Multi-agency Cooperation in the Management of the Northwestern Hawaiian Islands

Table of Contents

I. Before the 2006 Proclamation
   A. US Coral Reef Task Force
   B. Administration of the NWHI Coral Reef Ecosystem Reserve Under the Clinton Executive Orders
      1. Reserve permits
      2. Development of Reserve Operations Plan
      3. Activities of the Reserve Advisory Council
   C. Cooperation in the Development of the National Marine Sanctuary
      1. Development of the draft Sanctuary Management Plan
   D. Cooperation in Mitigating Marine Debris at the NWHI
   F. US Fish & Wildlife Service's Permits for Activities within the HI National Wildlife Refuges

II. After the 2006 Proclamation
   A. The Proclamation Regulations
      1. Geographical scope of the Monument as compared to the Reserve
      2. Impact on list of permitted activities and policies concerning use and mgt of the area
      3. Impact on role of agencies and their interactions (creation of "co-trusteeship")
         a) Monument Management Board
         b) Executive
   B. The New Memorandum of Agreement, Dec. 2006
      1. What it does to flesh out the co-trusteeship concept
      2. How it differs from the agreement signed before the Proclamation
   C. Permitting Activities
      1. Permits Issued before the Joint Permit Form
         a) Monument Permits
         b) State Refuge Permits
         c) Research permits, e.g., Census of Marine Life research cruise
      2. The Development of the Joint Permit Form and Permitting Process
         a) Initiation of the Joint Permitting Process
         b) Development of the Joint Permit Form General Conditions and the Special Terms & Conditions
      3. Initial Decisions under the Joint Permit Form and Process
         a) Monument Permits
         b) The State of Hawai‘i’s Land Board Review of Permit Applications
            i. Permit Approvals
            ii. Permit Review Process
         c) Review of Permits by Office of Hawaiian Affairs
      4. Controversial Issues
         a) The Bio-prospecting Issue
         b) Federal Management Activities
            i. NOAA Monument Superintendent Activities for 2007
            ii. The FWS Management Permit for 2007
            iii. Permit for Monk Seal Recovery Plan Actions (shark culling)
            iv. Ship Dumping in the Monument
   D. Development of the New Management Plan
      1. Decision to Let FWS Take the Lead – how arrived at
      2. Process and Timeline for revising the draft Sanctuary Management Plan
      3. Questions on the Process for and Timing of Public Participation and Public Advisory Committee
      4. Comparison of the CCP with the Sanctuary Plan Devt Process
Multi-Agency Cooperation in the Management of the Northwestern Hawaiian Islands

I. BEFORE THE 2006 PROCLAMATION

A. US Coral Reef Task Force

B. Administration of the NWHI Coral Reef Ecosystem Reserve Under the Clinton Executive Orders
   1. Reserve permits
   2. Development of Reserve Operations Plan
   3. Activities of the Reserve Advisory Council

C. Cooperation in the Development of the National Marine Sanctuary
   1. Development of the draft Sanctuary Management Plan

D. Cooperation in Mitigating Marine Debris at the NWHI

Marine debris can cause ecosystem-scale damage to coral reef ecosystems, including abrasion of living coral reef polyps and destruction or alteration of coral reef substrate. Marine debris and derelict fishing gear also result in entanglement of marine mammals, turtles, sharks, lobsters, crabs, other fishes and the endangered Hawaiian monk seal, the world's only extant tropical seal. The most common type of marine debris recovered in the NWHI are trawl nets, representing almost 84% of all netting recovered and 47% of bulk weight of marine debris in clean-up efforts. The likely source of this debris type is the sub-arctic waters of the Northern Pacific, where a dense assemblage of trawl fisheries operate; no legal trawl fisheries operate in the Hawaiian archipelago. Since 1996, NOAA's Pacific Islands Fisheries Science Center has removed over 511 tons of marine debris in a collaborative effort with federal, state and local agencies, NGOs and academic and industry partners. Though this constitutes a significant effort, it is unable to match the estimated accumulation rates of approximately 52 tons per year.

Marine debris is distributed throughout the NWHI, but is concentrated in shallow marine habitats on the northeast sides of islands and reef atolls, where prevailing ocean currents deposit debris. Physiography of the habitat is also important in determining deposition rate and location. Deposition rates do not appear to be influenced by season, but do increase during El Nino events. Marine debris is regulated internationally by of MARPOL, the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78). Annex V, which governs the prevention of pollution by garbage from ships, came into effect in 1989, making illegal the

---

10 MARPOL, online at: http://www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258
release of debris, including fishing nets, lines and gear, from vessels registered in nations that are signatories to the convention. Though some marine mammals have experienced lower rates of entanglement in marine debris, rates for Hawaiian monk seals in the NWHI did not change in pre- and post-MARPOL surveys. Similarly, accumulation rates for marine debris in the NWHI were seemingly unaffected by Annex V.

Marine debris constitutes a chronic form of pollution in the NWHI, threatening coral reef ecosystem species and natural ecological processes. The vast majority of marine debris observed and removed from coral reefs and islands/atolls in the NWHI is attributed to commercial fishing practices from a broad spectrum of international sources. Some sources of marine debris even originate from federal agencies. Though international action is clearly needed to address this trans-jurisdictional source of pollution, some domestic action has been taken by the US. On Dec. 22, 2006, the Marine Debris Research, Prevention and Reduction Act ("MDRERA") was signed into US law, establishing programs to identify, assess, reduce and prevent marine debris and its effects on the marine environment and navigation. The NOAA is the lead agency in the effort, but the effort is executed in conjunction with other federal agencies, including the EPA and US Coast Guard. The MDRERA identifies three priority areas: 1) identification, mapping, impact assessment, prevention and removal, 2) reducing impacts associated with derelict fishing gear, and 3) outreach programs. In the NWHI, several factors have supported a successful multi-agency effort to remove marine debris from coral reefs. Bolstered by positive media coverage, the partnership benefits from clearly defined objectives and obligations. Public participation has also been identified as a key element in the success of NOAA's multi-agency marine debris program.


F. US Fish & Wildlife Service's Permits for Activities within the HI National Wildlife Refuges

II. AFTER THE 2006 PROCLAMATION

A. The Proclamation Regulations

I. Geographical scope of the Monument as compared to the Reserve

The boundaries of the NWHI Coral Reef Ecosystem Reserve, established by President Clinton in 2000, were preserved in the designation of the Monument. Executive Order No. 13196 defines the boundaries of the Reserve in Section 6. The Reserve boundaries were derived from the 50 n.m. Protected Species Zone established around each island pursuant to NMFS regulations. Boundaries of the State Refuge are still pursuant to Hawai'i Administrative Rules (HAR) and Hawai'i Revised Statutes (HRS) but some boundary line issues exist with French Frigate Shoals (Mokupāpapa) according to DAR staff. State waters are generally accepted as those waters from the baseline to 3 n.m (1 marine league) offshore, as established by the Submerged Lands Act of 1953 (SLA). 19

17 Executive Order 13178.
19 HAR § 13-60.5-2
20 HRS §§ 171-6(3) and (8), as amended
21 See comments from Don Polhemus, Minutes for the June 8th, 2007 Land Board meeting, available online at: http://www.hawaii.gov/dlnr/chair/meetings/index.htm

3
The boundary of the state’s jurisdiction beyond 3 n.m. is somewhat contested, as the State of Hawai‘i and OHA have asserted a claim to archipelagic waters, or channel waters, between the islands based on historical claims by the Kingdom of Hawai‘i.24 Though a 9th Circuit case denied the State’s claim to archipelagic waters,25 the state was not a party to that lawsuit and still asserts an archipelagic claim. The SLA leaves open expansion of state territorial waters beyond 3 n.m. if historical claims can be proven prior to the state’s admission to the Union.26

