display placards informing crew members of prohibitions on the discharge of oil in languages read by the crew and displayed in the engine room or ballast pump control stations. Rather, "Coast Guard officers found a 'Discharge of Oil Prohibited' placard written in English and no other language affixed to the mess deck door…. [F]oreign crew members working aboard the *Elizabeth* between December 1, 2016 and March 2, 2017, were unable to read English."

A week after the complaint was filed, notice of a proposed consent decree was published in the *Federal Register*. The defendants were to correct the violations identified in the lawsuit and pay a total of $13,000 in penalties. "The penalty amounts were set after considering each defendant's limited ability to pay a higher penalty, as demonstrated through documentation submitted to the United States and analyzed by a financial expert," the notice says. "TWOL LLC must pay a civil penalty of $1,000; Mr. Hang must pay a civil penalty of $8,000; and Mr. Tran must pay a civil penalty of $5,000."

Tran and Hang are listed on the state Department of Commerce and Consumer Affairs website as principals of two companies that hold longline permits. They are the sole members of LNK, LLC, which owns the *Pacific Dragon*. And they are listed as directors of Lady Karen, Inc., which owns the *Lady Karen II*.

— Patricia Tummons

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More Water

While the stipulation provided some respite to what could have been a contentious debate over Mahi Pono's water needs, OHA and the community groups were far from satisfied with the rest of Miike's proposed D&O.

In particular, they argued that water should be allocated to the dozens of taro farmers who applied for a traditional and customary (T&C) rights use permit, but were not recognized by Miike because they failed to show they were lineal descendants of people who used the properties in the same way they proposed to more than a century ago.

The stipulation with Mahi Pono frees up 4.43 mgd that Miike had slated for HC&S. Bunn suggested that some of the other allocations Miike proposed could also be reduced. For example, she mentioned that Makani Olu Partners, LLC, which mainly raises cattle, would be awarded 138,200 gallons per day, or 2,090 gallons per acre per day under Miike's proposal. She pointed out that other similar operations in the area used far less or none at all for irrigation.

"The question is whether that is reasonable-beneficial if nobody else needs it," she said.

Avery Chumbley, representing the company, thought it odd that OHA, Hui o Na Wai Eha and Maui Tomorrow would oppose such a small allocation.

"They propose a 90 percent reduction. … It seems like a lash-out against me personally as operator of Wailuku Water Company," he said.

Bunn and Earthjustice's Isaac Moriwake argued that the proposed allocation to Wailuku Country Estates was also too high. "The water [the D&O] does award is phenomenal, close to 4,000 per day per lot," Bunn said, adding that was more per-acre than what Mahi Pono plans to use. Moriwake added that Wailuku Country Estates itself has stated that it limits users to 2,666 gallons per day. "There should be no basis for allocating any more than that for sure," he said.

Wherever the water for T&C permit applicants comes from, OHA and the community groups argued that denying them permits would be unjustified.

"Nothing in Hawai'i's constitution, statutes, or legal precedents requires an ahupua'a tenant seeking to exercise his or her T&C right to cultivate kalo to show that his or her direct ancestors cultivated kalo in the same location prior to November 1892. All that must be shown is that the traditional and customary practice of kalo cultivation was established in the ahupua'a comprising Na Wai Eha prior to November 1892, which is both undisputed and undisputable," OHA stated in its exceptions to the proposed order.

Miike had recognized only 13 of the 40 T&C permit applications submitted by native Hawaiian applicants who established their right to cultivate kalo, OHA continued. "Imposing the restriction would thus plainly violate the Commission's 'affirmative duty to . . . preserve and protect traditional and customary native Hawaiian rights,'" OHA stated.

Hui president Hokuao Pellegrino contested Miike's decision not to grant him and his wife Alana a T&C permit. "Both my wife and I are kanaka maoli. … There was no process for me to prove I am genealogically connected to this parcel, even though I am," he told the commission. Even though he can prove a connection, he continued, "it is irrelevant because I am kanaka."

He asked that his water use permit for his kuleana taro patches be categorized as a Category 1 T&C permit. Miike had proposed granting the Pellegrinos water under Category 2 permits for appurtenant rights holders, as well as a Category 3 permit for new uses. Category 3 permits, however, would only be honored if there was enough water, Miike proposed.

