

MINUTES
FOR THE MEETING OF THE
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: June 20, 2017
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 10:04 a.m.

The following were in attendance and/or excused:

MEMBERS: Mr. Keith Kawaoka, DOH Designee for Dr. Virginia Pressler, Mr. Neil Hannahs, Mr. William Balfour, Dr. Kamana Beamer, Mr. Michael Buck

STAFF: Jeffrey Pearson, Dean Uyeno, Lenore Ohye, Roy Hardy, Charley Ice, Rebecca Alakai, Neal Fujii, Ayron Strauch, Malie Beach-Smith

EXCUSED: Mr. Milton Pavao

COUNSEL: David Day, Esq.

OTHERS: Colin Lau, Jonathan Scheuer, David Taylor, Eva Blumenstein, Stacy Ellamar, Rachel Briggs, Alyssa Kav, Isaac Moriwake, E. Halealoha Ayau, Natasha Baldauf

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

May 16, 2017

Commissioner Hannahs noted corrections to the minutes on page 2 where it says that “water is explicitly held by the Mohihi”. It should be mo`i not Mohihi. On page 16, 4th to the last line, first word should be “resources” not “sources”.

Commissioner Beamer made corrections to page 3, second paragraph, first line, should be “Ola ikawai” not “Ole ikawai”.

Chair Case abstained from voting for approval of the minutes since she was not present at the May 16, 2017 meeting.

Approved by the Commission on Water
Resource Management at the meeting
held on August 15, 2017.

**MOTION: (HANNAHS/BEAMER)
To approve the minutes as amended.
UNANIMOUSLY APPROVED AS AMENDED.**

B. ACTION ITEMS

Stream Protection and Management Branch Manager Dean Uyeno asked to move Item B-1 last because Steve Anthony of U.S. Geological Survey (USGS) was on a conference call that started at 10:00 am. Since there were no objections, Item B-2 was taken first.

2. Department of Hawaiian Home Lands' Modified Petition for Reservation of 6.903 Million Gallons per Day of Surface Water in the Kōke'e Streams, Waimea Surface Water Hydrologic Unit, Kaua'i

SUBMITTAL PRESENTATION BY: Rebecca Alakai

Commissioner Buck pointed out that based on the testimony from Earthjustice, it appears that Department of Hawaiian Home Lands (DHHL) has overstated their water needs on pastoral lands and that they are now recommending 5.19 million gallons per day (mgd). Commissioner Buck asked if in the future can they ask for more. The question is did they base on a precedent overestimate the gallons per acre per day on the pastoral? Is that some sort of precedent? He would like to keep the agreement on the mediation, moving forward, is this pastoral per acre?

Ms. Alakai stated that if this is part of the mediated agreement she was not aware of any numbers or analysis or loose ends or things that didn't quite make it into the mediated settlement. When you do the math from page 11, she stated that she was not sure how DHHL came up with their analysis.

Commissioner Buck asked what is the normal allocation per gallons, per acre, per day for pastoral uses.

Ms. Alakai stated that in the State Water Projects Plan (SWPP) it is 20 gallons per cattle, which is the amount the cattle drinks. There is nothing in the SWPP dealing with irrigated pastures. Not sure if DHHL is including that in their pastoral; she does not know how they came up with those numbers.

Commissioner Buck asked if those numbers would be higher than what we would allocate for pastoral uses that DHHL is asking for in the 6.9 mgd?

In our SWPP, it is 20 gallons per head of cow. In the SWPP there is no mention of irrigated pastures. Ms. Alakai is not certain if DHHL is including that in their pastoral and not sure how they came up with their numbers.

Commissioner Buck asked if the numbers are higher than we would normally allocate for pastoral uses that DHHL is asking for in the 6.9 mgd?

Ms. Alakai answered that in our SWPP, it is 20 gallons per acre per cattle.

Commissioner Buck asked if that would add up to 6.9 or 5.1 mgd?

Ms. Alakai stated that it would have been less.

Commissioner Buck stated that if we approve the 6.9 mgd are we setting a precedent of approving higher lines of water for pastoral?

Ms. Alakai said yes, it's possible. That was her impression.

Commissioner Buck said that if we did approve the 5.1 mgd and made it clear that if DHHL needs more but up to 6.9 mgd, would that be an onerous process?

Ms. Alakai said that it would be the same process as now. If they amend something in the future or add something in the future, DHHL can always come in and submit an additional recommendation.

Chair Case inquired a follow-up question on the number Ms. Alakai cited was per cow per day, not calculating the irrigated pasture part into that number?

Ms. Alakai stated that would be a good question to ask DHHL how they came up with their numbers. Her understanding is 20 gallons for the cow to drink and not for the irrigation of pastures.