Within the Monument, there are also disagreements between the State of Hawai‘i and the US FWS about jurisdiction in near-shore waters. The FWS claims jurisdiction out to 10- and 20-fathom depths, depending on the location. The FWS claim is based on their interpretation of the original 1909 Executive Order 1019 by President Theodore Roosevelt establishing a bird refuge in the islands and reefs of the NWHI.27 The 1909 E.O. includes marine areas on maps and makes reference to marine features including “reefs, shoals and islands.” A 1993 inventory by the FWS includes 254,418 acres of ceded land and water in the NWHI, leading to the basis for FWS’ claim of jurisdiction in State waters.28 The state considers this claim irrelevant and tenuous, and FWS apparently did not start claiming jurisdiction until the 1980s, before which only terrestrial components were included in FWS jurisdiction in the NWHI.29

2. Impact on list of permitted activities and policies concerning use and mgmt of the area

3. Impact on role of agencies and their interactions (creation of “co-trusteeship”)

Arising from the memorandum of agreement (MOA) was the establishment of two managing boards for the monument. The first, a Senior Executive Board, includes high-level members from both federal agencies and from the State of Hawai‘i. The Monument Management Board was also created, including two NOAA agencies,30 two representatives from FWS, and three divisions in DLNR, including the Division of Aquatic Resources (DAR), Division of Forestry and Wildlife (DOFAW), and the Office of Hawaiian Affairs (OHA). As of February 2007, these management boards were still in the process of being formulated, but the Monument Management Board did meet at least by early April 2007.

B. The New Memorandum of Agreement, Dec. 200631
   1. What it does to flesh out the co-trusteeship concept
   2. How it differs from the agreement signed before the Proclamation

---

22 The baseline was established by the Hawai‘i Supreme Court in Diamond vs. the State of Hawai‘i, as either the debris line marking the extent of the high tide or the vegetation line, which ever is further inland (mauka). 2006 WL 3013083 (Hawai‘i)
23 43 U.S.C. § 1312, Seaward Boundaries of States
25 Island Airways, Inc. v. C.A.B., 352 F. 2d (9th Cir. 1965), aff’g C.A.B. v. Island Airlines, Inc., 235 F. Supp. 735 (D. Hawai‘i 1964)
26 43 U.S.C. § 1312, Seaward Boundaries of States, which states: “Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State’s seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.”
27 Executive Order No. 1019 originally established the Hawaiian Island Reservation, which was renamed the Hawaiian Islands National Wildlife Refuge by Presidential Proclamation No. 2416 (July 25, 1940).
28 Need citation from original Roosevelt Act of marine features included in refuge; also add in analysis of subsequent legislation in the NWHI – are these jurisdictions preserved, destroyed or ignored in subsequent legislation & management documents? See also: MacKenzie 2003, pgs 7-8;
29 Under the Custody and Accountability of Federal Civilian Agencies in the State of Hawaii, General Services Administration, Office of Governmentwide Real Property Relations (March 17, 1993).
30 The two agencies that represent the Department of Commerce are: 1) NOAA’s National Ocean Service, which includes NOAA’s PMNM Staff under the National Marine Sanctuary Program, http://hawaiireef.noaa.gov/, and 2) NOAA’s National Marine Fisheries (NMFS) Pacific Islands Regional Office (PIRO), http://www.fpir.noaa.gov/.
C. Permitting Activities

I. Permits Issued before the Joint Permit Form
   a) Monument Permits
   b) State Refuge Permits
   c) Research permits, e.g., Census of Marine Life research cruise

2. The Development of the Joint Permit Form and Permitting Process
   a) Initiation of the Joint Permitting Process

The joint permit process was initiated by the Co-Trustees (NOAA, US FWS, & State of Hawaii) soon after the establishment of the NWHI Marine National Monument by Presidential Proclamation on June 15, 2006. The development of the joint permit form involved extensive legal consultation between attorneys from the various departments representing the Co-Trustees and from the White House’s Council of Environmental Quality (CEQ). Initial meetings began in the fall of 2006 and involved multi-agency conference calls between the attorneys to resolve differences in legal mechanisms between the Co-Trustees in developing the joint permit form. At the request of the CEQ and Chairperson Peter Young of the State of Hawai‘i’s Board of Land and Natural Resources (BLNR), the Office of Hawaiian Affairs was brought into the process in December. The development of the joint permit form was not a public process, and the first notice given to the public regarding the joint permit form was through the State of Hawaii’s BLNR (Land Board) meetings, which are open to the public. The Land Board represents the State of Hawaii in the Co-Trustee relationship.35

At the February 22, 2007 meeting of the BLNR, members were given a binder on the Papahanaumokuakea Marine National Monument (PMNM) prepared by the Division of Aquatic Resources (DAR), of the Bureau of Land and Natural Resources (BLNR), State of Hawai‘i. The binder, which was not made available to the public, included information on the establishment of the PMNM, federal regulations enacted to legalize the monument and the memorandum of agreement with the State of Hawai‘i. Also included in the information were state regulations, the joint permit application, instructions, draft forms, summary forms, the 2006 permit register and information on the UNESCO World Heritage Programme.

Representatives of the managing Co-Trustees stated that the joint permit process represented a coordinated effort between state and federal agencies to create a unified permit process for the PMNM, and that the joint permit application was the result of collaborative interactions between the agencies at higher levels (Washington, DC). The joint permit was developed over some months, requiring consultation with the White House CEQ, U.S. Departments of Commerce, Interior and Justice, the Office of Hawaiian Affairs, and the Department of the Attorney General. The permit form required attorneys to “break new ground” in getting agreement between state and federal conditions and each agency’s laws and regulations. The effort required to create the joint permit was re-iterated in subsequent meetings when Land Board members deliberated on the general terms and conditions and the special terms and conditions.

The unified permit process required a switch from three permit types to six types. Previously, the State Refuge had three permit types: education, research monitoring and special use. Six types of general permits are allowed under the joint permit process including: Research, Education, Native Hawaiian practices, Recreation (Midway only), Conservation & Management, and Special Ocean Use. The joint permit process reflected the necessary legal inclusions under the proclamation and applicable agency regulations.

---

35 The Office of Hawaiian Affairs, though a part of the State of Hawai‘i, considers themselves a separate entity from the BLNR and its departments in representing the State of Hawai‘i in the management of the PMNM. See H. Guth Interview, July 3rd, 2007.
37 It is unclear what stage of completion the joint permit form was in this submittal to Land Board members.
To address cumulative impacts, the Co-Trustees will manually review applications to ensure that duplicative work is occurring in the state waters of the monument. Impacts (direct & cumulative) to the Monument are a central concern of the agencies, and are embedded in the internal review process. The process requires that permits be submitted prior to one of three annual deadlines for review by the applicable Co-Trustee and consensus approval at the Monument Management Board meeting. Once the permit is received, it is reviewed for completeness and then sent out for internal review by the Co-Trustee administering the jurisdiction of the monument in which the proposed activity is to be permitted. If there is a need for consultation with the applicant, the Co-Trustee does so 45 days prior to the activity.

As a first look into the development of the joint permit process, the Land Board meetings were often characterized by questions from both the Land Board members and the public (through the Land Board to DAR staff) about the management of the monument. Questions arose about whether there would be a public process involved in the review of permit applications. Another issue addressed at the Land Board meetings involved the role of the reserve advisory council (RAC). The RAC is a public advisory committee established by NOAA under the National Marine Sanctuary Act (NMSA) for advisement on the operations and management of the NWHI Coral Reef Ecosystem Reserve (Reserve). The Reserve, established by President Clinton by Executive Order 13178, was managed by NOAA in consultation with the FWS and State of Hawai‘i, and was intended for designation as a National Marine Sanctuary prior to designation as a Marine National Monument.

