

**Recommendations for the 2007 NWHI Permitting Season:  
Building on Best Practices and Lessons Learned in 2006  
Stephanie Fried, Ph.D.  
Environmental Defense, February 20, 2007**

Last year was the first year of implementation of the state's new NWHI Refuge rules. Quite understandably, given that this was the first attempt made by the DLNR at implementing stringent NWHI protections, the permitting and public review processes were difficult. We warmly welcome the fact that DLNR Chairman, Peter Young, has made a firm commitment to ensuring public input regarding the public trust resources of the NWHI, indicating support for a reasonable public comment period for NWHI permits. This stands in sharp contrast to last year's process where public access to hundreds of pages of permit documents was routinely provided only a few days prior to Board hearings. To date, the DLNR is the only NWHI agency to provide detailed information or allow public input on the NWHI permitting process. The relative openness of the DLNR has provided the first public view into the formerly closed permitting process for this fragile public trust resource.

**Serious problems** include:

- **Lack of a NWHI management plan for state waters in 2006, 2007**
  - **Lack of a research prioritization plan for state waters in 2006, 2007**
- Despite Board's request in 2006 that DAR NWHI staff provide research prioritization and management plans prior to the issuance of any permits in 2007, no such plans have been circulated.
- **Lack of written biosafety protocols, biosafety handbooks, etc.**
  - **Permits issued in a piecemeal manner throughout 2006 for close to 340 people for 380 activities in the NWHI, no real-time or post-season assessment of impacts of permittees or cumulative impacts of combined activities throughout the season reported to Board or public.**
  - **Permitting irregularities at the State Division of Aquatic Resources:** only 10 of 25 permits were signed and dated, leading to questions of when permits were actually issued; only 41 of 340 people allowed in NWHI signed any permits;
  - **Serious permit violations, questions regarding reporting to enforcement officials:** Board briefing documents on HIMB coral harvesting, bacteria cultivation and waste dumping violations included no DOCARE enforcement materials or recommendations.
  - **Lack of transparency regarding the state permitting process, apparent violations of state "sunshine laws"**
  - **Significant increase in number of permits scheduled for 2007:** There are now 3 scheduled permit application periods (February 1, May 1, October 1). The number of permits received by DAR as of the Feb. 1 deadline -- the first third of the 2007 permitting season -- totals 144% of all permits received by the state in the 2006 season.

**The magnitude of these problems poses a significant threat to the ecological integrity of the state's public trust resources in the NWHI.**

I) Board vigilance will be required to **ensure that State rules, guidelines, and permit conditions remain in place under the new Monument permitting system.** Pg. 3

II) **Things to Know:** Quick Guide to State Refuge Rules and Permit Guidelines Pg. 3

III) **What Happened in 2006?** – Hundreds of people permitted in piecemeal manner, no analysis of impacts of permittees or cumulative impacts of combined activities presented during Board decision-making Pg. 4

IV) **Best Practices to be Retained** Pg. 9

1. Public circulation of NWHI permit applications and full text of reviewer comments (examples enclosed);
2. Continued use of robust permit conditions developed by the Board;
3. Permit application and instructions: Applicants must be informed about State rules, permit guidelines; data requirements must be clearly presented;

V) **Recommended Improvements to Ensure Fulfillment of State NWHI Refuge Rules and Guidelines**

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1. Institute **45 day public comment period** immediately – the new application deadlines, staff 45 day review period and current receipt of 36 permits makes this feasible;
2. Require **overview of thirty-six 2007 permit requests** (i.e. simple spreadsheet listing permit applications, number of people and vessels seeking access to each atoll/island, gear types, duration of access, etc.) prior to granting 2007 permits; require staff to provide this information to permit reviewers, Board and public to allow cumulative impact assessment and avoid piecemeal permit analyses;
3. Given last year's evaluation by NOAA's chief NWHI Scientist of the NOAA Hi`ialakai wet lab as a "**bacterial cesspool**" in a report circulated to the Board, and apparently illegal bacteria cultivation and waste dumping, **do not allow vessels or permittees to depart for the NWHI without written best practice biosafety protocols for vessels and permittees;**
4. **Ensure commitment to openness and transparency; halt apparent violations of state "sunshine laws";**
5. **Conflict of interest:** We salute the DAR's effort to institute a conflict of interest protocol. It will be of the utmost importance to ensure recusal from permit evaluations by those whose financial interests are linked to those of the permit applicant. **We recommend language to identify the fact that a contractor (who is not a civil servant of the state of Hawai`i) and who is paid by an applicant would have a conflict of interest requiring recusal when reviewing a permit from or financed by that applicant.**
6. **Enforcement:** Significant enforcement issues in 2006 lead to the need to ensure the presence of state or federal enforcement agents on board vessels, such as the NOAA research ships, while in the NWHI. We recommend a Board assessment of the manner by which DAR staff handled the multiple HIMB violations, including informing state enforcement officials.

