

MINUTES
FOR THE MEETING OF THE
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: May 15, 2018
TIME: 10:00 am
PLACE: DLNR Board Room
Kalanimoku Bldg.

Chairperson Suzanne D. Case called the meeting of the Commission on Water Resource Management to order at 10:03 a.m.

The following were in attendance and/or excused:

MEMBERS: Ms. Suzanne Case, Mr. Neil Hannahs, Mr. Michael Buck, Mr. Paul Meyer, Ms. Joanna Seto

STAFF: Jeffrey Pearson, Dean Uyeno, Roy Hardy, Lenore Ohye, Ayrton Strauch, Malie Beach-Smith

EXCUSED: Mr. Kamana Beamer, Mr. William Balfour

COUNSEL: Cindy Young

OTHERS: Diamond Tachera, Matt Kollinser, Jonathan Scheuer, Tiare Lawrence, Karl Rhoads, Brytne Okuhata, Sara Tsukamoto, Mark Murakami, Travis Hylton, James Geiger, Stephen Anthony, Barry Usagawa, Eva Blumenstein, Nicole Lautze

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

A. APPROVAL OF MINUTES

Commissioner Hannahs pointed out typographical errors on page 26, 5th line should read “staff has done here to build committee and helps to reduce tensions” otherwise it reads “to build community around is perfect and contentious”. Staff’s work is definitely not contentious.

MOTION: (MEYER/HANNAHS)

To approve the minutes as amended to the March 20, 2018 meeting.
UNANIMOUSLY APPROVED AS AMENDED.

MOTION: (MEYER/HANNAHS)

To approve the minutes to the April 17, 2018 meeting.
UNANIMOUSLY APPROVED.

Approved with correction by the Commission
on Water Resource Management at the meeting
held on June 19, 2018. Correction is on Page 25.

Item A-2

Chair Case asked if there was public testimony on the March 20 minutes.

Ms. Sara Tsukamoto from the law firm Star Nakamura and Fisher stated that on behalf of their client Steve Strombeck who lives in the Launiupoko area in West Maui, owns and farms on that land. Since the March 20 meeting to adopt new IIFS for four West Maui streams, Mr. Strombeck is concerned that the new flow standards will affect his ability to access irrigation water for his crops. On March 29 Mr. Strombeck submitted a petition for a Contested Case Hearing (CCH). The petition is still pending.

Chair Case asked if she had any comments about the minutes.

Ms. Tsukamoto replied, not specifically.

Chair Case stated that the minutes are not opened again for discussion. This is just corrections to the minutes. So, there is no agenda item to hear this matter. This is only about the minutes.

Ms. Tsukamoto refrained from making any substantive comments. She wanted to state their position that the adoption of the minutes does not constitute a substantive decision as to the contents of that petition and wanted to confirm that.

Mr. Mark Murakami of Damon Key Leong Kupchak Hasert represented Mahanalua Nui Homeowners Association, Inc., Makila Plantations Homeowners Association, Inc. and Puunoa Homeowners Association, Inc. whose association and members will be impacted by the IIFS adopted on March 20, and we will be filing petitions for CCH as to the application of the Commission's decision.

Chair Case asked if he had any comments about the minutes.

Mr. Murakami answered that he had no comments on the minutes but just to make sure their CCH request is noted prior to the Commission approving those minutes.

Chair Case replied that the Commission needs to talk to staff and the attorney general about their request, noting that the time periods have passed of requesting for a CCH.

Commissioner Meyer recused himself on Items B-1 and B-2.

B. ACTION ITEMS

- 1. Request Imposing a Fine Against Landowner Olowalu Elua Associates LLC for Construction of a Stream Diversion Works and Diverting Water Without a Permit Required in HRS §174C-93 and HAR §13-168-32; Approve an After-the-Fact Stream Diversion Works Permit (SDWP.4722.6) Application for Construction of a Dam/Spillway to Divert 273,000 gallons per day Subject to**

Special Conditions Including Completion of a Remediation Plan; Olowalu Stream, Olowalu, Maui, Tax Map Key No.: (2) 4-8-003:108

PRESENTATION OF SUBMITTAL: Rebecca Alakai

Commissioner Hannahs referred back to the submittal that is exclusively a design issue and repair issue. He asked if there is an overtake withdrawal of too much water from preventing the water from coming over.

Ms. Alakai answered that there is a sluice gate that can be adjusted. The Commission is proposing that they adjust the sluice gate to allow the diversion close to 273,000 gallons, a controlled basis not whatever the stream can give them.

Commissioner Hannahs stated that the image shown reflects the take of approximately 273,000 gallons.

Ms. Alakai said that is what is used to back up water at the sluice gate.

Commissioner Hannahs understood the purpose of this, but questioned that upstream of this is a diversion.

Ms. Alakai said that diversion is damaged; the upper diversion is gone.

Commissioner Hannahs asked if that is the state of the stream not diverted?

Ms. Alakai answered that is what the stream is like after the diversion. This is the diversion.

Commissioner Hannahs asked if that is the diversion above this eroded area?

Ms. Alakai answered that the sluice gate is up above.

Commissioner Hannahs asked if they are taking about 273,000 gallons or are they taking more. You can see there is not much water coming over.

Ms. Alakai answered that they do report to us monthly and have been reporting monthly for years, decades. She did not look at the reporting, but it is her understanding they are diverting 300,000 or 400,000 gallons, in that order of magnitude. At one time, they were reporting 2 mgd at the lower diversion. Since November they were reporting 2 mgd. They might have gone out and adjusted the sluice gate or remeasured it and they are now reporting a lower amount.

Commissioner Hannahs commented that at the lower amount, very little is coming across the diversion.

Chair Case asked is the lower channel for aquatic animal access, is that essentially a low flow channel?

Commissioner Buck asked about recommendation no. 4 to divert 273,000 gallons and an amount sufficient to support cultural uses. What is the amount and how do we deal with instream flow standards (IFS).

