

MINUTES
FOR THE MEETING OF THE
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: February 17, 2010
TIME: 9:00 a.m.
PLACE: Kalanimoku Building
Board Room 132

Chair Laura Thielen called the meeting of the Commission on Water Resource Management to order at 9:03 a.m.

The following were in attendance and/or excused:

MEMBERS: Ms. Laura Thielen, Dr. Lawrence Miike, Mr. Neal Fujiwara, Ms. Donna Kiyosaki, Mr. Sumner Erdman, Mr. William Balfour, Jr., Dr. Chiyome Fukino (arrived at 9:12 a.m.)

STAFF: Ken Kawahara, Roy Hardy, Lenore Ohye, Robert Chong, Charley Ice, Ryan Imata, Neal Fujii

COUNSEL: Randall Ishikawa, Esq., and Linda Chow, Esq. (for Fat Law's Farm Inc.)

OTHERS: Brooke Wilson (McNeil Wilson); See Ba Thee (Alii Turf. Co.); Koa Kaulukukui (Earthjustice); Laurie Goodwin (Syngenta); Mark Cummings (Hawaiian Earth Products); D. McDonald (Agtech Pacific); Thoug Sohgrilay (Fat Law Farm); Tim Law (Fat Law Farm); Richard Ingersoll (Gelber, Gelber, Ingersoll); Joseph Dare (Gelber, Gelber, Ingersoll), Paul Atchitoff

A. APPROVAL OF MINUTES

1. December 16 and 17, 2009

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

B. ANNOUNCEMENTS

Deputy Director Ken Kawahara recognized Susan Hoagbin, secretary for our Ground Water Regulation Branch, for her twenty years of service.

Budget: We are still getting our allotments quarterly and it is being reduced by 13.8%. At the last meeting, Deputy Kawahara mentioned that staff is closely monitoring federal appropriations to take advantage of them. Items E1 and E2 are the result of staff's efforts.

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He mentioned that the two items, E1 and E2, are reversed on the agenda and also asked that item D5 Fat Law's Farm be taken last since Deputy Attorney General Randall Ishikawa needs to recuse himself from that item.

Furloughs: Deputy Kawahara said the staff is still on two days a month furloughs. There are also three (3) vacancies within the Water Commission. Two are in the Ground Water Regulation branch, a hydrologist who resigned in July 2009, an engineering support technician who retired in October 2009, and the third vacancy is for the branch chief for the Stream Protection and Management branch, Ed Sakoda who retired in December 2009. Another engineering support technician also retired at the end of 2009. So, with that coupled with the reduction in force of our Survey branch, we are seven (7) people less that a year ago. We will however, do our best to keep the critical items going.

Water Commission staff and the Division of Aquatic Resources staff conducted a site visit on east Maui during February 2nd - 4th, basically gathering data for what the Commissioners asked for at the December meeting in Maui.

Deputy Kawahara said there is still drought within the state (copies distributed).

Staff attending a free two-day water conservation and leak detection workshop hosted by the Honolulu Board of Water Supply.

Also distributed were CDs of the Pre-Final Drafts of the Watershed Management Plans for the Waianae and Koolauloa regions. Per the Water Code the plans will be taken to the City Council as well as the Water Commission for adoption. Staff will be publishing a 90-day public notice for the required Commission public hearing.

Staff also provided in-kind services in exchange for complementary registration to attend a local workshop put on by the American Rainwater Catchment System Association. Deputy Kawahara felt this was important because as mentioned in the December Commission meeting, we wanted some of the parties to look at catchment options.

Staff met with the Department of Health's Safe Drinking Water Branch to discuss updating ground water sections of the Water Quality Plan, which has not been updated since 1990.

The University of Hawaii's Ka Huli Ao Center for Excellence in Native Hawaiian Law is studying Native Hawaiian rights under the State Water Code, and staff will be working with their students in the future. We are under no obligation to implement any of the recommendations but will benefit from having their perspective.

Deputy Kawahara said that staff briefed the U.S. Senate Committee on Appropriations staff, Subcommittee on Agriculture, Rural Development, Food and Drug Administration and related agencies on water issues in Hawaii. Briefing topics included the role of the commission, challenges facing agricultural water uses, and supporting strategies, using East Maui as a case study.

