

MINUTES
FOR THE MEETING OF THE
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: November 17, 2010
TIME: 9:00 am
PLACE: DLNR Board Room
Kalanimoku Bldg.

Chairperson Laura H. Thielen called the meeting of the Commission on Water Resource Management to order at 9:08 a.m.

The following were in attendance and/or excused:

MEMBERS: Ms. Laura Thielen, Dr. Chiyome Fukino, Mr. Neal Fujiwara, Ms. Donna Kiyosaki, Mr. Sumner Erdman, Mr. William Balfour, Jr.

STAFF: Roy Hardy, Ryan Imata, Dean Uyeno, Charley Ice, Robert Chong

EXCUSED: Dr. Lawrence Miike

COUNSEL: Linda Chow, Esq.

OTHERS: Richard Ingersoll (Syngenta Hawaii), Alison Kunishige (Yamamoto & Settle); Lisa Baill (Goodsill Anderson for Castle & Cooke); Matt Rose (ADC); Kathi Meechan (Halms Enterprise); Joseph Dane (Syngenta Hawaii); Bruce Koike (Dept. of Health, Safe Drinking Water Branch); Tony Herrmann (Monsanto); Dan Clegg (Monsanto); Pam Bunn (PJPN for Office of Hawaiian Affairs, OHA); Barry Usagawa (Board of Water Supply); Eadean Buffington (Mililani Group Inc.); Mark Stovtemyer (Pioneer Hi-Bred); Blake Vence (HARC); Lynn Maeda (Aloun Farm); Alan Murakami (Native Hawaiian Legal Corp., NHLIC); Jocelyn Doane (OHA); Yvonne Izu (Moriyama Lau & Fong for Monsanto); Paul Achitoff (Earthjustice)

All written testimonies submitted at the meeting are filed in the Commission office and are available for review by interested parties.

Chair Thielen announced that Dr. Fukino will be about 10 minutes late.

A. APPROVAL OF MINUTES

October 18, 2010

MOTION: (Balfour/Fujiwara)

To approve the minutes (Balfour, Fujiwara, Kiyosaki, Erdman, Thielen).

UNANIMOUSLY APPROVED.

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B. ANNOUNCEMENTS

Roy Hardy, Ground Water Regulation Hydrologic Program Manager, was filling in for Acting Deputy Director Lenore Ohye.

Vacancies: Roy Hardy mentioned that hydrologist Chui Cheng in the Stream Protection and Management Branch recently resigned. He reported that Ms. Cheng will be working with the U.S. Geological Survey which isn't a total loss because she is going to be continuing on stream research which is directly related to us. It brings our total vacancies to eight which includes the deputy position, a 36% reduction in our staff of 22.

Outreach:

- Staff will be making a presentation at the Hawaii Water Environment Association this week at their biennial conference on drought, conservation and wastewater reclamation at Makena Resort, Maui. Kapua Sproat and Yvonne Izu will also be speaking on the Instream Flow Standard issue for Maui.
- Staff also met with the Water Conservation Initiative Committee of the Landscape Industry Council of Hawaii (LICH) to develop their landscape irrigation conservation policies.
- Staff met with the Taro Security and Purity Task Force. The purpose was to review and prioritize recommendations from the Task Force's 2010 Legislative Report, identify objectives for the next five years, and determine how the task force will continue forward.

Projects: Staff attended the Water Conservation Project Kickoff meeting with U.S. Army Corps of Engineers personnel and project consultant CH2M Hill to begin the statewide water conservation program project that was approved by the Commission in February 2010.

Drought: Mr. Hardy reported that during October, tradewind showers brought some drought relief to parts of the state from Oahu to the Big Island. However, drought conditions continue on the leeward sides of Maui, Molokai, and the Big Island ranging from abnormally dry to drought-extreme. Drought-exceptional conditions continue in the Kawaihae and South Point areas on the Big Island and in the Kihei-Makena region on Maui. The National Weather Service Climate Prediction Center El Nino/Southern Oscillation Diagnostic Discussion shows the status of La Nina is to continue at least into the Northern Hemisphere spring 2011. This means for the long-term outlook there's a 40% chance of above normal precipitation from December 2010 through May 2011, though there is much uncertainty associated with this prediction.

Mr. Hardy reported that staff has been investigating a number of surface water complaints in Waipio Valley, Big Island, Molokai, and Kauai, concerning alleged illegal diversions which might be coming up in subsequent meetings.

Mr. Hardy announced that the January 2011 meeting will be on a Thursday rather than the normal Wednesday due to the opening of the Legislature, and as a reminder that all 2011 dates scheduled are tentative.

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Mr. Hardy requested to hold off the last announcement until Dr. Fukino arrives.

Referring to the vacancy report, Chair Thielen reminded the Commission that they made the call at the last meeting to defer hiring the Water Deputy until the new Administration comes in. They do have permission to fill the Stream Branch Manager position and will seek approval to fill Chui's hydrology position. She said it's something that's happening across the department and other agencies as well, but due to the attrition and economy it's been a real difficult few years. In some cases where we have permission to hire, we're still not being able to find people to come in despite the economy. Chair Thielen said that it's been a real strain across state government, particularly this division and a couple of other divisions within DLNR.

Chair Thielen stated that in the transition materials she's preparing for the incoming Chair, she is placing a couple of vacancies that are high priority recommendations that they move forward expeditiously. The Water Deputy is one of them that is a critical one.

Chair Thielen reminded the commissioners that several meetings ago they were asked to take a look at non-use in an area and the Commission directed staff to evaluate non-use in this region. What we were looking at is what process should the staff be directed to follow in going forward preparing a draft process, getting Commission's approval, hearing the public testimony and identifying the best way for them to move forward.

