

MINUTES
FOR THE MEETING OF THE
COMMISSION ON WATER RESOURCE MANAGEMENT

Approved by Commission on
Water Resource Management
at the meeting held on
March 15, 2016

DATE: January 28, 2016
TIME: 9:30 a.m.
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 9:32 a.m.

The following were in attendance:

MEMBERS: Ms. Suzanne Case, Mr. Jonathan Starr, Mr. William Balfour, Jr.,
Dr. Kamana Beamer, PhD, Mr. Michael Buck

EXCUSED: Dr. Virginia Pressler, M.D., Mr. Milton Pavao

STAFF: Jeffrey Pearson, P. E., Roy Hardy, Dean Uyeno, Lenore Ohye, Charley Ice,
Neal Fujii, Jeremy Kimura, Rebecca Alakai, Jonas Burgon, Ayrton Strauch,
Malie Beach-Smith

COUNSEL: Julie China, Esq. (Items B1 - B6)
Linda Chow, Esq. (Item C1 - C2)

OTHERS: Jon Nishimura (Fukunaga & Assoc.), Lance Fukumoto (Fukunaga & Assoc.),
Myoung Oh (HI Assoc. of Realtors), Stacy Ellamar (Pacific Resource
Partnership), Tae Kay (Environ Com), Stanley Watanabe (Austin, Tsutsumi, &
Assoc.), Terrance Hashiro (Austin, Tsutsumi, & Assoc.), Marti Townsend
(Sierra Club), Ernie Lau (Board of Water Supply), Erwin Kawata (Board of
Water Supply), Bianca Isake (Sierra Club), Kaleo Manuel (Department of
Hawaiian Home Lands), Jonathan Scheuer, Kurt Inaba (Hawaii Department of
Water Supply)

A. APPROVAL OF MINUTES

1. December 16, 2015

Commissioner Jonathan Starr said some parts of it, some sections of them are quite good, but still felt that our standard needs to be verbatim transcript so he would be voting against it.

MOTION: (Balfour/Beamer)

To approve the December 16, 2015 minutes.

MINUTES APPROVED (Aye 4 - Opposed/Starr)

B. ACTION ITEMS

1. Project Description for Phase 2 of the Hawaii County Water Use and Development Plan Update for the Keauhou Aquifer System Area

STAFF PRESENTATION by Lenore Ohye
(Earthjustice letter for Item A.1 distributed.)

Lenore Ohye, Planning Program Manager, said B-1 is a follow-up from your last meeting in Kona on August 17 last year where you preliminarily approved the demand analysis of the County Water Supply Ditch for the Keauhou Aquifer System Area in Kona and now we're on to Phase II which is the source part. You've got the demand set and now we're going to do source strategies.

So you can see the proposed scope in your Exhibit 3 and staff has handed out some minor amendments and clarifications to the scope that you should have in front of you. The basic amendments are to replace terminology with the legally recognized terminology of "traditional and customary rights". So we've done it in Ramseyer format, it's under Tasks one (1) and six (6), so that's just for clarification. We also wanted to clarify the link between the assessment of traditional and customary rights and the source development strategy that the purpose of doing the assessment is to vet the source strategies as per Ka Pa'akai. So those are two (2) minor amendments to the scope.

You can see in your submittal that we've analyzed the elements and we find that it meets all the requirements of a water use and development plan Phase 2 as well addresses the concerns that you have raised. I won't go into detail on the planning elements but there's a source development program, they're going to have an implementation plan to meet anticipated demands, they will develop non-portable source strategies, they're going to assess traditional and customary rights and environmental issues and other public trust needs. There will be provisions for inter-agencies coordination and information gathering, public consultation, there will be continued coordination with the Commission, so we will be briefing you as this plan is developed. There will be draft and final reports, and the schedule shows that they anticipate completing this in December-of this year. And so with that, we recommend that you approve the project description as amended.

RECOMMENDATION:

Staff recommends that the Commission approve the project description for the Phase 2 Water Use and Development Plan update for the Keauhou Aquifer System Area.

(handout distributed - 3 pages)

12/7/2015

AMENDED SUPPLEMENTAL PROJECT DESCRIPTION

SCOPE OF WORK – Phase 2

**Update of Water Use & Development Plan (WUDP) for the Keauhou Aquifer System
County of Hawaii**

OBJECTIVE:

Update portions of the 2010 County of Hawaii Water Use and Development Plan (HWUDP) to incorporate refinements in County Planning Programs and Policies, and updated information regarding land use, population growth & distribution, and water use and availability. This effort is to be consistent with recommendations of the HWUDP and conditions of adoption of the HWUDP in the Hawaii Water Plan by the State Commission on Water Resource Management (CWRM) in 2011.

BACKGROUND:

The 2010 HWUDP served as the initial update effort by the Hawaii County Department of Water Supply and Department of Planning to formally link water resource management and land use planning policy and decision-making. One of the primary objectives of the 2010 HWUDP was to conduct an island-wide assessment of water resource supply and demand conditions and identify any areas of greater concern. The intent was to focus the County's resources on those identified areas in a

prioritized manner, evaluating them in more detail and vigor, while continuing to monitor the remaining areas, tracking any significant changes in water resource information and /or land use policies.

The Hualalai Aquifer Sector, specifically the Keauhou Aquifer System (ASYA), and the Waimea ASYA were identified areas based on the initial island-wide assessment (2010).

The update for the Keauhou ASYA will proceed in two phases. Phase 1 refined the land use- based (zoning) and 20-year demand projections and calculated anticipated water demands. Per direction from the CWRM, Phase 2 will assess the potential impact of groundwater pumping on traditional and cultural practices (T&C) in the Keauhou ASYA and will also involve the development of source development strategies and scenarios to meet the anticipated water demands determined in Phase 1.

This scope of work addresses the Phase 2 requirements.

TASK 1 – Phase 2 Project Description

The Phase 2 Project Description will outline the technical approach for development of the source development program described below in Task 3, in addition to proposing a consultation program to [determine Traditional Native Hawaiian and cultural issues] identify traditional and customary rights in the Keauhou ASYA described below in Task 6.

TASK 2 – Interagency Coordination, Information Gathering and Update

This task will involve coordination with several agencies, including the exchange and analysis of information. The agencies and associated information are as follows:

- County of Hawaii, Department of Water Supply (DWS)
 - o Capital Improvement Projects and budget
- County of Hawaii, Department of Environmental Management (DEM); and State of Hawaii, Department of Health (DOH)
 - o Water reuse data and projections
- State of Hawaii, Commission on Water Resource Management (CWRM)
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- State of Hawaii, Department of Land and Natural Resources
 - o State Water Projects Plan project demands and water development strategies
- Federal Agencies, as required, to be determined

TASK 3 – Source Development Program

The source development program will include a list of Capital Improvement Program (CIP) projects to be implemented over the next 5-year period provided by DWS, and methodologies and strategies for development of and policies for programming future sources will be proposed. Additional high-level sources will be pursued to reduce the use of the basal sources, and the general area and magnitude of these high-level sources will be delineated (the southern region of the Keauhou ASYA between existing Waiaha Wells and KS high level wells).

TASK 4 – Non-Potable Source Strategies

Potential non-potable source strategies to meet agricultural demands will be identified and evaluated. These strategies may include reclaimed wastewater, brackish groundwater, and ambient rainfall. The State of Hawaii, Department of Agriculture will be consulted; however, surface water is not likely to be considered a feasible option because there are no perennial streams or surface water irrigation systems in the Keauhou ASYA. Water reuse/reclaimed wastewater data and future projections will be coordinated with the County of Hawaii, Department of Environmental Management (DEM); and State of Hawaii, Department of Health (DOH).

TASK 5 – Meeting Anticipated Demands

Details of how each component of the anticipated water demand determined in Phase 1 could be met by each different source strategy (groundwater, reclaimed wastewater, water conservation, etc.) will be provided, and a conceptual water source implementation plan will be developed based on projected growth.

TASK 6 – Environmental and Cultural Issues

As indicated in the May 26, 2015 letter to CWRM, DWS reviewed over 200 Environmental Impact Statements (EIS) and Environmental Assessment (EA) reports, 47 of which were reviewed in greater detail, to identify traditional and cultural practices (T&C) in the Keauhou Aquifer System Area as well as the Waimea Aquifer System Area and how pumping groundwater may impact the resources affecting T&C. However, only one report was found to address the potential impact of pumping water and the potential impacts to T&C as well as other habitat concerns. DWS will develop and execute a consultation program with selected individuals, groups, and/or agencies to [determine Traditional Native Hawaiian and cultural issues] identify traditional and customary rights in the Keauhou ASYA. The findings will be used to vet source strategies and recommendations from the program will be presented in the Phase 2 WUDP report.

TASK 7 – Public Consultation

Up to four public informational meetings in Kailua-Kona will be conducted at various stages of development of the Phase 2 report to receive community input regarding findings and proposed recommendations.

TASK 8 – Compiled Phase 1 and 2 Report and Agency Approvals

The Phase 2 report will be presented to the CWRM at several stages of development for approval, and subsequent to approval of the final Phase 2 report, the Phase 1 and Phase 2 documents will be compiled into a single WUDP report for the Keauhou ASYA. This compiled report will be presented to the DWS Water Board, and then to the County of Hawaii County Council for approval/adoption.

TENTATIVE SCHEDULE

The deliverables for the WUDP Update for the Keauhou ASYA, Phase 2, are scheduled as follows.

Deliverable	Anticipated Date
Source Development Program and T&C Consultation Preliminary Findings	May 3, 2016
Draft Report – WUDP Update for Keauhou ASYA Phase 2	August 3, 2016
Final Report – WUDP Update for Keauhou ASYA Phase 2	November 2, 2016
Compiled Phase 1 and Phase 2 Report – WUDP Update for Keauhou ASYA	December 30, 2016

(end page 3)

Chair Case asked for questions.

Commissioner Mike Buck said one of the issues that we've been dealing with in Keauhou is the location of wells. And I'm wondering one of the issue is what exactly jurisdiction of putting wells on private lands. I wonder how does this plan address that or begin to address that, or how will we be able to – because the actual location of placing private wells is an important issue as far as the complaint that we're dealing with in Keauhou.

Ms. Ohye said we have the consultants for the Phase 2, as well as the Department of Water Supply, and they can provide maybe more additional information. The public consultation process should involve consultation with developers in the area for their source

development plans. And that should be included in the report.

Commissioner Buck said, I can ask the County guys, but as far you know the plan itself won't be able to dictate where exactly the wells will be put in the future.

Ms. Ohye said not for the private sources.

Commissioner Kamana Beamer said it's like you guys read my mind when I was reading through here and editing cultural issues versus traditional and customary rights, so thanks for making that change.

Commissioner Jonathan Starr said I do have some comments and likely an amendment but I thought I would hold them until after the presentation by the county people and whoever else might want to testify on the plan.

Chair Case asked if somebody was doing a presentation.

Ms. Ohye said there is no presentation but the applicant is here.

Chair Case asked Commissioner Starr if he had questions for the applicant or for the county or if he wanted to just ask Lenore (Ohye); there's no more presentations.

Commissioner Starr asked who's here for the County. Voice said: Kurt Inaba. Commissioner Starr asked, and the consultant too? Okay.

Commissioner Starr said let me state my concern which is that I've been watching the month to month pumping data from some of the basal wells and by far the largest source in the area is the Kahuluu shaft and I'm seeing numbers of 420 up to 470 parts per million chlorides when the EPA secondary standard which I believe all the other counties have if they're to always adhere to was a max of 250. So there's very salty water being added into the system and I want to be sure that the process is going to take this issue very seriously and resolve it and not just look for ways to provide new water for new development but to proactively remove from the system any sources that are pumping over 250.

Chair Case asked Kurt Inaba and their consultant to come up and say their names for the record and respond to his comments.

Kurt Inaba, Engineering Division at Department of Water Supply for Hawaii County, and John Nishimura, Fukunaga and Associates, consultant on Water Use and Development Plan, came forward. Mr. Kurt Inaba said, basically we are trying to reduce, we have achieved some of that in the past but some bad luck I guess with some of high level wells, we had them down, we had to increase again the use of the shaft so it's right now serving as a backup and actually being used because some of our wells being fixed. But we are intending again to, and I think it does state that, we are intending to ultimately stop using the shaft.

Commissioner Starr said, I'm glad the intent is there. This Water Use and Development Plan is the opportunity to create a path to funding to fix it. Mr. Nishimura, it looks like you wanted to comment?

Mr. John Nishimura said, it's going to be a lengthy process; of course, we've got transmission to deal with this well, it's not just the sources but because of the wind system was built into improve our infrastructure.

Chair Case said, just to clarify the higher well problems are technical with the pumping

system not with the water.

Mr. Nishimura said, yeah, when the well goes down per se, then we would start moving back to what the system used to do which was pump from the shaft, we've been developing the high level sources with the necessary transmission. The old system was built for sources on the bottom to pump up. We've since developed high level sources and we've developed a couple of transmission systems down now.

Commissioner Starr said, I understand the problems in doing it and it should have been done years ago but I feel that it's getting to a point where it's becoming a health issue because there are people who should not be drinking very salty water, or from the taste there are people who might have issues if they're consuming lots of salt and they shouldn't have a disincentive to drink the water. If it becomes a social inequity issue which perhaps it now is where the community in town who are drinking the salty water the only request I have is to move to new developments which gets the sweet water from the upper wells then I think that it does not really go along with what our standards and feelings about water and equality and quality.

Mr. Inaba responded, the water and the chloride levels we are reporting are directly from the sources, when it's brought up before it enters into our system. We do blend it so that's not necessarily the final chloride; but then it's still that the source itself is an issue with chlorides.

Commissioner Starr asked, and do you agree that 250 is the max you want to be at?

Mr. Inaba said, well, the secondary standard at – yeah.

Commissioner Starr said, I will be adding an amendment to try to help encourage this.