## Building on Best Practices and Lessons Learned in 2006

### 1) Board Vigilance will be Required to Ensure that State Rules, Guidelines, and Permit Conditions Remain in Place under the New Monument Permitting System

The State NWHI Refuge rules, permit guidelines and permit conditions are, in many cases, the most highly protective rules, guidelines and conditions of any NWHI jurisdiction. Governor Lingle has challenged NOAA to meet the stringent level state rules. It will require substantial vigilance by the Board to ensure that the state continues to lead by example and that state protections not weakened during the joint Monument process. *We respectfully request that the Board bring copies of the state's NWHI Refuge Rule and Permitting Guidelines (enclosed) to any hearings or briefings pertaining to the NWHI.* We draw your attention to the information (circulated last week by email) from the General Counsel of the Council on Environmental Quality of the Executive Office of the President of the United States in response to claims about the “new Monument permitting system” made by the head of DAR at the 1/26/07 Board meeting.

The DAR head stated that the new Monument permitting system would eliminate or render “archaic and irrelevant” current state permit guidelines and conditions:

*“Let me assure you that the concerns or speculation you have heard are false. ... Consistent with the Proclamation and the regulations, no representative of the Co-Trustees has, in the course of providing counsel on the permitting process, expressed a view that the State of Hawaii's applicable Constitutional provisions, statutes, regulations, guidelines, or permit conditions should be eliminated, overridden, weakened or amended as a result of the Monument designation. ... The State has invested considerable thought and energy into formulating the regulations, guidelines and permit conditions for activities in State waters and for Kure.”*

**Familiarity with state guidelines, rules and existing permit conditions, therefore, and taking measures to ensure that there is no weakening of these protections during the Monument process will be one of the most important Board activities as the permitting process evolves this year.**

Last week, at the request of DLNR, we met with researchers and we reviewed one NWHI permit (for monk seal research) where applicants have used the new Monument application form. There are significant problems with the new form which fails to inform applicants of the state's guidelines and stringent rules (which differ from and are often stronger than federal rules). The new Monument forms substantially hinder the ability to properly assess permit applications under state refuge rules and guidelines. We are currently drafting recommended changes to the application form and permit instructions and will present these to the Board for your consideration in the near future. We would like to underscore the fact that these forms are still in *draft* format, and are subject to change after public input and Board input.

### 2) Things to Know: Quick Guide to State Refuge Rules and Permit Guidelines

**State Refuge rules** provide for simple and clear protection of NWHI ecosystems “in their natural character”. Everything is prohibited that is not explicitly permitted in a short list of three categories of permits allowed for the state waters of the NWHI:

- (1) Refuge Rule: “scientific or education purposes” – DLNR Guideline calls this a “Research, monitoring, education permit”
- (2) Refuge Rule: “non-extractive purposes undertaken to further the knowledge of resources or which provide for enhanced resources protection or benefit resource management;” – DLNR Guideline calls this a “Special Activity Permit”; Please note that, unlike federal “Special” Permits (Special Ocean Use, etc.) the state permit is allowed solely for “non-extractive purposes”; (it might be clearer if the

Board required the name of this permit to reflect the legal state definition, something like “Non-extractive Protection, Management Permit”)

- (3) Refuge Rule: “subsistence, traditional and customary practices by Native Hawaiians consistent with the long-term preservation of the refuge resources” – DLNR Guideline calls this “Native Hawaiian Practice Permit”

Refuge rules also stipulate:

- a “**do no harm**” requirement for permitting;
- use of clearly defined “**precautionary approach**” to minimize risks of adverse impacts, especially where data is limited;
- a **public comment** requirement;
- and strong steps taken towards **permit violators** -- the penalty for violating permit conditions is denial of future access to this fragile public trust resource:

### **The State permitting guidelines:**

#### **1) Describe State Refuge Rules:**

“The Department established a marine refuge in the NWHI for the long-term conservation and protection of the unique coral reef ecosystems and the related marine resources and species, to ensure their conservation and natural character for present and future generations. The primary goal of the NWHI Marine Refuge is resource preservation, with the specific objectives of preserving and protecting unique habitats, conserving biodiversity, restoring natural communities, and avoiding human impacts. The Refuge will be managed using the best available science and a precautionary management approach to resource protection to minimize risks of possible adverse effects on the regional ecosystem, its biodiversity or its indigenous wildlife in this area, especially where data is limited. DLNR is implementing an entry permit program for the area that will cause no harm to the refuge resources and be consistent with the management programs in the adjacent National Wildlife Refuge and the NWHI Coral Reef Ecosystem Reserve for this area, that preserves the area by limiting entries and restricting access to specific areas. In addition, the Refuge allows Native Hawaiian cultural, subsistence, and religious practices that are consistent with the applicable law and the long-term conservation and protection of the resources of the marine refuge. The refuge is also intended to support, promote and coordinate appropriate scientific research and assessment, and long-term monitoring of the refuge resources, and the impacts of threats thereto from human and other activities, to help better understand, protect, and conserve the NWHI.” Pg 1,2