C. GROUND WATER REGULATION

- 1. PROCESS FOR PROPOSING RECOMMENDATIONS ON REVOCATION ACTIONS FOR WAIAHOLE GROUND WATER USE PERMITS (Well Nos. 2657-05, 2853-01, 2953-01 to 03, 3053-01, 3154-01): GWUP No. 619, 2.130 mgd to Dole / Castle & Cooke / Robinson; GWUP No. 630, 0.150 mgd to the State of Hawaii / Waiawa Correctional Facility; GWUP No. 631, 0.140 mgd to Mililani Memorial Park; GWUP No. 632, 0.250 mgd to Mililani Golf Course; GWUP No. 634, 0.480 mgd to Nihonkai; GWUP No. 636, 0.170 mgd to Kamehameha Schools / Bishop Estate; GWUP No. 775, 0.750 mgd to Puu Makakilo Golf Course; GWUP No. 804, 2.390 mgd to Robinson Kunia Land; GWUP No. 807, 0.260 mgd to Hawaii Agricultural Research Center; GWUP No. 827, 0.024 mgd to Edmond C. Olson Trust No. 2; GWUP No. 828, 2.636 mgd to Monsanto Co.; GWUP No. 851, 2.030 mgd to Agribusiness Development Corporation; GWUP No. 860, 0.590 mgd to Syngenta Hawaii, LLC; GWUP No. 871, 0.551 mgd to Fat Law's Farms, Inc. et al.**

Presentation by: Ryan Imata

Ryan Imata stated that this is a process for proposing revocation action for all of the permits issued for the Waiahole Ditch system. The authority that staff is citing is Hawaii Revised Statutes §174C-58 that talks about the revocation of permits, Section 4, 'Partial or total nonuse for reasons other than conservation'. The second citation would be in the Waiahole Decision and Order I, Item 7,

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‘All permits shall be subject to review at any time and shall be reviewed within 5 years, or sooner if deemed necessary’. The third citation from Decision and Order III issued July 13, 2006, third paragraph, ‘Of the 15.00 mgd available for offstream uses...’ and talks about what had been permitted. Mr. Imata said that this number has changed at this time due to various distributions and a couple of reductions. The 20-year permit review under §174C-56, refers to the review of all water permits every 20 years.

Since the Decision and Order III, there was a modification to Robinson’s permit. There was an issuance of a new water use permit for Fat Law’s Farms and there was a vacating of Puu Makakilo water use permit. So based on the new allocations issued and the reduction to Robinson, there’s currently 2.729 mgd of unpermitted water available for offstream uses as summarized in Table 1.

Mr. Imata also reported that Syngenta’s application was submitted and is under review. He said even if those two are allocated fully, there’s still a potential available allocation of 1.613 mgd. Typically when staff receives a new water use permit application, staff doesn’t do a system wide evaluation of all water use permits. However, during the approval of the Fat Law’s Farms permit and actually the processing of the application, staff had sent out letters to various permittees requesting voluntary relinquishment and if permittees were unable to relinquish any water, staff asked why. Those responses are found in Exhibit II. The letters were sent out in response to issues and objections raised by Earthjustice to provide more factual information in order to address their concerns regarding non-use and also to avoid a contested case with Fat Law’s Farms. After the approval of the Fat Law’s Farms’ permit at the February 17 Commission meeting and in anticipation of future applications, the Commission directed staff to initiate revocation proceedings for non-use for all of the users on the Waiahole Ditch System.

PROPOSED WAIAHOLE REVOCATION SCHEDULE:

Based on Decision and Order I’s special condition of 5-year review and CWRM’s directive during Fat Law Farms’ GWUPA, staff is proposing the following revocation schedule, with Phases 1 and 2 already completed:

Table 2: Process for Waiahole Ditch revocation

Phase	Date	Days	Deadline	Action
1	4/3/09	NA	NA	Information collection and compilation <ul style="list-style-type: none"> • Review: <ol style="list-style-type: none"> 1. Decision and Order requirement for 5-year review 2. Water use reporting 3. Water use permit and transfer information 4. 20-year permit compliance review 5. Fat Law’s Farms Public Hearings (7/7/09) • Convert billing into monthly water usage • Calculate 4-year non-use
2	8/3/09	25	8/28/09	Initial contact with permittees <ul style="list-style-type: none"> • Letters sent out via certified mail, requesting voluntary relinquishment or explanation of why unused allocation is needed
3	11/5/10	30	12/5/10	Review and respond to permittee response letters to address specific information provided by each permittee <ul style="list-style-type: none"> • Request further information / timelines as needed • Set up a time to conduct field investigations not

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				done adequately in 20-year review
4	11/17/10			Submittal on implementation plan to Commission for action <ul style="list-style-type: none"> • Provide background information to date • Delegate authority to appoint hearings officer for Public Hearings, required under HRS 174C-58
5	11/10/10	21	12/1/10	Conduct field investigations
6	12/1/10	30	12/31/10	Notification to permittees and publishing of public notice for hearings <ul style="list-style-type: none"> • Publish Date: 12/3
7	12/15/10			Brief Commission with any updated information
8	1/1/11	59	2/28/11	Conduct required Public Hearings on revocations (HRS 174C-58) <ul style="list-style-type: none"> • By the close of public hearings, requests for Contested Case Hearings will need to be made, if so desired • Deadline for follow-up written requests is 10-days after close of Public Hearing • Staff to review standing of CCH petitioner
9	3/11			Submittal to Commission for action For each permittee: <ul style="list-style-type: none"> • Recommendations to the Commission for revocation • Findings on standing of petitioner, if CCHs are requested

RECOMMENDATION:

Staff recommends that the Commission:

- 1) Approve the proposed revocation schedule in Table 2 above; and
- 2) Delegate authority to the Chairperson to appoint hearings officer(s) for the public hearings per Phase 4 of Table 2.

