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Order? What Order?

The Water Commission has always struggled to arrive at decisions. The action it took in June, deciding who should get water from Maui streams, was no exception.

But in the months following, the commission's order is still being observed in the breach by some, including the Wailuku Water Company. In fact, it didn't even bother to send a representative to last month's commission meeting, where the complaint lodged by the group representing Native Hawaiians and holders of other superior rights was heard.

The commission has limited ability to enforce its orders and largely has to rely on the users themselves to comply. In this case, though, as commissioner Neil Hannahs so aptly put it, "We need a better community."

IN THIS ISSUE

Hui Argues Maui Ditch Owner Flouts Water Allocations for Taro Growers

"Where is the justice in this?" Hui o Na Wai 'Ehā president Hōkūao Pellegrino asked the state Commission on Water Resource Management at its September 21 meeting.

In June, the commission issued its decision and order in a contested case hearing over water use permits for the Na Wai 'Ehā surface water management area in Central Maui. The order, which established who was entitled to water and how much each permittee should receive, gave priority to native Hawaiian traditional and customary uses, domestic uses, Department of Hawaiian Home Lands reservations, and the Maui Department of Water Supply.

Yet, as Pellegrino and other Hui members allege in a complaint they filed August 11, the company that controls the old plantation-era distribution system continues to deprive native Hawaiian taro growers of the water they deserve.

The Hui argues that Wailuku Water Company (WWC), which owns and operates the ditch system that diverts Waikapū, Waihe'e, Wailuku, and Waiehu streams, is instead providing water to its customers first, even if they have lower-priority use permits.

The company has cut off or restricted flows to those taro growers and other kuleana landowners by pouring concrete where a wooden gate used to be and a locked valve on a pipe that taps the reservoir those kuleana users must rely on because of that concrete.

According to the Hui, the problem dates back to last October, when WWC installed the butterfly valve and lock on the pipe that releases water into the South Waikapū kuleana 'auwai.

The Hui and the taro farming families who rely on that 'auwai complained to commission deputy director Kaleo Manuel about their lack of water following the valve's installation.

Manuel was unable to get the commission to take any action on the matter because the commission could only address interim instream flow standard

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PHOTO: COMMISSION ON WATER RESOURCE MANAGEMENT

Reservoir 1, which receives water from Waikapū Stream. The southern half (right) must fill and overflow into the northernern half (left) before the water level reaches a pipe that serves kuleana users.

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NEW AND NOTEWORTHY

Hu Honua Update: Proceedings before the Public Utilities Commission in the case involving the Hu Honua power plant, being built just north of Hilo, are gaining steam. In September, parties in the case filed prehearing testimonies.

The state Consumer Advocate, Tawhiri Power (owner of a wind farm), and Life of the Land all filed statements opposed to the PUC's approval of the power purchase agreement between Hu Honua and Hawaiian Electric (HELCO). One objection all three statements have in common is to the high price of power that HELCO has agreed to pay. As Tawhiri Power stated, in the first year, HELCO is to pay about 22 cents per kilowatt hour, with the rate increasing to 44 cents in the 30th (final) year of the agreement. "Both of these rates are drastically higher than the rates that HELCO obtained" in more recent agreements, Tawhiri Power's testimony states.

Tawhiri also raised concerns about the claimed sustainability of the fuel supply: "In order for biomass to be sustainable the rate of harvest must not exceed the rate of forest growth. This rarely happens. Further complicating this issue is a recent five-year review from the U.S. Fish and Wildlife Service noting that harvesting of trees greater than 4.6 meters (15 feet) tall when Hawaiian hoary bats are present 'continues to be a threat' to the species. The U.S. FWS and Hawai'i Department of Fish and Wildlife [sic] recommend not cutting trees above 4.6 meters tall between June 1 and September 15 of each year, the typical pupping season for the bat. Given this 3½ month window, it is unclear how a 37-day supply [of fuel] would be sufficient to bridge this time period of curtailed timber harvesting."

Parties to the proceeding now have the opportunity to submit their responses to the testimony and supporting exhibits. By December 9, all parties should have filed their final prehearing statements of position. The actual hearing itself won't start until sometime next January. In the meantime, public comments have been pouring in, many of them from the workers at the plant and officials in the union representing them, the ILWU.

The Pacific Tsunami Museum also commented in favor of Hu Honua; its president, Marlene Murray, noted that Hu Honua "has been a great corporate partner and has financially supported many organizations on Hawai'i Island, including the Pacific Tsunami Museum."

Quote of the Month

"We can't have the natural capital keep giving way just because people don't want to make the financial investment."

— Neil Hannahs, Water Commission

Red Hill Update: Under an Administrative Order on Consent with the EPA and Hawai'i Department of Health, the Navy and the Defense Logistics Agency must complete a variety of tasks to address a large release of fuel that occurred in 2014 at the Navy's Red Hill fuel tank facility and to prevent future releases.

Attached to the order is a statement of work covering eight subject areas, i.e., tank upgrade alternatives (TUA), corrosion and metal fatigue practices, and a risk/vulnerability assessment.

In August, the Navy submitted a 500-page supplement to its TUA document. The EPA and DOH had found the original document, submitted in 2019, deficient.

In the supplement, the Navy proposes to line the Red Hill fuel tanks with the same kind of system used in natural gas tanker ships.

"There's a lot of information in it. It's taking us a while to go through it and make sure we have the information that we need," the DOH's Joanna Seto told the state Commission on Water Resource Management last month.

The DOH and EPA are also reviewing the Navy's recently submitted plan regarding the need for and scope of modified corrosion and metal fatigue practices.

The two agencies recently completed their review of Phase 2 of the Navy's Risk/Vulnerability Assessment scope of work, submitted last December. Phase 1 addressed internal risk events. Phase 2 will address fire and flood initiating events, seismic initiating events, and other external initiating events.

On September 2, the DOH and EPA informed the Navy and DLA that they found the document to be deficient.

With regard to a fuel spill at Red Hill on May 6, Seto said the Navy is still conducting an investigation and "causative research studies." The DOH is waiting for the Navy report, she said.

These issues and more will likely be discussed at the DOH's Fuel Tank Advisory Committee Zoom meeting on October 28, from 9-12.

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Turtles on the Menu at Meeting Of Western Pacific Fishery Council

When the virtual meeting of the Western Pacific Fishery Management Council opened on September 21, chair Archie Soliai led off with a Christian prayer.

Although the council is a federal body, no one objected. Rather, participants on the WebEx screen duly bowed their heads as Soliai asked his lord to guide the council's deliberations over the next three days.

With that, the 187th meeting of the council was launched.