Ms. Alakai stated that the Duey's testified in March and they requested that wording. They have a cultural preserve on the downstream side of the sluice gate and the diversion supplies their cultural preserve for a number of lo'i that are not in active service at this time. She believes there are 12 or 18, but not sure of the size. They are not active lo'i at this time. The Duey's requested that language and an amount sufficient to support cultural uses in a preserve. The inlet and outlet is above the IFS point.

Commissioner Buck asked how do you know that it won't be affected if you don't know the amount.

Ms. Alakai answered that at the moment there is no lo'i in there.

Commissioner Buck asked that if there is lo'i that is going to be developed, what would be the amount that is going to be diverted.

Ms. Alakai couldn't answer that; it requires speculation and she cannot answer that.

Chair Case called Dr. Ayrton Strauch to answer.

Dr. Strauch, Stream Protection and Management (SPAM) Branch answered that the IFS is located below the return water from the lo'i. Most lo'i water if flow through so there is very little consumption so IFS monitoring point that is below the lo'i water returns to the stream. So, whatever is taken out for cultural use, goes back to the stream and should not affect the IFS.

Commissioner Buck asked if the remediation plan will affect the amount of the diversion.

Ms. Alakai replied that the remediation plan is to fix that; to make it more fish friendly, overhang local channel. The diversion works permit is for the amount of water.

Commissioner Buck didn't see any conditions here the remediation plan is not actually done that the stream allocation is revoked or do we have a plan; have to prove it, but there is none. He is assuming the remediation plan is an important part of this and want to make sure that it's done.

Ms. Alakai stated that it was her understanding that if this permit is approved and the remediation plan is approved and they don't comply, then that would be a repeat violation. Daily fines and additional fines can be implemented. Then it becomes a notice of violation, because you ordered them to do something.

Commissioner Buck asked if it should be included in the recommendation no. 5?

Ms. Alakai answered yes, it could be added.

Mr. Dean Uyeno, SPAM Program Manager noted that it is in the special condition of the permit. Any violation of that will constitute a violation.

Deputy Attorney General Cindy Young said that in recommendation 4, subsection a, that would require a remediation plan subject to final approval by the Commission.

Commissioner Buck asked what happens if we don't approve it.

Mr. Uyeno answered the permit can be revoked.

Commissioner Buck answered, as long as the applicant is clear on this.

Commissioner Seto asked what is the deadline to actually implement the plan?

Ms. Alakai answered that would be 2 years. Construction permits in our administrative rules is 2 years. So, the Commission needs to approve the plan in 6 months, and they need to complete the project in 2 years.

Commissioner Hannahs recapped that the Commission approved the administrative rules on fines and fees increase in Kona. Does the higher fine apply?

Ms. Alakai said no because the administrative rules hasn't been formally approved by the Governor and it can't be applied retroactively.

Commissioner Hannahs asked if this is a one-time fine and what is the gravity issue.

Ms. Alakai answered that the daily fines cannot be implemented because we don't know the start and end date of the violation. However, if they don't implement it, then you have dates.

Chair Case clarified the new rules with Commissioner Hannahs, stating that you apply the rules that are in effect on the day of the violation.

Mr. James Geiger on behalf of Olowalu Elua Associates, LLC came before the Commission in March and now today. Unfortunately, he didn't have a representative. He handed out testimony from an anonymous person. Mr. Hans Michael gave public testimony. He was a Pioneer Mill employee from the 60s up until he retired shortly after 2000. He was very familiar with the intakes. Things came up and not clear, for the record, he provided declarations and summarized the declarations. Gave background. He saw when it was in active use by Pioneer Mill. He has seen what has been done, the repair that was made in 2016. He implied what was put back, was the same as what was there in 1989 when it was first registered. The purpose of his testimony is to inform the Commission that Olowalu didn't do anything that wasn't there before. It did make a repair to the structure that was

there before. In the application, there was one thing that is very important. The structure that was in the channel was 52 feet wide. What was replaced, that is in staff report, is 30 feet. So, there was 22 feet of the structure that was still in existence, wasn't touched, wasn't changed by Olowalu. This is not a situation where there wasn't a diversion; this is not a situation where we built something that was different. We just put back what was there from before. There was a question whether or not this particular diversion was registered. Yes, it was registered. It was done by Pioneer Mill, but unfortunately Pioneer Mill didn't put the dimensions of the particular diversions. It was identified as lower Olowalu intake powerhouse. The reason they did that is at one time they had a hydro plant that fed off the water that was diverted at the lower diversion. That hydro plant stopped using at an unknown time; couldn't figure it out. That was the purpose of that particular diversion. The second question the Commission asked about how much is being diverted and what are we trying to do. The after the fact permit application, that was pointed out that the sluice gate or control gate was being changed. This was to make sure that only what was entitled to take under the diversion permit was taken, no more, so that everything else will stay in the stream. That's why they are here for the after the fact permit. One of the things they are asking in the application is to change the gate so that they can make sure that the IIFS is complied. The second thing that is important, in their application they are asking to use 646,000 gallons. The reason 646 is for the users in the service areas, because Olowalu Water Co. is a public utility and it delivers to approximately 60 service connections within the service areas. The water that is being delivered is 200,000 gpd to the users. They know this because they meter what is delivered to the users. They believe their system losses because it has to run through a number of ditches to get to the users, around 40,000 gpd. So that means they need about 240,000 gallons. They are asking for 640,000. The reason for the 200,000 gallons is for Olowalu Cultural Resources lo'i that they were using. That was the amount of water they generally would take to use. When they got done with their use it goes back into the stream. That's how they came in with that number. The challenge is their usage varies. Mr. Geiger said that they don't know how much they are going to be using on a day to day basis for anything else. So, the decision was they can divert 273,000 gallons which was in the PUC application plus what the cultural resource commission needs, but since Ayron noted since the IIFS is set below the return, it should not make a difference, we should have the water back in there at that time.

