

MINUTES  
FOR THE MEETING OF THE  
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: February 18, 2009  
TIME: 9:00 a.m.  
PLACE: Kalanimoku Building  
Conference Room 132

Chairperson Laura H. Thielen called the meeting of the Commission on Water Resource Management to order at 9:00 a.m.

The following were in attendance and/or excused:

**MEMBERS:** Ms. Laura Thielen, Mr. Neal Fujiwara, Mr. James Frazier,  
Ms. Donna Kiyosaki, Ms. Meredith Ching

**STAFF:** Ken Kawahara, Ed Sakoda, Roy Hardy, Lenore Ohye, Ronnie  
Torres, Charley Ice, Robert Chong, Jeremy Kimura

**EXCUSED:** Dr. Lawrence Miike, Dr. Chiyome Fukino

**COUNSEL:** Julie China, Esq. and Colin Lau, Esq.

**OTHERS:** Duane Taniguchi(SDOT-Highways Design); Bryan Sarasin, Jr.;  
Isaac Moriwake (Attorney for Earthjustice); Patricia Hanwright  
(Larsens Beach Rd., Anahola); Barry Simmons (Oasis Water  
Systems-Kauai); Kevin Polloi (R.M. Towill Corp.); Luigi Manera  
(Zappacos), Alan Arakawa (former Mayor of Maui County), Jeff Eng  
(Director, County of Maui Department of Water Supply), Jane Lovell  
(Deputy Corporation Counsel, County of Maui)

Chair Thielen announced that there was a request to take Item D2 first and therefore it will be taken out of order. Deputy AG Julie China will sit in on Item D2 and Deputy AG Colin Lau is here for Items D1, D3 and C1.

**A. APPROVAL OF MINUTES**

1. January 22, 2008

MOTION: (Fujiwara/Frazier)  
To approve the minutes.  
UNANIMOUSLY APPROVED.

**D. GROUND WATER REGULATIONS**

2. **Mr. Bryan Sarasin, Mr. John Varel, Maui Department of Water Supply (MDWS), Applications for Water Use Permits: Waihee-Sarasin Well (Well No. 5631-08), Future (Domestic and Agricultural) Use of 0.051 mgd, WUPA 853, TMK 3-2-007:016**

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**Waihee-Varel Well (Well No. 5631-07), Future (Domestic and Agricultural) Use of 0.041 mgd, WUPA 825, TMK 3-2-001:001**  
**Iao Tank Site Well (Well No. 5230-03), New (Additional Municipal) Use of 0.802 mgd, WUPA 846, TMK 3-5-001:021**  
**Mokuhau Well 3 (Well No. 5330-11), New (Additional Municipal) Use of 0.589 mgd, WUPA 847, TMK 3-3-002:024**  
**Waikapu Tank Site Well (Well No. 5131-01), New (Additional Municipal) Use of 0.900 mgd, WUPA 848, TMK 3-5-004:099**  
**Iao Tunnel - Kepaniwai (Well No.5332-02), New (Additional Municipal) Use of 0.840 mgd, WUPA 852, TMK 3-3-003:003**

PRESENTATION BY: Charley Ice

RECOMMENDATION:

1. Approve a pump installation permit for Well No. 5631-08 for a 160 gpm pump with the understanding that the well will only be used for domestic purposes at this time. Monthly flowmeter readings shall be recorded and reported to the Commission. The Certificate of Pump Installation Completion will reflect these limitations.
2. Defer action on the request for new non-public trust ground water irrigation uses in Water Use Permit Application No. 853, Waihee-Sarasin Well (Well No. 5631-08) until a decision and order for CCH-MA06-01 is approved by the Commission.
3. Approve a pump installation permit for Well No. 5631-07 for a 65 gpm pump with the understanding that the well will only be used for domestic purposes at this time. Monthly flowmeter readings shall be recorded and reported to the Commission. The Certificate of Pump Installation Completion will reflect these limitations.
4. Defer action on the request for new non-public trust ground water irrigation uses in Water Use Permit Application No. 825, Waihee-Varel Well (Well No. 5631-07) until a decision and order for CCH-MA06-01 is approved by the Commission.
5. Approve Water Use Permits Nos. 846, 847, and 848 for the reasonable-beneficial for existing and requested additional new domestic use of potable ground water from Maui Department of Water Supply wells, or 60% of the requested amounts for a total of 1.374 mgd, as shown below (amounts in million gallons per day (mgd):

<u>WUP No.</u>	<u>Well No.</u>	<u>Well Name</u>	<u>Request</u>	<u>60% of Request</u>
846	5230-03	<b>Iao Tank Site</b>	0.802 mgd	0.481 mgd
847	5330-11	<b>Mokuhau 3</b>	0.589 mgd	0.353 mgd
848	5131-01	<b>Waikapu Tank</b>	0.900 mgd	0.540 mgd
		(total)	2.291 mgd	1.374 mgd

remaining Iao balance: 0.916 mgd

6. Defer action the additional new use amount of the balance of 40% of non-public trust needs of MDWS until a decision and order for CCH-MA06-01 is approved by the Commission.

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7. Defer action on Water Use Application No. 852 for reasonable beneficial use of a new total of 2.200 mgd from Iao Tunnel (Well No. 5232-02), pending a decision on the Na Wai Eha contested case hearing (CCH-MA-06-01).

Charley Ice distributed the correct original table version of the Maui Department of Water Supply's requests located in the Summary of Request section of the submittal on page 3. He explained that the submittal's version was incorrect.

Mr. Ice pointed out that the two private well construction permit applications came in prior to designation and were actually issued prior to designation, and that the well construction process was underway already prior to designation. With designation, the applicants were notified they would be able to complete their wells but unable to get pump installation permits without obtaining a water use permit.

Chair Thielen stated that this was the first instance in a ground water management area where there are competing applications, wherein the total would take it over the sustainable yield, and explained that the recommendation is to do a partial granting for the domestic use and the domestic portion of municipal uses, and not for the agricultural uses and to basically defer such non-domestic uses until a decision and order is made on the contested case hearing.

Mr. Ice further explained that in terms of water availability (refer to Table 1, page 6), the total request is 92,000 gallons over the estimated sustainable yield due to the fact that the County of Maui is requesting the full balance of what had been remaining within the sustainable yield on top of what the private well owners requested. The purpose of the private well applications was to overcome an inability to get reliable guarantees of service for irrigation from the ditch system, which is the historical supplier of those agricultural lands.