Commissioner Mike Buck said thanks for coming and thank you for the hard work on this. The same question I asked staff, is this going to help us at all in our issue of determining location of source wells within the aquifer on private land.

Mr. Inaba responded, when we go ahead and pursue the development of the source, you know that's where we again are taking control. We are going to look to work with the developers when they come in obviously to, you know to us, if we're going to accept the source then that's when we get to see the developer's proposal. We're going to work with whoever comes in to propose to develop source to make it work in our system. It's not a very large area right now that we're mentioning in the update, it's between Waiaha and the Keauhou area and we're right now pursuing some property to develop a source. But if a private developer comes in, we'll let them know where we think the optimal place would be. Ultimately, we'll try to work together to make sure that we can address the needs.

Commissioner Buck asked, do you have the capacity to deny an application of a well on private land if it's not consistent with this plan?

Mr. Inaba said I'm not too sure on that. I wouldn't know if I have that capacity to deny or not.

Commissioner Buck requested, can you take that back. I've asked that question couple times at public hearings and I still haven't gotten a clear answer, but it would really help the Commissioners when we deal with the Keauhou complaint.

Mr. Inaba said he's not sure if it falls within their jurisdiction. Not sure.

Commissioner Starr asked, what would you characterize as the percentage of new source that will be developed by the county compared to the percentage that you would expect will be developed by private developers.

Mr. Inaba said I'm really not sure. But we are developing or proposing to develop two sources in the next five year CIP.

Mr. Nishimura explained that typically what happens as a condition of approval of the development, and that's with the Department of Water Supply and the County Planning Department working together. That's why it was important for that link to be established as far as approval and condition of development to get the water and infrastructure things resolved at least up front to some degree any way. Not necessarily, specifically on the property. But ultimately the water source would be turned over to the county. That's typical in this particular area.

Commissioner Starr said, I have some experience with this as I sat many years on the Maui Board of Water Supply and Maui Planning Commission. What we discovered was that when source is developed by developers, a lot of times they'll say we'll give a third of it to the county but the third that goes to the county often does not exist because when you take a well of pumping capacity say of a million gallons, we in the field know that you have to first of all derate it by a third for operational factors because one of every three or four wells will be down at a given time, then you have to derate it by another third for peaking factors, max day factors, you know there's days when it's Memorial Day weekend and everyone's got the sprinklers going and stuff so if you take one million gallons a day and you derate it by a third, you got 666, you derate it by another third, you got 450. So the actual production and if you track we know that if you track a well over 20 years it likely will actually produce 45%, 42, 47% of the pump capacity. So, if the developer is going to get more than 45% and then overage is going to the County, it doesn't really do anything and that's one of the reason why AWWA really encourages that the system operator do source development and capitalize on it. So, I think that's the only way realistically you're going to fix it. I'd like you to come back to us with more detail in this area and show that it actually is going to be used to get rid of the salty basal existing sources.

Chair Case asked is WWA?

Commissioner Starr said American Water Works Association. Someone said: AWWA.

Mr. Inaba said one of our goals was to go ahead and do our own source development so that's what we're trying.

Commissioner Starr said this makes me happy and I also wanted to ask staff or our deputy whose real familiar with the stuff and staff to organize a presentation to us about the chloride situation in the wells and give us a graph, graph it out, and show it to us and discuss it. You know, this is something that will come in handy in discussion on Molokai and other places as well.

Commissioner Kamana Beamer said if we took (Commissioner) Jonathan's just that question and thought about it historically, what roughly could we say what percentage was developed as county source vs. the private source in the past 10 years. Is it 2 out of 10; is it 2 out of 6?

Mr. Inaba said I know we developed seven sources that was a developer's source, we developed at least three of the previous six and there were two state wells I believe. We actually did all six but a couple of them were small participation by developers; one being QLT and one was a well we decided to pursue Keapu was initially started by a developer.

Commissioner Beamer said: so three out of six, and two by the state.

Those are just ours, the wells that were turned over to DWS.

Commissioner Starr asked you aren't showing meters or credits against the development. When you take over the wells you'll give out either meters or water credits to the developers in exchange.

Mr. Inaba acknowledged that those are typically worked out ahead of time and a developer's agreement.

Commissioner Starr asked what's the typical percentage of meters or credits related to pump capacity.

Mr. Inaba said about two-thirds.

Commissioner Starr so you're giving out two-thirds. So, in other words not 45% but two-thirds.

Mr. Inaba said in a sense it's 45%, I guess because two-thirds is the max like you mentioned. But considering it being 24/7.

Commissioner Beamer said strategies for developing County sources, are you guys looking into other financing options, I'm just wondering are there federal grants available in terms of water quality, when we're dealing with salinity issues in places like Keauhou shaft, how you guys thinking of -

Mr. Inaba said we're trying to work with State Department of Health to utilize Safe Drinking Water Revolving Fund. We do utilize that program quite a bit.

Commissioner Beamer asked if that is something that's been spurred by this process or were you folks already working with Department of Health.

Mr. Inaba said they were already working with them for a number of years.

TESTIMONY:

1. Kaleo Manuel, Acting Planning Program Manager, Department of Hawaiian Home Lands, thanked the Commission for the opportunity to provide comments and some potential recommendations. In reviewing the proposed project description we commend DWS as well as CWRM in including an analysis of traditional and customary practices because those do affect our beneficiaries. But one thing that is missing is all the other public trust uses, one of those is our DHHL reservation which you granted to us in November, so I think it would benefit everyone in this process to include some level of discussion of whether it's in the source strategy program or even the consultation program that's being proposed to at least include DHHL in the discussion because we're not even listed as an interagency partner, in this OHA (Office of Hawaiian Affairs) also has a huge role in advocating for traditional and customary rights, and they aren't even listed either. So, just a friendly recommendation would be to include DHHL and OHA within the scope of this Phase 2 if the focus is truly on traditional and customary rights.

Mr. Manuel said I offered to the Department of Water Supply our agency support in identifying what that consultation would look like, we have beneficiaries that we need to protect their rights, and we will be willing to work with them to identify what that consultation program could look like. There's other agencies, ahumoku, there's another big player in this that's not even listed here, it may be implicit in the idea but it

would be great to see some explicit identification of Office of Hawaiian Affairs, Department of Hawaiian Home Lands in this.

And really one of the things we presented in the November meeting before the Commission is we have this reservation and we're thankful for the Commission taking a proactive step in identifying our water demands but what is unclear is how this Commission as well as Department of Water Supply will protect or enforce that reservation in the context of source development both potable and non-potable in this region. And so some explicit identification or investigation or analysis of how any source program impacts our reservation will be greatly appreciated. We would want to participate in that process because that still has not been disclosed or identified to us. Other than that I think that's the context of the Department's comments at this time.

Commissioner Starr asked, would it be in order to ask our staff, preferably Ms. Ohye if necessary to work with them with some language to address, particularly the DHHL issue because that regulation is in place and that has to be respected.

Chair Case said, if you're going to do it you need to include all the public in this if you're going to be specific as to that.

Commissioner Starr said I'm on it, working on a draft for us.

Ms. Ohye said, thank you Kaleo. So, those are good comments and one thing we could do to address that is under Task 2 we could add separate bullets for OHA and DHHL, that was an oversight and that should be added. Chair Case asked where the Task 2 is. Ms. Ohye apologized that Task 2 is missing in the submittal. She asked to refer to the amended scope of work which is the proposed scope of work. Under Task 2 we have consultation and there's a number of agencies listed there and asked Kaleo, would that address your concern to add OHA and DHHL to that list.

Commissioner Starr said I think there should be some specific language that does make reference to the DHHL reservation and protection.

Commissioner Beamer said, it was made by the Commission, I can't recall of the top of my head the quantity but we did approve in Kona.

Ms. Ohye said it was a reservation and because they are going to be using authorized plan use /anticipated water demand which does include the 3.398 DHHL demand is included in the full demand analysis for which case source strategies will be developed so, we could emphasize that if you want but in the definition of APU and with the County's APU, the full DHHL reservation is included so they will be addressed.

Commissioner Starr asked if that was in Phase 1.

Ms. Ohye explained that in Phase 1 it explicitly included the full reservation as part of the demand to be met in Phase 2 so I think it's addressed.

Chair Case followed up on the public trust purposes comment, you have large elements of it in Task 6 - Environmental and Cultural Issues and I wonder if it's appropriate to have that as opposed to just make sure that this analysis includes an analysis of impact on overall public trust purposes.

Ms. Ohye, "sure".

Mr. Nishimura addressed Kaleo and said, part of the reservation that DHHL had included was the State Water projects. That was kind of the reference for DLNR who's in charge of

preparing the state water projects plan of which OHA and DHHL are in contact. I have no problem; I don't think we have any problem with just emphasizing and as Chairperson Case said maybe it's implied that that would be part of the consultation. That's why maybe the oversight, sometimes might be too close to it.

Chair Case said, I think we're just suggesting some more specific language to call it out.

Commissioner Buck said after identify traditional and customary rights, (comma) and other public trust mandates, (comma) on Task 6 identified as an appropriate place. Chair said that sounds good to her.

Commissioner Beamer said in Task 2 to add two bullets to these agencies, one is DHHL and one is the Office of Hawaiian Affairs.

Commissioner Starr said if we're adding language, I have something I was going to offer as a formal amendment. It might be easy to offer language first. This would be under Task 3 – Source Development Program, and line five begins “the basal sources” and then after “the basal sources.” (full stop) the word “and” is removed the word and the “t” of “the” becomes capitalized. (capital T)…”

Chair Case said, we have three changes to your proposed scope of work. The first is under Task 2 to add DHHL and OHA under specific Interagency Coordination bullets. The second is to add this language to Task 3. And the third is to add and other public trust mandates to the second to the last sentence.

(Following 3 Pages)

12/7/2015

Amendments to TASK 2, 3 and 6 are underscored.

AMENDED SUPPLEMENTAL PROJECT DESCRIPTION

SCOPE OF WORK – Phase 2

Update of Water Use & Development Plan (WUDP) for the Keauhou Aquifer System County of Hawaii

OBJECTIVE:

Update portions of the 2010 County of Hawaii Water Use and Development Plan (HWUDP) to incorporate refinements in County Planning Programs and Policies, and updated information regarding land use, population growth & distribution, and water use and availability. This effort is to be consistent with recommendations of the HWUDP and conditions of adoption of the HWUDP in the Hawaii Water Plan by the State Commission on Water Resource Management (CWRM) in 2011.

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 - State Water Projects Plan project demands and water development strategies
- State of Hawaii, Department of Hawaiian Home Lands (DHHL)
 - Water reservation and source development plans
- State of Hawaii, Office of Hawaiian Affairs
 - Traditional and customary rights
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TASK 3 – Source Development Program

The source development program will include a list of Capital Improvement Program (CIP) projects to be implemented over the next 5-year period provided by DWS, and methodologies and strategies for development of and policies for programming future sources will be proposed. Additional high-level sources will be pursued to reduce the use of the basal sources, in order to proactively address and resolve chloride issues in existing basal sources. The general area and magnitude of these high-level sources will be delineated (the southern region of the Keauhou ASYA between existing Waiaha Wells and KS high level wells).

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The Phase 2 report will be presented to the CWRM at several stages of development for approval, and subsequent to approval of the final Phase 2 report, the Phase 1 and Phase 2 documents will be compiled into a single WUDP report for the Keauhou ASYA. This compiled report will be presented to the DWS Water Board, and then to the County of Hawaii County Council for approval/adoption.

TENTATIVE SCHEDULE

The deliverables for the WUDP Update for the Keauhou ASYA, Phase 2, are scheduled as follows.

Deliverable	Anticipated Date
Source Development Program and T&C Consultation Preliminary Findings	May 3, 2016
Draft Report – WUDP Update for Keauhou ASYA Phase 2	August 3, 2016
Final Report – WUDP Update for Keauhou ASYA Phase 2	November 2, 2016
Compiled Phase 1 and Phase 2 Report – WUDP Update for Keauhou ASYA	December 30, 2016

(end page 3)

TESTIMONY:

1. Jonathan Scheuer works as a consultant for National Park Service wanted to share a few observations under discussion. First of all I want to thank staff, particularly Lenore (Ohye) she got to us, made sure we had a copy of the submittal, knew when the submittal was posted, and had a chance to review it. We definitely appreciate the changes in the reference to traditional and customary rights, the legal term of art, as well as to note this is actually going calculate authorized planned use rather than something else, so I think there's some good progress there. And to also note that the focus on future development seems to be going farther south rather than in the area that's been of greatest concern to National Park Service. So these are very encouraging signs. I do want to really thank Commissioner Buck for his question, that is a really a critical question, is there anything short of designation to control the location in the pumping of private wells. And actually, in this context I think it's significant because the Water Use and Development Plans really, the Commission has previously rejected for instance, Maui had a draft Water Use and Development Plan Section for Central Maui that focused solely on its system, the DWS system. The Commission said no very clearly the Water Use and Development Plans are supposed to look at water as a whole not just county systems. I think that applies to

this update as well and so it's really good the county is looking at its system and the potential impact of its systems on traditional and customary practices, there is still need to look at the potential of private water development outside county control or Commission control and what impact it might have both on the County's ability to develop its own systems as well as traditional and customary practices and other constitutionally protected public trust uses of water. Two other brief comments, I just wanted to note in regard particularly to potential impacts on traditional and customary practices when the Park Service and the County had some discussions encouraged by the Commission a number of months ago, one of the first thing that was put on the table by the County and which we thought we have some point of agreement was this, we're going to stay out of the brackish system. Obviously it's a very sensitive thin fresh water lens, we don't want to go there, I just want to note that this project description actually specifically suggests that we're going to look at the brackish water as a potential water source for irrigation. So it's sort of shift back from in that conversation. I just wanted to highlight that for you. And then the last thing might be worth considering as you guys were having your discussion on replacing current brackish wells with other wells, that there's also an unknown amount, at least unknown to me, number of credits that already been allocated by the County so there's this sort of amount of water that they've already committed to deliver out of their system so it's not just a one for one replacement of a gallon of water out of the Kahaluu shaft to another thing, they also have other commitments that they've already issued and the question is what capacity does the existing system have to deliver those. And you can't really know that until you know how many credits the County is contractually obligated to already deliver with their existing systems. Just a few observations that hopefully will help in your deliberations.