Turtles

One of the first items on the council's agenda was the report of its longtime executive director, Kitty Simonds. Simonds was especially happy to report what she apparently sees as an increase in the population of honu, the green sea turtle.

"I point you to the PIFSC report," she said, referring to the Pacific Islands Fisheries Science Center, an arm of the National Oceanic and Atmospheric Administration. "How the numbers have increased – and, actually, I'll quote, 'These numbers for basking turtles far exceed numbers seen during previous monitoring seasons.'"

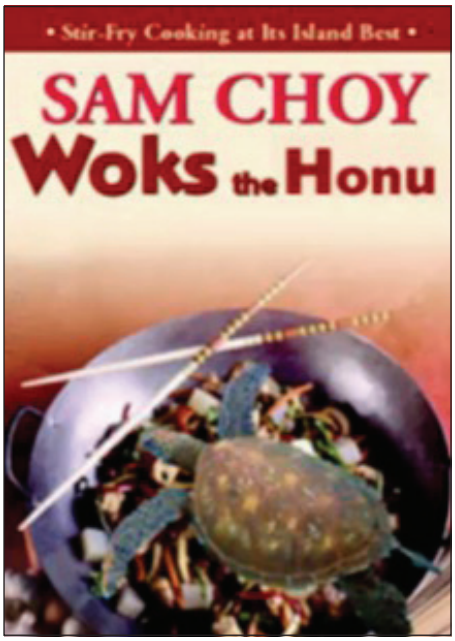
The PIFSC report did note that numbers of basking turtles at Tern Island, in the French Frigate Shoals, "far exceed numbers seen during previous monitoring seasons at that site." What Simonds did not mention is the fact that one of the primary turtle haul-outs at French Frigate Shoals, East Island, practically disappeared after Hurricane Walaka tore through the Northwestern Hawaiian Islands in 2018, resulting in greater use by the turtles of Tern.

"Monitoring includes what's happening around main Hawaiian islands," Simonds continued. "The nesting season is still ongoing, with 150 documented nesting events around O'ahu's north shore, Moloka'i, Maui, Kaua'i."

When Mike Seki, PIFSC director, made his presentation, he was not as sanguine as Simonds about the recovery of the turtle in Hawai'i, a distinct population segment listed as threatened under the federal Endangered Species Act. Seki mentioned that the loss of habitat in French Frigate Shoals could be why increased nesting is being seen in the main islands.

Or, as the Science Center's report states, the nesting in the main islands, "coupled with the major alteration of one of the primary remaining nesting habitats in the NWHIs (East Island), as a result of hurricane Walaka in 2018, have raised the possibility that the MHI may represent increasingly important nesting habitat for green turtles. The islands may offer protection and buffer against threats such as nesting beach loss due to climate change."

A week earlier, when the council's Scientific and Statistical Committee was discussing the Science Center's report, Simonds commented that the situation



A screen-shot of the photo-shopped cover of a Sam Choy cookbook depicting a turtle in the wok.

"looks like it's not as dire as we all thought it was when the hurricane happened."

"More kaukau!" she added.

The full council discussion of the status of sea turtles, which usually would take place in the section of the agenda dealing with protected species, was instead shifted to the last day of the three-day meeting.

The power-point presentation that led off the council's deliberations was prepared by council staff and highlighted what it described as the cultural value of the turtle to Native Hawaiians. One slide included a photo-shopped cover of a cookbook by Sam Choy, showing a turtle in a wok.

Josh DeMello, the staffer narrating the presentation, stated that the Hawaiian elders most knowledgeable about how to use the honu – for food and medicinal and cultural purposes – were dying off. "We continue to hear from fishers complaining that kupuna are passing on. We need to be able to pass on knowledge, ecological knowledge … There's a cultural disconnect," he said.

Council members from Guam, Commonwealth of the Northern Mariana Islands, and American Samoa wholeheartedly embraced the idea of cultural take of the turtles.

David Sakoda of the Hawai'i Department of Land and Natural Resources' Division of Aquatic Resources and a representative of Suzanne Case, head of the DLNR, chimed in on the subject as well. "It's important to keep exploring cultural take permits," he said. "I was in Ha'ena and talked to an auntie up there. Her grandfather had turtle oil, and when she had a burn, her grandfather applied turtle oil to it. Now you can't see the scar.

"Lots of medicinal uses are being lost. Cultural practices need to be maintained and rediscovered," he said.

Matt Ramsey, director of the Hawai'i program of Conservation International and a newly appointed council member for Hawai'i, also supported the work. "Any management change will take a while," he said. "In the meantime, we can't wait to start that documentation process. We have to interview kupuna, elders. It's extremely important. We can't wait too long for that."

It fell to Mike Tosatto, director of the National Marine Fisheries Service's Pacific Islands Regional Office (PIRO), to inject a discouraging word.

"I want to make sure the council's expectations are set properly," he said. The report presented to the council is "an acceptable report, but, to be clear, this is not a fishery resource. It is not under the purview of this fishery management council. The role of the council must be measured and smartly executed. There are boundaries for this council and council staff. … This is a turtle that's subject to an international agreement the United States has signed."

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Any permit to allow turtle takes, he noted, can be considered "only when it's in the best interest of the conservation of the species. So our preliminary analysis of this species, including the disappearing islands of French Frigate Shoals, its principal habitat nesting area, makes it a very hard case to see how additional take would benefit conservation."

Nonetheless, council staff proposed a motion for members to consider, directing staff "to continue working with NMFS to determine the feasibility of a cultural take of green sea turtles for Hawai'i." A second motion directed staff "to document the history and tradition of green sea turtle harvest in Hawai'i to include in future management, including a video capturing interviews of community members that previously held subsistence permits for honu, and/or otherwise hold strong familial cultural connections with the harvest and use of honu."

Again, Tosatto cast cold water on the proposal. "This is work directly supportive of a petition to NMFS," he noted. And therefore it would not be within activities supported by the council's grant, and therefore could not be conducted by staff."

Simonds proposed a different approach. "Of course, we will speak to [General Counsel] about this document, but you do know that years ago, the council developed – but never finished – a management plan for the honu and we are allowed to develop a management plan for the honu. The only species we can't develop management plans for are birds and marine mammals … I could say we are developing a management plan for honu and we need to do this. We will have a discussion with GC."

The motion passed.

False Killer Whales

The capture of false killer whales by Hawai'i longliners is one of the biggest concerns of the owners and operators of the 148 vessels currently holding permits to operate out of Honolulu harbor. If four false killer whales are observed caught within the U.S. exclusive economic zone, and NMFS determines that the injuries are serious or likely to result in the animal's death, then a large swath of the ocean south of the Main Hawaiian Islands known as the Southern Exclusion Zone (SEZ) is closed to the fleet for at least the remainder of the year.

