

**MINUTES FOR THE  
MEETING OF THE  
BOARD OF LAND AND NATURAL RESOURCES**

DATE: FRIDAY, NOVEMBER 12, 2010  
TIME: 9:00 A.M.  
PLACE: COUNTY OF MAUI  
DEPARTMENT OF PLANNING  
KALANA PAKUI BUILDING  
250 SOUTH HIGH STREET  
CONFERENCE ROOM, 1<sup>ST</sup> FLOOR  
WAILUKU, HAWAII 96793

Chairperson Laura Thielen called the meeting of the Board of Land and Natural Resources to order at 9:04 a.m. The following were in attendance:

**MEMBERS**

Laura Thielen  
David Goode  
John Morgan

Rob Pacheco  
Jerry Edlao  
Dr. Sam Gon

**STAFF**

Sam Lemmo/OCCL  
Francis Oishi/DAR  
Paul Murakawa/ DAR  
Robert Nishimoto, Ph.D./DAR

Russell Tsuji/LAND  
Scott Fretz/DOFAW  
Russell Sparks/DAR  
Skippy Hau/DAR

**OTHERS**

Bill Wynhoff, Deputy Attorney General  
Kelly Bronson, K-1  
Irene Bowie, K-1  
Malama Minn, K-1  
Jim Smith, K-1  
Pualani Lindsey, K-1  
Ke'eaumoku Kapu, K-1, F-1  
Ekolu Lindsey, K-1  
Irene Bowie, F-1  
Darrell Tanaka, F-1  
Randy Vitousek, K-2  
Meyer Ueoka, D-10

David Cowen, K-1  
Sean Lester, K-1  
Josh Strickler, K-1  
Jeanne Skog, K-1  
John Oliver, K-1  
Lucienne de Naie, K-1  
Mahealani Ventura, K-1  
Scott Vuillemot, F-1  
Robin Newell, F-1  
Martin Luna, D-2  
Heidi Meeker, D-12

{Note: language for deletion is [bracketed], new/added is underlined}

**Item K-1      Regarding a Request to Amend a Condition of Conservation District  
Use Permit (CDUP) MA-3533 for the Kaheawa II Wind Power  
Facility at Kaheawa Pastures, Ukumehame, Lahaina, Maui, TMK (2)  
4-8-001:001 & 3-6-001:014**

A number written testimony was received and distributed.

Sam Lemmo representing Office of Conservation and Coastal Lands (OCCL) conveyed Item K-1 that the Board issued a CDUP subject to a number of conditions and suggested amending condition #15 with language to the applicant will not erect any wind turbines until it has obtained both the Federal permits and State license. The applicant needs that change because they are ready to do some initial site preparation work, but are not sure if they are going to have their Habitat Conservation Plan and take permit in time to initiate those pre-construction activities. Also, the applicant wants to do some site prep work before they get those permits which will be issued shortly. Staff did not have any problems with this since a number of conditions were imposed in the CDUP and in the EIS as mitigation measures before they do any work on the site. In addition to that, staff ran this by some agencies and generally they didn't have any problem with it, but Mr. Lemmo did get some late comments from U.S. Fish and Wildlife Service who asked the Board to entertain a list of things. U.S. Fish and Wildlife asked that if Kaheawa does any pre-work construction for site preparation work they would like the applicant to follow the Wildlife Education and Observation Program protocols that is part of the Habitat Conservation Plan. They would like sites surveyed for nene or other protected species prior to any ground clearing and to have a qualified biologist on site during construction activities. The applicant will alert Division of Forestry and Wildlife (DOFAW) and the U.S. Fish and Wildlife Service on the start of construction activities. They would also need an archaeologist monitor which is a condition of the CDUP and that is what the U.S. Fish and Wildlife is asking for. Staff stands on their recommendation to approve modification and these other conditions.

It was questioned by Board member Edlao whether there were any problems with the recommendations. Mr. Lemmo acknowledged that they made sense.

Member Pacheco asked how surveying the site before hand is different from the daily monitoring they are required to do. Mr. Lemmo explained surveying the site is to make sure they don't damage any nene habitat. It refers to long term monitoring that is required as part of the Habitat Conservation Plan which is forthcoming.

Board member Goode asked whether the previously approved Habitat Conservation Plan (HCP) is part of the Federal/State take license and the HCP has most of those conditions in it. Mr. Lemmo said he hasn't looked at the 2 HCPs that this is a different site from Kaheawa I and wasn't sure whether that original HCP for Kaheawa I legally covers the site for II and that is why the company had to get a new HCP. Member Goode recalled

approving a new plan a couple months ago. Mr. Lemmo suggested having DOFAW staff explain.

Scott Fretz representing DOFAW said that the second HCP has not gone to the Board yet which was approved by the DHRC and staff is ready to go to the Board, but staff is waiting for the Federal side to get caught up so the State is concurrent with them. It should be ready within a month or two for the Board to sign, but the two are different HCPs because they cover different pieces of land and different entities. Chair Thielen asked whether the Fish and Wildlife list of items were consistent with the HCP that is going through the State process. Mr. Fretz said more or less. Mr. Lemmo's Office sent a request for DOFAW to comment on which was similar to Fish and Wildlife's and staff replied with almost the same conditions.

Dave Cowen, Environmental Affairs with First Wind testified that he was here to answer any questions. Member Goode asked whether they were okay with the conditions as suggested. Mr. Cowen acknowledged they were and is consistent with the CDUP now.

Chair Thielen noted that there are 2 items on the agenda related to Kaheawa Wind II. They have a CDUP with DLNR that staff issued and staff was discussing amending that to allow First Wind to begin some ground breaking at this point. The second item is a lease for this area. The Chair noted that some people signed up to comment on both agenda items and to do so, that way you can give all your testimonies at one time.

Sean Lester, a Maui resident testified in support of KWP II's renewable energy facility for both items. Many Maui residents worked hard to ensure ethical, renewable energy installations to our island's aspirations to be self-sustaining. KWP First Wind has accomplished this goal and received strong support from Sierra Club, Maui Tomorrow, other groups and individuals who were tasked to ensure that this company would be good stewards of the land as well as the community. KWP will ensure Maui's energy needs into the future. Mr. Lester related the climate situation in the world and reliance on fossil fuels that the demand for materials has increased, but China has curtailed manufacturing. The ability to grow and build large wind turbines is becoming increasingly difficult which is important to have them in place as earliest as possible. Mr. Lester noted the use of a minimal footprint on the land and an on going commitment with Maui cultural lands by reforesting the area with native plant species. He asked to approve the additional land use to KWP.

Irene Bowie, Executive Director of Maui Tomorrow testified in support of this project relating Kaheawa I has been a good neighbor to Maui and was pleased with the on-going reforestation. Her organization supports the mitigation plan for the 4 endangered species and asked that the owners continue to provide trail access. Maui Tomorrow supports the State's lease and the amended condition to the CDUP.

Josh Strickler representing Department of Business, Economic Development and Tourism (DBEDT) testified in support of the project and was here for any questions.

Malama Minn representing DBEDT testified in support and reported that they have been consulting with Kaheawa throughout this project.

Jeanne Skog, President and CEO of the Maui Economic Development Board testified that her organization's mission is to diversify Maui County's economy by attracting existing businesses engaged in research and technology related activities and to prepare the workforce on these activities. She related the growth in renewable energy to achieve Maui's goal to get off dependency of fossil fuels and the ability to get a project of this magnitude done. The approval of this direct lease to Kaheawa II and the permit will ensure that Maui County will build on the multi-faceted success of Phase I.

Jim Smith, a Haiku resident testified that the draft environmental assessment is inadequate because the structure on page 4 is questionable. He related concerns with killing of the Hawaiian hoary bat and Newell's shearwater and the altitude of the project affecting their flight paths. Also, detereating conditions, the Environmental Justice Act on page 101, the social effect to low income individuals and Native Hawaiians are not addressed. The scenery is affected and there are no community plans in place. Don't move forward and to give this project more time.

John Oliver testified that the Untied Nations and the Governors of every state received a memo that was issued in 2010 by a legal advisor who works for the State Department, regarding human rights violations and the public policy denying information on human rights violations. The Chair noted that per our Sunshine Law the Board can only take up items that are on the agenda and suggested Mr. Oliver make his recommendation to the Board on the items in front of us and if he could leave his written testimony with the Board. Mr. Oliver testified to take these observations seriously and he asked that each of your (the Board's) legal written delegated authority to represent the Kamamalu Estate of which the wind farms are going on. This estate has gone under the executorship or control from the heirs, beneficiaries and judicial advisees into the Board's hands. Mr. Oliver wants to see in 3 days the State's written declaratory authority to represent the Kamamalu Estate. The interest holders of the state have never been notified properly. He wanted to see what law that says you are able to collect interest from the public for these private estates which is confusing to him. Everything happening today has to do with interest belonging to judicial advisees that you guys (the Board) have continually and public policy, has been denying their rights.

Pualani Lindsey, representing Maui Cultural Lands testified relating that her family has gone to Hanaula since the 1970s to work on the native plants by bringing students and volunteers to plant. She thanked First Wind for supporting them and the environment. Ms. Lindsey was concerned with the forest fires and suggested taking down the ironwood trees. Her family supports alternative clean energy that there needs to be a balance.

Lucienne de Naie representing Sierra Club, Maui Group testified in appreciation for being consulted and for outreaching with the public by incorporating people's suggestions and supports this project with the proper mitigation. Ms. de Naie commented on the Habitat Plan and was concerned that there was no mention of the pueo referring to

Uncle Ed Lindsey's work and brought this to the attention of DLNR, but she was happy that the pueo was addressed in the Habitat Plan where she related her concerns with the mitigations for the pueo is less clear whether endangered on Maui and the urbanization of their habitat. Sierra Club would like to see the cultural and biological impacts of the pueo in the area addressed. Several pueo have been killed there over the last 4 years and there might be more during construction, but not as many while the turbines are running. The second most common reports from people to Sierra Club, Maui are dead pueos and questions on who to go to and who to tell. Ms. de Naie specifically requested detailed plans in the mitigation giving an example of enforcing a 10 mile per hour speed limit on the step roads, but there is no talk on enforcement. Also, there was talk of setting up a one time \$25,000 fee to last over the 20 years of the project to train more vets to care for injured owls. The Club was not told how many qualified vets there are or how many places that can receive owls. There is a need for greater mitigation for the pueo to survive.

Chair Thielen noted that the Habitat Conservation Plan will come back to the Board after going through the State and Federal processes which will conclude about the same time. The representatives from Kaheawa are hearing your comments and that the Board will be looking for more detail in the mitigation of the pueo which will come back in a few months. Ms. de Naie said that mitigation should conclude whether there is enough funding to have an adaptive management approach to deal with the mitigation for the pueo. Maybe \$25,000 the first 5 years and then another \$25,000 5 years after the construction is done. Also, the cultural aspect should be addressed and recommended working with Maui Cultural Lands and other practitioners on what the cultural mitigation is supposed to be to protect the cultural side of natural resources. Ms. de Naie thanked the Board and turned in her written testimony.