Mr. Isaac Moriwake, attorney for Earthjustice (EJ) on behalf of Po'ai Wai Ola clarified on two issues. The first is regarding the pastoral use and the issue of allocation for diversified agriculture. On the diversified agriculture figure EJ has been working on water cases for decades and working on this issue dealing with reasonable water duty for diversified agriculture. Almost 20 years ago, this Commission, in the Waiahole case, based on extensive proceedings that 2,500 gallons per acre per day (gad) is a reasonable water duty for diversified agriculture as a general matter absent more specific on the ground information when making this transition to diversified agriculture which is exactly what is happening here in the case of DHHL's agricultural operations. In the Waiahole case there were lots of arguments for more or less. The Commission established this figure as a starting point subject to periodic evaluation or upon request based on best available data and field experience. That is a quote from the Commission's decision. None of the diverters challenged that determination. Twenty years later at this point no one has requested to revisit that number to amend it, in fact, it appears to have been fully sufficient for that transition to diversified agriculture. So, in its reservation request, DHHL is relying on Department of Agriculture's (DOA) Agriculture Water Use and Development Plan. That figure is 3,400 gad, but as EJ pointed out the Commission has not used these types of guidelines in its allocation decisions because the findings in the Waiahole case suggested

that these guidelines overstated water requirements. The Commission's own modelling which is used in analyzing water allocation request has confirmed this general trend. So, EJ is recommending for diversified agriculture water allocation that the Commission follow the Waiahole ditch decision of 2,500 gad as the general working allocation for diversified agriculture. As pointed out DHHL is always entitled to ask for more if it proves necessary. Our main concern, as Commissioner Buck raised is a precedent. The Commission is dealing with more than this one case. The Commission's kuleana is much broader. The Na Wai Eha, East Maui case and this issue of water needs for diversified agriculture is a key issue in these cases. So with that big picture in mind, EJ believes that the Commission should be recognizing the precedent; and should be applying consistent non arbitrating standards and just want to point out this concern for this Commission and recommend that they stick to this 2,500 gad figure. There is a question that was raised as to how this relates to the mediation agreement. The mediation agreement provided that DHHL would submit this request without disclosing the inner workings of the mediation process which is confidential. Nothing in the agreement says that DHHL is agreeing to that particular number, in fact, here EJ is discussing some of the details and raising some concerns. The Commission's kuleana is deciding what is appropriate for this particular allocation. Mr. Moriwake wanted to clear this up. There is going to be other implementation details that will be coming up in this Waimea agreement. It's historic and EJ stands by this agreement as a model for moving forward together in an unprecedented and path-breaking way. But as always there is going to be implementation details which ultimately the Commission is going to take the responsibility to resolve if the parties cannot figure out all of the specifics. That is where EJ stands today.

Commissioner Beamer asked for clarity on the 6.9 mgd in the mediated agreement.

Mr. Moriwake answered yes the agreement specified 6.9 mgd and DHHL would file that request and the Commission would act on it.

Commissioner Beamer asked if in the mediated agreement everyone understood that this number could be revisited?

Mr. Moriwake stated that basically it provided that the request will be made and if it is not clear, we support DHHL's right to water as established in the Hawaiian Homes Commission Act, in the Water Code and just a matter of determining the details based on the big picture including the Commission's precedent and other cases that might be affected.

Commissioner Hannahs asked when was the 2,500 gad standard was set?

Mr. Moriwake replied in 1998.

Commissioner Hannahs asked that 20 years later on climate impacts, would that number be still adequate or headed upward or downward due to the effects on climate change.

Mr. Moriwake answered that remains to be determined.

Commissioner Hannahs asked what is happening with climate change in the Leeward community; are they going to have more water or less water in terms of rainfall.

Mr. Moriwake answered that there may be more rainfall, but concentrated at times and did not think they are in a position to say today the planning matter, allocation matter and how much we compensate for that. That is something that is needed to figure out on a going basis.

Chair Case commented as she understood, it is the episodic, more water on the wetter sides and more drier on the drier sides.

Mr. Moriwake stated that the 3,400 gad has nothing to do with that concern of climate change. It's the DOA's stand on this particular issue. Again, the Commission has never relied on DOA's data.

Commissioner Hannahs commented that holding on to a 20-year standard in light of important changes is an issue. It may suggest research but he feels that it is an issue.

Mr. Moriwake agreed that it is an issue, but would like to point out that it is an issue as far as the Waiahole allocation goes or any farmers returning to the Commission indicating that allocation has not been adequate in the 20 years since it was made. I agree that these are real concerns in terms of climate change and not for this particular case, but all cases; it is something that we should do research on a systematic and ongoing basis.

Commissioner Beamer asked Mr. Moriwaki about his concern, that legally if somehow the Commission approve the request as it is with the 3,400 gad, others might interpret that as a precedent and that the Commission would have issues in revisiting that in the future. He stated that if he wants the Commission to be mindful this could be an issue that we face.

Mr. Moriwake said that it will be an issue that you face. Yes, we should be mindful of precedent. We potentially may be setting how other parties will interpret that when we talk about the Na Wai Eha case and the East Maui case for starters, we are talking about a matter of months. This issue is teed up front and center in those cases.