As of the end of August, the deep-set (tuna-targeting) longliners on which observers had been placed had caught 12 false killer whales, three of them inside the EEZ. Two were determined to be serious and one was a mortality. At the Wespac meeting, Diana Kramer, with the NMFS PIRO Office of Protected Resources, called out one piece of good news in her otherwise grim report: in one of the hookings last June, the hook straightened, allowing the animal to swim away. A NMFS-sponsored study of the effects of weak hooks, in the works for several years, has finally been completed, Kramer said, and will be presented to the False Killer Whale Take Reduction Team (TRT) by the end of this month.

But Kramer also noted that a thirteenth hooking had been observed more recently. Details on that interaction – whether it was inside or outside the EEZ, whether it was classified as an M&SI or not – were not available at that time.

If that interaction is judged to have resulted in a mortality or serious injury, then it would seem as though the SEZ closure would be triggered.

Getting rid of the threat of that closure, which for most of the last decade has been a critical part of the take reduction plan developed under the Marine Mammal Protection Act, has been a paramount objective of the longliners for years.

Last year, a small subset of members of the council's Scientific and Statistical Committee undertook a review of the TRT's false killer whale recovery plan, its metrics, its mitigation measures, and its results. Members of the group were the SSC chair, attorney Jim Lynch, Queensland fisheries scientist Milani Chaloupka, retired professor of social sciences Craig Severance, and Askua Ishikawa, a council staffer.

At the SSC's June meeting, a draft paper that the sub-group put together was shared and discussed by members of the SSC, a committee that is established under the federal Magnuson-Stevens Act to advise the council on scientific matters. Its members are selected by the council and generally embrace approaches that favor expansion of fishing opportunities. The draft was not available for public review at that time.

At the September SSC meeting, held the week before the full council met, the draft paper was still not available to the public, but again it was discussed at length by the SSC.

Lynch led the discussion. "We wanted to create a marker, a bright line in the sand as to what the SSC believes should occur with respect to false killer whales," he said, adding that the regulations "had a substantial impact on the operation of longline fisheries."

The paper was highly critical of the metric known as Potential Biological Removal that is required by the MMPA to be used in determining allowable levels of harm.

"Blindly relying on PBR is not the best approach," Lynch said. "The agency" -- NMFS – "may feel it is constrained by law, but better tools should be considered and used to develop appropriate take reduction measures."

The group also recommended that the SSC be included on the Take Reduction Team, "so a more rigorous scientific approach can be used," Lynch said.

The final recommendation in the paper was for the council to undertake a study to assess the economic impacts of mitigation measures, he noted.

Lynch then asked the full committee to adopt the recommendations in the subgroup's report, "so we can forward these as recommendations to the council."

"Any objections to indicating the SSC adopts these recommendations as their own?" he then asked.

The group responded with silence, which Lynch then deemed to be approval.

When the full council met, Lynch described the subgroup's work and the recommendations it had arrived at. Council members' comments were enthusiastic.

Again, it fell to Tosatto to throw a bit of cold water on the discussion.

"I want to make sure the council, under the Magnuson Stevens Act, knows it has a charge to reduce bycatch of all species and reduce interactions with protected species. This is where there is an overlap with the mandates of the Marine Mammal Protection Act. I need to be cautionary about the SSC, to make sure they focus on efforts that meet the council's broad charge to reduce bycatch and appropriately support the council's role as one of the many members of the Take Reduction Team…

Continued on next page

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"Some of the things the SSC recommends are on target, but a couple of things are not necessary to MSA management and are not capable of entering into the MMPA construct, which requires us to consider PBR. … We have a scientific adviser, and it is not the SSC," he said, noting that under the MMPA, the Take Reduction Team is advised by the Pacific Review Group.

Notwithstanding Tosatto's caution, the full council adopted all the recommendations in the SSC report.

Transparency Issues

Wespac lags behind other fishery management councils when it comes to transparency. For years, documents distributed to council members that concern budgetary matters and other administrative concerns have been withheld from the public.

The September meeting was no exception. The council's Executive Committee met the day before the full council meeting was opened. The agenda had no links to any of the documents provided to council members that related to financial reports or administrative matters.

In the public WebEx meeting, however, those documents were discussed. With regard to the financial reports, Simonds noted that the council "is on track to spend all of our money."

Simonds called on her staff to elaborate on other aspects of the financial report, including funds spent on coral reef studies, ecosystem modeling, nenue research, shark depredation in the Mariana islands, tori lines, and other issues.

Then, suddenly, Soliai announced that this was the end of the public meeting: "We have a closed session after our agenda." Simonds elaborated, "This part of the meeting is over. We will go into closed session." Abruptly, members of the public were removed from the WebEx session.

Tosatto was asked about the closed session, which was not in the *Federal Register* notice of the meeting. In reply, he said that the NOAA general counsel "was consulted in advance by the council executive director [Simonds] about the potential to close a portion of this meeting so the committee can discuss 'employment or other administrative matters.'"

He then referred to a portion of the Magnuson Stevens Act that allows the council to, "without the notice required" elsewhere, "briefly close a portion of a meeting to discuss employment or other internal administrative matters."

Other councils are not nearly as cagey when it comes to financial matters. The public agenda for the September meeting of the Pacific Fishery Management Council, for example, links to a detailed financial report made by its executive director. The Gulf of Mexico Fishery Management Council discloses the stipends paid to members of its Scientific and Statistical Committee ($300 a day), and also includes the most recent audit of its books.

Wespac members finally got around to the agenda item relating to financial and administrative concerns, in the final hour of the last day of the meeting. "Council members have had the first two documents" – financial and administrative reports – "for more than a week," Simonds said. "Any comments?"

There were none. The council then, without objection, adopted a motion to "endorse the 1875th council meeting financial and administrative reports as provided by staff."

Soon after that, chair Soliai closed the meeting with a prayer, solemnly observed by all. ***— Patricia Tummons***

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issues at the time. But Manuel believed that the final decision and order, which established water allocations and priority uses, would allow the commission to resolve the issue.

"[Y]et after two months since the Final D&O has been out, nothing has happened," Pellegrino complained.

Meanwhile former WWC vice president Clayton Suzuki "has been able to capture whatever amount of water is flowing into the kuleana 'auwai," Pellegrino wrote. Suzuki, he pointed out, "does not have appurtenant rights that are recognized in the 2021 Final D&O and does not have Native Hawaiian lineal/cultural T&C rights."

The Hui also points out in its complaint that Waikapū Properties, LLC, a cattle ranch that takes its water from the reservoir, has the lowest priority permit and is also receiving water before any of the other kuleana users. The Hui also alleges that the company is providing water to a farm that should not be receiving water from Waikapū Stream.