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C. STREAM PROTECTION AND MANAGEMENT

- 1. Application for a Stream Channel Alteration Permit (SCAP.2504.8), New House, Gazebo and Pond, Pukihae Stream, Hilo, Hawaii, TMK: (3) 2-6-008:022**

Presentation by: Robert Chong

RECOMMENDATION:

That the Commission approve a Stream Channel Alteration Permit (SCAP.2504.8) to construct new house, gazebo and pond along Pukihae Stream in Hilo, Hawaii at TMK: (3) 2-6-008:022 subject to the standard conditions in Exhibit 5 and the following special conditions:

1. The permittee shall develop a plan acceptable to DAR to contain pond effluent and prevent alien species from escaping into Pukihae Stream.

Robert Chong added that the Commission had previously approved a Stream Channel Alteration Permit; however, the scope of the project has changed so a new application permit is required, and staff is recommending approval with the special condition.

MOTION: (Fujiwara/Erdman)

To approve the submittal.

UNANIMOUSLY APPROVED.

- 2. Violation and Application for After-the-Fact Stream Diversion Works Permit (SDWP.2529.8), Unnamed Tributary to Kaieie Stream, Papaikou, Hawaii, TMK: (3) 2-7-006:028**

Presentation by: Robert Chong

RECOMMENDATION:

That the Commission:

1. Acknowledge that the previous owner, Mr. Liloa Willard, submitted a Registration of Stream Diversion Works and Declaration of Water Use to the Commission in 1989 for a concrete collection box on the unnamed tributary to Kaieie Stream for a future use and constructed the concrete collection box in about 1995.

2. Find that the previous owner, Mr. Liloa Willard, was in violation of Hawaii Revised Statutes §174C-71(3)(A) for constructing a concrete collection box in the unnamed tributary to Kaieie Stream without a Stream Diversion Works Permit (SDWP) from the Commission.

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3. Acknowledge that the applicants, Matt and Alicia Wills, purchased the property from Mr. Liloa Willard in 2005 after Mr. Willard had constructed the concrete collection box on the unnamed tributary to Kaieie Stream.
4. Waive the Commission's Civil Penalty Guideline (G01-01) for a \$250.00 fine based on a first time, non-repeat violation for one incident without gravity component because the applicants purchased the property after the concrete collection box had been constructed.
5. Issue a written warning to the applicants indicating any future violations involving the alteration of stream channels or stream diversions without the necessary stream channel alteration permit or stream diversion works permit may be considered repeat violations with fines up to \$5,000 for each day of violation.
6. Approve an After-the Fact Stream Diversion Works Permit for the concrete collection box on the unnamed tributary to Kaieie Stream, Papaikou, Hawaii, TMK: (3) 2-7-006:028. The permit shall be subject to the Commission's Standard Conditions in Exhibit 5. Standard Conditions 4 to 8 do not apply to this permit.

Robert Chong said the previous owner constructed a concrete collection box on a tributary to Kaieie Stream, which doesn't show up on the USGS map or the Division of Aquatic Resources Watershed Atlas. The previous owner was in violation of not applying for a stream channel alteration permit, and so there was a \$250 fine for a one day violation but there are mitigative components that reduce the fine to \$50.

Commissioner Balfour asked who is getting the \$50 fine. Mr. Chong said the Wills, who are the current owners. Commissioner Balfour said the current owners bought the property, figuring that everything was all right and the violator is actually the original owners. He wondered why we don't fine the original owner instead of the people that bought the property. Mr. Chong said he believed the original owner is on the mainland. Commissioner Balfour said that he's the guilty person, and not the person who bought it. Chair Thielen said that the question comes up at the Land Board, purchasing coastal property with encroachments on a property that were built by prior owners and frequently because the prior owners are long gone, it's part of due diligence of buying property, and that responsibility carries forward.

Chair Thielen said the prior Board policy, listed in the back of the submittal, list fines that are a certain amount which may be reduced because of mitigative circumstances. For instance, if the fine is a higher fine, it should act as a deterrent, but it's been reduced down to the \$50 amount because it was not the person who actually built it. Commissioner Erdman said the reality is that, if you are going to go do it, by the time you went through doing the engineering, everything is going to cost you a lot more than \$250; so you might as well just do it and be fined \$250.