Commissioner Buck asked if 40,000 gallons is an estimating loss for the entire system.

Mr. Geiger answered that it's not what they like; they would like it to be less, but that is approximately what the system losses have been. This would be 20% which for a closed system, water works association says 10%. He thinks that most open systems are much higher, maybe 20%; they would like it less.

Commissioner Buck asked if there was any chance to improve?

Mr. Geiger answered the challenge is that they are regulated by the Public Utilities Commission (PUC). To do anything like that, they need PUC approval, which could mean a rate increase because improvements need to be made. It is something we (Olowalu Water

Company) are considering but also have issues because it works through PUC. They have several; they would like only one.

Commissioner Buck asked if there are plans for that?

Mr. Geiger didn't have any specific answer but PUC looks at things to make sure they are operating efficiently.

Commissioner Buck commented that's a lot in loss if you are losing that much.

Mr. Geiger responded they're not losing that difference. That amount of water that is diverting is going to the resource cultural and then remaining going back into the stream. If they're not using, we don't have to divert for their use.

Chair Case asked about the photo in Exhibit B and if was reviewed with staff?

Mr. Geiger said the Exhibit B photo was provided by Mr. Michael at the last hearing. He left photos with staff. That was merely to show the photos he took in 1999 shows exactly what was there in 1999. To finish, they did have a partial remediation plan to talk about the sluice gate that they are going to change. The other thing is because of the erosion in the staff photo, that is something that needs to be addressed. We didn't want it there but we needed a permit to do it. That was part of our application here is to put something in there to prevent erosion to happen. In the application, we have boulders designed to try to prevent erosion to happen. The other thing that we would like to work with staff, we know we need to make sure that there is sufficient design in the diversion so that aquatic life can migrate through the diversion. That is one thing we need to coordinate with staff, hoping to get done. If the after the fact permit is approved, we are hoping to get that done along with the other remediation aspects and have the construction fully done within 2 years of the approval of the plan. Mr. Geiger stated that he would like to have the opportunity to address the Commission again after public testimony in case something else comes up.

Chair Case asked Mr. Geiger the fact that he has a photograph of construction from 1999, does that have any impact.

Mr. Geiger said the whole purpose for that is questions from the last hearing that did they put back what was there before or was it something different. And we are trying to show you that all we are doing is putting back what was the previously there. We are not putting in a bigger diversion or a broader diversion.

Commissioner Hannahs asked if he was speaking against staff's recommendation.

Mr. Geiger said no we are asking the Commission to approve the permit, what staff has recommended. There are some things in there that we thought are not clear.

Commissioner Hannahs asked if we made a motion to approve the recommendation of staff, would you be ok?

Mr. Geiger answered that they would ask that the after the fact permit be approved and be allowed to do the remediation plan.

Commissioner Hannahs wanted to understand and separate the background. He asked about the sluice gate taking over 600,000 gallons and utilizing 200,000 gallons, and the rest goes to cultural users and our ability to monitor that is the instream flow standard which is below the cultural uses. So, we should see an 80% return of that back to the stream?

Dr. Ayrton Strauch answered that he was not sure what stage they are at installing monitoring equipment. They work with consultants for installing monitoring stations in the ditch just past this diversion to monitor what they pull out from the stream. They don't believe they monitor what gets to cultural uses. They were at one point two or three types that truck through water from the ditch to feed the lo'i. The lo'i have not been active for over a year and a half so I don't know if water still being drawn through those pipes. We are monitoring the stream which is our responsibility.

Commissioner Hannahs asked once those gages are in, we catch it at the IFS?

Dr. Strauch answered yes.

Chair Case then asked for public testimony.

Tiare Lawrence – community organizer for Hawaiiana for progressive action. She was also one of those who filed complaints, took pictures, videos that was sent to the Commission. Her testimony follows: “I am requesting to impose the maximum fine and deny approval for the after the fact stream permit. CWRM should impose the maximum fine allowed to send a message that it's not ok to illegally create a new diversion on State land after years of illegally diverting public trust resources from State land and then waste them, depriving native stream life of a chance to survive. I have a question and I know you can't answer this but perhaps you could elaborate after is why is the fine not calculated from the date there was a notice of violation to the date an application was filed and the fine would be arguably towed. I believe the fine should reflect August 22 to November 6 which would be 76 days at \$1,000 per day. I just want to clarify that they take 600,000 gpd but they use a few hundred, the rest does not go to cultural use. They are currently using a pipe and a pump. I was just there a few weeks ago so I can speak to that. The Hawaii Supreme Court in the Waiahole case quoted a previous case when they said in a popular government justice must not only be done but manifestly be seen to be done. And a \$1500 fine surely less than the violator's attorney is earning today to hear this matter be justice? I don't think so. Olowalu Water Company (OWC) historically have been horrible stewards of our public trust resources. Since the closing of Pioneer Mill in 1999 OWC illegally diverted water from State land with no permit. It's only now after we filed multiple complaints for their newly constructed diversion, that they are finally trying to get an after the fact permit. CWRM records show a diversion of 2 mgd by Olowalu Irrigation from an intake on public land with an expired permit. While most of the 400 acres of Olowalu remains fallowed during that time. After the intake was illegally constructed the Army Corps of Engineers sent a letter to

OWC with the need for an after the fact discharge permit. Finally approving waiting on Dept. of Health, Clean Water Branch to issue an individual Section 401 Water Quality Certification, does this diversion affect downstream water quality? The lower diversion was hastily put into place with sandbags and sent debris down the stream. I observed this and have pictures and videos and the fine should reflect this. OWC has had other options for water such as several brackish wells from the plantation era, still on land and in Olowalu and did not need to illegally divert the stream water during that time. Olowalu 2015 EIS told the LUC that the project irrigation needs would not impact Olowalu Stream water because there were 2 unused plantation wells that could be added to the community system to fill in for any needed non-potable uses. When Mr. Nance testified to CWRM on March 20, 2018 meeting he informed the Commission that the option of providing irrigation water from non-potable ground water sources would require new wells being drilled and be very expensive. Olowalu town 2015 EIS did not share Mr. Nance's reservations about this option Pioneer wells being drilled or being expensive. Was Olowalu Irrigation lying to the LUC then or are they lying to CWRM now."

