

MINUTES
FOR THE MEETING OF
THE COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: March 21, 2023
TIME: 9:00 am
PLACE: Online via Zoom and In person
Meeting ID: 834 0987 2314

Chairperson Chang called the meeting of the Commission on Water Resource Management to order at 9:10 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. Chairperson Chang read the standard contested case statement and took a roll call of Commissioners as well as introduced the Commission staff.

MEMBERS: Chairperson Dawn Chang, Mr. Michael Buck, Mr. Neil Hannahs, Dr. Aurora Kagawa-Viviani, Mr. Wayne Katayama, Mr. Paul Meyer, Ms. Joanna Seto

COUNSEL: Ms. Cindy Young

STAFF: Deputy M. Kaleo Manuel, Mr. Jeremy Kimura, Mr. Dean Uyeno, Mr. Ayron Strauch, Mr. Neal Fujii, Ms. Alexa Deike, Ms. Nadine Pomroy, Ms. Kathy Yoda, Ms. Darlene Ferreira

OTHERS: Ms. Eva Blumenstein (Maui Dept of Water Supply); Maui Councilmember Shane Sinenci

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

032123: 00:07:18

A. APPROVAL OF MINUTES

January 24, 2023

PUBLIC TESTIMONY – None

Commissioner Joanna Seto noted minor edits to be made.

MOTION: (BUCK/HANNAHS)

To approve the January 24, 2023 minutes with recommended edits.

UNANIMOUSLY APPROVED

BUCK/SETO/HANNAHS/KAGAWA-VIVIANI/KATAYAMA/MEYER/CHANG

*032123 00:10:37***B. NON-ACTION ITEM / INFORMATIONAL BRIEFING****1. Maui Island Water Use and Development Plan Update**

Mr. Jeremy Kimura of CWRM Planning Branch, Eva Blumenstein (Maui DWS Planning Office), and Honorable Councilman Shane Sinenci provided the update.

PRESENTATION GIVEN BY: Mr. Jeremy Kimura, CWRM Planning Branch

Mr. Kimura gave a presentation on a proposed approach for adoption of the Maui Island Water Use and Development Plan Update and some of the issues that were raised through the public hearing process. He also talked about the staff's analysis of the document and their recommendations as well as next steps. The Hawaii Water Plan is required in the State Water Code to plan for the State's water future and is made up of several documents as a management toolbox. Links to the presentation and relevant documents were provided for those watching remotely.

032123 00:34:01

PRESENTATION GIVEN BY: Maui Councilman Shane Sinenci

Shane Sinenci, Maui County council member and the former Chair of the Agriculture and Public Trust Committee which reviewed and approved the Water Development Plan before you today.

The Department of Water supply spent considerable time creating this plan. I wanted to focus on the review process and the community work that went into this plan and put forth considerable time and effort to review and add to the plan over the last seven years which played an important role in shaping it into the document that you're reviewing today. During my term as Chair, I held 15 Ag and Public Trust committee meetings on the plan. In previous years several other committees also worked on the plan including the water and infrastructure committee, the water infrastructure and transportation committee, and the environmental agriculture and cultural preservation committees. In my committee, council members went through each chapter of the document in each aquifer sector area as part of our review, and we added 49 new strategies and expanded five existing policies. We incorporated the addendum section throughout the corresponding areas of the document and into the document's main body. We added information on Native Hawaiian water and cultural rights including information on the public trust doctrine, riparian rights, kuleana rights, konohiki rights and the duties of state agencies to protect Native Hawaiian traditional and customary rights which were included in the Ka Pa'akai analysis sections. We wrote a new section entitled historical and cultural context of the regulatory system according to input from the 'Aha Moku councils. We also added the consent decree and the Board of water supply temporary investigative report regarding the feasibility of purchasing and maintaining the EMI water delivery system to the appendices.

I'm particularly proud of our work with the local Maui Island Aha Moku councils to ensure that water as a cultural resource is properly considered and addressed. My staff and I met with the local councils to integrate Native Hawaiian water resource management history, strategies, and generational knowledge into the plan. I want to note, that their input doesn't mean that they support the plan. They remain neutral and that not all their recommended strategies were adopted by the Council, specifically the West Maui council asked for strategy of prohibiting water system connectivity to the Council. The Council did not adopt that. The 'Aha Moku council in the Ko'olau area also did not support the Ha'ikū well strategy however, most of local council's recommendations were adopted in part one of the plan. We added a section on kānāwai, a history of Hawaiian water law and for each area the council's stress ecosystem management and returning water to the system as a result, strategies were adopted so requiring the county to advocate for stream connectivity and kalo cultivation,

kuleana, and traditional rights, a strategy requiring the Department of Water Supply to use generational and traditional knowledge to compliment scientific data strategies were adopted directing the Department of Water Supply and county council to consult with local Native Hawaiians when making decisions. The plan now requires that a Native Hawaiian advisory group be established, and that the Department of Water Supply employees receive training on Hawaiian Resource Management and Hawaiian rights.

The island Aha Moku councils and the general communities also cited a lack of enforcement by CWRM on stream IIFS and they hope you can work more with local volunteers for stream monitoring. Both the council and the general community ask for strategies to limit extravagant hotel water use and penalize water waste behaviors. We added strategies including policies directing the council to establish a new tiered rate structure and a separate hotel category that promotes water conservation. They ask that we add environmental protection strategies for dry land native forests. Wetland areas, aquifer recharge areas, groundwater, and policies directing the council to revise county laws to promote water catchment, water use efficient, landscaping and building requirements and water conservation for golf courses, resorts, and public facilities. Local area councils made some area specific comments for the Ko'olau district. A strategy encourages home rule of Water Resources specifically the EMI system which was adopted for Hāna strategy establishing additional water priorities for kuleana users, cultural uses and affordable housing was adopted for Ha'ikū members did not support the Ha'ikū well strategy but that input did not result in any new strategies. In West Maui there was the request to adopt a strategy not to interconnect water systems across the different areas, but the committee members did not adopt that.

So, while there are still community members who feel that areas need to be worked on, I see the plan as a living document. The plan is required to be updated regularly to reflect our ever-changing environment persistent with drought conditions, water scarcity, and new legislation also new state requirements including stream flow standards and inclusion of the newly created East Maui Water Authority board. Our community went over the plan and testified at each of the community meetings. There are concerns specifically about climate change and the need for the county to adopt more stringent water conservation goals. The current goal is eight percent over the next 20 years, and I know should strive for more. The plans also need to include updated data as Mr. Kimura had mentioned in the update. I would like to see data presented in an easier to understand in layman's terms in ways that the public can easily understand. The Department of Water Supply may also want to hire a consultant for the update to make the plan easier for the public to use and I understand that other islands have also done this. There is also a need for the update to include information on the Water Authority ballot initiative that passed during our last election. We are in the process of creating the East Maui Community Water Authority board and it is our hope that having the county in control of Public Water Resources we can provide more resources to help satisfy the up-country water meter list applications. And finally, the Ha'ikū community strongly spoke up against the Ha'ikū aquifer as the main source of new county wells and they felt that this strategy is unfair because their needs have not been met. There was discussion in the committee about removing the Ha'ikū well strategy, but not enough support was received to remove it and the major reason was that removing the Ha'ikū well strategy as a source of water would have created an imbalance in the plan's demand causing the plan to become invalid. The new water director stated yesterday that a consultant has been hired to complete a feasibility study as mandated by the court consent decree and so in closing I would just like to leave the commission members with an understanding of all the work that was put into this document it is a living document much like the importance of ka wai ola. The work doesn't end today.

032123 00:43:24

PRESENTATION GIVEN BY:

Ms. Eva Blumenstein – Maui Dept of Water Supply

Just want to mahalo Councilmember Sinenci and the community and the commission staff that has spent so much time working diligently with the Department and private water conveyers. A lot of work went into this plan. We had an original plan submitted in 2010 to the commission that was rejected, it was not adequately addressing all the private purveyors, it wasn't based on hydrologic units and we feel that the plan really now

addressing these controversial issues that have been unsolved for 30 plus years. It doesn't come up with a solution, but it really tackles it. We knew starting this reigniting the public outreach and doing this effort back in 2016 that there would be tradeoffs and some difficult compromises. After 70 plus meetings, we feel that the plan now meets the needs of the land use plans. It has support from the broader community. It's not going to be everything to everyone but it's a good tool. We've been able to use it already on the county level to guide our Capital Improvement program and investing in water resource protection so regardless the Commissions purposes we believe it meets the state water code and beyond even the framework so far, we are grateful for all the work that went into this and that we've been able to apply this as a guide for the county level.

032123 00:45:10

QUESTIONS/COMMENTS

Commissioner Buck: asked Jeremy Kimura, how does the plan address that the majority of the water delivery system on Maui is controlled by private entities?

