

**MINUTES
FOR THE MEETING OF
THE COMMISSION ON WATER RESOURCE MANAGEMENT**

DATE: January 30, 2024
TIME: 9:00 a.m.
PLACE: DLNR Boardroom, Kalanimoku Bldg.
1151 Punchbowl Street, 1st Floor
Online via Zoom, Meeting ID: 882 6720 0753

Online link to the video recording of the January 30, 2023 Commission on Water Resource Management meeting: <https://vimeo.com/910975472>.

Chairperson Dawn Chang called the meeting of the Commission on Water Resource Management to order at 9:05 a.m. and stated it is a hybrid meeting being held in the Kalanimoku Building boardroom, remotely via Zoom and live streamed via YouTube. It was noted that people may testify via the information provided online. Chairperson Chang reminded the public not to use the chat feature for any comments, as it presents a Sunshine Law issue. She read the standard contested case statement and took a roll call of Commissioners and introduced Commission staff.

The following were in attendance and/or excused:

MEMBERS: Chairperson Dawn Chang, Mr. Neil Hannahs, Dr. Aurora Kagawa-Viviani, Mr. Wayne Katayama, Mr. Paul Meyer, Dr. Lawrence Miike, Ms. Kathleen Ho

STAFF: Mr. Dean Uyeno, Mr. Ryan Imata, Dr. Ayrton Strauch, Ms. ‘Iwalani Kaaa

COUNSEL: Ms. Cindy Young

OTHER: Ms. Susan Lebo, SHPD; Ms. Sheri Mann, Kaua‘i DOFAW

All written testimonies submitted are available for review by interested parties and are posted online on the Commission on Water Resource Management website.

20240130 00:11:17

A. APPROVAL OF MINUTES

December 19, 2023

PUBLIC TESTIMONY – None

20240130 00:11:39

MOTION: (HANNAHS / KATAYAMA)

To approve minutes with non-substantive edits.

UNANIMOUSLY APPROVED

(MIIKE/KATAYAMA/HANNAHS/CHANG/MEYER/KAGAWA-VIVIANI/HO)

20240130 00:16:41

B. ACTION ITEM

- 1. Approval of Stream Channel Alteration Permit Application (SCAP.6002.2) and Special Conditions, Kaua'i Island Utility Cooperative, Kōke'e Ditch Diversion Modifications and Installation of Monitoring Stations at Waiakōali (Div. 620), Kauaikinana (Div. 607), and Kōke'e (Div. 622) Streams, in Accordance with the Mediation Agreement for the Waimea Watershed Area dated April 18, 2017, Waiakōali, Kauaikinana, Kōke'e Streams, Waimea, Kaua'i TMK: (4) 1-4-001:003 and 013**

PRESENTATION OF SUBMITTAL: Deputy Directory Dean Uyeno

Staff stated the summary of request which is to approve SCAP.6002.2, ditch diversion modifications, and installation of monitoring stations as pertaining to the Waimea Watershed Agreement.

QUESTIONS / COMMENTS – None

PUBLIC TESTIMONY

JOSHUA UYEHARA, KEKAHA AGRICULTURE ASSOCIATION (KAA): Good morning, Chair, Commissioners. We submitted a written testimony and I think we'll stand on that testimony, but here to answer any questions.

COMMISSIONER KAGAWA-VIVIANI: Can you identify your organization?

JOSHUA UYEHARA, KAA: I'm sorry, with the Kekaha Agriculture Association (KAA).

ELENA BRYANT, EARTHJUSTICE: Hi, good morning, Chair Chang, and Commissioners. For the record my name is Elena Bryant testifying on behalf of Earthjustice and we'd like to testify in support of the staff recommendation for agenda

items B1 and B2 and we implore this Commission to approve KIUC's (Kaua'i Island Utility Cooperative) stream channel alteration permit and stream diversion works permit without further delay. These permits are the final approvals needed for KIUC to fulfill its monitoring and reporting obligations under the Waimea Watershed Agreement which this Commission has already ordered six years ago and that the community has been waiting for nearly seven years. I'd be happy to provide more context on the Waimea Watershed Agreement, if needed but basically the agreement outlined two phases and phase one went into effect upon Commission approval of the agreement which occurred in May of 2017. and that phase one required immediate restoration of flows to the maximum extent possible: simple modifications on the ditch system diversion such as removing a board or lifting a gate and also monitoring and reporting requirements. Here we are nearly seven years later and most if not all of these requirements have been outstanding and by letter dated August 2, 2023, Earthjustice documented these concerns related to ongoing violations to the Commission and asked the Commission to take prompt and firm action to enforce these terms. I had a chance to review ADC (Agribusiness Development Corporation) and KAA's testimony and just wanted to make three quick responses to that. The first, we've held quarterly compliance meetings since 2018 and KAA and ADC have been parties at all of those compliance meetings, including the most recent one two weeks ago on January 11th and never once expressed any concern about KIUC fulfilling its phase one obligations under the agreement. As far as KAA's requests to deny the application to allow additional time for collaborative discussions, we maintain that as outlined in our August 2023 letter, we've documented years of ongoing violations and progress in the compliance meeting remains painfully slow or non-existent. If anything, I think that track record or lack thereof speaks for itself. The testimony also raises the hydrologist meeting which was proposed to address what the modifications to the diversions would be done and reviewing the meeting summary notes that KAA provided to the compliance group. There's nothing that's going to be done to at least two of the diversions, Waiakōali and Kawaikōi. At the very minimum, these permits would allow KIUC to do reporting and monitoring of what is actually being taken into the ditch, what's being put back into the stream. Waiakōali is especially concerning because KAA previously reported that there was a throwback that was returning flows that were diverted. We had asked for months for verification of that throwback, and it wasn't until Dr. Ayron Strauch went up and verified that the throwback is not returning anything to the streams. I think at this point the Commission needs to take action and the first step is by approving these permits so we can get basic monitoring and reporting requirements fulfilled. I'm happy to answer any other questions that the Commission might have for me.

DR. JONATHAN SCHEUER, DEPARTMENT OF HAWAIIAN HOME LANDS

(DHHL): Aloha mai kākou, Commissioners. Good morning, my name for the record is Jonathan Likeke Scheuer and I'm appearing here today on behalf of the Department of Hawaiian Home Lands. I like perhaps many of the Commissioners when we saw the agenda last week thought, okay this is a fairly quick and straightforward action item, and

we didn't even plan to testify. Previously DHHL when these diversions were contemplated as phase one of a multiphase process of implementing the Waimea Watershed Agreement and the West Kaua'i Energy Project thought it was a straightforward action. We were contacted by KAA Friday, I believe, and had a chance to talk to them Monday and the information that was conveyed to the Department of Hawaiian Home Lands was that...we have, if you don't know, about 16,000 acres of land that are on the slopes above the Mānā plain and we have a reservation of 6.9 million gallons a day granted by this Commission to deliver water to some of those lands to allow settlement. We have a homesteader as well as a homestead association tenant on those lands now that rely on water that is diverted by the system. We don't operate the system, we rely on ADC and KAA to deliver water in the system and what they have conveyed to us is that if these phase one modifications that are considered in both items B1, this item, and B2, the next item, go through there will be perhaps six months of the year where our tenants will have no water delivered to them. That's obviously a very concerning issue since our tenants have cattle and plants and other things that rely on diversion waters. We have not obviously since this came up on Friday and getting more details midday yesterday had any chance to do any verification of any of these things. It does occur to me that most of the members of this Commission now are not members of the Commission when the Waimea Watershed Agreement was reached and that the very recent dissolution of the proposed West Kaua'i Energy Project which was both a key part of the Waimea Watershed Agreement as well as the mechanism by which DHHL was going to be able to efficiently get at no cost to us water to our lands so that we could homestead those lands. The best path might be for the Commission to defer action on these two items to ask the staff and perhaps the parties to brief you both on the Waimea Watershed Agreement in general and its current status as well as the status of the West Kaua'i Energy Project at your next meeting and then take up these permits with that background, perhaps at the March meeting. I would be happy to answer any questions.

DAWN HUFF, KAUA'I ISLAND UTILITY COOPERATIVE (KIUC): Aloha, Dawn Huff here on behalf of KIUC. I don't have any testimony, I'm just here to answer any questions if there are any.

LYLE ROE, AGRIBUSINESS DEVELOPMENT CORPORATION (ADC): Because we're trying to understand the changes that have been brought by the modification of the West Kaua'i Energy Project, we're just requesting that the Commission defer or deny the approval of the permits for the moment pending resolution through the Waimea Watershed Agreement working group. With that I'm here to answer any questions to the extent that I can.

COMMISSIONER MIIKE: Since I'm new to this, Jonathan, I think you said that this past Friday you were informed that the homestead lands would not be able to get water if this went through. How come this came up so late? It seems to me that this has been going on for what, seven years? And then now right before a decision comes up? I would like anybody out there to explain to me what happened.

DR. JONATHAN SCHEUER, DHHL: Chair, may I quickly respond because the question was directed to me by Commissioner Miike? The Department of Hawaiian Home Lands has indeed sort of tracked this closely and we were aware of this permit coming up. We had not evaluated it independently or considered it as what happens if phase two as contemplated in the Waimea Watershed Agreement didn't occur. Again, we only heard from KAA this past Friday. What we have been doing since KAA informed us, so this is where it can get complicated. There were attempts at mediation informally among the parties to the Waimea Mediation Agreement to settle issues surrounding a lawsuit filed by Earthjustice on behalf of their clients over the adequacy of the environmental assessment prepared by KIUC for the West Kaua'i Energy Project. There were many months of discussions, we were actively participating with the mediator in ways to address the various concerns of Earthjustice's clients and have this project go forward. That was going forward until very late last year. We were then informed very late last year that this project was not going to go forward in its current form. There have been very preliminary discussions between KIUC and DHHL to see how an altered project could go forward that would provide water to DHHL's lands and we've been participating in preliminary discussions along that. But the terms of the relationship of this stage of things to how it might affect immediate delivery of water for our lands, we were not aware of this concern from our ditch operator until Friday.

CHAIR CHANG: Can I follow up with Mr. Ross? You're with ADC, Lyle? Lyle Roe, sorry. I guess I'm going to follow up with the same question that Larry is asking. Why is this only now come to a head? Has ADC been participating in these mediation discussions? Have you been aware of this?

LYLE ROE, ADC: Yeah, I've been in attendance for pretty much all of them, but we've only recently become aware of Dr. Gomez's analysis, for me on around November 7th. I have an email here talking about it. For us, it's sort of a new, for me anyway, it's a bit of a new revelation.

COMMISSIONER MIIKE: I'm going ask, who else has looked at that analysis? It's sort of been put before us as given, but who's evaluated that? Do we just believe it or what?

LYLE ROE, ADC: I can say for ADC's part we're taking it seriously, but we're sort of relying on the mechanisms of the working group and discussions with the parties including Earthjustice to vet this. We're not asking that this application be forever gone, we're asking for some time so that we can consider it, further evaluate it. ADC is aware probably more than anyone else of the length of time that has passed since the execution of this agreement to now. It predates my tenure here at ADC. We are aware of that, but we also want to make sure we do this right. I think this analysis...

COMMISSIONER MIIKE: Who can speak for that analysis? It seems if on one hand this has been dragged out for seven years and then all of a sudden at the last minute something comes up that would sort of suspend it. Seems to me a little strange. Besides

just stating that there's this analysis done, who can explain further to us what this analysis is and what is it about and how reliable is it?