Ke'eaumoku Kapu from Lahaina, Maui testified that this Board should consider consulting all other Native Hawaiian organizations. Also, implemented in 2007 the Act 212, Aha Moku Council is in legislation this November to finalize the criteria. He is the Chair of the Native Hawaiian Historic Preservation Council and Advisor for the Board of Trustees, Office of Hawaiian Affairs. Also, he is Chair of the Maui, Lanai Island Burial Council and he is here representing himself as Kuleana Ku'ikahi LLC - a Native Hawaiian organization that consults under whatever term you want to place it - Section 106 using Federal monies or whatever the compliance is under the State, County or Federal Government. They are the consulting organization who sends memorandums to different developments to come up with a mitigation plan. What he sees in this room is a lack of public trust doctrine and people who are here to make a profit. The management of these islands needs to be heavily looked upon. Especially the comments by Mr. Oliver referring to the jurisdiction and not to leave out the public trust doctrine because there are a lot of Native Hawaiians who were not here to give their concerns. The turbines are intrusive on the mountain and discriminates the people of this land. Mr. Kapu suggested taking into heavy consideration the levies of justice related to economics and that there is no fairness to this. Defer this item and study how it's going to benefit the general public. He questioned whether the materials being used are recyclable or shoved off a cliff and left there and how much money it will take to remove it. He is in favor of green energy,

but what happens if it doesn't work? It should be mitigated in the plan citing examples in other Pacific Islands.

Member Gon agreed that the typical set of cultural practitioners that are consulted in the course of a project is a small one. It isn't properly representative of the community of a place and is a continual challenge for anyone who tries to reach out. He noted Mr. Kapu's credentials having the proper authority to make those points to the Land Board. Mr. Kapu's remarks regarding the removal and decommissioning of projects of this sort is a concern that he shares. In the early days of wind farming the investment was there to establish the system but once the equipment failed, wear and tear, and the company no longer exist, those things rust and looks nasty. In terms of the environmental assessment they should be consciously considered. Member Gon believes the representatives of the farm would speak to that and what guarantees are in place to ensure that, but for anyone who has the kuleana (responsibility) of protecting natural resources they need to take that into consideration and he thanked Mr. Kapu.

Mr. Kapu said that there were representatives appointed through Governor Linda Lingle and he hopes in consideration of their thoughts that they are sought out for input. Once this criteria is finalized in November he thinks we are looking at a mixed blend of consultants that may come as representatives from different moku (islands) that need to be highly considered. He is fine with these organizations, but noted a law that is set in place, Act 212 of the Aha Moku Council that were selected by the Governor to look into traditional versus contemporary land management and suggested considering those avenues when making decisions on who the consultants are going to be because he doesn't like someone else from another island deciding on their moku (island).

Mahealani Ventura testified and asked that this plan be deferred until all factual basis of claim to this land and their natural resources has been clarified. Her family is the Lindseys and she was concerned for the family today and those from Kamamalu and the heirs invested in her estate. Probate 2409 and that estate, although moving along to become vested in the heirs that they are at this time. Ms. Ventura has not heard anyone testify to the validity or acceptance of any claims to be able to build the structures here. Or be able to take the lives of animals or species that are critically important to the entire environment. This Board should know that it is critical to get real mana'o (thoughts) and real facts concerning cultural prerogatives, inherited and vested rights, the rights of the ceded judicial advisees and the heirs to the Kamamalu Estate. They are talking about water resources and as far as the decisions this Board shall make. What is the basis of your claim to that? Are you involving the heirs here? Do they know how the decisions made today would affect them in the future and affect their same rights and the Board's obligation? Ms. Ventura confirmed the Human Rights Task Force letter and asked for a meeting with the Chairperson because of complaints by officers who police these type of projects and perhaps gone outside of their realm. Jurisdiction is mentioned here which she supports questioning whether the Board is capable of bringing this matter into this venue and making decisions on it because we are talking about certain aspects and interests that are not present here, but will affect people here - business owners, economy, the environment and the culture. Ms. Ventura asked what the build out plan is and the

process around this deal. She spoke of a Spencer project that an Avery Chumbley claims owns the water in the area. There were concerns for the water systems in the area that the Board doesn't want to see or know these, and to include everyone. That the Board needs to come and sit face to face with the heirs that will be injured by the decisions made by this Board. Ms. Ventura questions the organizations representing the build out are – Spencer project, the road, water. She speaks for her family and as a supporter of the Human Rights Task Force on Maui and alerted the Board of human rights violations being committed possibly by officers (DLNR?). Chair Thielen reminded Ms. Ventura what the agenda item is in regards to the CDUP amendment. Ms. Ventura said that the CDUP needs to include what is being conserved and whose rights are being affected by this draft, the judicial advisees of the Estate of Kamamalu, na kanaka are completely vested today in that land, resources and culture rights including burial rights is a human right which could be violated by the Board's action. The amendment is based on the same thing. The heirs of Kamamalu are not anti-development or anti-progress and they understand that the economy needs to grow, however, rights must not be displaced any longer. The Board has her contact information.

Ekolu Lindsey, President of Maui Cultural Lands related the reforestation project and they support this project that the conservation efforts have been amazing working along side with them. His organization doesn't want to gain anything monetarily and just want to do the work to ensure things continue to restore the balance with help from everybody. Mr. Lindsey liked Mr. Kapu's comment and agreed he was concerned about the exit strategy too, but was pleased to hear that the land will go back to the way it was. He invited the public to come up to the site.

Member Gon said he has seen the rare plants at the site and thanked the family for their work and dedication and asked if Mr. Lindsey could briefly summarized their family's work up there. Mr. Lindsey described the devastation from the fire and it takes a great effort to put things back to the way it was. Not everything was burned and the seeds are coming back where you see the fight by the native and invasive species growing harmoniously. He related the area's names and the beauty of the view looking into Ukumehame. Use and manage the area effectively to teach children how to live in balance which creates a better future for all.

Chair Thielen said that some very good points were made about what's going to happen, whether is there a guarantee for a removal plan and when they get to Item D-11 there are some items under the proposed lease that would address some of that. She suggested the Board talk on the conservation district use permit issues. If you have any questions on the ground breaking prior to finishing the habitat conservation plan, they could not do vertical construction under the amendment. They are able to start the ground breaking with discussion to possibly amending the recommendation to add in those 5 additional requirements with U.S. Fish and Wildlife.

Member Morgan commented that the applicant was okay with the 5 additional conditions.

Member Goode said there was some public testimony regarding the draft EA and for the record there was a completed EIS on this project. Mr. Lemmo confirmed that there was a complete EIS for this project. Member Goode concluded that allows the Board to take action previously on the CDUP. Mr. Lemmo said correct. Chair Thielen noted that the same gentleman asked about an unidentified structure and she wasn't sure what he was referring to, but in the final EIS it did identify all the improvements and infrastructure that would go up there and address those. Mr. Lemmo said he wasn't sure what structure he was referring to and can't weigh in on that, but the EIS typically identifies all the structures that are proposed to be built.

Member Edlao asked whether those conditions will be addressed here. Mr. Lemmo said the agencies – DOFAW and Fish and Wildlife Service are asking for these additional provisions as part of your decision today. The Chair said it makes sense because they are finalizing the Habitat Conservation Plan and this ground breaking will occur before this is finished. What she is reading this to mean is there are certain requirements they know are going to be in those plans and they want them to be in place during the ground breaking. Nothing is different than what they are going to face down the line. It's just having it in place before everything starts.

Member Pacheco said several of those and DOFAW comments are already in the CDUP requirements and he asked is that correct? In the submittal it says it's in the current conditions of the permit from DOFAW. Mr. Lemmo said from the HCP it is summing up because the applicant wants to do a site draft now and they want you to approve these additional provisions in the interim while they seek their HCP to make sure while they go out to do some clearing they are in compliance with the HCP even though it's not approved yet.

Member Goode asked if the Board were to recommend or vote to adopt these it would be the Chair interim or the sunset at the adoption of the HCP. So there is no overlapping or no fine tune of words that aren't exactly the same. This is good until then after that HCP prevails. Member Gon agreed with the understanding the provisions will likely be extended by HCP rather than be changed. Member Pacheco said the 2 conditions that DOFAW notes are in the CDUP, items 7 and 13. They just stress the following current conditions in the permit. Chair Thielen said she thinks some of the items that came before the Board just now and the comments from Park Service are a little bit different from these here which Member Pacheco agreed. The Chair said they wanted to be notified at the start of construction, a qualified biologist on site, following the wildlife education and observation protocols and a survey for nene - referring to #13 that if nene should be discovered they have to be notified and a qualified archaeologist on site. Mr. Lemmo said that is in the CDUP and is not on the list. Member Gon wondered if there is an easy way to modify the recommendation to reference that document or do they need to verbatim at the decision. Member Pacheco suggested making subs of 15 - A, B, C, D.

Member Goode asked these would expire upon the adoption of these and Mr. Lemmo acknowledged that. Member Goode asked about the incident take licenses. Mr. Lemmo said he think that condition of the CDUP will be in place for the life of the project as well

as the conditions of the HCP. We don't want to do anything where the Chairperson has to vacate hearings. We don't want these conditions to necessarily continue into the life of the project. They are interim in nature.

Chair Thielen said they will amend condition 15 to say that the applicant will not erect wind turbines until they obtained both the Federal incidental take permit and State incidental take permit and until that time these 4 conditions will apply to activities up there. Mr. Bronson said he had no problem adding those conditions as long as they stay consistent.

Board member Edlao made a motion to approve as amended. Member Morgan seconded it. The Board voted to approve.

**The Board:**

**Amended staff's recommendation by amending condition 15 to say that the applicant will not erect wind turbines until they obtained both the Federal incidental take permit and State incidental take permit and until that time these 4 conditions will apply to activities up there.**

**Unanimously approved as amended (Edlao, Morgan)**

**Item D-11 Issuance of a Direct Lease to Kaheawa Wind Power II, LLC, Together with Easements for Access, Utilities, and Covering a Portion of State Land Under the Operation of General Lease No. S-5731, for Commercial Renewable Wind Energy Generation Facility Purposes, and Delegate to the Chairperson the Authority to Negotiate the Final Terms and Conditions of the Lease at Olowalu-Ukumehame, Lahaina, Maui, Tax Map Key (TMK): (2) 3-6-01: Portion 14, and (2) 4-8-01: Portion of 1.**

A number of written testimonies were distributed.

Russell Tsuji representing Land Division conveyed that the applicant has a short presentation for the Board and noted he has some amendments. There normally is a performance bond set at \$2,000 annual rent to cover any default under the terms of the lease. Wind Farm I had special language added to allow removal of the equipment or construction that may have started at the site. If there is a default of the lease staff is recommending the amount be set at \$1.5 million dollars. The other is no vertical construction shall occur under the terms of the lease until such time the applicant has secured the incidental take permit, HCP and gotten approval by the PUC. You'll notice in the lease is a request for a total of 143 acres total together with easements for access and utilities. Eight acres of which involve the Wind Farm II project mainly to access utilities, but are currently encumbered with Wind Farm I project. The reason is even if the parent company of these 2 wind farms are the same Kaheawa I and Kaheawa II are two separate legal entities and Kaheawa I has the exclusive for that area. Staff has a recommendation to delegate to the Chair authority to negotiate the final terms and

conditions of this current lease for Wind Farm II, but also negotiate terms and conditions necessary to protect this agreement with respect to Wind Farm I which the parent company is fine with.

Chair Thielen suggested that Mr. Cowen and Mr. Bronson summarize since the Board is familiar with what Kaheawa I went through and address the public comments.