Under the commission's order, Suzuki was granted a water use permit for 10,850 gallons per day (gpd) and Waikapū Properties got one for 1,838 gpd.

Drying Up

In 1850, there were 121-plus acres of taro on kuleana lands south of Waikapū Stream; now there are fewer than eight, Pellegrino told the commission.

He said that in 1904, with the construction of what is now known as Reservoir 1, kuleana taro farmers were cut off from their traditional 'auwai and forced to rely on delivery of water via the plantation ditch system.

Fourteen years ago, according to WWC data, 13 South Waikapū kuleana users were being provided with 840,000 mgd, "during one of Maui's severe droughts along with active cultivation of sugarcane by HC&S on Waikapū Field #735 off of S. Waikapū Ditch," the Hui's complaint notes.

Since then, the number of active taro farmers in the area has dropped to six, and the commission has allocated only 265,188 gpd to the South Waikapū kuleana users.

So why aren't they getting it, when WWC provided more than three times that amount to kuleana users 14 years ago?

Drought might explain some of the shortfall.

Maui has been in a long-term drought, CWRM hydrologist Ayron Strauch told the commission. For the most part, every single month, flow in Waikapū Stream has been below the long-term average, he said.

In 2020, there were a lot of days when the interim instream flow standards set by the commission were not being met because of both a decline in rainfall and efforts by WWC to meet the needs of offstream users, he said.

This past June, WWC, citing drought conditions, sought emergency relief from the IIFS for Waikapū Stream and asked the commission for permission to increase its diversions. That request was denied.

A month later, and after the commission had issued its decision and order, WWC reported that its emergency

Continued on next page

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control gate from Reservoir 1 had been vandalized so that it would release more water into the South Waikapū 'auwai.

WWC informed the commission that it would "shut down ditch flow to install a hollow-tile wall to seal off additional releases to South Waikapū 'auwai," according to commission staff.

Solutions

To resolve the issue, the Hui proposed the that the commission limit flows into Reservoir 1 and require WWC to release water to kuleana users via the sluice gate the company recently cemented shut.

According to Strauch, the unlined reservoir leaks 150,000 gpd when it's full. It's designed to hold 12 million gallons of water, but Manuel says it probably can hold only about seven million gallons currently due to siltation.

If kuleana users — and Suzuki — receive water through the sluice gate, the only permitted user of the reservoir left would be Waikapū Properties.

"Why would you want to fill a seven million gallon reservoir for 1,800 gallons a day for offstream use? The solution is very clear. Very easy," Pellegrino told the commission.

He pointed out that the reservoir needs to be full before the water level is high enough to reach the pipe that provides water to the kuleana 'auwai. So in drier times, Waikapū Properties would have access to water, but the kuleana users would not.

To make the sluice gate functional again, CWRM would have to require Wailuku Water Co. to remove the cement, keep the gate open, and install a gage to provide the right amount of water.

The Hui also asked the commission to require Suzuki to receive his water *after* the kuleana users, and to ensure that Waikapū Properties is the only off-stream user of the South Waikapū Ditch and Reservoir 1.

The commission's decision and order calls on the kuleana users to seek to reduce water losses from their unlined 'auwai. Pellegrino said he had done a feasibility study years ago to determine the cost of upgrading the kuleana ditch. The cost then was roughly $150,000.

"Last week, I got quotes from the only two piping companies on Maui. We're now looking at $865,000," he said.

Even if the Hui wanted to upgrade the 'auwai, they couldn't, since it runs across land owned by Waikapū Properties and is covered by a perpetual easement held by WWC.

"These kuleana landowners have literally been threatened [and] asked to not go to the reservoir [or] to clean the ditch," he said.

The Hui asked the commission to either require WWC and Waikapū Properties to provide the kuleana users access to maintain and manage 0.9 miles of 'auwai "AND/OR to allow access to restore the traditional 'auwai system from the Waikapū Stream (0.25 miles)." That land is also privately owned.

Earthjustice attorney Isaac Moriwake urged the commission to take the Hui's proposals seriously.

"How unprecedented this is," Moriwake said. He's represented the Hui for the last 20 or so years and has "never seen an outright dictatorial cutoff" of water.

He noted that WWC's own founding documents recognize priority kuleana rights in times of drought, and the commission's order recognized native Hawaiian rights and made them a top priority.

"Now we need to start acting like we mean it," he said.

Moriwake recounted that in 2017, when WWC was failing to meet the IIFS that had been agreed to in a settlement with the Hui and others, then-Water Commissioner William Balfour said it seemed like WWC was getting away with murder.

"What do we call this? Kuleana rights have been around more than a century before IIFS," Moriwake said.

Next Steps

Commissioner Mike Buck asked stream protection branch head Dean Uyeno what he would recommend to ensure compliance with the commission's June decision and order.

"I think one possibility may be to, as Mr. Pellegrino noted, directly feed the kuleana 'auwai and cattle operation from the intake and remove the reservoir. That would address some of the loss issues," Uyeno replied.

He continued, "Eliminating the use of the reservoir, that would need to come from an order from the commission. It's private property. There are issues with building up storage capacity in times of drought. The issue needs to be discussed in more detail."

Strauch later suggested that compartmentalizing the reservoir might help improve its ability to provide water to the kuleana 'auwai "without removing the reservoir's functionality."

No WWC representative participated in the commission's Zoom meeting last month, and the company submitted no written testimony on the Hui's petition. Even so, Manuel said his office has been communicating with the company and trying to facilitate discussions among all the parties.

"Any final decision needs to happen with this commission. I will say we shared all the same information with all the parties," he said.

This month, the commission staff plans to recommend a formal action

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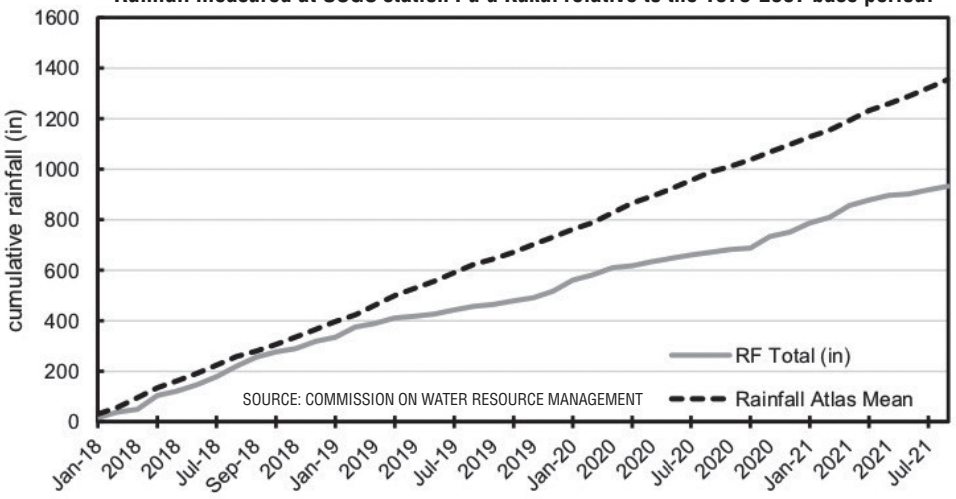
Rainfall measured at USGS station Pu'u Kukui relative to the 1978-2007 base period.