Commissioner Beamer stated that thus, we approach everything on a case by case basis. So whatever decision we make, we lay that out. He asked Mr. Moriwaki if that would alleviate some of your concerns for future requests?

Mr. Moriwake answered surely, if the Commission could be very clear about what it's doing and why and that it relates to the issue of precedent.

Commissioner Buck stated just to follow up, this Commission would like to honor the mediated agreement, understanding that to ask for more, it was made clear in our decision that this does not set a precedent for any future allocations on agriculture land uses. Would that be satisfactory from your perspective?

Mr. Moriwake answered that would help a lot.

Commissioner Hannahs asked about the numbers that are being examined in ongoing future cases, in other venues. Is the spirit of coming together in mediation also being talked about as a result of the success on Kauai's mediation agreement?

Mr. Moriwake answered that he didn't think conversation has started recently. Of course, the Na Wai Eha case was resolved earlier, in one round in the settlement which he thought that the Waimea settlement built on. Robbie Alm was also the mediator in that instance. Mr. Moriwake thinks that they are building an understanding momentum for alternative resolutions of these types of cases and certainly hope that would continue. He feels that positive energy has been built and real on the ground results has been established through these mediation processes. He did emphasize again that everything was not resolved in these agreements. Frameworks were established; guiding principles and often the implementation details have to be worked out. The Waimea settlement agreement spent a lot of time trying to address more details which fell through the cracks in the Na Wai Eha experience and partly because of the time pressures in that case. It's a learning process but at the same time, trying to be more detailed into the Waimea agreement. Mr. Moriwake pointed out Commissioner Beamer's concern regarding the problems in the Na Wai Eha case of the implementation of the Interim Instream Flow Standards. That said, Mr. Moriwake said that we are never going to cover everything and ultimately will force this Commission to figure out these details when they arise.

Commissioner Beamer pointed out on pg. 2 of DHHL's testimony, middle of the second paragraph, "DHHL is not seeking to have any actual use of....."

Mr. Moriwake said that is the basic principle that is always binding. You never take more than you actually need. The question is how much do we need to allocate at the beginning, recognizing that we can always allocate more. But whatever we allocate now as an overall number, at any given moment if you don't need that amount water users are not supposed to take that water to begin with. We're glad that DHHL and other diverters recognize and adhere to that principle but it's just restating that basic foundation requirement.

Mr. Jonathan Scheuer, on behalf of DHHL and Natasha Baldauf, Halealoha Ayau. Mr. Scheuer summarized by stating the three main points of their testimony. First, in the context of the mediated agreement, the DHHL had submitted a reservation request for 33 mgd. There are 15,000 acres of land in this area. Some of the original lands are set aside in the Hawaiian Homes Commission Act. That was our best faith estimate how much water would be needed to make the arable portion of these lands useable and productive. In the spirit of the mediation agreement, we were asked to withdraw that, which we did, and instead come back with a 6.9 mgd reservation. Less than a quarter of the water that would normally be considered reservations are supposed to be for ultimate long term needs, but to try to get to an agreement, we agreed on one quarter. We acknowledge that in Na Wai Eha and Waiahole there had been allocation numbers for diversified agriculture of 2,500 gad. A reservation is not quite an allocation. If this was a designated water management area and the Commission issued a reservation for DHHL by rule, we would still be required to get a

water use permit which would actually be an allocation of water. This is a planning number and the 3,400 gad number is, first of all, consistent with planning documents including the State Water Projects Plan document which the Commission approved last month. It estimates 3,400 gad. That is the best estimate for diverse needs for very diverse lands. We acknowledge in our testimony so it's not precedential but in these particular lands, high elevation south facing, windy, we did not want to estimate a lower number and then have to later come back when water might be allocated to someone else. Because ultimately DHHL has a fiduciary duty to our beneficiaries, to make sure they have sufficient water. On the pastoral needs, to be clear, this includes number for both stock water and pastoral irrigation. People cannot make a go of ranching on those pastoral lots without irrigated pasture. Evan Manini who has been a homesteader for decades will talk about ranching on those parcels and why irrigated pasture is necessary. To reassert the point that Commissioner Beamer brought up; these are planning numbers, best estimates for what we need over the near term to try and make this mediated agreement move forward, we are certainly not seeking to use more water, waste water, not take more than or use more than is need, but we feel 3,400 gad for planning purposes is a very reasonable allocation in this particular circumstance. We stand by our request for the reservation that we have asked for.

Commissioner Hannahs commented that this is complicated since the mediation is confidential, but a concern is if we start unravelling one number, then a whole bunch of numbers start unravelling. A month ago we were pleased when the parties came together, the settlement and worried that now with this act seems to align with the settlement, but is concerned about divulging the confidentiality of who was asking for how much and asked if that might that happen?

Mr. Scheuer stated that he played a limited role in the mediation agreement; not in the actual meetings of the mediated parties. If the Commission chose, you could deny our entire reservation request, you could increase, keep it the same. If you chose to follow the recommendation or the request of EJ today, the Hawaiian Homes Commission (HHC), when they approved participation in the settlement agreement was with the commitment towards seeking that amount of water, so then we would have to go back to HHC and get advice on the next step.