Mr. Ice presented a map that showed the relationship of the ditch systems to the wells that better described the ditch relationship to the wells than Exhibit 1 in the submittal.

Mr. Ice said that individual domestic use is legally exempted from the Water Use Permit application process.

Mr. Ice said he thought that someone who's not familiar with this process might not know quite how to completely describe just why this is the most efficient water use possible.

Mr. Ice noted that Mr. Varel requested tenfold increase the amount at the public hearing over what appeared on the application.

Mr. Ice stated that he thought the major issues with the applications were:

First, a lack of clarity on the alternative sources in the applications and [thinks that] because the court is looking very hard at this, we need to look very hard at this. At this point, we are still proceeding toward a better grasp on how to make the most efficient use of all possible alternatives and that in Iao we will soon have a better big picture, but some of that is still coming down the road [with the Na Wai Eha contested case hearing], so we are deferring some of the decisions today.

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The second issue is John Varel's request at the public hearing for a substantial increase in his request; there might have very well been a contested case requested had we decided to proceed with the increase. There's a question whether there was adequate public notice under the circumstances since it was noticed for his original amount and not for the increased amount. Staff concurs under the circumstances that it's possible that there would have been a number of other people who would have appeared at the public hearing and may have possibly raised an objection; so Mr. Ice said that under the circumstances they feel they need to accept the application as it was originally submitted, not foreclosing the possibility of coming back after the contested case results.

The third issue is trying to accommodate the requests before us with limited water availability. The code requires that when there are competing applications we accommodate them as much as we can, and provide allocations that best serve the public interest, which has been described as a whole spectrum of agricultural, domestic, power and development, industrial, as well as traditional and customary Hawaiian use, protection and appropriation of fish and wildlife, etc.

Mr. Ice reported that during the public hearing there was an exhibit presented by the Maui DWS that showed different types of consumption uses, and that domestic uses might be read as single and multi-family, whose total is shown to be about 60% of the total. Charley Ice distributed handout of the DWS Central District Consumption graph, with and without conservation measures.

Mr. Arakawa said there are a number of reasons for Mr. Sarasin to apply for well water; one is to have a consistent supply of water. He explained that the ditch that used to supply water to this area was controlled by Wailuku Water Company and no longer does so. Mr. Arakawa said John Varel is an active farmer and at peak had an income of over \$400K from his macadamia nut orchard and it has been reduced to around \$135K in 2007. The decrease in production is due to the lack of availability of water for irrigation. Mr. Arakawa said it makes every sense to be able to make this investment, to drill a well, to be able to have a secure water source and protect production at the level it should be.

Mr. Arakawa stated that almost any other community in the nation and even the world would be looking at the total amount of resource in this small geographic area. The farthest points in Maui island are insignificant so far in trying to develop and move water around. Mr. Arakawa said at some point you have to realize that Iao Aquifer cannot be the only resource that is tapped, should not be over utilized by the county and that the entire program cannot be geared toward trying to take amounts of water and spread it around and see how much you can bleed from this one poor aquifer when there is 478 million gallons of aquifer water available on the island. The Commission needs to direct and require Maui DWS to look outside of Iao. He also asked why Maui DWS didn't object to other developments that require Iao water but that now they are objecting to two farmers.

Mr. Arakawa said the water was calculated incorrectly on John Varel's initial application, and staff helped him to calculate out the volume of water needed for his farm. Staff came out with the suggested over one million gallons. Mr. Varel is not asking for the maximum of the calculation but asking for an amount in-between to irrigate his crops when there is insufficient water. Mr. Arakawa apologized on behalf of Mr. Varel, noting that he did not know that he had to go through a whole new process to have the increased amount. They do not believe that this should be lumped with Na

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Wai Eha in their settlement case since what is being asked for is agriculture water on their own property.

Brian Sarasin added that the Water Department was asking if he has a water use permit application for surface water, and he responded 'yes' they are working on it. Mr. Sarasin's concern about the well is to have an ample supply of water to use and only use the well as a backup, not as a primary source. Cost is a factor so he would naturally use the ditch water first but needs a viable backup and needs to control water costs. He also stated he was currently using water for raising fish.

Mr. Arakawa, also representing John Varel, said that both Varel and Sarasin would love to pull water from the ditch and added that it's this commission that is able to grant water for irrigation; however, it comes from the water company who controls the cost of ditch water.

Counsel Jane Lovell explained that the County of Maui does not have unlimited practicable alternative sources of water and stated that the Water Code refers to 'practicable alternatives'. Counsel Lovell said that the commission already determined that the county does not have practicable alternatives to the use of the Iao Aquifer for its Central Maui Supply when it granted Maui's water use applications for all basal sources in the aquifer as well as the Wailuku Shaft. Counsel Lovell wanted to address some of the points raised (in reference to Alan Arakawa's letter to DLNR, Commission on Water Resource Management dated December 26, 2008),

- 1) That the County could immediately acquire through eminent domain to Wailuku Water Distribution Company. Theoretically, she said yes they could do that and also acquire by eminent domain Alexander & Baldwin (A&B) and East Maui Irrigation's (EMI) ditch systems but right now they are faced with a surface water designation. The surface water has been designated, that was something the County supported both under former Mayor Arakawa's administration and the current administration. So to acquire a ditch system without knowing whether that ditch system will receive any allocation of water whatsoever would not be prudent and something that could not be done immediately.
- 2) Counsel Lovell indicated that it was the same for the Sarasin/Varel letter that the County can purchase surface water systems from the Wailuku Water Distribution Company. Because the surface water has been designated, people will have to come in and get permits and there's no guarantee that the Wailuku Water Distribution Company will get an increased allocation or the County.
- 3) The Sarasin letter mentioned that the County could negotiate for surface water from Wailuku Water Distribution Company and/or A & B. Mr. Sarasin and Mr. Varel are saying quite accurately that they are not able to get more ditch water and the same point in time this is true of the County as well. All users will have to come in and justify their request for that surface water in the proceeding before this commission.
- 4) With respect to the three (3) Maui Lani wells that are currently under construction, there is hope that those will provide additional water but the main point of those wells is to serve the Maui Lani subdivision itself and to take some of that water that will serve only short-term gaps.
- 5) With respect to rescinding the law abandoning the use of Homakupoko wells; that law was passed when former Mayor Arakawa was the mayor and had the opportunity to veto that ordinance but did not do so. Changing the law is not an easy process and the County does not see that as a practicable alternative.
- 6) With respect to waste water effluent reuse, the County is reusing some of its waste effluent water and certainly looking at that as a long-term goal to increase that use but as this

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Commission has previously decided with respect to our other water use permit applications, building a 20-mile pipeline for this ditch to one of the treatment plants is not immediately practical and is a very expensive proposition.

