

MINUTES
FOR THE MEETING OF THE
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: March 15, 2000
TIME: 9:00 am
PLACE: DLNR Board Room
Kalanimoku Bldg.

Chairperson Timothy E. Johns called the meeting of the Commission on Water Resource Management to order at 9:12 a.m.

The following were in attendance:

MEMBERS: Mr. Timothy Johns, Dr. Bruce Anderson, Mr. Robert Girald,
Mr. Brian Nishida, Mr. David Nobriga, Mr. Herbert Richards, Jr.

STAFF: Ms. Linnel Nishioka, Mr. Roy Hardy, Mr. Ed Sakoda, Mr. Eric
Hirano, Mr. Dean Nakano, Mr. Ryan Imata, Mr. David Higa,
Ms. Lenore Nakama, Mr. Charley Ice, Ms. Faith Ching

COUNSEL: Linden Joesting

OTHERS: Bert Hatton, Rosemary Chiu, George Hiu, Cliff Jamile, Delwyn
Oki, Sunny Greer, George Kuo, Karen Piltz, Stacey Uehara, Kapua
Sproat, Charlie Reppun, David Bills

All written testimonies submitted at the meeting are filed in the Commission office and are available for review by interested parties.

1. Minutes of the February 16, 2000 meeting

MOTION: (Nobriga/Richards)
To approve the minutes as amended.
UNANIMOUSLY APPROVED AS AMENDED.

Deputy Director Linnel Nishioka made correction to the minutes of February 16, 2000 on page 2. The descriptions of the 2 administration bills are switched. Senate Bill 2915 and House Bill 2574 are for revenue for the water licenses. Senate Bill 2917 and House Bill 2576 are the special fund bills.

Commissioner Nishida made an addition on Item 4 of the minutes. He stated in response to a question that Mr. Nakano mentioned that time lines would be a part of the entire process. This statement should be added to the last paragraph on page 3 of the minutes.

2. Old Business/Announcements by Deputy Director Linnel Nishioka

On March 16 Chairperson Johns will be speaking at the University of Hawaii, Water Resource Research Center at 3:00 pm. The topic is on current issues and problems that are facing the Commission.

Commission's legislative bills are still active and have passed out of the finance committees. This week they will be heard in the subject matter committees. All of these bills will be continually monitored by Chairperson Johns and Deputy Director Nishioka.

A visit to U.S. Filter is planned for the month of April. The plant is now in operation in the pilot testing stage. A presentation will also be made by U.S. Filter at the April meeting.

Copies of the letter to Hawaii's Congressional Delegation requesting for federal funding for Water Commission projects were distributed. Working with the Army Corps of Engineers and Natural Resource Conservation Service will be continued in order to gain some assistance for funding.

The Penalty Policy that was approved in September 1999 is moving to the next step which is a general plan of implementation for enforcement. In the past we did not have a plan on what things needs to be enforced and the importance of enforcing. The Commission is starting to work on a general plan of implementing enforcement.

The last announcement was on the Added Item that was handed out separately prior to the meeting. This item is a request from USGS for a variance from construction standards. According to the Sunshine Law, it does permit the Commission to add on items to the agenda as long as it is not of a major significance or affect a lot of people. The reason for the late item is that USGS is currently in construction for a deep monitor well in Kualapuu. The staff review and write up of this item did not make the time frame for the agenda.

Deputy Attorney General Linden Joesting stated that pursuant to HRS 92-7(c), an item may be added on if the board votes by two-thirds vote and that it is not an item of reasonably major importance.

Chairperson Johns asked for a motion to be made to accept the Added Item.

MOTION: (Richards/Nishida)
To approve Added Item No. 11.
UNANIMOUSLY APPROVED.

NOTE: The items were not taken in the order posted on the agenda.

8. Request for Approval to Adopt New Sustainable Yields for Ewa-Kunia and Waipahu-Waiawa Aquifer Systems, Pearl Harbor Aquifer Sector, Oahu

PRESENTATION OF SUBMITTAL: Mr. Eric Hirano

RECOMMENDATIONS:

Staff recommends that the Commission:

1. Adopt new sustainable yields of 16 mgd for the Ewa-Kunia and 104 mgd for the Waipahu-Waiawa Aquifer Systems, Pearl Harbor Aquifer Sector, Oahu, based on staff's recommendation as set forth in this submittal and to update the Hawaii Water Plan accordingly;
2. Adopt the milestones regulatory framework system as shown on Exhibit 5; and
3. Defer implementing milestone #7 as shown on Exhibit 5 for one-year to allow staff to process existing water use permit revocations, pending water use permit applications, and any bulk water allocation and/or reservation requests.