Commissioner Hannahs asked if the cultural users are not receiving any of the 600,000 gallons from this source?

Ms. Lawrence replied: "No, because it goes in the sluice gate and it comes down below the reserve, back into the stream. There is this one section, it goes into this old auwai system and part of the reason why they have been wasting 40,000 gpd is because it's an old 100+ year ditch system that has multiple cracks. Some of the photos that was sent during the initial complaint, water was visibly being dumped into the fallow land and that is part of the reason why they have excess amount of water being wasted. So, for me it's like ok they can come and get an after the fact permit and want to get legal, but I think even before we entertain the idea, they should fix what they have now. There needs to be a more holistic approach, more community involvement in this issue. I think you should hear from the home owners that have been affected by them. I just don't think now is the time to issue any permit. I just would like to see more community engagement, just a better approach at this whole issue."

Chair Case asked if there were any lo'i active right now.

Ms. Lawrence said no that there is absolutely no lo'i. The cultural reserve has been leasing to papaya farmers, a commercial entity.

Chair Case asked if the water is available for the lo'i but not being requested?

Ms. Lawrence said it's complicated because the auwai system, had to use pipes to get the water from the ditch system up above. When Pioneer Mill came, they changed the traditional way the auwai had originally worked. They have been using a pump and pipe to get water into their lo'i from their ditch system up above.

Chair Case asked if it is the upper diversion ditch?

Ms. Lawrence said no that it was in between where the lower diversion is. There is a pipe before the lower diversion that went into an old ditch. That is where the pipe was. And it is being used for papaya, commercial. When they built this illegal spillway, that is where the water is going into that old ditch system, mentioned earlier, where the water was dumping into the fallow land and above where a few homes are.

Chair Case asked, the water is being dumped right now into fallow lo'i?

Ms. Lawrence answered that it was basically being dumped at that time because they had nowhere for the water to go while they were putting all the sandbags in place. It was literally being dumped for 3-4 months, millions of gallons of water being wasted. That's how I found out because my ohana is from Olowalu and I got a phone call that there is a lot of water being dumped, someone has to take a look at this.

Chair Case asked if it's not being returned to the stream?

Ms. Lawrence said yes, not being returned to the stream. It was just being dumped into the fallow land.

Chair Case then asked what is happening now?

Ms. Lawrence answered that now, because of all the complaints, they had to fix it. There is still some leakage, not nearly as bad as it was because of the outreach by the community and the county but she still thinks there is a lot more work to be done. As you can see, there is a process. We would not have this problem. Now our native aquatic species are suffering because of poor engineering and clearly not in our best interest of our Mauka to Makai connectivity in Olowalu. What you see is majority of the water goes in and it comes back in down below the reserve and goes back into the stream.

Commissioner Buck asked Dr. Strauch, if we approve this and we know we have an amount for the cultural reserve, we have an IFS below, what happens if the IFS is not met. We have water going in two directions, one for the cultural reserve and one for the other users. Is that correct?

Dr. Strauch replied that it is his understanding that the IFS needs to be met.

Commissioner Buck assumed the cultural reserve has priority because it is more like a public trust.

Dr. Strauch said the cultural reserve water usage shouldn't affect the IFS because the return is above the IFS.

Commissioner Buck asked if the IFS is not being met below, do we have to amend the amount being diverted higher up?

Commission staff stated that the user would need to comply with the IFS.

Chair Case asked if this is not being used for lo'i, does it get diverted?

Dr. Strauch asked if she meant the operator of the intake?

Chair Case stated that what we heard is that the lo'i is not active.

Dr. Strauch said that is correct.

Chair Case stated that it is leaking out to commercial papaya but a large part of this amount is for lo'i.

Dr. Strauch said that the operator of the intake should cut back on what they are diverting if lo'i is not in use.

Commissioner Hannahs commented that holding it to 273,000 gallons which is their stated need in this case would not hurt the cultural user. Provide them what they need for their purposes and the cultural uses which are not in existence at this point.

Dr. Strauch said that the 273,000 gallons was estimated by their PUC application permit, not the end uses, not cultural uses.

Chair Case asked if they need extra permission for the lo'i?

Dr. Strauch answered that he would assume it was communication what happened between the cultural reserve and the irrigation system operator.

Chair Case asked if it is needed to be included in this permit?

Ms. Rebecca said that the commercial use is new information.

Dr. Strauch said that they have been on a sublease for a while but that is a different end use than the lo'i. They get the water slightly different from the ditch.

Commissioner Buck asked if this will this affect the IFS.

Dr. Strauch said that the 273,000 gallons was for a full built out and currently Olowalu is not at full build out so there is still water available.

Commissioner Buck stated that this is not the only case in kalo production. It's going to take time, as waters back in and the community comes together and figures out. He wants to make sure that there is enough there and doesn't come back suddenly.

Chair Case asked for any other public testimony and asked Mr. Geiger if he wanted to add anything.

Mr. Geiger added: “This was what was being discussed at the March meeting and the Duey’s, on behalf of the Olowalu Culture Commission, came in and said these were their needs. We don’t know because we don’t charge them for delivery of the water. They have a couple of pipes that they take water out of the ditch system for their uses. We rely on them to tell us that those are being used for their purposes because we don’t know and don’t know what they are using it for. Which is why Commissioner Meyer came up with the language that seemed to make sense which is ok you get to divert 273,000 gallons plus what is necessary for the cultural resource commission for their appropriate uses. I think that’s why staff made the recommendation and we are asking that you support this recommendation because we don’t want to come back here on a regular basis saying we don’t have enough water to deliver to the resource commission. You need to change the diversion and that’s the reason.”