7) The County is working with A & B to provide a water treatment plant to treat surface water. This is true but it totally depends on what this commission does with the pending IIFS petitions for the Na Wai Eha and also for the surface water designation and the allocations that will come under that.

8) The County could purchase more water from private sources. The private sources are not identified, but as we know water is not a saleable commodity.

9) Develop more water from other aquifers. As we put in our submissions that were given during the public hearing on these applications as well as throughout the record of the contested case hearings, we've gone into other opportunities are from other aquifers. USGS has said the Kahakuloa Aquifer is not likely to produce as much water as expected. Maui DWS faces competition from private developers. For example, the Maui Lani wells that are in the Kahaui Aquifer that were an untested aquifer, which has a sustainable yield of two million gallons a day.

11) The County has enacted the 'show me the water bill' that requires new developments to have their own source of water; this shows that the County has basically run out of water. As far as going into East Maui, we are operating under a decent decree, adopted during Mayor Arakawa's administration, which stopped a project that the County was going to develop 10 wells in the east Maui area. Under that consent decree the County has to exhaust its other options before vying once again to develop a sufficient EIS that would allow us to bring east Maui water into central Maui. That plan was in litigation for 12 years before that consent decree. Although the County is looking for other sources of water, their most practicable sources at this time are for central Maui is in the Iao aquifer. On January 31, 2007, the Commission in its order in the contested case hearing on the Wailuku Shaft suggested to the county that the County reserve the entire remaining amount of the sustainable yield of 20 million gallons in the Iao aquifer for municipal use. The County tried to do that; however, staff deferred the reservation to us. Therefore we come in now with these new uses and under new use permits. We are trying to follow the advice that was given to us in that decision by this body. The County not only serves the domestic portion of the public's need for water but also serves schools, hospital, fire and police protection, as well as commercial interests. Counsel Lovell suggests that the county not be restricted only to domestic uses if we build new single- and multi-family housing, because it will not have enough water to service schools, medical service, etc., [that go along with those homes] for those reasons she urges that the commission find that the county's applications meet all of the criteria of the Water Code and grant applications in the amount requested.

Director Jeff Eng mentioned that by centrally controlling the aquifer, they can manage it better. In the past couple of years by better managing that aquifer, pumping and extracting aquifer based on the twelve-month moving averages, it had been over the sustainable yield, and we got it down to 17.79 gallons per day about two years ago. In answer to the request for conservation, trying to maximize production at small surface water treatment facilities and also spread some of the pumping to Waihee aquifer, the average is down to 15.39 gallons per day. Director Eng stated that it's not that they are not considering them but through Maui's Water Use and Development Plan, they are looking for other strategies to serve the future of central Maui, but for the time being, for the short term he believes that their permits are needed for the community.

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In reference to Mr. Varel and Mr. Sarasin's recommendations, Commissioner Kiyosaki questioned why in the County's case there is a specific number, a quantity; however, for both Varel and Sarasin it indicates a pump capacity limitation but to be used only for domestic purposes, and is Mr. Sarasin permit to be limited to only 600 gallons per day for one single family household. Counsel Lovell added that the County fully supports staff's recommendation with respect to Mr. Varel's change in amount. The County strongly believes that what was announced at the public hearing and noticed was the original amount requested and if the amount is to change radically to over a million gallons per day, then a new hearing will have to be held, otherwise it would be a very serious sunshine law violation and would certainly ask for a contested case hearing.

Chair Thielen asked when the Water Use and Development Plan was adopted. Director Eng said the existing one is 1990. Chair Thielen asked how long have they been working on updating it. Director Eng said it's close to completion for central Maui and upcountry, maybe by spring or summer, and then it goes to county council for approval.

Commissioner Ching referred to statements made to Sarasin and Varel about municipal water being unavailable for agricultural use and asked if that was because of a source limitation. Director Eng thought that it's been the practice for the department for several years, a given that you can strengthen limitations on the available water that when large projects came in and it looked like they had a high agricultural use, a non-potable source was available and the projects were able to get non-potable water, that the County encouraged the developers to seek that non-potable water. It is his current belief at this time that surface water would be suitable for agricultural purposes would encourage that. Commissioner Ching asked if the County were to get more source(s) would the County's response be the same. Director Eng said they would do all they can to be accommodating.

Commissioner Ching inquired if the Iao tank and Waikapu tank wells were already drilled. Director Eng confirmed that they were and that construction contracts for pump installation have gone out, Waikapu tank site well notice to proceed was issued about three weeks ago and anticipate that it would be completed in this calendar year. Iao tank pump installation notice to proceed hasn't been issued yet and should be completed by the middle of 2010.

Commissioner Kiyosaki referred to Director Eng's comment that the County was pumping 17.7 mgd and managed to get it down to 15.3 mgd, and that they actually have additional unused allocation. If demand from this aquifer is 15.3 mgd and you want to be able to take up Maui Department of Water Supply's allocation up to the maximum sustainable yield, how long will that supply the needs in the central Maui area. Director Eng commented that in 2007 when he became aware of the severity of drought in central Maui, he projected a growth of about 70 – 50,000 gallons per year. The overall demand for central Maui was 25.7 million gallons per day based on the 12-month moving average. The current 12-month moving average for central Maui is about 23.9 mgd. Commissioner Kiyosaki commented that staff is recommending what sounds rather arbitrarily, 60% for domestic use.

