

MINUTES
FOR THE MEETING OF THE
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: August 11, 2015
TIME: 9:30 am
PLACE: DLNR Board Room
Kalanimoku Bldg.
1151 Punchbowl St., Room 132
Honolulu, Hawaii 96813

Chairperson Suzanne Case called the meeting of the Commission on Water Resource Management to order at 9:30 a.m.

The following were in attendance:

MEMBERS: Ms. Suzanne Case, Mr. Jonathan Starr, Mr. Michael Buck,
Dr. Kamana Beamer, Ph.D., Mr. Milton Pavao ,
Dr. Virginia Pressler, M.D., Mr. William Balfour, Jr.

STAFF: Roy Hardy, Dean Uyeno, Charley Ice, Malie Beach-Smith,
Ayrton Strauch, Neal Fujii, Jonas Burgon

COUNSEL: Cindy Young, Esq.

OTHERS: David Henkin (Earthjustice), Kylie Wager (Earthjustice),
Myra Kaichi (AG), Jonathan Scheuer, Shannon Wood (Windward
Ahupua'a Alliance), Mahesh Cleveland, Lynn Malinger (HYNC),
Amanda Tanaka, Kaleo Manuel (DHHL), Bianca Isaki (Sierra Club),
Keith Kawamoto (DOH), Kris Nakagawa (Moriwara Lau & Fong),
Bill Tam, Basil Gomez, Jeffrey Pearson, P.E.

A. APPROVAL OF MINUTES

June 24, 2015, 2015

Commissioner Starr thanked the Chair and staff for creating a more inclusive minutes format.

Commissioner Buck said he was all in favor of the minutes but it was a little lengthy.

Commissioner Pavao asked why the minutes were verbatim.

Chair Case recalled that there was discussion at the last meeting, specifically with the request for verbatim minutes by Commissioner Starr.

Mr. Hardy added that it was easier for staff given the time constraints. However, he said it would be more efficient to take good notes and summarize the salient and important points.

Commissioner Starr emphasized that verbatim minutes were a standard for creating a legal record. He noted that the Maui County Boards all have transcripts as minutes, which allows for clarity after-the-fact as to what really occurred and what was said. He mentioned that if the minutes revert to notes, he will object to it at every single meeting.

Chair Case said that what the Commission may be looking for is detailed notes. She suggested refining the minutes as the Commission seeks to find the best format.

MOTION: (Starr / Pressler)

To approve the minutes.

ABSTAIN: Beamer

Minutes approved as presented.

B. WELCOME

1. Welcome New Commissioner William D. Balfour, Jr.

Chair Case welcomed new Commissioner, William D. Balfour, Jr.

Commissioner Starr welcomed Commissioner Balfour back to the Water Commission and said Commissioner Balfour has the most extensive and deepest level of experience and knowledge with the existing layout of water systems and water needs of the plantations across the State of Hawaii.

Commissioner Balfour thanked the Commission and said he was happy to be back.

C. ACTION ITEMS

1. Approval of Chairperson's Appointment of Jeffrey T. Pearson, P.E., as First Deputy to the Chairperson of the Commission on Water Resource Management

Chair Case submitted approval of her appointment of Jeffrey T. Pearson as First Deputy to the Chairperson of the Commission on Water Resource Management. She noted that if Mr. Pearson's nomination is approved he will begin working as Deputy Director of the Water Commission as of August 25, 2015. Chair Case stated that according to HRS §174C-6(a), "The Deputy shall have experience in the area of water resources and shall be appointed by the chairperson with the approval of a majority of the commission." She said Mr. Pearson is a licensed professional engineer with extensive experience and commitment in the area of Civil and Environmental Engineering. She elaborated that Mr. Pearson has experience with the Maui Department of Water Supply and private water systems as well and therefore, has excellent qualifications for the job of representing and supporting the Commission on Water Resource Management and its staff in protecting and managing the precious water resources in Hawaii. She referenced Exhibit 3 and all the testimonies submitted have been in support of confirmation.

Mr. Pearson said he looked forward to working with the Commission and staff.

Commissioner Starr disclosed that he worked with Mr. Pearson in 1999 at the Maui Board of Water Supply and perceived Mr. Pearson to be hard working and very knowledgeable and a good person in the community. Commissioner Starr proceeded to question Mr. Pearson regarding water rights in Hawaii.

Mr. Pearson referred to the Public Trust Doctrine which is the key to dealing with the waters in Hawaii and stated that the Public Trust Doctrine makes it very clear that nobody owns the water. The water is for the use and enjoyment of all the people in Hawaii.

Commissioner Beamer asked Mr. Pearson his thoughts on the legal obligation, duty and authority of the Deputy under the Hawaii Constitution.

Mr. Pearson stated that as a Civil Engineer he didn't have all the legal knowledge. The duties of the Deputy Director are to work with the Commission and staff to enforce the State Water Code, as well as implement the Public Trust Doctrine.

Commissioner Beamer then asked Mr. Pearson his thoughts about specific provisions of the Public Trust that the Commission and the Deputy have to consider in managing the water resources.

Mr. Pearson stated that one of the provisions he would like to improve is the designation process.

Commissioner Pavao requested Mr. Pearson to utilize his managerial skills and to look at innovative ways to increase the Commission staff.

Mr. Pearson thanked Commissioner Pavao for his insight.

Commissioner Buck asked Mr. Pearson to outline his implementation priorities.

Mr. Pearson stated that in addition to designation issues, he would like to improve the communication between the parties and initiate discussions. He considered native Hawaiian water rights as a priority as well as obtaining additional data and increasing staff and funding.

Commissioner Starr asked Mr. Pearson to talk about the uses of water that the Supreme Court identified in relation to the Public Trust Doctrine for the Waiahole Ditch case: maintenance of water in their natural state, domestic water use, and native Hawaiian traditional customary rights including appurtenant rights.

Mr. Pearson replied with regard to waters in their natural state, if a stream/waterway is polluted, the value to the water in its natural state will not be maintained. Domestic water use is important but there needs to be a balance. Native Hawaiian traditional customary rights need to be protected. Appurtenant rights are preserved and are rights to the use of water used at the time of the Mahele.

Commissioner Starr asked Mr. Pearson about the maintenance of stream flow and setting instream flow standards.

Mr. Pearson said stream flow and setting instream flow standards should be looked at on a case-by-case basis.

Commissioner Starr asked Mr. Pearson about the importance of maintaining viable streams and restoring streams.

Mr. Pearson replied that where water is diverted and not enough water is flowing into the stream, water should be returned to that stream. He stated that it is important to keep the streams viable and in their natural state.

Commissioner Starr asked what should happen if *opa'e* and *o'opu* are reduced by the stream being diverted?

Mr. Pearson responded that streams should allow the natural species to thrive. And although, he didn't want to comment on an unknown stream, he agreed that if *opa'e* and *o'opu* are reduced water should be returned to the stream as the natural state is harmed by reducing the stream due to diversion.

Chair Case asked Mr. Pearson to describe his work with the Department of Water Supply, with regards to his knowledge in stream systems and how they work.

Mr. Pearson replied that he was involved with capital improvement programs. He worked from the design to the construction on many types of projects. He produced wells for the Department of Water Supply; he built tanks, water lines, and the basic infrastructure capital improvement. He was also involved with Maui Land and Pine's water systems in East and West Maui. In addition, he managed the Kapalua Water System and part of the approval requirement by the County Council for Kapalua Mauka was to work on the instream flow standard. He worked with Yvonne Izu on some interim instream flow issues, and worked with the PUC on some water issues.

Commissioner Beamer asked Mr. Pearson if he had any issues with previously working for Maui Land and Pine and now being responsible for maintaining the Public Trust.

Mr. Pearson explained that while he worked for Maui Land and Pine he worked on trying to keep the water in the streams. Although streams were diverted, water was returned to the streams and efforts were made to guarantee a wetted stream throughout the entire stream. He further explained that he wants to improve and manage the waters of the State of Hawaii. He looked forward to working with the Commission to follow the State Water Code and to follow the Public Trust Doctrine.