Chair Thielen said they had talked internally about the level of fines for the Water Commission. Commissioner Erdman said it might be good to do it again. Dr. Miike said in the past, even if it's a nominal amount, we should have some kind of fine if there's a violation rather than excuse it. Commissioner Erdman said in other circumstances, it's cheaper for you to violate and pay the fine

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than it is to actually go through the permit process. Chair Thielen said it is a good point for the Water Commission staff to review. The Land Board did go through the Legislature and raised the fines for violations because they were so low they were not a deterrent. On the Water Commission side, there is actually statutory authority to levy higher fines; however, the Commission itself has kept them very low, and so it's good to revisit them especially considering the cost of doing business today.

Commissioner Fujiwara said in this case, if the person came in prior to getting fined, he noticed that the 6-inch pipe is very large and that might have been put down to a smaller size because a 6-inch pipe can bring in quite a bit of water.

Robert Chong said the original owner did file a Declaration and Registration of Water Use back in 1989 and was planning to divert water for future use. He did not build the collection box until 1994-1995. There is gate control valve for the 6-inch pipe to control the amount of water that is diverted into the pond.

MOTION: Erdman/Fujiwara
To approve the submittal.
UNANIMOUSLY APPROVED.

D. GROUND WATER

- 1. Violation and Application for After the Fact Well Construction / Pump Installation Permits, Reid Well (Well No. 5610-03), Well Construction: 4-inch Casing Diameter, 6-ft Deep Well; Pump Installation: 16 gpm for Domestic use, TMK 3-4-003:003, Hawaii**

Presentation by: Ryan Imata

RECOMMENDATION:

That the Commission:

- A. Find the applicant in violation of HAR §13-168-12(a).
- B. Impose a fine of \$950 on the applicant as summarized in Exhibit 2 payable within 30 days.
- C. Approve the issuance of an after-the-fact well construction permit for the Reid Well (Well No. 5610-03), subject to the standard conditions in Exhibit 3, and the following special conditions:
 1. The well should not be used for drinking water unless it is properly tested and treated.
 2. If potable water is used to supply both domestic and irrigation purposes in a single system, the permittee shall eliminate cross-connections and backflow connections by physically separating potable and non-potable systems by an air gap or an approved

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backflow preventer, and by clearly labeling all non-potable spigots with warning signs to prevent inadvertent consumption of non-potable water.

3. That the permit will be issued after the fine described in Item B is paid by the applicant.
- D. Approve and issue a pump installation permit for a 16 gpm pump, subject to the Standard Pump Installation Conditions in Exhibit 4.
- E. Suspend any current, pending or future applications by the applicant until the fines are paid and the applicant completes the permit process for this well.

MOTION: Fujiwara/Kiyosaki

To approve the submittal.

UNANIMOUSLY APPROVED.

2. Hawaiian Earth Products, APPLICATION FOR A WATER USE PERMIT HEP-1 Well (Well No. 3104-02), TMK 6-5-002:026, WUP No. 879, Future (Agricultural) Use for 0.359 mgd, Wahiawa Ground Water Management Area, Oahu

Presentation by: Ryan Imata

RECOMMENDATION:

Staff recommends that the Commission approve the issuance of water use permit no. 879 to Hawaiian Earth Products for the reasonable and beneficial use of 0.355 million gallons per day of potable water for agricultural, industrial, irrigation and domestic use from the HEP-1 Well (Well No. 3104-02), subject to the standard water use permit conditions listed in Attachment B and the following special conditions:

1. Should an alternate permanent source of water be found for this use, then the Commission reserves the right to revoke this permit, after a hearing.
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.

Ryan Imata said the only difference on the application that they applied for, was that they decrease the feed irrigation. We're recommending 0.355 versus 0.359 million gallons per day.

Chair Thielen asked Mark Cummings of Hawaiian Earth Products, if he wanted to address the difference between the request and the recommendation on the volume of use. Mr. Cummings said the recommendation was fine.

MOTION: Miike/Erdman

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To approve the submittal.
UNANIMOUSLY APPROVED.