Bunn said it was wrong for Miike to have imposed the lineal descendent requirement. "I don't think there is any precedent. That is an issue that would force OHA to appeal [the commission's decision]. It has a very very concrete impact," she said.

She also asked the commission to eliminate Miike's recommendations capping water for T&C uses to one acre. "Again, there is simply no precedent for that. That is something Mike apparently thought would be a good idea without really saying why. Again, it has practical consequences," she said.

Implementation

In describing how the proposed D&O vastly underestimated the water needs of the kuleana parcel where he and his father operate a catfish farm, Bryan Sarasin, Jr., also shed light on how it's nearly impossible to ensure consistent water flow from the ditches operated by Wailuku Water Company (WWC), which he and many other kuleana landowners rely on.

He said he's spent countless weekends cleaning the auwai by hand trying to increase flow for kuleana users, "to get every drop flowing to the farmers on the auwai."

"It is in your hands to allow me to do this [raise fish] for the rest of my life … or leave big holes in the ground," he told the commission.

Commissioner Neil Hannahs asked Sarasin whether his issue was with the amount allocated in the proposed D&O or the amount of water that actually gets to his property.

He said it's both. The proposed D&O allocated one sixth or one seventh of what his farm needs, he said, adding that he has provided information to the Water Commission clarifying how the farm's water needs were calculated in his father's water use application. "I was able to show beyond a shadow of a doubt this is the amount of water we use … to have fish grow quickly, stay disease free, stock ponds…," he said.

In addition to the need for a larger allocation, he said there is an ongoing issue about water flow through the ditch system. He said he has to do a lot of the clearing himself. "It's a lot of work. … Sometimes you gotta drop in by ropes just because of the terrain."

Commissioner Kamana Beamer asked if the community could collectively manage the system if the commission established a process to allow for that.

"Being brutally honest, we've got a number of people on the system willing to cooperate. Some, not so cooperative for whatever reason or reasons," he said. He added that there are big swaths of land between some of the intakes that go untended. "Who's going to take care of this? Some people put in a lot of work, a lot more than what they should be, while others don't do their share and enjoy the water," he said.

Sarasin's plight exemplified the difficulties surrounding the implementation and enforcement of interim instream flow standards, as well as any water use permits that the commission grants.

Paul Mancini, attorney for WWC, complained that the company will be tasked with distributing water to permittees in an equitable fashion, but with no standards to guide how that should be done.

"There are very few users that are metered," he said. Even so, Miike's D&O tasks WWC with developing an implementation plan to allocate water, after first conferring with the Water Commission. "It's an improper delegation. These are obligations on the commission," he said, adding that the commission needed to develop rules to regulate the allocation of water to permittees taking water from the four streams.

It could take a year to pass such rules,

Continued on next page

Commission on Water Resource Management heard oral arguments on Maui last month in the Na Wai Eha contested case hearing. (From left to right: Mike Buck, Wayne Katayama, Neil Hannahs, Suzanne Case, Paul Meyer, and Kamana Beamer.)

he continued, expressing his hope that an implementation plan is in place before low stream flows require WWC to restrict allocations to permittees.

For one thing, "we have no way to accurately measure what is getting down and how it's used," Mancini said, adding that WWC also doesn't have a control mechanism to reduce the permittees' use.

"They [WWC] need help. … I think that's what the commission is for, is granting help," he said.

Commissioner Mike Buck asked what WWC's obligations were as the diverter of the water.

WWC's Chumbley said he thought that would depend on what the commission decides. "Should we have gages? Yes. Maintain the system to an operational standard? Yes. Beyond that, we're just diverting to someone else," he said.

Commissioner Beamer asked whether WWC is required to deliver water to people with appurtenant rights vs. people who pay the company.

"An excellent question," Mancini replied. He explained that the state Public Utilities Commission, which regulates utilities such as WWC, has not allowed the company to take on any new customers in the past decade. Providing water to a user with appurtenant rights who is not a current customer may require the PUC to make an exception.

"In any case, some tariff would be established by the PUC," Chumbley added. Users with appurtenant rights would be subject to a tariff that they have not had to pay in the past, he argued. "Now that we're a quasi-public utility, there will be a public hearing process…. The PUC will determine if there is a tariff or rate to participate in that system," he said.