Commissioner Hannahs said that Commissioner Meyer’s language sounds good, but asked if he would accept also that not only for that use but when it is needed. Seems like we are taking it in advance of any use or need and the allegations is being done. That may or may not be true but why not put that aside, why not take it when you need it. If a better sluice gate is built, take 273,000 gallons for the Duey’s to create the lo‘i. He wasn’t sure how this would be done.

Mr. Geiger replied: “From our standpoint I don’t think we have a problem with that. The whole reason this came up is because the resource commission came and testified and said that they want to make sure that they had sufficient water. As an operator, it does create some operational issues but if that is the Commission’s desire, we will do our best to comply with the Commission’s desire. As far as adding the additional language, when needed.”

Commissioner Buck commented that flexibility will be needed with the community may take time.

Mr. Geiger assumed that if we must come back to the Commission they will remember that some flexibility is needed on all sides to make sure to make this work.

Chair Case asked for a motion.

MOTION: (HANNAHS/BUCK)
To approve the submittal.
UNANIMOUSLY APPROVED.

- 2. Request Imposing a Fine Against the Landowner Bock Family Revocable Trust for Altering the Stream Without a Permit Required in HRS §174C-71 and HAR §13-169-50; Approve an After-the-Fact Stream Channel Alteration Permit (SCAP.4700.6) Application for the Installation of Two Road Structures and Culverts and about 800 Feet of Channelization Subject to Special Conditions Including Completion of a Remediation Plan; East Kuiaha Stream, Ha‘ikū, Maui, TMK: (2) 2-7-012:254**

PRESENTATION OF SUBMITTAL: Rebecca Alakai

Chair Case asked to explain why staff is proposing only one fine. It seems like the channelization is a big violation.

Ms. Alakai agreed and said she didn't think this Commission would agree to this in advance if they had proposed multiple permit applications. This is the way the applicant wrote the permit application. They put it all in as one.

Commissioner Buck commented that all the work was obviously more than one day. How come the fine is for only one day and not per day. Obviously, the violation was an extended duration.

Ms. Alakai reminded that this is a construction permit. We don't know when the daily fines would kick in.

Commissioner Buck stated that the evidence right here is obviously more than one day. The scope and scale of the clearing is obviously more than one day.

Me. Dean Uyeno added that because this is a construction permit, it is only a one-time violation versus a continuing offense. This is on the advice by the deputy attorney general.

Chair Case asked when would the continuing violation kick in?

Mr. Uyeno answered as in a water management area, the water use permit.

Commissioner Hannahs asked how does a \$1500 fine, when a project of this magnitude stop anything. If the purpose of a fine is meant to be a deterrent, at this level it doesn't deter anything. It's just the cost of doing business.

Ms. Alakai replied that she understood. It's the remediation plan that will cost money. He has to remove that fill to recreate the capacity of the stream, the meander of the stream, it cost him a lot of money to create that; it will cost him a lot of money fix that problem.

Commissioner Hannahs asked if the Commission approves the after the fact, what would be imbedded in it? He asked Ms. Alakai to elaborate the remediation plan.

Ms. Alakai replied that it is stated in 4B in the recommendation, stream bank stabilization. Probably the most expensive thing on here is to recreate flood storage capacity which may include the removal of structures and fill. There were 3 testimonies, one came in 3 days ago from another neighbor in that area. All three written testimonies said that this was a wide stream, held a lot of flood capacity and when it did rain it was a meander. He changed it and it is causing mud and debris flows downstream.

Commissioner Hannahs asked if there is anticipation that he is going to rip out those culverts?

Ms. Alakai answered probably so.

Commissioner Hannahs asked that it's up to him but you have to approve.

Ms. Alakai answered that it's the same as the previous one; he has to come up with a remediation plan within 6 months and he has to fix it in 2 years. If he doesn't then the daily fines will kick in.

Commissioner Buck asked why does the Commission have to approve anything right now? He does not want to approve an after the fact stream permit. He wants a remediation plan and wants to know how we are going to rectify this. He then asked what is it that we are approving right now?

Ms. Alakai answered a process to come up with a remediation plan.

Commissioner Buck asked why in the process we have to say oh, it was ok; you have an after the fact stream channel alteration permit. He said that it's not ok and didn't understand what we are approving. He is happy to approve a remediation plan and a fine. He is disturbed that we only do it for one day, but that is another issue.

Mr. Uyeno added that one way to get them on the hook is to issue the permit with a condition of a remediation plan.

Commissioner Buck asked if that is the only way or can we show them that they are in violation and one of the conditions of the violation is a remediation plan?

Chair Case agreed with Commissioner Buck's questions but not the condition of the violation. It's a violation. Can you just require a remediation plan to correct the violation?

Ms. Alakai was not sure on the process to get there. We issue construction permits.

Chair Case said the question is can we require.

Deputy Director Pearson said that Mr. Uyeno's response is to include the remediation plan in this.

Chair Case said the question is can we require the remediation plan to correct the violation without approving the permit on the alteration. Chair Case feels that it's a significant violation.

Commissioner Buck stated that you are asking us to approve something that obviously shouldn't be approved.

Deputy Director Pearson asked if a time frame can be added to the remediation order.

Chair Case commented that if we want we can take a little time to think about it and we can ask other questions and have testimonies.

Commissioner Hannahs referred to the comment of the testimonies that were received; other people have been influenced?

Chair Case asked if there are other testimonies that were received?

Ms. Alakai said yes, upstairs, but very similar to that.

Chair Case reminded that procedurally, testimonies are received and copies should be distributed to Commissioners. We should make sure that we did that before we make a decision.

Ms. Alakai answered that copies were not made for distribution.

Chair Case suggested that before we decide.