Commissioner Starr stated, I think with the track record of the Commission when they did get Maui to broaden their scope and end up doing a process that's much more the way Honolulu Board of Water Supply works which is an organic approach to the plan. I forget the term they use but it's all the waters, both potable fresh and brackish no matter who was operating them better taken into account and Maui's doing that and Oahu is doing that. And their approaches of doing it on a narrow basis were rejected and cost Maui a lot of money and a lot of time. I would hope that the track record makes a statement to Hawaii that that's the way to go. Whether they're going to really use that approach, we won't know till it starts coming back to us but I think that you know they're here and listening to this discussion and I think they understand the issues, I certainly hope they understand those issues. Do you feel that there needs to be wording to ascertain that, to me that's what we've been talking about for a long time, that it's not just not their systems.

Jonathan Scheuer directed to Commissioner Starr, I think that the description at which I looked but I wasn't thinking about public vs. private context until Commissioner Buck brought up that issue so I would say that the analysis of impacts on public trust uses is really in this project description describing context of the County system alone rather than of potential sources. I don't know if the project description reflects that. I guess the last, sort of for the Commissioners, observation I would have made into this regard I think very highly of the engineering firm that's the consultant but to a certain degree the County's differences have been reflective of the kind of consultants they've hired. Oahu, City and County of Honolulu, hired planning firms, a sort of larger perspectives; Hawaii County hired an engineering firm, Maui on its first run sort of hired a utilities forecaster to do it while that sort of narrow scope and so I think part of the interesting observation I have on this is you're asking an engineering firm to do a sort of much beyond engineering kind of level.

Commissioner Starr asked for comment from Mr. Nishimura or Lenore (Ohye).

Mr. Scheuer said it's just an observation and want to make it really clear, I'm not saying they're not a great engineering firm. They're a great engineering firm.

Commissioner Starr said I think they're great -

Chair Case said I would like to just go back to your questions. It seem to me that it would be beyond this scope of work to cover the private sources, is that right?

Commissioner Buck said, I agree. It's just an ongoing question. More relates to the issue with the National Park and our deliberation on designation but it seems like an appropriate time to ask again as we're doing this source development.

Chair Case asked Lenore (Ohye), one question, to tie in to the National Park's concern, in the list of interagency coordination under DLNR, do you have a tie in here to Division of Aquatic Resources. Do we have Aquatic Resources as part of the consultation process?

Ms. Ohye said, I think it's done through the State Water Project plan, that should encapsulate any of DLNR's source and demands in there and they're going to integrate that. Did you have something specific that you were thinking about with DAR.

Chair Case said the question is on impacts on anchialine pond.

Ms. Ohye said we'll definitely be working with DAR because they are the department's experts on aquatics.

Chair Case said I wasn't sure if it was a sub-element of one of your DLNR bullets.

Ms. Ohye said they will be coordinating with DAR on the task to see if they have any concerns about impacts.

Commissioner Buck said he read in the paper that National Park and the County are no longer having any sort of formal dialogue on the designation. Is that where we're at right now?

Mr. Scheuer said there has been no recent formal dialogue though each of us have been keeping in touch with your Deputy Director and I believe having some productive conversations around that and specifically actually on the question of what can be done to control development of private sources. So we're eager to have an answer.

Commissioner Beamer said I think it's related to Commissioner Buck's question and the way around spacing of the wells and now we're understanding its sort of maybe out of the scope of this particular plan to be able to determine private wells and where they might appear which is unfortunate because we sort of need that information for this other issue that we're dealing with regarding the National Parks. But my question is more another way to consider it is what are the traditional and customary practices in the area and how is it being utilized and I know you folks prepared a report for us and we haven't had a presentation on it yet. And I feel like the Commission should have the opportunity to hear you folks present that report and that might help us to understand at least what are, not the full scope because that wouldn't be under your folks purview but at least what are some of the traditional and customary practices that you folks have identified. And of course the burden's on us to understand the full scope of work in the nature in the relationship but in any case, we have a whole report that I read through that the Commission hasn't heard and I'm just wondering if we're going to an update on that.

Mr. Scheuer thanked Commissioner Beamer and said at the request of this Commission you asked for this update from Department of Water Supply and I believe some other information and asked for us, for a report on traditional and customary practices, as well as our proposed quantification of our water needs, and I'm sorry I have say this, we felt both were sort of placing the burden on protectors of the resource rather than on consumptive users of the resource, but none the less we've prepared both reports and we did not have a chance to

present on either of those so I think at the appropriate time perhaps when we have a clear answer to, is there something that can be done by the Water Commission or the County to control private water development in the area that could be the subject of a presentation to you. We would certainly welcome, we got to the end of the meeting and had like three or four minutes left to consider both of these report so we would welcome that.

MOTION: (Buck/Starr)

To approve amended recommendations.

UNANIMOUSLY APPROVED

2. **Find that Landowner, Kamehameha Schools, Alleged Violated Section 174C-93, Hawaii Revised Statutes (HRS) by Installing a Stream Diversion Works Without a Permit; Request the Issuance of Administrative and Civil Penalties of \$900 Per HRS §174C-15; Approve a Stream Diversion Works Permit (SDWP.3936.2) Application After-The-Fact; A Petition to Amend Instream Flow Standard is Not Required by the Landowner per HRS §174C-71; Update Standard Stream Channel and Diversion Works Permit Conditions Lumaha‘i River, Hanalei, Kaua‘i, TMK: (4) 5-7-003:001**

STAFF PRESENTATION by Rebecca Alakai

Rebecca Alakai, Planner - Stream Protection and Management Branch, reported that this is an after-the-fact stream diversion work permit, Lumaha‘i River, Kaua‘i. The summary of the request is that the Commission find Kamehameha Schools, landowner, violated section 93 of our statutes for water by installing a stream diversion works without a permit; Issue administrative and civil penalties of \$900 against the landowner pursuant to section 15 and the Administrative and Civil Penalty Guideline; Issue a written warning to the landowner indicating that future violations without permits may be considered repeat violations with fines up to a \$1,000 a day per violation; Approve a stream diversion works permit after the fact for a battery of eight intakes diverting about 0.54 million gallons of water per day to irrigate five acres of taro and five acres of banana, ti and luau leaf; Find that the diverted amount is less than 1% of the average annual flow within the normal variability of streamflow and considered an insubstantial modification, therefore a petition to amend the instream flow standard is not required by the landowner under section 71 of our statute; and update the stream channel alteration and stream diversion works permit conditions to state that the project may require other agency approvals regarding wetlands, water quality, grading, stockpiling, endangered species, and floodways.

Ms. Alakai reviewed the submittal information and comments from agencies.

RECOMMENDATION

Staff recommends that the Commission:

1. Find that the Landowner, Kamehameha Schools violated Section 174C-93, Hawaii Revised Statutes (HRS) and §13-168-32, Hawaii Administrative Rules (HAR) by installing a stream diversion works without a permit;
2. Issue administrative and civil penalties of \$900 against Landowner Kamehameha Schools pursuant to HRS §174C-15, HAR §13-168-3, and Administrative and Civil Penalty Guideline (G14-01);
3. Issue a written warning to the Landowner indicating any future violations involving a stream diversion without the necessary permits may be considered repeat violations with fines up to \$1,000 for each day of violation;

4. Approve a Stream Diversion Works Permit (SDWP.3936.2) Application after-the-fact for a battery of eight intakes diverting about 0.54 mgd of water to irrigate five acres of taro and five acres of banana, ti, and luau leaf subject to the standard permit conditions in Exhibit 5;
5. That the diverted amount requested, 0.54 mgd, being less than 1% of the average annual flow is within the normal variability of streamflow and considered an insubstantial modification. Therefore, a Petition to Amend Instream Flow Standard is not required by the Landowner/Applicant under HRS §174C-71 and HAR §13-169-36;
6. Update the standard stream channel and diversion works permit conditions to state that the project may require other agency approvals regarding wetlands, water quality, grading, stockpiling, endangered species, and floodways; and,
7. The Applicant should contact the Department of Health, Soil and Water Conservation District, Army Corps of Engineers, Fish and Wildlife Service regarding their concerns and permit requirements, if any.

Ms. Alakai stated that the landowner and applicant were present.

Commissioner Beamer asked if there would be a presentation.

Ms. Alakai said she had no presentation.

Commissioner Beamer said there's a couple, when I read through it just trying to figure how we handle this as a Commission, and the recommendation and everything makes a lot of sense. I feel like it relates to other issues that we're dealing with in terms of appurtenant rights, and traditional and cultural rights and practices. I'm just trying to determine as a Commission how do we have a family that's cultivating taro in a space that I would probably wager a significant amount that taro was cultivated traditionally, using a new system that probably in some ways more efficient and has minimal impact on the stream. I'm just wondering how do we determine it's not an appurtenant right or traditional and customary practice.

Ms. Alakai said the statute reads you shall have a permit; you shall be issued a permit. That's just what the statute reads.

Commissioner Beamer said if you have appurtenant right it shall be granted your appurtenant right. It's a statutory –

Ms. Alakai, correct, and these are some of the legal, I can't really answer –

Commissioner Beamer told Ms. Alakai that he's not asking her to answer as an attorney. I'm asking you to answer as a Commission. How do we deal with an issue like this? Do we know it's an appurtenant right or traditional and customary practice and I'm just wondering?

Ms. Alakai reported that this is the first of several enforcement actions dealing with stream diversion works, dealing with taro. And as we discussed with staff that if there's no penalty then we lose all control over granting permits because people will divert water with a permit because there will be no penalty. This is the minimal penalty. We just lose all control. And I totally understand the issues with traditional and customary practices and appurtenant rights. But this is, you know I'm not sure if you should say that it's fine for this crop and not fine for that crop.

Commissioner Beamer said, that's not what I'm saying either and asked Dean (Uyeno) if he wanted to jump in.

Dean Uyeno, Stream Protection and Management Program Manager, I think if you need to separate out the appurtenant right issue versus the diversion work permit because we're not denying that they may have a right to the water but the law requires that they still need to get a permit to take that water out because if everybody had appurtenant right and everybody took water without a permit we wouldn't be able to determine, you know, there would be competing uses so we need to be able to manage that. There is a potential for multiple diversions.

Commissioner Beamer said everyone doesn't have appurtenant right though. I'm just trying to think, because this is the first of others and I understand, we don't want to set a precedent to just say anybody can use the stream whenever they want and, but at the same time, I'm just trying to figure out have we thought through this in the adverse. So if there is a taro farmer, been using it (the water), there's a stream. I mean if we go through Hawaii and, I'm thinking about taro cultivation and planting, there are thousands of auwai or manuwai that are put in streams that have been there for a long time, some have been updated, now are we going to go and fine all these users 900 bucks or in excess of that or what's – I'm just trying to figure out our rationale as we're trying to lay out these types of issues.

Commissioner Buck said just to add on Commissioner Beamer I'll vote in favor of this but we are setting a precedent by any action that we take and after-the-fact open violation of a pristine stream which is \$900 I mean that just sends a signal, hey \$900 you already approved it understanding this is dealing with taro. There's a lot of stuff in here and I understand where you're at. So, I will be voting in favor, but it also made real clear to me we need some more work and thought on this and this will not be a precedent because I think \$900 after-the-fact of a pristine stream, it's a slap on the wrist and it does not discourage other people for other uses to do the same thing. They are going to be in front of us as well. I just think it's an ongoing issue that we need to think a little more clearly. So I'll be voting in favor but be real clear that my mind is definitely open in the future for not establishing a precedent for all after-the-fact. You've spent more money on pictures than for \$900.

Ms. Alakai said our reading of the civil penalty was one day or it was every day. And so if you do the math on the everyday we get millions of dollars.

Chair Case said I don't think this really needs discussion but I would just note that half of it is for taro and half of it is for general and diversified ag. So those are two different categories and also the water is not returned to the stream which I was a little surprised about in terms of the practice.

Ms. Alakai said yeah, and the practice is not regulated.

Commissioner Balfour said I'm very, very disappointed in Kamehameha Schools. Quite frankly, I think that they had their fingers burned in Hamakua way back when, they know the rules. The violation, the amount of water does not even show up, not even a blip on a curve when you consider the amount of water. What it was used for was just fine. There's a letter in here from Kamehameha Schools instilling the virtues of the Harada's and I think I mean I don't know why that had to be a problem, I don't think there was any problem there. The problem is Kamehameha Schools knew better and they're getting away scot-free as far as I'm concerned. I find it very disappointing that an institution of that magnitude and that history and knowledge, they would let this get by. If it's an oversight, it's an oversight. If I were the head somebody would be in deep trouble, I guarantee you, for letting that happen. It's just

not right, an institution of that magnitude does something like this and gets away with it. I mean \$900; they drop that money on the floor when they put their pants on in the morning. That's nothing to them. It cost them more to go through all the process of getting the check, writing the check and sending the check, cost them probably more than \$900. It's not fair, it's totally not fair but that's the recommendation, so there's no sense in going back and hashing this all over again but I find it very disappointing.

Commissioner Starr said I'm happy with the resolution of it, not happy but satisfied with the resolution of it and I'm sure Kamehameha Schools is hearing this and will try to be proactive about regularizing this. I do have something that's going through my head and I also heard it from Chair Case and some of it from Commissioner Beamer which is that the idea that the water from the lo'i kalo is not being returned to the stream, I know it's a small amount but still I think there is an attempt to bring back a lo'i kalo and that's something that we try to encourage and I think about the ancient way of regulating that. Commissioner Beamer would know much more than I do about it but I believe the greatest concern on the konohiki was that the water be returned to the stream and kept in a pristine, or as close as that time as they are able to do that, condition and the quantity not be diminished any more than necessary. And I'm wondering if it's the regulatory framework that makes it difficult to return the water back to the stream or if it's just convenience or if it's the tail of the lo'i going into the bananas or what. What I don't want to see in the future is it become difficult for water from the lo'i to go back into the stream because of the NPDES or other regulatory obligations, and if that's the case that's something we need to think about.