Mancini said that WWC obviously wants more water users, but there is a problem with access to the ditches that's not dealt with in the proposed implementation program.

Commissioner Hannahs asked WWC what it has invested in infrastructure improvements to avoid system losses.

Chumbley said he didn't bring that information with him and the last real study done to determine losses and improvements to be made was in 1984. He said that the company has downsized from 15 reservoirs to eight, and has repaired diversion weirs, earthen banks and other places where there may have been leaks.

He said the company lost $2.5 million between 2007 and 2018. "We're not making money. We've burned through any cash reserves we had. … We're at a financial point I'm not sure how much longer I can continue to be able to do this. Had I had more cash reserves, maybe I would have done more system losses work," he said.

Given that, Hannahs said it was "hard to hold out a lot of hope there will be improvements in system losses."

"You're talking about millions of dollars to line ditches. … It's an open system that only functions with a certain amount of water going through it," Chumbley explained.

Even so, Hannahs said an investment in stemming system losses has to be made at some point. He raised the allegation — backed up by video — made by Hui president Pellegrino that WWC was dumping unused, diverted water from its system into Kealia Pond.

Chumbley explained that the irrigation system was built to take all of the water from the streams and use it all on a daily basis. Today, it doesn't always happen that the amount diverted matches up exactly with what's used, he said. "It's not dumping water, it's releasing water. … If you have an open system … you don't have a valve to turn on and off," he said.

To Hannahs, it sounded like more communication with the ditch users on their water needs would help. While Mancini had argued that the commission should not delegate its authority to implement the permit allocations to WWC, Hannahs asked, "Why not have an expectation you all would work together and reach an agreement like Mahi Pono [that] leads to better management and better resource use?"

Mancini replied that his concern was with the lack of standards for decisions on prorating of water. "It creates a serious problem because everybody is going to be pointing fingers on it," he said.

Already, Chumbley said he didn't think there was enough water in the ditch system to meet the 39 mgd in permitted allocations proposed in the D&O. At best, between 17 mgd and 24 mgd flows in the system these days, he said.

What if WWC is not viable going forward, and if so, how will that affect the kuleana owners who depend on the ditch system? Moriwake said he thought there is an opportunity to reconnect those kuleanas to the stream to make sure there's more consistent water delivery.

Historically, it was recognized that kuleana owners had priority use of the ditch water, he said.

Given Chumbley's claims about the impending PUC tariffs, Commissioner Buck asked Moriwake who should pay for the diverted water and who should not.

"I can start with who should not pay. The kuleana users who have been made to rely exclusively on the ditch system. There's an obligation [by the diverter], having cut them off [from the streams]," Moriwake replied.

With so many non-paying users, Moriwake conceded that it may not be viable for a private company to run the ditch system. "Talks are ongoing or are already done for this system to be transferred to a government entity," he said.

Commissioner Beamer asked whether it could require a diverter to ensure that appurtenant rights are guaranteed.

Moriwake said it could, because in all of Hawai'i case law on original water com-

Continued on next page

BOARD TALK

Owners of Sunset Beach Home Contest Proposed Fine, Sand Burrito Removal

One would think home buyers might want to conduct due diligence investigations before they close on a home along Sunset Beach that looks as though it might not survive the winter swells without some fortification.

One would also think the real estate agent for the seller would provide information, before the sale closed, to the buyers' agent on any government authorizations for the shoreline protection structure fronting the property, in this case, a single, temporary sandbag burrito.

According to documents submitted to the state Department of Land and Natural Resources, that doesn't appear to have happened with the as-is sale of a 1,600 square foot home, where new owners Gary and Cynthia Stanley had a contractor install additional burritos.

The Stanleys are the most recent property owners in the area to face fines for allegedly violating state Conservation District rules by installing structures on the beach to keep their house from being dragged into the sea.

In a September 14 letter to Department of Land and Natural Resources (DLNR) director Suzanne Case, the Stanleys admitted to being made aware of the property's serious erosion problems before they bought it, but claimed they were led to believe that they had a permit to add to the sand burrito that the department had allowed the previous owner to install earlier this year.

They were wrong.