Deputy Director Pearson made a suggestion to defer.

Chair Case replied that we may be able to finish this today. She wanted to make sure we have the questions answered and have the testimonies.

Commissioner Hannahs on Commissioner Buck's point. If we approve this and other people are damaged by this work, does that bring the Commission on any liability if our approval of this system then creates an impact on people.

Deputy Director Pearson answered that the approval includes the remediation plan.

Chair Case asked on the Commission's question is, can we not approve this and require a remediation plan?

Commissioner Hannahs stated that he does not want to put the State in any liability.

Commissioner Buck noted that the alteration permit we are approving does not include the remediation plan.

Deputy Director Pearson stated that recommendation 4b does not have the specifics of the remediation plan.

Chair Case moved on to public testimony.

Mr. James Geiger represented the applicant Rainer Bock who is the trustee. They have not seen the new testimony and have no idea of what is said. The engineer Stacy Otomi could

not be here today, had prior commitment. He prepared a declaration. Passed out testimony. Mr. Geiger made a suggestion which might make this more efficient and better for everyone. One of the things that Stacy pointed out is that because the remediation plan in this case is going to be significant. It is very important to get it right. There is time deadline of 6 months for basically from today to get the remediation plan approved by staff and back to the Commission for approval. Our request was a 6 months period to get approval by the Commission to start from the time when the staff would approve the plan and issues would come up along the way. In addition, the Commission brought up a point which is in the Maui flood control permitting. That has a timeline all of its own and we don't know exactly what it is going to be. If it is tied in to this permit, we could eventually be in violation. This permit, through no fault of our own, because the County of Maui hasn't been able to process what they need to process. He is suggesting to the Commission that it might make sense in this case to defer action to this application to give us an opportunity to discuss with the attorney general how we might proceed forward for this application in light of the comment from the Commission and a remediation plan.

Commissioner Buck asked if he had any communications from the County of Maui?

Mr. Geiger answered that they received after the fact grading permits with them. As far as the flood permit, no. There were no communications.

Commissioner Buck asked if he had any examples of past that have this type of remediation done by the county?

Mr. Geiger said that it's not really remediation done by the county. The flood permit application, yes. He can't give an idea of how long it's going to take because each case is different.

Commissioner Hannahs asked if work has been been suspended?

Mr. Geiger replied that there is no work done. It was completed; there was no further work done. He pointed out that the stream had been worked on from the upper culvert to the lower culvert. The upper culvert is culvert no. 1 the lower culvert is culvert no. 2. The work stopped effectively on the left arrow where it says channelized stream and the hairpin turn around that, there was no work done on the stream in that area. He said it was not important for their purposes here. What they are trying to look at here is how do they best get a remediation plan in place. That's what our focus is to do a remediation plan to do what is necessary.

Commissioner Buck asked Mr. Geiger a question but said he didn't have to answer if he didn't want to. He asked how do you communicate with the land owners. You are obviously very involved, you understand some of the landowners and when you see google earth and you see a lot of clearings, is that ok for you and your clients?

Mr. Geiger answered that he really couldn't answer that because it's not an issue of the permit application. He understood it's an important issue of the Commission, but it really

doesn't apply for these construction permit. He didn't think his personal opinion is critical to the Commission's decision.

Commissioner Hannahs stated to Mr. Geiger that he has shared with the Commission the engineer's opinion. He says at the bottom of page 2 that he has reviewed the aerial photographs of the area at different times and compared the photographs. The photographs show the stream substantially the same location today as it was before 2012 when the current owner bought the property. Strong events can cause the streambed to move. He read on. So, this licensed engineer is looking at the same photographs and not seeing.

Chair Case said that moving it is different from clearing it. That is a massive alteration.

Mr. Geiger answered that this is what the engineer's opinion is that it was not substantially moved.

Commissioner Buck asked what is his definition of streambed.

Mr. Geiger answered that he would have to check with him, but I believe that it is where the bottom of the stream is.

Chair Case asked if Mr. Geiger could also explain this army corps opinion that there is no discharge of fill material into waters of the state.

Mr. Geiger answered that is what the army corps determined based upon their examination. They had an individual out there who walked the entire stream and came to the conclusion.

Chair Case stated that if you run a bulldozer down a streambed and eliminate all the rocks that have been built up over centuries and all the vegetation so it's dirt and water goes through.

Mr. Geiger said that his understanding is that they didn't go down to dirt. His understanding is that there were rocks. He only stated what he's been told.

Commissioner Hannahs asked if he saw the picture of the bulldozer tracks.

Mr. Geiger stated he thought the picture is a little deceiving because actually up above is the streambed. It's difficult to tell. The reference in the pictures appear to be different trees, but he didn't think that is important for the Commission's decision.

Commissioner Buck asked if he thought the trees are different trees?

Mr. Geiger replied yes.

Commissioner Buck commented that he is a forester.

Mr. Geiger said that based on the trees around the location they appear to be different.