Commissioner Starr stated that the Commission on Water Resource Management's biggest limitation is the gap between the Department and Personnel in regards to what they are mandated to do, what they want to do and what they are able to do. He asked Mr. Pearson if he is willing to work through the procurement process to get positions filled and to help fight for budgetary dollars both through the Legislature and other means as well.

Mr. Pearson acknowledged Commissioner Starr's concerns and said he is eager to help everyone subject to briefings with the Chair regarding the budget. He stated that one way to justify increasing staff is to increase revenues by increasing application fees.

Commissioner Buck mentioned the opportunity to upgrade water resource management fund and referenced Section 174C-5.5, Hawaii Revised Statute.

Mahesh Cleveland respectfully opposed Jeffrey Pearson's appointment. Mr. Cleveland noted that although Mr. Pearson's resume reflected extensive experience in water management, his role as water manager for Maui Land and Pineapple companies was a career spent managing water in interests of development and business profits rather than

in the interests of the public, which is the Commission's mandate. The Commission has a duty to protect and manage Hawaii's water resources only for the benefit of the general public and he believed that Mr. Pearson's appointment would represent an inherent conflict of interests. Mr. Cleveland realized that although a lot is due to the budgetary constraints, the Commission has not established instream flow standards for the majority of the streams and there is a lot of work to be done on the designation of water management areas and putting a representative, someone with Mr. Pearson's background into this leadership position may end up either directly or indirectly stymying the efforts of the Commission. The role of First Deputy comes with some ability to influence the agenda of the Commission. He stated that he didn't know Mr. Pearson and had nothing against him personally. He just questioned whether Mr. Pearson's priorities would be properly in line with the Commission's constitutional and statutory duties. He thanked the Commission for listening.

Commissioner Starr acknowledged Mr. Cleveland's comments and appreciated his testimony. Commissioner Starr recollected and shared that Mr. Pearson's role was never part of the efforts to divert and to change the land use patterns in a negative way. Commissioner Starr never found any reason to object to what Mr. Pearson was personally doing, he was always held in respect.

Mr. Cleveland appreciated Commissioner Starr's thoughts because posted on the website is just a resume and a letter from the Governor. He stated that as someone not knowing Mr. Pearson or his actual past work it's just a reaction to what it seems like on the surface. He hoped that if Mr. Pearson's appointment is confirmed that Mr. Pearson and the Commission will work together to protect the water issues for everyone in the future.

Chair Case disclosed that her cousin is a majority owner of Maui Land and Pineapple, but has not had any dealings with Mr. Pearson or Maui Land and Pineapple on water issues.

Commissioner Beamer thanked Mr. Cleveland for offering testimony and his opinion and doing it with integrity. Commissioner Beamer said the questions Mr. Cleveland asked are important questions for the Commission to consider.

Commissioner Buck appreciated Mr. Cleveland's comments as well.

Chair Case suggested that Mr. Cleveland submit his written testimony.

Mr. Steinberger supported Jeffrey Pearson's nomination as the Deputy Director for the Commission on Water Resource Management. He believed Mr. Pearson's management skills and experience at the Maui Department of Water Supply would allow him to close the gap between filling positions and funding positions.

Commissioner Beamer questioned whether the Commission should go into Executive Session as this was a personnel issue.

Deputy Attorney General Cindy Young stated that Section 92-5(a)(2) of the Hawaii Revised Statutes allows a Board to hold a closed session, or an executive session for a number of purposes and one of the purposes is to consider the hiring of an officer or employee, where consideration of matters affecting privacy will be involved. There is a provision that says that the individual concerned, in this case Mr. Pearson, if he requests an open meeting then the Commission can continue discussions and basically the rest of

the discussions would happen or part of the discussions would be held in open session. It basically allows the Commission to go into executive session.

Commissioner Beamer commented that he would have liked to have seen multiple candidates that applied. The way the process worked, only one candidate was presented to the Commission and given the statements that were brought up in terms of managing the public trust, he would have liked the opportunity to know how the Department is moving forward in areas that the Commission has been remiss and that's one of the areas the Commission needs strong support. Commissioner Beamer was not speaking against Mr. Pearson. He stated for the record that the process did not allow the Commission to fully vet the range of candidates that could have been qualified.

Chair Case explained that the process is that the Chair's office determines and makes an appointment to submit to the Commission for approval. She acknowledged Commissioner Beamer's statement and respected his thoughts about ensuring that the Commission collectively was fully cognizant of its responsibilities and wanted to ensure that the Commission was implementing its duties.

Commissioner Starr agreed that it would be a better process if it were up to the Commission and the Commission had a process for appointing the Deputy to the Chairperson of the Commission on Water Resource Management. He stated that Chair Case did solicit suggestions or names that she could use in making her selection. He consented and wished for a broader palate of candidates as well. However, currently under Chapter 174C, the process was conducted as openly as possible. Although Commissioner Starr had no personal need to go into Executive Session, he expressed his willingness to do so if the Commissioners wanted to discuss this matter further.

Commissioner Beamer said that at this point it was on the record and was happy with that and appreciated the response and respect to the process.

Commissioner Buck recalled that Chair Case did extend the application deadline. As this was her first big appointment, Commissioner Buck assumed she put a lot of thought into it and took the benefit of the doubt that Mr. Pearson was the best candidate.

MOTION: (Starr / Pressler)
To approve Chairperson's recommendation.
UNANIMOUSLY APPROVED.

Chair Case acknowledged Mr. Hardy's hard work and instrumental leadership and thanked him for being incredibly detail-oriented.

Commissioner Starr added that Mr. Hardy was put in a difficult situation during a period of time when there was no Deputy for the Water Commission and there was no Chair of the DLNR. Commissioner Starr appreciated that there was always someone to call to get intelligent answers and how difficult issues were handled with excellence.

2. Request to Enter into a Joint Funding Agreement with U.S. Geological Survey for Statewide Hydrologic Data Collection and Water Resource Monitoring for Federal Fiscal Year (FFY) 2016

SUBMITTAL PRESENTATION by Roy Hardy

Item C2 is a request to enter into a joint funding agreement with the USGS. This is a standard annual agreement and the staff is recommending that the Commission enter into this agreement for the inventory and investigation of Hawaii's water resources. The total cost of this agreement is \$749,000 and the Commission's share is a \$486,933 for the next USGS fiscal year beginning October. There is a table summarizing the annual changes for FFY 2014 to the present which has gone from 62% to 65%. Exhibit 1 summarizes the changes that evolved over the years from 2007 to the present. Exhibit 2 is the proposed scope and Exhibit 3 details the stations to be operated. Most of the gaging stations are primarily surface water although there are some ground water wells as well. Many of the sites are on state lands and use state funds, therefore triggering the need for an environmental assessment (EA). However, there are exemptions and one of them is for data collection.

RECOMMENDATIONS

Staff recommends that the Commission:

- 1) Authorize the Chairperson to enter into a Joint Funding Agreement with the U.S. Geological Survey for FFY 2016 to undertake the specified monitoring activities;
- 2) Delegate authority to the Chairperson to modify the list of monitoring stations, provided that there is no increase in cost to the Commission, and
- 3) Find and determine that this Joint Funding Agreement is exempt from preparing an EA.

The terms of this Agreement are subject to the approval of the Attorney General's Office. Contract execution will be done in accordance with Hawaii Revised Statute Chapter 103D and Hawaii Administrative Rules, Chapter 3-122,

(DISCUSSION)

Commissioner Buck requested a budget presentation in the future as the Commission is being asked to approve CWRM's cost share for various projects.

Commissioner Balfour referred to Exhibit 2, Scopes of Services and asked if the USGS would be collecting the data and providing the reports while CWRM would be providing the financial support.

Mr. Hardy confirmed this for the monitoring stations listed.

Commissioner Balfour asked what is the Waiahole Trust Fund?

Mr. Hardy stated that according to the Waiahole Decision and Order, the end users contribute to this fund based upon their use of the Waiahole Ditch water to pay for such monitoring activities.