Commission Denies Mahi Pono's Bid To Boost its Na Wai 'Ehā Allocation

The Water Commission's June decision and order on water use permits for the Na Wai 'Ehā surface water management area involved some very big last-minute changes.

Mahi Pono, LLC, which a few years ago purchased Alexander & Baldwin's former sugarcane lands in Central Maui with the intent to grow diversified crops there, had initially been awarded a permit for 15.65 million gallons of water a day (mgd). But the commission quickly "corrected" its order to reflect its positions on system losses, alternative sources, and the acceptable amount of water needed for diversified crops.

Mahi Pono ended up with a permit for just 4.98125 mgd.

On July 8, the company filed a motion for partial reconsideration, which sought to amend its water allocation to 11.22 mgd. That's the amount Mahi Pono was to receive under a stipulation reached by the company and the Office of Hawaiian Affairs, the Hui o Na Wai 'Ehā, and the Maui Tomorrow Foundation shortly before final arguments in the contested case hearing on the water use permits.

Mahi Pono's attorneys noted that the commission had encouraged and praised the stipulation.

"In other words, at the urging of the Commission, Mahi Pono gave up its opportunity to move to reopen the contested case hearing to negotiate a settlement agreement to resolve the Community Groups' and OHA's assertions that only 4.68 mgd should be allocated to [Mahi Pono] and in which Mahi Pono agreed to significant commitments, only to end up with an allocation marginally higher than the Community Groups' and OHA's originally proffered allocation and less than half the amount agreed to by the parties in the Stipulation.

"To prevent this substantial injustice, Mahi Pono respectfully requests that the Commission reconsider its D&O as amended by the Errata and adopt the terms set forth in the Stipulation," wrote the company's attorneys, David Schulmeister and Trisha Akagi, in their motion.

In a September 22 minute order, commission chair Suzanne Case relayed the commission's denial of Mahi Pono's motion.

"The Commission commends the parties for coming together to forge the Stipulation and hopes that Mahi Pono will continue to stand by the commitments made in the Stipulation. The Commission, however, has to consider the larger picture and its trust responsibilities to balance water use amongst users, uses, and resource protection," she wrote.

She continued that the commission revised Mahi Pono's allocation because the commission had imposed a daily limit of 2,500 gallons per acre per day on other diversified agriculture permittees, and "it was important to treat all diversified agriculture equally, regardless of size."

The commission had also disagreed with the number of total acres to be irrigated by Mahi Pono. Rather than 3,740 acres, which is what the allocation in the stipulation was based on, the commission based its allocation on 3,650 acres.

"The stipulation also allows Mahi Pono an additional 500 [gallons per acre per day] over the same 3,740 acres if it meets certain commitments. That is not acceptable as no other diversified agricultural user is allowed to increase its per-acre water usage," Case wrote.

She also noted that Mahi Pono's revised allocation reflects its ability to pump water from one of its wells, and that the order allows permittees to divert water in excess of their permitted amounts in order to fill their reservoirs. "This would make additional water available for Mahi Pono," she wrote. ***—T.D.***

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on ways to ensure water is delivered to kuleana users. While those recommendations are still being worked out, it was clear last month that commissioners want to see their order followed and are open to the solutions offered by the Hui.

"Is there anything in the four solutions advanced by the Hui that is not in keeping with our decision and order? Do the solutions of the Hui strengthen our enforcement of the decision and order?" asked commissioner Neil Hannahs.

Manuel replied that the short answer was that the Hui's proposals were in line with the commission's order with regard to reducing waste.

He added that his office is investigating some longer-term strategies, including how the reservoir is used and whether it continues to be used.

Commissioner Aurora Kagawa-Viviani worried that, as the system is set up now, "the person at the end of the line gets short shrift." While the Hui and commission staff discussed a number of engineering solutions, she asked how the commission could also "mediate these power issues."

Commission chair and director Suzanne Case said that's something the commission wrestled with in making its June decision.

"One complication is we are not part of the agreement between the users and the distributors," Case said. "We need to be careful what is our role and what is the role [of users]. It is a complicated system and set of people … very much complicated by the drought situation. As the climate changes and earth warms, distribution of water gets more random. … This is a little microcosm of what is happening all over the planet."

"We just have to do our best to moderate as we are required to do and are able to do," she continued. "I appreciate the staff bringing this as an information item. It's been really helpful to bring information items before action items. … The absence of WWC in these discussions is notable and problematic. … I'm not going to speculate on why they're not here. I'm sure they have some positions they'll have to express."

Also in answer to Kawaga-Viviani's question, commissioner Hannahs said that the commission did set policy in its June decision and order, and now it needs to enforce that policy.

With regard to enforcement, he added, "trying to play cops against people who are trying to create problems or are misaligned with our decision, it's not an efficient way to go about business. We need a better community."

He said that's why he appreciated the Hui's work and Manuel's efforts to meet with people offline, to help "get through historical polarites [and] try to

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bring them around to new order we are trying to impose here. We need to be persistent and relentless."

Strauch said his office has been working with WWC to obtain reports on both the amount of water diverted and the amount of water distributed to the 'auwai. He added that end users must also report what they use, as well.

"It's our responsibility to make sure the IIFS is maintained. We just can't run around measuring everybody's use," he said.

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Lana'i Water System Shines As Example to Other Operators

"I constantly hear reasons why we can't do things. Joy is the reason why we can … with resources, obviously, but leadership," Water Commission deputy director Kaleo Manuel said after Joy Gannon, director of utilities for the Lana'i Water Company, briefed the commission on the utility's operations.

"I wanted to give the commission an example … of what can be done on a system level if you take the time and have the right leadership," he said.

In 2012, billionaire Larry Ellison's Lana'i Resorts, LLC bought the island of Lana'i. By April 2019, the company, renamed Pulama Lana'i, has invested some $10 million in improving the island's water and wastewater systems.

With both of its wastewater treatment facilities able to produce high-quality, R1 wastewater, "we are the only island that has the capability of recycling all of its wastewater," Gannon said.

In 2016, the utility began implementing "smart irrigation," installing a weather monitoring station at Manele, which has a Four Seasons resort and a golf course.