#### **2) Apply the following criteria to **all permit applications****

- a **prohibition on commercial activities, including bioprospecting**;
- Reiterate the public trust nature of NWHI, indicating that resources and samples are “not to be used for sale, patent, bioassay, or bioprospecting, or for obtaining patents or intellectual property rights”;
- Require permitted activities to show “**demonstrable benefits to the preservation and management of the NWHI ecosystem**”;
- Require that “the activity must **do no harm** to the ecological or biological systems, sites or resources of the NWHI, or by virtue of the mode of transport to be employed for access”;
- Require that the activity must have “demonstrable benefits to the cultural and spiritual relationship of Native Hawaiians to the NWHI ecosystem” and “must support the perpetuation of traditional knowledge and ancestral connections of the Native Hawaiians to the NWHI.”
- Explain that “**Special activities**” are non-extractive in nature and “**must provide a demonstrable benefit to the Refuge**” pg 4

**Describe criteria to be used for evaluation of permits:**

- **Relevance or importance of the proposed project to the NWHI Marine Refuge**
- How the project will benefit management of the NWHI Marine Refuge and the greater NWHI ecosystem, and/or Hawaiian archipelago
- Whether the proposed project **could be conducted outside the NWHI Marine Refuge**
- Scientific, educational, or cultural merits of the project;
- Whether the project will **cause harm to the ecosystem**;
- Whether the project will provide information that can assist in **improving or facilitating direct management actions either** in the NWHI or MHI
- Whether the applicant has had a **previous permit revoked**
- Comments received from other relevant agencies involved in the management of the NWHI

Recommend, for permits involving collection: “**pre-collection documentation of the habitat**, along with precise GPS of each collection location, which can substantiate the presence of individuals in the numbers suggested by your protocol being present prior to collection activity.”

**Require permit holders to submit a project report and cruise log to DLNR within 30 days** after return to Honolulu.

Stipulates that “**permit activities will be monitored to ensure compliance** with the conditions of the permit.”

**State Permit Instructions** stipulate that:

\* “Permits are good for a limited term (normally 6 months, but not longer than one year).

\* Applicants must

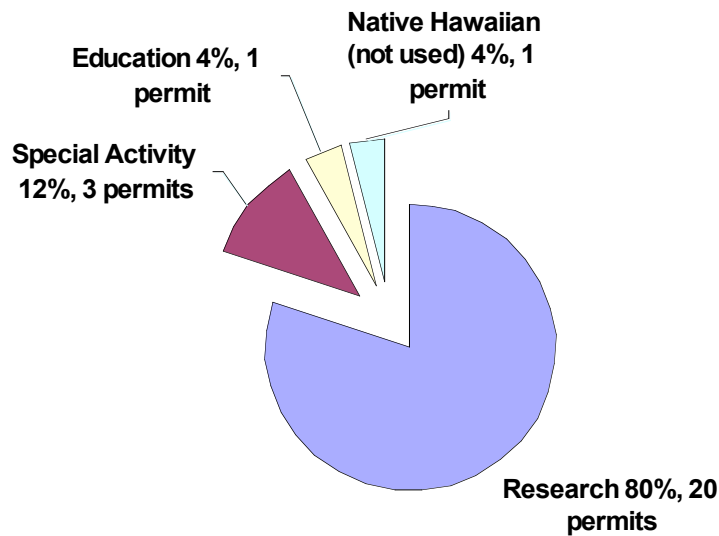
- “fully describe the purpose, need and scope of the activity and **provide complete details and project proposals.**” Pg 2, Appendix A
- “give reasons **why your activity must take place in the NWHI and why it cannot be carried out in the** Main Hawaiian Islands or elsewhere. Describe how the project will benefit management of the NWHI Marine Refuge and the greater Hawaiian archipelago, and attach additional sheets, as necessary” pg 3
- “Describe **what impacts your activities will potentially cause to the NWHI Marine Refuge (including transport)** and attach additional sheets as necessary.” Pg 3
- “Describe all procedures, step by step, that will be used in the proposed project. Include **documentation of all safety protocols**, data collection techniques, data sheets, sample collection techniques.”
- “Describe **how many samples will be collected, where, which species, time of day (if specific), gender, how often individuals will be handled and how long each individual will be handled (if captured and released).**” Pg 3
- “Describe anticipated **impacts of the project on target populations, impacts on other species, effects of installations, effects of invasive procedures, methods for evaluating impact** of the proposed project, methods for reducing or compensating for impacts.” Pg 3
- “Describe **how and where samples will be stored in the Refuge** and once they are removed from the Refuge.” Pg 3
- “Describe techniques for sample processing both in and outside of the Refuge.”
- “Describe **how samples will be transported out** of the Refuge.”
- “Describe **all training, experience, and capabilities of those who will be conducting** the sample collection and analysis.”
- “If the project is connected with one or more graduate research projects, please attach all institution approved graduate research proposals which correspond with this project.”