Ms. Alakai – the Harada's are here.

Chair Case asked, this comment about the Department of Health standard comment that they don't like after-the-fact permits, why philosophically or legally, why would we not say it's a violation and require the applicant to apply for a new permit as opposed to issue an after-the-fact permit.

Ms. Alakai asked why they wouldn't just apply for a new permit from our side?

Chair Case asked why we would give them an after-the-fact permit as opposed to just a violation of penalty.

Ms. Alakai stated they've been diverting water for fifteen years.

Chair Case said, I know, if they were diverting water for fifteen years without a permit they get a penalty for that, right, you don't have to give them a permit for having done that you can give them a violation and then say the right way to do this is to apply for a permit. We can talk about it more offline but I'm just curious.

Dean Uyeno said frankly the permit is more for recordkeeping purposes to make sure that we get the information we need to go into our system.

Chair Case, again you need that permit you don't need them to have a permit for something that they did for fifteen years they did without a permit. It's like condoning what went on for fifteen years. You're supposed to just say 'violation' and come on in and apply for a permit. Just a little philosophical approach.

Joey Char, Land Asset Manager, Kamehameha Schools, in charge of Lumaha'i, and joining me today is Sierra Boro-Harada who is the co-applicant on the after-the-fact permit application who flew in from Kauai this morning. We do appreciate your time and consideration regarding this matter. I can probably answer one question as to why the

water's not being returned to the river. The lo'i kalo sit above the level of the river so in order to get the water there it has to be pumped up and then dispersed into the lo'i and once dispersed it doesn't return because it's dispersed into and absorbed by the lo'i. Normally, lo'i kalo do return the water but because the lo'i sits above the river, gravity doesn't allow the water to return.

Commissioner Starr said I'm a little confused by that, it seems that gravity would help the water to return unless it's the porosity of the soil.

Commissioner Balfour said it probably absorbs before it gets back to the stream.

Mr. Char displayed a picture and explained that the river is more or less over here below the level of the lo'i so the pumps bring the water up and then through the system of piping that the Harada's have installed the water gets delivered into the lo'i. So again the river is on this side of the lo'i and the water is pumped up and dispersed into the lo'i itself. So the river is on this side of the foliage so you can see that it would come up here and delivered across the land.

Chair Case and then what and then just disappear.

Mr. Char said it just disperses and gets absorbed into the lo'i.

Chair Case said then maybe it's a function of the lower volume of water being diverted.

Mr. Char, so you can see, so the lo'i now is on this side, so the river is below the level where the water is being delivered, it has to be pumped up.

Commissioner Starr asked if that's kind of a dry land variety or hybrid that's – I know what I see in like Ke'anae, if there's not that much water flowing through and it gets hot, there's a lot of problems.

Mr. Char said Sierra can speak to the type of kalo they're growing.

Sierra Boro-Harada said generally speaking we do have a bunch of native and indigenous taro species so we have a lot of kai for eating purposes, bun-long for luau leaves, some palau a purple variety, and there are some hybrids that we do have as well but majority would be the Maui, the original strain, for the most part.

Commissioner Beamer said based off of what I know about lo'i and stuff, the water not returning to the stream I think as Chair Case says it's probably just a function of them using less water than what you would normally use for lo'i given off of that system so -

Mr. Char said then again the water isn't constantly pumping and flowing. They fill the lo'i only when they need it then it just disperses into the land.

Commissioner Buck asked, I wonder if you have any comments on any Commissioner Balfour's observation.

Mr. Char asked which.

Commissioner Buck said that Kamehameha Schools should know better and this level of fine is not really based on your history and your knowledge that it's not really sending the right message.

Mr. Char said I can't speak to the level of the fine, we do agree what the staff's submittal, as far as what's fair, I think, again that's for the Commission to determine and we do support what the staff's submittal is saying. As to Commissioner Balfour's concern I think it's something that - we certainly don't condone not having a permit for it. As soon as we were made aware that there wasn't a permit for this, we applied for it and are now going through the process of securing it. Again, that doesn't condone the fact that it was going on. As to why, it was not the intent to try to circumnavigate the process or do anything out of the norm. It really was just, for the lack of a better term, an oversight. I can't really say anything beyond the fact that we're trying to correct it and we are doing our best to be proper stewards of the land.

Commissioner Buck asked, are we going to be seeing some more lessees now on your land now that you are aware, that you will be coming forward.

Mr. Char said, from his perspective again, it's a big organization; I only manage a small portion of the portfolio. I can say from my portfolio I am not aware of any violation of this sort. I certainly can't even attest to how many farmers we have that are drawing water from the streams, that's not something that I, the scope of my knowledge to think of that, as far as how many farmers we have in the whole organization.

Commissioner Starr said, I have to say that I do feel a concern about the many families who have been continually growing kalo using riparian water along the streams. And that they've been just doing this, they come back to the family land to do it and then getting hit by having to permit it, I don't know if most of the existing taro growers are permitted or if this is something that's going to create thousands of problems for people who are doing what was traditional. I understand why there's a need for the process and the permits of diversions but I also kind of feel like it may be a difficult situation for a lot of people who are not really equipped to do the process.

Commissioner Buck, maybe as a suggestion to Kamehameha Schools is, you know the areas of land that you have lessees that are raising taro and similar to what we have done with endangered species and safe harbors, like a blanket permit for the area because the staff is looking at less than one percent of the streamflow but those all trickle in. It'd be nice to have them all piled up in one so we know what it is but that might be an approach so you could advise your other associates that are leasing land for taro to kind of do the review and kind step back half a step and kind of look at the whole valley and the streamflow and then maybe approach the Commission so it's not a burden on the individuals that are doing the farming but KS can just take care of stuff up front. Suggestion.

Commissioner Beamer said that's a good suggestion Commissioner Buck. Another way I think about this is actually we have a family that's farming taro, using water that was guaranteed traditional use to farm taro. To me that's part of an appurtenant right. And we want to support that. So I think the burden should also be on the Commission to determine, you know, Dean said it's really a record keeping aspect. We want to know the permits to keep records. So we should have a process, I think, to deal with these complex issues of traditional and customary rights, appurtenant rights, that isn't going to set a precedent that we're going to go out and fine people that have been farming taro in valleys historically they've had taro for 900 years that makes no sense to me at all. Especially given the fact that we've visited water systems on other islands and we've seen taro streams diverted by mistaken flumes that are going on, run by private companies that are drawing revenues off water. So I think the burden should actually be on us as the Commission, to come up with a process to support traditional and customary rights and appurtenant rights in ways that don't set up fines for farmers. And, Commissioner Balfour your comment is right. Kamehameha Schools is a large landowner and has lots of lands to steward. Ironically, it was Hamakua

Sugar that built the diversion that they got fined for and that they inherited. So it's a complex thing that we're dealing with but we do know taro and traditional and customary rights and appurtenant rights are part of the public trust and are things that come under the purview of the Commission. So I guess I look at it in a slightly different way that the burden shouldn't be on the large landowner or taro farmer, it should be on the Commission. If we want to document them, we can come up and document them but I'm not sure we want to get into the business of fining taro farmers. But I will support the recommendation as it is in this instance but I do think that that should be something that we try to be mindful of as a Commission because these kinds of issues will come up again in the future.

Commissioner Balfour said I want to make it crystal clear that I have no quarrel with the Harada's. I support them 100 percent. They did nothing wrong in my opinion as a Commissioner. My point is that an institution as big, as powerful, and as rich, and as prominent as it is in the State of Hawaii, to go 15 years and a-yah, mistake. It's a little bit late. It's way late. I just think maybe its manini to you but it's part of the rules and regulations that you operate under and you should have known. You should of, could of, would of. That's my only point. To go after the people, one acre of kalo and taking a little bit of water from the stream. I bet you there's probably a couple of hundred in the State of Hawaii if you actually walked every stream and looked at it. Those people, they've been doing it for generations and I mean, permit, what's a permit. That's long before permits. They didn't know what - the water is mine, I'm using it. So this is strictly a very prominent institution who let something slide for a long time and I think they're getting away scot-free, \$900 fine, whatever. They should have known better and as Commissioner Buck said maybe you better go check out your other ones. If you're responsible, you really need to do something about it.

Commissioner Starr asked Dean, Rebecca and other stream staff here. I'm thinking about all the major taro growing areas of the State, whether its Hanalei, Waimea, whether it's Keanae, Kipahulu, I mean is this going to lead to a real problem for the people who are growing taro?

Chair Case wanted to ask that question in a slightly different way. These comments, I know that we have some issues statewide with unreported, unpermitted, stream diversions. And so in a constructive way maybe this is just an opportunity for the Commission to work with Kamehameha Schools as a landowner- ,who is involved with a lot of these to get comprehensive solution to get some clear permitting and reporting in place.

Commissioner Starr asked could we create a process that's easy and maybe an amnesty situation where we're not going to have to go after, more than the Kamehameha Schools people, I'm thinking about the individual families or DHHL, beneficiaries and so on. Some process can be created that's virtually painless for them would create the recordkeeping.

Chair Case: Dean is going to respond.

Dean Uyeno, chief for the Stream Protection Management Branch for the Commission, said to address the issue of Kamehameha Schools. Actually a few years back, Kaeo Duarte, I'm not exactly sure what position he is in now, when he came onboard as the water manager the first thing he did was to inventory and verify all the diversions on Kamehameha lands. Whichever weren't being used, old leasees that had registered back in the '89 time frame; he took off the books and formally abandoned those diversions. Everything else they maintained. We are still working with them to try to get them reporting and I guess this one fell through the cracks. This one came about Kamehameha Schools applied for IAL (Important Agricultural Lands) designation for the area so that's how that one came about. As far as diversions, so I know there are concerns for other diversions that are out there. Back in 1989 there was a registration process, all the users in Hawaii were asked if they had

an existing use at that time, and were asked to come in to register their diversions. So it was a formal process. That captured, I think, most of the current loi growing areas as well as the plantation systems that are out there now, so pipes, pumps, everything. We do have a process internally that if someone comes in and they're able to prove that they were using water at that time, we'll get them onto the books as a registered diversion and they'll be included as part as the instream flow standards were set back then.

In this case, we have a user that put in pumps, which is a new diversion. It might have been a different case if they were using a traditional auwai. But in this case a new diversion, kind of a new system of farming, new lessees to the land at the time. So that's the cases we're dealing with here.

Chair Case said, so you wouldn't expect there's a large number of these because both Kamehameha Schools process and the 1989 registration.

Mr. Uyeno, correct. We are dealing with this time issue in Na Wai Eha. You speak to the appurtenant rights, over a hundred appurtenant rights claimants all vying for the same source. That's when the permitting issue comes into play; we need to be able to balance those uses. We do have some landowners that once the water was returned to the stream, 'hey, more water, let's put in a pipe.' So now we have to chase these guys down because it's not fair to everybody else who's been waiting in line for their permit. A new landowner comes in and starts taking water that's been restored to the stream that's been fought over. That's why I think the permit system is important to have in place.

Commissioner Starr asked, how about Keanae, Hanalei, or Waimea, are there typically permits in place. Because there's hundreds, thousands of...

Mr. Uyeno said, most of those areas, the diversions were registered and a lot of the large growing areas there's one single auwai that feeds the whole area. So Keanae, one single diversion feeds the whole peninsula. Same with Hanalei.

Commissioner Starr asked, so there's a permit for Keanae, one for Wailuanui.

Mr. Uyeno said Wailuanui is a little more complex but yes, basically all the diversions were registered for a lot of the large growing areas.

Commissioner Beamer said, I value the work Dean and I know it's really... Unfortunately we're kind of building it as it comes along in the terms of appurtenant rights and not everything would be perfect, so I value the work. I do feel like you know even in this instance, Lumaha'i, I know there was taro in Lumaha'i, and we're just saying, assuming there was appurtenant right here. Or the claimant didn't actually make that case so that would be different as well. But in any case, I just feel like given the nature of a native Hawaiian family taking water out of the stream to farm taro we should think through these issues as a Commission because it will probably come up again. And I think even your comment about whether or not it's a tradition in Hawaii or not, we should think about that as a Commission as well. Is that taro farming only regulated to traditional auwai, we have flumes and other things so just as I read this, these are all the things to sort of flush out.

Mr. Uyeno said just to throw another thing out, so we've brought it to the Commission in the past about raising the fees for the permit applications. Right now it's at \$25.00. For ground water; people that put in wells generally can afford to put in wells. We have a different case with surface water where you have a large plantation, company-type system. They can afford to pay the permit fees should we raise it to some amount, we have a different matter with the small farmer, whether it be taro or some other diversified ag, but that's one of those things

we're struggling with is to come up with that scale of application fees. It's just an example, but it's a consideration. For surface water, we deal with a larger range of applicants and what they can afford to pay.

Commissioner Starr said, it's may be a semantic question but do appurtenant rights come into play here because there's a riparian situation where they're right adjacent to the stream.

Commissioner Beamer said, that's just my thing as a Commission we should have a process for addressing that because had the petitioner said we have an existing appurtenant right and showed us some historical documentation of taro cultivation in the area, but we're using a new system to get the water there, I think we would have to evaluate that in my mind. I guarantee there's appurtenant rights to water in Lumaha'i for taro farming. But it didn't come up at all, so it just something, it's on us the Commission to determine that, not Kamehameha Schools as the landowner or whomever. So appurtenant rights aren't only in Nā Wai 'Ehā. You know that right? That's what I'm saying.

Mr. Uyeno, as far as Nā Wai 'Ehā it is the first time dealing with appurtenant rights on a large scale or any scale and we learned a lot and will still be learning how to deal with them as we move forward. In this case though the designation of a surface management area kind of forced our hand into how to deal with appurtenant rights so what we learn out of that, I think, will help to form any future regulations.