According to the Co-Trustees’ testimony, under the monument designation there was no legal mechanism that allowed for the RAC. The Federal Advisory Committee Act (FACA) restricts the federal government from receiving advisement unless mandated by statute (e.g. the NMSA). As such, the only public process that exists via statute is the involvement the Land Board, which would be used to its “fullest extent” to publicly review permit applications for activities in state waters. The National Environmental Protection Act (NEPA) also requires an environmental review process. The Co-Trustees have different environmental assessment and public comment processes under NEPA; those processes will be integrated into the joint permit process under the unified management plan.

Initially, BLNR members and members of the public highlighted the importance and effectiveness of the RAC and there was ample concern that the Land Board may not be the appropriate venue for permit issuance. The public process for the joint permits, however, would remain the responsibility of the Land Board because the marine permits were largely in state waters, preserving a modicum of jurisdictional authority between the Co-Trustees. Likewise, proposed activities that would occur only on federal lands managed by the FWS, or federal waters managed by NOAA, would not come before the Land Board.

Regardless of the activity, management policy between the Co-Trustees requires each permit that is approved to bear the signatures of each of the three Co-Trustees.

If the permit is in state waters, the permit comes before the Land Board, who has six days to review it prior to rendering judgment on the permit in a public meeting. Internal permit reviews for activities in state waters (State Refuge) requires the involvement of a number of state agencies including DAR, DOFAW, OHA & Native Hawaiians from OHA & Kaho‘olawe Island Reserve Commission (KIRC). Permit applications are available for public review through Land

---

38 As of February, 2007, DAR began working on creating a GIS database for permitted activities to help assess cumulative impacts in state waters of the monument.
39 A public review process was advocated by several NGOs, including Native Hawaiian groups, environmental groups and community groups. BLNR Chairperson, Peter Young also advocated for a public review process for permits.
40 This issue was also addressed at the meeting of the RAC on June 20, 2007, one year after the establishment of the monument.
41 'Aulani Wilhelm of NOAA’s monument staff stated that they are still working with their legal team to try and incorporate the RAC. According to the H. Guth Interview, Jun. 3rd, 2007, the US FWS is reticent to incorporate a RAC or similar public advisory council into the management of the monument.
42 Land Board member Tim Johns inquired as to whether the rules could be changed so that all permits would come before the Land Board regardless of whether they were in state waters. There was concern that the state may be signing off on permits without detailed knowledge of the activity. NOAA staff had no immediate answer to that concern, but it was addressed in subsequent meetings and later in June, at the first meeting of the RAC since the monument was formed.
43 Pursuant to the Memorandum of Agreement (MOA) for managing and protecting the Northwestern Hawaiian Islands (NWHI) Marine National Monument, signed Dec. 15, 2006. The MOA was signed by the Secretary of Commerce, Carlos M. Gutierrez; Secretary of the Interior, Dirk Kempthorne; and the Governor of Hawa‘i, Linda Lingle.
44 In response to concerns of the Land Board members, DAR staff agreed to work on a process where all permits would be brought to the Land Board for review, regardless if the activities occurred in state waters. It is unclear, under current statutes governing the PMNM, if the BLNR would be able to assert authority to review applications that occur outside of State jurisdiction.
Board submittals, and currently applications are made available 4-5 days before the Land Board meeting.\textsuperscript{45} There were also issues regarding what information would be held as confidential that only the Land Board would see and would not be available to the public. The public review process in the Land Board is somewhat difficult because permits could take 2-7 weeks to process. If reviewers and staff have issues they request a consultation with the submitter to work out issues, which takes time. Therefore permit applications that would potentially be issued to the public would simultaneously be undergoing an internal review.\textsuperscript{46}

In state waters, the joint permit form simplifies the review process, and agencies review "each permit type, recommendation, purpose, etc.,"\textsuperscript{47} according to DAR. For federal agency activities occurring in state waters, NOAA and the other agencies will present the Land Board with comprehensive analysis prior to submitting the permits for consideration. In the case of the State of Hawai‘i, the Chairperson of the Land Board may be authorized to individually approve of activities that do not occur in state waters (0-3 nm) without the consent of the entire Land Board, which is not required under state regulations for activities outside of state jurisdiction.\textsuperscript{48}

If the proposed activity is in federal waters, NOAA will conduct an internal review including staff biologists and managers from NMFS PIRO, NOS and PMNM staff; if the permit meets certain criteria under NOAA’s environmental assessment (EA) process, the permit is released for public comment as an EA. Similarly, if a proposed activity occurs solely on emergent lands managed by the FWS, the application is reviewed by FWS internally. Permits issued in FWS-managed areas require public posting for a compatibility determination with FWS’ federally-mandated Comprehensive Conservation Plan (CCP) requirements.\textsuperscript{49} Internal agency reviews are not available to the public, though comments to reviewer questions for permits in the State Refuge are available to the public in Land Board submittals. Internal reviews are from individuals (as opposed to committees) are compiled at the conclusion of the review process for an aggregate agency review. The different public review processes in the Co-Trustees represents one of the major issues that has yet to be resolved in the unified joint permitting process.

Once the internal agency review is completed, the application is brought before the Monument Management Board (MMB) for approval by the other Co-Trustees.\textsuperscript{50} If some thing is potentially contentious, the agency reviewing the application may contact other Co-Trustees to request review.\textsuperscript{51} Co-Trustees have yet to disprove of an activity recommended for consensus approval at a MMB meeting and are reticent to do so as the ramifications of permit disproval are unknown.\textsuperscript{52} Disproval of a permit would potentially result in negotiations between higher level managers of the Co-Trustees represented in the Senior Executive Board, and would also likely involve attorneys from the constituent managing agencies.

\textbf{b) Development of the Joint Permit Form General Conditions and the Special Terms & Conditions}

Every permit issued for activities in the PMNM is beholden to the permit form’s general conditions and a set of special terms and conditions. The special terms and conditions are crafted to address permit-specific activities as requested by reviewers. The general terms and conditions represent a synthesis of federal regulations and previous rules and

\textsuperscript{45} As of April 2007, the State of Hawai‘i’s Office of Information Practices is still deciding when the submittal will be available for the public prior to 4-5 days before the BLNR meets. Chairperson Peter Young advocated for a public review of 45 days. DAR staff thought this might set a precedent requiring a 45 day public review for all Land Board submittals and there were questions about whether this was a policy or a statute issue. It is unclear if state law allows a 45-day review for proposed permit actions.

\textsuperscript{46} Land Board members requested that all 2006 and 2007 permits made available to the public, and would encourage a 45 day public review “wherever possible.” The public review process of the BLNR is perhaps ill-suited to the public review process required for complex activities, and the AG, BLNR staff, and Office of Information Practices have yet to resolve the logistical and statutory issues to create an adequate 45 day public review process.

\textsuperscript{47} See minutes, Land Board Meeting, Feb. 22, 2007, available online at: http://www.hawaii.gov/dlnr/chair/meetings/index.htm

\textsuperscript{48} For cases in which permitted activities outside of state jurisdiction, the Chairperson, or designee (DAR or DOFAW administrator) can individually approve activities pursuant to HRS § 171-6(8) without consultation with the Land Board. This action is approved by the Attorney General (as opposed to committees) are compiled at the conclusion of the review process for an aggregate agency review. The different public review processes in the Co-Trustees represents one of the major issues that has yet to be resolved in the unified joint permitting process.

\textsuperscript{49} According to Dan Palawski, Refuge Manager for Pacific Remote Islands, FWS, notices for compliance with CCPs are advertised in the newspaper; notices for CCP activities are also posted online at: http://www.fws.gov/pacific/Planning/ (Pacific Region only).