Commissioner Starr asked staff to consider other sources of funding as surface water gages, well monitoring and rainfall data collection has declined over the years. He requested staff to report back to the Commission within one year.

MOTION: (Pavao / Beamer)

To approve staff's recommendation.

UNANIMOUSLY APPROVED.

3. Requesting Authority for the Chairperson to Enter Into a Planning Assistance to States Agreement with the U.S. Army Corps of Engineers and to Expend \$50,000 in Cost-share for an Implementation Plan to Improve the Climate Data Network and Establish a Climate Data Center for the State of Hawaii

SUBMITTAL PRESENTATION by Neal Fujii

Item C3 is requesting the Chairperson to enter into a planning assistance to states agreement with the Army Corps of Engineers and to expend \$50,000 cost-share to complete an implementation plan to improve the climate data network and establish a climate data center for the State of Hawaii. There is a loss of data collection sites across the State and this submittal is for the climate stations, mainly rainfall stations and some other stations. At its peak there were 950 rain gages across the State. As of 2010, 435 gauges are currently operating. Of these 435 stations, only 130 of them have data records beyond 50 years. The State Legislature in 2012 passed a climate change adaptation priority guidelines and one of the priority guidelines is to invest and continue monitoring and researching Hawaii's climate and impacts of climate changes for the State. The other aspect of improving the rain gages is the need for a centralized data center. This became an issue after Dr. Tom Giambelluca at the University of Hawaii completed the Rainfall Atlas. There was a need for a centralized place to archive and disseminate this information to the public. This is a request to do an implementation plan. The idea is to come up with an implementation plan researching where the existing rainfall stations are, where we need the new ones and develop a list of stakeholders. This project does trigger an Environmental Assessment but it's proposed that the action is exempt under Section 11-200-8(a)(5), Hawaii Administrative Rules: basic data collection, research, experimental management and resource evaluation activities, which do not result in a serious or major disturbance to an environmental resource.

RECOMMENDATIONS

Staff recommends that the Commission:

1. Authorize the Chairperson to enter into a Planning Assistance to States (PAS) agreement with the U.S. Army Corps of Engineers and to expend \$50,000 in Commission cost-share to complete an implementation plan for improving the climate data network and establishing a climate data center for the State of Hawaii.
2. Authorize the Chairperson to amend or modify the PAS agreement as may be necessary to accomplish the goals described here, provided that any amendment or modification does not require additional Commission funding.
3. Find and determine that the proposed action is exempt from the requirement to prepare an EA.

The terms of the PAS agreement would be subject to the availability of funding and approval of the Chairperson and the Department's Deputy Attorney General.

(DISCUSSION)

Commissioner Buck asked if the Army Corps was doing the actual work and commented on the broad scope of work.

Mr. Fujii responded that the way the process works is CWRM would contribute the cost share and the Army Corps of Engineers would be the procuring agency. The challenge is going to be looking for funding partners that are willing to establish and implement this plan

Commissioner Pavao asked who is the keeper of the data?

Mr. Fujii replied that there are several data keepers. NOAA runs a cooperative data collection program, there is a state run program at the University of Hawaii for private data and there are a number of networks both public and private. The goal is to collect the data and develop a model for a data portal and find ways to have the system sustain itself.

Commissioner Pavao asked if this plan will determine where the data will be kept.

Mr. Fujii answered yes. The goal is to have a centralized data center for climate data and to determine who will maintain the center and who will fund it.

Commissioner Pavao questioned what makes the U.S. Army Corps a perfect candidate for this project?

Mr. Fujii stated that The U.S. Army Corps is known for its civil works projects. This is one program authority within the Army Corps of Engineers that is strictly a planning assistance to States and is really a planning project.

Steve Anthony, Director, U.S. Geological Survey, pointed out that with respect to this effort, it is a very important undertaking especially as it relates to creating a data center. USGS is a keeper of a certain number of rainfall stations, ground water stations and streamflow. There are many other folks that are collecting data and establishing good quality control and a centralized place where the Commission staff can easily access the data and interpret it is really important for the State to work towards. USGS maintains a database available on the internet but it only has USGS's information in it and when carrying out projects it spends a fair amount of time trying to go many, many places to gather that other data so it is really important for the State to look at creating this proposed data center.

Commissioner Starr asked if Mr. Anthony would be willing to participate in a discussion at a later date on how the Commission can really understand what data points are needed, not just for rainfall but for streamflow and ground water as well.

Mr. Anthony replied, "absolutely". Some of those efforts have already been under way with respect to the Pacific Islands climate. The Climate Change Cooperative held a workshop a couple of weeks ago related just to climate stations. The Commission and USGS need to look at all other monitoring like streamflow and ground water.

Commissioner Starr suggested that maybe some of the Commission members and maybe the public would be willing to lobby for funding.

Mr. Anthony indicated his willingness to work with Mr. Pearson to host a couple of workshops.

Commissioner Starr proceeded to make a motion to approve staff's recommendations 1 and 2. He stated that he would make a separate motion to approve staff's recommendation 3.

Commissioner Pavao asked for the Deputy Attorney General's advice regarding Commissioner Starr's 2 separate motions.

Deputy Attorney General Young advised the Commission to approve the 3 recommendations as one motion or approve recommendation 3 in advance of the decision on whether to approve to enter into the agreement because the Commission will then be addressing whether or not an EA is required before the work.

Commissioner Starr stated that he felt as if an EA should be approved separately but was willing to include recommendation 3 with recommendations 1 and 2 and made a motion to approve staff's recommendations 1, 2, and 3.

MOTION: (Starr / Beamer)

To approve staff's recommendation.

UNANIMOUSLY APPROVED.

4. Kealia Farms, APPLICATION FOR A WATER USE PERMIT, Kealia Farms (Well No. 3-3412-006), TMK (1) 6-8-002:014, WUP No. 00984, New Irrigation Use for 0.009 mgd Mokuleia Ground Water Management Area, Oahu

SUBMITTAL PRESENTATION by Charley Ice

Item C4 is a request by Kealia Farms for 9,000 gallons a day to supply 7 acres of noni irrigation in Mokuleia. The applicant is requesting the use of non-potable ground water. There is adequate water available to accommodate this request, even with other completed applications awaiting processing. The applicant is requesting an average of 1,250 gallons per acre per day with an average of 250 plants per acre, based on an estimate from the University of Hawaii, Plant and Environmental Science Department. Kealia Farms will be using drip irrigation to minimize any evapotranspiration. There are other wells within a mile of this source which use water for irrigation. This well is about 600 feet from the ocean so the effects of pumping this well would not affect any nearby wells. In regards to public interest, agriculture is considered to be one of the primary uses for maximum beneficial use. This permit application is circulated to a number of agencies for review and submitted no comments. The Department of Hawaiian Home Lands commented that the application may be incomplete because the applicant answered "no" to the question regarding whether or not the application will affect Department of Hawaiian Home Lands rights. DHHL believes a "no" response was not an adequate answer. Mr. Ice noted that the State Water Projects Plan identifies DHHL needs, but for the North Shore Aquifer System Areas the needs are listed as zero. They also have no request for a reservation from this area. Mr. Ice further stated that the Board of Water Supply system draws from many parts of the island and it does not draw from the north

shore. The interconnectedness that might be true in other places would not be true on the north shore so as far as staff can assess, this would not be interfering with Hawaiian Home Lands' rights. This application also does not involve any public lands or funds and staff sees no trigger for an EA. The OHA Kipuka database shows no sites or crown lands involved and there are no objections from the OHA.

RECOMMENDATION

Due to the applicant's proper land use in providing agricultural products with medicinal value and their thoughtful use of water and conservation measures, staff recommends that the Commission approve the issuance of water use permit no. 00984 to Kealia Farms for the reasonable and beneficial use of 0.009 million gallons per day of Non-Potable water for from the Kealia Farms Well (Well No. 3-3412-006), 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. Approve a pump installation permit for the Kealia Farms Well (Well No. 3-3412-006), subject to the standard pump installation permit conditions listed in Attachment C and the following special conditions:
 - a. None

(DISCUSSION)

Commissioner Pavao questioned the regulation for the use of the 9,000 gallons a day.