3. Alii Turf Co., LLC, APPLICATION FOR A WATER USE PERMIT, All Turf Well (Well No. 3001-01), TMK 7-1-001:006, WUP No. 876, Future (Agricultural) Use for 0.115 mgd, Wahiawa Ground Water Management Area, Oahu

Presentation by: Ryan Imata

RECOMMENDATION:

Staff recommends that the Commission approve the issuance of water use permit no. 876 to Alii Turf Co., LLC for the reasonable and beneficial use of 0.115 million gallons per day of potable water for agricultural use from the All Turf Well (Well No. 3001-01), subject to the standard water use permit conditions listed in Attachment B and the following special conditions:

1. Should an alternate permanent source of water be found for this use, then the Commission reserves the right to revoke this permit, after a hearing.
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.
3. The applicant shall obtain the necessary permits from the Department of Health or any other agencies, pertaining to the implementation of Best Management Practices to prevent runoff into adjacent streams.

Ryan Imata added that the Department of Hawaiian Home Lands had comments regarding the livestock requirement and that staff has spoken to the applicant. And they confirmed that it may be a lesser amount and they calculated a little less, 0.115 that balance out.

Commissioner Fujiwara asked for details regarding the livestock processing waste management plan, which could be very expensive depending on how they are going to raise their hogs, pasture or pens. If the applicant has a waste management plan, he might have to construct a lagoon to capture wash down water, which could be put to other uses, such as reuse water for other crops.

Commissioner Fujiwara said they could check with DOH if a waste management plan is required unless they pasture the hogs.

Chair Thielen asked the applicant to talk about the waste management plan.

See Ba Thee (TC) of Alii Turf Co. explained that he has 120 pigs and most of the pigs are on slab, which is covered with compost wood chips to treat the waste. In the summer the pigs drink more and in the winter time they drink less. Mr. Thee said he is using a 250 gallon tank of water, filling the tank from home and taking it out to the farm.

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Commissioner Fujiwara agreed that using the chips is another way of waste management but asked if there was a waste management plan. Mr. Thee said he has one through NRCS [Natural Resources Conservation Service, U.S.D.A.]. Commissioner Erdman asked if they are composting the wood chips and if there were any problems with internal combustion. Mr. Thee said yes to composting and no to combustion.

Chair Thielen said on another note they are still going back and forth with the University of Hawaii. Mr. Thee said yes, and he is waiting for some feedback from them but is still interested.

Dr. Miike asked Mr. Thee if he is okay with that amount of water. Mr. Thee said it's better than nothing and right now, he has nothing. Commissioner Erdman asked if that 250 gallon tank is ever empty at the end of a day. Mr. Thee said no it's never been empty, the pigs are not confined, they are free range pigs which helps with the smell. The concern was that if that was enough water. Mr. Thee asked if he could come back for more water if that wasn't enough. Chair Thielen brought up the fact that it is still a 12-month moving average and explained that it would allow Mr. Thee to pump a little more in the summer and less in the winter so there's some flexibility of meeting the seasonal needs.

MOTION: (Fujiwara/Erdman)

To approve the submittal.

UNANIMOUSLY APPROVED.

4. Violation and Application for After-the-Fact Well Construction / Pump Installation Permits, Spring Mountain Produce (Well No. 5312-01), Well Construction: 4-inch Casing Diameter, 390-ft Deep Well Pump Installation: 20 gpm for Domestic and Agriculture Use, TMK (2) 2-9-011:009, Hanawana Road, Makawao, Maui

Presentation by: Charley Ice

RECOMMENDATION:

That the Commission:

- A. Find Roxana Ramos and Bruno Lenta to be in violation of HRS §174C-84(a) for the illegal construction of the Spring Mountain Produce Well (Well No. 5312-01).
- B. Waive the calculated fine and order the landowner to seal the existing well, and approve the issuance of a well construction permit to the licensed driller to abandon and seal the Spring Mountain Produce Well (Well No. 5312-01).
- C. Issue the letter of assurance to the licensed driller for a new well, to take its normal administrative course of approval on the well construction and pump installation permit

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application for the reconstruction of a well according to approved Commission standards once the County has resolved its Special Management Area (SMA) permitting issues.

Charley Ice wanted to point out that this may be the first time that they are recommending sealing a well in active use.

Commissioner Fujiwara asked if the first contractor that came was not licensed. Charley Ice said they do not know who the driller was and understand that Wailani was contacted prior to the well construction but not hired.