Commissioner Beamer said that the Commission approved it based on the 6.903 with the understanding that we were requesting that much water.

Mr. Scheuer said yes and that this is a small portion of the lands. The irrigated pasture is based on Mr. Manini's family experience; a minimum amount for the existing uses and there are not what might be needed to have.

Mr. Evan Manini – 2nd generation homesteaders with DHHL. His family has struggled from the very start, since 1968 with permit to enter that his father was awarded in early 1970s. From day 1, they never had water; it's really sad. On paper it's there, in reality, it's not. Very frustrating living his entire life and what his dad fought for, his parents, and today, back here asking for water again. We have never had water that was granted to us due to restricted pipes that DLNR approved for the plantations to regulate us. That is the head

water to our intake system. It was manipulated by the plantations and taken out even though my dad won the case. To this day, they may have about 1-1/2 inches of water flow through the pipe. If they had neighbors it would be 500 acres at 1-1/2 inches of water on the most driest part of this island. They average, if lucky, 20 inches of rain per year. Mr. Manini acknowledged earlier testimony of an animal drinking 20 gallons of water per day which is a good average. Being a rancher from that part of the island, 9 months ago when the irrigation system leading to their intake on DLNR land, the water was just sinking into the ground due to the trees that the state allowed to grow there, robust eucalyptus. It cracks the ditch line, the water disappears. It doesn't reach their property. The temporary pipe that his family put in is still the pipe they have today, and that is all that is coming to the property. It's a struggle that his family has gone through for decades. Today, he is asking what was requested by the DHHL of this sum of water. It is very sad to have skinny cows, when it is rated by DOA or some other state agency that you can have so many animals per acre per year. The numbers are not even close to reality. That series or 9 months ago of going without water in that system for almost 3 weeks, he had to carry water himself. To be honest the 20 gpd per animal per day is way under. It might be an average for the east side of the island, but not the west side. They are the only family that are ranching consistently since 1968 and their experience in irrigation and using water efficiently is a good way. Mr. Manini has worked with Chair Case when she was with The Nature Conservancy. He knows how to conserve water and knows how much water the mountain is providing. He knows the future; and is realistic; yes they will get less water in time. He has lived here all his life and saw the swamp dry up (Alakai Swamp). He feels that it's not going to get better; need to learn how to share. He said that what is available, yes, it is shared. He thinks what is proposed by the department is a sufficient number. His dad was granted a million gallons a day (court granted). Through the restricted pipe system, they would be fortunate if they received 40,000 gpd. By improving the system, they could be more efficient and more productive in ranching farming and caring for the land. The water that is put on the ground, stays in the aina; not through evaporation; it goes in the earth. They are trying their best to be good homesteaders and will continue to be good homesteaders, into the future. Mr. Manini asked graciously to grant them this number; it will definitely help the future, for the aina, not us.

Commissioner Hannahs appreciated Mr. Manini's testimony and travelling from Kauai to offer the Commission on the ground reality check.

Since there were no further testimonies, Commissioner Buck made a motion to approve Item B-2 as submitted and added an amendment to staff's recommendation:

"This decision honors the agreement within the Mediation Agreement for the Waimea Watershed Area but does not set any precedent for any future allocations for specific agricultural land uses."

MOTION: (BUCK/HANNAHS)

To approve the submittal as amended.

UNANIMOUSLY APPROVED AS AMENDED.

1. Request to Authorize the Chairperson to Enter into a Joint Funding Agreement with U.S. Geological Survey to Conduct Period 2 of a Study on Low-Flow Characteristics for Streams in Southeast Kaua'i, Hawai'i

SUBMITTAL PRESENTATION BY: Dean Uyeno

Commissioner Beamer asked about the monitoring of the stream flow. Is there existing agreements to get into these areas and monitor and not expecting any challenges with entry?

Mr. Uyeno answered that the USGS has been working on Period 1 in securing the right of entries.

Commissioner Buck asked if this is the final date, July 2019, as far as publication; are there actions that the Commission needs to do; i.e. briefing on east Kauai and other outstanding issues.

Mr. Uyeno made a correction to Commissioner Buck's date of July 2019 to September 30, 2019 is the current period end date. He also added that Wailua and Blue Hole diversions are covered in the later presentation. Staff is looking at setting interim instream flow standards (temporarily) until better data is obtained. Ideally, the need is to act on best available information.

Commissioner Buck asked if there is any tweaking needed in order to prioritize streams that get done first or streams that may have higher priority?

Mr. Uyeno answered, that USGS looks at every area as a whole. Data collection is for a set period of time, and the analysis is done together, then results are compiled and assessed all together in one document. That will need to go through USGS standards of peer review. He stated that staff is working with USGS as far as data collection, field work and checking out sites.