Chairperson Johns recognized the hard work of the staff after the last couple of years to complete this review. He asked if anyone wanted to give public testimony. No one did.

MOTION: (Richards/Nobriga)
To approve the submittal.
UNANIMOUSLY APPROVED.

6. The Estate of James Campbell REVOCATION/MODIFICATION OF WATER USE PERMIT NO. 298, Kahuku Airbase Wells (Well No. 4158-12 and -13), TMK 5-6-5: 07, Existing/Future Domestic/Agriculture/Aquaculture Use for 0.200 mgd, Koolauloa Ground Water Management Area, Oahu

PRESENTATION OF SUBMITTAL: Mr. Ryan Imata

RECOMMENDATIONS:

That the Commission amends the recommendations as follows:

1. Revoke WUP No. 298.

2. Approve the issuance of a Water Use Permit (WUP No. 524) to the Estate of James Campbell for the reasonable and beneficial use of 0.200 gallons per day of brackish/potable water for domestic / agriculture / aquaculture use from the Kahuku Airbase Wells (Well No. 4158-12 and -13), subject to the standard water use permit conditions listed in Attachment B and the following special conditions:
 - a) Should an alternate permanent source of water be found for this use, then the Commission reserves the right to revoke this permit, after a hearing.
 - b) In the event that the tax map key at the location of the water use is changed, the permittee shall notify the Commission in writing of the tax map key change within thirty (30) days after the permittee receives notice of the tax map key change.
2. Not assess the applicant for the period of overpumpage, as the applicant submitted the application on their own volition.

Mr. Imata made corrections to the staff submittal. On page 1, last sentence should read 103,000 g/d not mgd and recommendation No. 1 on page 4 should read 298 and not 248.

Dr. Anderson stated that it would be appropriate to allocate water for residential use a predetermined set amount and not to make an adjustment for that but to look at some additional allocation for that type of aquaculture use would be a cleaner way to deal with the issue instead of giving the blended residential/agricultural use a higher allocation. Dr. Anderson is concerned about the criteria in that how did we come to accepting the 2100 g/d limit for residential use. He also had a concern on the enforcement action of the penalty policy when someone overpumps.

Deputy Director Nishioka stated that possibly establishing a benchmark for the residential use and look into a benchmark for agricultural use. The counties have different standards as to what they consider domestic. This information can be broken down by property to determine exact water usage. Staff would need to return to the Commission with this recalculation.

Dr. Anderson stated that somehow we need to figure out the allocating use based on zoning. We need a more refined way of determining what potential use is based on zoning or what is allowed in that area and not necessarily rely on current uses which may vary from time to time.

Mr. Nakano stated that the county's water system standards are being referenced in each application to determine estimations of the various water demands.

Commissioner Richards asked if there is a guideline for aquaculture being that it is increasing in demand.

Mr. Nakano stated that there is room for improvement and that there is no good number that we can come up with about certain types of aquaculture cultivation. Perhaps the counties could develop a table within the water use and development plan so to set a standard that can be followed.

On the penalty policy, Dr. Anderson stated that the date of the fine should be retroactive to the day of the violation of the permit. A notice of the violation must be issued in order to assess the penalty. One option would be to issue an informal notice of violation where the permittee may not know that a violation is occurring. If the permittee voluntarily comes forward and wants to comply then there should be no penalty assessed. Another situation is when the applicant realized a violation but made an extraordinary effort to comply quickly, in which case there would be a very minimal or no penalty. Another case where the applicant is recalcitrant or not responding at all and in that case a heavy penalty would be assessed.

Dr. Anderson also stated that a policy that is predetermined on what the fines would be is not advisable, but having many options available would be advisable as well as rationale around whatever number amount is assessed. In all cases the penalty would be retroactive to the time when the violation first occurred whether notice was given or not. The owners or the applicant should be the ones to be in compliance with the permit conditions.

Commissioner Richards feels that the people have to be notified that a violation has occurred even though the violation unknowingly occurred. By doing the calculations for the 12-month moving average can the determination be made as to how much overpumping was occurring.

Chairperson Johns directed the staff to review Section IV B Duration of Violations and return to the Commission with a recommendation as to whether that section should be revised taking in account the concerns raised by Commissioner Anderson.

Commissioner Anderson then suggested that inquiries be made because of inconsistencies.