- “If **permits** are required by other entities (e.g. State of Hawai`i permit from State Division of Forestry and Wildlife for Kure Atoll Wildlife Sanctuary, Endangered Species Act permit, Marine Mammal Protection Act permit, State film permit), list them and **attach them to the Application**. If such permits have not been obtained at the time you submit this Application, please note the progress in obtaining them and attach copies of the applications which you have submitted for such permits.” Pg 3
- Provide a **list of all other projects in the State Marine Refuge** to which your proposed project is related. If applicable refer to it by Permit number and title. Describe any samples and/or data that other Permittees will collect for your proposed project and describe any samples and/or data you will collect for other Permittees. Describe how any samples and/or data may be shared by yourself and other Permittees.” Pg 4
- “In addition to Permit reporting requirements, when do you expect the following to be completed: sample **analysis, data analysis, write-up and publication of information gathered within the Refuge**.” Pg 4

### **3) What Happened in 2006?**

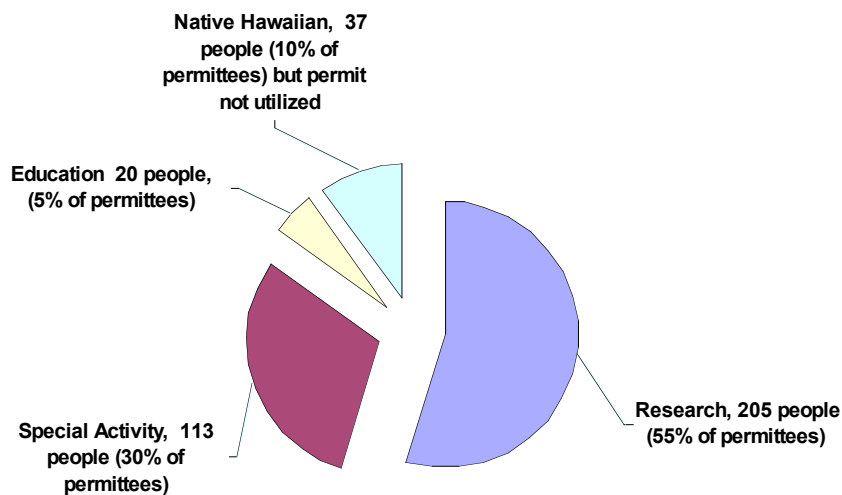
This analysis is based on information from 25 state permits approved in 2006 which have now been publicly released by DAR. In 2006, 80% of the permits issued were for research. One Native Hawaiian permit was issued (for the Hokule`a) but was not utilized. An “extreme sports” applicant sought a Native Hawaiian permit but, after criticism from the Hawaiian community, switched to an Education permit at the last minute, despite the lack of an educational outreach plan. This was the sole Education permit issued in 2006. Three Special Activity permits were issued – for operation of the NOAA vessel Hi`ialakai, the NOAA vessel Oscar Sette and the US Coast Guard Kukui. Twenty research permits were granted. The USFW management permit was classified under “Research, Education, and Monitoring.” NOAA did not apply for a management permit.

**Distribution of 25 Permits by Type, 2006**  
 Permits covered approximately 340 people and over 380 permit activities  
 Only 10 permits were signed and dated.



While 80% of the permits were issued for research, 55% of the permittees allowed in state waters of the NWHI were affiliated with research permits. Fully 30% were affiliated with Special Activity permits, of which only 3 were issued.

**Number of Permittees per Permit Type**



## No Data on Cumulative Impacts During Board Approval Process

One of the things that was difficult to judge last season (and this season, given the lack of data presented, so far, prior to the submission of new applications to the Board) was the extent to which different locations are being differentially impacted by vessel traffic and human presence. Although hundreds of people were permitted to conduct activities throughout the NWHI in piecemeal manner, staff did not present any analysis of the impacts of permittees or the cumulative impacts of combined activities during the entire Board decision-making process in 2006. This information is necessary for managers who must, by law, protect the NWHI from any cumulative impacts. The number of individuals on each permit varied widely, ranging from one to 67 people per permit, with an average of 15 people per permit. When the Board considered permit applications last year, discussions about the permits and their impacts did not include a discussion of the number of people involved in any given permit proposal.