JOSHUA UYEHARA, KAA: Chair, maybe if I could speak for a moment for Kekaha Ag Association. I think before getting into the technical details which if we wanted to get into that I'd rely on Basil, our hydrologist. I think the broader context from the Kekaha Ag Association perspective is when we originally evaluated the phase one changes, that was in the context of it being a temporary transitional state of affairs before the energy project would be put in place. That's a very different context than if that remains the permanent set of modifications from then forward. Part of the way we evaluated it, was there going to be unavoidable and potentially very lengthy disruption to service in the system as a result of the construction process. When you overlay that with, we expected disruptions due to the design in the phase one modifications, but we considered that those were likely to be unavoidable in any case if phase two were being built at the time. Because you would need to do that to renovate the reservoir, to renovate sections of the ditch. That was at least our internal evaluation. From a facts-on-the-ground perspective, from a water user perspective including KAA and ADC tenants and service users, that disruption was unavoidable and probably would overlap in time. If you were going to do that, that was the time to do that. The other sort of more administrative aspect to it would be if phase two did go into effect and even originally contemplated as part of the phase one plan would be a handover of the operational responsibility to the end users from the Kekaha Agriculture Association and ADC to KIUC at some point in that process. While we had reservations about the viability of those designs in the long term, they were also going to be another party's responsibility. That was the context in which we evaluated the phase one designs.

COMMISSIONER HO: Mike, again, I'm also new to this but there was discussion about a working group and I have a couple of questions. Is this working group statutorily created and what is its purpose and how do the outcomes of this working group intersect with these permits that are being requested?

CHAIR CHANG: Dean, you want to answer that?

DEPUTY UYENO: If I can, the working group is we've initially started meeting quarterly. It'll go maybe every two months at times, but basically it involves everybody, all the parties that were involved in the mediation agreement back from April 2017. Just to make sure that we're moving, we're doing our best to move forward on implementing the actions that were prescribed in the agreement.

CHAIR CHANG: Could you identify who the members of the working group are?

DEPUTY UYENO: The folks that signed on to the mediation agreement was the West Kaua'i Watershed Alliance which Earthjustice represents, Department of Hawaiian Home Lands, Kaua'i Island Utility Cooperative, Agribusiness Development Corporation and Kekaha Agriculture Association. I think that's everybody, if I'm missing anybody please feel free to speak up and jump in.

CHAIR CHANG: I don't think it was established by statute so it's not a Sunshine committee. Then there was a mediated settlement that you were implying?

DEPUTY UYENO: Correct.

COMMISSIONER KAGAWA-VIVIANI: It's clear that there's a lot of background that many of us are not up to speed on, the mediation agreement and compliance. But in looking at the scope of B1 it relates to monitoring and not the actual diversions. I think a lot of the testimony seems related to B2 so I guess I was wondering maybe from testifiers given Dean's update that actually some of those phase one monitoring actions have been taken. Dean, you said Waiakōali stream gage was installed May 2022, Kauaikinana?

DEPUTY UYENO: Correct.

COMMISSIONER KAGAWA-VIVIANI: It's not necessarily true that nothing's been done, something was done in May 2022 and we should sort of recognize that. It's this gap, is sort of for the completion of those monitoring infrastructures, is that correct?

DEPUTY UYENO: One gage was installed on Waiakōali and one on Kauaikinana, so this will provide for the installation of the remaining gages on the three streams.

COMMISSIONER KAGAWA-VIVIANI: Okay so I guess with that do any of those present submitting testimony...I think there's some issues conflated in the testimony. Are there issues with the completion of the monitoring and this particular action item?

CHAIR CHANG: In particular I guess that's directed to ADC and KAA.

COMMISSIONER KAGAWA-VIVIANI: Well, KIUC was the applicant, ADC and KAA.

CHAIR CHANG: They're the ones who are having an objection or asking for a deferral.

LYLE ROE, ADC: Good morning, Chair. I think for our part we would prefer to treat them the same given that the phase two modifications probably aren't going to happen or at least KIUC hasn't committed to those. We would like to include the monitoring as part of the project just to make sure that everything with the changes to the project, everything that is going to change or possibly change with the modifications to the diversions is measured properly with those changes.

CHAIR CHANG: You see them as integrated, B1 and B2. You're asking for deferral on both of those?

LYLE ROE, ADC: For ADC's part, yes.

COMMISSIONER KAGAWA-VIVIANI: Question, Mr. Roe. Given that part of the monitoring is to understand the natural water availability, does ADC anticipate being able to access some of that surface water in the future? We don't have data for these streams, correct? Is that true?

DEPUTY UYENO: Dr. Strauch assisted with installation of those two gages on Waiakōali and Kawaikinana so uh we are collecting that data. I believe there is a USGS gage um on one of the streams. I don't know if um Ayrton is on the call, I don't know if he's able to speak to it at this point, but um yeah, we do have some data currently.

COMMISSIONER KAGAWA-VIVIANI: I guess my question is it seems to me we would still want to understand um these streams regardless and so it's not wasted effort to measure and monitor them.

DR. STRAUCH: Ayrton Strauch with the Stream Protection and Management Branch. Kawaikinana, we have a monitoring station that measures natural flow conditions of the Kōke'e Ditch. On Kawaikōi, there's a USGS gage, long-term USGS gage that is about a half-a-mile upstream of the Kōke'e Ditch intake. Then on Waiakoali, we're measuring low flows in the ditch. It was the easiest, most accessible place to install the station and under low-flow conditions, 100% of the water is currently being diverted at that location because the modifications to the dam have not been made. We are gathering and we're now at about 18 months of continuous record data, I believe if my memory serves me right, with those low-flow continuous monitoring stations. These stations were operated as partial record stations for many years by staff, as well. We have some good data for these locations, at least with the Kōke'e Ditch monitoring station above Kōke'e Stream or upstream of the proposed modifications that KIUC is planning to make for phase one. That would help us understand how much water is going into the system because there are some small tributaries that also feed the system that aren't being monitored and there is release of water at some locations uh below the Kawaikōi and Kawaikinana intakes um that put water back in the stream. We're not at the moment monitoring how much is being diverted in total from the system um at that location. It would at least from a monitoring and availability standpoint, adding that one ditch gaging station would make a difference. I don't think it would affect any modifications or issues that ADC is bringing up. That's all I had.

COMMISSIONER KAGAWA-VIVIANI: Dr. Strauch, have you been able to review the recent report relied upon by KAA, submitted by Basil Gomez?

DR. STRAUCH: I was in the field all day yesterday. I've not been able to in the last 24 hours.

COMMISSIONER HANNAHS: All of these actions are pursuant to uh the mediation agreement, the settlement agreement that all parties agreed to. When you bifurcated phase

one and phase two in that agreement, was there a caveat that indicated that we would not proceed with phase one if phase two was altered? That's in effect what's happened, right? Phase two has been altered I want to come to that question. Secondly, whether KIUC had the unilateral right to make that decision given that they signed off on this mediation settlement.

DEPUTY UYENO: I can read um directly from the agreement. It says, "phase one will go into effect upon the approval of this agreement by the Commission as part of phase one. The parties agree to immediately take steps to restore flows to the maximum extent possible, for example by removing a board or lifting a gate while working on the structural modifications pursuant to the deadline set forth in section B." Obviously we did not meet a lot of those deadlines in part due to permits and approvals that were required. Phase two says, "phase two goes into effect if and when the KIUC Energy Project goes into service." So there was a caveat if that energy project did not proceed.

COMMISSIONER HANNAHS: But they clearly said that there are certain things that should proceed in phase one whether or not phase two happens.

DEPUTY UYENO: Right, which was primarily the gaging and the implementation of the modifications to meet the instream flow standards that were established.

COMMISSIONER HANNAHS: It feels like that's exactly what's happened, that phase two may not happen but the parties understood that when they signed off on the agreement, that it might not happen.

DEPUTY UYENO: Correct.

COMMISSIONER HANNAHS: I'm not sure why and I get sometimes there's new information and so forth or we have second thoughts about the agreement that we signed previously, but they did sign the agreement previously and recognize that there's value in this data, it would be disruptive in terms of the service to install those gages and take those actions. But they committed to it and we accepted that settlement, so it feels like we're re-trading all the hard work that went into finding that common ground. What's the case in abandoning it at this point?

CHAIR CHANG: Neil, you raise a good point and I guess looking to ADC to Lyle and to Joshua to respond to that because you were part of the discussions, you were part of the settlement agreement. You also knew that phase one was separate and apart from phase two so what is the new information? It appears KIUC has decided that they're not going to proceed, that was always a possibility given the lawsuit that was filed back in January of 2023. Why at this point in time is ADC and KAA seeing phase one as tied to phase two when that always appeared to be contemplated even under the agreement? If you could respond to that.

LYLE ROE, ADC: I'll jump in real quick, for our part we still support completing these phase one modifications just with some slight alterations. We don't know what those alterations might be yet and primarily to ensure that we can supply our tenants with, and DHHL frankly, with the water that in DHHL's case, they're entitled to. That's our big concern here, is the analysis that shows potentially 40 to 50% of the time that ditch will run dry in which case we won't be able to provide DHHL with the water that they're entitled to. At this point we don't really know what we don't know given the changes to the West Kaua'i Energy Project and so all we're doing is asking for some additional time to be able to understand what those changes are and what some of those effects might be so that they can be mitigated.

CHAIR CHANG: My question is similar to Dr. Kagawa-Viviani's question. What in B1 is objectionable that may impact the water delivery in B1 which is primarily the installation of monitoring. What in B1 is objectionable to ADC?

LYLE ROE, ADC: For our part, if the Commission were to approve this I don't think we would have a huge problem with B1. I think it would be a little bit of a waste. We would have to go back depending on any modifications we made to B2, any modifications we made we'd want to make sure that we had the follow-up gaging to be able to verify what we had done and do that monitoring. I think it's a case of both of these matters are tied together to the extent that we would want one to follow the other one, to complement the other so that we don't potentially have wasted gaging or wasted effort if we're going to make changes that aren't currently contemplated in the applications.

CHAIR CHANG: Would you agree that the information that's gathered from the data we collect pursuant to the installations in B1 would be important notwithstanding whatever changes you may have to the project in B2?

LYLE ROE, ADC: They could be, but if I understood comments earlier by Dr. Strauch a lot of that gaging already exists except for Kōke'e Stream.

CHAIR CHANG: Ayron, would you agree with that assessment that the items in B1 you have sufficient information with the existing gages, the only additional gage you need is what's in Kōke'e Stream?

DR. STRAUCH: At this point Commission staff were under the impression that the ditch was going to be piped over Kōke'e Stream and Kōke'e Stream's natural flow would remain in the stream and understanding the conditions that exist in that stream. It's a relatively small stream and we've tried to make flow measurements there without much success. The Kōke'e Stream gaging station is not a high priority. I was more referring to the Kōke'e Ditch before the Kōke'e Stream. I think it was an acoustic doppler or a pressure transducer and a new control point installed by KIUC in the ditch that was being proposed and that would help understand how much water is available in the ditch.

CHAIR CHANG: One final question for me, what length of time of a deferral are you asking?

LYLE ROE, ADC: At the moment I can't answer that, I would hope it would be really short. The hydrologist as we mentioned in our testimony, the hydrologists both from Commission staff, Earthjustice, and KAA Dr. Gomez, they've already met. I can't characterize the nature of the report because I haven't seen it but I know that their comments have been transmitted to Earthjustice already for proposed modifications to the existing plan for phase one. It's my understanding that Earthjustice is currently reviewing those changes.