In addition to being irrigated with only brackish or recycled water, each one of the golf course's sprinklers are tied to a computer system that allows for fine-tuning the amount of water to be spread in a certain area.

The utility was also an early adopter of the American Water Works Association's water audit, which forces utilities to examine the volume of water being used, the validity of the data it receives on that use, and financial impacts.

It initially didn't even have any real maps of the water lines and existing meters, she said, adding, "We had some real big gaps and problems." So during the first two years of its audit, it was focused on improving its validity score.

"We are one of the water audit fanatics I guess you might say. We actually do a water audit every single month to see irregularities in our data," she said.

The utility eventually replaced nearly all of the island's water meters with smart meters, she said. And of the 1,700 or so customers with smart meters, nearly 20 percent of them also use EyeOnWater to track their usage and detect leaks, she said. Customers can view their usage through eyeonwater.com or its app.

Smart meters will log how much water passes through every 15 minutes or every hour, depending on the type of meter installed. The meter then texts that information to a database.

For EyeOnWater customers, if a leak is suspected, the customer is sent an email.

In the beginning, one in every six meters detected a leak, she said, adding that since then, leaks have become less common.

Between 2016 and 2020, total pumping dropped from a little more than 1.75 million gallons a day (mgd) to less than 1.5 mgd.

"Some of it was just plain old irrigation and water line improvements," she said.

The utility has also installed smart meters on its distribution lines. Combined with a GIS system, the utility is alerted to when and where a leak is occurring, and can send a drone out to view the site.

"We are able to plug [GIS coordinates] into the drone. It has a map of where to fly," she said.

After Gannon's presentation, commissioner Neil Hannahs said he really appreciated what had been done at the golf course. "Is this common among golf course operators or are you in a lead position?" he asked.

"The technology that's being used at the golf course is quite frankly phenomenal. It's cutting edge," she said.

She warned that having the technology alone isn't enough. "You gotta match it with the staff's willingness to use that technology," she said, adding that there is a learning curve. Ellison's willingness to replace leaking pipes had a huge impact, as well, she added.

Hannahs said he hoped resort and golf course organizations are getting together to reduce their water use. When the commission is faced with a need to supply water to support an economic opportunity, the cost of system upgrades is thrown out as the reason why they can't do it, he said.

"We can't have the natural capital keep giving way just because people don't want to make the financial investment," he said.

Commissioner Aurora Kagawa-Viviani asked how a Lana'i's meter system would work with a bigger utility. The Honolulu Board of Water Supply serves 1 million people a day.

Gannon said that metering could be done by district. "You basically have a supply meter and all your demand meters below that," she said.

Again, she stressed that technology alone will not be enough to reduce water losses. "You have to work with your customers," she said. — ***Teresa Dawson***

PHOTO: JOY GANNON

A drone photo of a leak on Lana'i.

BOARD TALK

Land Board Accepts Final EIS For East Maui Water Lease

With members touting the need to support diversified agriculture, the Board of Land and Natural Resources unanimously voted on September 24 to accept the final environmental impact statement Alexander & Baldwin and East Maui Irrigation Company had prepared for a 30-year water lease.

The lease would cover 33,000 acres of state land across four licenses areas in East Maui: Nahiku, Keanae, Honomanu, and Huelo.

Under a June 2018 decision and order from the Commission on Water Resource Management setting interim instream flow standards for about two dozen East Maui streams, nearly 88 million gallons a day (mgd) would be available for reasonable and beneficial offstream uses.

A&B and EMI propose to take all of it, plus an additional 4.37 mgd from EMI's own aqueduct system. It total, the companies propose to divert about 92 mgd from East Maui.

The companies plan to provide 7.1 mgd of that water to the Maui Department of Water Supply for domestic and agricultural uses. The rest, about 85 mgd, would used to fulfill the diversified agriculture plans of EMI co-owner, Mahi Pono, LLC.

A&B and EMI have estimated that more than 20 percent of that water will be lost in their irrigation system, through transpiration or seepage. The remaining 66 mgd would be available to Mahi Pono for use on its fields.

According to the EIS, Mahi Pono proposes to plant orchards, tropical fruits, row and annual crops, energy crops, and to raise livestock and produce green energy on 30,000 acres.

Under revocable permits granted by the Land Board, the companies currently divert about 25 mgd, although very little of that is actually used to irrigate Mahi Pono's fields.

At the Land Board meeting, members of the public both for and against the proposed lease testified at length on whether or not the board should accept the final EIS.

Many of those who testified against acceptance argued that the document failed to adequately address the issue of system losses, or what many of them called waste.

The EIS does note that the Water Commission's 2018 decision and order recognizes EMI's irrigation system losses of 22.7 percent.

Attorney David Kimo Frankel, who represents the Sierra Club of Hawai'i in its ongoing fight to restore water to streams in the Huelo license area that the Water Commission's 2018 decision and order does not cover, pointed out that the commission also stated explicitly that such a rate of loss was unacceptable.

Specifically, the decision and order states, "[A]lthough estimates of over 20 percent transmission system losses may comport with current industry standards, they do not reflect best practices, will not serve the interests of future generations and are not acceptable."

"The primary issue for you is whether the EIS discloses what it needs to disclose. It has to discuss mitigating measures to reduce the severity of impacts. … The Water Commission demanded minimizing leakage and waste. The EIS doesn't address the issue in any meaningful way," Frankel said.

"Every 1 million gallons a day that is saved from waste is a million gallons of day that should really be in our streams," he said.

Ken Nakamoto, a former deputy director of the Water Commission and consultant who helped prepare the EIS, and Mahi Pono's director of water resources, Mark Vaught, later testified that the water going into the company's unlined reservoirs in Central Maui isn't actually wasted. It recharges the aquifer below, they said.

Board chair Suzanne Case rebuffed Frankel's efforts to respond, noting that the board was past taking public testimony. But while the board met in executive session to discuss the standards of acceptance of the EIS, Frankel took the opportunity to share his rebuttal with any members of the public still listening via YouTube.

"Well since the board won't listen to my comments, I'll tell them to you," he began. He argued that Mahi Pono had mischaracterized a USGS report to support an argument that there is a net gain in water through tunnel seepage. If EMI were to line the ditch there would be less seepage and less loss.

He also noted that right now, "80 percent of the water in many months that they take from streams is wasted. … It goes into the reservoirs and seeps into the ground. A&B's consultants say, 'Well, it recharges the aquifer.' It doesn't matter if it recharges the aquifer. We're going to drain streams dry to recharge an aquifer nobody is using? What kind of logic is that?"