10:25 AM RECESS

10:30 AM RECONVENED

Kelly Bronson, Project Manager for Kaheawa II under First Wind made a PowerPoint presentation to the Board relating some background on previous and current projects. Kaheawa Wind Power II (KWP II) is a renewable energy facility proposed for operation in the conservation district (Kaheawa Pastures) and their intention is to enter into a lease agreement for disposition of public lands with the State. Namely a lease and grant of easement type of request. The Hawaii Revised Statutes noted that the State may enter into disposition of public lands for renewable energy producers. Hawaii is venerable due to its reliance on fossil fuels. There are economic benefits to Maui and the State. Mr. Bronson presented a map of the Kaheawa I and II sites. KWP II is adjacent to KWP I. He referred to the Tax Map where KWP II is to the right bordered by a red line. The footprint is much smaller than the TMK which is in the lower left bordering the other TMK property and that site is approximately 135 acres which is a small fraction of that portion. Additional portions of the project are necessary for transmission and power connection which is mostly on the TMK on the left. Some of these areas overlap the KWP I project. To address this issue they propose to use easements for transmission and connection purposes. The area of the grant of easement is a small fraction of the total portion of the TMK as well as a small portion of the KWP I. Also, he noted some bullet points that high light birding activities and his company works closely with Hawaiian organizations and individuals. They have an on-going and active educational tour program with an environmental focus which includes a planting program with Maui Cultural Lands and a team of biologists looking after the ecosystem of the site. There is a long list of organizations that his company works with and Kaheawa II is committed to continuing the stewardship.

Chair Thielen said there was public testimony on the security and guarantees being made in the exit strategy by the company on broken equipment. Mr. Bronson said the lease agreement which is a legally binding document obligates and requires Kaheawa Wind Power to take down the turbines at the end of the 20 year period if it decides it no longer generates electricity and to continue to proceed with the extension of the lease. If before that the company falters they are obligated by law under the lease to take down the turbine(s) and restore the site to its prior status and guaranteed that there is a performance bond which is part of the submittal.

The Chair asked whether it was the understanding of Mr. Bronson that the \$1.5 million performance bond can be utilized by the State in the event First Wind doesn't honor the

responsibility under the contract, to remove facilities at the end of term of contract. Mr. Bronson replied saying that it's the State's legal right to take that.

Member Gon asked whether Mr. Bronson has ever had to remove and restore a site that currently houses a wind turbine of current design. Mr. Bronson answered in the negative. Kaheawa I was their first project. First Wind is an energy business and is not in the business of construction. Member Gon wondered whether the \$1.5 million amount was sufficient to remove a project of this size. Mr. Bronson said it depends on the magnitude of construction. First Wind's obligation legally is to restore the site regardless of the bond.

Member Morgan asked about the Kahuku Wind Farm and whether Mr. Bronson learned what happened when they terminated. Mr. Bronson said based on the information on the web those turbines were earlier generation technology and the industry has been through 4 phases of maturity and First Wind's turbines are the most advanced in the industry.

Ms. Minn, representing DBEDT reported that the turbines cost \$100,000 per turbine and this project has 15 turbines and the \$1.5 million is what they came up with based on that.

Member Edlao asked if something should happen before the end of the 20 year period would the performance bond come in if the company disappears and asked if that was accurate which it was per Mr. Bronson.

Also, Member Edlao asked whether it will be safe for hikers along the Lahaina/Ma'alaia Trail. Mr. Bronson detailed that the turbines will be located more than 300 feet away from the trail. The turbine blades extend more than 90 feet above the earth and there are no exposures to the parts of the turbine where each are locked and secured from access. Any electrical is at their sub-station which is behind an 8 foot high barbed fence and under lock and key. The collection system will be buried 3 to 4 feet underground and will be insulated. Further, the company has been working with the Na Ala Hele Advisory Council on taking measures to add signage at the Wind Farm at either ends of the leased area as well as at the intersections with the access road. Hikers who approach the Wind Farm will see signs that inform them of the active wind energy facility. Also, the signage will brief on the on-going habitat conservation efforts at the site. The policy, like Kaheawa I, is if staff sees someone that has strayed from the trail to approach them and offer education on what the Wind Farm is doing including the habitat conservation efforts. Staff would politely request the person return to the trail and in some cases their staff would provide escorts at the request of hikers.

Chairperson Thielen said that on the performance bond staff has been doing more projects recently. It's a concern in some cases where people are doing construction in a remote area where they may go out of business and the State ends up holding the bag. There is an obligation in the lease for the company to remove and restore the area, but just in case there is the performance bond. There is another check and balance where the company won't be able to begin construction on the turbines until there is a purchase power agreement and Mr. Tsuji confirmed that. One of the reasons is you want to make

sure this is a viable project before the company begins construction so that they actually have a market for the power. Going forward there will be a lot more renewable energy projects before this Board and she won't be Chair after this administration. She made a reference to the computer industry and how it's grown and that renewable energy may grow at a fairly quick pace. You want to make sure the company has a purchase power agreement, a market for the facility and the performance bond is critical if there are any changes. Mr. Tsuji clarified that Kaheawa II has a signed power purchase agreement with MECO (Maui Electric Company) now and is waiting for the PUC to go through.

Member Edlao asked should the technology get better and the company needs to do changes to the wind farm would it come back to the Board. Mr. Tsuji said as far as the construction, plans and specs, it will come back to the Chair for review and approval before they can implement. Any subsequent changes of construction, installation would come before the Chairperson for review and approval. Any deviation from that prior Board approval would have a recommendation to come back to the Board. Staff and the Department of Attorney General will decide if it's a substantial deviation on what was previously approved by the Board within the scope of the approval which is typically handled by the Chair for approval. Chair Thielen said also the Department has a conservation district use permit and if there are any deviations from that it would have to come back to the Board.

Member Morgan asked whether there is an existing power purchase agreement. Mr. Tsuji confirmed that it's signed with MECO, but still has to go before the Public Utilities Commission (PUC) which is for Kaheawa II. Mr. Bronson confirmed that Kaheawa II does have a signed power purchase agreement with MECO last August/September which has been filed with the PUC and they are on schedule with their timeline.

Mr. Tsuji went over the amendments. Paragraph 1.C., the amount should be \$1,500,000. At the end of paragraph 1.E., eliminate the period and add the following "and the Lessee is issued an incidental take license by the Department's Division of Forestry and Wildlife." Paragraph 1.F. should be revised in its entirety to read "Vertical construction of the wind turbines shall not commence until the approval by the Public Utilities Commission of the Power Purchase Agreement between the Lessee and the utility company purchasing the electricity." Mr. Tsuji noted that because there is no date certain to maybe have an annual report on the status of the power purchase application before the PUC might be helpful. Also, on page 9, a typo of #2 and to change it to a new paragraph J to "Delegate to the Chairperson the authority to negotiate the final terms and conditions of this current lease with Kaheawa II and to negotiate ancillary documents necessary to effectuate this project such as amendments or easements, etc. with respect to Kaheawa I." This is because Kaheawa I and II are two separate legal entities under First Wind.

It was questioned by Chair Thielen whether the lease term was included in the recommendation or incorporated in the submittal. Mr. Tsuji said it's incorporated in the submittal.

Member Goode asked whether the amendments for recommendation 1.F. Mr. Tsuji said with the way it reads now the lease cannot be signed until the PUC has approved the power purchase agreement with MECO. Staff spoke with the AGs that the lease can be signed because the EIS has been completed, but recommended that the lease not go forward for execution and have a condition in there that vertical construction of the wind turbine shall not commence until approval by the PUC. Member Goode said otherwise they would never be able to start by December 1 which Mr. Tsuji acknowledged. This changed because of the incident regarding the tax deadline and that is why the company needs a lease in order to perform the ground work that they are proposing. Staff is allowing signing the lease to allow the company to perform the ground work and not to put up any turbines until they get all their permits and approvals. That is why staff suggested an annual report because the PUC will take about 9 months. The Chair suggested a report to the Chairperson upon approval by the PUC and leased annually until that time, so at least you got at least one coming in if it takes longer than a year. Mr. Bronson agreed.

Member Gon asked whether the vertical construction included the footings and is that from the base to the tower. It was discussed and Member Pacheco noted it says vertical construction of the wind turbines. There was more discussion. Mr. Tsuji said that DOFAW looked at it and said there were no impacts.

Member Edlao asked whether anyone was monitoring the construction phase. Chair Thielen said that the conditions on the CDUP amendment require certain things - to have a qualified biologist on site. Mr. Tsuji said the Department has different things on the lease side and the CDUP. Both require separate approvals. If there were any public complaints from Kaheawa I it got to the Chair's Office right away and to the Conservation and Coastal Lands Office. He asked Mr. Lemmo whether staff went out to the site during construction of Phase I. Mr. Lemmo said there had been some minor things. Ground cover was an issue because the company couldn't find the native species of grass. There were minor incidents, nothing major. It's hard because OCCL staff is on Oahu. Mr. Tsuji said Maui staff is available if there is a complaint, but they are not engineers. Chair Thielen noted that there are community groups doing volunteer projects there and other government agencies that have agreements with the company including Fish and Wildlife Service and DLNR. Even private biologists or archaeologists know they have an obligation to report these things and staff will respond on a complaint basis without having staff there the whole time. Mr. Tsuji said also because of the amount of permitting needed for this project. One default of any of these permits will trigger a whole series of defaults all the way down to the lease and the applicants are aware of that and will comply to seek approvals necessary.

Mr. Lemmo said that on the first phase of the project there were some engineering challenges and our Engineering Division worked on that project to ensure everything was done correctly. That was because of an issue and staff came in.

Member Goode said there is broad support of the project, but there is a question about the land entitlement and maybe the ownership of the land asking whether the AG's Office

was aware of the action before the U.N. or any specific land action regarding Kamamalu heirs and its property. Mr. Wynhoff said personally, he has heard previously challenges and discussions with respect to ceded Kamamalu lands and was not aware of the details of that or whether any court action has been brought. He is not aware of any action taken by the United Nations with those claims. All sorts of claims have been made with respect to Native Hawaiian issues and by the United Nations. With respect to lands that may have come to the State through the Kamamalu Estate, he had no information and was not aware whether the AG has any information on whether there is any valid challenge or actual adverse claims. If any of the people from the audience want to provide him with information as to any such claims he would be happy to consider it and if there are any challenges he wouldn't be in a position to evaluate them since that would ultimately be up to a court. Lands that the State has asserted jurisdiction for decades or more are not really our lands. Those challenges would ultimately have to be brought to court and he is not aware of any such challenges. Member Pacheco said that this Board's purvey is not to disposition on crown land questions. The Chair acknowledged that she was sent an e-mail that included an attached document from the United Nations which talked about the United Nations Treaty to oppose human rights violations. There wasn't anything specific about the DLNR, the State of Hawaii or on these lands.

Member Goode said there is nothing out there that says the State doesn't own the land and they don't have the jurisdiction to support taking action today. Mr. Wynhoff said this Board doesn't have jurisdiction, but if there were serious questions they would take them seriously and encouraged the audience to talk to him later to communicate this. It isn't something Mr. Wynhoff is aware is a problem and would be happy to consider, but this Board doesn't have jurisdiction.

Member Goode asked the applicant whether they were okay with the modifications made. Mr. Bronson acknowledged they are okay with the modifications made to the recommendation.

A motion was made by Member Edlao to approve the recommendations as amended. Member Goode seconded it. All voted in favor.