CHAIR CHANG: Are you asking for 30, 60, 90 days?

LYLE ROE, ADC: I'm not sure I'm qualified to answer that, but I would hope within 30 to 60. Again, I'm throwing a number out.

COMMISSIONER HANNAHS: If I'm hearing everybody correctly the intent of what we want to do, there's alignment on that, there's no dispute about that. Question is as we now do the work uh people are going to be inconvenienced or out of service. There could be some damages created that are certainly unintended, in some cases possibly inevitable but not intended as damage. Because the virtue of the data has a long-term value so we undergo certain inconveniences for that purpose. When we issue you or approve a permit, is it so rigid that you can't have dialogue with the parties and figure out ways to do that to fulfill the intent of the permit which everybody agrees about, but do it in the best way possible so that the inconveniences are minimized? I mean don't you still have latitude if we improve this permit today to do some sensible things on the ground so people aren't hurt?

DEPUTY UYENO: A I think certainly for item B1 um which speaks to the gaging because certainly KIUC needs to coordinate with KAA and ADC possibly as far as what types of equipment to install because I believe the intent is that they will, once installed, they would be turning it over to KAA to manage and uh continue to maintain and report. In this case B1 I think it could proceed. I don't know if it would hurt to defer it and come back um so that we have a better plan but I don't think it's so much of an issue with item B1. Item B2 is another story. I don't know if I want to get into it too much because we're not on the agenda item yet but um there were proposals that were developed in the modifications um based on the energy project moving forward. I can understand that there may be more um concerns moving forward on that permit.

COMMISSIONER KATAYAMA: Dean, can we hear from the applicant on item B1 as to what the impact is to ADC or KAA on that?

DAWN HUFF, KIUC: Aloha, thank you. First, I just wanted to clarify that for the monitoring, some of the monitoring can be done with or without the modifications. It's independent of the modifications and other monitoring is integrally tied with the modifications because the monitoring is focused on monitoring the instream flow that is

released at the point of the diversion, the amount of water that stays in the stream at the diversion. That aspect of monitoring is integrally tied so if the permit for B1 were to be issued we could do a portion of that but not all of the monitoring. I did just want to clarify that aspect. In response to the question about whether we can respond to the hydrology report or hydrology work, we have not seen it um so we can't respond. I can say that the diversion modifications were designed to implement the phase one IIFS and they're flexible so they can divert what's available in the stream and they can implement the IIFS as its established in the mediation agreement.

COMMISSIONER KATAYAMA: Sort of addressing Commissioner's earlier question of is this sort of modest tweaking or is this certain portions of the application that could not be completed as presented?

DAWN HUFF, KIUC: I'm sorry, can you repeat the question?

COMMISSIONER KATAYAMA: There was an earlier question saying that do we have the ability to modify the gaging stations to make it fit as built construction kind of things? Or are you saying that they are portions of the application that cannot be completed?

DAWN HUFF, KIUC: That's correct, there are portions of the monitoring that cannot be completed without the modifications because they're connected to the instream flow, measuring the instream flow that remains in the stream. The ditch portions of monitoring and streamflow portions of monitoring, the ditch flow Ayron named the point at Kōke'e Ditch before it enters Kōke'e Stream. That's independent of the modifications. We could implement that portion of the monitoring but there are other monitoring points. An example is at Waiakōali stream at the diversion. There's a measuring point there for the phase one instream flow standard that would remain in the stream. We could install equipment but that would not be able to be monitored until the modification was made because the modification itself would be the instream flow release point. I hope that makes sense.

COMMISSIONER KATAYAMA: Thank you, that certainly does add a little more clarity to what we're talking about.

COMMISSIONER KAGAWA-VIVIANI: Dean, um if we approve a SCAP, there's no obligation of the applicant to necessarily do all of it, right? We're saying there is room for it not to be fulfilled given the sort of uncertain circumstances of KIUC's project. Is that correct?

DEPUTY UYENO: Yeah, you could issue a SCAP and they only complete portions of it.

COMMISSIONER KAGAWA-VIVIANI: We've already had that. I kind of want to move the discussion on to B2. I think B1 appears to be less...

COMMISSIONER KATAYAMA: I have one more question on this. Your license or access to the site itself, how is that to be resolved, Dawn?

DAWN HUFF, KIUC: The license that was spoken to earlier was a broader license that was primarily uh developed with the West Kaua‘i Energy Project moving forward. It has expired. If the permit is issued today we still have a procurement process to go through, there will still be a lead time on materials. So we have time and we would be more than happy to work with ADC on a limited right of access that would allow us to um get to the diversions and the contractor who’s going to implement the work, get to the diversions to do the work for monitoring or modifications or both. The work wouldn’t happen instantly after the permits are issued, there’s still quite a bit of lead time here before the work would go forward. We have some time to work with them.

COMMISSIONER KATAYAMA: Having said that, would it be a more reasonable approach to fine-tune your application to what work is actually to be done or can be done or should be done under phase one rather than having sort of this broad approach?

DAWN HUFF, KIUC: The proposal in front of you is and was designed for the phase one IIFS, it is not related to the energy project. The license with ADC which was developed under the broader terms of West Kaua‘i Energy Project moving forward and it was developed back in 2018 but the application in front of you is specific to the phase one modifications and not the energy project.

COMMISSIONER KATAYAMA: So it’s just principal gaging, no changes in flows?

DAWN HUFF, KIUC: It’s gaging and diversion modifications that would allow the ditch operator to implement the IIFS. Some of the diversions are passive, Waiakōali is a great example. It’s very difficult to maintain the IIFS at that diversion without some kind of modification. These modifications were designed independent of the energy project to allow the ditch operator to implement the IIFS, the phase one IIFS.

COMMISSIONER KATAYAMA: So, these hydrology reports have been issued. What’s the review time on that?

DAWN HUFF, KIUC: I have not seen them. We could review them relatively quickly and we would want to review them collectively with the rest of the working group and CWRM staff. I don’t think that would take a long time to do, a couple weeks maybe.

COMMISSIONER KATAYAMA: So that is not related to phase one at all?

DAWN HUFF, KIUC: If you’re speaking about the new hydrology that KAA mentioned, that KAA’s hydrologist has done, that’s new. There was significant hydrology work done through the working group, we had a hydrologist, Water Commission did their own work,

each of the parties had a hydrologist. Specific to KAA's new hydrology, we just have not seen that, but we could review it relatively quickly.

BASIL GOMEZ: Chair, since I'm the person that did this analysis, could I clarify Dawn's statement for a minute? This analysis is not new.

CHAIR CHANG: Could you introduce yourself?

BASIL GOMEZ: Excuse me, sorry, I'm Basil Gomez, I'm KAA's hydrologist. I'm the person that did this analysis and I would just like to correct Dawn Huff for a second. This analysis is not new, I was asked to revisit it in November when KAA learned that the energy project was not moving forward. I presented this analysis to Commission staff at a meeting held in the CWRM conference room on the 4th of December 2015. The analysis was presented to staff at that point in time.

DEPUTY UYENO: I think Ayron was in that meeting.

COMMISSIONER KATAYAMA: When was this?

CHAIR CHANG: December 2023, last month.

BASIL GOMEZ: December 4, 2015.

CHAIR CHANG: I thought that was a mistake. Okay, 2015.

COMMISSIONER HANNAHS: The analysis existed in 2015, the parties including the party you represent signed an agreement in 2017 to do this, so why are we revisiting it?

CHAIR CHANG: Yeah, that's kind of my concern is that we as a Water Commission we're supposed to be ensuring that the IIFS is being met and the fact that KIUC has changed their plan, that's independent of ensuring the IIFS is being met. If there's got to be changes to that, we still need good data. The good data is dependent upon the gages that are being part of B1. I'm ready to move on.

COMMISSIONER HANNAHS: I concur, there's another reason to do it. This is not the only place where parties have different viewpoints, and we urge them to mediation, and they worked really hard in mediation. We support that. When there's an agreement, I think it's incumbent upon us to enforce and honor the agreement. If we start letting people retrade agreements all the time, it's hard to move forward and we don't incentivize mediation and coming together as a community. The intent here is still that data is very valuable for a precious resource that is highly coveted. These gages will get us that data. As we issue a permit, number one, they have a right to not do it or to do it a little bit differently to accommodate other people's interests, I hope our approvals give

you that latitude so that you could do it the best way possible. The intent of the parties, the intent of the Commission is well served by getting these gages in place, so we have reliable data to make decisions upon.

CHAIR CHANG: I didn't hear Dawn Huff on behalf of KIUC withdrawing the application. I think they also agree that there's a distinction between B1 and B2. I also heard from ADC and in particular ADC perhaps not KAA that you were asking for some additional time but given Dawn Huff's comments that even if we were to approve this today it would still take some time to actually install them. There is still time even within the approval process for you to continue on the discussions to review the reports and to have some input. With that being said, do I have any more questions or anybody else who we've not heard from that would like to make a comment?

20240130 01:12:32

MOTION: (KAGAWA-VIVIANI / HANNAHS)

To approve staff recommendation as submitted.

YES- (MIIKE/HANNAHS/CHANG/MEYER/KAGAWA-VIVIANI/HO)

NO- (KATAYAMA)

20240130 01:13:50- Break

20240130 01:20:43

B. ACTION ITEM

- 2. Approval of Stream Diversion Works Permit Application (SDWP.6001.2) and Special Conditions, Kaua'i Island Utility Cooperative, Kōke'e Ditch Diversion Modifications at Waiakōali (Div. 620), Kawaikōi (Div. 616), and Kōke'e (Div. 622) Streams, in Accordance with the Mediation Agreement for the Waimea Watershed Area dated April 18, 2017, Waiakōali, Kawaikōi, Kōke'e Streams, Waimea, Kaua'i, TMK: (4) 1-4-001:003 and 013**

PRESENTATION OF SUBMITTAL: Deputy Director Dean Uyeno

Staff stated the summary of request which is to approve SDWP.6001.2 in accordance with the Waimea Watershed Agreement.

QUESTIONS / COMMENTS – None

PUBLIC TESTIMONY

JOSHUA UYEHARA, KAA: Good morning again, Chair, members of the Commission. Maybe what I'll do is we did submit testimony as well but maybe I'll try to preemptively answer some of the questions and maybe related to some of the discussion in the last item. We definitely take to heart the point about we engaged in the mediation process, and we signed off on a plan. One of the challenges we ran into early on in that process was sort of this fork in the road question on, well what happens in phase one if phase one is all that happens permanently and what happens if you have phase one and then it's transitioning quickly into phase two. From our perspective it was apparent that you would at least need an entirely different set of considerations in a phase one standalone scenario versus a phase one as a transitional to phase two. Then it became a question to us, and did we feel it was reasonable to demand that two separate phase one plans were fully engineered and permitted. The reason you would have had to do that in parallel was because of the lengthy time period that we did actually see realized in getting Army Corps and all the other necessary approvals. You had to pick what you thought was the most likely scenario and run that down to ground and it wasn't feasible to say, well we have to keep in mind that if the less likely scenario ends up being realized we need to continue to do all of the work required to potentially implement that alternate universe instead of the one in which we all thought at the time the energy project would move forward. That's not to say that maybe we made a mistake in taking that approach. I'm not saying that we necessarily made the right decision at the time but that was our thought process. We didn't foresee that as a possibility, it's that at a ground level what would it take to actually say, well if we really didn't do phase two then what would you do that would be an entirely different and significant set of work engineering, permitting, etc. that in all likelihood if we went to Army Corps with two different plans they would say figure out which one you're going to do and then come back and we'll permit that one. There was a logistical hurdle to that idealized concept of, well we've got a standalone thing if we don't do phase two and we've got a plan if we do phase two. We had to run with the more likely option at the time, at least that was our perspective.