On November 8, the DLNR's Office of Conservation and Coastal Lands recommended that the Board of Land and Natural Resources fine the couple $2,000 for unauthorized construction and charge them $1,000 in administrative costs. The office also recommended that the Stanleys remove the structure to avoid erosion around the ends of the structure (called flanking) and that the board impose additional fines of $15,000 for every day the fines were unpaid or the structure remained in place.

Because the couple's attorney, Greg Kugle, requested a contested case hearing on the alleged violation and proposed fines, the board did not discuss or vote on the matter at its November meeting. By requesting a contested case hearing, the Stanleys have likely bought themselves enough time to keep their sand burritos in place through the winter surf season, when waves on O'ahu's North Shore are the highest.

Hot Potato

"Over the past several years, the department, through the OCCL, has worked with landowners in the subject area to manage severe erosion. Dozens of authorizations for temporary soft erosion abatement have been granted (more than 40) and sand pushing requests (to artificially re-create the storm berm) have become seasonally recurrent," the OCCL's report to the Land Board states.

The OCCL has been overseeing erosion control measures fronting the Stanleys' home for nearly six years, beginning with a January 2014 emergency authorization for a sand push. The following year, a previous owner, Alice Lunt, requested and received permission from the OCCL for another sand push in 2015 for her property as well as several neighboring properties on Ke Nui Road.

When Gary Karrass bought Lunt's property in February 2018 for $2 million, the sales pitch on HiCentral.com called it a "prime ocean/beachfront home" that boasted fabulous views of the "World Famous" Sunset Beach to Ka'ena Point.

"Watch pro surfers & whales during the winter months & turtles & monk seals during the summer months. … After a day frolicking in the sun, sand, & surf, enjoy the wonderful outside hot/cold shower. Possibility of adding second ADU home. This home has a LEGAL VACATION RENTAL LICENSE. BEST DEAL FROM SUNSET TO PIPELINE!!!!!" the site stated. (ADU stands for accessory dwelling unit.)

In March 2018, Karrass joined five neighbors in agreeing to the terms of another sand push. But by 2019, in the midst of remodeling his new investment property, he wanted something more substantive. On February 7, developer Jillian Spaak was given permission from OCCL and Case to install a single, temporary ballast tube wrapped in a tarp (a.k.a. sand burrito) at the base of a steep escarpment that had formed below Karrass's home.

"If you proceed, you are proceeding at your own risk. We will come take a look after the swell and determine what happens next (e.g. removal/further permitting, etc.)," OCCL administrator Sam Lemmo wrote in an email to Spaak.

In her email that same day to Spaak and Lemmo, Case asked the OCCL to "keep an eye on the potential flanking issue, which may result in the temporary action authorized being revoked, if necessary."

With the burrito in place, Karrass (author of the 1987 book, *Negotiate to Close: How to Make More Successful Deals*) listed the home for sale in June for $2.688 million and sold it in late August to the Stanleys for $2.55 million. The sale was recorded in the Bureau of Conveyances on September 5.

Karrass's real estate listing on HiCentral.com had remarked: "Transferrable LEGAL VACATION RENTAL PERMIT! One of only a very few homes with a legal vacation permit on the North Shore. Exceptional investment home! This stylish house offers all of the amenities of an upscale hotel on the perfect stretch of beach with the best views."

The Stanleys, who own a home in Kailua, were experienced in managing vacation rentals. Gary Stanley has an Airbnb listing for a six-bedroom mountain chateau in Colorado Springs.

'Quite a Shock'

According to their September 14 letter to Case, the Stanleys conducted some due diligence before buying the Sunset Beach house, which sits on a lot of just under 5,000 square feet. They had been informed

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missioners, going back to the 1800s, water rights included not only the quantity, but the ability to access it. "I realize this is a new issue for the Water Commission, but the legal authority is there," he said.

Beamer returned to his idea of collective management, especially since the commission's limited staff would not be able to be "on the ground every day" to enforce the commission's decision.

Moriwake agreed that the situation in Na Wai Eha was a "tremendous opportunity for that type of collaboration. It starts with Hui o Na Wai Eha. … The board is unbelievably stocked with really capable, insightful leaders," he said.