Eva Blumenstein: answered, it's definitely one of the main challenges specifically for Maui because we have multiple private purveyors that are sometimes competing for the same resource, and we had to be really diligent developing this plan to make sure this is not the Department's plan. This is not our CIP program but looking at all the needs of other purveyors and there's only so many tools that can be used to implement strategies that address the private water purveyors because obviously the county doesn't have jurisdiction of allocations to that extent. Some of the strategies, I can give you a couple of examples-call for more investment in water resource protection in watershed management based on the type of end uses if you are private purveyor using groundwater from a specific watershed. We should see better investments, matching investments for the water resource that you extract. If their strategies for optimizing alternative resources before using conventional groundwater or surface water, we want the planning department and the bodies that will approve land use entitlements to include that strategy as a condition of entitling a land use or approving a land use permit. We've been working closely with Maui Planning Department to set that up so in areas that are not designated, there's all these different tools but it's always a challenge whether that is for conservation. I mean large municipalities are better equipped to have well-funded conservation programs or source protection programs and private purveyors benefit from that but other strategies such as regulating conservation measures in the future where proposing conservation bills could apply to all water purveyors and doesn't have to be for only county owned systems, just a couple of examples.

Dr. Kagawa- Viviani: Thanked Jeremy, Councilmember Sinenci and Eva for that overview. I guess I'm thinking mostly about that first complaint about that existing plan and I, myself, found it really difficult to navigate a 1360-page document that didn't have a clickable table of contents. I was wondering that because Maui is at this inflection point and as you emphasize community engagement is key, you know the document itself doesn't invite participation, it doesn't invite access. And parts of the document may have been overlooked because it is hard to find. Are there or can you develop a more accessible format of this document without having to go thru all the council approval just to make it more accessible and to allow for people to focus on the sections in the document that relate to them or search it? Because, even the IPCC (Intergovernmental Panel on Climate Change) report which is a totally an unwieldy beast has broken things down in a way to make it more accessible. Is that possible? I can see some easy things, but I don't know if that's for Jeremy or for Eva or Councilmember Sinenci? Is there a way to keep the content there but make it more accessible without having to go through council processes?

Jeremy Kimura: I'll just mention from the commission side that I totally agree with you on making all these documents much more accessible. I think it's a big issue too in terms of transparency making things more accessible for everyone to read goes a long way towards transparency in terms of government. The Commission, we are committed to working with the department on creating a summary document that would be easy for people to look at, so I'll leave it to Eva I'm not sure in terms of times and resources they're willing to expand on it but we are happy to work on that with the County.

Eva Blumenstein: This is something we heard not until the draft plan was submitted to the board and board hearings. As the plan went through County Council, it grew and grew, it started at a fairly large quantity, and it grew another couple hundred pages so it's an unwieldy document and the original format was never set up for easy access for the public. So, at this point and time when it's been passed as coordinates, I agree with Jeremy. We would like to have something that's more of a brief summary for general consumption and that document can be updated more quickly. A matrix showing sort of an implementation matrix of what kind of quantitative and qualitative criteria we should look at over the implementation of this plan because obviously there's all these different strategies that translate into projects to be scoped out where's there's more opportunities for community input whatever that is. You know environmental assessments, well construction, permits conservation bills, etc. so that sort of like a smaller user friendly public use document we would like to have that would just be quicker update because we know there's not realistic update of what your surround plan in five years has done that so as long as this is the format of the framework and the state water code it's going to take this long you're going to have some outdated information in the plan but we would definitely like to have a brief summary document to have for more immediate use for the public.

Dr. Kagawa-Viviani: I wanted to clarify that a summary document would be great but even just the table of contents. isn't hyperlinked to sections, so you have to scroll down. That doesn't even require any substance. Is that something that could be done expediently and just as a step. And as for the update the idea that this is a living document, that there will be version b or 2.0 in five years? Because people are going to refer to the plan, if it's a moving piece how are you going to control versioning?

Eva Blumenstein: I mentioned the implementation matrix similar to the community and the land use plans. You don't update version ABC until you actually update the whole plan. The policies are intended to be long term and what use demand changes more quickly than that so implementation matrix will be the tool to follow lead agencies funding other projects and what not. But that could also have more of a summary that's easier used and applied by the public that would follow maybe be attached to capital improvement program proposals or whatever the projects that we're scoping out.

Dr. Kagawa-Viviani: Quick question: What page is the implementation matrix? On a word search, I could not find anything matching implementation matrix.

Jeremy Kimura: {long pause} Okay this is a sign right here about it . This speaks well to the point that was just made.

Wayne Katayama: Thank you Jeremy just to help me put things into context other key elements providing input to the county plan or state plans. How current are these plans? Like the water quality plan, the resource protection plans the ag water plan or does the county need to sort of update that on their own? How does the integration of that database work as the counties go through their water development plan?

Jeremy Kimura: Good question. They're all sort of moving targets in a way so I'll just say the water resource protection plan which we've done was updated last in 2019 and the water quality plan as well. Joanna can confirm this with 2019 as well which water resource plan is the big one since it has the sustainable yield numbers. That's what the counties need to use to plan for the development as well as policies on instream flow standard setting and things like that. The ag water use development plan has been a difficult one in a sense that there's been several updates. I think you might have been here when the Department of Ag did their last update to us and there was a lot of pushback on this recent update to the plan so it's sort of in development right now where we've sent them comments on how they can improve it and put more information in but the latest version of that plan is really from 2012. I believe the only numbers that are being used by the water plan preparers right now is that estimation of ag zone lands or ag entitlements. The water duty could be right for these places. The state water projects plan recently just completed I believe in 2020 was the last statewide update for state projects across the state and previous to that in 2019 we had for Department of Hawaiian Home Lands an update was done so those projections went into the different plans. One of the big things that came

out of the state water projects plan update was we got an idea of what the reservation should be for DHHL that's what we're using to set the reservations for the State. They're all sorts of moving targets. The big one is the ag water use and development plan needs to be updated and we are working with the Department of Ag as you know they have new leadership now, so we are trying to work with that team to make sure that plan gets updated because we see it as a critical component for water planning.

Commissioner Hannahs: Jeremy, on this issue of ag water. Just clarify my memory if you will. Haven't we been using 2500 gallons per acre per day in most of our agricultural allocations?

Jeremy Kimura: maybe Kaleo can speak to that but the planning number that has been adopted is 3400 gallons per acre. People may ask for less I think because that's kind of an old number that was developed kind of a while ago. I believe staff is using things like our irrigation estimation model to get a better idea of what demand is for the specific geographic area I think that's resulted in lower per capita recommendations from staff.

Deputy Manuel: 2500 gallons per day comes from the Waiāhole Water Case and it's been kind of what we've used as a conservative number. But in the Ag Water Use Development Plan it is closer to what Jeremy said and what we are also using is IWRREDS which is a tool we partnered with Ulupono to develop and to estimate actual site-specific agricultural irrigation demands based on type of irrigation, evapotranspiration, all of that and soil moisture is all factored into it so it gets us more parcel specific estimates. All of those are presented to the Commission in its decision making. Ultimately the commission has kind of leaned more towards the conservative number of 2500 gallons per acre per day in order to encourage conservation. As Jeremy has talked about, we are looking at ranges and not necessarily definitive points for a number and if it can be justified through water reporting and data, we try to make it as real as possible.

Commissioner Hannahs: When we encourage or induce our people, we have the wisdom to invest in infrastructure that allow them to have water storage. Are they then able to supplement and meet any gaps that they have in irrigation need by way of our allocation of 2500 plus a supplemental infusion of water coming from their own storage systems?

Deputy Manuel: That's a great strategy and something we'd love to actually test and get proof on and data to support but unfortunately a lot of our agricultural users or systems in general aren't collecting that data and aren't doing that type of analysis. We need to push all water purveyors whether it's potable or non-potable to really start to look at how we can be better stewards of those resources and collect the data because I don't have a definitive answer for you that that strategy is actually working.

Commissioner Hannahs: Look forward to that continuing discussion. Second question: Councilman, thank you for that report I really appreciate the way you responded to the questions and the issues that were raised by the public by saying okay if you say our data is old or you say there's gaps, here's what we did, here's what we included and I really appreciate that approach to it and then invite what we missed and seems like people said you missed this you then went and backfilled that information into your plan in which I think is an excellent approach. My question for you is on the issue of incentivizing or inducing conservation. We live in an era of excesses when people can actually afford to be excessive and are undaunted by a fine or a tiered rate schedule to be excessive, are you finding that having that strategy of having higher rates really works to induce conservation in certain aquifers or might we have to put the very permit at risk or have the power to make our own reductions if they don't comply. What's working?

Councilmember Sinenci: Great question and I think the tiered structure was one of the first efforts to address those very large users. Some of the hotels that still had those huge water uses during a pandemic when they were closed so I think that was the first step. But you're right, part of the strategies we had to do it in conjunction with other things. For instance, the water director talked about expanding our R1 uses. If we are going to use so much water, we need to expand our R1 uses in those areas where there's high water use so that we can use recycled water in some of those areas. The tiered work but also pun intended multi-tiered approach

to doing other things in conjunction with those conservation efforts. The higher water taxes was just to kind of deter and encourage conservation but you're right there's other things that we still need to also do. Some of the things where if there's a lot of pool usage, we should be covering pools for evaporation so that they are not being evaporated in the dry areas so those are some of the discussions that came out throughout our two-year process.

Commissioner Hannahs: I think throughout our government we are looking at the issue of fines and for some people those fines are meaningless so if fines are meant to induce conformance and compliance it doesn't work.