MOTION: (Buck/Starr)

To approve staff recommendation.

UNANIMOUSLY APPROVED

Chair Case called for Recess

11:29 a.m. back in session

Chair Case announced that two Commissioners have birthdays today, Mr. Buck and Mr. Balfour.

3. Resubmittal of an Application for a Stream Channel Alteration Permit (SCAP.4271.6) County of Maui, Department of Public Works Kahana Nui Bridge Replacement and Utility Lines, Kahana Stream, Lahaina, Maui TMK: (2) 4-3-005:029(por.) and (083 por.); 4-3-019:028(por.) and 049(por.)

STAFF SUBMITTAL by Rebecca Alakai

The County of Maui Department of Public Works proposes to replace the Kahana Nui Bridge and install water and sewer lines. This application was previously approved by the Commission in 2004; however the permit expired in the process of acquiring easements from adjacent landowners. It's located 300 feet from the shore and it's a standard bridge SCAP. It is structurally deficient and functionally obsolete. They will be replacing the water and sewer lines and then removing the (old) water and sewer lines afterwards. Standard BMP measures are in place. They've contacted U.S. Fish & Wildlife, following county regulations regarding water quality and best management practices. They've asked for a 6-year SCAP permit, due to receipt of funding in 2019, instead of a 2-year permit. They scope of work is the same.

RECOMMENDATION:

That the Commission:

1. Approve the subject Stream Channel Alteration Permit (SCAP.4271.6) application to

replace Kahana Nui Bridge and install water and sewer lines subject to the standard conditions in Exhibit 4.

Commissioner Starr asked Colleen Suyama who is here representing the County. Will the current best management practices at the time when the project is done be followed. In other words, not the ones from the original, whatever they were from that date, but the BMPS at that date when it's done.

Colleen Suyama, Senior Associate with Munekiyo Hiraga, said it's going to be whatever the current BMPs are in place when they initiate construction. So if the BMPs change with the County of Maui as they have in 2004, they will follow the BMPs that are in place at that time.

MOTION: (Starr/ Balfour)

To approve staff recommendation.

UNANIMOUSLY APPROVED

4. Application for a Stream Channel Alteration Permit (SCAP.4261.3) City and County of Honolulu, Department of Design and Construction Flood Control Improvements, Kalauao Stream, Aiea, O'ahu, TMK: (1) 9-8-025:052 and 060

STAFF SUBMITTAL by Rebecca Akakai

Rebecca Alakai reported that Kalauao Stream located in Aiea by Pearlridge. City and County of Honolulu proposes to install riprap to prevent erosion and improve stormwater drainage along Kalauao Stream. According to the consultants, they found native species in the stream, fish. According to DAR (Division of Aquatic Resources) they found native species.

Chair Case said she appreciated that clarification.

Ms. Alakai said its standard excavation. Most of the stream is unlined and they'll be installing riprap. It's a very urbanized area. Current standard BMPs will be followed.

RECOMMENDATION:

That the Commission:

1. Approve the subject Stream Channel Alteration Permit (SCAP.4261.3) application for the installation of riprap to prevent erosion and improve storm water drainage subject to the standard conditions in Exhibit 4.

MOTION: (Balfour/ Starr)

To approve staff recommendation.

UNAMIOUSLY APPROVED

5. G Tree Ranch, LLC; Application For Ground Water Use Permits; G Tree Well (Well No. 3-3308-007), TMK (1) 6-7-002:043, GWUP No. 01010; Paty Well (Well No. 3-3307-026), TMK (1) 6-7-002:043, GWUP No. 01011; Wailua Mauka Well (Well No. 3-3307-019), TMK (1) 6-7-002:043), GWUP No. 01012; New Domestic, Agricultural, and Irrigation Use Totaling 0.276 mgd and Applications For Well Construction/Pump Installation Permit; G Tree Well (Well No. 3-3308-007); Mokuleia Ground Water Management Area, Oahu

STAFF PRESENTATION by Charley Ice

Charley Ice, Hydrologist with the Ground Water Regulation Branch, distributed a handout stating that items B5 and B6 are pretty close to each other and the conditions apply to them are very similar.

Mr. Ice referred to the map, that this is the north slope of Oahu, Mokuleia, and these two properties are in the upland just about the plain of Mokuleia, former sugar cane land. Actually these two properties were previously in pasture and incidental agricultural use in transition to private ownership and the G Tree Ranch, will be applying for raising a number of different kinds of stock and fruit trees. They actually have an application for three different water use permits, one for a well that has yet to be constructed, and two for wells that have been constructed in the past. The total request is for the entire property, a single owner, and initially came in for a unified permit, but since the wells are not going to be operated battery we separated them out. We are processing them together but they cannot operate as a battery so it's permitted independently.

Commissioner Buck asked what is battery.

Mr. Ice said in a lot of cases we see several wells bunched together that function together and they feed the same headworks. This would be true of the County water wells, but these are separate and operate independently.

The total context involves a number of horses, cattle and goats, forty acres of macadamia nuts and ten acres of fruit trees. There will be initially five dwelling units and I think it's seven not six, farm structures.

RECOMMENDATION:

Staff recommends that the Commission:

- A. Approves the issuance of water use permits to G Tree Ranch, LLC for reasonable and beneficial use from the three wells on G Tree Ranch, as follows:

WUP No. 1010 G Tree	(Well No. 3-3308-007) -	65,700 gpd	(0.066 mgd)
WUP No. 1011 Paty	(Well No. 3-3307-026) -	130,200 gpd	(0.130 mgd)
WUP No. 1012 Waialua Mauka	(Well No. 3-3307-019) -	<u>80,500 gpd</u>	(0.081 mgd)
			0.277 mgd

Subject to the standard water use permit conditions listed in Attachment B and the following special conditions:

1. Should an alternate permanent source of water be found for this use, then the Commission reserves the right to revoke this permit, after a hearing.
 2. In the event that the tax map key at the location of the water use is changed, the permittee shall notify the Commission in writing of the tax map key change within thirty (30) days after the permittee receives notice of the tax map key change.
- B. Approve the Well Construction Permits for the G Tree Well (Well No. 3-3308-007) subject to the standards conditions in attachment C.
- C. Defer and delegate to staff the approval of the Pump Installation Permit for the G Tree Well (Well No. 3-3308-007), subject to the compliance with the Hawaii Well Construction and Pump Installation Standards; specifically, the results of the pump testing requirements. The Pump Installation Permit will be subject to standards conditions in attachments D, and any special conditions deemed necessary by staff

relative to the construction and pump test results in protecting the resource or neighboring wells.

Commissioner Buck asked if Mr. Ice said “initially”.

Mr. Ice replied, if you want to look at it totally initially they have three different tenants on this and so each of these is being broken down and going to be permitted separately. So we’re going to get to the point here on page 4 where we break out each of the separate wells and the well owners, tenants, have different aspects of their projects so you’ll see that in the case of the G Tree well they’re looking at horses, fruit trees, alfalfa, one domestic dwelling and 250 head of cattle. The Paty well by comparison is macadamia nuts, more fruit trees, they have actually included stock water on this for –

Commissioner Buck interrupted staff to ask if we could speed – one of these, I’m not quite sure, I know there’s been a lot of community issues and development proposals, maybe not for this land but I know the ones flats yet. I know the amount of water that they’re asking for is not a lot and there’s a lot of diversified ag that they’re saying they are doing, are any of these parcels have been any other in your knowledge applications for development, country estates. One thing I understand we need to deal with the application in front of us is that it’s for agriculture I understand, I’ve been on these pieces of land and not many people make a lot of money doing what they say they’re going to do to improve the value of the land so once they secure water rights then the next thing is a development type thing. So have we ever approved of water uses conditional on a specific permit application and future applications that landowners might have that are not consistent with proposed uses that they have put in right now? Would that be a revocation of the permit or do they have to come back in?

Charley Ice said I’m not positive of what Commissioner buck was asking but thought the idea is representing their plan and that at some point we may be able to see if they are either meeting that plan or not.

Commissioner Buck the specific question is that some time we approved this according to these agriculture uses and five years later they get approval for subdividing one acre country estates or whatever, do we have the ability to put as a condition that they would that would be a revocation of this existing permit or once it’s approved, we are not in the regulatory group at all.

Mr. Ice said the water use permit is for specific purposes and if they are going to change purpose they need to actually get a new water use permit. We would cancel the old one.

Commissioner Starr said he has some concerns because these two wells will basically use up the last of the sustainable yield for that aquifer segment of the area and knows domestic uses are generally of a public trust use but this kind of feels to be a very lush, gentleman’s estate subdivision kind of thing, you know, and it becomes problematical if, you know, kind of a compelling use comes on at a later date. There’s not going to be anything left to allocate. You know, domestic use does certainly cover subdivisions for, you know, second houses, you know, for some kind of resort community or something. He didn’t really know how to consider those factors.

Mr. Ice said this has been a long standing issue I think all over the place. You may be thinking of another project, which had a public hearing not too long ago.

Commissioner Buck said, not these but I’ve been on these ranches before.

Mr. Ice said it’s in the neighborhood and there’s a lot of controversies regarding that one.

And it's interesting when they first came to us talking to us how they would proceed they told a different story than what they ended up telling to the public. Those things change, those projects change little bit. This is currently ag zone. It currently does meet the standard the County has been asked to weight in? They have responded in kind.

Commissioner Buck asked if the applicant is here.

Mr. Ice said he didn't believe so and could also address the question of sustainable yield a little bit more in depth?

Chair Case asked who was working with the applicants.

Mr. Ice said Mr. Kelly.

Commissioner Starr asked if this was a permit broker kind of guy for both projects.

Mr. Ice said no this is just for the G Tree Ranch, which has three different water use permit applications and one new well. The Paty well is owned by Randy Paty and the Waialua Mauka Well was drilled some time ago. So these were separate projects originally and it's been assembled now under the G Tree Ranch. Mr. Ice mentioned that the allocations out there are not being fully used. The total amount of uses is a very small fraction of the actual allocations out there. And when you look at the water use permits that exist right now there is fairly sizable chunk to Dillingham Ranch Aina and the North Shore Water Company which actually was the subject of Commissioner Buck's earlier questions. They have allocations already outstanding and they are using much water at all. They actually have pending applications for a little bit more than this but at this point those applications are incomplete and I know that the project seems to be stalled with the approval process with the County.

Commissioner Starr asked what the process to take some of that back to the previous owner. Is that Dole?

Mr. Ice said we had actually hired someone to go into the field and to inform all the different landowners how to file for their water use reporting and how to get up to speed with all those different things so when we send a letter out which is the next step as to the plans to update us where the status of their plans are we foresee that there's so much disuse or non-use that we expect that we would be revoking in part or in whole many of these permits that you see there now. So the actual use now is a very small fraction and the part that is not being used is all subject to revocation.

Chair Case asked if there were other questions.

Commissioner Buck said I have some concerns about the next two items. Part of it where we are part of a development process and I'm not saying it's good or bad but so we have the ability to approve a permit but based on any zoning change or any change in use of the land that permit can be revoked.

Charley Ice: yes

Commissioner Buck asked is that something that you can consider, I don't see that in the recommendation. On this island you have these large blocks of land that are owned by consortium of people, we know ag is a tough financial sustainable especially some of the crops that they are saying, the size that they're saying, it's just not penciled out in the long run. It just doesn't pencil out. The process will go but I'm wondering if you considered when you get these applications and the errors that you know there's some dialogue going on

development have you ever put in some sort of permit regulation, if any change in land use or additional houses will be cause for revocation of the permit?

Mr. Ice said, well there is a requirement that if they change that's part of the requirements of the permit, if they change the use they must reapply.

Commissioner Buck asked, change the use according to the county zoning or –

Mr. Ice said the use that's being applied for here is presented in page 4.

Commissioner Buck, I understand.

Chair Case asked, this is five dwelling and six farm structures and stock water, irrigation for forty acres, mac nuts and ten acres of fruit trees.

Mr. Ice, yes, right. That is what is being presented.

Chair Case said, if that changed to forty houses...

Mr. Ice said so if there's a subdivision they would need to come back for a new water use permit.

Commissioner Starr asked, even if it's categorized as domestic the specificity would remain with the entitlement.

Mr. Ice said also of course if there's a change in the TMK they need to be able to notify us on that. So if this thing comes up in that context we have another bite at the apple but you're right, I've seen this too. I've worked with City and County task force on ag development we wrestled with this quite a bit and the gentleman estate question and it's very hard to get a single set of requirements that would apply universally. So the County is really struggling with this.

Commissioner Beamer asked, how will you be notified is it they would have to notify you or is there some how do we get word of it in the process –

Mr. Ice they would have to notify us and one of the things that we do is we're watching the water use reporter and so when there's a change in the water use reporter, we have to kind of update them and at that point we usually pick up on a new ownership. That is something of an issue since although it's required on their permit the truth is we don't always get notice and we sort of end up getting word of mouth and so on, and so we follow up on that anything we learn about.

Chair Case said, the flip side is a) a use for this purpose and b) a legitimate use.

Commissioner Buck said, I don't any problem with that. I'm a little concerned that the applicant's not here. I would just like to hear from them. I kind of would like to have specific condition that the onus is on them to notify you of any sort of change or something. It's just I think everyone around here knows what's going on at this time and I don't deny they'll start with that but I know it's not the end. I don't know if you have any language that you could add in for specific recommendation that would address our concerns.

Mr. Ice said because it's one of the conditions of their permit, if they were to violate it then we could –

Commissioner Buck said I understand but that's buried into attachment B number -

Chair Case said so you're proposing an amendment to sort of reiterate the general condition that says if there is a change in use or ownership the applicant has an obligation to notify the Commission.

Commissioner Buck and the Commission may reconsider the water use permit, or something. I just think it's an important issue. I don't want to hold it up.