CHAIR CHANG: Commissioners, any questions for Joshua?

COMMISSIONER MIIKE: I want to ask a more implementation question. If we approve a stream diversion permit it has to start work within what a year?

DEPUTY UYENO: No, the permit's good for two years.

COMMISSIONER MIIKE: Okay, so if we approve a permit and they don't do anything then it expires?

DEPUTY UYENO: Correct.

COMMISSIONER MIIKE: If we don't approve a permit, they can't do anything?

DEPUTY UYENO: Correct.

CHAIR CHANG: And that's what got us here is they had a permit, but they didn't do anything.

DEPUTY UYENO: Correct. The only issue may be that if there were concerns about the actions that they're applying for, if there are issues with how they're doing the construction at certain diversions.

COMMISSIONER MIIKE: My point is that if you don't give them a permit, there's no incentive for people to come to some conclusion. If you give them a permit then they got to do something and I'm not talking about the applicant, I'm talking about people, the applicant and people who are concerned about their permit. I don't want to get stuck in foreverland forever. I'd like to force the issue.

ELENA BRYANT, EARTHJUSTICE: Elena Bryant on behalf of Earthjustice. As I stated in my earlier testimony on B1 the mediation agreement required basic structural modifications to be done to ensure that stream flow would be restored to the maximum extent possible and to ensure connectivity and a wetted path for which stream life could traverse. For Waiakōali the dam there diverts all stream flow, completely dewatering the stream below unless a heavy rainfall event allows some of the flows to over top the dam. At the hydrologist meeting that was alluded to by previous testifiers on B1 there's no modifications proposed for Waiakōali to ensure stream flow restoration, let alone connectivity. For Kawaikōi and Kauaikinana, planning boards remain in the ditch that prevent stream flow restoration to the maximum extent possible and the proposal set forth by KAA do have incremental improvements by moving boards up but not out. Again, this still doesn't comply with the spread of the agreement. None of KAA's concerns or DHHL's concerns were ever brought to our attention, ADC claimed they were aware of these on November 7th. They weren't shared at the January compliance meeting two weeks ago with Earthjustice or our clients. DHHL states they were made aware of this on Friday. Same thing, nothing was ever brought to our attention, so we do stand by the terms of the mediation agreement and the commitments that each party to the agreement made and ask this Commission to approve staff recommendation. If the Commission is inclined to defer, we would ask that this be placed on the agenda for the next meeting to ensure that the parties are in fact communicating and engaging in good faith discussions to meet the commitments in the agreement that were agreed upon seven years ago. Thank you and I'm available for any questions.

LYLE ROE, ADC: Good morning, Chair, good morning, members. Essentially, the same summary as before. We stand on our written testimony on this. Our main concern is making sure that DHHL and our users are able to receive the appropriate amount of

water. If the analysis proves accurate, which it looks like it will, we're just concerned about making sure that the users have the appropriate amounts of water.

CHAIR CHANG: Lyle, if I can ask you when you say the analysis, you're relying upon Basil Gomez's analysis?

LYLE ROE, ADC: Yes.

CHAIR CHANG: Did you just hear his testimony that the same data was presented in 2015?

LYLE ROE, ADC: Yeah, I wasn't here at the time, and I wasn't aware of that, so for our purposes and admittedly we've had some turnover in this office, I became aware of this on the 7th.

COMMISSIONER KATAYAMA: Hi Lyle, this is Wayne Katayama. Are there any reservations for not renewing KIUC's license or right of access to the site?

LYLE ROE, ADC: There is on our part at least until we know we have a holistic view of what this project is going to look like both in terms and I guess when I say that I'm referring to the old scope, the West Kaua'i Energy Project, the hydro portion has been eliminated. For our parts we want to know what the new project is going to look like before we make any approvals. I think we just want to make sure we don't piecemeal things and perhaps have an idea of what's happening over here, but we don't have a firm idea of what's happening over here. We'd like a holistic view of what the project changes are and what the amended scope will look like.

COMMISSIONER MIIKE: I'd just like to make a comment about I've heard several times about we want to assure that our people get the water. There are no absolutes in these streams, we're talking about stream restoration and off-stream uses. One does not trump the other completely so if there has to be a balance, part of that balance is that everybody doesn't get everything they want. That's my only comment on this.

DR. JONATHAN SCHEUER, DHHL: Good morning again, Commissioners. For the record Dr. Jonathan Likeke Scheuer for the Department of Hawaiian Home Lands. I appreciated the comments and questions on the all the testimony given and the comments and questions from the Commissioners during B1. I want to add first a little bit of additional information that I alluded to. We have long-term plans for a small portion of our 15,000 acres of land, particularly the lands around Pu'u'ōpae, about 300 acres of lands have been issued by license to a homestead association and they are currently farming on those lands. In addition, for decades we have had five homestead lots at the very mauka portion of our lands and three of those lots are occupied by a homesteader who ranches on those lands. They receive water now from the ditch system coming from Pu'uloa Reservoir through the Pu'umoe divide. It's fairly inefficient because it's an

unlined old irrigation ditch and one of our motivations for participating in the agreement was the promise that we would be able to get this water piped to our providing us and the Water Commission a much better way to balance instream and off-stream uses, you minimizing stream losses. We were surprised at the assertions shared with us on Friday and then Monday that this implementation of B2 could result in a lack of delivery of water to our lands. We haven't had a chance as I said to independently verify it. I absolutely share with everybody including Earthjustice's attorney and the Commissioners a frustration at we've been working for something for so long and hey at the last second, we're asking for you to hold the breaks on it. I want to point out that DHHL has actually continued to do its part in the implementation of the Waimea Mediation Agreement in good faith, including spending hundreds of thousands of dollars going through an environmental assessment process for what homesteading would look like around Pu'u'ōpae. We also issued that went through the entire beneficiary consultation process, issued a long-term lease to KIUC for access to our lands for their portion of the project. We've continued to participate all along. The concern that I have at this moment on behalf of DHHL is I don't know whether or not this implementation of these diversion changes which are required under the agreement would result in the failure to be able to deliver water six months of the year to our tenants. If that's the case, we obviously have a very significant concern. That's on the fly where we're at with this submittal. Happy to answer any questions.

COMMISSIONER HANNAHS: Jonathan, did you hear the prior testimony of Mr. Gomez that that data was old data from 2015 and that the parties knew that in 2017 when they executed the mediation settlement agreement. So why would it be a surprise that there'd be periods of time when less water was in the system and available to its users.

DR. JONATHAN SCHEUER, DHHL: Thank you, Commissioner Hannahs, I did hear the testimony of Mr. Gomez. I was not the lead for DHHL during the mediation agreement so I can only represent what I had as a consultant supporting the leads for the Department. I apologize if I get some of this slightly incorrect, but this is my understanding. As the agreement was planning to move forward, operational control of the system was going to transition from KAA, ADC to KIUC. We repeatedly spoke with KIUC as the West Kaua'i Energy Project was moving forward about how we would continue to be able to assure delivery of water to our homesteaders and homestead tenants during all phases of the project. When KIUC was involved with the entirety of the project through phase one to phase two, we had those assurances. They were very clear, yes and it was actually in our lease agreement with KIUC. Now, as it appears it might go KIUC's obligation under the Waimea Mediation Agreement ends with their implementation of these phase one diversions and so the operator would now not become KIUC but would instead remain KAA and ADC. We have no assurances from them that they're going to be able to continue to do that. In fact, what we've been orally conveyed is the exact opposite, so yes, the data existed, we relied on the assurances from KIUC that during all phases we'd be able to deliver water. I don't know what they base that on in

terms of their analysis of the data that was at hand. Is that responsive to your question, Commissioner?

COMMISSIONER HANNAHS: It's complicated, thank you.

DR. JONATHAN SCHEUER, DHHL: Which is why respectfully and if there was an after analysis of everything that's gone on, there is abundant blame to cast in many directions. But there's so much context to this, this is why my initial suggestion was a briefing on the agreement as a whole as well as the current status of the West Kaua'i Energy Project would allow the Water Commission to make a decision where it sees the relationship between the parts and the whole.

COMMISSIONER HANNAHS: But rest assured I for one was not casting a lot of blame and finding people to point fingers at but just resolve this as best we can and honor the agreements that we have but also make sensible accommodation when things are different. Dean, correct me if I'm wrong but I appreciate Josh's testimony on this issue that there's a material difference, you have an agreement. One is about putting gages out there to give you more information, that hasn't changed too much. Even though this part of phase one was separated from the commitment of the phase two creation of the utility system, these are material changes in the infrastructure that require permits and approvals not only by us but from Corps of Engineers and so forth. You might want to do it differently knowing that you're not going to have the phase two that you thought you had back in 2017. I'm sympathetic to that, that's a little bit different from gages.

DEPUTY UYENO: In these cases, because the water and anybody can correct me if I'm wrong, but because the water is going through the hydro system and being returned to the stream, the ditches are being treated as streams in this case per the Army Corps jurisdiction.

CHAIR CHANG: This is your application and your application was based upon a particular project, is that correct?

DAWN HUFF, KIUC: The application before you today is for designs that were created to implement the phase one IIFS whether or not the West Kaua'i Energy Project went forward. As we understood it our commitment was to make sure that those modifications when in place, the phase one IIFS could be implemented by the ditch operator regardless of what happened with the West Kaua'i Energy Project. That's what's in the application.

CHAIR CHANG: For me I will always talk about what's my lane and in this case my lane is IIFS. It's to ensure that that's been met and what I'm hearing you say is that this application even though it is more than just gages, it's intended to meet the IIFS. Is that correct?

DAWN HUFF, KIUC: It's intended to allow the ditch operator to implement the IIFS, yes. Clarification, implement the IIFS at the point of diversion. In other words the IIFS stays in the stream rather than go into the ditch and then return. That was what we were tasked with doing in our commitment for the phase one as we understood it.

COMMISSIONER HANNAHS: Thank you, Chair for that focus. Dean, back to you. Do you agree given that there's not going to be a phase two at this point this is the best way to achieve the IIFS objectives that we have? Would you like time to think about it? Some people are asking for deferral and so forth.

DEPUTY UYENO: At its face it'll implement the instream flow standards as per the agreement; however, with all due respect I think our lane is also to make sure that the diversions are installed responsibly and for the purpose that its intended, right? I recognize that there may be, given that phase two may not move forward, there may be concerns about how the diversions are constructed or modified to meet the instream flow standards. I can understand that there is some concerns by KAA and ADC to modify those plans to fit their needs as they move forward in managing the system.

CHAIR CHANG: No, and I appreciate that. I think that that is fair. I know that there are others still that have signed up, but does CWRM have a recommendation based upon what you're hearing? Do you want to hear other testimony because that's ultimately going to be my question.

DEPUTY UYENO: I mean most of the others are in association with the agencies.

COMMISSIONER MIIKE: I have a question. I assume that the IIFS was reached by the usual balancing of instream and off-stream uses and if that's the case what now comes up is that some of the off-stream uses might be affected beyond what the agreement was that sets the IIFS, is that right? Like what Jonathan was concerned about that some of the off-stream users may not get the water that they thought they would be getting. If that's the case, shouldn't they be trying to petition to modify the IIFS and if that's the case, why should we wait for that to come forward when we already have an agreement on what the IIFS should be? There's always going to be uncertainty about how much water is going to be available so I don't see why, at least from my point of view, we have to revisit this issue all over again.