Mr. Titcomb was not able to answer Commissioner Pavao's question; however, he speculated that Kealia Farms would eventually need to reduce the pump capacity.

Commissioner Starr asked what are the chlorides of the water and what is the tolerance of noni as he was not aware noni could be cultivated with brackish water.

Mr. Titcomb apologized as he did not have the chloride data.

Staff clarified that the chlorides from the well are unusually fresh so near to the ocean at around 250 parts per million.

Commissioner Starr asked for clarification regarding DHHL's belief that the applicant did not identify DHHL needs and the State Water Projects Plan identifying DHHL needs for the North Shore Aquifer System Areas as zero.

Mr. Manuel stated that DHHL is working on the update to the State Water Projects Plan, which identifies all of DHHL needs for DHHL lands throughout the state. On the island of Oahu DHHL has reservations in 2 areas, Waimanalo and Waiawa Aquifer System Areas. DHHL's rights to reserve water are limited to the lands or the aquifers directly below DHHL lands that come from various areas. So although there's no existing reservation in Mokuleia, and although the County system may not currently service that area, DHHL is identifying that there are some parcels on DHHL land that exist on Oahu that do not have adequate reserves of water and that DHHL is asking the Commission to

make sure the Commission is looking out for the interconnections of County systems as water can come from various aquifer system areas throughout the island.

Commissioner Starr believed that DHHL was asking for a “blanket” reservation statewide where there are no DHHL lands in the vicinity. DHHL wants to have the ability to reserve water but are not willing to say what DHHL’s needs are.

Mr. Manuel said DHHL is working on projecting its demands and is trying to get that codified in the Hawaii Water Plan. He disagreed with Commission Starr in regards to a “blanket” statewide application. Oahu, like all islands are all unique so in the assessment of the water use permit applications on Oahu with a system that is generally all integrated, those are conservations that DHHL included as part of the comment letter.

Commissioner Starr asked if that was going to be the comment for every place where DHHL does not actually have a need.

Mr. Manuel said that water use permit applications are reviewed on a case-by-case basis. There may be situations on other islands where DHHL does not have lands directly in the aquifer but an existing system services or gets its source of water from that aquifer system area that would ultimately service DHHL lands in a different aquifer.

Commissioner Starr noted that DHHL said there is no County system in the North Shore Aquifer System Area.

Mr. Manuel explained that DHHL has existing homestead communities that don’t have water and are serviced by DWS systems. Water is provided throughout the island on these systems. What DHHL is saying is that the term no interference, is for the purposes to show any kind of intent to actually analyze, beyond DHHL’s reservation request, how does the applicant or even the Commission look out for the interests of DHHL and its reservations or the lack of water for our lands.

Commissioner Beamer clarified that DHHL is not opposing this application, but is asking the Commission to understand that in the future DHHL may come to the Commission to make designations in areas or aquifers that are not above DHHL lands and that this could be one of them.

Mr. Manuel said that DHHL is looking at future acquisitions on Oahu specifically. One of the areas DHHL is looking at is Central and North Shore as potential land acquisitions. DHHL is taking a proactive vision in reviewing Kealia Farms’ application.

Commissioner Starr commented that this creates a moving target where DHHL knows that there is a County system that does not take water from an aquifer system nor are there any DHHL lands anywhere in the vicinity. DHHL is saying that in the future it desires to acquire lands and at that time a reservation will have to be made.

Commissioner Beamer interpreted DHHL’s comments as an attempt to be pre-emptive and the Commission could get an update when that plan is ready.

Commissioner Starr said assuming that the plan still does not show any use of lands or projects to acquire lands in that area, would it still be fair to leave it open for something that DHHL may do 20 or 50 years from now?

Commissioner Beamer explained that it is too theoretical to address right now. He believes the intention is in a system where delivery comes from all across the islands if DHHL is committed to certain lands that do not have access to water, DHHL may come back to the Commission and may want access to the aquifers.

Chair Case clarified that Mr. Manuel was raising these issues as part of a broader discussion and was not opposing this permit.

Mr. Manuel claimed that the testimony was not in opposition. DHHL is just providing comments. This has been a comment that DHHL made for all the water use permit applications on Oahu since 2012. DHHL is just stating for the record that on Oahu within an integrated system, sources can be developed all around the island and potentially DHHL could participate in funding for additional source developments or work with the Commission or the Counties so that DHHL can have water in areas that lack water.

Mr. Hardy noted that in the Standard Conditions 3g, 6 and 9f. are in all water use permits to address the DHHL contingency should things change in the future

MOTION: (Pavao / Pressler)

To approve staff's recommendation.

UNANIMOUSLY APPROVED.

5. Request to Authorize the Chairperson to Enter into a U.S. Geological Survey Water Use Development and Research Financial Assistance Agreement

STAFF PRESENTATION by Roy Hardy

Item C5 is a request to authorize the Chairperson to enter into a U.S. Geological Survey water use data and research financial assistance agreement. This came to staff's attention in July that USGS through its water use and information program is basically handing out money. The total authorized funding for this program is \$6.5 million over a period of 5 years. For this year USGS is distributing approximately \$26,000. The Commission is applying for this grant. The baseline goal of this grant is to develop a plan. Exhibit 1 is the water use data and research financial assistance guidance. This agreement will help the Commission's water use reporting program and is a non-matching fund. The Commission applied for the grant by the July 31st deadline but is still working on getting the approval. This submittal is just asking for the ability to delegate to the Chairperson to enter into that agreement. Some of the money will be used for the Commission's deep monitoring well program. There is state land involved and triggers an EA. Under the Administrative Rules basic data collection and continuing administrative activities are the exemptions.

MOTION: (Beamer / Starr)

To approve staff's recommendation.

UNANIMOUSLY APPROVED.

6. Approval to Conduct a Limited Meeting to View Portions of the Kōke'e and Kekaha Ditch Irrigation Systems in Waimea, Kaua'i, Hawai'i

STAFF PRESENTATION by Ayron Strauch

Item C6 is requesting the Commission to conduct a limited site meeting on the Kokee and Kekaha irrigation ditch systems in Waimea, Kauai. This site meeting will take place October 20-21 in compliance with Section 92-31 of the Hawaii Revised Statutes. It must be limited due to accessibility, land ownership, liability and safety. There will be public testimony taken at the beginning of each day for 30 minutes prior to the site visits. Exhibit 1 is a map of each of the sites staff will be visiting. On April 28, 2015 staff conducted the first site visit of this system. This second site visit will include diversions and areas of each of the systems that were not visited in the original site visit.

Commissioner Starr asked for clarification as to what the Commission is being asked to approve. He has very serious concerns with the agenda.

Commissioner Buck interpreted the recommendation as not approving the agenda specifically but simply to conduct a limited meeting.

Deputy Attorney General Young agreed. The Commission is giving the approval for the limited meeting pursuant to Hawaii Revised Statutes Section 92-3.1. It lays out a whole process so this is not the end of the process. If the Commission should approve this matter to be done as a limited meeting it would also require approval from the Office of Information Practices.

Commissioner Starr asked if the OIP has to approve the details of the Agenda or just that the meeting will be held.

Deputy Attorney General Young stated that OIP has to concur that the Board may hold a limited meeting. She was not sure of what OIP requires prior to that.

Commissioner Starr asked if he should state his concerns with the agenda.

Chair Case replied that it would be helpful.

Commissioner Pavao noted that the Commission is not voting on the agenda. The Commission is voting on whether or not the Commission concurs that a limited meeting is necessary it has nothing to do with the agenda. Mr. Pavao suggested voting on the conducting of a limited meeting. Commissioner Starr could express his agenda concerns when the agenda is finalized.

Commissioner Starr believed that he would not be given another opportunity to do that and stated that the agenda had been presented to the Commission.

Commissioner Pavao emphasized that the recommendation is not about the agenda. The recommendation is to determine that a limited meeting is necessary.

Commissioner Buck mentioned that he has been on these roads and understands that it is not denying the public's attendance. The public is allowed to follow the Commission and staff. The Commission and staff are not making specific accommodations for them.