Chair Case and the Commission can evaluate whether the permit uses have changed sufficiently to negate this. You're trying to call attention to that, it's in here but you're trying to highlight it.

Commissioner Buck said especially in regard since the applicant's not here that we could ask are there any future plans. That's problematic. I would be more than happy if we could defer it. I would like to see something in the specific staff recommendation not buried in attachment B, number 13 concerning -

Roy Hardy, Program Manager for Ground Water, said in attachment B, condition 12a -12b, those are standard conditions. We take it for granted already, that's where we get into this thing about transferring to a different person. Also, that the conditions of the permit include but not limited to the place, quantity, and the purpose of the use must remain the same. And that's what we highlighted. And everything in the submittal is also incorporated by reference in condition 18, so the breakdown on page 4 is listing by TMK the type of use and the units and the duties used to justify by amounts. So we track this now by TMK and we also usually have special condition that if a TMK changes we need to be notified if they subdivide because that affects the place.

Commissioner Buck said we just heard from Charley that historically you're not sure you get all the notifications. It's not very really clear that we want to before we approve this we want the people that hold this permit to be responsible for going back to us.

Mr. Hardy agreed.

Mr. Ice, I think Commissioner Buck is thinking we might highlight that and the special conditions in the recommendation.

Chair Case asked I wonder if you could actually accomplish this by highlighting the section 12b and below. Highlighting it in the return.

Commissioner Buck said something to call attention to it because I know it's not the final land use pieces of land.

Mr. Ice said insofar as the process is, we have someone in the field who's going to be helping people learn how to do water use reporting online. And that's a tool for us to begin to the point where we can also begin to enforce water use reporting and we can begin to enforce everything so the enforcement capacity that we have is improved a little bit and actually for the most part we find that people really want to cooperate with this, they feel like what we're doing is the right thing. They want to be part of that. It's more the exception that people kind of miss out or forget.

Commissioner Buck asked did you ask the applicant or suggest that he might want to attend this meeting.

Mr. Ice I think they receive a notice that say they will be on the agenda and they are welcomed to attend.

Commissioner Buck asked you never talked to them?

Mr. Ice, no I haven't.

Commissioner Buck said I know historically I don't even know Kaala Ranch was a consortium of dentists that owned that. Because I know we used to access to get up to there all the time. They were raising goats. They weren't that very active. I don't know who's the current owner or changes I just -

Mr. Ice said I think the Kaala Ranch has other properties as well as the particular one NB6.

Commissioner Buck I don't want to drag this out.

Chair Case said I would suggest when you if this was approved and submitted, you highlight paragraph 8 and paragraph 12b and the paragraph below.

Mr. Ice asked you speaking of conditions?

Chair Case said yes the standard water use permit conditions that have to do with use and change in ownership. 12b and the paragraph below it, and 8.

Deputy Jeff Pearson said it could be in the cover letter too.

Chair Case said to highlight it in the cover letter. What you don't want is somebody to go ahead of a bunch of plans and then they come in with this thing kind of done and there's extra pressure to approve a change in use.

Commissioner Buck or they go and submit their plans for change of use and say we already have water and another body oh, the Commission just gave you all the water they needed.

Mr. Ice that's an interesting point too because we don't necessarily get a request for review on those County approvals in which case we would highlight it.

Commissioner Starr I am kind of disturbed that they're not here and can't hear from them. I know it occurs that sometimes the applicant doesn't even know it's put on the submittal it's going through a consultant, a broker and stuff like that and I think perhaps we might want to put it off.

Chair Case said I guess in terms of process they don't have to be here. They don't have to be here and what we're talking about is a situation that we're concerned about but so far they're applying for legitimate uses so what we're trying to do is make sure the applicant knows that any change in uses is not permitted under this without a new permit.

Commissioner Buck said I would like to just see that statement in the recommendation, any change of use is not, what you said.

Chair Case any change in use is not -

Mr. Hardy said we can put it in there; we can put it in the cover letter.

Commissioner Buck as well as in the staff recommendation and having it buried in no. 18, attachment B just doesn't draw attention.

Mr. Ice said I'd like to amend to give it a number 3, a 3 and in the recommendations in case of change in those cases number 8, 12b and paragraph following below and number 18, not required to notify.

Commissioner Buck no that this permit is not valid for any changes in use.

Chair Case or any other use. Highlight it in the conditions, add a sentence in the staff recommendations in A3 and put it in the cover letter. A3, you are adding a section 3 under A in the recommendations?

Mr. Ice a number 3, yes.

Chair Case and so how will that read? Anybody wants to suggest a sentence.

Chair Case asked if Mr. Buck wanted to suggest a sentence.

Commissioner Buck, no it's my birthday and didn't want to.

Chair Case said as a birthday present she would start it.

Commissioner Buck thought we were there.

Chair Case said we should have language that we should be voting on right now. So that would be –

Mr. Ice what we might do is simply state the entire condition.

Chair Case, yeah.

Mr. Ice put the words in the condition.

Chair Case I wouldn't say it as an A3 because that's not a special condition.

Commissioner Buck said this is the same issue for B6. Maybe we could move on to some other item and the staff can come up with some language. I think they heard what we wanted and bring it back at the end of the meeting.

Chair Case said the next two items are updates, it might take a while.

Chair Case said a) I would add before the subject I would say this permit is only to supply five dwelling units and six farm structures, stock water, etc. for irrigation, etc. Any change in use invalidates the permit and requires a new permit.

Commissioner Buck said perfect.

Roy Hardy just for clarification, are you saying that the types of crops are only limited to that or ag, ag. It's always something before the Commission for agriculture use is agriculture use. So are you going so far to say that, that they are limited to those specific crops listed?

Commissioner buck didn't think that was necessary.

Chair Case said the permit says to supply five dwellings, six farm structures. So what we could say is this permit is only to supply five dwelling units, six farm structures, stock water and irrigation. Any change in use invalidates the permit and requires a new permit.

Commissioner Balfour when you talk about animals when you talk about goats, cattle, horses, sheep, all four per capita have different allowances so you can't cover every eventuality.

AMENDED RECOMMENDATION TO INCLUDE:

This permit is to supply five dwelling units and six farm structures, stock water for irrigation, etc. Any change in use invalidates the permit and requires a new permit.

To highlight in the Standard Water Use Permit Conditions, Attachment B:

8. Any modification of the permit terms, conditions, or uses may only be made with the express written consent of the Commission.
12. A permit may be transferred, in whole or in part, from the permittee to another, if:
 - b. The Commission is informed of the transfer within ninety days.

Failure to inform the department of the transfer invalidates the transfer and constitutes a ground for revocation of the permit. A transfer which involves a change in any condition of the permit, including a change in use covered in HRS § 174C-57, is also invalid and constitutes a ground for revocation

MOTION: (Starr/ Buck)

To approve amended recommendations.

UNANIMIOUSLY APPROVED

6. Ka'ala Ranch, LLC; Application For Ground Water Use Permit; Pietsch Well (Well No. 3-3307-030), TMK (1) 6-7-003:009, GWUPA No. 01013; New Domestic, Agricultural, and Irrigation Use Totaling 0.462 mgd and Applications For Well Construction/Pump Installation Permit; Pietsch Well (Well No. 3-3307-030) Mokuleia Ground Water Management Area, Oahu

STAFF PRESENTATION by Charley Ice

Charley Ice said that B6 is very similar to B5 but in this case the applicant is Kaala Ranch, Michael Peach, 40 acres each of avocado, coffee, citrus, and lychee, 1-1/2 acres turf and stock water for 100 cattle.

Chair Case this says six dwelling units, so is this something where the property could be subdivided into six parcels and associated stock water irrigation. Is this what you're talking about just a scale of six rather than 40.

Mr. Ice said at this point there is just one TMK, one property, and if it were subdivided it would incur this notice requirement.

Chair Case said noticed but permit still applies?

Mr. Ice said if they fail the notice the change it invalidates the permit.

Chair Case in regard to the question about are we turning both ag land into gentleman's farm. So if they notify you but they subdivide the property into six sub parcels then they've created six small farms.

Mr. Ice so you're saying if they have the same us but they said the rearranged the values that would be a change also under standard condition 18?

Chair Case said the way this is worded allows one property to turn into six small farms.

Mr. Ice, yeah.

Chair Case which is true of the previous one as well.

Mr. Ice, right.

Chair Case that was five. So you're taking one property and turning it into five small farms.

Mr. Ice said potentially.

Chair Case it's happening at that scale.

Commissioner Buck, first step.

Chair Case so to authorize it now, you're authorizing that first step, but not any further sub divisions. You're authorizing taking a parcel and turning it into six.

Mr. Ice perhaps we should amend the language a little bit further upon the suggestion to include not only any change in use but any change in sub division or TMK.

Commissioner Buck said the notification doesn't say you would have any effect on the permit.

Mr. Ice the language we had suggested was that this permit is only to supply those particular uses on the application. Any change in use, and I'm also going to suggest also any change in TMK invalidates the permit and requires a new one.

Commissioner Buck I don't see that in the recommendation.

Chair Case said he's recommending that now.

Chair Case said your general conditions require approval for sub division.

Mr. Ice said it again.

Chair Case under your current authorization, if somebody has authorization for six units there's one parcel and they turn it into six parcels, did they get a valid permit to –

Mr. Ice said if there's a change in TMK they have to reapply.

Chair Case where's that language.

Roy Hardy said no and pointed out Special Condition allows TMK changes.

Commissioner Buck yes, to allow it but all you have to do is notify it doesn't say anything about impact on permit.

Chair Case said both of these, I'm not saying it is or isn't okay, appreciate advise on that but I just want to recognize that's what's going on.

Commissioner Buck said I would like similar language that we put in B5 to be put in B6 and again it's hard because the applicant isn't here.

Chair Case said the language in B5 doesn't cover this issue. It doesn't cover the sub division issue. It doesn't cover the fact that a parcel can be carved up.

Commissioner Buck said it's actually under our jurisdiction.

Chair Case, correct. I'm not sure it does.

Commissioner Buck said I'm comfortable with what we put in B5 then if anyone has issues they can refer to this and it's if the water is still in play based on approval.

Chair Case said, basically we can approve in B5 and we can approve in B6, is to make sure the applicant knows you can't change the use but we are already approving five dwellings and one in one case and six dwellings in the other case. So that turns it into -

Commissioner Buck said we're not approving it, if they have to go through another body to sub divide that's not our kuleana. We're just don't want to make out approval of our permit to these described uses as a platform for them to come in and say look we have the water therefore we can't on the fly we're trying to come up with some language. The current staff recommendation, I don't think it's adequate, we tried to improve B5. I'm happy with the same language in B6 and I just ask staff to be cognizant of these areas, spend more time, and especially encourage the applicant when these kind of permits come in, if they could show up that would be helpful.

Mr. Ice yeah certainly whenever they call in and I'm talking to them I encourage them to do that.

Commissioner Buck and if for some reason they don't want to be here.

Mr. Ice we are required to send a notice that they are on the agenda. We don't necessarily talk to them directly, you're right.

Commissioner Buck normally a proposal of this size its implications usually the applicant shows up.

Commissioner Starr I have some time constraint and I know we have some real important stuff to do so either we could just defer or do something real quick.

TESTIMONY:

Kaleo Manuel with the Department of Hawaiian Home Land said, our letters have kind of started to address some of these things that you guys are discussing and so maybe a recommendation for us is always attaching the actual water use permit application to this document in that you can see the intent or lack of information presented. In our reviews that we get on the pre con on the applications a lot of the responses to our item section G which is design for interference with DHHL rights simply says none or not applicable which shows like almost no intent in our perspective to address those public trust uses. Maybe that could be one way address some of the concerns we discussed. Appreciate the conversation about gentleman farms and dealing with those kinds of issues but if the application isn't providing enough information may be asking for further detailed description of what intent. Maybe something you might want to consider doing. Just a friendly suggestion, I'd also would like to recommend that our letter be attached as an exhibit versus staff's interpretation of what we submit to the Commission as our comments on these water use applications cause it's not here in totality and we would be more than happy to provide that letter to you guys, and lastly, the

form and we had this in our letter is outdated but the actual number to contact us is way old, Alii Place and in our letter we asked that it be amended and I checked yesterday and it's still the same form, same number. I just went on line last night just to double check. Those are all comments that we've been submitted to be just to improve efficiency they can call us, talk to us but just those things were recommendations to all those letters.

RECOMMENDATION:

Staff recommends that the Commission:

- A. Approves the issuance of water use permits to Ka'ala Ranch, LLC for reasonable and beneficial use of 0.462 mgd of potable ground water from the Pietsch Well (Well No. 3307-030); subject to the standard water use permit conditions listed in Attachment B and the following special conditions:
 1. Should an alternate permanent source of water be found for this use, then the Commission reserves the right to revoke this permit, after a hearing.
 2. In the event that the tax map key at the location of the water use is changed, the permittee shall notify the Commission in writing of the tax map key change within thirty (30) days after the permittee receives notice of the tax map key change.
- B. Approves the Well Construction Permit for the Pietsch Well (Well No. 3-3307-030) subject to the standards conditions in attachments C.
- C. Defers and delegates to staff the approval of the Pump Installation Permit for the Pietsch Well (Well No. 3-3307-030), subject to the compliance with the Hawaii Well Construction and Pump Installation Standards; specifically, the results of the pump testing requirements. The Pump Installation Permit will be subject to standards conditions in attachments D, and any special conditions deemed necessary by staff relative to the construction and pump test results in protecting the resource or neighboring wells.

AMENDED RECOMMENDATION TO INCLUDE:

This permit is to supply five dwelling units and six farm structures, stock water for irrigation, etc. Any change in use invalidates the permit and requires a new permit.

Chair Case said right now we have a recommendation that we add the same line from B5 to B6, are you comfortable with it?

MOTION: (Starr/ Buck)

To approve amended recommendations.

UNANIMOUSLY APPROVED

Chair Case stated, we can do Well #17 this afternoon or we don't have anything on February 16 agenda right now, we can do them both today or we can defer Well #17 to February 16. You good with that?