Commissioner Buck stated that thinking of the success in the Kauai mediation, how would you set up another successful mediation. How do we get in front of it; how do the stakeholders get the same information, etc., so that these issues can be incorporated into thinking about these kinds of joint efforts. Hopefully there would be a new way of doing business.

Mr. Uyeno answered that where ever possible staff is working with the community as well as the diverters to make sure that there is information that can provide and address any issues that may come up ahead of that and get to interim instream flow standards.

Commissioner Balfour commented that he realizes that this is supreme court driven. Take the two parts of it, that is a lot of money. In the old days, the plantations did that and had the information and as they went out it was abandoned or let it go to pieces. That's a shame.

We should have thought about it when it was still functioning, not in disarray. Just a comment on this subject.

Mr. Steve Anthony, USGS, Pacific Islands Water Science Center, stated that USGS is making the data available as it is being collected. Blue Hole and other areas, working with staff in making sure that information, as it is collected, is available to them and all stakeholders. They can make informed decisions and some of those decisions may be able to make before the end of the total outcome of the project.

Commissioner Beamer asked to explain how the study will show connectivity between ground water and surface water, interactions.

Mr. Anthony answered that one of the type of measurements is stream discharge measurements along the length of the stream and look at changes and discharges moving down the stream and to be able to see where the stream is either gaining or losing water. If it is gaining water, that means that groundwater is coming up to the stream and if losing water between 2 discharge measurements, its losing water to the ground. That is the methodology being used.

Commissioner Hannahs thanked Mr. Anthony for stepping up to the higher number and given what is happening in the federal administration, provided vital services to our mission. He asked Mr. Anthony if he was experiencing further reductions that should give us warning or cause to be concerned about your ability to perform in the future?

Mr. Anthony answered that cooperative matching funds are not being cut which is critical and additional funds were added. Not to say it won't happen in the future. The other positive is that the stream flow monitoring has been recognized that it is vital and administration is avoiding proposed cuts to that.

Commissioner Buck asked if there are any opportunities or if he had knowledge of, in the federal government, where there is ongoing data collection and partnering in a mediation process.

Mr. Anthony said that it does happen. One of the tenets within the USGS is that information that is made available is made available to all parties at the same time.

Commissioner Buck asked if there were any grants that may assist in funding mediation?

Mr. Anthony said that he was not aware of any grants. That is external and USGS just participates as best it can.

Chair Case asked for further discussion, then asked for a motion if there were no public testimonies.

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

At 10:55 am, Chair Case requested a 5-minute break.

The meeting convened at 11:02 am

2. Enforcement and Action Items Regarding Millar Wells, Makena, Kamaole Aquifer System Area, Maui

1. Late Well Completion Report for:
Millar Well 1 (Well No. 3726-003)
2. Applications for:
 - a. After-the-Fact Well Construction / Pump Installation Permits for:
Millar Well 2 (Well No. 3726-005)
Well Construction: 6-inch Casing Diameter, 120-ft Deep Well
Pump Installation: 60 gpm for irrigation use
 - b. Well Abandonment Permit for Millar Well 1 (Well No. 3726-003)
3. Potential Violations and Fines for:
Chester Millar (Late Well Completion Report for Well No. 3726-003 and After-the-Fact well and pump permits for Well No. 3726-005)
Wailani Drilling Services Inc. (After-the-Fact well & pump permits for Well No. 3726-005)
TMK 2-1-005:079, Makena, Maui

PRESENTATION OF SUBMITTAL: Charley Ice

Mr. Ice did not feel comfortable about the fine, but according to the Penalty Policy, the amount is correct. He also stated that Mr. Mike Robertson has a long history with the Commission. He is currently involved in working in Tonga and getting the people there to adopt Hawaii well standards. He feels that there is discretion, but depends how one would look at it. Mr. Ice then passed out Mr. Robertson's testimony. If you feel it is unreasonable a different judgement can be made. Mr. Ice questioned whether we want this to be punitive and whether the punishment accomplishes the purpose, or is the fine appropriate to make a point? Mr. Robertson has admitted that some of his work didn't happen as planned, but has also done lots of good things with the Commission.

Commissioner Beamer made note on pg. 5 under EA triggers, action does not trigger the need for an EA, work is not done on private lands, not in a conservation zone, nor in a special management area. Above that paragraph a different statement caught Commissioner Beamer's attention.

Mr. Ice noted the misstatement not caught in the boilerplate language of the submittal: the project does lie within the special management area. Staff did receive a letter from the county stating that it does not trigger compliance with 343 because it is not within the shoreline area. However, it is within the SMA and the county did issue a minor permit.

Commissioner Balfour cannot believe the number of errors that have been made along the way and does not know why it took so long to realize the errors made. Commission is following the formula; has no problem. He also added that if my business was fined \$18,000 I would be unhappy but if I did what they did, I would have to say it's only right. I have empathy, but if you mess up you should pay the price.

Commissioner Beamer said that because it was very difficult to follow and seems like a lot of time involved, he asked if he felt that the people were not communicating or had ill-intent?