TESTIMONIES:

1. Yvonne Izu, on behalf of Monsanto, submitted a letter from Morihara Lau & Fong regarding the process. (Copies of letter were distributed.) Ms. Izu referred to Monsanto's proposal on page 2 of the letter dated November 17, 2010. Ms. Izu asked to flip the sequence of the procedure and by doing so it would be more efficient and forestall unnecessary requests for contested cases. Ms. Izu said, of what they understand of the process set forth on page 20 under staff's submittal, there would be public hearings held on all the Waiahole Ditch permits. Because of how the rules are written, anybody who may want a contested case would have to ask for a contested case prior to the close of the public hearing. At that point the permittees have no idea whether there's going to be a recommendation for revocation of the permit or any portion of the permit, so to preserve the permittees' rights, they will be forced to request a contested case at that point just because they don't have any idea what's coming down the pike. Ms. Izu continued that oral request for a contested case will need to be followed up with a written confirmation that they are requesting a contested case within 10 days.

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Ms. Izu understands that on the procedure being proposed by staff, after the public hearing and requests for contested case, staff will then make recommendations to the Commission as to which permits they are recommending some revocation action on. Ms. Izu stated that Monsanto suggests that if you flip that around, after the staff does its field investigations, come back to the Commission with its findings, make recommendations to the Commission, then at that point they proceed against certain permittees for revocations proceedings, they can then hold the hearing after that and at least the permittees would know which permittees these proceedings will be used against. It is suggested that the process set forth in Table 2 be changed that way and the revisions are provided on page 2 of their written testimony. The Statute, unfortunately, is written in an unclear manner and probably in a way that wasn't intended that the process be that they actually have a public hearing on this. Ms. Izu stated that the process that Monsanto is proposing still complies with the Statute 174C-58.

Chair Thielen referred to step 8 in Table 2 of their letter and explained that what staff talked about was a public hearing because the Statute said 'after a hearing'. She said there are many types of public hearings and one type that maybe staff was referring to was at the public hearing people would have to file a request for a contested case then. But there are other types of hearings where it's information gathering and it doesn't trigger the requirement of doing a contested case application at that public hearing. Instead, it's providing information to the public, gathering information from the public, and then using that in a subsequent submittal to the Commission. Chair Thielen clarified that you wouldn't have a contested case hearing at that point but it would only be after there's a Commission decision that if people wanted to contest, people could do it at that point. Chair Thielen stated that one of the concerns we had in a way that you have suggested that it almost may trigger two contested case hearings and that would be a little unwieldy. In that Section 8, it was more an information gathering public hearing, not one where a contested case has to be filed. Instead that comes at step 9 after Commission Decision.

Ms. Izu replied that it would address some of their concerns about having to request a contested case; however, her understanding why this public informational gathering step is in there is because of the requirement that it is after a hearing. The definition of a hearing under Chapter 91 is not a public informational hearing but the kind of hearing where you're going to have to request a contested case at the end of it.

Chair Thielen said that they would talk this over with their Counsel but it's something that Ms. Izu could consider. She added that the legislature recently enacted a Statute where un-renewable energy leases for the Department of Land and Natural Resources had to have hearings/meetings on island and the Land Board decision had to be on island, but there are many types of hearings, and it's the minority where you actually have to ask for a contested case at that hearing. In most cases the public hearings we have for Administrative Rule making and the like, is just gathering information in the submittal to the decision making body. She asked if it is possible to have that type of hearing at step 8. Deputy AG Linda Chow said she didn't think it made a difference because if a hearing is required to be held which is under the Statute and a meeting is also held with a decision made by the Commission, whichever is held sooner is the deadline by which the request for contested case has to be made.

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2. Richard Ingersoll, attorney for Syngenta Hawaii, said that the staff is well aware of Syngenta's situation and agrees with staff's recommendation that Syngenta's situation most probably be reviewed in connection with its pending application. Mr. Ingersoll described that Syngenta acquired its land from Campbell Estate two years ago and it was the last parcel that Campbell was selling that had been using water from the Waiahole Ditch. Syngenta got an allocation of whatever was left after they sold earlier parcels that took with them partial transfers of permit. Syngenta has been gearing up their operations by putting in infrastructure and to develop the irrigation distribution system. Their plans are going to require additional water beyond what was allocated to them and they have been addressing that with the staff. Mr. Ingersoll said there isn't a 4-year history for Syngenta and it's difficult to allocate what was actually used.

Chair Thielen clarified that they are not making a decision on any permits but discussing the process. Mr. Ingersoll commented that there was some confusion because Syngenta also leases some land that was sold to Monsanto and have been farming that land for a number of years and using water from the ditch. Commissioner Sumner Erdman asked that since Syngenta has had the land for two years, are they planning on using the water the next two years. Mr. Ingersoll said they started using it this year and plan on using it in the future.

3. Paul Achitoff of Earthjustice wanted to thank the Commission and the staff for taking the initiative to examine these permits because it's really been a long time coming. Mr. Achitoff said that they argued that the allocations that are subject to these permits were excessive before these permits were issued many years ago. And to be clear, the non-use period for many of these permits are far longer than just 4-years. For many years when this was pointed out, the permittees responded by saying well some of these permits are subject to appeal and there's uncertainty of the availability of the water, we don't want to expand unless we know, etc. That made a little bit more sense years ago when some of these permits were subject of appeal but most of them have not been for many years. So if there ever was intent to use the entire allocation these permittees have had a very long opportunity, far longer than 4-years to manifest the supposed plans that they have. Now recently of course there's a bit of flurry of new applications for water from the Waiahole Ditch and that has made the need to address these allocations more pressing because we need to clear out the dead wood before we add new permits.