Mr. Strauch noted that everything will be videotaped.

Commissioner Starr expressed his concerns regarding the 2 half hour testimony sessions at the headquarters of KAA. There are many people in the community who are involved

in what is a very contentious issue and to certain folks, KAA is the enemy and they have been told or at least perceive that they have been told they are not welcomed on KAA property. To make a statement that the only way they can interact with the Commission is to go to the KAA headquarters creates the perception of perhaps an unequal playing field or an intimidation type of situation. That is not conducive to process.

Commissioner Starr asked for a change of venue that allows the community to say what they want to say. He suggested an evening session in a neutral or government venue.

Commissioner Beamer agreed with Commissioner Starr. Commissioner Beamer mentioned 30 minutes for public testimony may not be enough time.

Mr. Strauch asked the Commission if an evening session would be more appropriate.

Commissioner Beamer replied "yes".

Commissioner Starr would be happy to approve the agenda subject to staff's revisions.

David Henkin wanted clarification that the petitioners and their representatives would be able to participate in the site visits. The petitioners think it is appropriate that they be able to participate and would look forward to doing that. The petitioners believe staff has identified important areas for the Commission to visit. However, Mr. Henkin wondered whether it was logistically possible for the Commission to get from the Waiahulu diversion on Waimea River to the mauka hydropower plant in 45 minutes and whether that would allow any time to see the Koai'e and Waiahulu diversions as it is very, very rough roads. Mr. Henkin had some concern about allowing the Commission an adequate opportunity because it is going to be quite an effort to get to some of these sites, particularly the ones down in the valley and he would hate for the Commission to be constrained in being able to fully investigate. Mr. Henkin said this would be an opportunity for many of the Commissioners to see these areas. In terms of the selection of sites, one location that is not listed is the Hukipo Flume. Hukipo Flume is the location outside of the watershed on the Kekaha Ditch where the KAA takes its measurements of water leaving the watershed. It is very important for the Commission to physically be aware that the measuring point for all the data that is provided to the Commission about ditch use is at Hukipo Flume, which is outside of the watershed and does not capture the amounts that are taken from the Waimea River. Mr. Henkin encouraged the Commission to visit that site as it is vital to understand how the system works.

Commissioner Starr hoped that staff would be able to work on revising the agenda. He would like to see Hukipo Flume as well as the Black Pipe Siphon. He asked staff if it would be possible to get into the valley.

Mr. Strauch said that all the times listed in the agenda are based on information from Landis Ignacio and Steve Spengler. In response to Commissioner Starr's question regarding parking, Mr. Strauch replied that depending on the question and answer session and the amount of time it takes to go from car to viewing the site, quite a bit of buffer was built in but it is going to have to be adjusted. The site visit will take place at a time of the year where there is less daylight so that is also being considered. Staff is trying to be as accommodating as possible.

Commissioner Starr asked if an evening meeting is held, would it be possible to start at 8 am on Wednesday.

Mr. Strauch replied if the site visit starts earlier that would provide a better opportunity to complete the site visit.

Commissioner Starr questioned whether the Commission needs to meet at KAA offices on Wednesday especially if the Commission is meeting there on Tuesday. He suggested meeting at the first site in the morning which could save everyone 2 hours in the morning. He asked for the Deputy Attorney General's advice.

Deputy Attorney General Young said the law does provide that if it is a limited meeting that the limited meeting can be held at the location that is not open to the public. The Commission can start off at a location that is not accessible to the public.

Commissioner Starr suggested meeting at Waiakoali Stream diversion and open the meeting there.

Chair Case recognized Commissioner Starr's issue regarding some people being uncomfortable with having a public meeting at KAA. Although she felt there could also be a sense of inclusiveness and connectedness if everybody is talking to each other, she understood Commissioner Starr's point.

Myra Kaichi stated that the Agribusiness Development Corporation as the managers of the property would also like to be included in the site visit. It is ADC's position under Section 3.1, Chapter 92 that the public can be excluded. ADC is asking the Commission to exclude the public from the site visit for health and safety purposes. If that is not an option, the ADC is concerned about liability and would like some coverage. ADC would like to be guaranteed or given some assurances that if the public is allowed to enter these areas, that ADC be covered by insurance for injuries that could occur. ADC also would like to negotiate the terms of right of entry with staff as well as the terms of right of entry for participants who do enter the premises. ADC would like common sense right-of-entry conditions such as no splashing around in the rivers and no fishing. ADC may want waivers or an assumption of risk declaration and/or releases of everyone who participates. Ms. Kaichi suggested in lieu of doctor's certificates, all attendees obtain certification that they are physically fit or that they have at least called their primary physician authorizing their participation in the excursion.

Chair Case commented that ADC's interest should be in notifying the Commissioners of what the terrain is like, what the hazards are and the Commissioners would be responsible for making sure they are comfortable attending the site visit. She did not feel it was appropriate for Commission members to sign waivers and provide insurance.

Commissioner Buck asked Ms. Kaichi when she refers to premises, is she referring to all the stops? If the premise is on public land on public road, ADC has no control or jurisdiction.

Ms. Kaichi stated that her understanding is that ADC has the set aside for the ditches so that includes all the flumes and tunnels, not the government roads or lands. To the extent that the ditch/irrigation system includes the diversions of the rivers, her understanding was that ADC also has jurisdiction over the diversion areas. She was not sure of the set aside as the set aside simply says diversions. So to the extent of the diversions, those are ADC lands.

Commissioner Buck said the diversions are just an improvement on the land. It has nothing to do with the actual land. He finds Ms. Kaichi's request unbelievable.

Commissioner Starr was angered by Ms. Kaichi's request. This is complete and total abuse of the public trust. These are trust lands, these are ceded lands, these are lands that are held in trust for the people of Hawaii by the State. What ADC is stating is abusive to that public trust by trying to keep the public out, trying to keep the Commission which is another governmental entity out. This is an attempt to keep this process from occurring as it should. The Department of the Attorney General put up one road block after another for giving access to Commission staff, to Mr. Spengler and to Commission members. The Attorney General's Office should examine what its responsibilities are as a Deputy Attorney General. The ADC should examine what their duties and responsibilities are as a governmental entity. The Commissioners and staff have a right and a mission and an obligation to visit the Kokee and Kekaha Ditches to get an understanding of this system. The public has a right to go there as well and if attempts are blocked it would be a great wrong and injustice by the government of the State of Hawaii.

Ms. Kaichi reiterated that she was not asking that the Commissioners be excluded. ADC does not want the general public to attend. The comment was that the Commission has the choice to allow a limited meeting, but if the public has an opportunity to attend, for instance having their own 4WD, they can attend. The Department of the Attorney General does not want the public to attend; not the Commission staff, or the Commission. In fact The Department of the Attorney General does not object to Earthjustice attending, and ADC would like to attend and the Department of the Attorney General would like the KAA to attend.

Chair Case stated that if these are public roads and public lands the purpose of conducting a limited meeting is to visit these areas and the public has a right to participate.

Mr. Strauch stated that the sites are not handicap accessible.

Mr. Manuel noted that the Department of Hawaiian Home Lands as well requests to be present at the site visit.

MOTION: (Pavao / Pressler)

To approve staff's recommendation.

UNANIMOUSLY APPROVED.

7. Commission to Discuss Procedure for Official Commission Correspondence Drafted by a Commissioner.

Chair Case stated that the Commission was going into Executive Session pursuant to HRS Section 92-5(a)(4) in order to consult with its attorney on questions and issues pertaining to the Commission's powers, duties, privileges, immunities and liabilities.

MOTION: (Starr / Pressler)

To approve Commission going into Executive Session.

UNANIMOUSLY APPROVED.

[Executive Session / Lunch Break]

[Commissioner Pressler left the meeting at 12:10 p.m.]

Reconvened at 1:06 p.m.