Isaac Moriwake had major concerns about the rationale expressed in the submittal on the recommended disposition that relies on the concept of individual domestic use and in particular, equating, incorrectly, individual domestic use with municipal use. Mr. Moriwake said that the Water Code treats them differently and there are separate definitions for those terms in the Code's

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definition section and explained that the water law in general treats those two concepts differently. Domestic means the individual user using water in place with no substantial diminution in the source whereas municipal under established water law is qualitatively and quantitatively different from domestic because of the large scale nature of the diversion. Equating the two terms would be unprecedented under law, and the diversion from the public trust precedent where the rationale is being drawn from at this current time, is an interpretation from the Waiahole decision as identifying domestic use as a public trust doctrine. Mr. Moriwake thinks that this recommendation shows what can go awry when this mistake is made of equating the two, domestic and municipal. An example is the County, under the current recommendation states, gets a cursory approval of 60%, which as Commissioner Kiyosaki pointed out is an arbitrary number. The County, which has a lot of influence and power because of the size of the use, is basically steam rolling over the other potential users that are zoned for agricultural in the watershed, and other landowners overlying the aquifer. This distorts the intent of what “domestic” means under the public trust and Waiahole decision. Another distorting effect is indications in the staff submittal that domestic users are exempt from water permits and there is some indication that 600 gallons per day is the amount that would be totally exempt or 3,000 gallons per acre per day for large lots. On page 16 of the recommendations, states ‘Because individual domestic use is exempt from ground water use permitting, each applicant may use 3,000 gpd for this purpose without a water use permit.’ It’s not clear but 3,000 gallons per day for each users, some large agriculture subdivisions also known as [gentlemen] estate farms also has hundreds of lots, an acre each or more, and if it’s 3,000 gallons per day being completely exempt from water permitting, another huge loophole. Extending this rationale to the County, assuming that domestic use is equal to municipal use, does this means that 60% of the county’s use is exempt from water permitting as a domestic use? Mr. Woriwake strongly urged the commission to steer clear from a rationale using domestic use, a public trust use, as a way to guide its decision making as planning.

Chair Thielen referred to page 15 of the staff submittal and read that domestic use is considered a public trust resource and while municipal uses include domestic, it also includes non-domestic such as commercial, industrial, hotel, irrigation, recreational uses and those non-domestic uses are not public trust uses and asked Mr. Moriwake if that was also his understanding. Mr. Moriwake did not agree. He thought that it was erroneous to start parceling out parts of municipal use as domestic, and therefore a public trust use, and other parts as not domestic, and therefore not public trust use. Mr. Moriwake said municipal use as a whole is only a creature under water law and domestic use is entirely different from a municipal use; its individual users using water in place without substantial diminution of the water source. Chair Thielen then understood Mr. Moriwake argument that to be a municipal purveyor of water to domestic residences does not count as domestic use. Mr. Moriwake agreed that municipal users cannot avail themselves of the domestic priority under water law because they are not domestic use, they are municipal use.

Commissioner Kiyosaki is concerned about setting a precedent, absolute priority regarding this issue of domestic use from Maui Department of Water Supply. Mr. Moriwake brought up the definition of domestic use may not be totally correct in the way that commission staff is looking at it. Commissioner Kiyosaki feels that the commission has to weigh competing interests for maximum beneficial use of the waters of the state and doesn’t believe that the commission is doing what it is suppose to do and what it is tasked to do under state water code and the Waiahole decision. She asked if this is policy that had been set internally, if staff just came up with this and if

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it has been discussed with AG, and believes we are over reaching again, making assumptions and policy that shouldn't be made.

Charley Ice said staff has wrestled with finding the rationale and Mr. Moriwake's point is well taken. Staff may be reluctant to adopt this as a policy, but is using it as a starting point to make a decision on the merits as Mr. Moriwake pointed out, and would like to defer to the Commission's Attorney General and others who may want to discuss how this domestic use issue gets clarified.

Chair Thielen mentioned that maybe the commission is in a situation where they have applications for more water than what's in the sustainable yield, at a point where we do have to make a determination on how to allocate that, then there may be some policy, flexibility, that the commission has in making that decision and then guidance on how to prioritize uses from the case law and the statute.

Roy Hardy added there had been much internal discussions with the Attorney General, the interpretation of Waiahole, and what are identified as public trust uses. In this case, staff is recognizing [the domestic] public trust issues at this time, and not saying to deny non-public trust uses, but are waiting on Na Wai Eha that can supply the non public trust uses for all the applicants in this case. This concept that individual domestic use, which is exempt under the code, applies to Varel and Sarasin. The municipal sources also supply individual domestic needs. In staff's view, it's not so much that municipal domestic is different from individual domestic, it's just that one is supplied by a purveyor and one is self purveyed. Basically the end use is still domestic in its nature. Where everyone on the municipal system is exempted from individually coming in for a water use permit, basically the Board of Water Supplies are the ones who need to apply since they supply multiple domestic uses. So that's always been staffs' feeling, and hopefully that answers Mr. Moriwake question about the 60%.

Commissioner Kiyosaki added that there are other uses besides domestic on the municipal system and doesn't think Mr. Moriwake's issue have been addressed.

Mr. Hardy added that in the earlier contested case, which was looking at the basalt aquifer sources, there was an issue that came up through the course of public hearings of separating out the municipal needs into the various components of domestic, commercial, etc. That, along with other discussions that the former Mayor Arakawa brought up regarding this concept about County eminent domain and taking over the ditch water to supply the non-potable portions, was part of the reason why the basal sources did not go to a full blown contested case. The agreement was to look at different demands [within the municipal system], there is this ditch source that can supply agricultural and other non-potable uses, and that the County was going to move ahead with procuring that ditch water. The contested case for the basal didn't occur and the permits moved ahead for the basal aquifer. That's why staff is separating out domestic use in the municipal system.

Chair Thielen said she doesn't think that staff's recommendation is assuming it's not also commercial and other uses going on, it's more of a determination that domestic is a public trust and having to make an allocation and taking a look at the fact that this municipal use is serving some of the domestic needs and while it may not be legally the same as an individual domestic use, it's certainly from a water management perspective and advantage to having a safer, better managed water system by having domestic uses served by a Board of Water Supply/Department of Water

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Supply rather than thousands of individual wells. Chair Thielen thinks that what staff was saying is that there's going to have to be a restriction on some of the needs, prioritizing domestic use. Clearly the County doesn't have the ability in its water system to segregate the delivery of water but one of the discussions that we had was that this aquifer was reaching its limit while Maui County came up and talked about what's immediately practicable alternatives and that rapidly changes when you hit your limit and if you're not preparing those alternatives now, it's just delaying the inevitable. Part of the recommendation on restricting and not granting 100% was based on the fact that the county needs to be sent a strong message that what may not have been practicable one, two, or four years ago, they better start looking on immediately because it's just a matter of time.