Mr. Ice answered that he didn't think there was an intent to deceive or violate our process or standards. He felt that answers by the parties were not articulated very well. Some of the reasons were not the same, poor communications between parties, and plans kept changing. What they originally had in mind shifted over the course of the project.

DOH Designee Kawaoka asked if this is an after the fact application, but you have worked with these parties before so are you saying that they should have known?

Mr. Ice answered yes, they should have known better. And we are very fortunate that a person present at this meeting has supplied past information and reports, and prepared necessary documentation for the wells that have been completed.

DOH Designee Kawaoka stated that the consequences because it is after the fact, had it not been developed or constructed properly, what would have been the consequences for that occurrence?

Mr. Ice said that is a good point, but even though this is not a sensitive areas it appears that good work was performed and confident that they have not created any problems for the aquifer and resources.

Commissioner Beamer asked to clarify the calculations of 9 days calculations.

Commissioner Buck asked if the 9 days in the letter from the driller or owner?

Mr. Ice's response was that we received the response from the driller 9 days after the 30-day period that we normally allow before applying that duration component. That duration component is being applied to the 9 days after the 30 days. The land owner responded; the driller was late. The land owner no longer owns the land; driller was away.

Commissioner Buck asked who pays the fine, the new landowner?

Mr. Ice answered the driller and the previous landowner who did not file a well completion report pay the fine.

Chair Case asked about the gravity component. To clarify, gravity component G3 is when multiple or repeat violations occur and G4 is evidence that the violator should have known about the violation. There are no G1 or G2 so there is no concern about this would harm the resource? How is the \$500 determined?

Mr. Ice answered that is how it is stated in the penalty policy; for each repeat violation; for this, there are 2 procedural violations, \$250 per incident. It's the 9 days calculations that makes the fine higher.

Chair Case whatever the problems were it doesn't make a big difference whether it was 1 day or 9 days as opposed to a continuing harm to the resource. Whatever gives rise to the gravity component would have happened by the first day whereas if there was a continuing problem the duration would make a bigger difference.

Commissioner Hannahs asked Mr. Ice if this would be considered an isolated incident or are there numerous enforcement actions coming up.

Mr. Ice said that there are a number that have come up, but in all fairness, there are complications that happen, financing falls through, people get half way started, miscommunication occurs between parties. Some may try to keep on top of things and try to keep things rolling. They are willing to absorb some of the difficulties and costs. It does get complicated.

Commissioner Hannahs stated that he is concerned about precedent; in case there are more of these cases presented to the Commission, will this set a precedent and/or negotiation at a Commission meeting.

Mr. Ice answered the main point is that our procedures do require a permit in hand before work actually commences and the permit should be posted on site during work. In our mind, that is clear and the bottom line.

Commissioner Buck asked how long did Mr. Millar own the land? Is there a lien on the property or basically is it an obligation to Mr. Millar and the driller?

Mr. Ice answered the obligation falls on Mr. Millar. We may see some repercussions since he is no longer around.

Commissioner Buck commented even though he sold the land with a well on it and probably made more money than the original cost, he asked Mr. Ice if there was no will; no bad intent?

Mr. Ice didn't believe so.

Commissioner Buck stated that Chair talked about the gravity impact of the resources. The combination is not actually affecting resources; there seems to be no bad intent but a confusing paper trail. He asked Mr. Ice if he is still recommending the full amount of the fine? We will probably hear more of these; wants to know staff's opinions.

Mr. Ice said that it's lot of money but that is how it calculates following the gravity component.

Mr. Roy Hardy stated that there has always been a problem with the penalty policy for the duration component. Staff encourages people to respond within a 30-day period.

Mr. Ice added said that another guideline that is used is to encourage applicant to call if they are ever in doubt. This was something that could have been done, but was not. We had an incident where the landowner did call and we were able to walk him through the process.

Commissioner Buck asked if there were any communication with this land owner?

Mr. Ice answered that we have communication from Mr. Millar by email which is Exhibit 4.

Chair Case said that it sounds like staff has good communication within the 30 days and therefore it is important to recognize that if you are late, there should be a standard for that, but the way it adds up may come up skewed in terms of the calculation.

In Commissioner Balfour's opinion, there is a formula, staff followed the formula, there are rules and regulations. My sense is that staff is very good at following up. I happen to know from experience that one should follow the rules or may receive a heavy fine. If we are going to start feeling sorry for people, this process could take time. If it was arbitrary I can understand it, but it is not, it is concrete, there is a formula and we are following it.

Commissioner Hannahs said that in their response to staff, they were 9 days late, they say at this point, we will cooperate with whatever CWRM needs to finalize this project. They are aware of the fine and prepared to pay it. There is no objection.

Mr. Ice answered yes to Commissioner's Hannahs' questions.

DOH Designee Kawaoka asked if the Commission's ruling final on this or is there an appeal process? Hearings officer?

Mr. Ice did not know the answer don't know about an appeal process then asked the Deputy Attorney General (AG) if they could they request a contested case.