Councilmember Sinenci: It's normally upcountry that has the water restrictions, so we are hoping to expand water use whether it be thru the East Maui Water Authority to increase water from there or other sources so that we're not putting certain parts of the County on water restrictions while others enjoy more water use.

Commissioner Hannahs: Chair the last question is for you. My zoom screen is showing that perhaps Lucienne Danaie and Keaauomoku Kapu is interested in testifying on this matter is that correct?

Chair Chang: Thank you I just want to confirm that this plan is really a framework. It's to guide future decisions. It in and of itself is not an authorization or decision. I do appreciate the County's responsiveness to the questions and Shane in particular. Mahalo for your effort and community engagement. That's really where I come from, I'm kind of a process person. It's important that people feel like they've been heard and listened to and you apparently did a lot of that. You heard the concerns, made appropriate adjustments especially with respect to native Hawaiian rights and issues, so again mahalo for taking the pause not rushing to get the plan approved but really taking the time to engage the community in ways that are meaningful to them so that this document is much more reflective of their concerns and approaches.

Commissioner Buck: Just a comment, this commission is not a stranger to controversial issues on Maui with water and seeing all the comments it sure would be great in April to have some sort of smaller executive summary or something. You guys have worked so hard on this to be able to have a 1300-page document that nobody can access is not really reflective of the work you've put in so, I'm really hoping that in April there is some sort of summary to make it a little more easy to read I think that would benefit all the future water issues on Maui.

Dr. Kagawa-Viviani: I did have one more follow up it's actually directed to our ex-officio DOH representative and the presenters. I'm thinking about O'ahu and Maui's trajectory of urbanization and our current water issues that I'm becoming more and more aware of. I'm teaching water and society this semester and get lots of questions from the students. We've covered recycled water and emerging contaminants so in the case of Maui we do want to use recycled water but how worried should we be about these emerging organic contaminants and pharmaceuticals that are in our wastewater streams as well as nitrates? Because it's not just about water amounts and allocations. As we're using more water, you're creating more wastewater to have to then spend energy cleaning. So, if you have thoughts about that and how to think about it in context.

Commissioner Seto: The department is supportive of reuse in the state and is working very closely with the county of Maui on their reuse program and procedures and the future of it. So, there is a review of the treatment train which is used for the reuse water and the importance of the treatment of the emerging contaminants as well as those contaminants that we are aware of. There is research that is being done. We are aware and keeping track of it and we have staff from the department that is attending reuse conferences and symposiums and they are trying to keep up with all the changing improvements to the processes so that we can bring them here back to Hawai'i.

Lucienne Denaie: I'm testifying on behalf of the Ha'ikū Community Association. We certainly mahalo all the efforts that were made on this plan. We were not consulted about the complete strategy of East Maui wells. We were invited to some vague meetings that were talking about an East Maui groundwater strategy. This is not

the way to engage the public. If all the water or majority of water for the Central Maui area is to come from Ha'ikū, no one in Ha'ikū is able to get a water meter for 20 years. I want people to understand that then you have a meeting in Ha'ikū and you announce what your plan is in Ha'ikū so that you can figure out the solution that fits for everyone. I've heard the presentations today this is a framework this or that please keep in mind every environmental impact document will cite this plan and will not cite the policies it will site the numbers in the charts it will say you know the chart says there's two million gallons a day available for hotel growth in West Maui is that going to be a real fact after we look at what the real water situation of West Maui is? Is that going to be a fact of life? If not, it shouldn't be in this plan or there should be a footnote that says this may be adjusted greatly and should be reflected in any documents. Every environmental document is going to say there's eight million gallons a day available for the central system because they're going to drill wells in Ha'ikū. Do we know if those wells in Ha'ikū are going to produce that amount? We do not. And the previous draft of a plan which this commission rejected from 2010 stated that there were great uncertainties about the Ha'ikū strategy and about several other strategies. It was honest. This plan is not honest. I can't go into the details, I only have 3 minutes. I guess the only way to explain these details is to ask for a contested case and have time to really explain. This is not about conservation measures like turning off the water when you brush your teeth, this is looking at South Maui where 11 million gallons a day of potable treated County water is used and 5 million ends up at the sewage treatment plant the other 6 million is probably used for irrigation. Is that a sound strategy when we are facing climate change? This document has the mealy mouth. It doesn't say we need a strategy to make this different now the folks in South Maui are talking about this they're updating their community plan right now and they're suggesting two million gallons being used to water in Wailea. Can we not use that water and instead use R1 water to irrigate these deserts into oasis. Our plan just leaves out this important information in spite of everybody's attempts and it should be readable. Our former plan was readable. In fact, the 1990 draft was not accepted by this commission. That's a fact that's kind of buried a new 1992 version that was done by a consultant, not done in house. I can't even start to explain how off this data is, framework or not, everyone is going to be looking at the data when your data says that A and B is going to be needing 4000 to 5000 thousand gallons per day per acre or Maui Mahipono and their actual reports that are available online show that they're using under 2 thousand million gallons a day over the 5,000 acres they've planted. Something's wrong. We don't have the right data here and we can't have a good plan. In fact, this plan is not going to be updated in five years, it may be another 20 years because it's structured so poorly. The structure needs to be redone and it needs to be made updatable. I commend the efforts that Councilmember Sinenci made. He was honest with you. Many of the things that were asked for by the kanaka community were completely ignored despite his best efforts simply because people don't want to face the inconvenient truth that we have less water. We can't have the same farming strategies. We can't have 23 percent loss with our ditch systems. We can't have 60 percent water system. I think there will need to be a contested case to really explain what is not right with this plan and why you should not accept it so thank you Commissioners for listening.

RECESS: 10:28 AM

RECONVEYED: 10:36 AM

PUBLIC TESTIMONY

Keaauumoku Kapu: Aloha Chair Chang and Commission. Mahalo for this opportunity for me to testify. Mahalo to the CWRM staff, Jeremy Kimura, for his synopsis on all the data details provided and also the hearing for our community concerns was great to share this around coming from your third staff and mahalo to council Shane Sinenci for having dialogue with our Moku Island counselors and implementing Native Hawaiian and kuleana cultural traditional rights and sharing the importance of seeking traditional generational knowledge. Why that is important is because we're losing a lot of our ground rooted kupuna in our community. It's really important we seek the mana'o from them now to try and see how we can incorporate those values with water use development plan. We in Maui like how this is going. We finally feel we have a great opportunity of being a part of a greater result and hoping that now that Komohana which is the West side of Maui is finally being designated gives us a greater opportunity to being a part of having a primary result and bringing more honest

recommendations. I hope that in the future we will always be a part of the recommendation provided for the Maui water use development plan. Komohana is different in many ways. The West side of Maui has been bombarded by private interests and the municipalities between the county as well as the private sector. It's good to see that the state has designated a referee to bring our major concerns to the forefront and when we didn't support the plan it was generally for the whole of Maui not just Komohana. But also Hikina in the East side of Kihei that the plan was really lacking a lot of grassroots information's on how the community concerns can be met. But I mahalo all of you for your due diligence. I know that this is not an action item. I just wanted to mahalo the route this is going. It's great for the Komohana community knowing that hopefully on the East side when they start the water authority, they'll be some kind of value in it. We can actually look at things and help incorporate on Komohana's side on the West side of Maui. So, Mahalo for your time and mahalo for this opportunity to testify and I'm willing to answer any of your questions. Thank you.

032122 00:1:33

C. ACTION ITEMS

- 1. Find that Patrick and Naomi Guth (Guth Farms), Applicant, Violated Section 174C-93, HRS and Section 13-168-32, HAR Construction of a Stream Diversion Works Without a Permit; Find that No Fine be Imposed on the Applicant; and Approve the After-The-Fact Stream Diversion Works Permit Application (SDWP.5508.6), Kahoma Stream, Lahaina, Maui, Tax Map Key (2) 4-5-016:888 and 4-5-017:888 (Stream) and 4-5-016:009, 4-5-017:005 and 007 (End Use)**

PRESENTATION GIVEN BY: Mr. Dean Uyeno, SPAM Program Manager, CWRM

Mr. Uyeno apologized for the delay in the submittal of the permit application for after-the-fact stream diversion works. He provided an addendum to correct some information and requested to replace the original application with a revised one. The landowners for the diversion intakes are unknown, and the applicant will need to follow all current rules and regulations with the new landowners if identified in the future. The State historic preservation division has no objections to the ongoing use, although recommends the property owner hiring an archaeological consultant to develop a plan for the continued preservation for the Haia terrace system. The commission found that the applicant violated certain regulations but recommended no fines be imposed. The applicant worked with commission staff to comply with the current permit process. The approved stream diversion works permit is for 9000 gallons per day for two acres of dry land kalo and one acre of diversified agriculture from the Kahoma stream subject to standard and special conditions.

032123 00:1:43

QUESTIONS/COMMENTS

Commissioner Buck: If the commission approves this, are we allowing commercial use for traditional and cultural native Hawaiian practices?

Dean Uyeno: The applicants will be able to speak better to this portion. Their agriculture, which does provide for home use in a sense of bartering in a traditional customary way and some are being used for commercial sale. So, there is a twofold use.