Earlier in the meeting, Moriwake suggested that it may not be necessary to maintain the system as it is today. "I would venture that the system of the future is going to be a much smaller system. There may be segments you may have to spin off to the community," he said. — ***Teresa Dawson***

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of the property's severe erosion issues and had a structural engineer evaluate the home. The engineer, Horst Brandes, "informed us that this house was experiencing extreme erosion, was one of the worst he had seen, and that it was 'falling into the ocean.' He also pointed out that most of our immediate neighbors had geotextile blanket and tubing or a seawall grandfathered in like our immediate next door neighbor."

Also before the purchase, the Stanleys said, they spoke with contractor Buddy Sheppard, who installed the initial sand burrito for Karrass and the extra sand burritos for them. They said Sheppard had "informed us that we had a permit that was good for three years regarding the geotextile blanket and tubes to mitigate any erosion issues and to fix the steep drop off. He advised that the current system needed to be fixed and suggested adding additional tubes upon the failing current damaged system and to add tubes up to a 45 degree angle up to our deck where there is a steep drop off. Based on this, we bought the property."

Even though Sheppard was the one who told the Stanleys that there was a permit for additional work, he apparently only asked to see the permit after starting his work for them, according to their account. It was then that the couple discovered there was no permit, they wrote.

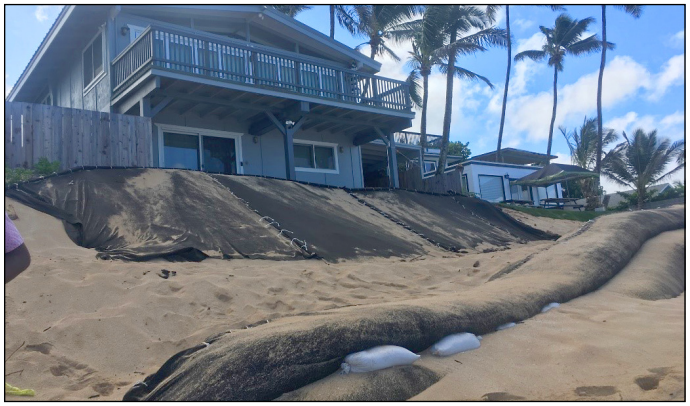
They attached a September 13 email from Scott Langford of Fahrni Realty, Inc., to Jerry Adamany, the real estate agent for the Stanleys. In that email, Langford included the February 7 emails Case and Lemmo sent to Jillian Spaak regarding the temporary sand burrito.

In their email to Case the next day, the Stanleys apologized for the unauthorized work and asked for permission to install a line of burritos up the scarp as Sheppard had recommended.

"[T]here is already significant water erosion up to the deck. … I note that the current fence is now leaning due to the erosion and that this fence used to go out about 4-6 feet further but was destroyed due to erosion issues,' they wrote.

The Stanleys' deed states that they agreed that the property was being conveyed in as-is condition, "WITHOUT WARRANTY OR REPRESENTATIONS, EXPRESSED OR IMPLIED." Even so, they wrote in their letter to Case, "It came as quite a shock that we did not have the proper permit as it was represented. Knowing that, we certainly would not have bought the property and most certainly would not have begun work without the proper permits. …

"We have six children (kind of snuck up on us :)) and this is where we want to raise our children. We want this to be a safe place (severe drop off on deck) and also structurally sound. We thought we were doing the right and sensible thing for our family and our home," they wrote. (Currently, the Stanleys have listed the 1,600-square foot, 3-bedroom, 2-bathroom home on Airbnb for about $800 a night.)



Unauthorized sand burritos installed below Gary and Cynthia Stanley's Sunset Beach property.

No Dice

Rather than granting the Stanleys permission to continue stacking burritos, the DLNR issued a notice of alleged violation and order on September 18 after an OCCL inspection. The notice recommended that they remove all unauthorized structures. Otherwise the matter would be referred to the Land Board.

When the matter was brought to the Land Board on November 8, the staff report from OCCL stated, "while soft measures are currently mildly effective at protecting beachfront development, it is understood that sea level rise will render these temporary measures increasingly ineffective. For this reason, the OCCL encourages beachfront homeowners living on chronically eroding shorelines to take proactive measures, such as decreasing their building footprint and relocating structures to the extreme landward extent of their property boundaries."

In the Stanleys' case, the agency stated it was particularly concerned about flanking to the west of the structure and that it was "potentially damaging to the beach and neighboring residences."