Deputy Attorney General Joesting in answer to the question of due process, if the water use permit has a condition in it, then it is clear that the permit is subject to penalty if a violation occurs.

TESTIMONY BY APPLICANT:

Mr. Bert Hatton, representing the Estate of James Campbell stated that this particular overpumping occurred during extraordinary dry years in 1998 and 1999, which increased water usage. Realizing that the 12-month moving average was being exceeded, Mr. Hatton stated that their incentive was to come forth before the Commission to correct this situation with the application. A positive look on this

has been a renewed interest on aquaculture which created more jobs. This is a relatively small system but Mr. Hatton stated that he hopes the Commission would take that into consideration. In discussing the guidelines for aquaculture, Mr. Hatton stated that one of the things that need to be considered is the freshwater and saltwater operations in this area.

Commissioner Nishida asked Mr. Hatton for clarity in Exhibit 6 which is the location map of the area.

In answer to Commissioner Nishida's question, Mr. Hatton stated that the dark area and the cross-hatched area are under the original permit application and the lightly-shaded area is under the current water use permit application.

MOTION: (Richards/Nobriga)

To approve the submittal as amended.

UNANIMOUSLY APPROVED AS AMENDED.

4. Request for the Commission to Order Mediation Prior to Any Hearing on Standing for a Contested Case Hearing, DEPARTMENT OF HAWAIIAN HOME LANDS, Application for a Water Use Permit (WUP No. 448), Kauluwai-DHHL Wells 1 & 2 (Well Nos. 0801-01 & 02), TMK 5-2-10:7, New Domestic and Irrigation Use of 270,167 gpd, Total Proposed Use: 637,167 gpd, Kualapuu Ground-Water Management Area, Molokai

PRESENTATION OF SUBMITTAL: Mr. Charley Ice

RECOMMENDATIONS:

That the Commission amends the recommendations as follows:

- A. Direct the DHHL, Molokai Ranch, and Kukui (Molokai), Inc. to enter mediation prior to and without prejudicing future initiation of the contested case hearing. The purpose of the mediation is to resolve the issues concerning the DHHL application without the need for a contested case hearing if possible, or to at least resolve as many issues under dispute as possible, and to narrow the issues that must be determined in a future contested case hearing should the Commission order a contested case hearing at a future date.
- B. Delegate the authority to appoint a mediator in §13-167-86, HAR, to the Chairperson; waive the time requirement in §13-167-87, HAR, for initiating mediation within fifteen (15) days of appointing the mediator, waive the time requirement (same section) that the mediation period shall not extend beyond forty-five (45) days; and set a deadline of ninety (90) days to complete the mediation once the mediator is appointed. Should

conditions warrant, the parties may request an extension from the Chairperson before returning to the Commission for further action.

Deputy Attorney General Joesting asked Chairperson Johns after checking the administrative rules, if there was a provision that the Commission can waive time requirements. If there isn't a provision that the Commission can waive the time requirements then the Commission cannot waive the time requirements in the administrative rules absent a waiver provision.

Chairperson Johns then directed that the Attorney General's office be consulted and extend it, otherwise the time requirements that set out in the administrative rules would control. If that is so, Chairperson Johns asked that the recommendation be amended in that manner.

MOTION: (Girald/Nobriga)

To approve the submittal as amended.

UNANIMOUSLY APPROVED AS AMENDED.

11. United States Geological Survey, REQUEST FOR VARIANCE FROM CONSTRUCTION STANDARDS, Kualapuu Deep Monitor Well (Well No. 0800-01), Well Construction: 12-inch Casing Diameter, 1750-ft. Deep Well, TMK 5-2-10:1, Kualapuu, Molokai

PRESENTATION OF SUBMITTAL: Charley Ice

RECOMMENDATION:

That the Commission approves the following variances from the Hawaii Well Construction and Pump Installation Standards for the construction of the Kualapuu-USGS Deep Monitor Well (Well No. 0800-01):

- (a) Section 2.5(c), requiring a minimum grout seal of 500 feet or 70% of the depth to water (whichever is less), and
- (b) Section 2.4(e)(3), requiring steel in wells deeper than 100 feet.

Commissioner Anderson asked if granting a general approval to the Commission to delegate the authority and responsibility to the Chair the approval for variances to avoid having to present them to the Commission.

Deputy Director Nishioka stated that she would check on delegation and rule making procedure.

Commissioner Richards stated that sometime ago the Commission delegated duties to the staff. It was requested at that time a list of the delegated approvals made be

attached to the agenda for the next meeting. This was to briefly update the Commissioners of what took place. He suggested continuing that type of updating.