\textsuperscript{50} In the case of permits for activities in the State Refuge, it is unclear whether the MMB approves the activity prior to the Land Board, or before.

\textsuperscript{51} According to Heidi Guth (OHA), NOAA has contacted OHA for comment and review on applications that involve activities that are potentially contentious. H. Guth Interview, July 3\textsuperscript{rd}, 2007.

\textsuperscript{52} H. Guth Interview, July 3\textsuperscript{rd}, 2007.
regulations for the NWHI State Refuge (see legal references below). The special terms and conditions applied to individual permits included the controversial bio-prospecting clause (considered below). The special terms and conditions have evolved as the joint permit process developed (see permit approvals, below).

The joint permit form was first made available to the public at the April 27, 2007 meeting of the Land Board. The joint permit form was vetted by the staff, according to Don state early in the process. Later on, Heidi Guth from OHA was brought into the process. The AG office and conditions only in terms of how they are written, not in terms of the regulatory or authority process. S7 The AG office does not consider the cases the general conditions supplant the current conditions under the state refuge mgmt regulations. This was primarily a 59 This assertion was challenged by 58 57 56

54 Boundaries of the PMNM are still pursuant to § 13-60.5-2, HAR, but some boundary line issues exist w/ FFS according to DAR staff, according to Don Polhemus, June 8th Land Board meeting.

55 It is unclear what role the rules and regulation for the Reserve and the State Refuge play in the management and governance of the monument. The State Refuge exists as part of the Monument; it is unclear if the Reserve exists, as the Reserve was governed under the NMSA.

56 See submittal to the Land Board, June 8th, 2007: Request Approval on Revisions to the Joint Permit Form, and Approval of Special Terms and Conditions, for Permitted Activities within the Northwest Hawaiian Islands - Papahanaumokuakea Marine National Monument

57 See BLNR minutes, April 27, 2007, (pg. 4) available at: http://www.hawaii.gov/dlnr/chair/meetings/index.htm

58 State Refuge rules were incorporated into the joint permit form with Colin Lau from the State Attorney’s office representing the state early in the process. Later on, Heidi Guth from OHA was brought into the process. The AG office and OHA have sparred over legal interpretations of the legitimacy of State Refuge rules and OHA has pushed to incorporate elements of the state’s refuge rules into the joint permit process.

59 This assertion was challenged by OHA, who helped develop the rules for the State Refuge. According to Heidi Guth, the State AG office does not consider the State Refuge rules to be valid, since they were never vetted by the AG office. As such, More restrictive language that was approved for the State Refuge was not incorporated into the joint permit form. OHA believes the State Refuge rules (in various forms) represent state policy in the monument, since these rules were used for a number of years in managing activities in state waters. OHA has pushed for incorporation of protections for Native Hawaiian rights that were present in the State Refuge rules, including a ban on bio-prospecting.
The MOA, the Presidential Proclamation and the federal register rules for the PMNM all protect the state's interests in the management and governance of the Monument. The Land Board was assured, somewhat inaccurately, that OHA had adequate representation in the joint permit process and was part of the team that put together the general conditions. OHA and the state (DAR) continue to ensure that the state regulations and requirements are covered by permit applications through the application of special terms and conditions to permits. Special terms and conditions will likely be continually required for activities in state waters, at the request of internal reviewers with various state agencies, including OHA. Activities that occur out of state jurisdiction, however, may be subject to special terms and conditions only if requested and approved by Co-Trustees when applications are reviewed in the MMB meetings.

The Land Board approved the general conditions on April 27, 2007, with amendments to requiring monthly reports on permitted activities to be made available to the Board. Another amendment was requested that special conditions be made available to the staff to keep permitted activities in state waters consistent with State law, rules and regulations, including previous State Refuge rules.

3. Initial Decisions under the Joint Permit Form and Process
a) Monument Permits
b) The State of Hawai'i's Land Board Review of Permit Applications
   i. Permit Approvals

The first permits submitted for approval at the February 23 meeting of the Land Board seemed to reflect a cautious approach to the new process and some potential disorganization in the submittals prepared by DAR staff. There were two permits, one for ongoing NOAA monk seal and cetacean research, and another permit for NOAA ship operations to support the research effort. Land Board members repeatedly asked staff for supporting documents, and staff testimony seemed to indicate some confusion in the joint permit form. Members of the public seized upon this confusion to contest the lack of public participation in the development of the joint permit form.

Since the general conditions were not approved until April 27, 2007, early permits for activities in state waters may have still been legally beholden to the State Refuge rules. The special conditions to the early permits were also somewhat contentious, as multi-agency efforts to implement controls on the spread of disease, introduced species and ban bioprospecting were still being developed.

There is also evidence that all actions detailed in the submittals were not actually completed. For example, Athline Clark stated that the boat operations permit was not reviewed by OHA prior to the February 23 Land Board meeting. The permit application submittal, however, says that OHA and KIRC were consulted, and had no comments on the permit application.

It is possible that the permits approved in February may have been pushed through without all of the stringent controls applied to later permits, largely because these operations had been conducted for years in the Monument by NOAA and because the activities included work on the charismatic endangered monk seal. This is perhaps evidenced by a comment from Dan Polhemus at the April 27th meeting on the joint permit form where he noted that the permit documents the state previously had were interim instruments that were developed in a relatively short time frame following the signing of the rules that protected state waters in the NWHI. "Staff knew at that time we would progress toward a co-managerial

---

60 OHA was brought into the development of the joint permit process by the White House CEQ staff; Land Board Chairperson Peter Young also advocated for OHA's involvement. According to Heidi Guth, OHA was not brought into the process until the general conditions were established, but she was able to participate in the attorney's conference calls on the issue.
61 OHA also urged the Land Board to allow the public review process to be complete; OHA is part of the internal permit review as well, though OHA's review is not a public process.
62 In response to this confusion, Land Board members requested that DAR staff provide "all information to see the whole picture," as it "tells the researchers how this is going to work." The Land Board also requested staff to provide copies of the permit conditions with each application submittal.
63 Environmental Defense called on the application to be deferred due to unanswered questions and improper use of the application form; KAHEA called for a moratorium to "set things in place first."
64 Bio-hazards were a concern of the Land Board and staff for early permits; the boat C.O. (Karl Mangels) reported that the ship is required to follow stringent Federal protocols.
66 State Marine Refuge Rules, Hawai'i Administrative Rules (HAR) ch. 13-60.5
relationship with a Federal entity in terms of the National Marine Sanctuary. Subsequently it became a co-management arrangement in a national monument with two federal entities.”

Land Board questions about permitted activities in March 2007 included inquiry into whether there was a prioritized hierarchy for permitted activities for management of the monument. Staff replied that permit reviewers are encouraged to review the permits with two primary questions in mind:

1) “Can this research be done only here and would it be applicable to the management of the monument, and,
2) What application does it have with the management of the monument?”

Additionally, comments on permits from Native Hawaiians with OHA and KIRC include ranking the permit with a statistical score (1-5) on an evaluation form.

In April, impact analysis continued to be a major concern of the Land Board. As such, staff prepared a spatial scale on the monument, including a graphic comparing activities in the monument with other scales of activities around Hawaii; for example, FFS was compared to Molokai since they have approximately the same acreage. In reviewing permits, DAR staff assesses the “affected area, spatial consideration, status of the resources, identification of impact factors, significance thresholds within limits of acceptable change and cumulative affects.” This is all part of the State’s internal permit review.