In looking at staff's recommendations, Commissioner Fujiwara suggested that it seems that no matter what, we should probably wait until the contested case hearing to get a better view of what's going to happen in the Na Wai Eha situation for alternatives. He asked if Sarasin and Varel have domestic meters at their homes. Mr. Sarasin responded yes they do have county meters, but that was an offshoot of drilling a well. Commissioner Fujiwara wondered why they didn't recommend a blanket thing on the contested case hearing rather than allowing them to use the wells for just their domestic use.

Roy Hardy said one thing that wasn't mentioned in the submittal but was part of the discussion was that fact that they aren't being supplied right now. It hasn't been that clear, in fact based on the statements that had been made, there needs to be more infrastructure put in specifically for the potable needs not agriculture. We had asked them if they could provide the infrastructure costs and economics on that but haven't seen anything to date to determine if they could continue with domestic use or not. The applicants are representing they would want to exercise the fact that they would be exempted from domestic use and want to install their pump for domestic use at this time.

Commissioner Fujiwara asked how long it would take before people that come in for permit on using Na Wai Eha surface water and assumed Mr. Sarasin would be applying. Mr. Sarasin affirmed he was working on such an application. Commissioner Fujiwara mentioned that he understood Dr. Miike mentioned last month that it would take him about 90 days to come up with a recommendation on the contested case but asked, in staff's opinion, how long it will be before such an application clears and people would be able to get their surface water use permits. Mr. Hardy said in the worse case, there would be a lot of contested cases.

Commissioner Kiyosaki asked if there was some reliance in the fact that they were granted well construction permits years ago and as business people they sunk money into improvements because they thought they would get some of this water for their use on their own property and somebody at some time approved this use of, not the actual quantity, but the proposed use of what the wells were build for.

Mr. Hardy said, again these were applied for before any designation occurred. They were actually constructed just recently four years after designation and had been extended a couple of times, so it wasn't a compelling argument just give them pump installation permits. There's this reliance issue that we've seen time and time again from other management areas. In hindsight we could have said, no we're not going to extend your permit, but on all our correspondences we say that we do give the landowner the option that if they want to drill this well in a management area for exploratory purposes you may not get the follow-up pump installation, now that it's a management

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area as well as the water use permit, since they go hand-in-hand. Staff has been flexible with the public saying, you can take the risk if you want to access the source and find out whether you indeed do have good supply for your purposes, go ahead but no promises that you would get the follow-up water.

Commissioner Kiyosaki said she doesn't feel she has enough information to know that this "arbitrary amount" that we're allocating to them is really something they need at this point in time and would like to have them seriously consider alternatives.

Commissioner Frazier again brought up the issue of having a permit to drill but no assurances of water back in 2003. Mr. Sarasin said he was not under the impression he could drill the well but not withdraw water. Had he known that, he probably wouldn't have drilled. Commissioner Frazier pointed out staff notifications though they may have been back in 2003. Commissioner Frazer further asked what happens to the two to three million gallons of water at the end of the ditch (refer to page 10 of the submittal) that was clarified as being taken from the ditch by the County and asked if DWS has the authority over that water. Director Eng responded that on page 10, it indicates the amount that the county currently treats and this is from actually the Iao Waikapu Ditch, it comes off the Iao stream and have the agreement to use up to 2.2 and added that currently they produce on the average 1.5 up to 2.

Commissioner Ching asked MDWS if there really is an excess of 1.7 mgd in their system because her understanding is that there are a lot of people waiting for meters and now have been unable to get them, under the show me the water bill where you have to guarantee a long-term supply of water. Director Eng said there are some meters that have been issued in the past that aren't showing any consumption yet and some that aren't at full consumption yet. One also needs to look at County System Standards that each of the counties have adopted. MDWS is well below what we have in place and there is a significant lack of tenancy. We can even have additional wells which would require permits in place for emergency backup. We operate and have the same standards as City and County of Honolulu, they are quite conservative. The two things looked at are: 1) what the average of daily demands are, which they are accommodating and 2) as far as redundancy, system standards, we are very deficient at this time.

Commissioner Kiyosaki stated she understands storage, operational, and redundancy components but doesn't understand the nexus with the excess in the system. Director Eng said they have been fortunate to bring the demands down, but there are projects in the que that have been issued construction permits and MDWS is trying their best to supply them. He is also worried of the ongoing drought and it's affect on demand. So he really doesn't know the answer.

Commissioner Fujiwara asked Mr. Sarasin Jr., if Mr. Sarasin and Mr. Varel are taking water from the Spreckels ditch. Mr. Sarasin replied at the present time, they are. Mr. Sarasin Jr. said they have enough water, they are taking from the ditch and applying for the water use permit, however the question is they still have not been granted that right by the board to withdraw the rate at which we're going to be sustainable. The ditch water is very variable. Though John Varel's property has historically been serviced by the ditch, Varel never drawn water from the ditch since the land was purchased by him said former Mayor Arakawa. He can't even negotiate such a use because the PUC won't allow any new diversions at this time.

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Commissioner Fujiwara asked Sarasin how many people take from the ditch in his area. Sarasin replied he doesn't know the number but it is substantial. Everyone is applying for ditch water. One of the reasons he applied for the well is that he is raising fish and once for one week there was no ditch water so they need a backup source for that. Ultimately they do want to use the ditch water but would like to have the well as a backup in case something does happen that we don't lose our total operation. We're not looking at using the 51,000 gallons a day for that but if something does happen we want access to that. Also on the domestic side, I want to go on the well water because I don't particularly care for the chemicals that the water department puts in it. I want to keep the water meter there but want to relieve the water department of their duty to supply me with water because I have my own source however if the pump breaks I want to have the option of going back to the meter until the equipment is fixed to go back on line. Mr. Arakawa added that only the ditch comes through this property and there is no natural connection to the stream.