DEPUTY UYENO: As far as the instream flow standards go?

COMMISSIONER KATAYAMA: Dawn, may I ask a question? As part of ADC's testimony they attached what looks like a press release. Have you seen that as Exhibit A?

DAWN HUFF, KIUC: I have seen the press release, yes.

COMMISSIONER KATAYAMA: One of the impacts, there were three listed, the third was the water delivery of water for irrigation and other purposes to users along the ditch of which one of them was DHHL, is that correct?

DAWN HUFF, KIUC: That was delivery of water through the energy project, not the phase one modification.

COMMISSIONER KATAYAMA: I think we're on phase two, B2 now.

CHAIR CHANG: We're on B2 but I think it's different than phase one.

DEPUTY UYENO: Phase one was to implement the instream flow standards as quickly as possible, phase two was...

COMMISSIONER KATAYAMA: Does that change the impact of your water or water availability for DHHL?

DAWN HUFF, KIUC: No, the phase one modifications are flexible meaning different volumes can be diverted into the ditch. The press release is specific to the energy project which would have delivered all of DHHL's water reservation actually but would have involved different modifications at the diversions. But the application in front of you is for the phase one IIFS modifications to implement the phase one IIFS and there's flexibility in the modifications to vary the diversion volumes.

COMMISSIONER KATAYAMA: To meet the six million that Jonathan stated earlier?

DAWN HUFF, KIUC: The modifications themselves they would not prohibit diverting six million gallons of water.

COMMISSIONER KATAYAMA: But at that point you won't be the operator?

DAWN HUFF, KIUC: We would not be the operator, correct.

COMMISSIONER HANNAHS: Dean, do the concerns that are being raised apply equally to all three streams that you're talking about here or are we isolating one of them or two of them that are problematic and the other's okay?

DEPUTY UYENO: I'm not certain, I would ask that of the stakeholders.

COMMISSIONER KATAYAMA: I guess the issue I'm having here is that the applicant is making representations for somebody else and to the extent that the operator can't remedy the situation, what's the recourse here especially to users like DHHL? I understand how the parties need to be coherent; however, there's a definite bifurcation

once KIUC is done with their application and you have a third party that is given the keys to the car which might be great or not.

CHAIR CHANG: That's a valid point. What troubles me a little is that some of this is speculation. If some of what I heard from Lyle was the reliance on Mr. Gomez's analysis but his analysis was available over 10 years ago or about 10 years ago. What appears to be the major change circumstance is KIUC is no longer going to do their large project. I do appreciate your point.

COMMISSIONER HANNAHS: Call upon your attorney background, do principles of attornment apply here that when somebody passes on an asset or the obligations go with them?

CHAIR CHANG: That kind of depends upon what the agreement is.

COMMISSIONER HANNAHS: If I buy a piece of land that's under lease I have to honor the lease.

CHAIR CHANG: But to me underlying all of that is the IIFS. It doesn't matter who's the operator, it doesn't matter. That is the guiding principle.

COMMISSIONER KATAYAMA: DHHL has interest in this as well.

CHAIR CHANG: I see Jonathan's hand is up, we're having a free flow conversation. Don't apologize, I think this is helpful.

DR. JONATHAN SCHEUER, DHHL: Thank you very much, Chair. Just to make two very brief points in this conversation, the first is I think the difference between the consideration of...I'm trying to respond to Dr. Miike's point that wouldn't it just be our obligation if there's now not enough water to amend the instream flow standards. Hawai'i's courts have been really clear that there are four public trust uses of water, instream uses are one of them, DHHL is another, that there's not a priority among them. My concern is that if sticking to the previously agreed to IIFS which may, we're being told by one party our system operator, may not allow for meeting their deliveries to us. You end up privileging one public trust use over another rather than holding them without one priority even trying to satisfy all of them. I just wanted to throw that out for your conversation to consider that if you burden DHHL with having to petition to amend the instream flow standards to provide for our needs then you are fundamentally placing the burden entirely on one public trust user against other public trust uses. The second thing I wanted to just share was that I am frustrated by this whole process, I had no desire to show up this morning but again we have beneficiaries who are relying on this water now who in some cases have been relying on this water for decades. It's just super concerning to us and we have a, I believe, fiduciary obligation. If somebody, our system

operator is coming to us and saying, hey we won't have enough water for you, we at least need to speak up in the process.

COMMISSIONER MIIKE: Let me respond to what Jonathan said. I am assuming that one sets up the IIFS, the opposing uses including instream flows have been considered and so it is not preferring one public trust use over the other. That balancing act should have taken place in the IIFS. If in the implementation of the IIFS it turns out that the assumptions that went into the IIFS are flawed then the burden falls upon the person who thinks they've been harmed to apply for modification of the IIFS. My basic point is that this does not favor one public trust use over the other. That act was balanced in the past however flawed that was and the remedy is to come back and say, I want to apply for a change in IIFS because the past one is not right.

COMMISSIONER HANNAHS: Jonathan, do the concerns of DHHL apply to all three streams that are in this report?

DR. JONATHAN SCHEUER, DHHL: I apologize, I'm not able to give a satisfactory answer due in part to the very short fuse that we were given to respond to the concerns raised to us.

COMMISSIONER HANNAHS: Dean, do you know?

DEPUTY UYENO: All three streams would contribute to the Kōke'e Ditch system which...

COMMISSIONER HANNAHS: Goes to DHHL.

DEPUTY UYENO: If I may real fast, let me just modify that last statement. Kōke'e Stream, it was proposed to return all stream flow and so the proposal here is to install a 24-inch diameter HDPE pipe. There would be no diversion from Kōke'e Stream contributing to Kōke'e Ditch if this were to proceed as presented.

COMMISSIONER HANNAHS: If we found the other two streams to be kind of problematic, we could still amend this submittal to approve the actions for Kōke'e which is undisputed.

DEPUTY UYENO: Sorry, repeat that?

COMMISSIONER HANNAHS: If Kōke'e was meant to be under the agreement to be fully restored without diversion then the discussions about farmers not getting water do not apply to that stream.

DEPUTY UYENO: Correct.

COMMISSIONER HANNAHS: In the event and I'm not sure we want to but in the event that we want to have further discussion about the other two streams, we could take action today on Kōke'e without dispute?

DEPUTY UYENO: Correct.

COMMISSIONER HANNAHS: It'd just be amending that to say, approve three but not one or two or approve two and three.

JOSHUA UYEHARA, KAA: Thank you, Commissioner. I guess that would be a good example of some of the concerns we have. I don't think we're concerned about trying to collect water from Kōke'e, but when we look at the long-term maintainability and reliability of the system our concern with that particular flume modification is that we believe it would get actually washed up during a heavy rain. If the system is modified for that flume to cross Kōke'e Stream and it gets washed out, it's going to disrupt the service for a while and we haven't done the work to figure out how frequent would that kind of flash flood event occur, how quickly could we replace a flume like that if it got washed down the canyon, is the remainder of the system post that modification such that we could affect a temporary fix to allow water to continue in the ditch system even if the flume itself is washed away? That's a good example, when we're evaluating it's not necessarily about the IIFS, it's also about is the system maintainable and reliably operable, separate, and apart from the IIFS.

CHAIR CHANG: I want to just follow, Wayne Katayama raised the issue of KIUC, they're going to transfer, you'll become the water purveyor. What better understanding do you need because you're asking for a deferral of this matter is that correct?

JOSHUA UYEHARA, KAA: I think we asked for denial but would be perfectly happy with that deferral.

CHAIR CHANG: You were asking for denial, okay.

JOSHUA UYEHARA, KAA: I think we'd be fine with the deferral. Maybe to back up a step, I think we can come to a discussion and agree on a set of changes that should be acceptable. What we probably want to do probably would cost less actually to implement than what KIUC's plans are but we just needed to be able to sit down and understand what the requirements are at this point and figure that out.

COMMISSIONER KAGAWA-VIVIANI: Listening to this there's a lot of discussion and uncertainty hinging on a report that many parties including CWRM staff haven't had time to really evaluate in light of this changing of the operator and the eventual operators comfort with the design. It is our duty to uphold the IFS and enforce these matters but I

think in the spirit of trying to support a design that sits with the multiple parties and their multiple concerns, if I can make a motion to provide the parties that time and to come back before us, including having our staff look at this report that was from 2015. A major concern I have if it is if it was written in 2015 and then decisions were made in 2017 and an approval was granted in 2020, maybe this is for Mr. Uyehara. Was that recent report updated to reflect those sort of design decisions or is there a new version or are we just looking at a report from 2015 that's been unearthed?

JOSHUA UYEHARA, KAA: I think I can answer that question for KAA's part. There are several steps removed from the hydrological analysis underpinning a lot of our conclusions and the ramifications of the different changes that are being decided. A good example, I think the analysis shows that you cannot actually meet the IIFS for significant portions of the year because there's just not that much water in the stream to begin with, but if you have Pu'ulua Reservoir online, you mediate the flow to end users by use of the reservoir right. The final answer on do the end users at, for example DHHL have reliable access to water depends on all these intermediate factors that are separate from just what the IIFS number is and that can include how reliable is the delivery of water in that system when it's available, what storage capacity is on the system to tide you over for dry periods. All of those answers sort of hinge on what actually happened with the project. Then to the basic point I think Jonathan made earlier. If a party says, look if we're in charge of it and we build our infrastructure you will have water, that's our commitment. Whatever reservations you have at that point if that's their commitment to make, you can decide to if you want to take that forward. That's sort of a different way to approach the problem which is what I think he stated was their approach.

COMMISSIONER MIIKE: Let me get some clarification then. I thought I heard that Kōke'e Stream would not be diverted and that's the point. If it's not diverted and it still is not having any water at certain times of the year, that's a natural state. To say that the IIFS has to be a certain amount at a particular point but reflecting an undiverted stream, those are opposite conclusions. The point is that it should be a natural flow of Kōke'e Stream, not a specific amount of water at a particular place. I don't understand why if it's going to be an undiverted stream, water has to be added to it to reach an IIFS.

CHAIR CHANG: Everybody's head is down, nobody wants to answer that question.

COMMISSIONER MIIKE: If that's the case then I don't see how it's going to be affecting off-stream users if Kōke'e is to return to a natural state. The other way it would affect off-stream users is if their water is artificially put into Kōke'e Stream drawing it from either the ditch or someplace else.

DEPUTY UYENO: I think in the case of Kōke'e, correct me if I'm wrong but it was the infrastructure issues there on that stream that if it were to be implemented as designed

and proposed in application there may be concerns about it getting washed out at high flows.

COMMISSIONER MIIKE: What is getting washed out? Isn't that separate from the issue about restoring Kōke'e to its natural state?

DEPUTY UYENO: Right now the diversion is instream so they need to create some way to bypass the stream from the ditch. The ditch flows into Kōke'e Stream and then is collected on the other side. In order to bypass that collection system they need to construct some type of flume or pipeline to carry the ditch over and across the stream. So in this case I think the issue that Joshua brought up was only infrastructure-wise as far as future maintenance and concerns about high flows. In other case, I think what he brought up as far as meeting the off-stream needs pertains to the other three streams Kauaikinana, Kawaikōi, and Waiakōali.

COMMISSIONER MIIKE: I don't understand it, now the place that will be washed out is where the Kōke'e Stream water goes back into the ditch, right?