The Land Board also requested clarification on the extent of state waters, and why state waters did not include the fringing reef. Staff clarified that maps were drawn from “emerging lands,” and “if that part of the land is not emergent then it doesn’t provide the basis for a claim.” Some DAR staff believe that some of the water around French Frigate Shoals is incorrectly claimed and this is being revisited by staff. Permits were approved at the April with considerably less debate than in early February; no objections were made by community members.

The review of applications seemed to attract more attention from community groups in the Land Board meetings beginning with the May 25th permits. Permits that came up for review in the public Land Board meetings in February were contested solely by an NGO representative, and no testimony was given by Native Hawaiian community groups or environmental groups in the March and April meetings, when a total of three applications were approved. The state also began requesting that the protocols for disease and introduced species be attached to permits as part of the permits’ special conditions, beginning with the permit applications submitted on May 25th and June 8th. The disease and introduced species protocols were adopted at the April 9th, 2007 Monument Management Board meeting and were developed by the Co-Trustees for permitted activities in the PMNM. The completed disease and introduced species protocols were presented to the Land Board at the April 27th, 2007 Land Board meeting, which considered the Joint Permit Form as discussed above; no permits were approved at the late April meeting.

Three permit applications were approved at the May 25th, 2007 Land Board meeting, including a controversial permit application to remove Galapagos sharks to reduce predation on the Hawaiian monk seal (considered below). A series of permits were considered at the June 8, 2007 Land Board meeting. The bulk were permits from University of Hawaii, Hawaii Institute of Marine Biology researchers (HIMB); a permit was also considered for ship operations for the NOAA research vessel Hi’ialakai to support HIMB research activities and an education and outreach permit for PMNM staff to film and photograph in the monument.

The federal and state Co-Trustee agencies continue to support research efforts in the monument. Prior to considering the applications for activities in state waters, DAR staff are consistent in reminding the Land Board members of language in

---

67 These “statistical scores” from OHA and KIRC are not publicly available on the Land Board submittals; it is unclear what role they play in the internal application review process.

68 E.g. impact comparison between Hanauma Bay, Oahu and French Frigate Shoals, NWHI). For example: in 2006, NWHI had 191 visitors (0.52 people per day, 0.0003 visitor per acre – these are strange metrics for comparison?). The spatial comparisons presented to the Land Board are not publicly available, but may be available from OHA.

69 43 U.S.C. § 1312, Seaward Boundaries of States, Submerged Lands Act of 1953

70 Stephanie Fried with Environmental Defense


10
the proclamation and the state regulations require the “best available science” to support the monument. Though the permits are typically approved in bulk by a single vote, researchers and staff usually comment individually on the permit applications. Researchers typically provide brief clarifications on technical questions from the Board, and no researcher is before the board for longer than a few minutes. Members of the public typically comment after the researchers have answered technical questions from the Land Board and prior to the vote.

Comments from the public are typically dominated by representatives from various NGOs. Among the more visible NGOs involved in the monument are KAHEA,73 the Ilio‘oukalani Coalition,74 Hawaiian Civic Club leaders,75 the NWHI Network,76 and Environmental Defense.77 NGO leaders that comment on permits often highlight the lack of public involvement in agency planning and processes while pushing for stricter environmental controls and protections for native Hawaiian rights. Testimony from NGO leaders at Land Board meetings is often heated and has succeeded in bringing issues with permits to the forefront of the debate.

ii. Permit Review Process

Starting Feb. 23, 2007, all permit applications are reviewed internally by the Co-Trustees. As stated earlier, the agency that manages the area of the monument in which the activity is proposed reviews the application prior to bringing it before the MMB for consensus. Review in the MMB meetings includes state and federal agencies and their appurtenant internal departments including DAR, DOFAW, NOAA PMNM, NOAA PIRO, and the US FWS. Native Hawaiians from OHA and the Kaho‘olawe Island Reserve Commission (KIRC) were also asked to review and comment on the applications.

For activities in state waters, DAR is the primary agency that coordinates the internal review process, which typically includes a consultation with the applicant to respond to reviewer comments, prior to a recommendation for or against approval by the Land Board. In the Land Board submittals, reviewers are often referred to in bulk as “scientific community” reviewers and “Native Hawaiian reviewers.” Though permits are received by NOAA through their PMNM monument office, DAR functions as the permit “clearing house” for activities in state waters.78 Prior to the June 8th applications, DAR seemed to apply a similar set of “Final Staff Recommendations,” including 1) that researchers be briefed on Native Hawaiian cultural practices and traditions at least once per year, 2) that hulls of all vessels used in the PMNM be scraped free of fouling organisms prior to entering the PMNM, 3) swimming and snorkeling activities be allowed only for research and hygiene purposes, 4) that permittees comply with disease and transport protocols, and 4) that all forms of fishing (commercial, subsistence) not be allowed in state waters. These recommendations are consistent with the rules of the State Refuge, and these staff recommendations can be construed as an attempt to preserve the Refuge rules by applying special terms and conditions to applications.

DAR stepped up their comments on applications submitted for review by the Land Board on June 8, 2007.79 Among these recommendations were 1) a requirement for applicant to consult DAR on their cruise plan prior to departure, 2) a list of species, by-catch, and mortality to be prepared in the post-cruise report (selected research studies only), 3) cessation of research activities when monk seals are present, 4) no fishing unless allowed under state law for subsistence or cultural practices by Native Hawaiians, 5) compliance by permittees with disease and transport protocol to minimize introduction of disease and import of live specimens to the monument, 6) careful operation of tender boats to prevent damage to coral reefs, 7) tender vessels to be equipped with engines that meet EPA emissions criteria, 8) refueling of tender vessels to occur along side the host vessel, outside of lagoons and away from near-shore areas, and the two most contentious provisions:

9) This permit is not to be used for nor does it authorize the sale of collected organisms. Under this permit, the authorized research activity, including work involving a bioassay or bio-prospecting, must be for non-commercial

---

72 HRS 13.60.5 – 1[2], [4]?
73 KAHEA, the Hawaiian-Environmental Alliance, www.kahea.org/
74 'Ilio‘oukalani Coalition, online at: www.ilio.org; http://www.earthjustice.org/about_us/clients_coalitions/ilio-ulaokalani_coalition.html
76 The Northwestern Hawaiian Islands Network, http://nwhinetwork.net/
77 Environmental Defense, http://www.environmentaldefense.org/home.cfm
78 This is because most of the permitted activities for research are occurring in state NWHI waters, and because the Land Board’s “interest” in the monument as a Co-Trustee stems from its previous management of the State Refuge.
79 See ‘Final Staff Recommendations,’ on permit applications, Land Board submittals for June 8th, 2007, available online at: http://www.hawaii.gov/dlnr/chair/meetings/index.htm
purposes, i.e., not involving the use or sale of any organisms, byproducts or material collected within the Monument for obtaining patents or intellectual property rights for profit,

10) The permittee may not convey, transfer, or distribute, in any fashion (including but not limited to, selling, trading, giving or loaning) any coral, live rock, or organism collected under this permit without the express written permission of the Co-Trustees.80

On applications from NOAA researchers and staff, it was consistently pointed out that NOAA staff and researchers have conducted several meetings with Native Hawaiians in order to receive their input guidance on their research activities. Among the groups consulted by NOAA are OHA, Kaho‘olawe Island Reserve Commission (KIRC), various Hawaiian Civic Clubs, Native Hawaiian Cultural Working Groups, and various experts on Native Hawaiian cultural practices.

c) Review of Permits by Office of Hawaiian Affairs

Native Hawaiians, including OHA and KIRC did not provide comments on any application received by the Land Board until the suite of applications submitted on May 25, 2007. Though OHA was brought into the MMB in December 2006, it wasn’t brought up to speed regarding the joint permitting process until approximately February, 2007.81 As such, DAR (DLNR) functioned as the representative for the State of Hawaii early in the process. Inclusion of OHA into the joint permitting process eventually resulted in consideration of Native Hawaiian practices and cultural traditions for permitted activities in state waters. OHA often clashed with the State AG from DLNR, resulting in significant tensions between the two state agencies. OHA was successful in getting special terms and conditions protecting native Hawaiian cultural resources attached to permits issued by the Land Board in May and June 2007. Beginning with the suite of applications submitted June 8, 2007, OHA began to request the presence of a Native Hawaiian cultural practitioner on all vessels entering the PMNM, and that all future applications consider impacts to cultural resources. As part of the general conditions, individuals entering the Monument are required to receive cultural training.