8. Commission Discussion for Mediation Approach for the Complaint and Petition for Declaratory Order Against Waste Filed By Po'ai Wai Ola and West Kaua'i Watershed Alliance (through Earthjustice), Waimea, Kaua'i, Hawai'i

STAFF PRESENTATION by Roy Hardy

Item C8 is Commission Discussion for Mediation Approach for the Complaint and Petition for Declaratory Order Against Waste Filed by Po'ai Wai Ola and West Kauai Watershed Alliance. Commissioner Buck has supplied information and a written letter and requested that the Commission itself provide the guidelines to the stakeholders of this combined petition for the Waimea River its headwater and tributaries and Complaint. This is an effort to help with the many issues raised in the Complaint and Petition. Exhibit 3 is Commissioner Buck's draft of this correspondence. There is a lot of information submitted and the Commission attached a number of exhibits as background, for example, Exhibits 4 and 5 responses from KAA and ADC in submitting responses to the request to the Commission's May 11, 2015 letter requesting information and also additional responses attached as Exhibit 6 for the Commission's information as well. At the June meeting there was discussion about how the Commission was to have a combined correspondence and provide guidelines. Staff is recommending that the Commission finalize Exhibit 3.

Commissioner Buck said that he was looking for ways for the Commission to fulfill its responsibilities using all the tools it has in its toolbox. The Water Code does provide some legal finality to deal with any disagreements but he believes there might be some opportunities that the Commission could actually expedite and provide directions to issues before it enters into a contested case or a formal mediation. After the Commission's first field trip on Kauai, he believed there were some opportunities for collaboration. The community and the stakeholders were asking for some direction from the Water Commission. This draft letter attempts to outline the Commission's responsibilities and how the Commission makes decisions and offers some broad guidelines for potential stakeholders to provide direction of future conversations, using other processes besides contested case hearings to provide a little easier and expeditious solution.

Commissioner Starr appreciated Commissioner Buck's intent in trying to get different parties and the community to work together collaboratively. However, he feels that it does not hold a great likelihood of solving the issues that arise. He wants to be assured Commissioner Buck's letter does not make a statement on behalf of the Commission. In the last paragraph on page 2, where the Commission says in many cases, the water ditch systems are providing public benefits that can be considered reasonable and beneficial. Commissioner Starr wants to be assured that does not put the Commission on record as saying the existing diversion and uses are reasonable and beneficial.

Commissioner Beamer thanked Commissioner Buck and the AG's office for helping the Commission to clarify how it can address the issues that face the Commission. There are a few things the Commission should consider when asking parties to go into mediation. What if the outcomes the parties present are not in line with what the Commission wants?

The Commission is putting its responsibilities upon the parties by asking the parties to resolve the issues. He questioned the effectiveness of mediation especially when the power situations and dynamics are not equal. The sole responsibility lies with the Commission. The community petitioned the Commission to look into these issues to make decisions. The parties are asking for guidance from the Commission.

Commissioner Buck responded that his guidelines were not the only tool in the toolbox. Any process needs direction so the mediation is directed toward a certain outcome.

Commissioner Beamer inquired why the Commission decided on a mediation approach versus a letter to show cause.

Commissioner Buck stated the mediation process could be used concurrently with the letter to show cause. He agreed with Commissioner Beamer that ultimately it is the Commission's decision.

Commissioner Beamer asked if the responses were vetted.

Mr. Uyeno replied to the extent that KAA and ADC met the request; there is additional data that staff would like as a result of what was submitted.

Commissioner Starr commented that he was surprised to hear staff say that the requests have been satisfactorily met as a majority of KAA's responses stated that KAA, BASF, Pioneer, Sunrise, Syngenta and Wines for Kauai object to each information request.

Mr. Uyeno said that KAA provided a response.

Chair Case stated that the important issue is does the Commission at least have the information that is available.

Commissioner Starr asked for clarity on what the Commission's next steps are if it is deemed the information the Commission asked for was not met. At what point does the Commission create a demand letter or notice to show cause.

Mr. Hardy stated staff will review the data and if it is determined that the data is less than adequate, the Commission could look to further action requiring an order to show cause.

Commissioner Buck said the order to show cause is based on the allegation of waste not whether KAA and ADC submitted the data on time.

Commissioner Starr stated that he would like staff to draft a potential order to show cause document.

Mr. Henkin of Earthjustice, representing Po'ai Wai Ola and West Kauai Watershed Alliance, noted that direction from the Commission would be needed in order to make mediation profitable and an efficient use of time and resources. KAA consistently takes the position that it currently has no use for the water. They need to bank the water in order to fulfill some future mission, some future need for diversified agriculture that might come along. Clear direction from the Commission is required when discussing the waste issue. Waste is defined in terms of what is happening today, not what might happen in the future. The Hawaii Supreme Court made it clear in the Waiahole Ditch

case, 94 Hawaii at page 156, the Commission recognized that the policy against waste dictates that any water above the designated minimum flows and not otherwise needed for use remain in the streams. Any flows in excess of the instream flow standard, shall remain in the stream until committed and actually needed for offstream use in keeping with the policy against waste and in recognition that the standard merely states an absolute minimum required under any circumstances. The basic issue is that in the February Commission meeting, Mr. Spengler identified that there are several headwaters of the Waimea River up by Kokee that are being diverted in virtually its entirety. At the time Po'ai Wai Ola and West Kauai Watershed Alliance filed its petition water was being dumped in Kauhao. Currently water is being dumped back into Kokee Stream but there are 3 streams that are being almost completely dammed and diverted to be dumped into a 4th stream. The reason for this is that KAA has no present use of that water because it cannot flow through to makai because of the limitations on Puu Lua Reservoir which has to be kept no greater than 60 feet in height for dam safety purposes. So while it takes about 12 million gallons per day up at the headwaters it dumps over 9 million back into Kokee Stream. KAA claims it is not wasting water because where the water is measured is just above Puu Lua Reservoir. Po'ai Wai Ola and West Kauai Watershed Alliance believes this meets the definition of waste under the Water Code. The Commission needs to make it clear that it likewise views this as waste, barring some showing by the other parties as why it is not waste, and what the Commission expects from the parties if it wants the parties in mediation to problem solve. Po'ai Wai Ola and West Kauai Watershed Alliance has had several meetings with KAA and ADC and at every meeting without direction from the Commission, the parties do not know what they are supposed to be doing. KAA's initial response on page 25 says KAA has not identified any potential modifications or solutions that may help address alleged waste concerns or dry streams sections raised by petitioners. The next paragraph says KAA does not believe it is causing any waste. Mr. Henkin again noted, without direction from the Commission that there is waste that needs to be addressed, the parties can sit down but KAA is not going to do anything.

Mr. Codiga objected to the mischaracterization.

Mr. Henkin went on to say that someone had suggested there was a way to return the water in the streams and that KAA believed the Commission did not want the parties to pursue that until the interim instream flow standard had been set.

Mr. Cogida raised the same objection.

Mr. Henkin believed the waste issue could be addressed immediately. According to Mr. Spengler, the headwaters of Kokee are being diverted. There has been ample opportunity for KAA or ADC to explain why that water should be removed from the headwaters in the streams and dumped into a different stream. The fact that Kokee Stream is now a 9 million gallon per day stream, instead of a 1/2 million gallon per day stream is not good for Kokee Stream. It is not the native ecosystem. Po'ai Wai Ola and West Kauai Watershed Alliance believes there is ample evidence that has already been proven to the Commission by its own investigator. There has been ample opportunity for KAA to explain why it needs to divert water from Kokee and Kekaha Ditch Systems or why it could not restore the native natural flow. If at some point in the future DHHL or anyone needed this water for actual use, then the Commission would have the opportunity to balance the public trust but in the meantime, there is no use for this water. This is just an illustration of the guidance the parties need from the Commission through an order to

show cause immediately. KAA and ADC will continue to divert water as they have for decades. The parties need guidance.