Deputy Jeff Pearson said I was considering announcing that there's nothing on the agenda as Chair said for the February agenda. We want to bring the Well #17 on the February agenda.

Chair Case, Do Red Hill but not do Well 17 today.

Commissioner Starr my only question is if we're going to take any action on Well 17

Molokai stuff, I feel like we need to go to Molokai before we do that but if it's informational and that information can be shared with the community then is fine for us to receive it here.

Deputy Pearson said this is considered a response to the request by the Commission for a better, more detailed update, so it's not an action item.

Commissioner Starr said he was good with that for the next meeting.

Mr. Ice said that the Commission has a couple of the handouts, one is a detailed timeline which of course doesn't include everything.

Deputy Pearson said the commission will have more time to study.

Mr. Ice said the power point is self-contained although it allows us the opportunity to discuss it. So the Commission can absorb some of that before the next meeting.

Kaleo Manuel wanted to request and on behalf of our beneficiaries that have been active in the water discussions on Molokai, that if you're not going to be on Molokai discussing and sharing the history of this case they would like to participate at least via teleconference or some way to communicate their history of this case and not just purely from CWRM's perspective. And that's something our beneficiaries asked for and we just want to extend that if that's possible in any way, shape or form to do some kind of teleconferencing to Molokai if you're not going to be there they have the opportunity to listen in at least and participate in that discussion.

Commissioner Starr, can we go there? I don't know how many years it's been since the Commission's been on Molokai. I think it's been decade, two decades, a long time.

Deputy Pearson said it was tentative when the information for the model came out that it would be a – I was going to call it a “working group” – a public meeting to share the information when the model's coming out and of course I don't have the detailed schedule when that model's was going to come out but that was the thought the next time we go to Molokai but of course that could change. That was the tentative schedule.

Chair Case for this we could try to set up a Web Ex so people from Molokai can listen in.

Deputy Pearson said we can do that.

Kaleo Manuel we can offer our facility or coordinate on our end to make sure that there's space on Molokai or we can help you guys with organizing that if that's something you need assistance with.

AG Deputy Linda Chow said we need to check because if we're going to do it to Molokai then we might have to open it up to all the counties.

Chair Case we'll try.

Commissioner Beamer said I know you mentioned this in other instances but I think it would be great to Web Ex to all the counties, I continuously get requests from people on Oahu call the neighbor islands to try to be involved in our meetings, so we support that.

Deputy Pearson and we need to accommodate testimony too right?

AG Linda Chow, yes.

Update - Item C. 1 was deferred to February 16, 2016 Commission meeting.

1. Briefing on Kualapai Ground Water Management Area, pending Ground Water Use applications, and status of Contested Case Hearing CCH-MO-97-1, Well 17, Molokai

C. UPDATES

2. **Red Hill Updates, Moanalua and Waimalu Ground Water Management Areas, Oahu**

Jeff Pearson, Deputy Director, Water Commission, I didn't plan to come up here to do much of a presentation on Red Hill. I just want to begin the discussion that a draft letter was provided by one of our Commissioner Mr. Buck, it's here in hardcopy and it was sent by email to the commissioners and hopefully you had a chance to read that prior. The second item that should be discussed related to Red Hill is non-disclosure agreement that the Navy asked the Water Commission staff to sign. If you are aware of the AOC and the statement of work, there's issues in the statement of work that they have asked the Water Commission to review reports, I think it's a total of four reports that they want the Water Commission to review at certain stages, review, comment, prior to any of us looking at any of this information they want us to do a non-disclosure agreement (NDA). Deputy Attorney General Linda Chow worked with the Navy Counsel to revise the non-disclosure agreement that they provided to us to make it better meet the requirements of the DLNR, she can go over those in details in greater detail. Another issue with the non-disclosure agreement is that it's provided to be signed by the individual so if there's ever any liabilities associated with this that the individual could be liable as opposed to under the umbrella of the Water Commission. Beyond that I think I'll let Linda (AG Chow) talk more in detail as needed or questions may be better directed to Linda on the non-disclosure.

Commissioner Starr said what he thought he was hearing is that a non-disclosure agreement will be signed by certain members of staff which mean they will be working still as representing the State Commission on Water Resource Management but they will not be able to share that information with the members of the actual Commission.

Deputy Pearson correct and the term 'that information' that's the key. I don't know exactly but maybe again Linda (AG Chow) can give you better details on what could be shared and what could not be shared. I understand just recently that the Department of Health reviewed this revised non-disclosure agreement and they have issues, I don't even know if our Attorney General knows the details of the issues, but they have issues that we weren't aware of until yesterday, I think, on this revised non-disclosure agreement.

Commissioner Starr I also understand that the Board of Water supply rejected it, did I hear that correct?

Deputy Pearson I think we can let that take place in testimony; Erwin Kawata and Ernie Lau from the Board of Water Supply are here. I think they expected to testify in some manner so if that portion comes up I think it would be better to hear from them.

Commissioner Starr I know I've read it but I don't know if other Commissioners have actually seen a copy of this.

Commissioner Buck can we back up a little bit before we get into the weeds of the NDA.

Deputy Pearson maybe I'll step back and then I can allow you to travel the path you want to

discuss this.

Chair Case the first thing is this letter.

Commissioner Buck said this letter was drafted last November and this was after we sent in an official letter in July on our comments on the AOC. The AOC was approved and I wrote this letter after that based on comments. I've been trying to think about what is our role as a Water Commission reviewing this issue. So one thing really important, we should get on record what we think of the AOC. That memo dated November 18 is what you have and it's up to the Commission if indeed they want to send a formal record. That's one issue. The second is I visited the Red Hill site and I strongly every commissioner to do that if you haven't had the opportunity. The AOC is now the AOC. That is the venue. We do have the military at the table now, I'll be perfectly honest that I've been somewhat disappointed that Department of Health has never come in and talk to us. They are our representative at the table and I think the role of the Commission now is how do we monitor and facilitate the implementation of the AOC because that is the vehicle that we have. I was very impressed with the facility, the strategic importance is without a doubt, the actual risk to the water is also not in doubt, and I'm happy to share with the Commissioners an audit that the Navy took of their own facility in 2010, which is very clear that they had leaks throughout, their maintenance schedule has not been adequate, they don't know the impacts, it's very clear in their own audit and I can send that to all the Commissioners. And now we're dealing with the NDA. I think the role of the Commission is to help facilitate in a transparent way the implementation of the AOC. Our member on the board Department of Health has never briefed us on their plans on how they plan to represent the State's interests and I think that is-

Chair Case we/they haven't asked for it.

Commissioner Buck they haven't been here for the last six meetings. I understand a lot of issues. And now I look at the NDA and that further one of my comments is that the lack of transparency, they only have annual public meetings, that's one of my concerns. Now the NDA I have trouble thinking how our staff can brief us and inform us if they sign this thing. I also know in talking to Mr. Lau that he had some recommendations on the NDA on how to be a little more specific and those comments were not received in a positive manner. The two big issues for the NDA are security and procurement. The security issue I understand and there's definitely a way to deal with that. The procurement issue in two years you're supposed to come up some supplemental technology or how they plan to it. Under the procurement issue they can hide almost everything. And so based on the AOC and the lack of I think transparency in that followed by the NDA to the staff, I have some real concerns about how we, as the Commission, can help the implementation of the AOC. The military has its priorities. I really believe that there's a role so my suggestion is 1) so if the Commission at least get on record of what they on the AOC there is a draft document for your review, 2) I would like to request the Department of Health to come and brief us on their perspective on how they plan to represent the State's interest in the implementation of the AOC. As Commissioner Balfour said it's not a matter of if the tanks leak, they're already have been leaking, it's well documented, they will continue to leak in spite.

And, you haven't seen it; tank 5 leak is 27,000 gallons that's 3/8 of an inch. That's a tank that's 200 feet tall. The value to strategic reserve is enormous. The risk is enormous. Ernie (Lau) told me they're going to be spending a half a million dollars a year to just put in monitoring wells on the west side to assure that water doesn't leak. These are kind of costs that I don't believe the Honolulu taxpayers should have to pay for that kind of risk. So that's kind of the context I would recommend the Commission approve and get on records of the stats on the AOC and ask our member, Commissioner of the Department of Health to brief us

to come and brief us and I also urge the Commission staff short term not to sign anything. Until we have a better clarity of how we plan to implement the AOC.

Commissioner Starr asked I like that letter and I will certainly will support that coming Commission action but is there more that should be added to it before it gets sent out. You know, in mind with what you just said.

Commissioner Buck said he wrote it about three months ago, I haven't changed it, I think the signing of the NDA adds a whole other perspective on it and again I want to hear, we're being represented by the Department of Health and we have not heard yet of their own perspective on how they plan to implement, how they plan to have public transparency. So depends on how far you went but I think the AOC is the AOC. I believe it should be on record that it's the final.

Commissioner Starr is there a step further we could go right now today. Is there anything you might want to add to this letter or should we just go with it and look for additional action next time.

Commissioner Buck I'm happy to go with it. Again, I would love to hear, how are the State's interests going to be represented, this is going to be a 20 year process. The Department of Health is the agency sitting at the table representing our interest; the military's not representing our interest. The Department of Health is especially in the context of the NDA. They do not have to sign it because they are party but there's lots of things going to come out and if our staff is afraid to even talk to us about what they know, how can we as Commissioners do our job.

Commissioner Beamer I support Commissioner Buck's letter and his suggestions that our staff don't sign any non-disclosure agreements and I think when Gary Gill was involved with Department of Health I remember a little more regular updates so Commissioner Buck is spot on and we should get updates that the interest of the Commission is being represented by Department of Health and we're not aware of what's going on. So I'm completely in support as well.

Commissioner Starr I feel similarly. I'm really looking forward to hearing from Board of Water Supply because I respect their position on this and would like to hear what they're thinking.

TESTIMONY:

Ernie Lau, Manager and Chief Engineer of the Board of Water Supply, thanked the Commission. I'm here today at the request of the Chairperson Case and available to answer any questions regarding the situation Red Hill AOC and some of our thoughts initially on the non-disclosure agreement, where would you like me to start.

Chair Case stated the non-disclosure agreement.

Chief Lau said this is first time I've actually had a chance to review it the version that's been negotiated I guess by your Deputy Attorney General Linda (Chow). I used to work at DLNR. I just want to say that this is just my non-legal thoughts initially just on seeing this just a few hours ago. Basically if you look at the draft NDA that's before you paragraphs one, two and three seem to be almost nearly identical to the Navy's version that was put out, also the fifth paragraph, it looks like the fourth paragraph and the last paragraph which somewhat new items that were added to the NDA of the version that put forth by the Navy, assuming that it's the same version that the Navy put in front of us. We had discussion between our legal counsel and the Navy and ourselves about some possible changes to their version. First of all I just want to make it really clear. The administrative order and consent that was signed September of last year does not limit the

participation of subject matter expert such as the Commission Water Resource Management, the Honolulu Board of Water Supply or others, I understand that the USGS has been approached also, to have to, the only way to participate is to signing on to this non-disclosure agreement. Clearly, maybe the attorneys can correct me, I'm an engineer not an attorney, but under attachment A of the AOC which is the statement of work, section 1.1 subject matter expert involvement, it clearly states here that the parties shall take action, the parties being Department of Health, DOA, the Navy and the EPA, that the parties facilitate sharing their information with subject matter experts such as establishing confidentiality agreements such as the NDA and/or providing redacted reversions of documents as necessary to address procurement integrity and security concerns. So it appears at least from my read on this that going down the confidentiality agreement broadens 1) opportunity, one avenue of participation, there's also the participation through just receiving redacted information. We won't see everything but we could participate by looking at redacted information and I just want to inform the Commission that as far as I know there's a week of scoping meetings between the parties held in the first week of December. And actually we received an invitation from the EPA to attend a separate meeting even though we did not sign a NDA on December 3rd. And we spent an hour and half with both the Navy, Department of Health and EPA and their consultants and we were able to provide input, even written input to the scope.

That was actually a good discussion. They informed us that they might follow up with some written follow up questions and I told them we'd be glad to participate through that process. So I just want to point that out. That's an important thing to consider the confidentiality agreement is not the only way SME or subject matter experts can participate here. They allow for another way.

For BWS, we are very concerned and had discussions with my Board as recent as this week Monday with the Water Board regarding the non-disclosure agreements and my Board has somewhat mixed position on the NDAs. I think they agree with my approach on being very cautious. I told them I was coming to this meeting so I wanted to see how the Water Commission's going to deal with this issue. First before to sign the NDA. We did suggest some amendments to the NDA to better define or narrow what might be considered confidential. We actually inserted language right out of the AOC, section 10D on page 17 of the AOC, we basically took that almost verbatim there. If you look at, I'll read that to you really quickly here – in particular last section of D. Navy and DOE agree not to assert such claim with respect to any data (the claims being the claims of confidentiality). Navy and DOE agree not to assert such claim to any data related to site conditions, including but not limited to sampling, analytical, monitoring, hydro geologic, scientific, chemical or engineering data or any other documents of information bivalency conditions at or around the site. We attempted to put that actually into the NDA with the addition of a few items. We added the environmental and human risk assessments which we think is going to be necessary to this process to define what is the risk, also proposed remedial options. Per remediating the contamination as they exists or might exists in the future site, below the site, or near the site. Unfortunately, the Navy turned us down. They went back to insisting that their original version was the version that we had to take it or leave it basically. Which I couldn't understand because we're just referencing what is in the AOC itself. One thing as pointed out that the NDA is the Navy's preference is to have it signed on an individual, per person, basis. So that exposes the individual to liability. We did attempt to negotiate a very similar memorandum from our corporation counsel that would be addressed to myself and my employees similar to what the Department of Health has done, their Deputy AG Wade Hardgrove has written a memo which I believe and understand unless it's changed that the Navy is agreeable, the parties are agreeable to that approach. Unfortunately, he turned us down on that. So, these are some of the concerns about the non-disclosure agreements the issue of transparency, also the issue of being able to communicate with the board freely and with our customers. So I would add one more thing that we didn't have in our draft proposal back to the Navy that perhaps the NDA should allow for a provision on challenging any claims by the parties by the Navy in particular the DOA that they claim to designate a particular item confidential but we feel a participant in this process that it should be public and not confidential. It doesn't really address procurement or security issues, it should be public so I would suggest maybe a change to the NDA that can be negotiated as an appeal process and allow for some mediation of the decision on designation of confidentiality.