Mr. Achitoff said that no one actually has an accurate idea of how much water is actually being used, going to be used in the near future or is available for allocation because there are these unused allocations that go on year after year. It's not fair to anybody whether it's those who want to apply for water, those who have interest in stream restoration, etc. It's fair to the permittees because they don't have to do anything except sit on their allocation.

Mr. Achitoff noted that in most part those responses have been non responsive, well we're not going to give the water back to you voluntarily we plan to use it some time in the future. With respect to the public hearing issue, Mr. Achitoff is curious why there is even arguably a requirement for a public hearing before revoking a permit for non-use, but apparently the

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law is being interpreted now not to require public hearing before issuing a new permit to someone who's never used water before. That was never the case for a number of years but that's the interpretation that's being given. Mr. Achitoff said it seems counterintuitive to him that public would have a greater interest in being heard for revocation than for a new permit for someone whose never used water before.

Mr. Achitoff pointed out that the general issue seems to be we haven't had our permit for 4-years, it belonged to somebody else. If the 4-year non-use requirement starts over every time there is a transfer of the permit, this leaves open the possibility of avoiding ever having to use the allocation or having it revoked as long as the permit is transferred every 3.9 years.

Chair Thielen said she wasn't sure what Mr. Achitoff was referring to when he mentioned 'recent interpretations' but as far as the question as to why a hearing in a revocation under 174C-58 it talks about revocations of permits and it states that after a hearing the Commission may suspend or revoke a permit for, and it lists the items including partial or total non-use. So that's the thing that we're wrestling with here if we're going to set up that process. At what point do you have a hearing and that's what triggering this discussion. Mr. Achitoff said he was referring to the fact that up until perhaps a year ago it was always the practice to have a public hearing on a new permit application as well and was informed sometime during the past year that whatever the reason this was no longer viewed as legally necessary, with new permit applications the only opportunity the public would have to be heard would be at the Commission meeting when the Commission actually took up the water use permit application. Mr. Achitoff said, if he is mistaken that is not going to be the case and that in fact there will be public hearings before that. But that's not what I've been told. Chair Thielen told Mr. Achitoff that she would be happy to talk to him about this after the meeting but this section of the Statute refers to revocations.

Commissioner Erdman asked if Mr. Achitoff still thought it should be looked at case-by-case. Mr. Achitoff said that he does think that the Commission should look at individual circumstances; however, procedurally, it doesn't make any difference whether they're done seriatim or all at one time.

Chair Thielen recapped that what they are trying to lay out is a process for your blessing for staff to be able to move forward. There is a section in the Statute that talks about after a hearing. According to the AG's office, if there are multiple public hearings then anybody who wants to file a contested case would have to do it at the first hearing. Yvonne Izu raises a good question that if we have a public hearing before there's been a recommendation to the Commission people would want to ask for a contested case hearing. On the flip side, if we do hold a due process hearing at step 8 and then step 9 the Commission makes a decision, then they would have a right to file for a second contested case hearing. We are trying to figure out a way to have some type of process that meets the Statute that may come prior to the Commission meeting and one thing I want to throw out to the Deputy AG is that Statute just says 'after a hearing'. Is it possible to have a step 8 hearing that's not a public hearing under Chapter 91 that follows pretty much the same notice but then the first formal hearing would be in front of the Commission with the presentation, or the Commission in step 9 can say for those who want it put them directly into a contested case and have the recommendation come back to the Commission.

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Commissioner Fujiwara asked what the downside would be for what Ms. Izu recommended. Chair Thielen said that you would end up with two contested case hearings on the same decision. Deputy AG Chow asked what the purpose of the public hearing is. If it's for a general information gathering, you won't have that prior to the Commission staff coming in making a recommendation, so they would be making a recommendation on incomplete information. Chair Thielen said that they could have an informational hearing as opposed to a public hearing in step 8 where they are able to gather information and then the formal hearing where they make a decision could be step 9. Deputy AG Chow said the hearing does not have to be held in front of a hearings officer, if the Commission wants to hear it, have all the commissioners at the public hearing and hold it right before the meeting at which they make a decision.

Commissioner Balfour said their proposal is better than ours. It seems to be a cleaner way to get there. Chair Thielen asked if the letter he is referring to is the one by Morihara Lau and Fong. Commissioner Balfour confirmed that it was the letter dated November 17, page 2 showing both staff and Monsanto proposals. Chair Thielen said the downside on the proposal is saying in item number 8 where that states 'conduct hearing on specific revocation proposals' that would be a due process contested case hearing. Item 9 would be a 'submittal to Commission for action' and at that point if the Commission issued a decision that the permittee disagreed with, they would have the right to submit another request for a contested case hearing. You could end up with a contested case hearing at step 8 and after step 9.

Chair Thielen said that one option maybe to change step 8 instead of to 'conduct a required public hearing' to 'conduct required informational hearings' and step 9 be 'submittal to the Commission for action' and at that point if there is a decision that a permittee disagrees with they can seek a contested case hearing.

To clarify, Deputy AG Chow said what Chair Thielen is describing is to include a step 5A on the Monsanto proposal to do an information gathering meeting but would still need a hearing so to include step 8. The Commission meeting cannot be the hearing because they've always maintained that appearing at a hearing is not a meeting.

Commissioner Kiyosaki asked if they could do a public hearing right before a Commission meeting where they take action. Deputy AG Chow replied yes and added that it's important when it becomes the operational of the rule when on contested cases when the request has to be made.