Mr. Henkin stated that Po'ai Wai Ola/West Kawai Watershed Alliance will also need guidance and orders from the Commission to access the ditch as it is going to need to get into the ditch to take measurements of the streams. Mr. Henkin commented with respect to Exhibit 3 that he would encourage the Commission to make it very clear that anything that it adopts with respect to Exhibit 3 would not represent findings as Commissioner Starr mentioned regarding reasonable and beneficial use. Mr. Henkin commented to the information request. He concurs with the Commissioners that noted very important information is missing from the document. He noted on the first page of KAA's response, it notes who the members of KAA are and who the other licensees are but there is no information for Sunrise Capital, which is one of the members of KAA. In footnote 2 there is no information regarding the "other licensees". No information is provided for how much water is flowing past the Mauka Powerhouse Dam as well as electricity use by any of the members' irrigation pumps. KAA tells the Commission it needs to divert the river for power for the irrigation pumps but there's no information provided for anyone to evaluate that claim. There is, however, some information provided to evaluate other claims. There is a claim on page 4 of the initial submittal for 3 of the members of KAA, BASF, Pioneer and Syngenta estimating that they use nearly 14 mgd for agriculture. Curiously with that submittal, BASF makes clear that it does not use the estimated 3.32 mgd but it uses less than 0.5 million gallons per day. Supplemental information provided by Pioneer claims an estimated use of 4.55 mgd, it actually recorded in the highest year, the year it claims it uses the most, 1.16 mgd, approximately a quarter of what was estimated. Syngenta's use was estimated over 6 mgd and the highest it ever recorded was 2 mgd in 2012. Syngenta's average over 4 years was 1.79 mgd. Pioneer said it was not going to provide the data for 2013 and 2014 because those were unusual years. It should have provided the data and then explained why it was unusual rather than not provide the data all. Mr. Henkin assumes that the water use for those years was very low, which is why it was not disclosed. The Commission is entitled to know where the stream water is going. KAA claims on page 9 of its response that Wines of Kauai uses over 12,000 gallons per acre per day on its grapes, fruit trees and protea. Mr. Henkin believes that is nearly double the consumption of sugar cane, which is one of the most thirsty crops and it is about 4 times the average for diversified ag that Kauai County uses for planning and it is 5 times what the Waiahole Ditch proceedings determined was diversified ag of about 2,500 gallons per acre per day. These numbers are not credible. The information is incomplete and the information that is provided does not substantiate its claims. Without guidance from the Commission the parties cannot be productive. Mediation is useful when the parties know what it is they are trying to accomplish, under what standards and what the consequences are if the parties cannot reach agreement.

Commissioner Starr asked Mr. Henkin to provide specific locations he would need access to.

Mr. Henkin responded that he would need to install flow monitoring devices to the ditches and would need permission to do that. One flow meter would be at the Hukipo Flume and one near Puu Lua Reservoir. Mr. Henkin was willing to provide additional information as it becomes available regarding a possible third measurement location. In the future he would also need access to modify a diversion on Kokee Stream.

Commissioner Starr asked Mr. Henkin to provide a schematic of what he envisions for the project.

Mr. Henkin replied that in order to provide a conceptual design, experts would need to be able to examine the structures and may need access to the ditch. Mr. Henkin further explained that as a non-profit law firm it is not going to invest that kind of money unless and until it knows what the Commission is looking for and that Earthjustice will have use for that information.

Chair Case commented that the main goal is to get direction on mediation versus a consensus on what information may be needed from the Commission in terms of direction.

Commissioner Beamer attempted to find a directive in mediation that would be helpful for the parties. He asked if the directive was to discuss how would waste be eliminated from Waiakoali to Puu Lua Reservoir while maintaining Puu Lua Reservoir at 2 million gallons, would the parties be agreeable to mediation. He asked Mr. Henkin if that is the kind of direction he is looking for?

Mr. Henkin replied yes.

Mr. Codiga on behalf of the KAA appreciated Chair Case's comments. He believes an orderly process will benefit everyone. He is very open to mediation and is ready to engage in a process. There are certain limitations in terms of what he thinks is practical and feasible regarding modifications referenced by Mr. Henkin. KAA just asks for a full and fair opportunity to be heard on issues with expert testimony. The parties are hoping to avoid a contested case hearing and thus the mediation process holds promise to having constructive dialogue. He remains very open to that process and appreciates the comments from Commissioner Buck. He also appreciates the road map that was prepared by Commission staff. He agrees it's important to have a timeline. He disagrees with Mr. Henkin that KAA's submission does not support the requested release. Mr. Codiga wants an orderly process and an opportunity to flush out the issues. Mr. Codiga noted that there are other users in the system who are not present and wants to ensure that as many parties as possible get together and collaborate to identify solutions.

Mr. Gomez noted that Mr. Henkin presented the Commission with very large numbers regarding how much flow is being diverted in Kokee Stream. Mr. Henkin obtained those numbers from the consultant's report, which is representative of a snapshot in time that was taken during the winter months and not representative of flows that occur in those streams on a day to day basis. If the flows are reduced beyond maintenance levels in any section in the ditch and the ditch is damaged in any way it is extremely unlikely that the ditch will ever be functioning again in the upper regions of the Kokee Ditch System simply because of cost. The reason that KAA takes the flows that it is taking at the moment is primarily for preventative measures. If the ditches are not maintained it will never be reconstructed. Finally, Mr. Gomez pointed out that in response to Mr. Henkin's testimony there are no stream gauges currently operating on the main part of the Waimea River. There are 3 active stream gauges in the USGS stream gauges in the Waimea River Basin, none of them are on the main part of the Waimea River. Commission needs reliable data in order to make decisions relating not only to ditch flows but to instream flow standards; however, those data are not available. If it were available KAA would have provided it to the Commission.

Mr. Codiga added that there is a lot of complexity and there is a lot of information that needs to be shared and discussed and mediation is a vehicle for that.

Chair Case stated that KAA's testimony has a lot of information and it has a lot of objections. She asked if KAA objected to provide the information or was there information that was not provided.

Mr. Codiga responded that all relevant information was provided.

Chair Case asked if he had any discussions with Earthjustice?

Mr. Codiga answered yes. KAA made a good-faith effort to reach out to Mr. Henkin and had a cordial and productive brief 30 minute meeting. Mr. Codiga's intention as well as ADC was to begin a dialogue. He believes the parties can work productively together so it is an attempt in anticipation of the Commission meeting to see what could be mediated, how that would work, what it would be like and so forth.

Chair Case stated that page 3 of Commissioner Buck's draft letter gives general direction for hopeful outcomes.

Mr. Codiga believed the general direction was sufficient to begin the mediation process. He concurred with Mr. Henkin that none of the outcomes should be taken as findings of the Commission.

Commissioner Beamer referred to Exhibit B from Pioneer Hi-Bred's response to the Commission, Pioneer is not providing estimates of water use for calendar years 2013 and 2014 because Pioneer's water use during these years was atypical. The Commission asked for all the data and one of KAA's parties chose not to give two entire years of water usage. He asked Mr. Codiga if he could explain how that is providing the Commission all the data.

Mr. Codiga respectfully asked to report back to Commissioner Beamer because he didn't know if that information existed.

Commissioner Beamer was concerned about KAA's good-faith efforts. He asked why didn't KAA enter into mediation in 2013?

Mr. Codiga replied it was unclear whether the Commission desired mediation at that time, or whether all the parties thought that was an appropriate course of action. He couldn't think of any other reason why KAA did not proceed. He said his client at all times had a general openness toward mediated resolution as opposed to a multi-year Commission proceeding. As to why it didn't begin in 2013 he couldn't say why it didn't begin.

Chair Case commented that the Commission is trying to get some openness to proceed.

Commissioner Beamer did not understand the justification as to why KAA was taking water out of Waiakoali Stream.

Mr. Gomez replied that's how the system was designed.

Chair Case asked is KAA going to be diverting more water and is KAA ending up dumping essentially more water than is needed to keep the ditch wet? What's the minimum amount needed, without lining the ditch, in order to keep the ditch functioning?

Mr. Gomez could not provide an exact number.

Mr. Codiga stated that it's possible theoretically to modify the diversions. It would require engineering studies and significant investment capital to figure out how to modify the diversions and how it will impact the stream if a diversion is modified. The questions become should the diversion be modified, if the diversion is modified how should it be done and what's the justification and rationale. Currently, KAA's response indicates a rationale for maintaining that flow.