He continued that "A&B and its consultant forget that the Water Commission [in a recent decision regarding water from the Na Wai 'Ehā area in Central Maui] just limited the amount of water that can be wasted to 5 percent. Here, they are talking about wasting 20 percent."

After the executive session, the deputy attorney general advising the board, Lauren Chun, reported that the Land Board has some leeway in determining whether a final EIS was acceptable. She suggested that it could be accepted so long as the document was compiled in good faith and allowed the board to fully consider the environmental factors involved and make a "reasoned choice between alternatives."

Yuen then suggested that the comments being raised at the meeting regarding waste should have been raised in comments on the draft EIS.

"I can definitely say this question of system losses, which was certainly out there,… was not a major focus of public comments," he said. However, he added, "I take it as a serious issue if and when it does come before the board as a lease."

In making the motion to accept the EIS, Maui Land Board member Doreen Canto seemed to be arguing in favor of Mahi Pono's efforts, in general.

"We can no longer fall back on tourism to drive our economy. While I'm not here to promote Mahi Pono LLC, … I believe there is promise in a business that supplies employment," she said, appearing to read from a statement she had prepared. ***— T.D.***

DOE Asks LUC to Scrap Requirement For Underpass Access to New Kihei High

The Department of Education is gearing up for the opening of the new Kihei High School in August 2022. A principal has been appointed. The Department of Transportation has begun work on a roundabout at the intersection of Pi'ilani Highway and Kulanihako'i Street, the mauka extension of which will provide vehicular access to the campus. The school buildings are designed to generate as much energy as they use, making Kihei High the DOE's first net-zero campus.

There's just one hiccup: the requirement, imposed by both state and county agencies, that students and staff who walk to the school be able to access the campus by means of an underpass or overpass across Pi'ilani Highway before the school opens its doors. The four-lane highway, with a speed limit of 40 miles per hour – observed mostly in the breach – separates the makai areas of Kihei, where most of the population served by the school live, from the school campus.

At the time the state Land Use Commission approved the DOE's redistricting request in 2013, most parties to the LUC proceeding seemed to regard the channels under the highway at Waipuilani gulch, on the south side of the proposed campus, and Kulanihako'i gulch, on the north, as possible pedestrian routes. Failing that, a pedestrian bridge over the highway could be built. Zoning approvals at the county level imposed the same condition.

But then the DOE began to finalize designs for the school and contracted for studies to show if a grade-separated crossing would be warranted. In consultation with the state Department of Transportation, the DOE did not move forward with any design of a grade-separated crossing.

Only in August 2020 did the Department of Education return to the commission with a request to be relieved of this requirement.

More than a year later, both the commission and the Kihei Community Association are questioning the substance of the request, as well how the DOE arrived at the decision to challenge the requirement for a grade-separated pedestrian crossing (GSPC).

Initial Plans

For years, high school students living in the Kihei area have been bused to Maui High School. As the community grew, the DOE began planning a high school to serve the South Maui area, settling on 77 acres on the mauka side of Pi'ilani Highway, a site in the state's Agricultural land use district that was unserved by utilities or other infrastructure.

In 2011, the DOE submitted to the commission a petition asking that the site be placed in the Urban district.

In its 2013 decision to grant the petition, the commission included conditions in its approval to ensure the safety of students and staff walking to the school. It required pedestrian route studies, the first to be done before the DOE executed a contract for the high school's design. After the school is built, at least three more pedestrian route studies are required, including one before occupancy and others following the school's opening.

Regardless of what the studies showed or will show, the commission included the requirement for a grade-separated pedestrian crossing.

The first required study, done in 2014, recommended that the Department of Transportation approve an at-grade crossing, and characterized pedestrian overpasses and underpasses as "last resort" measures.

The DOT found the study incomplete and rejected a traffic study the DOE had prepared that argued for the DOT putting in a signalized intersection.

The DOT eventually accepted a report in 2017 by DOE consultant by Fehr & Pears, which concluded that a GSPC was not warranted before the school opened. Shortly thereafter, the DOT notified the county that there would be no grade-separated crossing in advance of the school's opening. That prompted the County Council in late February 2019 to file for a declaratory ruling from the LUC, reaffirming the grade-separated crossing condition.

The commission did just that, reiterating in its ruling that its 2013 redistricting order "requires that a pedestrian overpass or underpass be constructed before the opening of the first phase of the new high school in Kihei and that construction of the overpass or underpass was … not optional."

The commission noted that the DOE did not participate in the proceeding – a fact that members interpreted as apparent agreement with the county's position. Not really.

Motion to Amend

In August 2020, the DOE filed a motion with the commission requesting that the condition requiring a grade-separated pedestrian crossing be deleted. The department included a draft report from Department of Transportation consultants recommending that the Pi'ilani-Kulanihako'i intersection be converted to a roundabout. Pedestrian crosswalks would be on both the east and west approaches to the roundabout along Kulanihako'i Street and across the southern entrance to the roundabout on Pi'ilani Highway, with median islands in all three crosswalks.

The DOE also included a memo from state Highways Division chief Ed Sniffen to DOE assistant superintendent Randall Tanaka that included a chart prepared by DOT engineers purporting to show that grade-separated pedestrian crossings would not be used if it could be shown that at-grade crossings were faster.

Based on a study by the Texas Transportation Institute, the engineers stated that "virtually no one will use a pedestrian overpass if it takes 25 percent longer to cross compared to crossing at grade… Using an overpass at this location will take 130 percent longer with stairs and 510 percent longer with ramps. … HDOT does not recommend building an underpass. In particular, use of Kulanihako'i Gulch for an underpass presents security issues as well as concerns for pedestrian safety in the event of a storm."

The Community Weighs In

The first hearing on the DOE's motion was held September 10, 2020. Members of the community, as well as the area's state representative, Tina Wildberger, argued against the abandonment of a grade-separated crossing requirement. Many expressed dismay that the DOE was continuing to plan for at-grade crossings despite the LUC's affirmation of

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the requirement in its decision on Maui County's request for a declaratory ruling, barely a year earlier.

Under questioning from commissioners, DOE representatives acknowledged that they may not have kept the community fully informed of decisions concerning pedestrian crossings.

To address that issue, the DOE conducted a virtual meeting on October 27, 2020, with members of the Kihei Community Association. As summarized by Stuart Fujioka, the deputy attorney general representing the department, "representatives of HIDOE and representatives of KCA discussed the motion and unanimously agreed that a roundabout is a viable, and perhaps the best and preferable available traffic safety and hazard mitigation measure. However, some representatives of KCA maintain that a grade-separated pedestrian crossing is also necessary … It is HIDOE's hope that KCA is satisfied with a roundabout, at-grade raised crosswalks, HAWK traffic control system, and ongoing assessment of pedestrian safety measures to allow for the opening of the school." (A HAWK system allows pedestrians to trigger a red light, signaling to drivers that they need to stop while pedestrians cross.)