Commissioner Buck: I do understand the rationale because we are trying to streamline the permits, traditional and cultural. We know the issue of commercial use is out there and currently it's not allowed. I believe if we approve this, we state somewhere in the recommendation that this is an ongoing issue, and we don't want to set a precedence that then will be used by other people.

Deputy Manuel: I think you bring up a good point. What we have been trying to do at the staff level is to work

with the applicants. In this case, a majority of the use is for subsistence purposes and traditional customary practices. It's a policy and balance that the commission must consider. But your right, traditional and customary practices do not include commercial use.

Commissioner Buck: Maybe we need a statement saying this does not provide a precedence for any commercial use in any future applications.

Deputy Manuel: One of the things we always advise is that you have the series of facts before you and this is specific to this permit application. We did highlight it in the submittal that staff, based on prior direction from the commission look at ways to help support traditional customary practices of native points in the permitting process. Whether an expedited or an exempted process is something we should pursue. I think this is related to the Alima Huli violation, which was very similar where a pump was put into the stream but supported traditional kalo cultivation. We are trying to balance with staff. Is one dollar worth of commercial the trigger or is it absolutely zero? Is it a range? We are using our best judgement in this context to provide a recommendation for you to consider, but this is a decision of the commission.

Commissioner Buck: I think the minutes should show the discussion that we are having in which should protect us in the future. Because what is the level of commercial use? I'm not against Farmer's markets and landowners selling things for some sort of income.

Commissioner Hannahs: Great question commissioner Buck and great response Kaleo. Are you in consultation with Kahuliao and the Native Hawaiian scholarship team at the Richardson school of law? They may have some thoughts on these rights and how they evolve in the current state.

Deputy Manuel: We've been in contact and coordination with Kahuliao and others including our legislators, who have policy conversations about it. Last session, there were amendments to the Water Code that started to articulate. For example, licenses on kalo growing in a traditional customary manner. There was a conversation about whether commercial kalo farming would also qualify for that exemption from water licensing. There's also another indication on a policy level that this dialogue between what policy stance the state should take. I use kalo as an example, of a traditional customary practice. We are working with anybody to look at the evolution of the code on its application to our modern times. Some of the things we are looking at is an evaluation of the intent. In some of the reviews, on the commission reports it already starts to anticipate one of the recommendations which was to exempt all traditional customary practices from having to get a permit from us. They are still required to get a permit from us so we're trying to balance between what is and isn't required.

Chair Chang: There has been legislation proposed this session regarding traditional customary practices and commercial use. It has been the position of the Department in our testimony that under article 12 section 7 it specifically says not for commercial use. We have taken the position that it is just for subsistence purposes. We understand it is an evolving issue. We are taking the position that traditional customary practices do not include commercial use and we were successful in getting proposed legislation to delete that. That's a question probably far beyond at this point and time. Unless we change the law, we may be drawing a thin line but I think one that we're holding to that it has to be traditional customary practices for subsistence use. Priority purposes of issuance and public trust, traditional customary practices may have a priority clearly over commercial use. But currently that is the Department's position.

Commissioner Hannahs: it's a complicated issue but subsistence back in the day meant you traded kalo for fish. Today, you got to pay property taxes you got to pay for cultural consultant to subsist. It's a difficult issue and I appreciate that the consideration is being made. I have a question for Ohana Guth, do you perceive that the retention of an archaeological consultant can get expensive and is that going to pose a burden on your ohana of users?

Naomi Guth: absolutely. We got a quote from SMS, and they want to charge us \$11,500 plus airplane fare and car rental and last year we made \$25,000. You guys are talking commercial but we are providing food for our

kupunas. We do 2 farmers markets a month, that's it, that's all we can handle. We are in our 60's and we farmed almost 40 years of our life. Saying that we have water going through the Haia terraces down to our property all of that is untrue.

Commissioner Hannahs: Did any of this Haia terrace extend to Kamehameha schools land? Is it in that vicinity or is it off their land? Could it be that Kamehameha, who has land in that area, may have done some landscape level archaeological reviews? They may be able to provide you with access to that information. I would encourage outreach to the school who's done a lot of research on their land and the surroundings.

Naomi Guth: I'd like to share a little bit about my background. I am a lineal descendant. My maiden name is Akiona. My father was Albert Kauhilani Akiona, his mother was Mabel Mahoe Akeo Akiona, and her mother is Ella Papiwelo Haia Kekai. Her father is Haia Kekai. So that Haia terraces are family to me. I would never desecrate any of the burials or the land. All we are doing is farming.

Commissioner Hannahs: Kaleo, perhaps our staff could help facilitate the access of the information. So that it's acquired through somebody that you have to retain at their expense, which would be a burden to them. We might be able to get that information in other ways. We might be able to provide the assurance to SHPD that the sites are being adequately protected from use and not a threat to the sanctity of the sites.

Patrick Guth: Can I also give you a little history of our history with SHPD? When we first purchased the property in 2020. We began the application process with Rebecca Alakai. Item 34 on the application was to reach out to SHPD and we did. Again, this was in 2020 when covid was full blown. I talked to Andrew McAllister, and he told me they weren't doing site visits because of covid so, we marked that on our application. We navigated our way through the application, which was difficult. But Rebecca helped us and in November we finally had it all to the place where they deemed it complete. We submitted it and the following year in 2021 we were actually on the agenda a few times but got taken off because they decided they needed to look a little deeper into our application. They suddenly became aware of our association with the Haia terraces. I let them know that we are very familiar with it because it's my wife's ohana. In fact, she has family buried up there as recent as her father's siblings that died at birth. There were 11 children but two of them had died and were buried in Keoihuihu which is the area. They let us know that they had a new website and that we had to navigate that now, so we did. In November of 2021, we finally got that completed and in January they said that they completed the review and that we needed a letter from the government agency who requested the review. We let CWRM know and at that time we were told that they were super busy, and they would get to it, so we left it at that. That was in January 2021 and then in May of 2021 we received a letter from Kathy Yoda with a new form that the State Historic Preservation was putting out there for people to use. He asked that we use that. I explained that we already went through the review, and they said they never got a determination letter. I asked well did you ever send that letter in that they asked for? They said they forgot. So, they sent it to me. I had to upload it and send it to SHPD. I sent in that new form and what it did was it generated a whole new review. So, this was in June that I got this new review submitted. We waited and waited and kept calling because it was holding up our application. Then SHPD finally, in last November, tells us that they cannot do a review of our property because it's an after the fact and according to their books we've already unearthed the area and they show it in their pictures that we have a stream diversion on that side of the stream and water flowing through the Haia terraces, that is totally false. We have six land commission awards, two on one side of the stream and four on the other. The two on one side of the stream are accessible for us to drive, to do our work during covid. It was perfect because we had six grown kids and their families, and everybody came and helped us clear the land and plant kalo. It was a special time for us. We didn't do anything across the stream, which is where four more land commission awards are. The Haia terrace property is adjacent to ours on top of the hill. We are down at the stream area and they are on top of the hill. This is the land where Kahoma stream and Kanaha stream merge. It goes up about 200 feet and that's where the Haia property terrace is. For them to say that we have a diversion in which we don't, and that we have water going through the terraces, is so unbelievable. There's nothing we can do about it because they never came out to visit. We wanted them to do a site visit, but they never did. In fact, I could barely get a hold of them since they sent the determination letter saying they're going to recommend to CWRM that we get denied. I wrote to Dean that I'm just flustered. I

don't know what to do. I appreciate Dean and his willingness to try. He came out there with Alexa and Ayron and they could see that we hadn't done anything over there. It's still in its natural state. There's no reason why SHPD cannot come out and do a study to see if the terraces are being impacted or will be impacted by any type of cultivation or planting. There's nothing we have done there except build a bridge that goes from one bank to the other, that's all. Now they want us to call a consultant. We called several and finally one answered. The expenses for the consultant, the car and airfare is \$12,000. All we want to do is grow food. I have a degree in Agriculture from the University of Manoa and ever since we've been married in 1984, we've always done some sort of subsistent farming out in Honokohau and now we are continuing to do this up here. We make kulolo and sell it at the farmer's market. We were making poi for a while, but the Board of Health said we can't because we don't have a commercial kitchen unless we pound the poi by hand. I tried but it's too hard. We should not have to go to the private sector and empty our bank account.

Commissioner Hannahs: It seems like SHPD's position may be based on misinformation and the lack of ground truthing site visit, rather than kind of take an easy path for a state agency to have the applicant prove something at their expense. Is there a way we can get this clarified? And avoid that expense which would be a burden.

Chair Chang: Commissioner Hannahs, you know what I'm going to recommend. Do you know Hinano Rodrigues? He's our Cultural and History branch chief on Maui. I would ask that Hinano talk story and review SHPD's letter with you and any changes that needs to be made. Hinano will have the opportunity to review this. Clearly you have a lineal connection to this land. I cannot imagine that you would in any way attempt to damage or desecrate your ohana that's there. When we get down to the recommendations, that will be something that I will recommend, especially if he's there on Maui. I think he would be in a better position to make an appropriate recommendation to SHPD regarding your particular activity. Commissioners, do you have any questions before I have the Guth's have an opportunity to tell us? There's any additional information?