Just given their earlier discussion on the fines, Chair Thielen said this is an after-the-fact and staff is not recommending a fine. She asked Mr. Ice to address how waiving the fine is consistent with the past practice of the Commission. Mr. Ice said in their view sealing the well is going to cost something, he's not sure exactly what that is, and he doesn't have the number for that. The construction for the replacement well is maybe in the ballpark of \$80,000, and Mr. Ice considers that might be punitive.

Chair Thielen said she does not see a date for things to be completed on the recommendation and asked if that was discussed with the parties. Mr. Ice said no, it hasn't been and this could be an issue. One of the problems is that the Commission is not suppose to be issuing permits without an SMA clearance and we are unable to get this from the County because there are a number of other County code violations to resolve before they will give us clearance to proceed with the well permits. Therefore, staff is recommending the Commission approve the sealing of the well ASAP. Chair Thielen stated that the sealing of the well could be done by a date certain but the new well may take time, and asked if there was a timetable for the sealing of the well. Mr. Ice said he thinks if the Commission would approve it we would want to issue it immediately and get that started. Chair Thielen said if they are going to waive the fine because of the cost of doing this other work, to have some guarantee that the other work at least for the sealing is going to take place by a date certain and asked if there was a suggested completion date that would be reasonable so the contractor can do the work. Mr. Ice said he didn't but probably thought he could say 30 days. Commission discussion entailed the issue of fines and a recommendation to have the well sealed within 60 days.

Roy Hardy said because its an active well it'll probably be best for these applicants to have that other well started, despite the Special Management Area (SMA) permit problem. It would be ideal if they could drill that well and once that well is drilled, constructed properly accordingly to the standards then seal the other. Chair Thielen said the point that she was making was that the way this is worded, this guy can be sitting there 10 years from now and saying he never got the SMA permit and couldn't drill the new well and continued using the current illegal well, so the concern is for protecting the ground water supply. If anything, that would motivate them to go and resolve their permitting problems with the County and get the other well done. Chair Thielen said she is looking for a reasonable time.

Commissioner Erdman asked staff for their opinion is on the real risk to contaminating ground water. Mr. Ice said any kind of accidental spill is always problematic, he didn't know how to

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answer that. Commissioner Erdman asked Charley Ice if he seen the site; Mr. Ice said he has not seen it.

Charley Ice added that they have been notified also that there was a recommendation in the order of \$90,000 fine by the County and that we have also heard there may have been action on a fine on the order of \$40,000, and the folks in question don't have a lot of money.

Chair Thielen said another risk is people walking away and leaving an unsafe well in place where it's not sealed so to give an extensive period of time and then have the chance of people abandoning the area, going into bankruptcy, and not taking care of it, leaves a potential risk.

Commissioner Balfour asked what did they do before they had the well, did they need water or get it from somewhere else. They kicked it good-bye a long time ago, there are violations across the board with practically everything they are doing and if in fact sealing the well is prudent to do, then we should give them a timeframe. If they don't have another well, they haul it in, hook up to the County or something, but he can see this going on forever with no real timeline or urgency. Roy Hardy concurred saying this has already been going on for a year. Commissioner Balfour said this is illegal, bad, and needs to be corrected now.

Chair Thielen asked if there was anyone present to testify on behalf of the applicant. There was no response.

Commissioner Erdman said after the well is sealed staff should check the nearby stream as that may become their new source of water.

It is unknown when the well was drilled but the complaint came in January 2008. Mr. Ice said the gentleman who filed the complaint has his own well. Dr. Miike asked if staff spoke to the owner of the well. Roy Hardy said that staff has and thinks the driller, Mike Robertson, gave the approximate time because he was asked by the applicants how much to drill the well and was not contacted after that. Mr. Ice thought that staff got the complaint after that and by asking around believe the well could have been constructed in late 2007.

Chair Thielen mentioned that if the Commissioners wanted to add in the deadline for sealing the well that would be in recommendation B on waiving the calculated fine and order the landowner to seal the existing well within 60 days of the date of the decision.

MOTION: (Erdman/Fukino)

To approve the submittal as amended.

UNANIMOUSLY APPROVED AS AMENDED.