The tables below show the locations ranked by number of permits as well as by number of people in each location. Between 40 – 65% of all applicants received permission to conduct activities throughout most of the state waters of the NWHI (i.e. at 7 or 9 state locations). French Frigate Shoals was the area with the greatest amount of human traffic permitted in state waters (at least 244 people) but significant numbers of people -- from 121 to 192 -- were given permission to carry out activities in state waters surrounding every other island and atoll. Last year, staff indicated that the traffic at FFS may have been “too high” and indicated plans to shift more traffic to Kure Atoll in 2007. There is concern among many, however, about the impact of increased traffic on Kure.

Near-shore waters of the NWHI are thought to be feeding grounds for juvenile monk seals and are the location of most of the coral reef ecosystems. The table and graph below shows the most recent monk seal counts per location. The comparison between numbers of people and numbers of monk seals is, of course, not a direct comparison since only a portion of the permittees were present in nearshore waters at any given time. Nonetheless, the numbers do provide an idea of the extremely small seal populations per location and give rise to questions regarding the impact of human disturbance in near shore foraging grounds.

By way of contrast, the new Visitor Plan for Midway Atoll has just gone through a

	# PERMITS
FFS	18
Nihoa	14
Gardner	12
Kure	11
Pearl and Hermes	9
Laysan	8
Lisianski	7
Mokumanamana	6
Maro	5

lengthy public

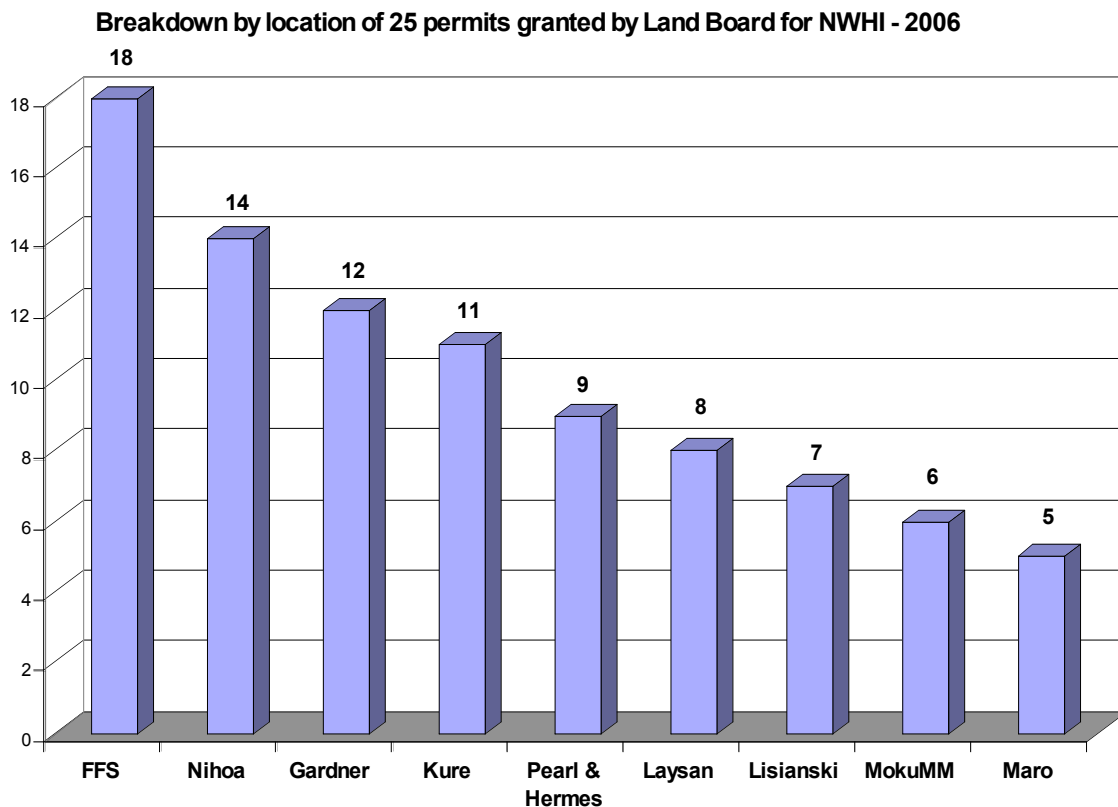
	# PEOPLE	PERCENT OF PERMITTEES	MONK SEALS
FFS	244	65%	322
Nihoa	192	51%	47
Laysan	187	50%	273
Lisianski	167	45%	168
Kure	166	44%	114
Pearl and Hermes	157	42%	228
Maro	153	41%	
Mokumanamana	133	35%	133
Gardner	121	32%	

comment period. The USFWS received over 6,400 public comments as well as input from organizations representing 5.6 million people. The draft Midway Visitor Plan only envisions about 100 visitors during the first test year of opening up Midway to public access and includes plans for on-site enforcement, a contrast with DAR recommendations for the first year of state refuge operation. We note that, compared to other regions of the NWHI, Midway is widely viewed as the “sacrifice zone” in the NWHI – an area bombed during WW II, massively impacted by the presence of thousands of soldiers and military waste, contaminated with lead paint (contributing to the deaths of approximately 10,000