The following month, the commission met again to consider the DOE's request to remove the grade-separated pedestrian crossing requirement. As before, the community members testified in support of its retention. Commissioners raised questions that the DOE was unable to answer at the time – including whether the DOE had ever included funds for design and construction of the crossing in its budget requests to the Legislature, and whether the DOE had objected to the condition when the LUC first approved it in 2013.

The Land Use Commission urged the DOE to work with the community, whose support for a grade-separated crossing was again stressed in a meeting with the DOE and DOT held in January.

The Last Chapter

Following that meeting, DOE representatives pursued an agreement with the county that could be presented to the commission. But the proposed language fell short of what county planning director Michele McLean wanted.

On April 6, Brenda Lowrey, with the DOE's Office of Facilities and Operations, emailed LUC executive officer Dan Orodenker, asking that he place the DOE's request to remove the GSPC condition on an agenda before the end of May.

Orodenker replied that he was "not disposed to put this matter back on the calendar until we have some kind of stipulation or agreement from the various groups as to a solution. The past two times the matter was placed on the calendar it was clear that the community and the DOE were still at odds. I do not wish to waste the commissioners' time or further cause undue concern unless there has been significant progress."

The DOE followed up with a more formal request to Orodenker on April 29, this time from Assistant Superintendent Tanaka. The DOE, he said, was continuing to work with the Maui Planning Department.

He also argued that a GSPC was not warranted by any traffic study and noted that the DOT does not support one. "HDOT's position must be taken most seriously," he said.

On July 29, Fujioka filed with the LUC a "request for written findings" on the DOE's motion to amend the 2013 decision. Orodenker then placed the matter on the agenda for the commission's August 25 meeting.

The Chair's Recusal

On August 19, after the August 25 agenda had been published, the DOE filed an "emergency motion" to have the LUC chair, Jonathan Scheuer, recuse himself or be disqualified from any further deliberations on the Kihei High School matter. The DOE had evidence of what it described as "improper ex parte communication" between Scheuer and a witness, Mike Moran, president of the Kihei Community Association.

The communication consisted of an email that Scheuer had sent to Moran. Moran had forwarded to Scheuer and Orodenker an August 10 letter from the Kihei Community Association, asking the commission to require the Department of Education to undertake an updated study of a grade-separated crossing.

Scheuer's email reads in its entirety, "Mike, Thanks for the letter and this other information. Did you ever see the DOE's response to our LUC letter? [referring to the eight questions] It can be found here: [LUC website]. I think the only way we are going to move the incredibly stubborn DOT and DOE is if we gain greater publicity for the issue and their obstinacy."

Moran then forwarded Scheuer's response to another KCA member, Andrew Beerer, who in turn forwarded it to Rep. Wildberger and a DOE employee, who forwarded it to Brenda Lowrey,

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who shared it with Fujioka, Sniffen, Tanaka, and a host of other DOT and DOE staff.

The LUC met on September 8 and 9 to hear the emergency motion and deliberate on the DOE's petition.

As soon as the emergency motion came up, Scheuer announced that, "after thoughtful consideration, I have decided to recuse myself … from any further deliberations on this petition. … I do not agree with petitioner Department of Education that my recusal is required under the law. However, I do believe their motion for recusal is itself a distraction, so my withdrawal will eliminate the distraction."

With that, vice chair Dan Giovanni took over.

Frustration

If Fujioka and others with the DOE thought that by getting Scheuer off the panel, the way to approval of their request would be clear, they were quickly disabused of that notion.

Commissioner Gary Okuda asked the representative the DOE had sent to defend its case, Brenda Lowrey, if she had read a study that the DOE said supported its decision to forego a grade-separated crossing. She acknowledged she hadn't read all of it.

This study, Okuda said, actually supported grade-separated crossings, "where the number of pedestrian-motor vehicle conflicts is high and/or risk to pedestrians is great."

"Isn't that true that that's the situation we have right here, with the highway?" Okuda asked.

"My understanding," she replied, "is we could open the school without the grade-separated crossing and then do studies –"

Okuda interrupted her: "No, the motion is to modify a LUC condition, which a lot of people have relied on including the [Maui] County Council."

In response to further questioning from Okuda, Lowrey acknowledged that she had heard members of the public testify that Waipuilani Gulch was regularly used by pedestrians to get from one side of Pi'ilani Highway to the other.

"[W]e have huge liability issues and concerns," she said.

Had the DOT ever stated "absolutely and under all circumstances that it rejects the building of some type of improvement under the bridge at Waipuilani Gulch?" Okuda asked her.

The DOT did not recommend it, Lowrey replied.

"That's correct. They do not recommend. Where do they say they'll reject it?" Okuda asked.

Lowrey acknowledged that the DOT stated only that they did not recommend this.

Maui commissioner Lee Ohigashi asked Lowrey if the DOT had the final say in the matter of a grade-separated crossing.

Lowrey said that the DOE made reports, but the recommendations in the reports "have to be approved by the DOT."

"You're the petitioner," Ohigashi reminded her. "Department of Education. You're the ones who came here. This is a condition for an off-site improvement. Like any other developer, the petitioner will be required to do it. … Is it your final say whether or not you're going to do this work?"

"It's not me," Lowrey replied. "I have at least three bosses above me. … And then we have the Legislature. We have to get funding. And then we have the Board of Education."

Ohigashi asked Lowrey who did have the final say.

"Because the studies have to be approved by DOT, I think it's DOT, in conjunction with our assistant superintendent with the Office of Facilities and Operations," she said.

Ohigashi's frustration grew over the course of several more exchanges with Lowrey.

"Maybe I'm totally off," he said, "but I just want to say somebody has to make a final decision on what position the DOE is going to take. And you're telling me all these mid-level managers are making these decisions? Well, then, I want to make sure that the superintendent knows and the head of DOT knows and they are fine if we continue with this course that we are on. My question is simple. Who made that decision? Was it made at the highest levels?"

After a short break requested by Fujioka, Ohigashi resumed his questioning, directed now at the DOE attorney.

"If the question is, in terms of whether to build a grade-separated crossing or not," Fujioka said, "it came down to, when the DOT was not going to recommend it, or not approve it, then the DOE found itself unable to proceed at that point."

For hours, the questioning of Fujioka and Lowrey continued, with commissioners' frustrations – and anger – growing over the inability of the DOE to commit to a grade-separated crossing, even if studies showed it to be warranted.

By 3 p.m. on the second day of the September meeting, the commission was going to lose quorum, but members were not prepared to vote on the DOE request. The LUC will resume its deliberations at a future meeting.

— Patricia Tummons