Dr. Ayron Strauch: Ayron Strauch from the Stream Protection Management Branch. Dr. Strauch explained that staff with the Stream Protection Management Branch conducted multiple site visits and provided photographs for context.

Deputy Manuel: Let me just be clear. The terrace system, from what I understand is an agricultural system. There's also been an intermixing of burials language in the conversation. After talking with SHPD and the Guth's the burials are located up mauka. So, the burials aren't going to be impacted but under Historic Preservation law we have an obligation to protect archaeological sites especially, if they are registered. I think that is the extent of the comment that came from archaeological branch. So, I think your recommendation to have the culture and historic branch review this and provide additional recommendations to this body would be helpful. Even with lineal descendants that have claims. These are just larger wahi kupuna stewardship issues that we have to deal with wai throughout the state. There is a nexus here with the re-establishment of wai and traditional cultural sites before the water commission.

Chair Chang: sometimes we just have to use common sense and be practical. But Hinano is from the area, and we should give him an opportunity to visit the Guth's if he hasn't already and provide us with an assessment based upon a site visit based upon his own cultural and historical knowledge of the area. Doing a site visit will give him a better appreciation for what you are doing in relationship to these particular sites. He knows that your activities is going to be further makai from where the historic sites are, out of harm's way of both the burials as well as the features. So, let's see what he says. I think Hinano takes into consideration people's lineal connection. I mean not in any way disregarding SHPD and the archaeologists, but I think this is one that merits cultural considerations. So, as we get to the recommendations let's explore. Ayron It's 11:20, The Guth's would you like to provide any overview of what you're doing before we take a break? I know there are people here who've either provided written comments or would like to provide oral comments.

Naomi Guth: I think that I've said all that I needed to at this time.

Patrick Guth: We enjoy what we do every day. People drive by and see us out there working hard. We love it we always have, and we hope that our kids and grandkids that come up there, enjoy it and carry this on as well. We try to grow as many things that we can eat and don't like to grow anything that we don't like to eat. But we do enjoy eating what we grow. Our papayas, bananas, our kalo. And We've planted a lot of mango trees and this year they're starting to flower for the first time and give fruit. We have a whole backyard down in Lahaina of plants and are excited to put in the ground fruit trees. That will help us to live off the land and for our family and grandchildren. So that's our dream. We have our legacy lands that we will pass down to our children and hope our children will continue this legacy of farming the land and working the land.

Naomi Guth: I'd like to say that these lands that we have are legacy lands that we will pass it down to our children. I hope our children will continue this legacy of farming the land, working the land, that is what we've always done and something that we really enjoy. We believe that we can only be stewards of the land and we need to take care of the land.

Patrick Guth: We don't use any fertilizers. We don't use any pesticides. We do everything by hand and that's what's going on with the Guth Ohana

Chair Chang: Can I just ask, are you connected to this land? Is this where you grew up? Where your ohana grew up?

Naomi Guth: No, this is not my family land. We bought this from West Maui Land.

RECESS 11:23 AM

RECONVEYED 11:35 AM

Chair Chang mentioned that we received written testimony.

PUBLIC TESTIMONY

Keaauumoku Kapu: Mahalo to this commission once again for allowing me to provide my testimony. A lot of key things that came up in the discussion. Mahalo to Commissioner Buck for that question on Commercial uses. Which is not only missed and out of context many times. Everybody looked at just the basic concept of what that means. When you start talking about what kind of rights kuleana basically have versus people who purchase property. It's different in my eyes. Mahalo to Kaleo for your mana'o and to you, Chair Chang for your knowledge and clarification of article 12 section 7. The Hawaii revised statute 7-1 on gathering rights. Subsistence gathering rights is not for commercial use. This HRS is from the Privy Council of 1850 and used as a system to clarify its uses. Based on what I heard then and how it kind of intermingled to today's policies. I'd like to mention that I am a recognized lineal descendant of Keoihuihu burial terrace known as the Haia Terraces which Kaleo corrected. The burials are lower, my mana'o provided by Uncle Jonah Keahi is no longer with us. But a descendancy recognition came from State Historic Preservations site number 50 50-03-01776 and what I'm saying is that any further discussion that has to do with the State Historic Preservation division, to consider the recognize the lineal descendants as well, to be a part of the consultation. Not only myself, but also, there's two others that were recognized to the State Historic Preservation Branch and the Burial Council which is Namea'aia Alpachino and Kahikilani Niles. Which is one that would recognize the lineal descendants. If any work or anything that even encroaches upon those areas should have some kind of consultation with recognize lineal descendants. There's a report that we have on the ongoing work for the Corps of Engineer back in 1974. In the last stage of the report it basically stresses the importance of their concluded recommendations. That any other work that is done within this area, which is not related to the Kahoma Stream Flood Project. When they were doing it back then, they had to take into serious consideration federal archaeological work needs to be justified. If necessary, to the Kahoma stream terraced area that was implemented in this archaeological plan that was done in 1974. There's another issue that I would like to also put on the table. There are multiple land commission awards in my records. I had three of them and the one that I have kuleana to is the land

commission award of 8021 'āpana 1 royal patent 1732. There's another one by Nalehu which is another parcel. The information or 6621 Royal Patent 1722 issue to Nalehu. The Haia terrace is also mentioned in the osteological report that these areas are highly significant and also kuleana live in that area today. The Haia Terrace, where we are right now is in the process of putting together a lot of these applications for water to address these area. After the designation was made it was important for us to make sure that we are implemented in a plan. How we will be able to continue our kalo cultivation within the areas that I mentioned. The land commission award and the possibility of getting simple water up Haia terrace so we can start managing and beautifying the terrace area. Cutting the grass down so it's eminent that we're looking at what we actually protecting that's a long management plan. I'm hoping to take into consideration that these things need to involve the recognized lineal descendants of the area. I also want to ask that tax map key 245-017:002 should be stricken to this request. This kuleana that we live on and if this plan goes forward what does it do for our application? There are other pending applications that are in this area that is in the process now for the water use permit. How is this going to impact or negatively affect the work that we've been doing? Because we call our designation those lands that have been cultivated. Even above in Kahoma with the repatriation of waters provided by Kamehameha schools we put water in the river to make sure that the kuleana had water or the ongoing cultivation of the taro. So the main request is to make sure that 245017.002 is stricken from this request because we live there and there was no permission by doing all these altercations going fast forward. Mahalo, for this opportunity I am here to answer any of your questions.

Chair Chang: Keaamoku, are you familiar with the Guth's?

Keaamoku Kapu: I see them. I like the work that they're doing in the valley. I have no problem with that they're just certain clarification that I want to make sure that we're a part of. Especially when it comes to the consultation of the Haia terrace.

Chair Chang: Do the lineal descendants meet regularly?

Keaamoku Kapu: We meet every Monday. We sit down and talk about the water use permit application. Because once the designation was made, I want to stress again that it's important for us to make sure that we lay down the ground rules, pertaining to what we can do and what we cannot do to provide clarity. This is not just Kahoma it's Kalaula going into the water use throughout Komohana. Komohana kuleana was the one that was vital to the state designation that we really thought we needed. Because we were being left out of the picture, so we supported the designation just for that back. May the record show that a lot of the purchases on West Maui Land company was not in support of the designation. This gives us more of an opportunity to be a part of the management system.

Chair Chang: Is there an opportunity for the Guth's to meet with the Ohana that meets regularly?

Keaamoku Kapu: I think that would be a possibility. I don't know it is depending on them. But I know eventually down the road, when there is some kind of consultation with the Historic Preservation that there will involve the lineal the newly recognized descendants.

Chair Chang: Okay, thank you very much Keaamoku. With that do the commissioners have any questions?

Kapali Keahi: Aloha Chair Chang and Commissioners mahalo for this opportunity to speak. Aloha to the staff as well. I understand how much work went into helping the Guth's get to this point in their application for the after the fact permit. But there are a few things that really needs to be clarified there are other end uses that have been included in this application that I don't think should be included in this application. They should be considered on their own. Some of the tax map keys that were cited or at least included in the application initially. I'm not sure if it changed over time. Maybe it got revised. But at least what I'm seeing is as uncle Keaamoku had mentioned there are several that should be stricken from the application. I feel like some other properties were snuck into somehow some way other people are currently residing in there that have their own diversions on the stream. And also taking water for domestic consumption as well. I'm not sure if that is

included in their request. How much they can harvest from the from the river. Whether or not that is included in the Guth's application. It's supposed to be used for agricultural use. There's a lot of reason to think that some of the people who are residing on adjacent lands have acquired those lands through the Land Company. They are also taking water from the river for domestic use and not necessarily for agricultural use. They have some agriculture but to me the extent is just to show that they're using that as an excuse to take water from the river. Before I go on. I have to clarify that I am a descendant of Emily Haia who owns the Haia terrace. That is her aina. She is my father's mother. I did not seek any lineal descendancy confirmation from any Boards or Commissions of the State. That is my grandmother's Aina so just to clarify I am a hoa'aina of that place. I currently steward several acres in the valley for other Ohana as well. Land Commission 6621 to Nalehu as well as 8021 that uncle Keaamoku had already mentioned in his testimony. I am one of the hoa'aina of those lands. I have to add that I think SHPD presence in the valley is very necessary because it's not just the Haia Terrace. Everywhere you look in that valley there's significance and the fact that the valley was abandoned for so long for over 100 years. The plantations took the water after the overthrow of our kingdom the plantations took the water with the help from the diversion above Kahoma stream. They took the water away from the valley, our family left the valley eventually and the land has been sitting there abandoned for almost 100 years. So, a lot of those lands with respect to what was used by the plantations for sugar operations. I just think that there's other people who are acquiring lands through the Land Company that need to file their own applications. When it comes to the Guth's application I feel like the Guth's are extending their application to even include others who are not necessarily serviced by the Guth's. They have their own diversions. The commission needs to consider that they have their own application reviewed.