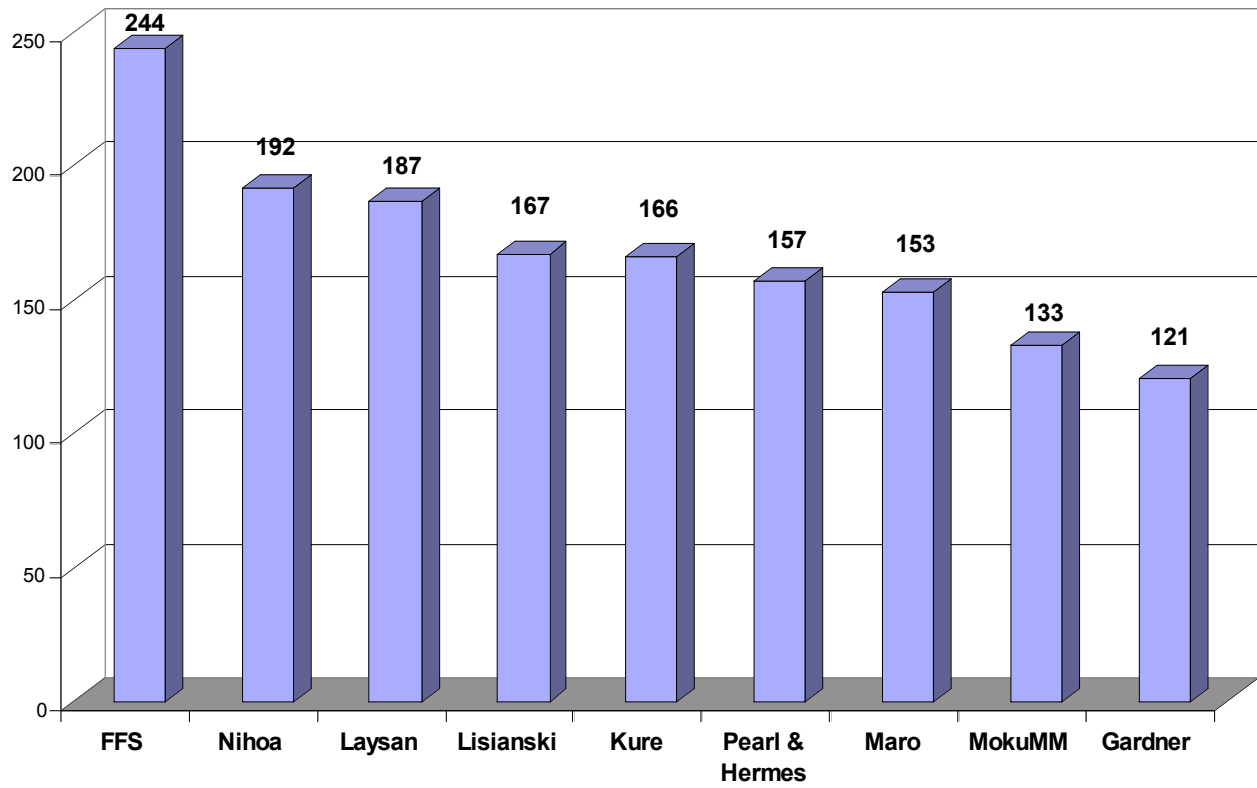
albatross chicks each year due to lack of clean up), and other forms of contamination. It was also the site of

an unprofitable 5-year “ecotourism” operation which appeared to have a negative impact on the resident population of ulua. Midway is expected to be the area of the NWHI which will remain open to and be most impacted by human disturbance.

We note with alarm the significant number of people allowed by the state in other fragile areas of the NWHI despite the new highly protected state refuge rules and guidelines. We are deeply concerned that these numbers will be rapidly increasing year after year. We note that –*at no point during 2006* – did DAR staff ever present to the Board any indication of the total number of people and vessels per location as an aid to assessing cumulative impact during decision-making on permits. We have requested such an analysis and even now, as the second year of permitting is underway no such information has been forthcoming.



**Number of People Permitted for Activities per Location, 2006**  
Total approximately 340 individuals, 380 activities



## **Best Practices: Posting of Permit Applications, Circulation of Advisor Reviews, Use of Permit Conditions, Clarity regarding State Rules and Guidelines, Application Requirements, Signature Page**

It will be of vital importance for the Board to ensure that the best practices from 2006 are applied and strengthened in 2007. In 2006, best practices included:

### **1) Public circulation of NWHI permit applications and full text of reviewer comments;**

Last year, during the NWHI permitting process, the NWHI hui and our panel of scientific and cultural advisors found the comments of DAR NWHI permit advisors which were made publicly available prior to Board hearings to be extremely useful.