**The Board:**

**APPROVED with amendments as recommended by staff. The following are the amendments to the recommendations section:**

**1C. Amend recommendation 1C by amending the numerical amount of the performance bond to "\$1,500,000."**

**1E. At the end of recommendation 1E, delete the period and continue with the following by adding "and the Lessee is issued an incidental take license by the Department's Division of Forestry and Wildlife."**

**1F. Amend recommendation 1F by revising 1F entirety to read:**

**"Vertical construction of the wind turbines shall not commence until the approval by the Public Utilities Commission of the Power Purchase Agreement between the Lessee and the utility company purchasing the electricity. The Applicant/Lessee shall report to staff, who then shall report to the Board on the status of the approval by the PUC of the aforesaid Power Purchase Agreement, upon approval or annually from the date of this Board approval, which ever is to occur earlier. This reporting obligation shall end after the Board has been informed that the Applicant/Lessee has obtained the approval of the PUC of the aforesaid Power Purchase Agreement."**

**Also, on page 9, a typo of #2 and to change it to a new paragraph J to "Delegate to the Chairperson the authority to negotiate the final terms and conditions of this current lease with Kaheawa II and to negotiate ancillary documents necessary to effectuate this project such as amendments or easements, etc. with respect to Kaheawa I."**

**Unanimously approved as amended (Edlao, Goode)**

Chair Thielen apologized for not introducing the Board members where she did.

**Item F-1 (1) Report and Assessment of Coral Damage of the Keawakapu Artificial Reef Incident; (2) Evaluation of the Coral Damage; and (3) Issuance of a Fine Against American Marine Corporation for Damage to Coral, Live Rock and the Environment on Unencumbered Submerged Lands in the Conservation District**

Francis Oishi representing Division of Aquatic Resources (DAR) introduced Item F-1 and that staff has a PowerPoint to show. A handout was distributed to the Board.

Russell Sparks, DAR Education and Outreach on Maui presented a PowerPoint presentation to the Board on:

- A. The Artificial Reef Project
  - 1. History – Since the 1960s.
  - 2. Purpose – To enhance fishery resources and opportunities.
  - 3. Areas established on Oahu and Maui.
- B. Contract Specifications
  - 1. July 14, 2008 posted.
  - 2. October 1, 2008 – A contract was signed between the State of Hawaii and American Marine Corporation (AMC).
- C. Contractor responsibilities
  - 1. Any deployment of Z modules would occur in water depths of 55 to a 100 feet.
  - 2. The contractor should be anchored or held in a stable position not more than 50 yards away within a 100 yard diameter circle from the marked deployment area.
- D. State's responsibilities

1. The State is required to mark the deployment areas with surface floats at the selected artificial reef locations.
- E. Deployment site identification
1. On November 29, 2009, Division staff surveyed the deployment site.
  2. Involves assessing and identifying existing artificial reef material.
    - a. St. Anthony wreck and other modules.
  3. Evaluate the intended new deployment site.
    - a. Buoys used to mark the St. Anthony as well as a small patch reef southeast of the intended drop and because of this the intended site was moved more northwest.
    - b. A red buoy marks the new deployment site.
- F. The Keawakapu Deployment
1. December 2, 2009 – 1400 Z modules and 52 deep water square modules were deployed by AMC forklifts on a large barge held in place by a tug boat.
  2. About a 125 Z modules landed on living coral reef habitat.
- G. Modules of Reef Habitat – Map of Area
1. The circled area is the 100 yard diameter.
  2. The white portion near the top is reef habitat.
  3. The little spots are the concrete modules that landed on the reef.
  4. The letter T with numbers is where staff did the assessment.
  5. A black line outlines where all the modules are in place.
  6. Distances between the buoy and coral reef impacted.
    - a. Nearest is 62 yards.
    - b. Farthest is 202 yards.
- H. Reef Assessment
1. NOAA conducted.
  2. Staff did detailed measurements of the damaged habitat.
    - a. 311.79 square meters habitat impacted.
  3. Percentage/Role
    - a. 1% - high ecological value
    - b. 22% - medium service value, moderate size
    - c. 77% - low ecological service site
- I. Comparisons to Past Maui Cases
1. Kai Kanani – history and damage
    - a. Settlement for coral damage - \$127,642 or \$140 meter square
  2. Kai Anela – history
    - a. 105 meter square impacted
    - b. Settlement for coral damage - \$386, 297 or \$3644/meter square
- J. Coral Reef Comparisons
1. Kai Kanani and Kai Anela reef to Keawakapu reef were compared to come up with a fine.
- K. Recommendation to the Board
1. To issue a fine to AMC for damages to coral, live rock and environment of encumbered submerged lands for the conservation district set at \$2,644/meter square which resulted from a

comparison with the Kai Anela case, \$3644, but reducing that by \$1,000 because the habitat is a slightly lower eco-system value and the Kai Anela occurred inside an Molokini Marine Life Conservation District (MLCD). The Keawakapu incident did not. The fine at a suggested sum of \$824,373 using the per meter square sum multiplied by the 311.79 meter square.

Chair Thielen referred to the submittal talking about how staff entered into discussions with AMC where both parties made good faith efforts that the Department approached a concept of shared responsibility to see if we could reach an expeditious decision and start on mitigation. That did not happen. AMC would like to present the argument that they are not responsible for the damage on the reef and if the Board finds that they are or take some responsibility this will end up in a contested case. She noted that the hearings officer will flush it out and come back to the Board with a recommendation for a Board decision. If the Department bears some or more responsibility the Board will need to look at the Department on what. Staff put forward a recommendation to fine AMC to be sure they will have a contested case, but another possibility for the Board may come up with a level of fine that is appropriate and rather than taking any position on liability. They asked it go into contested case and if AMC concurs, wait for that hearing to flush out the issues to bring a recommendation to this Board. There is a lot to sort through and this is a tough incident for the Department to review.

Scott Vuillemot, President of American Marine Corp. distributed some handouts and introduced himself, his Executive Vice-President – Rusty Nall and they are represented by their attorney – Joachim Cox. Mr. Vuillemot testified relating some company background information that they are salvage responders for the State and Federal agencies. Also, they're from Maui relating some personal background information and have knowledge of the waters around Maui. AMC values their relationship with the State of Hawaii having spent decades building it. Presently, they have \$10 million dollars worth of work under contract with the State of Hawaii. In the 35 years since AMC started they never have been sued, never had a fine assessed and never been to any court brought about by the State of Hawaii. They believe the State values AMC as specialty marine contractors. The reef damage is extremely unfortunate for both parties and the community, but AMC is not responsible for the incident resulting in the damage. The presentation by staff was fairly graphic, but the examples used for fines and incidents to compute damages are questions where there is no real issue of liability. The vessel groundings vessels are owned by somebody and there is no issue of responsibility in those particular matters. This is different since we're dealing with a procurement contract where the State of Hawaii hired one of AMC's tug and barges. Page 3, AMC has been the primary contractor with the DLNR in over 20 deployments at all 4 sites on Oahu and Maui since the mid-1980s and support the creation of all of Hawaii's artificial reefs over these years. Mr. Vuillemot related AMC's background.

Mr. Vuillemot said AMC always puts the same people on the same projects because of their experience. Port Captain, Paul Burnett has handled all the deployments for AMC since the early 90s. AMC has worked with DLNR/DAR staff, Paul Murakawa and Brian

Kanenaka on every deployment since the early 90s deployment of artificial materials at the site. All of the previous module deployments were carried out without incident and all were carried out in the exact same fashion. AMC always worked under the direction and control of the DLNR representatives on scene. The DLNR representative places the buoy(s) to mark the general area and directs AMC verbally as to where the module should be dropped. Standard practice is to make adjustments in the location of the barge as the deployment progresses. Adjustments and directions are communicated from the DLNR's deployment site manager to the tug operator by VHF marine radio communications. The DLNR's deployment site manager is always on site in a DLNR vessel in the immediate vicinity to ensure that the deployment is controlled and to their direction. Page 5 represents AMC's interaction and direction from the DLNR which is the only supportive evidence from their side of this which is an e-mail from Paul Murakawa. The highlighted portions are "...Maui DAR staff may have to take the lead on this deployment. ....largest structure in the Keawakapu artificial reef (old fishing vessel). Depending on how the deployment is going, the barge may be asked to move to the northwest from this spot." This is the primary directive AMC received from DLNR. Prior to this and during this DLNR expected to be in charge and were in charge of the deployment. The buoy marking the sunken vessel was so far away from the red buoy deployment that it wasn't of any concern. There was no indication of caution expressed or concern by the staff.

Mr. Vuillemot said that DLNR petitioned the Attorney General's Office where a Deputy Attorney General (AG) issued an opinion of liability against AMC based on one sentence which he incorrectly believes support action against AMC. "Contractors barge must be anchored or held at a stable position not more than 50 yards away (within a 100 yard diameter circle) from the marked deployment area." This language was in previous contracts as well. This sentence makes no reference to where the structures are to be deployed, only to where the barge is anchored or held. AMC's barge is 240 ft. long and tug/barge has a combined length of 300 feet. This is the same equipment AMC has been using for these deployments for the last 5 years. It is physically impossible to put a 240 ft. barge in a 50 yard (150 ft) space with no mention of the issues associated with being at sea with wind and waves, dynamics of the ocean. This project and all previous projects over the past decades were directed by the DLNR. Specifically, the DLNR's Deployment Site Manager directs AMC as to where and when to deploy reef structures throughout the operations. DLNR's attempt to shoe horn a single sentence into creating liability against AMC improperly seeks to override the operational reality of DLNR control during the deployment operations. This is wrong. This Board should not go along with DLNR's flawed argument. Regarding the specifics of this deployment there was a lot referred to in the DLNR's own claim against AMC, but in AMC's research things are easy to look at after-the-fact. The following DLNR Planning Deficiencies are obvious.

- Inadequate planning as stated in DLNR's report.
- DLNR acknowledges inadequate reef surveys.
- The DLNR was unaware that there was live coral within 62 yards of the buoy.
- The DLNR never notified AMC of any concerns regarding live coral within the proximity of the DLNR's identified deployment area.

- The DLNR rushed the deployment as the day of deployment was the last day of the Army Corp of Engineers permit granting the DLNR authority to deploy. What this means is if they didn't get the material in that was already loaded on the barge they would likely not have been able to deploy. Then they would have to unload the barge and have the permit reissued. This fact places obvious pressure on DLNR and AMC believes can be identified as a prime contributory fact to the incident.
- The day of the initial survey which was one day before deployment there was a storm going on Maui with high winds of 25 mph and rain. The subsequent rain run off resulted in cloudy water. The water visibility on the day of the deployment was also poor leading to a lack of understanding of the reef structure in the proximity.

Mr. Vuillemot said regarding the deployment itself. The only instructions AMC received from the DLNR Site Manager were to "Stay north of the buoy." By staying north of the buoy our entire operation was directed to be deployed over the existing reef. AMC was directed twice to "Come Closer." This was not presented in a tone of a warning by DLNR as indicated to their writing, but was a direction to adjust the location of the barge which is typical in regards to the direction and control relationship that had been established by the DLNR and AMC's historic business relationship. It is typical in these operations for the boat to call in and say get in a little closer to the buoy, drop off a little bit, come over to this side and as the letter by DLNR indicated they might have said they want you to go to the northwest for a little while and drop some there. In these operations AMC loads up, they go out, there is the buoy - our responsibility is to perform the operation safely. AMC has no responsibility for inspection, ocean bottom, anything at all other than to put these where the DLNR has asked us to. The DLNR never instructed AMC to stop deploying modules. He believes the logs to the vessel which shows the actual deployment takes about 5 to 6 hours. AMC is on-site the tug is under power the entire time to hold itself. On that day we were dealing with the waning storm and winds were still up about 20 knots. Even though the water was somewhat flat it created a need to power against the wind to hold a stable position. As DLNR indicated they had to say twice to come closer. During a 6 hour period AMC was in a position acceptable to DLNR's on-site Project Manager. There was never any instruction or indication that anything was gone wrong clearly indicating that DLNR had no idea there was anything wrong. He referenced DLNR's and AMC's photos of the barge. To load the 1450 modules taken on 3500 tons of concrete and the barge is full enough to allow one forklift down the center of the barge. The project is set up so that AMC can dump from the perimeter of the barge along the 240 foot length and no specific point on the barge.