Commissioner Frazier asked if there were five homes on Mr. Varel's property. Mr. Sarasin replied you need to ask the county but he understands there might be one meter at the bottom point of his property where he can't even get the water from the county meter up to his houses. Director Eng believes he has two meters for the five houses and stated that the lower elevation would have to be pumped up to his home. Mr. Sarasin stated for this reason it is imperative for Varel to install a well.

Commissioner Ching questioned the pump sizes in the recommendations, that actually a person with a smaller acreage has a much larger pump size. She doesn't want to send the wrong message that we approve only domestic but allow a much larger pump size. Roy Hardy acknowledged that that was correct, that's what they applied for, and that's what they tested the well for, and based on the data from that seems to be okay from the resources perspective. For the end use, the reasonable and beneficial use, historically or as a matter of practicality, staff has never tried to limit the use by pump capacity. It's actually a common issue that's raised why a person is asking for an X amount and the pump is 2, 3 or 4 times that size. Not everybody pumps 24/7. Operationally, cost-wise, if you need to build the storage tank up higher - we don't get into that too much and definitely not in non-designated areas. In management areas that would be subject to consideration, but for domestic source, that's exempt. Commissioner Ching wasn't so much concerned with the limiting by pump capacity but suggested that stronger language be used when applying for these things to address the reliance. Roy Hardy read some sample permit and correspondence language that attempts to do this.

Chair Thielen pointed out that if the permit was approved for domestic only, there should be stronger language used that the limits need to be abided by. If this is a pump that could or would have the capacity to pump more than domestic use that it be clear. There is a requirement that monthly flow meter readings be recorded and reported to the commission but what we're looking for is stronger conditions that something that's higher than domestic use.

Commissioner Kiyosaki referred to the paragraph before the recommendations (page 16) that states "Because individual domestic use is exempt from ground water use permitting, each applicant may use 3,000 gpd for this purpose without a water use permit", and asked if it wasn't 3,000 gpd per acre and if so, Mr. Varel would have a huge amount he could use without a water use permit. Roy Hardy explained that he would need a water use permit for five homes and added that it's not a public water system but it's not individual domestic so he's limited to one single individual domestic need. Commissioner Kiyosaki thought that maybe we should put an amount. Roy Hardy

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agreed that it could mention that it's limited to the county guidelines, which in this case would be up to 3,000 gallons per day. Former Mayor Arakawa asked if there are five houses why not limit it to 15,000 gpd. Mr. Hardy said that would require a water use permit because it not longer an individual use any more. Chair Thielen asked Mr. Hardy if it was his understanding that Mr. Varel was applying for domestic use for his home or all five homes. Mr. Hardy said his understanding was for one home. Charley Ice said he's asking for a water use permit, we can't have an individual domestic water use for five units, but in terms of an exemption for individual domestic use that's limited to one unit. In most cases where one individual owner is supplying just the one individual domestic use, it is exempt from a water use permit.

Director Jeff Eng explained that the standards for the County of Maui are the same as the City and County of Honolulu, for a single family residence guideline is 600 gallons per day. On acreage basis, use 3,000 gallons per acre per day. This is used for small subdivisions to estimate demand. For residential, one stand-alone is 600 gpd. Mr. Hardy said it's either or according to the guideline, Commissioner Ching clarified that under the recommendation, technically we are not giving them water use permits, and they are getting an exemption for an amount. Mr. Hardy said yes, and deferring their water use permit applications.

Mr. Sarasin added that he had spent in excess of \$100,000 on his well and is really trying to become self-sustainable.

Commissioner Kiyosaki asked the applicants what would be the impact to their operations if no action was taken today. Mr. Arakawa stated they would prefer an action as well and pump equipment will go bad if it just sits around, especially if you are looking at an indeterminate amount of time. Varel and Sarasin would at least like action on their domestic needs. The County stated non-action would be alright in the short-term but they may have to revisit their water use and development plan if longer-term.

MOTION: (Ching/Fujiwara)

To approve the submittal (for discussion purposes only).

Commissioner Frazier commented that the three requests should have been taken separately and that Maui DWS did not have to be treated now but after Na Wai Eha was resolved. They can look at Varel and Sarasin now for their domestic use.

Commissioner Ching is not against setting a conservative starting point and investigating alternatives for all three parties. However, agrees with Mr. Moriwake and objects to underlying law issues that are overreaching. The submittal states there is a short list of high priorities and another tier of lower priority uses categorically and looking back at the Waiahole decision it says the exact opposite of what to do, we're suppose to look at things on a case-by-case basis. Similarly we are defining domestic use and it's unclear what the court meant by domestic use; to say it's 60%, to say it's everything but commercial, industrial, hotel, irrigation and recreation, it went far beyond what she feels comfortable doing. Some language should be stricken from the recommendation: identification on non-public trust use being deferred, take out the word non-public trust because it's on a case-by-case not a categorical elevation. The 60% seems rather arbitrary.

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Chair Thielen asked Commissioner Ching what the alternatives would be, starting from a conservative start point. Commissioner Ching believes the Maui Department of Water Supply needs water now and understands that the Commission would not want to allocate up to 20 million gallons a day and see whether their efforts to spread out the pumping really improves aquifer and suggests 75% of what they are asking or leaving a cushion of half a million per day in the aquifer. And use stronger language on the fact that the individuals are limited to domestic.

Chair Thielen clarified that the difference between the 600 gpd figure and the 3,000 gpd number is the lower number is for a single residence but according to the County the higher number is because there may be more than a single residence on that acre. Staff understands that exemptions from the water use permit is for only an individual residence. Roy Hardy confirmed this and added that in the past staff did not understand that the 3,000 gpd/acre figure applied to multiple residences but do now. Chair Thielen asked if that would be problematic for the applicants to go with the 600 gpd figure. Mr. Sarasin said they would want the 3,000 gpd as they will be building another residence and will have additional uses. Chair Thielen pointed out that for multiple residences one would then need a water use permit. Sarasin replied although one residence could be feed by the MDWS meter and the other by the well. Commissioner Kiyosaki pointed out then a water use permit could be considered then in this situation because she would not like to set precedence on the use figure as an inadvertent policy for exemption for a domestic limit without understanding the law. Chair Thielen said there could be a recommendation granting the two private applicants a water use permit for a specific amount instead of an exemption. Chair Thielen stated that the application was for a water use permit, for domestic and agricultural use for a certain amount and discussing granting a water use permit for a domestic use for a specified amount. Commissioner Ching said to use a specified amount and not specify the purpose. Roy Hardy said staff would not support that because that would call into the question exemption clause in the code, that individual domestic uses are exempted from water use permit yet the Commission is identifying amount is based on a domestic estimate. Chair Thielen clarified that the water use permit not be limited to domestic purposes but it's only up to 3,000 gpd.