Ms. Audrey McCauly who testified on Maui; brought the same pictures. Her testimony is as follows: “My property is (showed from picture). I see what is going on everyday. I didn’t want to complain, waited for a number of years because this project started more than 5 years ago. Over time it kept getting worse and worse on my property. Flooding is a major problem due to the channeling. I don’t know if this gentleman has been on the property or not but, but the area that was bulldozed was at the bottom of the gulch. I live at the bottom of the gulch. The bottom of the gulch has been filled in and it’s hard to believe that anyone could fill in a gulch. But that is what has been going on and moving the rocks. This has been going on for 5 years. The fact that there has been so much earth that has been moved is really made the water flow on to my property in a way that it is flooding my cottage, flooding the area by my cottage. Never flooded my back before. My cottage is being at risk now because every time there is a major rain, flash flood, not just every day rains, but flash floods, like you seen in the pictures. It never did before. I know the law says in Maui County that if the adjacent down-stream property can’t be negatively impacted and it’s not just a little, it’s a lot. Now I can’t even leave my property because water keeps filling my driveway. My driveway gets filled up with too much water. To hear that we should postpone this plan to me sounds crazy because we have been postponing it so much already and every time it gets postponed. This year I had this same problem. At some point, we can’t keep postponing. Every time we get heavy rains it gets challenging. I had the army corps come out because I had to empty out twice because of all the debris that has come down. There was so much debris; I spent thousands of dollars in cleaning the debris. I am a single person, can’t afford lawyers, so hoping the Commission can help. Really appreciate how attentive you have been to this issue. The comment that was said that nothing has changed from culvert #2. It’s been worked on since he was told to desist. Pointed out on the picture: This area right here where it goes from culvert 2, over here, it goes on to my property, he put this much dirt up on the bank and that’s not even the 10-foot amount of dirt they put to create this. All that land absorbs the water at the bottom of the gulch, all that water gets absorbed into the property and now it does. I don’t have to sit here and tell you the water dynamics of the whole thing. People in the neighborhood are very conservative. There are people that are hesitant that have been affected. To me the remediation plan needs to restore the storage capacity of the stream.”

Chair Case asked if she was there when the construction was going on? How many days do you think he spent channelizing the stream.

Ms. McCauly said yes. He started this project shortly after he bought the property and google earth very clearly the date that the clearing happened. It was within a couple of months.

Chair Case asked Ms. McCauly if she thinks it took him 2 months bulldozing the stream and creating the culverts.

Ms. McCauly replied no, it took longer than that. From the time that he purchased the land, she can’t remember when, but 4 months after he purchased the land. (she checked calendar). But definitely 6 months. He was still working on it 6 months ago, even after this

letter came out. She took pictures of it because it was outraging to her, because he was told not to, and he kept doing it. How much is it going to take. It's going to take an enormous amount of earth moving to get this back to a place where the water goes into the land instead of into a channel.

Chair Case is he building homes on this property? What is all the clearing for? A subdivision?

Ms. McCauly answered yes; that is the intention. She doesn't think he can do more than put 2 houses.

Commissioner Hannahs asked if the Commission can keep these photos for the record. He thanked her for coming from Maui to this meeting.

Ms. McCauly said it's so important to her because she was a nurse for 30 years, just retired and her livelihood is partly this cottage and it's critical. She thanked the Commission.

Chair Case asked if there were any other public testimony.

Commissioner Buck stated that he could not approve this item today as far as our permit, our legal options are. He requested to move into executive session.

BUCK/HANNAHS

To move into Executive Session

UNANIMOUSLY APPROVED TO MOVE INTO EXECUTIVE SESSION

At 11:34 pm the Commission moved into Executive Session to discuss their legal options and consult with their attorney on questions and issues pertaining to the Commission's powers, duties, privileges, immunities and liabilities.

At 12:02 pm the Commission returned from Executive Session.

Chair Case declared that by the questions the Commissioners are asking there is concern because this is a very serious matter. So, we need to figure out the right path forward. Does someone want to make a motion?

Commissioner Hannahs started by turning to page 9 and the recommendations made by staff. He moved that the Commission approve recommendation No. 1, find that the applicant and landowner violated by installing the two road structures. Secondly, defer decision making on recommendation No. 2 and put on the record that the Commission's position is that this is a serious ongoing violation with the one time fine situation. Recommendation No. 3, find that to be moot at this point; deny the request for the after the fact permit and direct staff to work with the parties on a remediation plan to be submitted to the Commission within 6 months with a permit request to conduct the work contemplated by that plan.

Commissioner Buck added in addition to recommendation no. 4 that staff to provide more information about the length of time of the violation.

Commissioner Hannahs accepted Commissioner Buck's addition and approved recommendation No. 5.

MOTION: HANNAHS/BUCK

To approve the submittal as amended.

UNANIMOUSLY APPROVED AS AMENDED.

Chair Case asked for any further discussion. Since there was none the motion was unanimously approved as amended.

C. PRESENTATIONS AND UPDATES

1. 'IKE Wai (EPSCoR) Project Update

Nicole Lautze, associate specialist faculty at UH Manoa joint between HI Institute of Geophysics and Climatology and the Water Resource Research Center (WRRC), presenting on behalf of Gwen Jacobs, the lead investigator of the project and Greg Chun, who is the communication engagement lead for the project. Steve Anthony USGS is on the leadership team for the project and 2 graduate students. Her presentation is linked to the May 15, 2018 agenda.

Chair Case asked if she could reiterate the overall purpose of the project.

Ms. Lautze stated that the overall purpose of the project is to facilitate sustainable management of Hawaii's ground water in the future.

Commissioner Hannahs commented that another way to put that is there are a lot of us in that business. He asked so what is broken, what are you trying to fix. What is the gap you are trying to fill.

Ms. Lautze answered physical science perspective.

Chair Case replied, geophysics for dummies, how do you get a concept of what is underground.

Ms. Lautze answered sensors are put on the surface that will either passively or actively send something down, reflect on the given boundary and send the signal back up. By putting your sensor out on the surface, you can try to understand what is happening there.

Commissioner Hannahs asked if there is a cultural resource on the team.

The next slide focused on that.

Commissioner Meyer asked to tell the Commission what methods you are going to use for estimating submarine ground water discharge.

Ms. Lautze said that is led by Henrietta Dulia and she uses radar. Radar is worked only on land so can detect in the coastal environment and from that trying to estimate the amount of discharge as a trace. Some new novel techniques will be tried in year 3 using geophysical techniques that can also constrain deep submarine ground water discharge.

Commissioner Hannahs asked as part of your outreach, do you have an outreach component to those who are in business as water resource management experts so that they get a common data set and understand their systems. They then will inform clients who then come before with issues before the Commission. How and when is that outreach program.