Mr. Vuillemot referenced back to the Deputy AG's sentence on page 6 and to the map on page 11 (which was from DLNR's information). The star is the Marker Float and the blue outline represents the barge. The distance between the two is not more than 50 yards. Also, 95% of the total 1450 structures are within the area defined by the State's contract language. It is true that 7 of these modules are outside of that line. The State's write-up for the DLNR and for the public indicates very high fines and liability to AMC. As a result, AMC hired our own counsel and took this as a serious issue. There are a

number of things that are serious, not just the fine, not just AMC's reputation, not just our working relationship with the State of Hawaii and not just the perception of AMC in the community of Maui. AMC took it seriously and as a part of that they did a pre-deposition research with the expectation that this will go forward which is what they were told and that they would be subject to the full liability. AMC doesn't understand it. There were many discussions and negotiations with the State of Hawaii appreciating the time that it was handled with the best of intentions. They were handled as working meetings by the tone between the parties trying to understand where the other parties are coming from and AMC do appreciate that, but still don't understand it. But, it is clear what direction it's heading.

Mr. Vuillemot reported as part of the research AMC wants the Board to understand some of the facts as it relates to any further action as to whether through a contested case hearing or any other legal that appears. It will show that because of the DLNR's failure to act as the Project Manager that they have shut down their own Artificial Reef Program after 46 years and the significance of this incident. The DLNR Division Head was fired partly because of the incident and they understand that he has stated support for AMC's not being responsible. Mr. Vuillemot summarized the above that

- DLNR rushed deployment because it was the last day of the Army Corp Permit.
- Poor water visibility.
- DLNR initiated a Third Party investigation and AMC believes will support our position.
- The port captain has worked 15-18 of these deployments and he was never told of any coral in the area reiterating the directions Mr. Vuillemot related earlier.
- AMC was never directed to stop and there was no indication anything was wrong.
- AMC was told "good job" on departing the scene.
- Subsequent to the coral damage becoming public, a DLNR employee called AMC and said "don't worry this was not your fault. DLNR is responsible."

Mr. Vuillemot said with regard to the DLNR admission, none of that was presented DLNR's presentation. Nor was it included in the suggested sharing of the fine. None of the contributory responsibility is mentioned in the negative television, media and newspaper information coming against his company. AMC understand how it works and understands it's a process. But, they feel it's necessary to say that even within DLNR's own staff referring to the July 19, 2010 letter from the Deputy AG to AMC they admit that weather, time constraints and State permits contributed to the difficulty of the deployment. The DLNR action dated November 12<sup>th</sup>, DAR staff acknowledges that they may have not conducted as thorough a survey to the surrounding ocean bottom as they would have liked to. From the DLNR action submittals dated the same date "However the diver survey did not identify coral reefs beyond the surface marked deployment area." "Furthermore, in the event the Hearings Officer finds that the Division of Aquatic Resources should bear some portion of responsibility for the fine..." It is unfair for the DLNR to admit responsibility for the incident, yet to fine AMC for the full amount of the damage. AMC believes the basis for this behavior is rooted in DLNR's inability to argue

for or against its position due to the conflict of interest found in DLNR's responsibility as the Deployment Site Manager. AMC believes that it would be in the State's best interest for the DLNR to accept its responsibility for this incident and thereby improve its credibility with the public.

Mr. Vuillemot said AMC is not responsible for the DLNR damage to the reef. There has been an established pattern and practice which has control of these deployments over the past decades. It's easily definable and will be defined. Even if the contract language is adhered to by showing the drawing and going back to read the language you will find that regardless 95% of the modules are within the specifics of the required language. This has taken up a lot of time and costing a lot of money and they understand it is part of the process. AMC understands this is a significant issue to the community and the Island of Maui. As a result AMC made efforts to settle this to close it. We remain open to discussions for an early resolution of this matter through settlement.

12 Noon        RECESS

1:08 PM        RECONVENED

Chair Thielen said that some of the Board members had clarification questions and asked staff and AMC to come back up.

Member Pacheco asked whether DAR has any correspondence refuting the claims of AMC as far as the instructions on direction and the fact there is no mention of live coral. Does the State have anything that shows that is not the case? Francis Oishi said this is the first time they saw AMC's handout and there are a lot he would like to say, but can't at this point because it's a matter of interpretation. Member Pacheco clarified whether there were any e-mails or memo correspondence that talked about specific things regarding the direction of the barge. Paul Murakawa, DAR Project Manager said there was no other correspondence. Member Pacheco asked whether he had done deployment previously where Mr. Murakawa said he had done it for Oahu.

Member Pacheco asked whether DAR knew about the presence of live coral where the blocks were dropped. Mr. Murakawa answered no they did not. Member Pacheco asked AMC was never told to stop deploying. Mr. Murakawa said no. They did not. Member Pacheco said that they get the impression the barge drifted quite a ways out from where they needed to be. Those 7 modules seem far away and what reason why staff did not stop deployment. Mr. Murakawa said that could have been one of the times that they called them back.

Member Pacheco asked AMC when doing other deployments were they ever anchored or do you always use a tug. Mr. Vuillemot said that we have anchored, but not for about 15 years. They usually use a tug and barge in this particular deployment.

Member Pacheco asked referring to the language of the contract that it seems almost impossible to do in this case because of the size of the vessel and tug to stay within the

diameter? Mr. Vuillemot said that speaks for itself, but the reality is there is a captain on a tug with 240 foot of barge ahead of him. There is a buoy for reference and in order for it to work the captain has to have his eyes on the buoy where he maneuvers the barge using the buoy as his reference point. If you are on top of buoy you can't really see it. You have to be in a position where you can maneuver the barge using the buoy as a point of reference. He agreed that it is impossible to put a 240 foot barge in a 150 foot space. Member Pacheco wondered why AMC would sign a contract with language like that with something you couldn't accomplish. Mr. Vuillemot explained that it's the same language in all the other contracts and there was a pattern that had established the operational routine and he believes Paul would agree with that. He is not saying there is complacency on the part of the State or AMC, but he is saying it is a fairly simple operation and it's always been that way. With regards to the 150 foot mark itself, it was never AMC's intent to consider that 150 foot as where the module should have gone, but it was their intent with the bow of the barge no more than a 150 foot away where 95% of the modules were dropped in an appropriate distance from the barge.

Member Pacheco asked whether the surveys were done on the day of deployment. Mr. Vuillemot said that is DLNR's responsibility and can't comment on that. Member Pacheco asked who does the survey and when is it done. Mr. Murakawa said that DAR usually does it prior to deployment, but it was delayed because of the Samoa Tsunami. He did the survey on November 29<sup>th</sup> and the deployment was done on December 2nd. Member Pacheco asked what diagram or information that comes out of the survey. Mr. Murakawa explained that staff takes video and still photos of the ocean bottom habitat and if its limestone habitat, that is ideal for dropping the modules on and staff is on top of the barge directing where to drop the modules.

Member Pacheco said that there was a report that AMC mentioned that is not available to them and asked what is that report? The Chair said that report is for 2 Federal agencies to do the initial assessment because the Department was asking for an objective on-site assessment of the damage. NOAA and U.S. Fish and Wildlife Service went out and did the assessment identifying where all the modules were dropped. That's been shared with AMC and also some internal administrative evaluation was done which are confidential personnel matters, but that did weigh in some of the information staff put into the submittal and our approach and then discussion. Member Pacheco asked that neither one of those reports – this one the Department of Transportation (DOT) that Mr. Shiroma mentions in his written testimony. Chair Thielen said what was talked about in that public meeting was the Federal reports that identified the damage and the location of the modules - that is a public record which was released that night where people could link through the website. Member Pacheco asked whether there was any DOT investigation and the Chair said only the internal administrative matter.

Member Morgan asked what entailed to get a new Army Corp of Engineer permit. Mr. Murakawa said that staff requested an extension at that time and it just happened that the deployment occurred on the deadline date of the permit, but they do have documentation for a request for extension. Member Morgan asked how long was the request for. Mr. Murakawa said for another 5 years which is up to the Army Corp and if it is granted.

Member Morgan asked whether they had extensions before. Mr. Murakawa said that Brian Kanenaka (another biologist) has had extensions before.

Member Edlao asked whether Mr. Murakawa was on-site and where was he. Mr. Murakawa said it was myself, Skippy hau and Russell Sparks and they are on boats. Member Edlao asked whether it was standard to put people on boats and not in the water. Mr. Murakawa said you don't want to put people in the water because it's dangerous.

Member Edlao asked whether AMC familiarized themselves with the job in the past. Mr. Vuillemot said that being a marine contractor they understand what the process is with understanding the work to get things done. In regards to this particular contract, this is not a construction contract, but a procurement contract. AMC was hired to transport and deploy structures. At no time in the past did AMC participate in any survey or have been requested to. It has always been the State's responsibility. The relationship is the way that it stands and basically it's not required. They never consider the survey. AMC only works the boat using the buoy as a reference.

Member Edlao referred to AMC's handout the difficulty of the size of the barge fitting in the 150 foot area and asked whether AMC brought that to DAR's attention. Mr. Vuillemot referred back to the drawing in AMC's handout and page 6 looking at the language which he read. The bow of the barge is at the 150 foot mark and 95% of the structures are within the specs of the contract and that is AMC's position.

Member Goode asked whether AMC is willing to accept responsibility for the 7 modules outside. Mr. Vuillemot said they haven't gone through proceedings to come to a negotiation amount. He checked and AMC's counsel acknowledged it, but Mr. Vuillemot couldn't speak on it because it's between counsel and the insurance company. Member Goode wondered if there was a dollar figured offered during negotiations. Joachim Cox, counsel for AMC said that if they were in a position to go into executive session then yes, they would be happy to discuss. The availability is currently on the table. Everything with AMC is they want to move forward with this and they are not looking for a contested case hearing. AMC is not in a position to be shouldered with a damage amount or a fine amount that identify anything close to this. However, there is an insurance policy and working on behalf of AMC the insurance company is available to provide the sum compensation for this. That is not admitting AMC made an error on this. It's going to be AMC's argument that the contract language identifying the 50 yard radius is an after-the-fact creation as to that being the basis for the deployment. Nothing in the pattern of practice amongst these parties ever indicated that. These parties going throughout the decades of work that's always been the deployment site manager through DAR has been there telling AMC where to dump. The easiest fact is staff was there and they didn't tell AMC to stop dumping. At no point is it that there was a concern at that time by the people who were the experts and had the opportunity to look at it. In answer to Board member Goode, yes, there is money on the table and they are happy to go about to resolve this without admitting any liability on the part of AMC.