The relationship between OHA and DAR wasn’t entirely antagonistic; for example, DAR pro-actively contacted OHA regarding the BBC’s permit request to film at French Frigate Shoals, resulting in a requirement for the BBC film crew to undergo cultural briefing prior to filming in the Monument. The submittal of HIMB permit applications for the June 8th Land Board meeting resulted in a meeting between HIMB and DAR staff (prior to the June 8th Land Board meeting), during which reviewers’ concerns were discussed. This meeting resulted in the responses by HIMB researchers to permit reviewers questions (see June 8th permit applications in BLNR meeting submittals). OHA concerns were also addressed by DAR staff at these consultation meetings. A list of cultural practitioners available to go on the research trip was requested; additionally a briefing of scientific researchers from OHA or an OHA designate to provide information on cultural impact analyses practices was requested by OHA on HIMB permit applications.82 The addition of a cultural monitor for future permitted activities is also a priority for OHA and NGOs representing native Hawaiian rights and will likely be integrated as a special term and condition for future permits once the logistics are resolved.83

4. Controversial Issues

a) The Bio-prospecting Issue

The bio-prospecting issue has gained significant traction in debates about permitted activities in the Monument. Indigenous communities comprised of native Hawaiian elders (kupuna) and native Hawaiian activists were disheartened to learn of the exclusion of a ban on bio-prospecting in the PMNM in the State’s Refuge rules upon initiation of the joint permitting process for the Monument. OHA and various NGOs have taken the lead in pushing this issue during Land

80 It is unclear what motivated DAR to submit new special conditions on these permits starting in June, but it may have been the influence of OHA in the joint permitting process. According to Heidi Guth, OHA began pushing for protections against bio-prospecting once it was brought on in December 2006. Objections from community groups (e.g. Environmental Defense, KAHEA) may have also contributed to these staff recommendations

81 H. Guth Interview, July 3, 2007

82 OHA was pro-active on altering the permit applications to include cultural impacts analyses starting in June 2007. Since OHA was not brought into the development of the joint permit process until later on, many of OHA’s recommendations are attached as special terms and conditions, rather than direct integration as general conditions. Heidi Guth stated at the April 27th Land Board meeting that “she would like the Board to consider the option of the Special Permit Condition because that is how OHA is coming about this.”

83 A list of approved cultural monitors may be proposed to fulfill this priority, but there are also issues with funding for this position. It is somewhat difficult to get volunteers that can continually serve as cultural monitors for cruises that typically last multiple weeks. OHA hopes to recruit native Hawaiians that are also scientists to serve as cultural monitors. H. Guth Interview, July 3, 2007
Board meetings, resulting in significant deliberation and a peaceful public protest at the June 8th, 2007 Land Board meeting. The issue has polarized a debate between advocates for research versus supporters of native Hawaiian rights. Native Hawaiians consider the NWHI as Hawaiian property held in trust. As such, supporters of a ban on bio-prospecting consistently point out that Monument resources are publicly-owned resources and should therefore not be privatized for profit.

Language in the joint permit form’s general conditions include clause 21, which states that “all monument resources within the jurisdiction of the State of Hawai‘i are held in the trust under the Hawai‘i State Constitution, Article XI, Sec. 1. The State of Hawai‘i and the Government of the United States reserve ownership or control, as the case may be, of Monument resources, both living and nonliving, that may be taken or derived from those found in the Monument.” DAR staff believes this adequately covers the bio-prospecting and intellectual property issue, but OHA and NGOs are adamant that additional language be added to specifically target activities that could be construed as bio-prospecting.

Clause 23 in the general conditions states: “All data acquired or created in conjunction with this permit will be submitted with the summary report, and annual report…The permittee retains ownership of any data, derivative analyses, or other work product, or other copyrightable works, but the Federal Government and the State of Hawai‘i retain a lifetime, non-exclusive, worldwide, royalty-free license to use the same for government purposes, including copying and redissemination [sic], and making derivative works. The permittee will receive acknowledgement as to its ownership of the data in all future use. This requirement does not apply to data acquired or created by the news media.” Data is not defined in either the joint permit form or the Final Rules for the NWHI Marine National Monument.

Prior to Monument designation, the regulations for the DLNR NWHI State Marine Refuge rules state: “This permit is not to be used for nor does it authorize the sale of collected organisms. The research activity must be non-commercial and will not involve the sale of any organism, byproduct, or material collected. Furthermore, any resources or samples collected are a public trust, and are not to be used for sale, patent, bioassay, or bio-prospecting, or for obtaining patents or intellectual property rights.”

In a comparison matrix between State Refuge rules and the joint permit form, it is stated that Clause 21 of the general conditions in the new joint permit form covers this issue, as does the final rule issued for the Monument. 50 CFR 404.11(e)(1) in the federal register rules states: “(e) Additional findings for Native Hawaiian practice permits…a permit to allow Native Hawaiian practices under paragraph (c)(4) of this section, may not be issued unless: (1) The activity is non-commercial and will not involve the sale of any organism or material collected.”

The comparison matrix illustrates the fundamental differences in interpretation between the State AG representing the DLNR and OHA. While OHA battled with the DLNR AG in joint attorney conference calls on the bio-prospecting issue, the public debate on bio-prospecting probably originated in the April 27th, 2007 Land Board meeting. In the comparison matrix submitted to the Land Board by DAR staff, a response is also included regarding the original state refuge condition: “Bio-prospecting and intellectual property rights are still being discussed due to legal concerns and will be added as special conditions in some form as needed depending on permitted activities.” According to DAR at the April 27th meeting, language is being drafted by staff to address “specific concerns like bio-prospecting and things like that,” which were addressed in the State permit, but were not imbedded by the AG’s office.

At the request of the Land Board at the April 27th, 2007 meeting, DAR staff presented the “Legally Vetted Special Terms and Conditions,” at the May 25th meeting. These special terms and conditions contained the controversial language on bio-prospecting in clause 1: “This permit is not to be used for nor does it authorize the sale of collected organisms. Under this permit, the authorized research activity, including work involving a bioassay or bioprospecting [sic], must be for non-commercial purposes, i.e., not involving the use or sale of any organisms, byproducts, or material collected within

---

84 50 CFR 404.3 - Definitions
86 50 CFR 404.11(e)(1), Final Rule, NWHI Marine Nat’l Monument
87 This can be read include only activities under “Native Hawaiian” practice permits – can it be applied to all permitted activities?
88 H. Guth Interview, July 3, 2007
89 NGO groups, who followed the public process for permit reviews closely probably seized upon this in the April 27th Land Board meeting. KAHEA and other environmental NGOs and Hawaiian community groups organized a protest at the June 8th meeting shortly thereafter.
the Monument for obtaining patents or intellectual property rights for profit.” The revised general terms and conditions and special conditions were presented on May 25th, 2007 to the Land Board for approval.