Chair Thielen reviewed that if you had a public hearing right before a Commission meeting and the process was that at the public hearing the staff would make whatever the recommendation is with whatever the information is they have up until that point and if a permittee disagrees, you have to end the public hearing and start the Commission meeting. Deputy AG Chow's answer was yes. Chair Thielen asked if the permittee disagrees and they ask for the contested case hearing the Commission would then make the decision to say we either agree or disagree with the staff recommendation and if the permittee's going to appeal it, they are appealing both the public hearing and Commission's decision at that time and it goes into a contested case hearing. Deputy AG Chow

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said they would only be appealing the decision of the Commission; the public hearing doesn't come out with the actual decision and go forward into a formal contested case at that point.

Chair Thielen said we basically will merge step 8 and 9 so that it's a public hearing immediately followed by a Commission meeting for action. Deputy AG Chow answered that that was correct.

Ms. Izu stated that it could work and added that their concern is that you hold a public hearing at which the permittee would have to ask for contested case when they have no idea what the recommendations are.

Chair Thielen said to add after step 5 'conduct field investigations', a 5A to 'hold a public informational meeting to gather additional information' and step 6 'notifying the permittees and publishing notice for a public hearing which will be immediately followed by a Commission meeting'. We did add step 7 to 'brief the Commission with updated information' but can now skip that, and combine steps 8 and 9 to say 'conduct required public hearings on revocation immediately prior to the Commission meeting for action'. Deputy AG Chow agreed.

Commissioner Erdman voiced that he would like to keep step 7 as it will give the Commissioners a better idea if they will be in for a marathon or a short meeting. Chair Thielen suggested that step 7 to brief Commission with updated information that it could be incorporated into the announcements of the meeting so they are briefed with a progress report.

Mr. Hardy asked that this is specific only to revocations because we have surface water use permits hearings coming up on Maui for 150. Deputy AG Chow added, specific to revocations to Waiahole Ditch.

Mr. Imata thought that when talking about step 7 it was about proposal on the Monsanto side so everything on the staff proposal side comes out. Some thought that it was referring to staff's proposal not Monsanto's. Deputy AG Chow said the Monsanto proposal works better because then you'll come out with the recommendation from the Commission regarding possible revocations at the time the public hearing is held, where if you use staff's proposal it doesn't have that step in there. So when you go for public information gathering you need to come back to the Commission at some point for the Commission to decide for the staff to make a recommendation for specific proposal for revocation and that would then go out to the public.

Chair Thielen was confused as to why they would come back to the Commission since we are already directing them to go and take a look at the non-use and come back to us with a proposal so why would they come back under that Monsanto to say okay, we're going to make certain proposals and then we authorize them to go out to public hearing. Chair Thielen asked if they shouldn't be telling them that they need to be doing the informational meeting, coming up with their recommendations, briefing the Commission as they go through this process so we're aware of their progress but that the next time they come back to the Commission would be for the public hearing followed immediately by the Commission meeting. Deputy AG Chow said that that is workable if doing this process after it goes out to the public informational meeting that the authority to determine which permits are proposed for revocation and delegated to the Chairperson, so that the

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Chairperson would approve the notice for the public hearing that would go out. So potentially you have a field of 20 permits that may or may not be subject to 4-year for non-use. They do the public information gathering meeting and narrow down that field to ten permittees possibly so then the notice of public hearing will have to go out for only potential revocations for those ten permits and that's what they're talking about, how do you narrow that. You can either narrow it by delegation to the Chairperson that you would approve that notice to go out or it comes back to the whole Commission.

Chair Thielen asked the Commission if they wanted to delegate that determination to the Chairperson so that the staff may move forward with the informational meeting, decide which one needs to make a recommendation on, Chair blesses or doesn't bless and then ultimately comes back, or do you want it to come back to you for a decision at the Commission level.

Chair Thielen thought that to make the decision any easier to some degree it is going to be somewhat delegated to the Chairperson because it doesn't get on the agenda without the Chairperson's signature so it has to come through the Chairperson in one form or another, and whatever does come up opens opportunity for Commissioners to say if there were others that should have been examined, to raise that at that point at the Commission meeting. Who is going to make a determination about which permits to move forward with a potential revocation and which not, would that be delegated to the Commission Chair so that the staff could then notice a public hearing and agendize the Commission meeting immediately following or does that determination have to come back to the Commission members.

Chair Thielen referred to having the step in there about the public informational meeting does provide an opportunity for transparency to the process and input. And that information gathered at that meeting would need to be included in the staff's submittal and ultimately the analysis comes back to the Commission. It is assumed that the submittal would have to include some analysis of why not recommending on certain ones as well as why recommending revocations on others.

Looking at the table on page 20 of the staff's submittal, it is noted to add in an extra step 5A between steps 5 and 6, which would be a 'public information meeting'. Step 7 would be 'brief Commission with any updated information during the process during the announcements. Combine steps 8 and 9 to 'conduct required public hearings on revocations followed immediately by a Commission meeting' and under the staff's recommendation: 1) approve the proposed revocation schedule in Table 2 as amended and 2) delegate authority to the Chairperson to appoint hearing officer(s) but also for determining which permits are proposed for full or partial revocation.

Mr. Imata asked if there were specific dates that they wanted to assign to the process. Chair Thielen said there are tentative dates in Table 2 that was a schedule that was put together; however, since that time there was one of the staff leaving and with a new Chair coming in they may need some briefing time to digest and get up to speed, so these are aspirational dates. Mr. Hardy added that some of them have already been investigated under the 20-year review, so this could be a follow-up if necessary for some of them, and the other half there wasn't a 20-year review investigation.

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Chair Thielen addressed the Commissioners that one thing to keep in mind is that it is possible that some of the permittees may not cooperate and may not provide information and that will have to a choice by this Commission. Revocations are non-prejudicial and that people can come back later when they are available, have the information and ready to move forward. But there is an obligation on the permittees to cooperate and provide the information so some of that as far as the field investigations where we can move forward, we encourage all them to cooperate with us.