DEPUTY UYENO: Right.

COMMISSIONER MIIKE: What's the point if you restore Kōke'e Stream to its natural state but in that segment between where the ditch goes in and comes out it's higher than the natural state. If you take out the amount of water going in from the ditch and carrying it out, flowing down how is that going to affect the IFS? There's no requirement that it has to be the same through the entire stream. Nothing's even being taken out.

DEPUTY UYENO: If you look at page 10 on the submittal, the ditch enters the Kōke'e...I can share my screen. Kōke'e Ditch enters Kōke'e Stream on the left bank of the stream. There's a dam and a spillway here that would typically have stop logs or planning boards in it to back up the water into this area of the stream. The stream is flowing mauka to makai and would flow across the dam or through the spillway and to ensure that no water is collected from Kōke'e Stream the application proposes to install a 24-inch HDPE pipe across the stream channel. I think there were a couple supports that would be located on the edge of the stream channel and then it would continue to flow into Kōke'e Ditch on the right bank. That's the type of concern that Mr. Uyehara raised as far as its design and ensuring that it's able to stand up to high flows and other future maintenance concerns.

CHAIR CHANG: Dean, and maybe Jonathan was correct it might be a little too late that we should have considered having a briefing, the watershed agreement, the changed circumstance of KIUC. I'm trying to understand that KIUC has determined that they're not going to do their hydro project. Does that now mean that KAA is now going to operate the system, not KIUC.

DEPUTY UYENO: We're not privy to those discussions between KIUC and their process moving forward.

CHAIR CHANG: I think Mr. Katayama raises a point that if we're going to have a new provider that may be saddled with something that somebody else puts in, maybe they need to have the opportunity to review everything.

DAWN HUFF, KIUC: I just wanted to respond to your question, KIUC is not the ditch operator now. We would have only become the ditch operator if the West Kaua'i Energy Project had moved forward, and we would not be the ditch operator. There's no longer a consideration for KIUC to become the ditch operator now that KIUC is not taking over Kōke'e Ditch and doing the hydro.

CHAIR CHANG: My understanding based upon your clarification is KAA is the current operator.

DAWN HUFF, KIUC: Yes.

CHAIR CHANG: Under the KIUC proposed project that would have been transferred to KIUC, but you're no longer going to do the project so KAA will continue to be the operator.

DAWN HUFF, KIUC: Yes.

CHAIR CHANG: And KAA is now asking for additional time, a deferral because the application was submitted by KIUC based upon a sort of a hydro project that's no longer going to be built. Since KAA is going to remain to be the operator you now want to reassess what kind of infrastructure you may want to install there to ensure that all the users get adequate water. Is that correct or did I miss something? Is that correct, Joshua?

JOSHUA UYEHARA, KAA: Chair, I think what Dawn would probably say as she said earlier that they designed phase one separate from whether the energy project would go forward. The scenario that changed in the middle was whether KAA would remain the operator earlier in the process actually. The request was made, and ADC board had granted the request from KIUC to actually plan to remove KAA as the operator even prior to phase two. Just in the intervening period it became clear that if KAA was removed no one would remain to operate the ditch. We remained in the role to operate the ditch, but this was unclear when the designs were being evaluated at the time. The context of us just taking the design evaluation as something we would not have to operate and wouldn't be responsible for ensuring the delivery assurances, that was our perspective when we evaluated even the phase one design originally. Now that we have very recently figured out that this is going to be in all likelihood permanent and we will

be responsible, that of course presupposes we remain the ditch operator for ADC's infrastructure which our agreement has to be renewed periodically. I can't say that it's the permanent situation but at least for now that's the way we're evaluating the design is, okay if now that we change perspective to being responsible for delivering the water to the end users in the amounts that they've requested and expected to receive even under the agreement, these are our concerns.

COMMISSIONER MIIKE: I'm a little confused. All of these parties have been involved in these decisions for what seven, almost 10 years and I find it not credible when someone says, oh we never knew we were going to take it over. None of this stuff was set in concrete at the beginning, these were all supposed to be part of the discussion and the decision making, so I just don't understand why it would come as a surprise to any party that, oh they may be the one that's running the ditch. But anyway, besides all of that, I'm fine with delaying this a bit but not very much. It seems to me that you're either going to come to an agreement or not. You're either going to have decided what the final decision is going to be and since you guys have been involved in this for years, I don't see why we need to delay it much further than maybe next time.

DAWN HUFF, KIUC: Chair if I may, this is Dawn Huff again. If I may just make one clarification, the license that we had with ADC had an embedded lease and the lease was tied to KIUC, the execution of the lease was tied to completion of 343 for the West Kaua'i Energy Project and KIUC taking over the operation of the ditch. KIUC did not contemplate or plan to take over operation of the ditch and our understanding of the license and lease agreement is we would not take over operation of Kōke'e Ditch until we initiated construction on the West Kaua'i Energy Project or until we completed the 343 process and executed the lease for the West Kaua'i Energy Project. I just want to make that clarification, maybe there's some internal confusion or misunderstanding between us and ADC, but from our perspective that was our understanding of the terms of the lease.

CHAIR CHANG: I too find it a little frustrating that we're now at this hour and after years of the working group meeting, obviously assumptions were made that the KIUC project was going to move forward, and nobody really put in consideration for other options. Now it's saddled with the Water Commission when our real role was to ensure that the IIFS is being met and the terms of the settlement agreement are being met, but we're sort of being asked, okay put a hold on our process to let everybody else catch up. I do find that a little frustrating because it does impact these people who have negotiated in good faith who are relying upon this water. I'm assuming that during this if there is a determination by the commission to grant a deferral that the downstream users including DHHL will not be impacted by the status quo, is that correct, maybe Jonathan?

DR. JONATHAN SCHEUER, DHHL: Yes, that is correct Chair. If I may and this is also in response to the excellent point on frustration with this raised by you and Commissioner Miike. If we did things again perhaps, we would have started to investigate further how

our deliveries would continue under a no West Kaua'i Energy Project, but our investment and our good faith efforts have just been focused on helping the agreement successfully be implemented and that's where our attention was. It was not, at least on behalf of DHHL, an attempt to deliberately delay the process or obfuscate any issues or do anything against the Commission's wishes. We were working hard to make sure this would be successful because it was going to allow us to settle lands that were set aside in 1921. We want to see it happen.

CHAIR CHANG: I apologize, I'm just going to ask one more question to Joshua. Joshua and Lyle, both of you have raised issues. How much time are you asking?

JOSHUA UYEHARA, KAA: Just speaking for KAA, I think 60 days probably should be enough at least for us to come to an agreement as to what we think would be a feasible plan going forward. I can't speak to if there's engineering work that needs to be done as a result of that and what it would take to prepare that in principal agreement into something that's a submittal for the Commission to consider, but I don't think it should take us very long to actually come to an agreement.

LYLE ROE, ADC: I was going to sort of dovetail on what Elena had said earlier about 30 days, but I think 30 days would be good. I think 60 days would be better. I think that would be our position and that's just to come to agreement on how we should be moving forward. But ADC for our part, I'm not authorized to speak for the board, but I probably could. I know we're committed to seeing this project through, seeing the terms of the Waimea Watershed Agreement, seeing this through. It's just with the termination of this portion of the West Kaua'i Energy Project, it's thrown a bit of a wrench into what we were planning and now we're just respectfully requesting a little bit of additional time to sort of regroup, come to some agreement within the working group so that we can move forward.

CHAIR CHANG: Dean would the applicant still be KIUC, or would the applicant change?

DEPUTY UYENO: That's a question for the applicant and the other parties, particularly KAA and ADC.

COMMISSIONER HANNAHS: Dean, you need time, too, to write up the reports. If we said it came back here in 60 days and two months that means their agreement has to be achieved like in 30 days so that you have time to craft a new submittal.

DEPUTY UYENO: I think in that case it would presume that KIUC is the applicant, and the amendments are made to the application to bring that back in that time frame.

COMMISSIONER MIIKE: I would agree with that but if this is delayed any further and if they're asking for more time then I would say that as part of the deferral is that if nothing is brought to us within say 60 days, then we consider the current application as the standing application.

COMMISSIONER KAGAWA-VIVIANI: I would be very interested if KAA is willing to share that report to make sure that our staff or we have access to it because it seems some assumptions, a lot of tension is sort of riding on it.

CHAIR CHANG: Okay, Joshua and Lyle can you share that report if you have...have you shared that report with CWRM? Ayron, why don't you come on up.

JOSHUA UYEHARA, KAA: Commissioner, Joshua Uyehara again for KAA. The base hydrological analysis was shared as part of the sort of discussions for the mediation and I think the discussion here today was how do you infer what the end result is going to be if this is the condition in the stream for our analysis. We look at the infrastructure that's planned and we look at other things like whether Pu'uloa would be renovated or not, then what? The report is shared but there's a whole bunch of steps in between and there's room for reasonable parties to disagree as to what is going to happen in the end because it's kind of uncertain. We're taking what we view as a responsible view on that and opinion on that as a responsible ditch operator. Other people might not necessarily come to the exact same conclusions but whatever information people would be interested, we're more than willing to share and that's been what we've been doing in the spirit of the mediation process.

DR. STRAUCH: Ayron Strauch, Stream Protection and Management Branch. I agree with Josh that the original data that went into establishing the instream flow standards and the availability of water for off-stream uses including for DHHL, it was a modeling exercise that everybody agreed to the assumptions of the model and moving forward that was basically 2016, maybe early 2017 but mostly 2016. The plan was for the agreement to be implemented somewhat rapidly so that we could get monitoring on the ground to verify or update information available that went into the instream flow standards, principally water available at some of these smaller streams that don't have a USGS gage or maybe had four years of data from 1921 to 1925 which may not be relevant in today's climate period. There was a little bit of frustration in the delayed implementation because we didn't get any of the phase one information coming until commission staff went out and actually installed the gages in 2022. We had five years of lost data opportunity and so now with KIUC not moving forward with phase two, I also understand that ADC, they don't want to be stuck with infrastructure that's going to be either costly to maintain or impossible to maintain or something they wouldn't have designed themselves. I don't want to speak for either entity but maybe KAA can come to some sort of agreement with KIUC where they either they share the costs or KAA decides on what design they would move forward to and they would move forward with the permitting process because there's Army Corp permits that are needed. KIUC has been bouncing back and forth between agencies, between landowners and they want to just get what was on the books

three years ago implemented but that's not necessarily relevant today because the project, the phase two project, isn't going to move forward. I also agree that we can come together and evaluate what data we do have now and compare it to what was predicted based on the modeling efforts that KAA did. Maybe we do need to update the IIFS, maybe there are other modifications that would meet the IIFS that aren't being considered at the moment that KAA would rather implement. There is some wiggle room there and, but I also agree that KIUC wants to just move forward.

CHAIR CHANG: They should have moved forward a little earlier.

COMMISSIONER HANNAHS: Rather than characterize wiggle room like you want to get out of something, I think really what we're talking about is taking the moment to do something to affirm our commitment and to do it better.

CHAIR CHANG: 60 days seems ambitious given what you said Ayron is that the original IIFS was based upon certain assumptions and models with the data that you had. Now you have perhaps hopefully newer data, but you may end up amending that IIFS based upon. Again 60 days and KAA may decide to have a whole different system because they're now going to have to maintain it. We're obviously extremely frustrated and I'm hoping Dawn that whoever the applicant is, I mean this was a responsibility of KIUC. I am hoping that KIUC will honor its commitment to work with these entities to come up with something that may be not necessarily what KIUC would have done and what you would have wanted, but moving forward now with these changed circumstances working with KAA and ADC and the other stakeholders on designing something that may be more appropriate given the changed circumstances. But KIUC is going to be a contributor to that process.