TESTIMONY BY APPLICANT:

Delwyn Oki of U.S.G.S. stated that the well construction should take 5 to 6 months to complete.

MOTION: (Richards/Nobriga)
To approve Added Item 11
UNANIMOUSLY APPROVED.

7. Waihuna Joint Venture Application for a Stream Channel Alteration Permit (SCAP-OA-296) Drainage Outlet Structure, Waikakalaua Stream, Waipio, Oahu (TMK:2-7-13:67)

PRESENTATION OF SUBMITTAL: Mr. Edwin Sakoda

RECOMMENDATIONS:

That the Commission approve a stream channel alteration permit for the construction of a drainage outlet structure at Waikakalaua Stream, Waipio, Oahu (TMK 2-7-13:67). The permit shall be valid for two years subject to the standard stream channel alteration permit conditions in Exhibit 5.

TESTIMONY BY APPLICANT:

Mr. David Bills, Vice president of Gray Hong Bills & Associates, representing the applicants, supports staff recommendation.

MOTION: (Richards/Girald)
To approve the submittal.
UNANIMOUSLY APPROVED.

3. East Kauai Soil and Water Conservation District Application for a Stream Channel Alteration Permit (SCAP-KA-297) Drainage Outlet Structure, Kuia Stream, Koloa, Kauai (TMK: 2-7-13:67)

PRESENTATION OF SUBMITTAL: Mr. Edwin Sakoda

RECOMMENDATIONS:

That the Commission approve a stream channel alteration permit for the construction of a drainage outlet structure at Kuia Stream, Koloa, Kauai (TMK: 3-4-01). The permit shall be valid for two years subject to the standard stream channel alteration permit conditions in Exhibit 4.

MOTION: (Girald/Nobriga)
To approve the submittal.
UNANIMOUSLY APPROVED.

5. Oahu Sugar Company, Ltd. REVOCATION OF WATER USE PERMIT, WP 7A, 7B, 7C, Well Nos. 2300-21 to 23 (WUP No. 127), Waipahu-Waiawa Ground Water Management Area, Oahu

PRESENTATION OF SUBMITTAL: Ms. Lenore Nakama

RECOMMENDATIONS:

Staff recommends that the Commission revoke WUP No. 127.

MOTION: (Nobriga/Girald)
To approve the submittal.
UNANIMOUSLY APPROVED.

9. Executive Meeting with the Department of the Attorney General to consult with the Commission's attorney on questions and issues pertaining to the Commission's powers, duties, privileges, immunities and liabilities concerning the Application for Water Use Permit by Kamehameha Schools for Waiawa Development Tunnel (Well No. 2657-05) and for Petition for Declaratory Order Denying Bishop Estate's Water Use Permit Application filed by Waiahole-Waikane Community Association, Hakipuu Ohana, Ka Lahui Hawaii, Kahaluu Neighborhood Board No. 29, and Makawai Stream Restoration Alliance on January 26, 2000.

Chairperson Johns stated that the Commission will consult with the Department of the Attorney General's office on matters pertaining to Item 9.

Mr. Charles Reppun of Waiahole-Waikane Community Association stated that if the public hearing process is started, then a contested case hearing will need to be requested on this application. He doesn't think that that is the way to proceed. He thinks that the project should be looked at completely and not only one portion of its water use.

Ms. Stacey Uehara representing Kamehameha Schools stated that the application requests that the water use application be denied because it is inconsistent with the Waiahole contested case hearing decision. Kamehameha Schools' position has been consistently that the water that they are requesting does not come from the Windward Streams and does not affect the Windward Streams and therefore this case hearing involving the Windward parties is not necessary.

Ms. Kapua Sproat of Earthjustice Legal Defense Fund stated that their petition has requested that the Commission deny Bishop Estate's water use permit for failing to

comply with the final decision and order of this Commission in the combined contested case hearing. The reason behind that is what Mr. Reppun had testified to earlier.

Chairperson Johns asked for a motion to enter in Executive Session at 10:55 a.m. to confer with legal counsel on issues pertaining to Item 9 of the March 15, 2000 agenda.

MOTION: (Richards/Girald)
UNANIMOUSLY APPROVED.

At 11:35 a.m. Chairperson Johns asked for a motion to adjourn.

MOTION: (RICHARDS/ANDERSON)
UNANIMOUSLY APPROVED.

Respectfully submitted,

FAITH F. CHING
Secretary

APPROVED AS SUBMITTED:

LINNEL T. NISHIOKA
Deputy Director