Our concerns are that information might be broadly labeled confidential. We know that having been subject

to 92F requests ourselves when you have to look at the document and redact information then it's a lot of effort. With so much information related to Red Hill there may be a tendency to try to avoid all that hard work of redaction.

Commissioner Starr what I think I'm hearing is that if you were to sign this then the possibility could exist that if there were an additional a leak or if you found that there is a plume that it's putting your own system at risk you could not disclose it either to the public or even throughout your department to deal with it. And that is really scary and chilling.

Chief Lau said it is a dilemma one might be faced by individual signing the non-disclosure agreement. If there was information that's revealed that, and I'm not saying that this is true, I want to be very clear I cannot be misquoted by the media, that as far as we know, we only know what we know from records that we received through 'for your request' and the department of Health. But if some information were to indicate that the problem was even more pressing, and more dangerous, but it was designated confidential by the Navy there's no process to try to appeal that designation and make it public. So you'll be facing an internal dilemma within yourself. You can only talk to others that have signed NDAs, you will not be able to talk to anybody else so one of the options we've looked at was to designate a very small set of individuals within my organization to sign the NDA and be 'quote unquote' under the tent of confidentiality but the dilemma is going to be if they come across information they can't talk to me. Yes, they would be violating the terms and could be personally held liable for releasing that information.

Commissioner Starr said and that could be made almost hostages.

Chief Lau said I don't know if I would use that term but they would have to always keep the NDA in the back of their minds and speaking or sharing information about the Red Hill situation always be cognizant of what the Navy is designated as confidential, and make sure that they don't inadvertently release that. As time goes on, as more information becomes available it becomes even more challenging for the individuals.

Commissioner Starr, I would not want to do that to our staff, even a potential target.

Chief Lau said I think if the Navy, and I want to be collaborative here and I know some of the folks have accused me of being too hostile or adversarial on this issue but we have really attempted to be collaborative during this process but it's been the experience of last two years has led to our need to be very firm on this position. And we're being firm not because we have any personal dislike of the military, we understand they have an important role in our economy, in our state, but really we need to take a firm stance for protection of resource and the risk grows each year as this facility continues corrode as rust as the wells begin to fail. We estimate maybe two miles of wells holding the steel plate together in each tank. So those are some of the challenge but we're committed to participate in the AOC process. Our dilemma right now is do we sign a NDA or not sign the NDA and what version of the NDA and how many people do I designate within DWS to sign this NDA who are willing to sign also as individuals. This is kind of the challenges we face right now.

Commissioner Beamer asked, can you do your obligation and duty to the County of Honolulu if you do sign a non-disclosure agreement.

Chief Lau said the only way I think is, one thing is I'm also trying to be pragmatic, our possible lease of being successful of changing the minds of the parties. We've attempted to do that the last two years and suggestions to the AOC and SOW provided forty-two pages of comments to them. Numerous suggestions that I think at the end of the day, maybe two or three of the suggestions wind up incorporated into the AOC so – they hear us but I'm not sure

if they're going to listen to us and make any changes in the process but we have to make the attempt to do that. I think our customers expect us to at least be working hard to try to influence them before they lock any final decisions but also be aware, our role is in advisory only. We do not have, there's no obligations by the parties to include us in every single discussion related to this AOC. They'll invite us as an as needed basis and involve us where they want to and our role as advisory so how effective will be is kind of the question in my mind. But we have to be somehow participating in this process. We are continuing independent research outside of this AOC process. And as Commissioner Buck mentioned exploratory monitor or test wells, I feel it's important to take quick action to actually start to install some of these because there's really no information between the Red Hill fuel tanks and our Halawa Shaft. It's a vast area that's unknown. It's unknown except for the CWRM, the Water Commission deep monitor well which is located on the public safety property, Halawa Correctional facility. That's the only well there and that well is detecting fuel contaminants in the groundwater. So we want to put additional wells to create the beginning of an early warning network to give us a heads up and advanced warning should the plume start to move our way, that we would start to collect that data then we can take appropriate actions early enough at our Halawa shaft or our other services.

Commissioner Beamer so the Halawa wells is already showing signs of contamination.

Chief Lau said our Halawa shaft is not. It's about 5,000 feet to the northwest. I guess its northwest from the Red Hill fuel tanks. The Navy's Red Hill pumping station or Red Hill shaft is showing detection of low levels of fuel contaminants, various strengths of contaminants. At that's based on the Navy's information. I'm not sure if I answered your question Commissioner Starr.

Commissioner Starr, I think you did.

Commissioner Buck, rest assure Ernie (Lau) when I hear your name I don't think of hostile. Did you say that the Navy at one time asked for the possibility of utilizing your wells in case their well became contaminated?

Chief Lau said yes, that's correct. We did receive an inquiry around middle of last year. Should their Red Hill well have to be shut down because of some event, they asked us if they could obtain water from us. They were not very specific so we returned it with a request by letter asking for a lot more specificity more information, details about wells, water that they need, and what would be the cause of that, and also if they've looked at alternative like conservation, reuse of waste water effluent, development of other sources before they came to us and made the Board of Water Supply having to replace the water being lost at Red Hill shaft. Since then they withdrew their request.

Commissioner Starr said I just want to compliment you and Chair's sympathies for the position they put you in.

Commissioner Beamer asked what could CWRM or the Commission do to better support your efforts or what role would you like to see us play in the conversation at this point.

Chief Lau said I think what I heard earlier in the discussion I really appreciate it. Department of Health has a critical role. We really have only legal, the only agency with true legal authority over this situation. And they also sit on the Water Commission so I think your discussion about asking Department of Health to be define how are they going to protect the interests of the state and not let the EPA and the Navy just dictate whatever they want to do at the end of the day. I think that's a great thing. Please continue. My suggestion is to continue that, it does help that BWS is not the only government agency that is taking on the position to

protect that resource. It would have been great if the Health Department took the same position to really trying to protect the resource because we thought that was their job. That is their responsibility. It's about protecting our environment. I hope that they would be as aggressive as necessary through this AOC process to ensure that to prevent the mass contamination were precious ground water resources. That I think there's a high probability it'll occur if action's not taken as soon as we can. So, Commission, please continue doing what you're doing. I think you're headed in the right direction. I really appreciate it, mahalo.

TESTIMONY

Marty Townsend, director for the Sierra Club of Hawaii, said recognizing that you guys are doing much with this, I will be quick. There are two things she would like to encourage more of. There's one, the non-disclosure agreement. Once the Navy's contamination escapes from their property they lost all expectation of privacy, not just security anything. I mean they can't expect us to help them in their mediation of contamination they caused and not be able to freely discuss it. And, we were talking about the quality of our water that's an issue of genuine security which trumps anything else that they have on their plate. I'm disappointed actually that there are no Navy representatives here today. It's an indication that they don't have the kind of attention to this matter that we need them to have. There are many holes, the one I would like to highlight today in terms of holes in the AOC and the statement of work is the identification of the existing contamination. So we know some unknown amount of jet fuel has been released from these fuel tanks since they were installed in the 40s. We don't know how much is out there and we don't know where it is. And the way the statement of work is written now there's no obligation to find it. They're going to put in monitoring wells as needed and as it is right now they only put in two and you've already heard that Board of Water Supply testify that this is such an urgent issue to them identifying where the contamination is, setting up early warning systems that they're spending their own money to find the Navy's contamination. So, there needs to be more pressure asserted. If there's one amendment you could make to Commissioner Buck's letter it would be to ask if the Navy commits serious funds to finding that contamination to know exactly where it is, how much there is and what our options for mediating it. Interestingly enough, I've been talking to some scientists in the field and technology been developed around fracking could actually help us to identify jet fuel in the bedrock around the Red Hill storage facility. So it's not that there isn't different technology out there.

Commissioner Starr your comments are consistent with previous letters that we've written.

Ms. Townsend yes, we're very grateful for the Water Commission taking this position. Yes, I echo the Board of Water Supply demonstration and support.

Commissioner Buck you were on the same tour I was on.

Ms. Townsend replied yes.

Commissioner Buck I'm just curious what impressions, were they reinforced or when you what was it that anything changed your mind.

Ms. Townsend, it was a PR campaign honestly, the Navy representatives were extremely smooth. They have practiced this presentation many times. I felt like they tried to make the effort to demonstrate that their need to store fuel at this facility was greater than my need to drink clean water. They didn't succeed at that. I do think there are alternative storage facilities, modern storage facilities that they could use and employ and that we should be pressuring them to do that as opposed to taking this approach storing this fuel in the most dangerous way.

Commissioner Starr's motion, either I'm going to make three motions or I'm going to make one motion with three parts.

1. We approve and ask staff to send out Commissioner Buck's letter;

MOTION: (Starr/ Beamer)

Chair Case, send this out in letter form under the Commission letterhead to the same recipients as before.

Commissioner Buck said I would send it to the DLA, the Navy and the Department of Health, since we do mention I would cc to the congressional delegation.

Commissioner Beamer asked could we send it to the Star Bulletin as well.

Commissioner Buck said sure.

Commissioner Starr added and Civil Beat?

MOTION: (Starr/ Beamer)

To approve recommendation.

UNANIMOUSLY APPROVED

2. Suggest to members of the Water Commission staff that they not sign the non-disclosure agreements as currently written.

MOTION: (Starr/ Beamer)

Deputy Pearson asked Deputy AG Linda Chow, so you have anything you want to speak to the current condition of the non-disclosure agreement. You as our representative was comfortable enough to work with the Navy to get the document that we have today. I think you could say something please to clarify or to form.

Deputy AG Linda Chow said my understanding would let the staff participate and in doing so they would sign the non-disclosure agreement. My goal in working with the Navy was to have a document that would not require them to be subject to conflicting laws. So where they have the duty to disclose under HRS Chapter 92F pursuant to the UIP request, I don't want them to have to violate that law in order to maintain the confidentiality required under this agreement. And so that's why the provision's in there say that if the required to by OIP under the new procedures, they would just notify the Navy and it's up to the Navy to figure out or to defend why documents should not be provided pursuant to the UIP request. I did it by the staff though that whether to actually participate under these terms is more of a policy call. And I did agree that we put a, create a barrier for the staff to be able to communicate with the Commission based on the terms of NDA. But that was the requirement that I understood that the Navy was putting on the participation. And then, lastly and so for the liability portion my understanding in the citation that are contained in here is that the liability is primarily under the procurement code for the federal that the Navy operates under and that there are two types of sanctions, one there will be criminal penalties for knowing disclosure, use and having gain from the use of information that was obtained during the procurement process. And the other would be disclosure be more of a civil liability for disclosure again of procurement information. Being that I did not think that our people would knowingly disclose procurement information, I thought since that it is incumbent and subject matter experts are actually included in those provisions in the coverage of those provisions, again it would become a policy call whether the individuals were willing to agree to those terms because that is what the federal laws requires.

Chair Case wanted to clarify that Commissioner Starr's motion is a suggestion to staff and if there's further discussion and negotiation or somebody feels strongly about participating and comfortable with it this motion doesn't prohibit that, correct?

Commissioner Starr I'd be happy to make a stronger but I don't know whether we can –

Chair Case I'd rather not.

MOTION: (Starr/ Beamer)

To approve amended recommendation.

UNANIMOUSLY APPROVED

3. Commissioner Starr my third motion is that at our next meeting we invite the Department of Health, the US Navy and the Board of Water Supply and anyone else who would like to join us for an open and spirited discussion.

MOTION: (Starr/

Commissioner Buck said I sure would like to spend some time with our Department of Health first who is just representing our State's interest. If the Navy wants to come by - that's the first step. I'm not sure we need to be spirited. If the Navy's here it might be a little more spirited, they're the ones representing our interest and they need to show up to the Commission that they are part of and kind of brief us on there. I would like to kind of take that first step first before we reach out.

Chair Case you're amending the motion to invite the Department of Health to come –

Commissioner Buck responded to attend a Water Commission, yes.

Chair Case so just to clarify, our representative has a regular conflict at the time we have our Water Commission meetings and is unable to delegate representation and that's a problem.

Commissioner Buck questioned unable?

Chair Case unable, unable. So we're seeing if there's a fix to that. How they require a statute to that.

Commissioner Buck, I wasn't aware of it. At least the staff can attend and Mr. Gill was very present and discussing this issue.

Commissioner Starr even if the director can't be here I don't think it's about needing the vote.

Chair Case I'm just clarifying that when she's not here it's because she has HHFDC at exactly the same time.

Commissioner Buck I was not aware that she was not able to delegate.

Chair Case, motion to invite the Department of Health at an upcoming meeting to brief us on the Department of Health's representation of the State in the negotiations.

Commissioner Beamer invite, I think it could be stronger right. Aren't they -

Chair Case we'll say request.

MOTION: (Starr/ Beamer)
To approve recommendation.
UNANIMOUSLY APPROVED

Commissioner Beamer asked Ernie (Lau) would you share with our attorney general the language that you proposed in narrowing the scope of the NDA if you have that –

D. COMMISSION MEETING SCHEDULE (TENTATIVE)

1. March 15, 2016 (Tuesday @ 10:00 a.m.)
2. April 19, 2016 (Tuesday @ 10:00 a.m.)

The meeting was adjourned at 2:52 p.m.

Respectfully submitted,

Kathleen Oshiro
Secretary

APPROVED AS SUBMITTED:

JEFFREY T. PEARSON, P.E.
Deputy Director