Enclosed are two examples of these publicly-available comments from members of the DLNR NWHI Permit Advisory body, to provide a reminder of the precedent set last year : a permit review written for DAR by Sol Kaho`ohalahala on a NMFS permit and a review written by a DAR coral reef ecologist on the "Census of Marine Life" permit.

Not only did our advisors find these comments helpful, but the Land Board drew significantly from the detailed advice provided by the DAR ecologist and by Mr. Kaho`ohalahala in establishing permit conditions stronger than those originally recommended by staff. **The importance of continuing to provide full copies of such reviews cannot be overstated. These reviews are carried out by individuals acting in an official capacity as advisors to the DLNR in the management of public trust resources of the NWHI and, as such should be provided, in their entirety, to the Board and public.** It is vitally important that DLNR draw from state-funded civil servant staff biologists who have a sworn duty to protect state public trust resources.

### **2) Use of Robust Permit Conditions Developed by the Board**

By the end of the 2006 NWHI season, as a result of action by the Land Board and extensive public comment on most of the 25 permits, a relatively robust set of permit conditions was developed. The conditions required by the Board and public comment were substantially more robust than those initially proposed by DAR NWHI staff. These permit conditions included, among other things, requirements for the tracking of waste via waste logs, daily impact logs (collections, incidents) collected and held by state or federal authorities, improved disease and alien species protocols, anchoring protocols, intentional and unintentional interaction requirements for endangered species, collecting practices, requirements for all individuals covered by a permit to sign the permit indicating comprehension of permit conditions, and reporting responsibilities.

**It will be quite important for the Board to maintain these permit conditions, developed through months of public consultation and Board action throughout the transition to the joint state-federal Monument permitting system and to make them publicly known to applicants via the application form.**

As more data are gathered regarding best practices, it will be important for the Board to improve and strengthen these conditions. We note that efforts have been made by DAR staff during testimony at recent Board hearings to eliminate the waste dumping and collection/impact reporting requirements for permittees, including NOAA. We underscore the fact that last year, there were allegations (and an ongoing federal and state investigation) of illegal coral harvesting and waste dumping from a NOAA vessel during the HIMB voyage. Requiring signed waste and collection/impact logs provides the state with an additional enforcement tool.

**3) Permit Application: Applicants informed about State Rules, Permit Guidelines; data requirements are clearly presented; all applicants sign copy of permit;**

Given that state rules for NWHI waters are more stringent than many of those of the Monument and the NOAA Reserve, it will be of vital importance to ensure that all who enter state waters continue to be clearly informed of and obey state rules and guidelines, in addition to any Monument requirements. State rules and guidelines should be adequately enumerated on the new joint Monument application and instruction forms. Activities that are allowed in federal waters but are illegal in state waters must be so indicated. As is the case in other protected areas, all individuals entering the NWHI should sign and possess a copy of the permit covering their activities. Currently, there are significant problems with the new joint Monument permitting instructions and application form. We will be providing the Board with a full analysis of the differences between the proposed joint Monument permitting system and the state system, as well as recommended changes to the new joint documents in order to meet state protection mandates.

**Improvements Needed to Ensure Fulfillment of State NWHI Refuge Rules and Guidelines:**

**1) Institute a 45 day public comment period immediately.** DLNR head, Peter Young has firmly committed to the broadest principles of public input regarding the public trust resources of the NWHI. Given the new application deadlines where all of the permits are now received at a given time and the DLNR's planned 45 day staff review period, it is now logistically simple to provide a 45 day period for public review of documents. Throughout the past year, members of the public and external scientific reviewers have often only had a few days to review hundreds of pages of permit application documents. Currently, 36 permits applications have been received by DAR for review. We urge the Board to recommend that staff allow the 45 day review period for public comments now, beginning with this group of 36 applications.

**2) Require overview of thirty-six 2007 permit requests** (i.e. simple spreadsheet listing permit applications, number of people and vessels seeking access to each atoll/island, gear types, duration of access, etc.) **prior to granting 2007 permits;** request staff to provide this information to permit reviewers, Board and public to allow cumulative impact assessment and avoid piecemeal permit analyses;

There are now three periods for permit applications: February 1, May 1, and October 1. By the February 1 deadline – the first third of the 2007 permitting season – DAR received 144% of applications received during the entire 2006 season. DAR now has 36 applications in hand, making it possible to actively attempt to avoid cumulative impacts.