Member Pacheco asked how many boats were out there. Mr. Sparks said there were 2 vessels out at the deployment and neither were DAR vessels, but volunteers and DAR staff were on both vessels. Member Pacheco asked what those boats position was whether all on one side. Mr. Sparks said they moved all over the place. Member Pacheco asked whether AMC had any responsibility with the location of the deployment or the condition of the ocean floor. Mr. Murakawa said no, there is none.

Member Gon asked when a vessel is to be not more than a certain distance from buoy point is that from the bridge or from any portion from the vessel as long as that portion is that distance. Mr. Vuillemot described that the vessel was held at no more than and the language itself is clear that you could hold the barge in position. Member Gon concluded that you chose any edge rather the center of the vessel. Mr. Vuillemot confirmed that and described dropping an anchor based on maritime ratio correlating that with the language on page 6 and the barge would be further away. Member Gon asked whether the modules go straight down in the water. Mr. Vuillemot described the physical characteristics of the modules being flat that they would float down like a feather and would largely go straight down, but if an edge is caught there will be motion.

Mr. Oishi related when he was on earlier deployments confirming that AMC won most of those contracts and got better at it each time. AMC has used the tow line as an anchor, but at this deployment they decided not to use that. He described the tug boat and the barge that the 80 yard barge fits within the 100 yard diameter circle.

Member Goode asked about the science of spreading an artificial reef. Mr. Oishi said the Department started out using derelict car parts until it wasn't environmentally acceptable. Then a mold was designed using discarded concrete where the contractor and Ameron work together to produce. The modules are designed so that when they fall spaces are created which serve as shelters for marine life. It is more effective making a mountain. And, the 1200 of the 1400 modules are in the permitted area.

It was asked by Member Pacheco whether there were past mishaps and there were none per Mr. Oishi's knowledge. Mr. Oishi described other deployment areas on Oahu – Kualoa, Maunalua Bay and Waianae. Member Pacheco asked whether the Department would have brought forward the 7 modules that landed on the reef as a violation instead of 1400. Mr. Oishi said he doesn't have that latitude. A violation is a violation whether it's one module or hundreds.

Irene Bowie, Executive of Maui Tomorrow Foundation testified that the environmental community is aware of the many assaults on the reefs in Hawaii and look at incidents like this to try and figure out how to prevent in the future. They are happy that DLNR is suspending the Artificial Reef Program. She does not agree with saddling AMC with the entire DLNR-calculated fine. Ms. Bowie wondered why some projects would have an EIS and others not which could have prevented this situation and she related information on the Kalaeloa project. She questioned why rush to meet the permit deadline when you have an extension and the weather was bad. She suggested sending a diver down to assess and having an EIS done. The community was concerned with whom or how the

finer will be assessed and who will oversee these funds and decides on mitigation measures because those forms have been out there for a year now.

Robin Newbold, Chair of the Maui Community Resources Council testified that they are fishermen, dive boats, environmentalists and many stakeholders concerned about the reefs. They appreciate that the Department will continue to look into this incident to right a wrong and make sure there is mitigation. She suggested getting the tons of concrete off the reef because its critical habitat, it's a nursery ground. There is a concern that Maui reefs are declining and that the next generation may not be able to fish. The coral habitat is important for the juveniles and the people who depend on subsistence and economy. Do something because the coral is dying under that concrete.

Darrell Tanaka, a spear fisherman testified that people are concerned with the reef being destroyed. He compared this incident with the Kai Kanani and Kai Anela incident and the difference is this is creating a habitat. The money from the 2 incidents wasn't used to restore those reefs. Mr. Tanaka described how finger coral is destroyed by turtles, but is not catastrophic compared to low coral which is. He suggested putting the fine to what was being created rather than what was destroyed. Maui is better with deployment of artificial reefs because their reefs are too small for the carrying capacity of the island. Mr. Tanaka said that this program does need to be updated using better concrete. Rushing this through is an accusation because there was ample time for studies to be done. DLNR was put in a position that seemed like they were rushing, but it was unfortunate circumstances. He questioned whether a proper study was done to the 100 yard circle, but if they were done then how responsible is DAR. It was suggested having 2 or more buoys and if there is 1 buoy the operator should use GPS as a point of reference. Mr. Tanaka said as he stood on that shore that day there were no big swells, conditions were normal with a slight breeze, but to position a barge of this size relying on a couple of boats off the side is inadequate. The barge operator needs to take some responsibility that if they drift off of the location he should call it off. If it's a problem for the operator to remain in that area it should have been brought forth during the contract negotiations by AMC. Maybe a 200 yard circle was needed and bow of the ship should be the reference point and not deploy off the sides or center.

Ke'eumoku Kapu from Lahaina testified that he had a problem with the public not being allowed to review any application or permit to allow this kind of thing to happen. He suggested providing a traditional management perspective of providing resources to our future generations. Artificial reefs are invasive and are for the tourists which have nothing to do with subsistence gathering and infringes on his rights as a Kanaka Maoli fisherman. It's crazy to drop rubbish modules onto the reefs because our landfills are so overloaded. He questioned whether anyone looked at the permit conditions and look at what is lawfully just to make a decision based upon how to deal with this situation. Mr. Kapu related a shipwrecked sailboat ruining the resources. If someone was obligated to a contract or permit and didn't follow the procedures within their fiduciary duties to follow the recommendation that they signed it would make your discussions easier to see how this is going to go. He may even want to file a contested case with this Board, DLNR and the people involved to find out more details. There maybe possible money

laundering here. Don't know what kind of indiscriminate issues when this Board reviews these kinds of things, allows this to happen, go to another agency to make a decision and then someone signs the contract that gets blamed for something. Everybody is at fault here. Mr. Kapu encouraged everyone to look at the traditional management perspective rather than foreign ideas.

Member Edlao asked Mr. Tanaka whether he has been back to the site since the deployment. Mr. Tanaka said he hasn't, but he can see it by the pictures presented and agreed some current pictures would be good to see how the artificial reef has enhanced the fish population.

Chair Thielen said this has been a challenging issue for the Department. They are taking the damage to the coral very seriously and moved forward with a number of enforcement cases. Staff has used revenue from finds to help with other mitigation projects like the day-use mooring permits and other things. It's disturbing for her that there was coral damage in a project that we (DLNR) had initiated. We had to take steps to have some objective investigation and the public on Maui may be frustrated by the amount of time that takes, but it takes time to go through that. The first step was to have the Federal agencies go out and look at the area. Then sit down with their attorneys and bring AMC to the table and AMC was willing to talk in good faith without either party admitting any liability. They spent a lot of time talking through a series of meetings and gathering information. At those meetings without violating any confidentiality of the discussions there were a number of issues to try and work through. She will be ending her term as Chair of the Department and her concern was will there be continuity in this examination of what happened in the project and will there be some action and determination whatever that might be. Staff tried to be clear in the submittal how they approached the discussion, but the only way they could make sure that something would go forward is to bring an action forward. They tried to recognize in the body of the submittal the complexity of the factual issues recognizing that it is likely to go into a contested case if the Board were to decide that AMC bore some of the responsibility. At the time we wanted to go to contested case AMC said no they don't want one because they don't think they were liable at all and could walk, what guarantee would we have for the process to continue? Staff worded the submittal the way it is to try to get a process to go forward which would flush out the facts, the arguments and the issues that came out during the settlement discussions. It does mean it's going to be longer and you don't get to the mitigation projects until you resolve some of those issues. Staff had been hopeful to get there before the end of her term and then concentrate on the mitigation and other things, but that didn't happen because of the issues and she didn't think this Board is going to be able to flush out all those issues fully at the hearing today. The Chair recommended moving forward to a contested case and it would be fair to not take a position on liability if AMC were willing to commit to participating in a contested case and maybe the Board could look at what is an appropriate fine given fines that were issued in past cases. And if AMC were acceptable of throwing this into a contested case hearing the hearing officer would then allow each party to flush out their issues, arguments, bring forward the facts and then bring back to this Board with a

recommendation on responsibility and possible next steps. It won't happen before she leaves, but it's important to get some type of process in place.

It was asked by Member Morgan whether it's appropriate to evaluate the fine issues. Chair Thielen said staff put together a recommended fine based on past cases. If this Board wanted to adopt that it could. If this Board wanted to say we will even throw that to the hearing officer. The real issue to be brought forward today is liability. There were good points raised today, but when you get down to where is the balance, it will require a lot more facts conditioned on what we do today.

Member Morgan asked whether AMC wants to settle and Mr. Cox confirmed that. AMC wants to move forward and recognizes there is damage and would like to assist with funding any mitigation and is why AMC actively participated in all the settlement discussions. He reiterated that AMC doesn't believe they are responsible, but the party to benefit from a contested case would be his law firm by being paid. AMC wants this resolved and they don't want to be held liable. They recommend to the extent there is an opportunity today let's go ahead and settle this. If we are not able to do this then AMC request that the Board make a determination as to liability. If at all the Board finds AMC should be responsible for having to go forward in some form of liability on this then yes AMC will be making a request at that time per the administrative rules for a contested case. They can't be held up by this, but they still want to try and get this done. We don't want to go to contested case, but only if they have to and would rather settle.

Chair Thielen said that they can't guarantee whether settlement discussions would continue on their end. Throwing into a contested case hearing doesn't prevent the parties from engaging in settlement discussions. There have been such instances. Its very difficult for the Department to be viewed as objective and one of the benefits of bringing in a hearing officer is it provides a third party to listen to the arguments and issues to make a recommendation to the Board, but its nothing that would preclude settlement discussions. If the Board wanted to ensure some processes were done they could recommend going to a contested case, but prior to starting that, continue engagement in settlement discussions. Member Pacheco questioned that because as a Board they must make a decision first before going to contested case hearing. Mr. Wynhoff said the Board will have to take action. If AMC wants to challenge that action it does raise some difficulty. If the decision of the Board was to...we've done in the past where we know we are going to issue a fine and yes we are going to go to a contested case. If you don't take definitive action that says we are going to issue a fine of X thousands of dollars and AMC chooses to stand on its right not to go to contested case until we have a definitive action. Member Morgan asked whether staff is recommending \$800 so thousand dollars as a fine. What is the purvey of this Board to say no, it should be hypothetically ¼ million and if that passed, AMC would have the opportunity to file a contested case on whatever the amount is that this Board has the authority to act on the recommendation and make the fine according to what this Board decides. And it's up to AMC to decide whether or not to contest it. Wynhoff acknowledged that. Chair Thielen noted that is why the submittal is worded the way it is. Otherwise, there would be no way to get into a contested case if the other party isn't willing.

Member Pacheco said approving the recommendation would put the entire responsibility on AMC. The issue is who is at fault here and that the Department is primarily responsible for this activity. There is a difference between making a mistake and being responsible. It was admitted by the Department that AMC has no responsibility for what is underneath or on the ground there, where they deploy the modules and there is nothing here that tells him that the Department knew there was coral reef down there. Chair Thielen noted that AMC said they have an 80 yard barge that can fit in a 100 yard diameter AMC's argument is to go as far as possible. If there is a shared liability where do you put that down, where do you draw that line? She thinks it would come out in the detailed facts that the Department hasn't presented everything in the submittal. Staff tried to acknowledge that in the body of the submittal, but was caught up in how you get into a contested case to be able to flush those issues out if the other party says I won't come to the table. Mr. Wynhoff said that the Board is on its own motion to order a contested case, but he would say that the level of participation of AMC is if we make them go to contested case and there is no action to contest we can't make them come here.