Deputy AG David Day there is a potential request for a contested case that would be considered.

Chair Case asked if they would need to request orally at this meeting and follow up with something in writing.

Deputy AG Day said that was correct.

Commissioner Beamer asked Mr. Ice who did Mr. Robertson send the documents to.

Mr. Ice responded that he emailed the documents yesterday and intended to be testimony.

Commissioner Beamer asked about the test bore over the past 20 years, and was unclear of the definition as to what constitutes a test bore. Take this into account; is this well a test bore? What is the point that he is making?

Mr. Ice was not sure how to answer and said a geologist could best answer the question.

Mr. Hardy's understanding of the situation, when they had the original well that had collapsed, they were saying that they drilled a test bore. The well standards provides definition of a test bore. It is a small diameter hole, an environmental hole to check the water level and is not a well intended for production. That is what the driller had been saying that he thought he was drilling a test bore, which didn't require a permit. This was meant to be temporary and if they find water and a quality they like, then they would have applied for a permit to drill a production well. That was the plan, and this is where confusion started; no one applied for a permit. This is where he drilled the hole larger.

Commissioner Hannahs said that the driller knew that time was of essence and he was 9 days late; knew he was going to get fined \$18,000 and makes no objections and wants to take care of this.

Commissioner Buck asked legal consultant if there would be any potential problems on page 8 on the violation.

Deputy AG Day suggested that if we are discussing the fine that it would probably best to discuss in executive session.

MOTION: (BEAMER/BUCK)

To move into Executive Session

UNANIMOUSLY APPROVED TO MOVE INTO EXECUTIVE SESSION

At 11:32 am the Commission moved into Executive Session.

At 11:50 am the Commission returned and commenced meeting.

Commissioner Buck questioned the 9 days and asked if the actual violation was not having a permit for the well. The 9 days is that they did not provide notice in a timely manner with the violation, which occurred once. He asked if these are being considered separately. He commented that it looks like the violation and the 9 days are combined. The actual violation is an unpermitted well.

Mr. Hardy replied that the penalty policy states that the duration doesn't start until after the notice of violation regardless of how long. The potential violator is told that there is a violation, how do you respond, here are the issues. They have a month to respond. Daily fines will start from the point of the 30 days that is set from the penalty policy.

Commissioner Buck said that might not be consistent with the statutes. They are not in violation of contaminating the resource, which would make sense by doing a daily fine. In this case this is for an unpermitted well. In figuring out the fine, the minimum component and the gravity were the minimum and the 9 days made it a larger fine. Understand the reason for reporting and sending a message that the operators need to send in a report. He asked if there is a reason for the minimum component and gravity components in the penalties.

Mr. Hardy answered that it wasn't the minimum, if you tally it up it comes to a \$1,000 per day which is technically, legally in our rules, the maximum. We are going through a rule change because our rules are inconsistent with the statutes.

Commissioner Hannahs asked what would the fine be for the driller if the maximum for a one time event, without a multiple.

Mr. Hardy said that a one-time event would be \$5,000 and the daily fines would start. The statutes and code need to be updated; our rules need to catch up. The driller is being held responsible for the after-the-fact; for the new well, the owner is being held for noncompliance permit conditions from 1988, and reporting the status of the collapsed well.

Chair Case asked, under the current rules, the minimum plus gravity cannot add up to \$1,000, which should be \$2,000 per day for the driller and \$250 per day for 3 violations.

Commissioner Hannahs said that until such time we align our rules with the statutory authority, to increase it, then we are stuck with \$1,000.

Chair Case said that we could consider \$1,000 per day penalty once for the violation and once for being late. If you want to look at it that way, it would be for 2 days. You wouldn't go the full 9 because it's not continuing. Question is continuing initial violation and continuing disregarding our process. That's the part that is in the calculation, seeming extensive. But nevertheless, you want people to pay attention to the rules. We are trying to give some guidance because of potential impending violations. It's the continuing violation part that matters. You want a fine that sends a message to the people to pay attention to the rules and process and have communication with staff. It's not the same when someone continues to misuse the resource itself on a continuing basis.

Chair Case recommended that we use 2 days in the formula instead of 9 days and otherwise on the Wailani side, leave it the same; which amounts to \$4,000.

Commissioner Buck made a motion to amend staff recommendation to instead of 9 days of recurring violations it's 2 days for driller and table on page 9 total fine changed to \$4,000 for the driller and landowner would remain as staff recommended at \$750.

MOTION: (BUCK/HANNAHS)

To approve staff's submittal as amended.

UNANIMOUSLY APPROVED AS AMENDED with discussion.

Discussion:

Commissioner Buck recommended to staff on further thought on how to deal with upcoming fines by maintaining a strong message of reporting which is important but separating some of the minimal for some of the violations that are having an impact on natural resources versus an accounting process and reporting in a timely manner.

Mr. Hardy suggested that the best thing to do is revisit the penalty policy and adjust the guidance, come back to the Commission.