E. PLANNING

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1. Request to Authorize the Chairperson to Enter Into Planning Assistance to States Agreements with the U.S. Army Corps of Engineers for Hawaii Water Resources Management

Presentation by: Neal Fujii

RECOMMENDATION:

1. Staff recommends that the Commission authorize the Chairperson to enter into Planning Assistance to States agreements with the USACE to provide cost-share funding not to exceed \$270,000 to complete the projects listed below. Commission funding would be from general funds or special funds or a combination of both, subject to the availability of funding. Funding may also be provided from other government agencies through a temporary trust fund or in-kind services.
 - Evapotranspiration in Hawaii
 - Statewide Water Conservation Planning
2. Staff also recommends that the Commission authorize the Chairperson to further amend or modify these agreements provided that such amendment or modification does not include any additional funding.

MOTION: (Fujiwara/Erdman)

To approve the submittal.

UNANIMOUSLY APPROVED.

2. Request to Authorize the Chairperson to Modify an Existing Planning Assistance to States Agreement with the U.S. Army Corps of Engineers for the Update of the Rainfall Atlas of Hawaii

Presentation by: Neal Fujii

RECOMMENDATION:

1. Staff recommends that the Commission authorize the Chairperson to modify the existing Planning Assistance to States agreement to update the Rainfall Atlas of Hawaii for the purpose of investigating historical rainfall trends and possible future changes in extreme rainfall events in Hawaii, and to provide cost share funding for this work not to exceed \$31,000 from Commission general or special funds, or a combination of both, subject to the availability of funds, for this additional investigation as described in Exhibit 2.

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2. Staff also recommends that the Commission authorize the Chairperson to further amend or modify this agreement provided that such amendment or modification does not include any additional funding.

MOTION: (Erdman/Fujiwara)

To approve the submittal.

UNANIMOUSLY APPROVED.

Deputy AG Ishikawa left and Deputy AG Chow was present for this next item.

D. GROUND WATER

5. Fat Law's Farm, Inc.; APPLICATION FOR A NEW WATER USE PERMIT; Waiahole Ditch System, WUP No. 871; Future (Agricultural) Use for 1.220 mgd on TMK 9-2-004:010, Kunia, Oahu

Presentation By: Ryan Imata

RECOMMENDATION:

Staff recommends that the Commission approve the issuance of water use permit no. 871 to Fat Law's Farm Inc. for the reasonable and beneficial use of 0.551 million gallons per day (based on a 12-month-moving average) of water for agricultural use on TMK 9-2-009:010, from the Waiahole Ditch System, subject to the standard water use permit conditions listed in Attachment B and the following special conditions:

1. Should an alternate permanent source of water be found for this use, then the Commission reserves the right to revoke this permit, after a hearing.
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.

Ryan Imata wanted to amend this application and state that both the applicant and objector sent in a signed agreement (copies distributed). The agreement is attached to Exhibit A and they made it a point to amend the request to 0.551 million gallons per day (mgd) instead of the 1.22 mgd as originally requested. Staff's only concern is that the 1.22 mgd quantity that was public noticed and was also noticed on the agenda for today's meeting.

Chair Thielen referred to Deputy AG Linda Chow that this has come up before that we may notice a certain amount on there but that's always subject to board or commission debate and deliberation, and maybe changed so if the board were to agree to a different number that doesn't mean that the public notice is incorrect. Deputy AG Chow said it would be okay because the public notice is to mostly it should provide people notice that this agenda item is coming up and if interested should

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come to testify but as far as a specific amount, of course it will be for discussion and decision by the Commission.

Commissioner Erdman can see it being a problem going the other way. Chair Thielen said that's always a possibility. The last one we were just asking if they needed more water so for notice purposes if you got a specific amount on there and may vary and could go up. Deputy AG Chow said maybe we should not put a specific amount in the future.

Ryan Imata wanted to point out that the agreement was subject to the applicant requesting the lower amount of 0.551 rather than the 1.22.

Chair Thielen asked the applicant to come up. Commissioner Erdman said that maybe we shouldn't state the amount in the public notice in the future. Ryan Imata said it might be a requirement in the State Water Code on the use.

Chair Thielen asked if the letter was amending or if the Commission adopt what's in the January 25 agreement by the parties' will that change the recommendation by in the staff's submittal. Mr. Imata responded no, this is a way to formalize the request for the smaller amount and a signed copy.