Member Morgan agreed with Member Pacheco that AMC was not liable for the majority of what happened, they are willing to settle and it seems we have a good company with good people doing good work for many years. They don't want to go to contested case and want to be able to settle it, but we are dragging them into it against their will and that bothers him. He is troubled by the valuation issues citing Molokini and choosing \$2400 which comes out to \$11 million an acre which is a big number. Chair Thielen revealed that negotiations concluded unsuccessfully because she did not feel comfortable with the direction AMC was going and she couldn't get into more detail than that. Member Morgan said there is a huge range in the fines and the intrinsic nature of this reef.

Chair Thielen said now you understand how difficult a case this is. She asked what is the best way to get to a recommendation in front of the Board on what happens both on the valuation issue as well as the apportionment of responsibility? She can't think of a way other than throw it to a hearing officer to flush it out with the opportunity for both parties to continue settlement discussions as they go forward. If this Board doesn't take some action on this there is the risk that nothing happens. What happens if there is another coral damage case? If this Department doesn't go through the process when we're involved how do we hold people responsible when we're not involved? We have to hold ourselves accountable. She wants this to go forward in a manner that it comes back to this Board. And, if the answer that comes back is the Department is 100% responsible then that should come back to the Board and the Board needs to figure out what to do about it. Member Pacheco asked why can't the Board make that decision because they are not employees of the State, but a citizen Board appointed by the Governor to look at issues like this and make decisions. He disagreed with going to a contested case and to come to a fair decision based on the evidence before us today. If the decision is not suitable to AMC then they can go to a contested case hearing. We should talk about who is responsible first before talking about valuation. He would possibly accept that argument of the placement of the boat if it wasn't for DAR staff there watching it the

whole time. The Department should be responsible if not fully, then majority responsible for this incident.

Member Edlao said he understood what the Chair was saying that a contested case maybe the only way, but his concern was the \$800,000 whether the hearing officer will look at that or should the Board direct him. In terms of responsibility he could see both sides. It will cost money for a hearings officer. In the past there were times where they went to contested case, but negotiations continued and an agreement is reached and it stops the process. He would like to see this resolved and suggested splitting the \$100,000 both ways, but questioned the \$800,000.

Member Goode made a motion to go into Executive Session in order to consult with their attorney on questions and issues relating to departmental permits, and questions and issues pertaining to the board's powers, duties, privileges, immunities and liabilities. Board member Gon seconded it.

Mr. Wynhoff noted that there are limited number of things the Board can talk about in Executive Session and don't know whether the number discussed was confidential and there is an issue there.

Member Pacheco asked whether the Army Corp has an ability to assert any kind of penalty against the State. Chair Thielen said staff has worked with Federal agencies, but those agencies they have not worked with, they don't know if they have jurisdiction or not. Mr. Wynhoff said with the Army Corp they are interested in structures rather than coral.

1:30 PM EXECUTIVE SESSION

2:18 PM RECONVENED

Member Goode was uncomfortable with the process used to value the coral and turned it over to Member Gon who referred to the submittal where it characterized 1% of the 311.79 square meter as a pie value, 22% of medium value and the remaining 77% of low value. Looking at previous cases where the low value was charged \$140/square meter and the high was \$3644/square meter. Running the math you get a total of \$174,752 for the whole area. They took the average charge for the high and the low and came up with the median value of \$1,892/square meter.

Member Pacheco asked staff whether those percentage numbers were correct. Mr. Sparks agreed, but said you are missing some key components. We are characterizing a reef ecosystem as high, medium or low. He noted Kai Anela reef ecosystem and to look at the reef dynamic.

The Board and Mr. Sparks had more discussions on the percent of coral cover, differences in coral, value of the reef and referred to Molokini, Kai Anela and Kai Kanani.

The Board discussed the amounts of the settlement and what percentage to assess AMC and the Department.

Member Gon made a motion to forgo staff's recommendation and revise the recommended fine to \$400,000 total recognizing both the involvement of the State and AMC and fine AMC 1/3 of that portion which is equivalent to \$132,000.

Mr. Wynhoff wondered whether the Board would consider rather than proposing a fine to settle on a number rather than calling a fine because they might be some legal benefits for doing that. He suggested not calling it a fine and state numbers.

Member Gon said recommend a settlement amount of \$132,000 from AMC.

Member Pacheco asked whether they need to insert language in consideration of DAR and how we need to process that. Member Gon agreed that would be a good addendum.

Member Edlao suggested DAR do an EIS. The Chair said they could direct DAR to do an environmental assessment or EIS for a removal or partial removal of the modules. The Board members said mitigation. The Chair said that the EIS or EA would determine that. Member Goode suggested giving a timeframe. Mr. Wynhoff said if you are talking about a 343 EIS it would raise a lot of issues that makes him uncomfortable and he doesn't recommend it here. Assess what they should do and alternatives, that is fine, but he is concerned with this Board saying to go through a 343 process.

Member Gon suggested directing DAR to assess a course of mitigation for damage at Keawakapu and review with the Board within a year. The Chair said they should bring it back sooner than 1 year on what their assessment is and the mitigation should be in the amount of their portion of responsibility for the damage, the 2/3. They should bring back a plan to this Board on how they would accomplish mitigation to that dollar level in this region in the next 60 days and how they are going to do the funding. It would be perverse for DAR to go to the Legislature and ask for more money for that damage. Instead it should come in the form of some loss of discretion or discretionary monies they do have or go out and seek additional grants or maybe setting aside other activities in order to work on this as a higher priority. But, whatever it is it should be presented to the Board within the next 60 days because at least we have a target number. Member Gon asked whether at that time the Board could go through the actual mitigation amount and the means in which it could be quickly procured. Chair Thielen agreed that it should be in their plan and would give legal counsel time to discuss with them whether it is EA on removal or not EA and would have time to work it through. In some community testimony it was said don't bother removing them. Most of the testimony said if you can remove them in a cost effective manner without creating further damage to take a look at that, but there was some discussion on an environmental assessment to make that determination. Mr. Wynhoff agreed that is certainly possible.

Mr. Cox said the business of AMC is difficult to accept a settlement amount and this is a large number, but his position has always been AMC is to move ahead and would like to see mitigation efforts go forward at Keawakapu and there is funding available through the settlement via the insurance company. He is here to say they can get this done.

Mr. Murakawa said this is a fair agreement because they didn't do the assessment that they wanted to do and they should bear some responsibility. Mr. Hau agreed its fair looking at the situation. It's complex and difficult. Mr. Sparks said the numbers were from comparisons of past cases. What went into the monetary settlement in those cases are different in this case. It was difficult for staff to come up with the numbers. Member Gon agreed with what he came up with.

Member Pacheco said he would not want this Board decision to in anyway to infer that they don't value the coral reefs, but he believes this is a different situation, different mitigating factors regardless the value of the coral in relation to other cases.

Member Gon made a motion to forego staff recommendation, direct DAR to create a mitigation plan for damage at Keawakapu for review by the Board within 60 days. Revise the recommended settlement amount to \$132,000 from AMC. Member Pacheco said he thought they were directing staff to go back and settle.

Chair Thielen suggested a finding to direct the Chair to go back and attempt to negotiate a settlement with AMC for a total of \$132,000 which will represent a 1/3 responsibility for the total damage and to direct DAR to prepare and present to the Board within 60 days a draft mitigation plan for the remaining 2/3rds responsibility which would be \$264,000. Member Gon accepted that as his motion which was seconded by Member Goode.

Member Pacheco asked whether this would in any way preclude AMC from any further involvement in bid processes with the State. Board members and Mr. Wynhoff said they didn't think so. The only thing that came to mind is if you're in violation of a lease or permit. This is not a finding that AMC violated a contract and he is not aware of any reason that they would not be able to. Mr. Cox said it was their understanding that this proceeding was identified as a settlement. AMC wouldn't be admitting liability and was just assessing the benefits of resolving the matter now for all concerned as opposed to going forward with a challenge. The settlement should not impact AMC. Mr. Wynhoff said he is sure the settlement documentation would say it's not an issue of liability. Mr. Cox agreed to the wording.

Chair Thielen took a vote. All were in favor.

Mr. Vuillemot said it's been difficult and thanked staff and the Chair for taking this seriously. As bad as this looks the entire commercial marine sector has been involved for 5 years with change contractually as well as operationally in relation to dealing with things like coral. He related reduction of coral damage by the industry and that changes have been made.

The Chair said they tried to make it clear in the submittal and apologized for what was said in the media today that AMC was 100% responsible that the media did not pick up the other things in the submittal. AMC has acted in good faith and negotiations and she approached him from the beginning that they bear some responsibility.

**The Board:**

**Moved to amend staff's submittal by adding the following:**

**A finding to direct the Chair to go back and attempt to negotiate a settlement with AMC for a total of a \$132,000 which will represent a 1/3 responsibility for the total damage and to direct DAR to prepare and present to the Board within 60 days a draft mitigation plan for the remaining 2/3rds of the responsibility which would be \$264,000.**

**Unanimously approved as amended (Gon, Goode)**

**Item C-2 Request for Approval for Release for Public Review of the Habitat Conservation Plan and Accompanying Incidental Take License for Kaua'i Lagoons**

Mr. Fretz said there was nothing to add per the Chair's questioning.

The representative from Kauai Lagoons was here to answer questions.

**Unanimously approved as amended (Morgan, Gon)**

**Item C-1 Status Report for the Hawaii Conservation Reserve Enhancement Program**

Mr. Fretz said he had nothing to add.

Member Gon was happy this came out and said he liked seeing projects like these get off knowing it's been a slow start. Mr. Fretz said that was what he was going to say. Its typical in other states that these programs start up slow based on the capacity of our Federal partners. Staff said they've got things resolved and things should pick-up in the near future.

Member Gon asked whether these come before the Land Board. Mr. Fretz answered in the negative. The Chair signs each agreement and one request today is to authorize the Chair to sign these agreements through 2013 which would add another 2 years to what is currently delegated to the Chair. Chair Thielen said as long as the Board gets an annual report. Member Goode said it's a slow start, but there is no other process to come to the Board and he was fine with 2 years.

Chair Thielen acknowledged giving DOFAW all the credit for this.

**Unanimously approved as submitted (Gon, Goode)**

**Item D-2 Consent to Sublease General Lease No. S-5700, George Y. and Suzuko Tamashiro, Lessee, to Donovan Doag, dba West Tech Auto & Hydraulic, Hawaiian Roll-off Services, LLC, Phoenix V LLC, dba BEI Hawaii, Island Equipment, Inc., dba American Machinery, D & M Hydraulics Sales, Brian Kelly, dba Kelly's Tree Service, Dennis Florer, dba Kona Machine and Service, Nixon Y. Arakaki, dba Honaunau Auto Center, Environmental Services, Inc., Atlas Recycling Centers, LLC, Sub lessees, Kealakehe, South Kona, Hawaii, Tax Map Key:3<sup>rd</sup>/7-4-20:18 & 20.**

Mr. Tsuji conveyed that he had no changes and that the applicant was here earlier.

It was questioned by the Board members whether this was in North Kona and it was said to check the tax map key.

Martin Luna said he didn't have any questions and agreed with the conditions.