Kahi Kamohoali'i: Aloha Commissioners and the Chairman. I've never watched a CWRM meeting before my apologies. I am testifying in favor of the Guth's to get the permit. I am a lineal descendant of the original inhabitant of Kahoma Valley. My tutu was the Konihiki of Kahoma valley and I want to address a couple of things that I've heard. One of them being commercial use. I'm guessing that goes towards the Guth's using their farm products. They sell it at the farmer's market. So my Ohana was in the valley until 1936 farming kalo. I have pictures and documentation to support this and around the early 1900s to about 1915 Lahaina had a POI Factory. There's documentation of this POI Factory from Lahaina restoration and my ohana sold their Kalo to that POI Factory. In turn my ohana worked also for that POI Factory they were POI Pounders and POI Baggers. They harvested, so there was commercial use coming out from Kahoma Valley from the late 1800s to about 1936 when they finally left the valley. I didn't know the Guth's until about five years ago in 2018 is when I first met the Guth's. Their kalo that they grow over there is absolutely amazing and absolutely beautiful they are at the very beginning of the valley. They brought the valley back to life that's what the Guth's did. I mahalo them so much. I don't understand all the statutes that go into water rights for Kahoma stream. But what I do know because I did the title search for all of the kuleanas in the valley is that with each deed that got passed on. Water rights was passed on to the next person and hence they were passed on to Pioneer Mill then into Kahoma land and then to the Guth's. I was doing some back research for the Guth's. I live on Oahu. I came across a deed dated February 1st 1932. It's from Pili Kekai and his wife Marianne John Manuia Kekai who is a widower. They were the children of Kekai and Kekai was the son of Haia who was the original land holder of noncommissioned awards 6541 to Haia which includes the Haia Terraces. On this deed it says that intent to Grant unto Pioneer Mill company the right and privilege of taking any waters from said lands that may be developed in the course of said tunnel excavation and construction. So this particular deed is from that ohana giving Pioneer Mill access through their land for water that was coming from Honokōwai and Kahoma Valley itself. It has a different system of what that value was used for. I also want to bring up so I heard Kapali talking about diversions. Well Kapali's family is squatting on land they're squatting on Nalehu they have no claim to that aina and they are also diverting water. There's diversions in that Valley going all the way up to where Kamehameha schools put the water back in the stream which I am so thankful for. I 100 percent support that effort to make the stream run 100 percent. In regard to Neil Hannahs asking about KS. This area, Kamamalu owns the upper part of that flat part in between Kanaha and Kahoma. The tip is still owned by that Haia family. Kapali is correct his grandma is one of the owners of the Haia. I'll summarize really quick the Guth's, Naomi, especially she's a native tenant of Kahoma Valley. I don't think that she should have to apply for a permit but I understand that that is the law now. But based on her rights as a native Hawaiian and based on the fact that commercial use was used in Kahoma Valley to supply taro to the

rest of Lahaina. They didn't just do it for free. Yes, there's bartering going around but bartering only went so far and there was monetary use monetary value given to the kalo that was grown in Kahoma Valley. I know that that's a really touchy situation, but I do think that they should be approved because what they are doing provides for all of the community of Lahaina.

Eric Meade: Aloha Chair Chang and members of the Commission of Water Resources Management. My name is Eric Meade and I'm a student at the William S Richardson School of Law. In deference to the issues raised by previous testifiers which I believe should be addressed. I support a precedence of waiting of these fines because of the Constitutional priority of water use for traditional and customary native Hawaiian practices. I'm enheartened to hear that the commission is conscientious of the burdens that traditional and customary Native Hawaiian practitioners face. Thank you.

Chair Chang closes public testimony and asks Commissioner's if they have any questions.

032123 00:2:51

QUESTIONS/COMMENTS

Commissioner Kagawa-Viviani: I have a question for Deputy Manuel and Ayron Strauch. Clearly this is an intense situation among neighbors and people who are connected to each other and in same space. But just focusing on what we're responsible for as the water commission. I'm curious your view on if we approve this after the fact permit, what precedent does it set for both all the hard work we've been working on with IIFS and enforcement and the fact that we designated Lahaina as a water management area? We tried, we were leveraging penalties on Olowalu and yes this is a different case but it's clear from testimony that people value the work of the Guth's - that's not the issue at hand.. What we are talking about is the water. So how does this affect our responsibilities to steward resources and mediate conflict? Sorry two things, let's just focus on stewarding the resource for the stream and the precedence we set as we're going to be rolling out(inaudible).

Deputy Manuel: I'll start then Ayron and Dean can jump in. The use that's described and the quantity that's described has been evaluated against IFS as indicated in the presentation or the submittal. But the Guth's are located at the mouth of the valley. So a lot of the other users that have testified are located mauka of them so they wouldn't necessarily be impacted by the Guth's diversion of water. The stream does and will continue to flow and the use per Ayron's analysis is de minimus. I will say within the context of the Commissions regulation of water resources with designation coming forward. This diversion works permit is one process the Guth's will still have to apply for a water use permit. There's opportunities for the commission to further evaluate and balance the Guth's water use with all the other water uses in the valley for in stream and off stream users. So, it's one step to try to quote unquote clean up the files but the water use permitting process that's coming this summer, the Guth's will still have to apply for a water use permit and the commission will reevaluate and balance those reasonable beneficial uses at that time with all other users of this water of Kahoma stream.

Dean Uyeno: Commissioner Kagawa-Viviani in this case once the water was restored in Kahoma valley from the Kamehameha school's diversion. There was a lot of people that we found out that began diverting water from the stream and that's something that we're trying to work through to follow up on. In the case of the Guth's it's our understanding that West Maui Land company began selling off land commission awards that are part of a bigger TMK parcel. Some people that are adjacent to the Guth's begun diverting water from the stream via smaller pumps. Those are some follow up actions that we'll need to work on. The Guth's to our understanding is going through a subdivision process. I believe that their LCA's that they purchased from West Maui Land are in the process of receiving their own TMK parcel numbers and they may be able to speak to that more.

Ayron Strauch: Just to take a broader view. The establishment of interim in stream flow standards to support in-stream uses and repairing uses downstream anticipated the use of water in the riparian zone. The resurgence

of traditional customary practices the rejuvenation of ecosystems. We knew this was likely to happen. We just hope that all of these repairing users that are diverting water will go through the necessary legal channels to re-establish those structures if there's actual structures in the channel or pumps. So we kind of anticipated this might happen. Does that help?

Commissioner Kagawa-Viviani: It helps I just want to add a final comment. I think as a commissioner and as kanaka 'ōiwi, though not from Maui, what I don't want to do is produce conditions that are going to increase local conflict without a pathway to working through them. We open up a resource and that's stimulating really good things but also there's these people who've been waiting for generations to get access to that and it feels like somebody's jumping in line. I guess if I were to make a motion right now I would want to defer a little bit. Make sure we sort of sort out our understanding of those TMK's and LCA's and get people together. Kaleo you've been working at that already but maybe I just want to put that out there because I think people have been waiting long. I'll just leave that comment.

Deputy Manuel: I appreciate that and as a planner and as somebody that similar to chair that supports process is something that I encourage and support. However, we are regulatory body and what we have before us is a request for a permit. I'm trying to honor the applicants process and request and process it within the context of our authorities. A lot of what you talk about is community building and community conversations and to be honest I don't feel comfortable being the one always forcing these conversations to happen. We recommend it. We highly encourage it. We could recommend consultation with, but making things subject to gets really challenging in this context. I hear what you're saying. I hear the testimony from all parties I am working with staff and the applicants trying to present to this to commission what's within our authority and within our space to help facilitate. There's larger systems and policies of how we better encourage community conversations but at this point as cited in the submittal this has been a permit that's been languishing for years. We want to help support especially in this context. Where we have somebody that's doing kalo cultivation customary practices as well as some commercial. But getting them across that finish line to create some hope for movement. That's just my response Commissioner. I honor you as a Commissioner and decision maker and we are here just to recommend decisions to you. Ultimately you make the decision, and we will follow your lead.

Commissioner Katayama: Kaleo can you help me with this? The application is for a stream diversions permit. Is that correct?

Deputy Manuel: yes, Commissioner

Commissioner Katayama: the applicant, what is his legal access to that diversion?

Deputy Manuel: so, the diversion from what I understand, is a pump along the stream along their parcel.

Commissioner Katayama: why is it that in the application, the landowner is unknown?