In order to avoid the problems associated with the piecemeal permit analysis that occurred last year and to allow for an assessment of permits in the context of potential cumulative impacts on the ecosystem, we have requested that the following information be made available to the Board, DAR advisors, and the public prior to any evaluation of individual permits:

- the proposed number of individuals, identified by permit, applying for entry and activities in the NWHI
- the number of individuals proposing activities at each location, identified by permit
- the extent of vessel traffic at each location
- the timing and nature of the proposed activities, including gear types used (if any)

This data could easily be compiled by staff or contractors into a simple spreadsheet format, much in the same manner as we have compiled the 2006 permit data above. Unfortunately, DAR staff have so far failed to provide this data; permits have already been circulated to DAR advisors for their review; this basic level

information necessary for management and ecosystem protection has not been yet provided to the public or the Board.

**We recommend that the Board instruct staff to ensure provision of of this information to permit reviewers, the Board and the public, prior making recommendations on NWHI permits or voting on their approval.**

**3) Require best practice written biosafety protocols for vessels and permittees.** Given last year's evaluation of the NOAA Hi`ialakai wet lab as a "bacterial cesspool" in a report by a NOAA scientist (circulated earlier to the Board by staff), and apparently illegal bacteria cultivation and waste dumping by researchers, we recommend that the Board does **not allow vessels or permittees to depart for the NWHI without written best practice biosafety protocols in place and mandated as a permit condition for vessels and for permittees;**

Last Tuesday, NWHI hui representatives were asked to meet at DAR with NMFS monk seal and cetaceans researchers to discuss their permit application. The cetaceans researcher indicated that they followed practices at a level of standard medical (human disease) biosafety. We requested, at that meeting, that the monk seal and cetaceans researchers present to the Board (and public) on Friday 23 February written documentation of their biosafety protocols. If they do, indeed, meet human medical biosafety standards, this will be a significant step forward and could be utilized as an example for other researchers and for vessels.

**4) Ensure commitment to openness and transparency; halt apparent violations of state "sunshine laws"; cancel the DAR "gag order" on permit reviewers;**

Throughout 2006, as part of the public input process, NWHI permit applications and DAR and advisor recommendations were published on-line prior to Board hearings in order to make public comment possible. Land Board deliberations determined the final permit conditions through the public hearing process and the Board instructed staff to release the final permits to the public. Yet, DAR staff, including the DAR's NWHI coordinator, refused to make available all but one of the NWHI permits utilizing misleading claims of "privacy" and "confidentiality."

The permits, however, (if they had been issued (i.e. signed and dated) as required by law) should simply have been a written reflection of changes (or lack thereof) made publicly by the Board to public documents posted on-line. It took the filing of a complaint with the Office of Information Practices to secure the public release of the permits by DAR in mid-January 2007, some 10 months after the season began. When the permits were finally released, however, we could not find a single word on any page of the 25 permits which had been blacked out, indicating that there had not been, after all, any confidentiality issues.

Initially, DAR staff only released unsigned versions of the permits. We indicated that this was insufficient. Staff then began (slowly) to release signed versions of most of the permits. However, the majority of the permits had no dates to indicate when they had been signed (i.e. before or after NWHI activities had been conducted).

### **Gag Order**

On Saturday January 27, 2007, DAR staff finalized a document that they have since attempted to make staff and permit reviewers sign as a prerequisite for being allowed to review NWHI permits. DAR and OHA staff have refused to sign the gag order indicating that it would be impossible for them to carry out their evaluations (the gag order requires that, among other things, they not discuss the permit applications and may not retain any records of any of their deliberations or of the permit applications for future reference). These conditions are not applied to the DAR permits for state waters of the Main Hawaiian Islands and

represent a reversal of the precedent for review set last year. They also have not been applied equally to all DAR staff (some have been allowed to attend permit evaluation meetings without signing the form) and would block Board and public access to extremely useful permit reviews of the sort provided last year, and upon which the Board based conditionalities that were applied to permits.

**5) Conflict of Interest Provision:** We salute the DAR's effort to institute a conflict of interest protocol. It will be of the utmost importance to ensure recusal from permit evaluations by those whose financial interests are linked to those of the permit applicant. **We recommend language to identify the fact that a contractor (who is not a civil servant of the state of Hawai'i) and who is paid by an applicant would have a conflict of interest requiring recusal when reviewing a permit from or financed by that applicant.**

We recommend drawing on state civil servant marine biologists, sworn to carry out duties to protect state resources, especially in the case of projects from or funded by an agency paying the salaries of contractors on the review panel.

#### **4) Enforcement**

Significant enforcement issues in 2006 lead to the need to ensure the presence of state or federal enforcement agents on board vessels, such as the NOAA research ships, while in the NWHI. We recommend a Board assessment of the manner by which DAR staff handled the multiple HIMB violations, and an identification of best practices.