**Unanimously approved as submitted (Edlao, Pacheco)**

**Item K-2 Regarding Time Extension Request for Conservation District Use Permit (CDUP) KA-3460 for Single Family Residence (SFR) Catherine M. Bartmess Trust, 356 Meridian, Crystal Lake, Illinois, 60014, Subject Parcel TMK: (4) 5-9-005:027, Haena District, Island of Kauai, by Roy A. Vitousek, Cades Schutte, Kona Office, Hualalai Road, Suite 303, Kailua Kona, Hawaii, 96740**

Mr. Lemmo requested the Board to withdraw this item from the agenda and apologized that this is something that should have not risen to the level of a Board action and should be dealt with administratively.

Chair Thielen noticed that Mr. Vitousek was here where Mr. Lemmo said he's been gone for awhile. Mr. Vitousek was asking for a clarification in a letter to staff and it was mistakenly taken as a request for Board action on an extension. When it got scheduled Mr. Vitousek questioned why this is on the Board agenda. Mr. Lemmo read the agreement and he agreed that it is not necessary for the Board to take any action on this matter.

Chair Thielen asked whether they are running into a time deadline and they are not according to Mr. Lemmo.

**Withdrawn (Gon, Morgan)**

**Item D-12 RESUBMITTAL: Special Acquisition of Private Lands and Set Aside to Department of Education for Educational Purposes, Honouliuli, Ewa, Island of Oahu, City and County of Honolulu, Tax Map Key: (1) 9-1-069:027, from Item M-4 of the September 9, 2010 Land Board meeting and the September 22, 2010 Land Board meeting.**

Mr. Tsuji said that Heidi Meeker from Department of Education sat through most of today although he just saw her leave the room. This is a re-submittal of an item that came before the Board a month or so ago and what happened was the Board approved the acquisition of land from Gentry Homes in connection with the DOE's development for a school. At that time the form of the deed was brought before the Board and so approved, but since then the Attorney General's office has rejected that form of deed. Since that time, the Attorney General's office and Gentry have worked together to come up with a form acceptable to the Attorney General's Office and Gentry, and this is the reason they are back here before the Board.

Chair Thielen asked whether Ms. Meeker was still here. Mr. Tsuji said he saw her grab her bags and left the room about 5-10 minutes ago.

Member Gon asked whether they were okay with the recommendation. Mr. Tsuji said he believes so and confirmed that. He knows Gentry Homes will be a party and signing off on the deed is okay. All the other recommendations that you see there with a provision note from staff indicating Department of Education's responsibility and that was part of the prior submittal.

Chair Thielen said she had asked Ms. Meeker to come because of concern that the Department had put the DOE on notice 2 years ago about no longer relying on Land Division staff to do their land transactional work, and given the furloughs, the rift, and the shifting of general funded staff within the Department to special funds; she had notified the DOE that they had to be like DOT and other agencies and handle their own land transactions. The head of their section is Randy Moore who formerly ran Kaneohe Ranch and is very astute on land transaction matters. The Chair's concern was that DOE staff has repeatedly returned to our staff and are not picking up the work; and one of the things that worried the Chair was the DOE placed that form of the Deed in front of the Board for approval the last time when we repeatedly told them they need to conduct their own due diligence on their acquisition and to work with their assigned lawyer from the AG's office. Apparently they never did it. The Chair wanted to put it on the record so the DOE will have formal notification again that they've got to do this [i.e., their own land transaction work that includes a due diligence review and working with the Attorney General's office on the acquisition] because otherwise the State will have a lot of problems with these land transactions. DOE did go to the AG's Office, belatedly, and found out the deed they had previously brought before the Board was incorrect or not acceptable to the Attorney General's office. A lot of times this Board defers to DOT, but because DOT has picked up that work with their own staff and worked with the Attorney General's office, there is more oversight. The Chair recommended to the Board that

whenever we get DOE submittals to make sure they do their due diligence with the AG's Office because that was not the case with the one before today.

Board member Pacheco approved as submitted. Member Edlao seconded it.

**Approved as submitted, but with comments noted for the record as follows:**

Administrator Tsuji noted the DOE representative; Ms. Heidi Meeker had been present but appeared to have left the room at about 3:00 p.m. Administrator Tsuji noted that the Land Board previously approved the acquisition and specific form of the Deed with certain noted encumbrances that the DOE and the donor, Gentry Homes had approved amongst themselves. The Department of the Attorney General rejected that form of the Deed, and Gentry Homes and the Department of the Attorney General has now come to terms on the new form of the Deed which is attached as Exhibit A to the submittal.

**Unanimously approved as submitted (Pacheco, Edlao)**

**Item D-10 Issuance of Land Patent in Confirmation of Parcel 1 of Land Commission Award No. 3702, Apana 2 to Davida Malo, situate at Kiholaa, Lahaina, Maui, Tax Map Key: (2) 4-6-17:12 (portion of).**

Meyer Ueoka, a long time Maui real estate lawyer representing Hans Michael and Emily Michael testified that in 1852 the Land Commission awarded to David Malo and over 150 years a land transfer was never granted. The property in the meantime has transferred several times and Mr. and Mrs. Michael are now the owners of it. They request a land patent be issued to David Malo to clear title.

**Unanimously approved as submitted (Gon, Pacheco)**

**Item D-9 Annual Renewal of Revocable Permits on the Islands of Hawaii, Maui, Molokai, Kauai and Oahu**

Mr. Tsuji said the Board Secretary distributed a sheet of amendments for this item referring to Exhibit A listing all the permits that staff is asking the Board to renew. The amendments are to correct typographical or misstatements and ask to amend according to the sheet.

Mr. Wynhoff said he didn't find it a problem and was okay with the RPs.

Member Goode asked whether staff notified the permit holders. Mr. Tsuji explained that a letter was sent after the Board had reviewed it. If one is not going to be renewed it's because there is a default situation that can't be rectified which would then disqualify for renewal. The other situation is if the permit is only for 30 days and DOFAW needed the property or going for a long term option, but those permittees will be notified prior to the action. This is a continuation of existing RPs that all expressed interest.

Member Goode asked whether the rents are going up. Mr. Tsuji said the rents remain the same and are in good standing. Once terminated you are disqualified from any state.

Member Pacheco asked what the trigger was because he thought they could only do revocable permits for a year. Mr. Tsuji said for land base it's a 30 day revocable permit and can be renewed annually. Member Pacheco asked about the 1 year parking and whether that is because they have to go out to bid. Chair Thielen explained that they can, but in those situations they do an RP and then go back out for a RFP or full contract down the line, but you could. Mr. Tsuji said the parking is another statute in another chapter. There was more discussion about that.

Member Pacheco was wondering how much money is left on the table. Mr. Tsuji said anything with commercial activity they try to be thorough on the evaluation. Commercial is one area. Often times the applicant approaches the Land Division directly without going to a public auction process, but the down side is only a 30 day permit. They don't have a big office.

Member Pacheco moved as amended. Member Gon seconded it.

**The Board:**

**APPROVED with the following Amendments to Exhibit A:**

**Replace RP 6587 Hawaii Community Development Authority annual rent from \$0 to 10% of net revenues.**

**Replace RP 6822 Olomana Golf Links, Inc. with RP 7517 Olomana Golf Links, Inc. Recently (October 2010) signed new RP document with new insurance provisions.**

**Replace RP 7579 Auwaiolimu Congregational Church annual rent from \$0 to \$480.**

**Replace RP 7633 Hawaii Explosives and Pyrotechnics annual rent from \$0 to every Friday at \$.10/square foot.**

**Replace RP 6809 Michael Aki with RP 7521 Michael Aki. Recently (August 2010) signed new RP document with new insurance provisions.**

Add RP 7621 Barron Thomas Souza, Jr., tmk: (2) 2-9-1:8 and 11, pasture use, annual rent is \$480. Recently (October 2010) signed new RP document.

Add RP 7628 William Sanchez, Sr., tmk: (4) 3-9-5:19 and 20, pasture use, annual rent is \$996. Recently (October 2010) signed new RP document.

Delete RP 6511 Gay & Robinson. This property has been set aside to DOFAW via GEO 4202 for Puu Ka Pele Forest Reserve. Tenant has to obtain a permit from DOFAW not Land Division.

Due to a clerical error, EXHIBIT A contains 10 extra pages that need to be deleted. These pages contain the same information, just formatted differently. Delete the last 10 pages of EXHIBIT A.

Unanimously approved as amended (Pacheco, Gon)

- Item D-1 Grant of Term, Non-Exclusive Easement to United States Department of Agriculture, Forest Service, for Stream-flow Monitoring Station Purposes, Manowaiopae, North Hilo, Hawaii, Tax Map Key: 3<sup>rd</sup>/ 3-6-006:007.
- Item D-3 Issuance of Revocable Permit to MC&A, Inc. for a Teambuilding Event for The Aramark Corporation at Wailea Beach, Maui, at Tax Map Key:(2) 2-1-008: seaward of 109.
- Item D-4 Amend Prior Board Action of October 14, 2010 (D-15) Cancellation of Grant of Easement bearing Land Office Deed No. S-24803; Rescind Prior Board Action of September 27, 1996 (D-6); Set Aside to County of Maui, Department of Water Supply for Water Storage Tank Together with Access (Roadway) and Water Transmission Line Easements; and Authorize the Issuance of a Management Right-of-Entry Permit to the County of Maui, Department of Water Supply, Kealaloe, Ukumehame, Wailuku, Maui, Tax Map Key: (2) 3-6-001:Portion of 014; and to include (2) 3-6-001:053.
- Item D-5 Issuance of Revocable Permit to Molokai Canoe Club, Kaunakakai, Molokai, Maui, Tax Map Key:(2)5-3-001:002 por.
- Item D-6 Issuance of Revocable Permit to Hawaii Explosives and Pyrotechnics, Inc. for Aerial Fireworks Display at Duke Kahanamoku Beach, Waikiki, Honolulu, Oahu, Tax Map Key:(1) 2-3-037:021 portion.

**Item D-7** Amend Prior Board Action of August 12, 2010, D-14 Set Aside of State Land for a Microwave Tower Site at Puu Ualakaa, Honolulu, Oahu; Rescind Prior Board Action of February 14, 1986, Item F-12, TMK (1) 2-5-019:003 portion.

**Item D-8** Set Aside to Department of Transportation for Shoreline Protection Purposes; Issuance of Construction and Management Right-of-Entry; Kapaka, Koolauloa, Oahu, Tax Map Key: (1) 5-3-014:009.

Unanimously approved as submitted (Pacheco, Morgan)

**Item M-1** Issuance of Direct Lease to Vanguard Car Rental USA, Inc., dba Alamo Rent-A-Car, Hilo International Airport

**Item M-2** Issuance of a Revocable Permit to Showcase Hawaii Productions LLC., a Hawaii Limited Liability Company for a Museum Gift Shop, Production, and Related Retail and Office Uses at the No. 1 Capitol district (formerly the Hemmeter Building), Honolulu, Oahu


**Item M-3** Amendment No.1 to Concession Agreement No. DOT-A-10-0008 Retail Concession for Tiare Enterprises, Inc. at Hilo International Airport and Kona International Airport at Keahole

Unanimously approved as submitted (Pacheco, Edlao)

Adjourned (Pacheco, Gon)

There being no further business, Chairperson Thielen adjourned the meeting at 3:19 p.m. Recordings of the meeting and all written testimony submitted at the meeting are filed in the Chairperson's Office and are available for review. Certain items on the agenda were taken out of sequence to accommodate applicants or interested parties present.

Respectfully submitted,



Adaline Cummings  
Land Board Secretary

Approved for submittal:



William J. Aila, Jr.  
Chairperson  
Department of Land and Natural Resources