Table 2: Process for Waiahole Ditch revocation

Phase	Date	Days	Tentative Deadlines	Action
1	4/3/09	NA	NA	Information collection and compilation <ul style="list-style-type: none"> • Review: <ol style="list-style-type: none"> 1. Decision and Order requirement for 5-year review 2. Water use reporting 3. Water use permit and transfer information 4. 20-year permit compliance review 5. Fat Law's Farms Public Hearings (7/7/09) • Convert billing into monthly water usage • Calculate 4-year non-use
2	8/3/09	25	8/28/09	Initial contact with permittees <ul style="list-style-type: none"> • Letters sent out via certified mail, requesting voluntary relinquishment or explanation of why unused allocation is needed
3	11/5/10	30	12/5/10	Review and respond to permittee response letters to address specific information provided by each permittee <ul style="list-style-type: none"> • Request further information / timelines as needed • Set up a time to conduct field investigations not done adequately in 20-year review
4	11/17/10			Submittal on implementation plan to Commission for action <ul style="list-style-type: none"> • Provide background information to date • Delegate authority to appoint hearings officer for Public Hearings, required under HRS 174C-58
5	11/10/10	21	12/1/10	Conduct field investigations
5A	11/10/10	21	12/1/10	Public information meeting for all permittees
6	12/1/10	30	12/31/10	Notification to affected permittees and publishing of public notice for hearings <ul style="list-style-type: none"> • Publish Date: 12/3
7	12/15/10			Announcement: Brief Commission with any updated information
8	1/1/11	59	2/28/11	Conduct required Public Hearings on revocations (HRS 174C-58) followed immediately by a Commission meeting <ul style="list-style-type: none"> • By the close of public hearings, requests for Contested Case Hearings will need to be made, if so desired • Deadline for follow-up written requests is 10-days after close of Public Hearing • Staff to review standing of CCH petitioner Submittal to Commission for action For each permittee: <ul style="list-style-type: none"> • Recommendations to the Commission for revocation • Findings on standing of petitioner, if CCHs are requested

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Staff recommends that the Commission:

- 1) Approve the proposed revocation schedule in Table 2 as amended and
- 2) Delegate authority to the Chairperson to appoint hearing officer(s) but also for determining which permits are proposed for full or partial revocation

MOTION: (Kiyosaki/Erdman)

To approve the submittal as amended. (Balfour, Fujiwara, Kiyosaki,
Erdman, Thielen & Fukino)

UNANIMOUSLY APPROVED AS AMENDED.

Back to the last item of

B. ANNOUNCEMENTS:

Roy Hardy said that it is an honor and privilege of recognizing that today may very well be the last Commission meeting for the two ex-officio members, Director of the Department of Health, Dr. Fukino and Chairperson of DLNR and Chairperson of the Commission, Laura Thielen. “We also want to recognize and thank you for all of your hard work and sacrifices and manao.” Leis and tokens of appreciation from the Commission staff were bestowed to both of them. Mr. Hardy also recognized secretary to the Commission, Kathleen Oshiro, as this might also be her last meeting.

Chair Thielen recognized her fellow Commissioners, who are volunteers, were put through a lot in the last few years. Updating the Water Resource Management Plan for the State for the first time in 18 years, going through the West Maui contested case hearing, doing the first setting of the Instream Flow Standards through the Commission Legislation process, we dragged you guys up and down galleys and mountains in Maui and streams, factories, which was phenomenal. And you are about to embark on another groundbreaking one in this process. It’s exciting the issues the Commission has taken on and encourages them to continue them.

Chair Thielen also said, “many thanks to the staff, it would be phenomenal what you guys accomplished over the last three years under any circumstances but to do it when the bottom just dropped out of the worldwide economy, and the State, and everything else that’s been going on, it’s absolutely phenomenal”. Chair Thielen repeated her thanks to the staff for their hard work they do every day.

D. NON-ACTION ITEM

1. Update on the Implementation of Maui Interim Instream Flow Standards

Presentation by: Dean Uyeno

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Dean Uyeno mentioned that this update covers the period from the last Commission meeting in July to this meeting. Mr. Uyeno reviewed selected points listed in the Stream Protection and Management Branch, November 17 Quarterly Update handout. (Copies were distributed.)

Mr. Uyeno wanted to note that on the CWRM website, they haven't been posting partly due to the loss of one staff, but also that they were working on updating the website to organize information by hydrologic unit. Mr. Uyeno recognizes that these updates need to be completed in order to post more of the Na Wai Eha information as they go through implementation.

TESTIMONIES:

1. Alan Murakami said that although there's been some progress on the implementation of these IIFS his clients are very concerned yet. He said it's been nine years since it's been filed to set the IIFS, it's been two plus years since we got a decision and as his testimony shows from the best data they can find which is not the official monitoring data that the IIFS has never been met on Honopou. From the USGS preliminary data, there hasn't been any updates, modifications or corrections to that data and the observations from his clients, the gaging stations were installed March of this year, a year and a half after the Commission's decision and both sets of data indicate that the IIFS has not been met. Mr. Murakami recognized that in June staff made an attempt to complete modifications mauka on the upper three diversions in addition to Haiku Dam, but there is no real documentation that certifies that those actual diversion points were shut off completely. The sporadic data or an observation from his clients is that there is some doubt on whether or not water is being released completely. Clearly in Haiku, and he believed this had been acknowledged by staff, that there has been ineffective reduction of the diversion to pass over to downstream users including his client. They have appurtenant rights that are superior to this diverter and Mr. Murakami doesn't believe that there has been sufficient action taken to assure that that kuleana over the past nine years has received the water it deserves and is entitled to under the law. He raises this concern, which is reflected in the complaint they filed this past March and added that there's been no compliance.