DAWN HUFF, KIUC: Certainly, we're happy to work with the other parties on other design considerations.

CHAIR CHANG: And paying for that?

DAWN HUFF, KIUC: KIUC, their commitment is to implement the phase one modifications, so nothing has changed about that commitment.

CHAIR CHANG: Thank you, I really appreciate that. You have now shared that with all of us on the screen. Thank you, I appreciate that, Dawn.

DR. STRAUCH: I'm not saying that we need to modify the IIFS with this process.

DEPUTY UYENO: Sorry, just to clarify the date so if you were to go with 60 days, that would put us at the end of March, roughly. The earliest that we would bring it back to Commission is at the April Commission meeting.

20240130 02:25:24

MOTION: (KATAYAMA / MIIKE)

To defer submittal for 60 days.

UNANIMOUSLY APPROVED

(MIIKE/KATAYAMA/HANNAHS/CHANG/MEYER/KAGAWA-VIVIANI/HO)

20240130 02:26:28

B. ACTION ITEM

- 3. Modification of Stream Channel Alteration Permit (SCAP.6026.3), Scaffolding for Reconstruction of Pedestrian Bridges Mauka of Kamehameha Highway and Installation of Temporary Pedestrian Bridges Makai of Kamehameha Highway; and Revised Recommendation from State Historic Preservation Division, Hawai'i Department of Transportation (DOT), Kamehameha Highway Resurfacing, Laiewai to Waipuhi Bridge, Hau'ula and Maakua Streams, O'ahu, Tax Map Key(s): DOT Right-of-Way**

PRESENTATION OF SUBMITTAL: Deputy Director Dean Uyeno

Staff stated the summary request which is to approve the modification of SCAP.6026.3 with revised recommendations from SHPD.

QUESTIONS / COMMENTS

CHAIR CHANG: I did ask CWRM to ask SHPD (State Historic Preservation Division) to be available because the modification is primarily due to a changed position from SHPD.

PUBLIC TESTIMONY

MERANIA KEKAULA: Madam chairman, board members it's great to be here, see your faces again. My name's Merania Kekaula and I'm from the Mermaids. It's just a swimming group, we do it for our health, we do ancient Polynesian and so it's very important at Kokololio Beach. It's important to us to make sure our environment is kept pristine, and we have a legacy to leave our children, grandchildren. It's with a lot of concern that I'm here in a good way. I mean it's not a lot of concern but there are just issues that have cropped up because of the bridge. Is that the bridge we're at now we're doing?

DEPUTY UYENO: This is for the Hau'ula and Ma'akua Stream bridges.

MERANIA KEKAULA: Right and there are like about seven or eight bridges that will be reconstructed, yes. We're wondering why the original SCAP, stream channel alteration permit was then changed and modified whereas why couldn't that have been done in the planning stage in the original SCAP? What we've seen is a lot of adverse reaction, things that have happened as a result of this modification. The first, I'll just go into them briefly, is the unearthing of the area right next to the stream where those two homes were, I take it those were the two homes that were removed.

CHAIR CHANG: Are you on this particular agenda?

DEPUTY UYENO: That would be a question for DOT.

MERANIA KEKAULA: Okay, so what there is then there's this huge dirt area and right next to the stream and we're just praying that it doesn't rain so hard. I mean we want the rain, but we're concerned that it may just fall into the stream if flooding occurs. That's one issue, the other issue that is of concern to us is the wildlife and the area of the environment that it cuts across, this spot of land is home to our turtles and our monk seal. Hau'ula is famous for because they always have this monk seal coming down and the areas are built up enough as it is, so we want as little disturbance for the sea creatures as possible. We're concerned about the amount of chemicals, and I know you have programs to stop the chemicals from seeping into the ground around the area as well as the stream. I looked at the sausage bags you have and things to alleviate turbidity and things like that but we're thinking of pathogens, we're thinking of chemicals that you can't see that get into the water and that are carried out to the ocean and into the environment. That coast along Hau'ula, it's an area because Hau'ula/Kahuku that is on top of an aquifer. It has little pockets deep in the ocean and freshwater bubbles out and it's cold. There's a lot of good stuff there that we don't want to see harmed.

CHAIR CHANG: This is for the stream channel alteration permit for the scaffolding, right? On Hau'ula Bridge?

MERANIA KEKAULA: They've already taken down the original bridge, haven't they?

DEPUTY UYENO: That'd be a question for DOT. Again, this is just for the scaffolding.

CHAIR CHANG: They're moving the scaffolding from the mauka side for the pedestrian bridges and then they're going to move it. Is this the same project?

MERANIA KEKAULA: This is the same project, but we're just concerned about the big vehicles and how they say if there's any seepage it'll be taken like 100 yards down the road and away from the site. Well 100 yards down the road is still the area affected, the environment. We're very concerned about that as I said. I did want to say also that I don't know how many times we cross that bridge during the day, my husband does a lot he

works out that way, but the makeshift bridge is very narrow, and we're concerned as to how long the actual project of this bridge, just this bridge will take. Now it says sometime during April or May this year? No, was that next year it's going to be completed? We were concerned is it just that bridge or is it the entire bridges that will be finished by it says 2025 May?

CHAIR CHANG: Ms. Kekaula, we have DOT here and they're the project proponent so I'm going to ask because we're not proposing the project, we're actually just granting the permit. I'm going to ask you to summarize. I'll then have DOT come up to respond to some of your questions.

MERANIA KEKAULA: Great. We're concerned about that area and the strips that run along on either side of the bridge. It's causing havoc because they're ill-placed and they cause damage to the underneath of your car as well as wear and tear on the tires. That's why we're concerned as to when that particular project will be finished and if they can pull them up.

JENNIFER RUSSELL, HAWAII DEPARTMENT OF TRANSPORTATION (HDOT): I just wanted to get some clarification on the project in question because we have not started construction and our project is a resurfacing project and so the pedestrian bridge improvements are just for two of the bridges within our limits. With regard to concerns about damage to the environment, we are implementing best management practices and incorporating it into our plans and specifications to mitigate that.

CHAIR CHANG: I understand it the Water Commission had previously approved this request. It's now coming back, it's a modification that you are moving the pedestrian bridge from the mauka side to the makai side. Temporary, is yours the repaving or is yours the construction?

JENNIFER RUSSELL, HDOT: It's a resurfacing project that part of the scope also includes replacing the pedestrian bridges.

COMMISSIONER HANNAHS: DOT has looked at this recommendation of staff including the incorporations of the need to have community meetings in alignment with DHHL's concerns as well as best management practices with DOFAW's concerns. You're okay with the recommendation?

JENNIFER RUSSELL, HDOT: Yes.

SUSAN LEBO, SHPD: SHPD reviewed the project. We raised concerns about the presence of cultural resources and potentially burials within what their calling the area of potential effects, primarily on the makai side. We consulted with HDOT and Federal Highways regarding our concerns and the different agencies agreed, one that they would

put interim protection measures where there are known sites to try and make sure that those areas are not impacted and that there would be some architectural documentation of the bridge before there was some modifications and that there would also be archaeological monitoring to ensure that if anything was impacted or identified during the actual construction that it could be documented and mitigation could occur. That was our letter, I believe it was in July of 2022.

CHAIR CHANG: Your original determination was no historic properties affected, but the modification does acknowledge that there. Is that based upon you did some additional consultation or?

SUSAN LEBO, SHPD: We did additional due diligence on our end and then again, we consulted further with HDOT and Federal Highways.

COMMISSIONER KAGAWA-VIVIANI: When we approved the permit the first time, we recommended DHHL's note that DOT should reach out to neighborhood board. Has that already been done or is there a planned date at which this will be presented just to make people aware of the project and that the precaution is being taken.

JENNIFER RUSSELL, HDOT: that has not occurred, yet.

CHAIR CHANG: Are you going to do that?

JENNIFER RUSSELL, HDOT: Yes.

COMMISSIONER KAGAWA-VIVIANI: If there's a date, that would be great and I just say this especially with SHPD doing this kind of due diligence, it would sort of show that DOT is aware and has anticipated and prepared to have monitors on site. I think that could allay some of the community concerns that may come up as they see construction activities in the area.

CHAIR CHANG: My recollection, I believe Cy Bridges lives across the street. I think Cy Bridges lives mauka and they have found burials on that site, so I appreciate the due diligence. I thought I had raised a concern when we first had this matter, so I appreciate the fact that SHPD went back and did some additional discussions with DOT and that DOT has revised its plan.

20240130 02:45:43

MOTION: (HANNAHS / KATAYAMA)

To approve staff recommendation as submitted.

UNANIMOUSLY APPROVED

(MIKE/KATAYAMA/HANNAHS/CHANG/MEYER/KAGAWA-VIVIANI/HO)

20240130 02:46:27

B. ACTION ITEM

4. Approval of Stream Channel Alteration Permit (SCAP.6039.2) Application and Special Conditions, Hawai'i Department of Land and Natural Resources, Lihue-Koloa Forest Reserve Queensland Crossing, Wailua Stream, Kaua'i, Tax Map Key(s): (4) 3-9-001:004; 3-9-002:001; and 4-2-001:002

PRESENTATION OF SUBMITTAL: Deputy Director Dean Uyeno & Sheri Mann

Staff stated the summary request which is to approve SCAP.6039.2.

QUESTIONS / COMMENTS

COMMISSIONER KATAYAMA: Why do you need to replace it and just not remove it?

DEPUTY UYENO: I can call up Dr. Strauch to speak to the difficulties in having to cross that. Whenever there are high flows the basketball-sized boulders that are within the stream channel tend to get moved and when you're trying to cross the stream at times it is...

COMMISSIONER KATAYAMA: Wasn't that an old cane haul crossing historically?

DEPUTY UYENO: Yeah, it was in the submittal. I believe it was 70 or 90 years old.

COMMISSIONER KATAYAMA: So again, is there a need to access at that point?

DR. STRAUCH: Ayrton Strauch, Stream Protection and Management Branch. I won't speak on behalf of DOFAW, but I do know that state employees, both DOFAW and CWRM if not other state employees utilize the lands mauka of this crossing. This is an important access point to forest reserve and game management area lands. CWRM has two monitoring stations above this crossing. The original crossing was passable under most non-flooding conditions, but currently it takes a lot of maintenance, to maintain any sort of crossing some sort of excavator has to move around the boulders after high flow events.

COMMISSIONER KATAYAMA: Well aware of that.

DR. STRAUCH: Not just state employees but the public likes to access the forest and the streams mauka of this location.

COMMISSIONER KATAYAMA: There is a utility value?

DR. STRAUCH: Yeah.

DEPUTY UYENO: Maybe Sheri can speak to that as well, from DOFAW.

CHAIR CHANG: If you could share with us what the crossing is used for and by whom?

SHERI MANN, DIVISION OF FORESTRY AND WILDLIFE (DOFAW): Sure, aloha Chair, Commission. My name is Sheri Mann, I'm the branch manager for the Division of Forestry and Wildlife for Kaua'i island. This forest reserve has many uses by the public, it's also the primary access road to Blue Hole which is towards the end of the road and a very unique geologic formation on Kaua'i island. It's also the location where the North and South Fork streams start and divert and so there's a lot of uses of those streams. As Ayron said there are some devices up there to be checking instream flows. It's also a major hunting area and we have people up there every day of the week hunting and it's used a lot by cultural practitioners. It's heavily used in terms of forest reserves on Kaua'i island. It's also the primary route to get up to do research and all kinds of management activities that are critical for us to maintain, so we slowed down the encroachment of invasive landscape-altering plants that we don't want to go up into the upper mauka watershed that's highly protected.