"[I]t appears that the Stanleys did not perform their due diligence in ensuring that the information that they were given regarding permitting was correct. … This case exemplifies brazen disregard for Hawaii Administrative Rules, which are intended to promote proper stewardship of Hawai'i's natural resources. In recent years, such disregard has become increasingly prevalent along Oahu's North Shore. … [L]andowners are actively being urged to install these structures by contractors profiting form their installation. It is our belief that this case exemplifies such unauthorized activity," the report stated.

The Stanleys' contested case petition argues that removing the burritos will "create a physical taking of their real property interests." — ***T.D.***

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City Climate Change Commission Mulls Changes to Shoreline Setback Ordinance

Sunset Beach homeowners Gary and Cynthia Stanley may have bought some time to keep their unauthorized sandbag burrito pile in place through the winter by requesting a contested case hearing from the Board of Land and Natural Resources (see Board Talk), but the long-term future of their home and others in the area is dubious, at best.

Hawai'i magazine last month reported on one 40-year Sunset Beach resident who has accepted that he may have to abandon his home as the shoreline erodes ever closer.

It's unlikely seawalls or other type of hardening will be a viable or even legal solution.

The Board of Land and Natural Resources has a policy against shoreline hardening within the Conservation District. The City & County of Honolulu does allow structures, including seawalls, to be built much closer to the shore than Kaua'i or Maui counties, but that may soon change.

Under the city's shoreline setback ordinance, structures must generally be built no closer than 40 feet inland from a certified shoreline. For shallow lots, the shoreline setback line can be as close as 20 feet from the shoreline to allow a minimum depth of buildable area of 30 feet.

With sea level expected to rise significantly in the coming decades as a result of climate change, the city Department of Planning and Permitting (DPP) is in the process of amending those standards, and Mayor Kirk Caldwell has sought guidance from the Honolulu Climate Change Commission.

DPP planner Katia Balassiano said earlier this year that her department is looking to Kaua'i's setback ordinance as a model. Kaua'i's minimum setback distance is 60 feet from the certified shoreline plus 70 times the historical annual erosion rate.

At its November 18 meeting, the commission discussed several other possible amendments. In addition to simply acknowledging the science of climate change and sea level rise, the setback ordinance should also be tailored to the specific physical and/or ecological characteristics of an area and not necessarily tied to an individual parcel, commissioners suggested.

> *"How are we going to recover beaches if we are perpetually repairing seawalls? How are we not going to repair seawalls without an exit strategy for the homeowner?"*
>
> ***— Chip Fletcher, Honolulu Climate Change Commission***

Commissioner Chip Fletcher argued for the closure of a "loophole" in the ordinance regarding setback variances that has allowed homeowners to build seawalls too close to the shore. The ordinance allows for a "hardship variance," so long as the planning director determines that the applicant's proposal is "a reasonable use of the land."

"The determination of the reasonableness of the use of land should properly consider factors such as shoreline conditions, erosion, surf and flood conditions and the geography of the lot," the ordinance states.

"I would posit there is evidence all around us it's been violated," Fletcher said. He argued that under the current laws, state and county agencies have granted permits for shoreline hardening that has resulted in significant erosion.

"Shoreline hardening goes against objectives of the [shoreline setback] chapter. It destroys the beach. It preserves the land associated with a single landowner and ignores the public trust. … You are sacrificing the good of all for the good of a parcel owner," he said.

"One may ask, is it a 'reasonable use of the land' during a time of sea level rise to develop it, to develop a parcel in a location where you know the parcel is not going to outlast the threats of sea level rise? … Is it reasonable to develop a high-risk zone?" he continued.

The matter of whether to allow for the repair and maintenance of eroding seawalls is particularly difficult, he said.

"How are we going to recover beaches if we are perpetually repairing seawalls? How are we not going to repair seawalls without an exit strategy for the homeowner?" he said.

In light of a recent controversy over a the fact that the U.S. military plans to install a large seawall to protect a training area in 'Ewa Beach — without any city or state permits — commissioner Rosie Alegado asked how much coastal land the military controls and if there are any other entities that are exempt shoreline setback policies.

"It would be interesting for me to know if they are interested in dialoging with what we're proposing," she said.

At its December 17 meeting, the commission may take action on a white paper, prepared by members Fletcher and chair Makena Coffman, that provides recommendations on changes to the city's shoreline setback ordinance. ***—T.D.***