Mr. Murakami said he hoped that this isn't interpreted to mean that we are critical of what's been happening at the staff level. He said that Dean Uyeno has been doing yeoman's work to get this implementation to be effective. But the cutbacks and the departures have been egregious, as the Commission's staff has been decimated and that's what is really of concern to him today as the Commission faces the future with this new administration. He hopes this Commission gets to a sounding board to raise the alarm that the Commission cannot do the work even after it makes a decision.

Mr. Murakami noted that it's been nine years since this issue has been raised when they filed the petition, two years since the Commission's decision, and there've been

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five deputy directors. It's with some frustration that he is testifying, but hopes that it does not reflect on staff who have been trying. He is trying to raise this issue because he believes there is a critical administrative need to get the staffing and the funding that is needed.

Mr. Murakami mentioned that there have been only six monitoring trips since Commission's decision and none since June, at least posted on the Commission website. That's why he submitted his own observations submitted by his client, the question is whether it's objective but that's all you have in terms of what observations of the gage height there is since the IIFS station was put in. And those observations indicate it's below the 1.78 threshold that indicates that 2 cfs is passing by that station. There are now questions about whether the monitoring required will be in fact available to produce the data the Commission needs to determine whether there is compliance. They will continue to monitor on their side, but he hopes that the Commission would accept these observations as official because there's nothing else.

They are still in discussion with staff, and there might be some disagreement on this point, about whether the observation with respect to appurtenant water rights is going to be truly given to his clients because he's been pushing for adequate monitoring, that is flow and temperature gaging, hopefully on a real time basis but whatever is available that can be of systemic collections of data to show what the effect is of this reduced flow on his client's loi system. And there has been some apparent disagreement on whether or not the State is willing to require that monitoring be done at that location which is a critical point of which water should be measured to determine whether there's adequate flow for continued taro growing. Without it he doesn't know how the Commission could ascertain whether in fact sufficient water is flowing to that site even after the IIFS is attained because under the adaptive management strategy he thinks the Commission's decision says that the staff is directed to come back to the Commission if in fact the current IIFS is not adequate. So there are two additional phases to really address whether the IIFS is attained and even if it is attained whether or not it is sufficient to meet all the appurtenant water rights.

It also raises at that point the question about adequate resources because there has been some question about whether enough money is there to pay for the monitoring. He's urged upon the staff and urges upon the Commission today to view this issue from the point of view of the governing law. The diverters have the sole burden of showing that there is no harm to downstream users. That's under the HC&S case, decided in 1904, still a good law when they won against Wailuku Sugar. Mr. Murakami feels that the cost of monitoring should be imposed upon the diverter. There is formal recognition of their complaint filed in March but not sure what the procedure that is established for complaints filed. There's no formal response. He urges that there be a formal response, that there is some certainty of what's being done and finality should some final decisions be made. Mr. Murakami said if it will

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be addressed in the implementation of the IIFS and the enforcement of IIFS, then let's get to it and find out whether or not there's going to be sufficient water. If it's not, then under the adaptive management strategies, he urges the Commission continue to give attention to this in the future.

Commissioner Erdman commented that what is missing from Mr. Murakami's argument, and for him to make a logical decision, he noticed that the gage that he's been given is during one of the worst drought there's been in east Maui. What was the rainfall? Are those observations made during the time of completely low river flow or was it made during high rainfall. The same with the revocation, here we are in a bad drought and we are not utilizing that water that would be an appropriate factor for us to make a decision because if they are not using that water when there is high or low rainfall. Knowing what is coming down that river at that time would be appropriate. One of the problems Commissioner Erdman said he has is that the Commission can't make water appear where it may not be. Mr. Murakami said even that it may be an appropriate issue to address is that there's not been a certification that all the water that passes down the streambed on Honopou passes by those four diversions. There have been assertions that they are and there have certainly been attempts to seal off those diversions. Mr. Murakami said his clients having been there watching this happen are not satisfied that that's happening because they've observed some leakage. And he did personally view Haiku Dam, the fourth lowest diversion, that there is significant leakage into the ditch at that point at Honopou. Irrespective of rainfall, he thinks there's still that issue to address. Commissioner Erdman said he doesn't disagree with Mr. Murakami's argument, but in the argument if he at least saw the rainfall then that at least helps.

2. Pam Bunn on behalf of the Office of Hawaiian Affairs thanked the Commissioners for their responsiveness in trying to get the second stipulation entered and more so to thank the staff and HC&S. They had their meeting with staff and HC&S and committed to trying to figure out what data they would need for a longer term solution. Ms. Bunn said she wanted to sensitize you to the fact that they would be back again, since what's been entered now is another short term solution while they figure out what data needs to be collected. The Commissioners that are leaving will be sorely missed and wished them well.

Ms. Bunn also wanted to raise another issue that relates to the procedures for revocation. She said was some allusion to the fact that there are the surface water use permit applications on east Maui coming up and the public hearings are scheduled for December 1 and 2. They've already been through an informational meeting and don't have a staff recommendation. She wanted to alert the Commission that there would likely be about 128 contested case requests. She said they have been discussing this with the deputy director to try and find some way around that. She would assert that the kind of discussion that took place earlier, the kind of procedures laid out, and the opportunity to respond to them may be a very good idea in the surface water use permit proceeding.

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Chair Thielen did comment that it was a really good thing that in the second case of the stipulation that the parties were able to work it out directly. She looks at that as being good progress in starting to set aside some of the past things and work on the future.

Chair Thielen closed the public testimony and directed her comments to Dean Uyeno. She said that Alan Murakami raised some concerns that the IIFS is not being met for Honopou and one Commissioner raised some concerns about what was the rainfall and what was in the streams and we may have some issues about leakage, allegations whether the diversions have been fully cut off. Chair Thielen asked Mr. Uyeno to give a more specific status on Honopou, what's going on with the four diversions, the stream level and she understands that there are gages that are not necessarily measuring the IIFS but measuring what's going into the loi which is a very different thing.