Mr. Hardy said to clarify Commissioner Erdman's public notice question on quantity, HRS 174-C 52(B), requires that the quantity of water be in the Public Notice.

Dr. Miike asked about the agreement is 0.551 and this is 0.552. Mr. Imata said what happened was that he rounded the number up based on calculation and staff is recommending 0.551 in order to avoid a contested case hearing.

Dennis Hwang, attorney for the applicants, Fat Laws Farm, Inc. introduced president Tim Law with his translator. Mr. Hwang said Mr. Law has been farming since 1986 with a three acre farm in Waianae and another 25 acre farm in Kahuku, and most recently operates in Ewa Beach for 10 years under Fat Laws Farm. Fat is an acronym for brother Frank (F), wife Alice (A) and himself (T). The farm grows a variety of crops and distributed to farmers markets, produce stores, restaurants and wholesalers throughout Hawaii, and exports to US mainland and Canada. In 2006, Fat Law Farms was recognized as export farm of the year in Region 9.

Mr. Hwang said with the new farm in Kunia, the applicants will employ 40 people and be fully operational in a year. Regarding the agreement with the windward parties, he thanked the Commission staff for the proposed calculations for reasonable and beneficial use, and formed the basis of the agreement and helps avoid a contested case hearing. The agreement amends the application request to 0.551 mgd no more and no less, and with the agreement the windward parties will withdraw both their objections and request for a contested case hearing. It is based on sound science and considers the water needs of our applicants while circumventing the burden and risk of all parties going to a contested case proceeding. Mr. Hwang wanted to mention that in regard to the availability criteria the request is water in an amount that's less than the remaining unpermitted sustainable yield, so there is an available amount. The application is for diversified agriculture, the property is zoned Ag1 and lies within a special agricultural district. And with the stipulation of the

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interested parties and the farmers, we have considered the practicability of alternative water sources and the farmers have met the burden of 0.551 mgd.

Chair Thielen said it is essentially half of the original request; Mr. Hwang responded yes. Chair Thielen asked Mr. Law if this is sufficient water for him to start the farming operation he is seeking to start. Mr. Law's translator spoke to Mr. Law.

Mr. Hwang explained that the 0.551 mgd in addition to the water from the community water association will be over the one million gallons per day. The question was rephrased to Mr. Law, if the water that he's getting from all the sources including the Kunia, would be sufficient. Mr. Law said that it would be enough.

Chair Thielen noticed that there was another signatory on the letter and asked if they had anything to add to the testimony today. Paul Atchitoff said it wasn't necessary to add anything.

Dr. Miike asked the staff that one of the issues was that in meeting the agreement he believed Earthjustice wanted the Commission to address the unused amounts of water and revocations and was curious where we are about that.

Dr. Miike said because in the standing remand on the Waiahole we didn't address it in the remand but what we said that we would address that in a separate action for Puu Makakilo but there are lots of other users that still have not used all their allocation.

Roy Hardy said they haven't moved forward with that other than assessing the current status. Dr. Miike asked if Mr. Hardy intends to move. Mr. Hardy said staff could but typically when water is available staff does not move on revocations unless an applicant comes in and there is a need to make room for another person, which provides stronger grounds for revocation. Staff could do this in every management areas all the time but we usually wait until the maxed out situation occurs before moving on revocations. Dr. Miike surmised that unused permitted water still gets diverted back into the streams, so it's not an issue because the practical effect is that water still is not being drawn over to the leeward side and asked if that was correct. Mr. Hardy said yes.

Commissioner Balfour stated we have 2.5 million gallons of [ground] water which is unused and the 15 million gallons that comes to the leeward side. Using potable ground water, potable water for agriculture is basically and inherently the wrong way to go. If we have surface water set aside for agriculture but instead use potable water it causes him to wonder if that's really the right way to go. Potable ground water is for human consumption yet we have ag water available but we comprise and consider doing half and half. The agreement for Waiahole allowed 15 million for the leeward side, there is still 2.5 available so there's plenty to take care of the 1.22 request and still have $\frac{3}{4}$ of a million gallons remaining. Additionally, there is 3.5 mgd of unused allocations, which could also be available. Commissioner Balfour feels it's a problem that we're using potable water for agriculture when we have [non-potable] ag water available.