Commissioner confirmed with staff that the applicants would be required to report their usage to help verify the usage amounts.

Chair Thielen added, then to deferring action on the remainder of the requested amount of water instead of talking about the non-public trust. Both private applications would be for 3,000 gpd for now and after a decision and order is made on the Na Wai Eha case people can return without prejudice for the remainder of their request.

Discussion turned to the Maui DWS application and the 60% versus 75% allocation suggestion. Commissioner Frazier suggested staying with the 60% figure. Chair Thielen was personally concerned that one of the rolls of this commission is to send a signal back to Maui County for the policymakers that it is time to start to pay serious attention to both the adoption of the Water Use and Development Plan that hasn't been updated since 1990 and considering that the information in the planning, zoning, and permitting decisions made at the county level because their choices are to reduce the demand, increase conservation, or find alternative sources. There is limited time and if we continue to grant extra cushion, it takes that urgency away and she thinks it's important as a commission that they send a signal back to the county that they need to pay attention to this now despite what's going on in the economy and maybe some the least expensive options are in the

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conservation area and there may not be as fast-increasing demand because certain things might take longer to get built out now and they apparently have some cushion built in already. Chair Thielen agrees with the lower percentage rather than bumping it up to the 75%.

Commissioner Ching agrees but also knows that on the ground that there are a number of affordable housing projects who cannot proceed because of the show me the water ordinance and the need for the county to be able to certify to them that there is a long-term reliable source of water. At the construction plan stage nothing is moving forward right now because of the lack of water in the county system.

Chair Thielen said part of that is that this commission cannot make water magically appear so if there are at a point that they don't have sufficient water for that demand then they have to develop the alternative sources, which are going to cost money, or mandate greater conservation, or not approve certain developments. And if we give an additional 60% of what's left or even the 100%, they will always come up with that problem because it's a finite supply.

Commissioner Ching feels they are buying time until the next sources come on line and feels they have made efforts in conservation and pursuing alternatives but are trying to fill in the gap to keep things moving. Commissioner Kiyosaki thinks there is a concern if there are all these projects shovel ready and they can't allocate water; but her concern is that they don't even know what that number is and haven't heard from Maui County what that number is.

Chair Thielen said the commission suggesting a starting point wouldn't prevent them from coming back with additional data later to add more to their supply. They do raise a good point that it's better to have a municipal water supply managing that system rather than thousands of individual wells. However, the Commission needs to push the county on the water use and development plan to see what has been granted that has yet to come online because we don't know what that buffer is right now.

Commissioners Fujiwara and Frazier agreed with staff's recommendation of 60%.

**WITHDRAWAL OF MOTION AND SECOND:** (Ching/Fujiwara)

Chair Thielen stated that the discussion supported approving the water use permit and to amend the recommendations.

### **AMEND MOTION:**

To grant (approve) Water Use Permits for up to 3,000 gallons per day for domestic and agricultural uses to Mr. Brian Sarasin and Mr. John Varel with the standard terms and conditions, and defer action without prejudice on the remainder of requested water.

Item No. 5: Approve Water Use Permits for the Maui County, Department of Water Supply, totaling 60% of their request in the amounts described in staff's recommendation and defer action of the remainder of their request, eliminate the term 'domestic' and defer action without prejudice on the remainder of the requested water.

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Item No. 7: add, to defer action without prejudice on Water Use application for Iao Tunnel.

MOTION: (Frazier/Fujiwara)  
To approve the submittal as amended.  
UNANIMOUSLY APPROVED AS AMENDED.

11:45 a.m.: Recess.

12:03 p.m.: Back in session.

Items were taken out of order: D2 was followed by D1, C1, and D3.

### **D. GROUND WATER REGULATIONS**

- 1. Oasis Water Systems, Inc. for Mrs. Patricia Handwrite, APPLICATION FOR AN AFTER-THE-FACT PUMP INSTALLATION PERMIT, Handwrite #2 Well (Well No. 1220-05), Pump Installation: 14 gpm for domestic and landscape irrigation use, TMK (4) 4-9-011:023, Moloaa, Kawaihau, Kauai**

PRESENTATION BY: Roy Hardy

#### RECOMMENDATION:

That the Commission:

- A. Find the applicant in violation of HAR § 13-168-12(a).
- B. Impose the minimum fine of \$125 on the well owner/operator as summarized in Exhibit 9, payable within 30 days.
- C. Authorize the Chairperson to approve and issue a pump installation permit, subject to the Standard Pump Installation Permit Conditions in Exhibit 10, and the following additional special conditions.
  1. The permit shall not be issued until the fine is paid by the well owner/operator.
  2. Standard Condition 5 is deferred until such time as the permittee removes the existing pump and pumping equipment for repair or replacement.

Roy Hardy explained that the minimum fine is \$250 and the reasons for reducing that minimum fine by \$125 for applicant's good faith efforts.

Commissioner Fujiwara said it is noted that they needed a measuring device to measure the static level and they don't have that, and they will put it in when they pull the pump. Mr. Hardy said to pull the pump is expensive, it's near the coast. Commissioner Fujiwara asked if the information needed for that isn't critical and it could be years before they pull the pump. Mr. Hardy agreed however in this situation it's a small source, about 5,000 gpd for both.

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The applicant Patricia Hanwright was in agreement and Barry Simmons said she wants to come into compliance.

MOTION: (Frazier/Ching)  
To approve the submittal.  
UNANIMOUSLY APPROVED.

### C. STREAM PROTECTION AND MANAGEMENT

1. **Application for Stream Channel Alteration Permit (SCAP.2034.3), DOT Bridge Replacement across Kaipapau Stream, Hauula, Oahu, TMKs: (1) 5-4-011:004-0001 and 0002, 5-4-011:021, 5-4-018:001, 002 and 003**

Presentation by: Robert Chong

#### RECOMMENDATION:

That the Commission approve a Stream Channel Alteration Permit for the State Department of Transportation's bridge replacement across Kaipapau Stream, Hauula, Oahu, TMKs: (1) 5-4-011:004-0001 and 0002, 5-4-011:021, 5-4-018:001, 002 and 003. The permit shall be subject to the Commission's standard conditions in Exhibit 5.