CHAIR CHANG: Sheri, it's a vehicular access, right?

SHERI MANN, DOFAW: Yes, the Queensland Crossing is actually a cement ford and over time the ford has been deteriorated and then the floods of 2018, it was pretty much wiped out. We've done our best to try and patch it and fix it over time, but it's just been altered significantly at which time we approached Rep. Tokioka for a CIP for more of a long-term repair. These are the funds that are going into that kind of work and this permit is needed to put that work into action. It's a \$2 million CIP.

CHAIR CHANG: The permittee is DOFAW?

SHERI MANN, DOFAW: I'm not sure if it's under engineering or under us.

CHAIR CHANG: Well, it's actually DLNR, it's not the county.

DEPUTY UYENO: Engineering division.

CHAIR CHANG: So DLNR. There's always an issue about who should be maintaining streams and whether that's the state or the county. I guess we won't address that here.

DEPUTY UYENO: State lands, in this case it's the state.

COMMISSIONER KAGAWA-VIVIANI: This is for staff and it pertains to traditional and customary practices. While the applicant kind of reviewed the site history, are there downstream users who could potentially be affected by the construction and repair of this? Specifically, when we discussed Mahi Pono's modifications we talked about downstream users and just notification of when construction is happening. If there are downstream users that may notice changes in flow or quality, that we consider that in this application?

DEPUTY UYENO: At this point in the stream if you're speaking specifically to aquatic species I believe there is a lot of largemouth bass in this section of the stream so our concern for native species isn't as, not to say it's not of concern in this area, but we temper that there is a considerable amount of invasive species such as bass and trout in this section the stream.

DR. STRAUCH: The quantity of water won't change in the stream and obviously best management practices regarding water quality will be practiced.

COMMISSIONER KAGAWA-VIVIANI: Specifically speaking to traditional and customary practices, are there any kalo farmers down gradient? I don't know this area well so that wasn't...

DEPUTY UYENO: There shouldn't be any impacts to the flows in the stream while construction is going on.

CHAIR CHANG: Even during construction, you won't have to stop the flows to put in this?

DR. STRAUCH: They're just building a small coffer dam for half the stream at a time.

SHERI MANN, DOFAW: We will be closing the Loop Road during construction so that won't allow the public to traverse to this point or beyond it. There are other ways to get beyond this point but they're from either other landowners or they would have to go through forest non-accessible lands. There will be a temporary change to general access for all users, but it'll just be during the construction phase of the project and it's basically repairing the ford that was already there so the water flows over it. The way we've been mitigating it is building the rocks back up so users can cross but this should allow smooth, traversable access with a four-wheel drive. Ayron would know better but I don't see this changing the water flow. That really has been a natural occurrence when floods come, it comes raging down but otherwise it's fairly consistent.

CHAIR CHANG: Following up on Aurora's comment about hunters, are we notifying hunters that this access may be closed temporarily so that they'll have to find alternate access?

SHERI MANN, DOFAW: Yes, we have had to close it several times over the last several years due to the impassibility of it. They're fairly aware and used to us closing but certainly once we get close to construction time, we'll put out press releases and consult with the GMAC and make sure that all the stakeholders are aware of this. I think they're supportive of it because right now they either can't pass, or they take a chance passing which is not anything we want. We've had vehicles get stuck and roll into the river and we just want to avoid that. They are aware and we will certainly reiterate that.

CHAIR CHANG: It's probably better that we improve it for water quality and everything else. They're probably driving all over the place.

PUBLIC TESTIMONY- None

20240130 02:58:42

MOTION: (KATAYAMA / KAGAWA-VIVIANI)

To approve staff recommendation as submitted.

UNANIMOUSLY APPROVED

(MIKE/KATAYAMA/HANNAHS/CHANG/MEYER/KAGAWA-VIVIANI/HO)

20240130 02:59:16

B. ACTION ITEM

- 5. Approval of Stream Channel Alteration Permit (SCAP.6047.3) Application and Special Conditions, City and County of Honolulu, Board of Water Supply, Waihe'e Inclined Wells Modification, Waihe'e Stream, O'ahu, Tax Map Key(s): (1) 4-7-008:002**

PRESENTATION OF SUBMITTAL: Deputy Director Dean Uyeno

Staff stated the summary request which is to approve SCAP.6047.3.

QUESTIONS / COMMENTS

CHAIR CHANG: I was just wondering project proponents, BWS, did you guys talk to John Reppun or Rick Towill or KEY Project? They've been very active here; this is where I grew up, so I know Waihe'e Stream and I know that they like to be informed. I think this is probably advantageous, but did you consult with them by chance?

MATTHEW MURAYAMA, HONOLULU BOARD OF WATER SUPPLY (HBWS):
Sorry, can you repeat that?

CHAIR CHANG: Did you consult with either John Reppun, Rick Towill, or KEY Project? They've been very actively involved with BWS.

MATTHEW MURAYAMA, HBWS: I don't think so.

CHAIR CHANG: I would urge you to put a call out to them, ask Barry Usagawa to give them a call so they know what's happening up there.

MATTHEW MURAYAMA, HBWS: Okay, yeah.

COMMISSIONER KAGAWA-VIVIANI: I would just echo that. That was a section of the application I also honed in on was traditional and customer practices and I know that there's kalo farming in the area. Similar to with my comments on B4 when construction is occurring that there be communication with the downstream users because they will probably observe changes to maybe quality or flow or would be aware of the activities.

CHAIR CHANG: Matthew, you got that too? There is a very active neighborhood board there, Kahalu'u Neighborhood Board that just meets right down the street. My grandfather had a poi factory on Waihe'e right down and so this stream ran through his yard.

COMMISSIONER MIIKE: Now you're in Windward Mall, the poi factories.

CHAIR CHANG: Well no, that was Waiāhole. My grandfather was Waihe'e.

COMMISSIONER HANNAHS: I bet you guys used to have debates as to whose poi was better.

CHAIR CHANG: There was never a debate, we always knew, it just depends on which side of the table you sitting on.

PUBLIC TESTIMONY- None

20240130 03:03:11

MOTION: (HANNAHS / KATAYAMA)

To approve staff recommendation as submitted.

UNANIMOUSLY APPROVED

(MIIKE/KATAYAMA/HANNAHS/CHANG/MEYER/KAGAWA-VIVIANI/HO)

20240130 03:21:00

B. ACTION ITEM

- 6. Approval of Stream Diversion Works Permit Application (SDWP.5083.6) and Special Conditions, East Maui Irrigation Company, LLC, Abandonment of Stream Diversion Nos. 152, 247, 246, 191, 264, 240, 242, 217, 155, 225, 330, 331, 324, 322, 321, East Maui Irrigation System (Category 1), Honopou, Hanehoi (Puolua), Pi'ina'au (Palauhulu), and Wailuanui Streams, Maui, TMK: Various; and Declare that Project is Exempt from Environmental Assessment Requirements under Hawaii Revised Statutes, Chapter 343, and Hawaii Administrative Rules Chapter 11-200.1**

PRESENTATION OF SUBMITTAL: Deputy Director Dean Uyeno

Staff stated the summary request which is to approve SDWP.5083.6.

QUESTIONS / COMMENTS

COMMISSIONER MIIKE: This is the contested case that ruined my eyes permanently.

CHAIR CHANG: Well, we appreciate the sacrifice and the service.

SEAN O'KEEFE, ALEXANDER & BALDWIN: I don't hear Mark jumping in. This is Sean O'Keefe, director of Environmental Affairs for Alexander and Baldwin. I just wanted to highlight that the approvals that were previously obtained for the work on the category one diversions were for the O & M (operation and maintenance) work that has already been completed. By approvals I mean approvals by agencies other than this Commission and so we just wanted to again highlight the fact that if the additional work is approved by the Commission, then we're going to have to go back to these other various agencies OCCL (Office of Conservation and Coastal Lands), the Clean Water Branch, Corps of Engineers. For a couple of diversions, the county with regard to SMA (Special Management Area) permitting and get separate approvals for the additional work. I don't expect that to be especially complicated especially since they've got some familiarity with this project already, but it's definitely boxes we need to tick before we can go out in the field and do the actual work. I don't know if Mark, I stepped on your toes at all in jumping in but that is one point we wanted to make.

MARK VAUGHT, EAST MAUI IRRIGATION, CO. (EMI): Aloha, sorry about that. I had to get some help, I'm not that smart when it comes to the computer. I heard Sean's testimony and we're prepared to work with the submittal to move forward with this, get this put behind us. I know this has taken forever and I'd just like to get this put behind us. We're willing to do whatever we need to do to make sure this is taken care of.

COMMISSIONER KAGAWA-VIVIANI: I have a quick one because I wasn't around in the earlier 2020 discussion. For those Commissioners who were and staff, those reasons for the reservations, have they all been addressed with this submittal? I see various comments for each of those diversions and so are those? It's interesting that there's no testimony so I'm kind of curious how those have been addressed and what's changed?

DEPUTY UYENO: Reservations meaning the Sierra Club's comments and DOFAW?

COMMISSIONER KAGAWA-VIVIANI: What I meant is the reason that the Commission deferred action on the stream diversion permit application, have those all been addressed? This was a very site-specific submittal.

DEPUTY UYENO: I believe so, we were just in the field actually yesterday with Sierra Club members in a related action. They mentioned to us that they'll just be monitoring but I think we've addressed all of their concerns while still maintaining the viability of the system. For example, there are portions where the tunnel runs underneath the stream channel with the diversion just adjacent to it or above it. Working with EMI and Sean with Alexander and Baldwin, they're willing to make those modifications without impact to the remaining system.

COMMISSIONER KAGAWA-VIVIANI: So those quarterly meetings are working?

DEPUTY UYENO: This was a little outside of that meeting specifically. We had met specifically with DOFAW, DAR, and Sierra Club over the years.

COMMISSIONER MIIKE: Just out of curiosity I think early on there was some concern that if the flows in the ditch got too low it would affect the ditch walls and things like that. That hasn't happened? I don't know how much the flows have decreased.

MARK VAUGHT, EMI: We've decreased the flows significantly just to meet the irrigation demand on the farm and the Upcountry, particularly in the Wailoa Ditch and thus far we haven't found any issue with that. Thank you for asking.

PUBLIC TESTIMONY- None

20240130 03:29:47

MOTION: (HANNAHS / MIIKE)

To approve staff recommendation as submitted.

UNANIMOUSLY APPROVED

(MIIKE/KATAYAMA/HANNAHS/CHANG/MEYER/KAGAWA-VIVIANI/HO)

20240130 03:31:10

D. NEXT COMMISSION MEETINGS (TENTATIVE)

February 20, 2024 (Tuesday)

March 19, 2024 (Tuesday)

The meeting adjourned at 12:29 p.m.

January 30, 2024

Minutes

Respectfully submitted,

Iwalani Kaaa

‘IWALANI KAAA
Commission Secretary

APPROVED AS SUBMITTED:



DEAN UYENO
Acting Deputy Director

WRITTEN TESTIMONIES RECEIVED:

Please refer to the Commission website to read and view written testimonies received:
<https://dlnr.hawaii.gov/cwrn/newsevents/meetings/>