Commissioner Erdman added that if we want ag to continue in Hawaii too, we need to look at that because there's an expense to pumping that hits ag hard.

Minutes

Commissioner Balfour said well #1 was part of the super fund and in the attachment it basically saying that its okay but they need to check it out. Obviously they're going to start pumping from it that does hasten the problem if in fact it's out there. It's a philosophical difference and being new to the commission asked if someone can enlighten him why we are doing this.

Roy Hardy commented that certainly with new [ag] applications for ground water, that's something that we'd be recommending against if there's a non-potable alternative. It's a complicating factor with this one, because of the pre-existence of these wells, which even precede the Commission - the Del Monte wells were approved under the board back in 1979-1980 - so it's the continuance of something that's already been there, and we haven't gone so far to be retroactive to all the pre-existing sources and revoke their permits to have them go on to other alternative sources. There's probably enough demand out there that even with the existing [ground water] sources that have permits and [supply] Waiahole it might not be able to satisfy demands, but that's just a comment.

Commissioner Balfour mentioned that Kunia is pretty much filled up right now. Most of the property is pretty well set in ag. He's not sure if there's going to be a lot more demand and asked if BWS had any comments as to taking potable water for agriculture; are they in the equation? Weighed in on it at all? Mr. Hardy said, not on this particular application.

Dr. Miike stated that he's been one of the stronger advocates to use water for best use, surface water for non-agriculture, ground water for potable use, but in this case, he thinks technically if Del Monte was using this for agriculture and a new user is using it the same it's comparable to a transfer of a permit. In an absolute sense, it shouldn't be done but from past practices and past use of that water, I don't have a problem with that. The transfer is for agricultural wells for as an agricultural use and if the parties are agreeing to that then we can avoid a contested case. I think it's going to actually help the applicant because otherwise he's not going to be able to get his water.

Ryan Imata added that the requirement for water for Kunia, there is currently one other applicant, Syngenta, who will be coming before the Commission within the next two months and will be requesting around 0.59 mgd. There is one current permittee who is overusing so they will need to come in for an additional permit. There is the Department of Agriculture and subdivision that's closer to Royal Kunia who's also going to come in so we're looking at a couple of potential new applications that might bring us within or very close to the 2.5 mgd [unallocated Waiahole water]. The Kunia Water Association, through HARC, is looking at doing some kind of ag water plan for a system that involves utilizing waste water/ reuse water as well as water from wells #1, 3 and 4.

In regards to Well #1, they are remediating the water right now to pretty high quality standards, and they're dumping the effluent, right now they need to find a place to dump it. Fat Law is currently using some of the effluent water right now. So this treatment does not exacerbate the contamination problems.

Commissioner Balfour commented that when Oahu Sugar used Wahiawa treatment plan reuse water the Department of Health did not want effluent water used.

Minutes

Chair Thielen referred back to Table 3, page 9 of the submittal, there's over 3.5 million gallons of four year non-use. Chair Thielen said because it's almost like a false thing to say that there's other sources available because of the concern of the other sources in these cases are potable water. So it's probably going to be important to go back and revisit that and the new applications we're expecting to come up especially because some of these applicants named are people who have four year non-use. We're getting to the point where we're going to have to push permittees beyond the voluntary revocations and start making recommendations based upon the four year non-use practice.

Dr. Miike asked why Syngenta is coming in for more if they are not using their allocation. Mr. Imata said you would have to ask them, but he thinks they have planned use. Syngenta is using water; they're just not using it on their property. They are using it on a portion of Monsanto's property that they've been allowed a seven-year lease. Chair Thielen said there is also Monsanto that has four year non-use. What you're hearing from the Commissioners is don't come forward with the recommendation on the next rounds saying there's going to be alternative wells sites in other areas. You're going to have to take a hard look at this non-use. Dr. Miike said if we still pretend that they are using all this water, we're going to bump up against the limit and we should really deal with this.

MOTION: (Sumner/Fujiwara)

To approve the submittal.

UNANIMOUSLY APPROVED.

F. NEXT COMMISSION MEETINGS (TENTATIVE)

1. March 17, 2010
2. April 21, 2010

G. The meeting was adjourned.

Respectfully submitted,

KATHLEEN OSHIRO
Secretary

APPROVED AS SUBMITTED:

KEN C. KAWAHARA
Deputy Director