Commissioner Beamer added for clarity too that Chair brought up G-1 gravity factors, significant risk to the resource or G2, actual damage or harm. In instance like this, for pumping that well, he asked if there was damage or no damage?

Mr. Hardy also added that there is a need to discriminate between the gravity components a bit further.

C. PRESENTATIONS AND UPDATES

1. Maui Department of Water Supply, Water Use and Development Plan Update

Lenore Ohye introduced Dave Taylor, Director of Maui Department of Water Supply, and Eva Blumenstein, Planning Section Head, to give a presentation on their Water Use and Development Plan (WUDP) update. Maui County's WUDP for the island of Maui has never been updated since 1990. They recently released draft chapters, available on their website. They have done a preliminary review and laid good foundation but are not yet done with the plan update.

Ms. Eva Blumenstein's power point presentation is attached and made a part of these minutes.

Commissioner Buck asked about the 241% on slide #22.

Ms. Blumenstein stated that very few of the aquifer systems are developed and used. In 2014, the average total pumpage was 91 mgd. Again, it's not where the infrastructure is, but overall there is a lot of undeveloped ground water. Other areas have been heavily developed because of affordable supply near developed areas. Kahului Aquifer has a

natural sustainable yield of 1 mgd. It's a very dry area, but because of all the irrigation return flow from East Maui Irrigation, existing pumpage has exceeded sustainable yield by several hundred percent. There is a concern that existing wells in the area may be impacted if there are changes in irrigation return flows.

Commissioner Buck asked if the percentage of aquifer pumped is the same as sustainable yield?

Ms. Blumenstein answered that sustainable yield does not account for artificial recharge from return irrigation. The reason you can pump that much is because of the artificial return recharge.

Commissioner Hannahs asked about in infrastructure, surfaces, etc. roads, highways, other ways to achieve savings or optimize recharge?

Ms. Blumenstein answered that they don't have any specific proposed strategies to address incentives to do that.

Commissioner Buck asked if these are backed up by some metrics that will measure your success? I'm assuming you would drill down to some of these that have metrics to see if you are successful?

Ms. Blumenstein answered that lots of them are based on existing studies. We are sorting and updating in terms of desalination studies for our resources or stormwater capture. Those are already in place. This is a strategy of moving forward.

Commissioner Buck thanked Ms. Blumenstein for the presentation and asked one quick question. He was surprised that they are dependent on private water suppliers a lot on Maui. He also wanted to know if there would be a scenario where management would take over the ditch systems? He was surprised in the planning that there is this huge issue.

Ms. Blumenstein said she touched briefly on that in terms of maintaining/insuring the survival of the plantation irrigation system. A more detailed scope of that is public/private partnerships. There isn't a plan in place or strategy in place. For now, there are concerns from the county and state regarding how the Wailuku Water Company, the East Maui Irrigation Company and West Maui lands would be done. There will probably have to be a collaborative partnership to make sure that it is done. Not just municipal, its private users on the west side; they are dependent on the irrigation system and reservoirs have been decommissioned. It's in all regions.

Commissioner Buck said that it's a major issue in your planning process.

Commissioner Hannahs stated that, as is the case with Honolulu Board of Water Supply, he didn't see a specific outreach to research for best practices and innovation. There are things happening around the globe, learning from and incorporating a design. Engage

stakeholders and come up with some ideas. Can we include it in a forward looking plan, innovation, and where is that in the process.

Ms. Blumenstein asked if he was referring to green infrastructure, incorporating the rain water. She said she didn't highlight it today but there is something in there, and she appreciated the feedback.

Commissioner Buck suggested to schedule more updates for commissioners, separate from the regular meeting.

Commissioner Hannahs was excused and because we lost quorum, Chair Case suggested that Item C-2 be deferred and meeting be adjourned.

Chair Case asked for a motion to adjourn.

**(MOTION) BALFOUR/BUCK
UNANIMOUSLY APPROVED TO DEFER ITEM C-2 AND ADJOURN**

The meeting was adjourned at 12:47 pm

D. NEXT COMMISSION MEETINGS (TENTATIVE)

July 18, 2017 (Tuesday)
August 15, 2017 (Tuesday)

Respectfully submitted,



FAITH CHING
Secretary

APPROVED AS SUBMITTED:



JEFFREY T. PEARSON, P.E.
Deputy Director

Amendment to Commission submittal for meeting held on June 20, 2017

Item B-2: Department of Hawaiian Home Lands' Modified Petition for Reservation of 6.903 Million Gallons per Day of Surface Water in the Kōke'e Streams, Waimea Surface Water Hydrologic Unit, Kaua'i

The amendment is as follows:

This decision honors the agreement within the Mediation Agreement for the Waimea Watershed Area but does not set any precedent for any future allocations for specific agricultural land uses.

Item B-3

Commissioner Buck made a motion to amend staff recommendation to instead of 9 days of recurring violations it's 2 days for driller and table on page 9 total fine changed to \$4,000 for the driller and landowner would remain as recommended by staff at \$750.