Chair Case stated that the cost of that is dry streams. The status quo comes with a cost and the Commission is trying to assess what the cost is. And how much of it can be done at a relatively minimal cost and how much of it is a big expensive. If KAA is selling electricity as a revenue generating operation, that is something that ought to be captured into the economic review of this whole system.

Mr. Codiga noted that any revenues must be used toward capital improvements of state property.

Chair Case mentioned that the Commission should be looking at what KAA is spending that revenue on and what else as far as an overall fix it might be spent on.

Ms. Kaichi said Mr. Henkin defined waste as the use above the designated minimum flows and Mr. Gomz testified that KAA didn't actually have minimum flows yet. This does not exclude the Commission from addressing waste. The question really is how much water is being used right now. That is what the Commission has been addressing for about a year. She envisions the process as being like the roadmap, gradual processing, and slowly changing the diversions. Funding is always an issue but that should not govern decisions that are made regarding the Public Trust or the maintenance of the ditch. She envisions the mediation process to be the parties sitting down together and slowly carving away chipping away at each little fruit. If it means lifting one board at a diversion, lift one board and see how the water flows, see what the effect is on the ditch. Maybe it is a matter of setting up a schedule where the parties are required to meet once or twice a month and report back on progress to the Commission at each monthly meeting. The result might be the whole matter cannot be resolved and the parties end up with a contested case hearing, but if some of the issues are chipped away that would help make the contested case a little easier.

Chair Case agreed with Ms. Kaichi. Chair Case suggested the parties work toward a goal by the October 20-21 Commission meeting. She asked the parties if the guidelines are sufficient directions to enter into mediation.

Ms. Kaichi said the guideline is a little broader than what she was thinking. She was thinking more specific issues, board by board, drop by drop. But the parties could compartmentalize and categorize and outline little factual issues into these categories. These are pretty much the issues the parties have to address.

Chair Case said this may not be the best forum to get to that level of detail. She asked if the Commission is identifying a mediator or are the parties going to sit down and start talking.

Ms. Kaichi recalled there was a submittal to hire a mediator but it was not on the agenda.

Chair Case suggested the Deputy Director conduct a task meeting with a goal of finding out the process and a timeline and taking first steps by the October 20 and 21 meeting in Waimea.

Commissioner Starr commented that he would be willing to have the parties report back to the Commission in October however he had difficulty in seeing how this was going to go anywhere as KAA is saying that there is no wastage and no need to present additional information.

Mr. Henkin commented to Commissioner Beamer's question about maintenance of the ditch and in response, the reason KAA has to take the entire stream is that that's how the system was designed. Waiakoali diversion is a dam that goes across the entire river. The stream in its entirety flows straight into the ditch. Mr. Henkin recalled a presentation by Mr. Spengler and it was documented that the concreting over a diversion structure would have allowed flows to return to the stream, so when it was designed it was not designed to take 100% of the flow of that stream.

Chair Case said the Commission does not want to get into the details as it is trying to set a general process.

Mr. Henkin commented that the Commission's investigator identified headwaters of Kokee and the use of Kauhao as things that the parties should focus on but if it does not have direction from the Commission, he is not optimistic.

Chair Case said the results of the mediation will be reported to the Commission in a month. She suggested that no action be taken on agenda item C8 other than the Commission has asked the parties to move forward in a meaningful discussion and report back by the October meeting. By the September 16 meeting the parties should at least have outlined discussion points and a timeline and to have met several times by then to show progress in those discussions so that the Commission has an idea whether it needs to take any more affirmative actions to help move mediation forward.

Commissioner Starr said that he was very glad that the Commission will have a verbatim record of this discussion.

Chair Case stated that she couldn't promise that but the Commission will do its best to have a meaningful record.

[Break]

[Commissioner Beamer left the meeting at 2:45 p.m.]

9. Commission Discussion and Possible Position on the Red Hill Bulk Fuel Facility Draft Administrative Order on Consent to the U.S. Environmental Protection Agency (EPA) and State of Hawaii Department of Health (DOH)

STAFF PRESENTATION by Roy Hardy

Item C9 is a Commission discussion and possible position on the Red Hill Bulk Fuel Facility Draft Administrative Order on Consent to the U.S. Environmental Protection Agency and the State Department of Health. Commissioner Starr requested that the Commission itself provide additional comments to the Chairperson's comments letter dated June 17, 2015. Commissioner Starr's and Buck's letters have been submitted by themselves to meet the July 20th EPA and DOH deadline. The letters are provided for the Commission's consideration. Staff would also like to provide additional technical comments. Exhibit 10 is an aerial map with well locations, indicating areas lacking ground water data, the orange area is the product which may begin in the formation of the lava flows and may be held up and stored above the water levels. The task force committee discussed drilling to determine the extent of the product in the unsaturated area around the tank followed by removing the product before it gets down to the ground water.

Commissioner Starr requested staff to combine his letter, Commissioner Buck's letter and staff's additional technical comments into one letter and send it to the Department of Health as well as the Governor and Congressional Delegation.

Chair Case stated that it would be best if the letter is signed by the Chair as all Commission members were not present to vote.

Commissioner Balfour firmly stated that the Navy needs to double line the tanks and remove the products before it contaminates the aquifer. This can probably be done within 6-8 months. What the Commission needs is a hammer. The Navy took 2 years to do a study and there is nothing to study. To do nothing and wait another 20 years before the Navy finishes this task is unbelievable.

Myra Thompson, Director for the Sierra Group Hawaii, thanked Commissioner Balfour for his courage regarding the Red Hill Fuel Facility issue. With the amount of negative feedback the AOC has received, the Commission does have the power and it is reasonable to ask that the tanks be drained until it is repaired. She encouraged the Commission to be more specific in expediting the timeline.

Barry Usagawa, Head of the Water Resources Division at the Honolulu Board of Water Supply, thanked the Commission for its support. Mr. Usagawa updated the Commission and said BWS hired consultants to drill a couple more of wells in Halawa and Moanalua between BWS's sources and the tank. BWS is working with USGS to do a numerical ground water model entire Pearl Harbor aquifer. BWS has also hired consultants to model the unsaturated area where there is a lot of fuel contamination. Experts will also be hired to study corrosion in the tanks. He agreed with Commissioner Balfour that the Navy could start double lining the tanks as it previously studied double wall lining in 2008.

RECOMMENDATION:

That the Commission review and finalize Exhibit 2.

MOTION: (Starr / Buck)

To approve staff's recommendation.

UNANIMOUSLY APPROVED.

[Commissioner Pavao left the meeting at 3:20 p.m.]

D. RESENTATIONS & BRIEFINGS

1. Hawaii Water Plan Updates

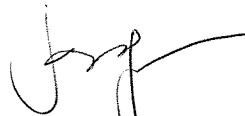
a. Status of County Water Use and Development Plan (WUDP) Updates

i. Honolulu Board of Water Supply

Mr. Usagawa gave a status update of BWS's Watershed Plan. The watershed approach begins with each ahupua'a, moku and island. The Watershed Plan focuses on resource protection, conservation, restoration as well as water use and development. The land use plans embrace the ahupua'a concepts. The key planning principles are community-based environmentally holistic and economically viable. The ahupua'a management principles include kuleana and kapu. The Plan is action oriented and in alignment with State and County water and land use policies. The Water Code approved the Watershed Plan approach in 2006. The watershed management plan goal is balance between protection, preservation and management of watersheds with the sustainable ground and surface water use and development. The watershed management plan objectives are to promote sustainable watersheds, enhance water quality and quantity, protect native Hawaiian rights and traditional and customary practices, facilitate public participation and meet future water demands. The plan has 2 sections, water use and development and watershed protection.

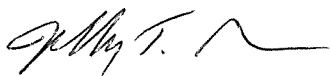
The meeting was adjourned at 3:46 p.m.

Respectfully submitted,



KATHY YODA

APPROVED AS SUBMITTED:



JEFFREY T. PEARSON, P.E.
Deputy Director