Mr. Uyeno said he didn't have anything prepared specifically for this and hoped to do this at a future meeting. (Handouts distributed from a meeting with USGS.) Mr. Uyeno explained that above the Wailoa Ditch is the USGS real-time gaging station that basically tells us what the stream flow is before anything goes into the ditch. After it passes the gaging station it goes into Wailoa Ditch and any excess will go into New Hamakua Ditch, after which the water would continue downstream and go into Spreckles Ditch, continue down Hana Highway to Haiku Ditch, and further downstream is the intake for the Kekahuna-Wallet property. The blue triangles are the gaging stations on the East Maui Irrigation (EMI) system (after the streamflow has gone in), the green triangle is the staff gage that serves as the IIFS locations. As water continues downstream at the red dot is the real-time temperature gage and the flow into the auwai system (only reflects what water is being taken out), the pink dot is the streamflow gage (that measures what in the stream itself) so if the two flows are added it would be total streamflow at that point. The orange squares are temperature stations that were installed, two in the loi, and one in the auwai on the Kekahuna-Wallet property. Furthest downstream is another staff gage that serves as Honopou IIFS site B.

Commissioner Erdman noted that there were some homes depicted in the aerial photo upstream of the loi and asked if those homes changed the amount of foliage around the stream. Are they old homes that have been there for a long time or are they new homes that have removed vegetation along the stream? Since water temperature was brought up earlier, Commissioner Erdman wondered if shading had been removed that would affect temperature. Staff and Mr. Murakami responded that for the most part they are old homes. Mr. Uyeno described the close-up aerial photo and the locations on the various gages on the photo, followed by the list of USGS gaging station in east Maui and the graphs provided.

Mr. Uyeno noted that on Alan Murakami's testimony the graph that he provided is actually the diversion ditch intake so it doesn't reflect streamflow. That only measures what the ditch takes. Chair Thielen asked if the numbers in red is discharge in cubic feet per second that remains in the stream. Mr. Uyeno answered that it was right. Chair Thielen asked that during the low periods, reflected in both the red and blue lines, does that mean that it's just dry? Mr. Uyeno responded that that was correct. She then asked if this reflects that there is more water in the stream and that the kuleana ditch is not diverting all the water. Mr. Uyeno answered that that was correct.

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Chair Thielen asked about cubic feet per second (cfs) and million of gallons per day (mgd). IIFS is in cfs. There are days when there is over 10 cfs in the stream and at the low time there is something less than 1 cfs. But in the cases when there is more water in the stream it is available to the kuleana ditch. Mr. Uyeno went on to explain the flow duration curve for the Kekahuna's diversion ditch and the combined Honopou Stream flow and that it showed that the auwai is taking about half. Chair Thielen asked if under the ruling by the Commission it is allowable for them to take that additional water.

Chair Thielen asked if there are people taking water out upstream. Mr. Uyeno answered that that was correct. Chair Thielen asked if people are taking water out downstream. Mr. Uyeno answered no, the Kekahunas are the lowest. Chair Thielen stated that so even if there are people taking water out up above, there is still more water in the stream when it reaches the Kekahunas than they are taking off. Mr. Uyeno went on to explain the next two USGS graphs that depict the temperature data. The last graph was prepared by staff after a meeting with OHA, NHLIC, and USGS, which depicted streamflow above Koolau Ditch, the IIFS at Honopou site A, along with the observations made by Lyn Scott.

Chair Thielen said there were some testimony about whether there are diversions still continuing at the four points and leakage and asked for status. Mr. Uyeno said it was documented that on June 23 EMI released water past the Koolau and New Hamakua Ditches. There were some leakage at that point, and the week after EMI went back in and made repairs to the concrete to seal up those leaks which were completed on July 1. The sluice gate at Spreckles Ditch has remained open which staff has documented several times. USGS measured stream flow right above Spreckles Ditch and the gate has remained open. At Haiku Ditch, staff recognizes that there is some leakage past the 2x4s berms that EMI had installed. There is a low flow bypass channel that water flows over, there's about a two feet drop and there is some leakage from splashback into the ditch, and those are the issues that EMI will be addressing in their next work.

Commissioner Erdman asked who the others were that are pumping water out of the stream. Mr. Uyeno said that based on the contract for site verification, it was noted that there are three or four domestic users, with 1.5-inch pipes pumping on occasion, but not 24 hours. This has been noted but has not been verified.

Chair Thielen said that she understands Mr. Murakami's testimony but in her discussions with staff, and it's confirmed by this information too, they'll continue to work with EMI and it seems that the leakage at the ditch system points now is a matter of plugging up minor holes at Haiku. There is water in the stream, more water than is being taken out by the auwai system that is available to the Kekahunas. There may be reasons why they are not taking that and that may be the capacity of their loi system or other reasons, but what is showing is that water is available, but she believes the parties will keep working on that as well.

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H. NEXT COMMISSION MEETINGS (TENTATIVE)

1. December 15, 2010
2. January 20, 2011 (Thursday)

Chair Thielen commented that the term for the Director for DLNR goes until the end of December because there is a board and commission attached to it, although the new Governor is sworn in on the first Monday at noon on December 6. Chair Thielen said she contacted the incoming Administration because there are two meetings, a Land board and Commission meeting, where the agendas are being set under the Sunshine Law. She is seeking direction if they want to move these meetings forward or not, and it may be possible that we will be notifying you that we'll be cancelling them.

Meeting was adjourned at 11:20 a.m.

Respectfully submitted,

KATHLEEN OSHIRO
Secretary

APPROVED AS SUBMITTED:

LENORE N. OHYE
Acting Deputy Director