Chair Thielen pointed out that the last sentence of the Division of Aquatic Resources' comments (page 4) recommends a survey to measure whether the proposed mitigation was effective and removal of stream debris effectively created habitat. She commented that standard conditions talk about post-construction clean up work and asked if there were anything in the standard conditions. Robert Chong referred to (Standard Stream Channel Alteration Permit Conditions) number 6 relating to best management practices and design and construction activities but nothing specific to clean up afterwards.

Duane Taniguchi, SDOT, said that the property owners actually own sections of the stream and are willing to clean up the post-construction activities.

MOTION: (Fujiwara/Frazier)  
To approve the submittal.  
UNANIMOUSLY APPROVED.

- D. 3. **Pierluigi Zappacosta, Application for Water Use Permit No. 869, Well Construction and Pump Installation Permits, Papohaku-Zappacosta Saltwater Well (Well No. 0916-01), TMK 5-1-008:049, New (Agricultural) Use for 0.008 mgd, Kaluakoi Ground Water Management Area, Molokai**

Presentation by: Charley Ice

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### RECOMMENDATION:

Staff recommends that the Commission approve the issuance of Water Use Permit No. 869 to Pierluigi Zappacosta for the reasonable and beneficial use of 8,460 gallons per day of brackish basal ground water for agricultural irrigation from the Papohaku-Zappacosta Well (Well No. 0916-01), subject to the standard water use permit conditions listed in Attachment B and the following special conditions:

1. The applicant shall obtain appropriate approval for the disposal of desalting waste stream brine from the Department of Health, and meet the Division of Aquatics approval for any described impacts on the near shore environment, prior to using any water from a desalting process.
2. In the event that the tax map key at the location of the water use is changed, the permittee shall notify the Commission in writing of the tax map key change within thirty (30) days after the permittee receives notice of the tax map key change.

Commissioner Fujiwara noticed that there will be a home on the property and asked if there was domestic water. The domestic water is not county water but part of the Kaluakoi system and not enough water for the desalting process.

MOTION: (Frazier/Ching)  
To approve the submittal.  
UNANIMOUSLY APPROVED.

### E. NON-ACTION ITEMS

#### 1. Update to the National Hydrography Dataset for Hawaii

Presentation by: Jeremy Kimura

Jeremy Kimura briefed on the National Hydrography Dataset (NHD), which is a nationally standardized and publicly available digital surface water dataset. (Copy of power point made a part of this record.) Mr. Kimura reported that currently state agencies are using different surface water datasets for decision making. This can be problematic if different datasets are used for regulatory action in the same geographical area. In checking with the Office of Planning, there are currently 16 different surface water datasets.

The NHD provides us an opportunity to compile the data into a singular, publicly available dataset. Updating and maintaining the NHD will also be a focal point for cross agency coordination. The Department of Health and the Office of Planning are joining DLNR in this effort.

A Memorandum of Understanding (MOU) is being finalized and is currently at the Attorney General's office. The MOU will formalize the State's commitment to edit and maintain the NHD for Hawaii.

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## **E. ANNOUNCEMENTS**

Deputy Ken Kawahara announced that they are not able to fill the geologist position for the instream use protection section due to the state-wide hiring freeze. This position is currently being proposed to be abolished in the budget (now in the House). At the last meeting Deputy Kawahara distributed the proposed budget spreadsheets. CWRM is actively trying to leverage its monies with federal monies.

Also mentioned was the CWRM's 19 projects totaling over \$12 million for DLNR's environmental Stimulus Package which was signed yesterday and don't know how much, if any, is in that package.

There was heavy rainfall in December 2008 and beginning 2009, drought continues to impact Maui, Molokai, Lanai and the Big Island. Kauai and Oahu are no longer experiencing drought conditions.

Staff is awaiting the Bureau of Reclamation's response to the four proposals for emergency drought assistance that were submitted in November.

East Maui Site Visit (Trip 5): Staff conducted a visit in February to various East Maui Streams to measure pre-restoration flows and post restorations flows. The focus of the trip was to visit and document the Wailuanui peninsula, including the taro loi and the auwai that supply the peninsula with water. On trip 6, staff will try to schedule visits to the agriculture in the central and upcountry areas; talking with the Farm Bureau, HC&S, Department of Agriculture and Maui Department of Water Supply.

OHA's Taro Security and Purity Task Force: Staff will attend a meeting regarding proposed Water Code-related legislation, the commission's September 2008 East Maui Interim Instream Flow Standards decision, and general questions regarding the Commission and the Water Code.

Deputy Kawahara reported that staff participated in a conference call initiated by the State Civil Defense regarding clearing the mouth of Wailoa River in Waipio Valley, Big Island. There is an opportunity to use the heavy equipment that was used in the restoration of the Lower Hamakua Ditch intakes in upper Waipio Valley, for clearing the stream mouth. The contractor volunteered their equipment provided by Royal Construction, free of charge. The discussion revolved around the effect of the October 2006 earthquake on current flooding conditions in Waipio Valley, the Governor's Emergency proclamation regarding the earthquake that is still in effect, and the permitting requirements of the various agencies involved.

### **OUTREACH:**

On January 16 and February 10, the Iolani RoboRaiders Teams which took 1<sup>st</sup> and 2<sup>nd</sup> place in the statewide Lego League annual Championship met with staff to demonstrate their stormwater reuse project and interview staff regarding CWRM's research in this area. The teams will combine to compete in the national championships in Ohio and will focus on three scales of stormwater reuse.

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On February 5, 2009, staff gave a presentation on the Stormwater Reclamation and Reuse Appraisal Study at the Hawaii Water Environment Association Conference.

March 16-20 is fix a Leak Week: Staff will promote water conservation strategies through our website, flyers, bulletin and email.

### **F. NEXT COMMISSION MEETINGS (TENTATIVE)**

1. March 18, 2009
2. April 15, 2009

Meeting was adjourned at 12:18 p.m.

Respectfully submitted,

KATHLEEN OSHIRO  
Secretary

APPROVED AS SUBMITTED:

KEN C. KAWAHARA  
Deputy Director