Various NGO leaders contested the approval of the joint permit form, requesting deferment. NGO leaders believed that the new rules (general conditions, item 21) weren’t stringent enough, and would allow bio-prospecting. The language on bio-prospecting was not embedded in the general conditions, according to DAR staff and (corroborated by the AG at the May 25th and June 8th meeting), because there were no legal definitions for bio-prospecting. According to the DLNR AG, bio-prospecting has not been addressed by state, national or international law, and the Co-Trustees agreed that bio-prospecting should not be given any commercial application. The joint permit form was approved at the May 25th meeting, but the special conditions were deferred until the June 8th meeting, at which KAHEA organized a rally to protest bio-prospecting in the PMNM.

At the June 8th meeting, DAR staff once again pointed out the substantial resources that had been put into developing the joint permit form approved at the May 25th meeting. The special conditions were amended at the June 8th meeting. Of these conditions, the “legally vetted special terms and conditions” were amended to include the disease and introduction of species protocols for researchers applying for permit approvals at the June 8th meeting (largely HIMB researchers).

Representatives from various NGOs90 pointed out that the State of Hawai‘i legislature and the governor had convened a special working group on bio-prospecting and Native Hawaiian intellectual property rights. Representatives asserted that it was premature to write into the permit conditions language on bio-prospecting that was currently being considered by the State. KAHEA presented a petition detailing concerns, including a 45 day comment period on all permit applications, a moratorium on all permitted activities pending completion of an EIS, and a precautionary approach on bio-prospecting pending decision from state working group. KAHEA asserted that the current language in the special terms and conditions allows the UH researchers to patent as private property PMNM resources, and that is BLNR’s duty to defend public trust resources. KAHEA said a recent AG opinion says that 3rd parties may use material removed from state property and patent that material.91 Members also testified that the Poaokalani Declaration, a consensus among Kanaka Maoli from the Native Hawaiian Intellectual Property Rights Conference, should be honored.92 Native Hawaiians touted the declaration as a consensus among Kanaka Maoli, who support a ban on bio-prospecting and calls for the return of stolen property.

Similarly, native Hawaiians with the Waikiki Hawaiian Civic Club support a “ban on the patenting, licensing, sale and transfer of natural resources,” in the Poaokalani Declaration. According to the Waikiki Hawaiian Civic Club, there is clear evidence that UH is “undermining Native Hawaiian intellectual property rights.” ‘Ilio‘ulaokalani Coalition testified that the Land Board was allowing a “theft of native resources that belong to Hawaiians,” and that this was being allowed while law on this is still being crafted. A Native Hawaiian representative testified that it was not the current UH researchers that they were concerned about, but that the loophole should be closed so that an unscrupulous researcher could not patent PMNM resources.

The Land Board and DAR staff pointed out that clause 21 (below) holds all resources in public trust. The AG testified that DAR does not have the authority to ban bio-prospecting in the permit as it over-steps state authority. The current revision is vetted by the AG. DAR staff testified that permits are extremely restrictive and that everything is forbidden except those actions that are specifically permitted. A White House CEQ letter supports the general conditions. Heidi Guth with OHA testified that the language in the bio-prospecting clause was OHA’s fault. The original language is fine and OHA is working with the federal agencies on this issue. The best idea would be to come up with a “stop-gap” until the state commission is done crafting official policy on bio-prospecting. Ultimately the Land Board approved all the special terms and conditions and amended the bio-prospecting clause to omit the language “including work involving a bioassay or bio-prospecting” and “for profit.” It was agreed that this would protect the State’s interests in PMNM resources pending policy from the state’s working group on the issue.

Bio-prospecting continues to be a highly contentious issue among native Hawaiians and other indigenous cultures. The governor has appointed an official “Temporary Advisory Committee on Bio-Prospecting” to advise the state legislature on

90 KAHEA, ‘Ilio‘ulaokalani Coalition and the Waikiki Hawaiian Civic Club were represented
91 Can we track down this AG opinion? – perhaps in our interview w/ KAHEA
92 The Poaokalani Declaration was formulated during the Ka ‘Aha Pono Native Hawaiian Intellectual Property Rights Conference held in Las Vegas in 2003. The declaration is available online at: http://kaahapono.com/resources.html
the issue. Members of the advisory committee include five native Hawaiians and six appointees from various other stakeholders, including pharmaceutical companies and researchers. Members are considering the Paokakalani Declaration, but genetically modified organisms (GMOs) are also entering the debate. Intellectual property rights of indigenous peoples of the Pacific region are also addressed at length in a new volume entitled: Pacific Genes & Life Patents.

b) Federal Management Activities

i. NOAA Monument Superintendent Activities for 2007

Chronology of Developments: State of HI Review of Special Activity Permits for Management Activities by NOAA Monument Staff in State Marine Refuge for 2007

Nov. 2006: DAR receives NOAA permit application and sends it out for review to state agency staffs and 2 NH entities; comments from DAR staff indicate concerns with the scope of the activities and that activities involving taking or transporting specimens, disturbing wild animals, and interacting with protected species, live coral and fish “may not be necessary or justified.” “These activities should be more accurately characterized as monitoring and research activities instead.” [this is a different category of permit under the state refuge rules]. Request for clarification was sent to NOAA on Nov. 29 and the issue was discussed in a permits coordination group meeting on Dec. 27, 2006. [Check to see when the FWS Management Permit application was received and reviewed.]

Jan. 2007: NOAA permit is presented to the Board at its Jan. 12 meeting with DAR requesting authorization to issue the permit. DAR expressed the opinion that the application was properly justified and that the Monument permit application to enter state refuge waters to conduct the mgt activities described in the application should be approved subject to a list of special instructions and conditions as well as the General Conditions in the Application Guidelines. Questions were presented to NOAA representatives at the meeting but several issues were unresolved by the end of the meeting. NOAA was asked to include a statement explaining why the non-mgt related activities were necessary or amend the application to clarify the request for the noted activities. Of particular concern was the request to conduct archeological research and NH cultural activities under the mgt permit. Also discussed was whether the Monument Manager should be applying for a Scientific Research, Monitoring and Education Permit instead of a SA Permit, one that apparently receives a higher level of internal review and scrutiny at the state level. Decision on the permit application was deferred until discussion could be continued at the next meeting.

NOAA submitted an amended application to DAR staff on Jan 17, and this was presented to the Land Board for review at its Jan 26th meeting. The amended application was on the DLNR NWHI State Marine Refuge Permit Application Form and was signed by the Monument Superintendent. It withdrew request for allowing archeological research and Native Hawaiian cultural activities in the managers permit but maintained the request that the Mt manager be allowed to participate in otherwise permitted NH cultural activities “in a management capacity” as the Superintendent of the Mt. The occasional but unpredictable need to conduct field work and make field collections was explained in connection with coral bleaching or disease outbreaks, alien species invasions, and vessel impact incidents. Assurances were given that the managers permit would not be used as a substitute for research, education and NH practices permits and that the RAMP monitoring activities would be covered under separate permit applications.

At the Jan 26th Board mtg, the DAR staff noted that the State NWHI Cultural Working Group and individuals and organizations from the NH community had been asked to review the permit and that the Working Group had reviewed it at its Sept 2006 meeting at which time a briefing was given by the Superintendent on the planned activities for management of the Monument. [We need to find out more about the NWHI Working Group and the process the DAR uses to obtain reviews of permits; it looks like from the DAR Request for Authorization that OHA for example is asked to review permits separately and is not on the Working Group.] OHA submitted formal comments to DAR on Dec. 21st

---

94 Kevin Kelly, personal communication, June 2007
96 Sources include BLNR minutes, submissions, and requests for authorizations to approve applications, available online at: http://www.hawaii.gov/dlnr/chair/meetings/index.htm
expressing support for the FWS management permit application. There is not similar mention regarding comments on the NOAA permit application. [We should ask Heidi Guth about this.]