Dean Uyeno: There are two Parcels basically the stream channels. We've seen other instances and like Honokōhau Valley where that 888 parcel was the TMK Parcel. Were drawn up or digitized originally the 888 was a number sequence that was assigned to these parcels where no landowner was identified so it doesn't belong. It's not identified as a state or the county, any government entity, or any private entity it's just these outlier parcels where ownership has not been identified.

Commissioner Katayama: so, the occupancy and the maintenance of this diversion. Is it sort of a free for all?

Dean Uyeno: well, without doing an exact survey. The understanding is that the pump is on the parcel that the Guth's own. The streams is these 888 parcels. I guess just the pipes would be going into the stream if that makes sense. Does that answer your question?

Commissioner Katayama: well, what does the Guth's enjoy any kind of long-term standing in maintaining that? or legal access to it?

Dean Uyeno: that I'm uncertain just because there'll be a land ownership issue there.

Commissioner Katayama: well, I guess I mean have we granted these kinds of permits for lands with owner's unknown to someone to have access to it?

Dean Uyeno: I'm trying to recall if we did one in Honokōhau where the parcel was in a similar situation? Difficult for me to answer that question.

Deputy Manuel: I hear what you're saying right now. There's access the pump and the pipes are accessing the TMK which the stream is located on, and that stream is identified. There's no landowner identified so from our stance or at least in our initial review. We are recommending approval. Unless it's challenged, unless somebody does actually come forward and say that they're the landowner. Therefore permission should be sought through them. For example if it was a State of Hawaii right of entry to access that parcel. Would you have to be granted by the state? But because there's no landowner identified we don't have anybody to determine whether that access is allowed or not.

Commissioner Katayama: How much of this stream is in that 888 parcel?

Deputy Manuel: I'd have to look Commissioner. Dean we'd have to pull up the TMK and analyze that.

Dean Uyeno: yeah, I'd have to do a closer look. But I think it's in the vicinity. Just a rough guess, it's maybe a quarter mile section. There are other portions along the stream that are owned by private entities. For example, just upstream of this is owned by Kahoma land.

Commissioner Katayama: and another clarification for me as part of the application. The landowners of the three different TMK's are listed? What is their participation in the diversion?

Dean Uyeno: The Guth's maybe better to answer this but as far as we know the Guth's are the only one's operating their diversion. There are other pipes or pumps as we've seen during our site visits that have been in the stream at times. Between our first site visit to our last one, some of the pipes had changed there were different pipes where on our first site visit some of the pipes were in place, but they weren't actually diverting either because they had been broken or I'm not sure if they were clogged. But there was no water in them at the time versus when we went this last time. There were additional pipes in the stream different from the ones we had seen prior, and pumps were observed.

Commissioner Katayama: And those were all in the 888 parcels?

Dean Uyeno: So again, the 888 is just a small sliver of the stream itself. The pumps that we observed was up on the bank so I'm not exactly sure which parcel that was on. I guess some of those pipes may have been in that 888 parcel.

Commissioner Katayama: Are there any other diversion permits other than the Guth's?

Dean Uyeno: no, we need to follow up on these other diverters. It was kind of a messy situation initially. We didn't really understand what was going on as far as these individual LCA's within this larger parcel that was being sold off and how we would treat those in that case. In the initial complaint when we looked up ownership we referred to it. I believe it was Kahoma land which is a subsidiary of West Maui Land company. We were talking with the president Peter Martin at the time and his response was, well we sold off these LCA Parcels so you need to talk to those people. So that's the situation we encountered early on.

Commissioner Katayama: so, who could sort of provide a little more clarity on the landowners listed as end users? Kahoma Land Company is one of them.

Dean Uyeno: we'd have to work with them to identify the owners through that that had purchased through them.

Commissioner Katayama: and the AG is comfortable about allowing us to issue diversion permits to someone that has no legal access?

Deputy AG Cindy: we haven't been consulted on that issue. If the commission requires advice, we'd want to look into it further.

Commissioner Katayama: it's just a matter of comfort. Are we providing the Guth's with any kind of comfort by issuing a permit?

Paul Meyer: Hi Cindy a question quick question for you. I'm not an attorney and have you looked into the question of traditional and customary activities being the basis for commercial activity as is the case here. What we've heard earlier today that the law currently does not provide for that and somebody needs to change the law if they want to do that. It really comes to the commission to try to deal with that circumstance. What does the law say right now? Can you clarify that unequivocally for us?

Deputy AG Cindy: I just need a minute. We haven't taken a deep dive into that. I mean if that's your question?

Deputy Manuel: Commissioner Meyer mahalo for the question. I think just for clarity. Staff in our review anybody can apply for extreme diversion works permit so that's what we're processing the analysis and recommendation related to TNC was typed defined. Whether or not we find what's tied to the fact that there's traditional customary practice. I want to bifurcate the conversation that the stream diversion works permits are not only limited to TNC so just making that clear for the record. Anybody can apply for stream diversion works permit but our intent to not fine is because the applicants participate in TNC as well as commercial. Based on that that's why we recommended not fining so that's the context of a TNC.

Paul Meyer: I understand thanks very much Kaleo. At the same time, what it seems is that we're participating in a scheme to break the law that whether a fine is issued or not; the permit comes into question and question of whether a cease-and-desist order or cease and desist letter is appropriate. I'm not trying to be a hard guy or anything I understand the value out there and understand it pretty well. But I think we have a duty an irrevocable duty to follow the state code and unless somebody can change the law I don't know. Are we in a bind here seems like maybe we are.

Chair Chang: I understand it and I appreciate the clarification from Kaleo. The traditional customary practices; the question about commercial is only related to whether we decide to waive the fine or not. So that's separate because anybody's entitled to apply for a stream diversion permit. So, notwithstanding that, the Guth's may be doing commercial activity. I think it's the question of traditional customary practices is only related to whether we would waive the fine.

Deputy Manuel: it's ultimately the discretion of this body to decide whether to deny, accept, modify condition. This is your discretion and I think you are acting within the context of the water code to do that.

Chair Chang: I'm sorry commissioner Meyer. Are you okay? Do you have any other questions? Are you comfortable?

Paul Meyer: It seems to me that the question of the permit and the question about fine really is irrelevant given the statements in the code and the laws. I understand it as you explained it as a matter of fact. So, I am uncomfortable with this situation and I don't like to be in position as a Commissioner; to be looking the other

way if you will and by virtue by encouraging other people to do the same. To conduct the same kind of activity. So, I'm uneasy with that. I have been uneasy before and I don't think it seems like we're really doing our job as far as the law is concerned.

Chair Chang: appreciate that perspective Commissioner. My understanding is the Guth's have applied for the permit and so I don't think they're trying to violate; well it's an after the fact permit. But that permit has been pending the application.

Commissioner Hannahs: Staff we recognize that we've got a long list of things we need to accomplish in doing our work for this commission. And so, you want to dispense with items as they come before the board even though sometimes you don't have perfect information or absolute consensus, or the matter would benefit from community building. We're not resourced to support much more than the current level. We don't want to kick cans down the road where we're just not doing our job and making a decision with less than perfect information. But in this case, I just think there's some things that would benefit from a little bit more time. It's not just as we've said. It's not just for the value of this one permit. It sets some precedence that could be troubling if we move too precipitously. The whole SHPD issue. You've got the commercial use issue, you've got TMK identification issues, and questions which I'm not saying that the concerns are correct or not. It's just that they've been raised today, and I think we would really benefit from leaning in a little bit more on this to see if we can sort some of that out. I would say that with respect to the opportunity for community building. I guess I just kind of said it is an opportunity and not just a duty and that opportunity falls not just to our Commission staff but to the community itself. There are some reasonable people who have spoken on both sides of this issue here, before us today from our community and they're all impressive. Can you guys just talk and I hope the meeting works out so the Guth's can go to the meeting that meets regularly on Mondays that Keaauomoku has talked about. I hope some of this stuff can get sorted. I hope that our SHPD folks can make a site visit and it seems like we've got some low-hanging fruit that you know can be accomplished in a short order. If things fall out that this bring us closer to consensus and closer to clarity on the issues to address the concerns about precedent setting that may produce unintended. I think we are better off. I don't know how that jams up future schedules of work for the staff or for the agendas of this Commission. But it just feels like we would benefit from a little bit more time and having this come back to us.

Chair Chang: Mahalo for that wisdom, Commissioner Hannahs are you proposing a motion?

Commissioner Hannahs: I'd like to hear the staff's response to that and then perhaps offer a motion.

Deputy Manuel: I'll start I'm hearing the sentiment of the Commission as a decision-making body. I'm going to defer and work with the applicants and the community through some of the issues identified. I will say on some other questions raised about ownership and legal issues we'll consult with our AG's, but I don't know how long or how fast that's going to take, and we can coordinate with SHPD as well. I had no control over them as a sister agency. So, I will say that I am concerned that we're going to continue to move this out and that the Guth's have been applicants in this process since 2018. So, I just want to acknowledge them for their patience through this process if we decide to defer.