Ms. Lautze answered in year 1 there was a big effort to engage with the stakeholders and agencies to find out what the questions were. Another element is the cyber infracture to develop a data platform so that historical and new data will all go into this data platform that will be a tool for the state agencies as well as the public.

Commissioner Hannahs asked how will the Commission look at this work. What is our job? You are doing something very important. What will you have us do with that information? We have people operating, advising clients on water resource issues and will your work help inform their work.

Ms. Lautze said she hoped so. That is the goal.

Commissioner Hannahs asked if she is reaching out to them in a specific way to do this, to accomplish that.

Mr. Steve Anthony, U.S. Geological Survey (USGS), answered that the subsurface geological information they hope to develop as part of this project would then help inform say the ground water modelling that they are going to do well as we do. One of the real outreach aspects the project early on was to engage with USGS. One of the questions we are facing with providing information to the Water Commission and water departments so what we see are information gaps so they can hopefully do some of the research and provide some of that knowledge.

Ms. Lautze added the goal to develop land use and climate change scenarios will help with management of the ground water so in that way assist the decisions that you need to make in terms of the clients that come to you.

Commissioner Buck asked if there are enough data points that you are looking at land use, be it residential, urban, natural. Have sample points been laid out?

Ms. Lautze answered what the economic team is doing is looking at the pumping optimization. These are elements of the project that she is not entirely familiar with. But

Lea Bremmer is saying if developed as urban versus reforestation, how will it affect our ground water supply. Our sampling is more designed to target the question that she described up here, but if we can build a better numerical model that understands what is happening with our ground water, where it sourced from then the climate change model or the land use model will be more accurate.

Chair Case asked if there was any public testimony. Since there were none, the Commission proceeded on to Item 2.

2. Maui Island Water Use and Development Plan Update, Part III Sector Reports Draft

Eva Blumenstein, Planning Program Manager for Maui Department of Water Supply gave her presentation which is linked to the May 15, 2018 agenda.

Commissioner Hannahs asked about the return stream flow and cultural use of stream waters, with respect to your plans, is that a continuing use or complements any use?

Ms. Blumenstein answered for Na Wai Eha we have used the latest, November 2017 proposed decision and order as our guide. They have taken the face value of the hearing officer's proposed allocations by different categories whether those are tradition and customary kuleana.

Commissioner Hannahs asked what is the finding at this point.

Ms. Blumenstein said that they find that category 3 uses may have to identify alternative resources to satisfy agricultural needs if those are actually materialized in this planning period; we are looking at 20 years. There are some alternative resources outside, Na Wai Eha, such as the Kahului Wastewater Information Facility. There is a project that was previously funded and sort of on hold. That could offset the non-potable surface water with R2. This would be for energy crops. We are not trying to modify the proposed decision but we can assume some of the impacts and some alternatives.

Commissioner Buck asked if at this point would R2 for energy crops be considered.

Ms. Blumenstein said the project could be upgraded to R1 and more achievable uses. But with this about 4.2 mgd available could probably be used on all crops that doesn't necessarily need R1. She wanted to point out that those are 2 options.

Commissioner Buck asked if the water recharge of the aquifer from East Maui streams in this aquifer?

Ms. Blumenstein answered that we are talking about this in central. They overlap a lot. It's almost impossible to keep them separate.

Commissioner Hannahs asked if the Planning Department is looking at permeable surface, ways to create an urban environment and optimize recharge.

Ms. Blumenstein answered that it hasn't been proposed now. The Maui island plan does not have much about infrastructure or permeable. The community plan that is being updated is the west side and she feels some of that coming in. They are in there now because those are the level where you start to more or like design. This is still too high level.

Chair Case added that we will plan on scheduling a better agenda, or start earlier to continue this update.

Mr. Jonathan Scheuer asked if the powerpoint can be shared on the website.

Ms. Lenore Ohye answered that the powerpoint will be linked to the agenda online.

3. Symposium on Groundwater Dependent Ecosystems-Keauhou, Island of Hawaii

Mr. Roy Hardy made clarification from last month's meeting in Kona. There was a brief discussion in talking with National Park Service (NPS) presenting the status of your non-designation decision about these symposiums. There was a brief discussion about the Hawaii Conservation Conference coming up in July 24 to 26. The good news is our abstract was accepted with modifications. This was what is being presented in addition to that. We will be talking about Keauhou. This is part of NPS petition from 2013 and the decision was just about a year ago. The main one being to further investigate the science of coastal leakage impacts, consideration for setting or adjusting sustainable yield. The Ike Wai presentation they were talking about the hydrologic, radar and how much water is going to the ocean. That's helpful. We did ask for help on the ground water ecosystem, the biological side of things and how the ecosystems affect it. That was a major concern and one of the reason for that decision. We are trying to tackle this now. This publication was forwarded to Commissioners after the meeting was requested and we followed up and sent it. If you had a chance to read it, it came out 2 months after the decision last year. It talked about this management approach and a global framework, Australia, South Africa.

Chair Case asked if there were any testimonies and since there were none, she asked for a motion to adjourn.

MOTION: (BUCK/HANNAHS)
TO ADJOURN THE MEETING.
UNANIMOUSLY APPROVED TO ADJOURN

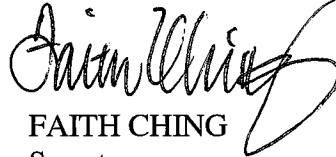
This meeting was adjourned at 1:14 pm.

D. NEXT COMMISSION MEETINGS (TENTATIVE)

June 19, 2018 (Tuesday)

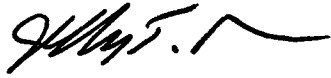
July 17, 2018 (Tuesday)

Respectfully submitted,



FAITH CHING
Secretary

APPROVED AS SUBMITTED:



JEFFREY T. PEARSON, P.E.
Deputy Director

Correction to minutes of May 15, 2018

Page 19 the time when the Commission moved into Executive Session should be 11:34 am and not 11:34 pm.