DAR requested that the Board approve the amended permit application to allow the Monument to enter state waters to conduct management activities therein, but subject to seven special instructions and conditions that are in addition to the General Conditions laid out in the application guidelines for the State Refuge. The conditions are similar to those DAR recommended in its request for authorization at the Jan 12th meeting but with some significant differences. For example, the conditions require NOAA to file a post-cruise report with DAR within 30 days rather than merely after the trip. They do not include archaeological research and NH cultural practices in the list of activities consistent with management purposes and emergency responses. The conditions require all other activities not enumerated to obtain prior approval in the form of a permit amendment or separate permit as determined by the DAR staff. These include taking and transporting specimens, catching and killing wild animals, interacting intentionally with protected species, live coral, fish or sharks, and other scientific research, monitoring or education projects or activities (this is Condition 5). Another condition specifies that all vessel support activities related to the Superintendent’s management activities under this permit except those in connection with emergency response must be covered by a separate permit application and permit.

Minutes from the Jan 26th meeting indicate that the FWS Management Permit was also presented for Board approval. The Request for Authorization indicates that two permits were requested for FWS: one for certain management activities within state waters and the other for the operator of the vessel that FWS would charter for related support activities. DAR reported that this was the same submittal that the Board had seen at the Jan 12th meeting, with the exception that the title was changed to comply with the Sunshine Law [this may refer to the change in dates from Jan to Feb as the beginning of the permit term]. Board members raised questions regarding why FWS activities included snorkeling, and the applicant responded that these recreational activities were important to the well-being of the long-term staff at Tern and Laysan Island. The Board approved the FWS permit with the requirement that the language be clarified to limit such activities by “authorized personnel” instead of “visitors.”

The NOAA management permit authorization request received more discussion. It was only for the management activities; there was apparently no application for a permit for vessel support activities (this may be that the only vessels used are also those used in connection with research permits. The Board heard a presentation by a Monument staff member (Malia Chow) who emphasized that NOAA management activities are all closely coordinated with DLNR/DAR and the FWS principally through a Monument Mgt Board that meets several times a month. Emergency response activities are coordinated over the phone. The need for a long term plan was discussed and the ongoing negotiations over how and when this would be completed were described to the Board. (It’s clear from this discussion that the process that is now unfolding for the review and revision of the management plan was not yet settled). Opposition to the permit was presented by the Environmental Defense representative (S. Fried) particularly about things that appear to be extractive and scientific research related. She urges the Board to apply the same rigorous general conditions to this permit as it did last October [this was a research permit, perhaps the Census of Marine Life survey cruise]. Chair Young clarified that this permit was for management activities not research. The ED representative requested that the Board issue only a permit for emergency response and time-sensitive activities that are time sensitive and require NOAA to come back to the Board with a much more specific explanation of what activities it intended to conduct and a copy of any and all existing permits, including permits issued by the Monument. Reference is made to written testimony by ED that contained recommended permit condition language, including a requirement that all personnel sign a form acknowledging the permit conditions. DAR staff point out that changes to the proposed special conditions would address concerns that unlisted activities might be carried out without notice or permission. After further discussion, Chair Young recommended that action on the NOAA permit be deferred to allow DAR and Monument staff to review general permit conditions referred to by the ED representative.97

Was there a shift in power starting w/ NOAA’s invalid permit in January? The permits for “certain management activities” in state waters for FWS and NOAA (Don Palawski & ‘Aulani Wilhelm) were taken off the BLNR website. In later meetings the NOAA permit was described as invalid by DAR Staff (Don Polhemus) b/c NOAA did not sign the amended permit. NOAA either didn’t like the Land Board’s amendments to the terms and conditions or decided to wait until the joint permit form was completed and agreed upon by all Co-Trustees.

97 NEED to add items indicating what happened at subsequent meetings on the NOAA management permit
Malia Chow, representing NOAA in the January 26th Land Board meeting, raised concerns that NOAA’s management activities in state waters would be restricted to certain activities (e.g. emergencies) that were proposed by Env. Defense.

There was brief discussion on the “invalid” NOAA permit at the April 27th, 2007 meeting. The permit was invalid because NOAA was unwilling to sign the permit, which was for management in state waters. 98 DAR staff stated in the May 25th Land Board meeting that the new special conditions (Legally Vetted Sp Terms & Conditions) were consistent with the NOAA Management Permit brought before the Land Board in January 2007. 99

ii. The FWS Management Permit for 2007

iii. Permit for Monk Seal Recovery Plan Actions (shark culling)

One of the most contentious permits was an application by Dr. “Bud” Antonelis to remove Galapagos sharks from French Frigate Shoals to reduce predation pressure on pre-weaned Hawaiian Monk Seals. Of all the permits reviewed from February 23, 2007 to present, Dr. Antonelis’ permit was the only application recommended to not be approved by two of the three Co-Trustees. Comments from the “scientific community” reviewers were lengthy; most reviewers thought the activity ran against the objectives of the Monument, there was little to no consideration of alternative methods, and that the technique was unproven in reducing monk seal mortalities. Native Hawaiian groups, including OHA, also commented on the permit application, requesting that takes of sharks observe cultural protocols. Dr. Antonelis had met with Native Hawaiians from OHA, and was commended for adding a Native Hawaiian to the Monk Seal Recovery Team. There was considerable debate at the May 25, 2007 Land Board meeting on this permit, with members of FWS and NOAA supporting the application and KAHEA opposing. The permit was ultimately approved, with amendments to the permit conditions and one Land Board member voted against the application. 100

iv. Ship Dumping in the Monument

Ship operations for research and management activities typically require dumping of “grey water” in the waters of the monument. In cases where permits for ship operations are reviewed, the dumping continues to be a contentious issue. For example, in the June 8, 2007 meeting of the Land Board, a permit was also considered for ship operations for the NOAA research vessel Hi’ialakai. The vessel permit was reviewed first, and the ship’s 1st officer, Dretlak assured the Land Board that the ship will not discharge into state waters or SPAs, and that upgrades to the ship’s grey water system have been completed. A proposed retrofit to the ship, which would allow the ship to not discharge into the monument have not been completed, and community groups seized upon this issue to encourage the Board to disprove the application. KAHEA voiced multiple issues with the permit and was concerned about the ship’s failure to upgrade its wastewater system. NOAA assured the Land Board that the Hi’ialakai staff would use best management practices to minimize impacts, and NOAA staff asserted that dumping outside of state waters was not a prohibited activity within the Monument. 101

D. Development of the New Management Plan

1. Decision to Let FWS Take the Lead – how arrived at

Decision to Let FWS Take the Lead, you should describe the CCP and refer to the FWS’s policy guidance and describe past planning efforts for the Hawaiian Islands NWR, etc. (including what is the "step-down research plan" under development for Palmyra Atoll and Kingman Reef NWRs?). This will help set up the comparison discussion in II.D.4.

2. Process and Timeline for revising the draft Sanctuary Management Plan

3. Questions on the Process for and Timing of Public Participation and Public Advisory Committee

4. Comparison of the CCP with the Sanctuary Plan Devt Process

By the latter, I mean the generic planning process that all sanctuaries are supposed to have, not the specific process that was followed for devt of the draft sanctuary mgt plan for the NWHI (that will be described under I.C).

98 The NOAA permit for management activities in state waters (Jan. 26, 2007) is no longer available on the BLNR website, but I have a copy.

99 This statement by DAR staff was contested by KAHEA and Environmental Defense

100 Amendments were made to permit conditions 2, 4-9; changes made are not available on BLNR website; Land Board member Edlao voted against approval

101 Is NOAA research vessel’s (carrying the HIMB researchers) discharge of wastewater inside the Monument in violation of the Proclamation, the federal rules, etc.?