Deputy AG Cindy: I can give some general information about article 12 section 7. It's basically what chair Chang said. It's reaffirming that the state protects all rights customarily and traditionally exercised for subsistence and right of cultural and religious purposes by ahupua'a tenants for descendants of Native Hawaiian. Just to remind you of the provision in your water code which is 174 C -101 that also talks about Native Hawaiian water rights. It doesn't really go to this specific issue but it does talk about Native Hawaiian rights. So, a deeper dive would be needed to answer your specific question. I wanted to give you kind of the framework that the Constitutional provision and your own statute provides.

Dr. Ayron Strauch: We know that there are unpermitted diversions across the state not just in Kahoma. We are trying to get them on the books as rapidly as possible. We've been working with the Guth's and they've been patient with us for five years. They've been moving forward the fastest trying to get their use or their

withdrawal of water legal in a sense. As mentioned, upstream of them or at least four other locations. We have documented water withdrawals from the stream that haven't been issued stream diversion works permits. This is just the permit for them to take water. This isn't an allocation of water; this isn't a judgment per se. Just that their use of water is reasonable. That's all I wanted to say.

Dean Uyeno: Just to follow up that the Guth's have been patient. They have been greatly cooperating to get to this point. I understand that deferring may be a good option just because of these other issues. These other diverters that Ayron mentioned will face similar issues in all likelihood; and to me it makes sense to work through these issues before you folks make a decision; and bring it back to the Commission at a future date.

Commissioner Hannahs: The issue for instance. Commercial use could take a long time. I'm not sure you're going to get some counsel on that but I'm not sure we want to wait until you totally work that issue through. I mean there's an issue here for the Guth's benefit we need time to get SPHD over there. Because right now you're looking at a recommendation that requires you to hire a cultural consultant and that's not necessarily what I've heard you want to do; although you can speak for yourself on that issue. I think there's a benefit for you to have us take this time to work through some of these issues; and if you're amenable to that unless you see a great hardship you can speak to this issue of a deferral.

The Guths: We're fine with it. Yes, we're willing to work with SPHD if they're willing to come over. We would love them to do it.

Commissioner Hannahs: well, our chair is very persuasive, and she seems to know a guy. So, I think we can make that happen. Chair I would like to move that we defer item C-1. Kaleo is two months good? Have it come back to us within two months so it's not an endless thing?

Deputy Manuel: I wouldn't put a time frame on it just because some of the issues that you brought up might take longer; and I don't know if we can resolve it in two months. We can shoot for two months but that would be May.

Commissioner Hannahs: we won't be looking for perfect information and total resolution of every single issue. But at least let's take care of the low-hanging fruit that we can resolve; if we can defer this matter to address the concerns that have been raised at this hearing and then bring it back to us as soon as practical.

MOTION: (HANNAHS/KATAYAMA)
To defer item C1

03212023: 03:23:49

Chair Chang asked for discussion.

Commissioner Meyer: I think it's headed in the right direction. I would like to ask that we ask the AG's office for clarity on the question of commercial use, and if possible on a priority basis. It seems like it's a narrow enough issue at this point, that somebody ought to be able to write a memo on that and give us proper legal advice; promptly. But I don't know that lies with the AG's office. I'll be happy to support this. I would like to condition this resolution on an opinion from the deputy AG's office.

Chair Chang: as a practical matter, pending the final approval or action by the Commission. What happens to the Guth's? The existing diversion do they continue to use it not use it?

Deputy Manuel: We haven't issued a cease and desist so, a lot of that has to do with crops that have already been planted; and working with them you know, trying to be flexible with a party that's making an effort to comply. If we did do that; there would be lost of crops and so forth so, again from looking at it holistically, the

quantity being requested the quantity being used isn't drying up a stream. It isn't necessarily affecting downstream users so at this point in time we're not recommending them to stop using water.

Chair Chang: there's no doubt that they have been extremely patient and that they've not intentionally delayed the process. They have been trying very hard to comply and unfortunately government is not moving as quickly as we would all like.

Commissioner Hannahs: Chair, if you wish to have a motion amended to acknowledge that during this period of deferral the Guth's shall enjoy continued use of the resource at the current level.

Chair Chang: I think that gives them some certainty. I think any questions that people attending this, it puts the impetus on us to move as quickly as possible.

Commissioner Hannahs: get it sorted out, yes.

Chair Chang: commissioner Katayama, Do you agree with that proposed amendment to the motion?

Commissioner Katayama: Absolutely.

032123 00:3:27

MOTION:

To defer item C-1

UNANIMOUSLY APPROVED

HANNAHS/KATAYAMA/KAGAWA-VIVIANI/MEYER/SETO/BUCK/CHANG

Commissioner Kagawa-Viviani: Wait that was for deferral?

Chair Chang: yes, for deferral with the condition that the Guth's can continue to use, pending return to this commission.

Commissioner Kagawa-Viviani: Just wanted to make sure this was clear on this record.

Chair Chang: you sort of set the tone Commissioner Kagawa Viviani by suggesting that earlier so, with that being said the motion has been passed unanimously. We greatly appreciate the Guth's for their attendance and for all of those other testifiers who submitted comments both in writing and orally. Thank you very much for participating we are going to take a lunch break and come back at 1:15. So we are in recess.

032123: 00:03:28 -Commissioner Seto requested and was excused from the rest of the meeting

RECESS: 12:38 PM

RECONVEYED: 1:27 PM

03212023 04:17:02

C.

2. **Approval of Stream Channel Alteration Permit Application (SCAP.5955.3) and Special Conditions to State of Hawai'i, Department of Transportation, Bridge Widening and H-1 Eastbound Highway Improvements, Kalihi Stream, Kalihi, O'ahu, TMK: (1) 1-3-002:044 (west bank); no TMK (east bank)**

PRESENTATION GIVEN BY: Mr. Dean Uyeno, SPAM Program Manager, CWRM

Dean Uyeno: Dean Uyeno with the Commission Stream Protection and Management Branch here to present on submittal item C-2. Approval of stream channel alteration permit application SCAP 5955.3 by the state of Hawaii Department of Transportation. The project is proposing to widen the Kalihi stream bridge on the ocean side of the H1 Highway and affect approximately 14 linear feet of the East and West Bank wall to accommodate the extended bridge abutments and foundations. The details are in the submittal and just want to note that we did not receive a comment letter from the State Historic Preservation division. We did however receive comments from the division of aquatic resources and the division of forestry and wildlife and so their comments are reflected in the recommendation. If I may, I would jump straight to the recommendation, but the commission approved stream channel alteration permit SCAP 5955.3 application subject to the standard conditions in exhibit four and the special conditions outlined below. a) approval is subject to SHPD concurrence to SHPD requires conditions authorities shall be delegated to the Deputy director to attach those as a condition of the stream channel alteration permit in confirmation with conformance with the Hawaii division of aquatic resources recommendations. The permittee shall ensure stream flow connectivity around the project site at all times with no more than 50 percent of the stream channel being diverted around the project area to enable 'o'opu and opae passage incorporated by reference to exhibit two. The applicant shall contact the division of aquatic resources should unforeseen events pose a potential threat to the aquatic environment in conformance with the Hawai'i division portion of wildlife recommendations. The permittee shall seek to minimize impacts in a species, utilizes native plant species for landscaping and prevent the introduction and spread of invasive species and the letter from the division of forestry and Wildlife is attached to exhibit three. Other than that staff stands on its submittal and I'm available if you have any questions?

032123:00:4:20

PUBLIC TESTIMONY

Miya Akiba: good afternoon, Commissioners. I'm Miya Akiba with Jacobs Engineering. I'm an environmental planner and I prepared this permanent application. I don't really have anything to add unless there's any questions? And I am in agreement with the conditions of the permit.

QUESTIONS/COMMENTS

Commissioner Kagawa-Viviani: I just have a quick comment that it's kind of nice to know that there is 'o'opu'akupa, you know other native aquatic animals that can handle Kalihi stream.

MOTION: BUCK/KAGAWA-VIVIANI

To approve item C-2 as submitted.

HANNAHS/KATAYAMA/KAGAWA-VIVIANI/CHANG

Chair Chang: The next is we are going to go back to item B-2. Do I have a motion to go into executive session?

MOTION: BUCK/HANNAHS

To go into Executive Session pursuant to HRS 92-5 to consult with its attorney to address item B-2.

UNANIMOUSLY APPROVED

032123:04:22:48

032123:05:40:55 – Commission out of Executive Session

Deputy Manuel: Just an update to the commissioner's announcement. From our side Jeremy Kimura's last day is this Friday he's transitioning into a new space in the work he's doing around water. So, just wishing him the

best in his future endeavors and that's just an update from our side for the commission. Thank you.

E. NEXT COMMISSION MEETINGS (TENTATIVE)

April 18, 2023 (Tuesday)

May 16, 2023 (Tuesday)


This meeting adjourned at 5:45 p.m.

Respectfully Submitted,

Nadine Pomroy

NADINE HÖKŪLANI POMROY
Commission Secretary

OLA I KA WAI:


Marvin Manuel (April 19, 2023 11:17 HST)

M. KALEO MANUEL
Deputy Director

WRITTEN TESTIMONIES RECEIVED:

Please refer to the Commission's website at:
<https://dlnr.hawaii.gov/cwrm/newsevents/meetings/>
to read view written testimonies received.