

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

DATE: April 20, 2005
TIME: 9:00 a.m.
PLACE: KALANIMOKU BUILDING
CONFERENCE ROOM 132
1151 PUNCHBOWL STREET
HONOLULU, HAWAII 96813

CALL TO ORDER

Chairperson Peter Young called the meeting of the Commission on Water Resource Management to order at 9:05 a.m.

ROLL CALL

The following were in attendance:

MEMBERS

Mr. Peter Young
Ms. Meredith Ching
Mr. Clayton Dela Cruz

Mr. James Frazier
Dr. Chiyome Fukino
Dr. Lawrence Miike
Ms. Stephanie Whalen

STAFF

Ed Sakoda, Roy Hardy, Glenn Bauer, Dean Nakano, Dean Uyeno, David Higa, Kevin Gooding, Lenore Nakama and Charley Ice

COUNSEL

Linda Chow, Esq.

OTHERS

Rebecca Alakai, Dick Cox, Manabu Tagomori, George Tengan, Kapua Sproat, Dave Penn, Teresa Dawson, Chester Lao, Gordon Tribble, Bill Tam, Charlie Reppun, Yvonne Izu, Linnel Nishioka, Denise Antolini, Ed Kushi, June F. Harrigan-Lum, Pete Olson, Dr. Jonathan Likeke Scheuer, Sandra Wilhide, Joseph Sax, and Paul Berry

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

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

APPROVAL OF MINUTES

1. March 16, 2005

MOTION: (Ching/Whalen)
To approve the minutes
UNANIMOUSLY APPROVED

SUBMITTALS

Acting Deputy Director, Dean Nakano requested withdrawal of Item #2 regarding the Watershed Coding System as a Management Tool.

Motion: To amend the agenda noting the withdrawal of submittal Item #2.
(Frazier/Dela Cruz)
UNANIMOUSLY APPROVED

1. **Application for a Stream Channel Alteration Permit (SCAP-OA-378), Construct Bridge for Subdivision Access & Replace Culvert, The Woods at Ahuimanu, LLC, Kahaluu Stream, Ahuimanu, Oahu (TMK (1) 4-7-05:60)**

Presentation of Submittal: Ed Sakoda

DISCUSSION:

The overall objective of the project is to develop The Woods at Ahuimanu, which is a 46-lot subdivision. The two components of this project are: 1) the construction of a new bridge crossing and 2) the modification of an existing culvert that crosses Ahuimanu Road, to better convey the stream flow for flood control purposes. An important secondary consideration is its effect on the migration of the stream animals.

The construction is expected to take approximately 8 months, 4 months for each component. After completion it will be turned over to the City and County of Honolulu.

Commissioner Frazier asked where the Corps of Engineers fit in the permitting sequence. Mr. Sakoda stated that together with the Department of Health (DOH) Clean Water Act, Section 401 Water Quality Certification and the Corps of Engineers, Clean Water Act Section 404 permit, we have the best management practices that are enforced by the DOH.

Dave Penn from the DOH participated in a site visit with the Department of Land and Natural Resources' Division of Aquatic Resources and Commission staff. The culvert has to be enlarged to meet the City's drainage requirement in conjunction with building this subdivision. The bridge is for the road passage and not necessarily for any flooding, as the subdivision is located at a high elevation.

RECOMMENDATION:

That the Commission approve a stream channel alteration permit for construction of the vehicular bridge and installation of a 10' by 24' box culvert at Kahaluu Stream (TMK (1) 4-7-05:60), Ahuimanu, Oahu. The permit shall be valid for two years subject to the standard conditions for stream channel alteration permits in Exhibit 7 and the following special condition:

"The applicant shall revegetate and landscape Kahaluu Stream channel at the project site. The landscaping plan shall be designed by a competent landscape architect in consultation with Oceanit Laboratories, Inc., or an equivalent stream consultant and shall be implemented by the applicant at his expense. A copy of the landscaping plan shall be submitted to the Commission prior to construction work. Upon completion of the project, the landscape architect shall notify the Commission, in writing, that the landscaping plan was properly implemented."

MOTION: (Miike/Frazier)
To approve as recommended by staff
UNANIMOUSLY APPROVED

3. Maui Department of Water Supply Petition For Declaratory Ruling

Presentation of Submittal: Roy Hardy

Discussion:

Mr. Hardy explained that this is a resubmittal of the October 28, 2004 petition that was initially submitted to the Commission on December 15, 2004.

The two issues that were stated by Jane Lovell, Deputy Corporation Counsel, representing the petitioner, County of Maui, Department of Water Supply (MDWS), at the time were: 1) That HAR §13-167-25, Filing of Documents, does not require signature of all parties, and 2) a possible solution to this would be to invoke HAR §13-167-27 whereby the Commission could allow amendments to complete applications.

Regarding the first issue, staff reiterated that the landowner's signature is and always has been required for water use permits and The Department of the Attorney General (AG) has concurred with staff. For the second issue, staff argued that it pertained to contested case hearings to the December 15 2004 meeting. The AG concurred that the specific rule is not applicable as argued by the petitioner. The AG further stated that the Commission risks an amendment action subject to being struck down upon challenge. Although the Commission has the authority and discretion to allow amendment of documents that are not in substantial conformance with rules or are insufficient, the Commission also has the discretion to refuse those same documents. This discretion cannot be exercised where to do so would contravene Hawaii Revised Statutes (HRS) §174C-50(c), which is the one-year deadline to apply for existing uses.

Ms. Lovell raised three major points in the staff submittal. The first was that the MDWS's water use permit application was received and acknowledged by the Commission on July 2, 2004, well in advance of the deadline and was timely filed. Ms. Lovell stated that the statute, HRS §174C-51 (c) does not require signatures. The statute says that an application for a permit shall contain the following; the name and address of the applicant and the landowner. Ms. Lovell stated that the application filed before the deadline had all of the information that was required by the statute. The statute also requires that the landowner be stated as a joint applicant and our (MDWS) application stated the landowner as a joint applicant.

The second point made is whether an application that is not complete affects its timeliness. If every incomplete application is treated as untimely then none of the applications were timely. Ms. Lovell urged that all applicants be treated the same way, if their applications are incomplete, that they also be deemed untimely. Ms. Lovell urged the Commission not to equate incomplete with untimely because the statute does not require that.

Ms. Lovell further stated that staff members Charley Ice and Lenore Nakama, dispute the statements that were made under oath by their (MDWS) staff Ellen Kraftsow and Eva Blumenstein. The correspondence between the Commission and the MDWS staff indicated that if they (MDWS) could not get the landowner's signature, they (MDWS) should submit the application without it and do their (MDWS) best to get the landowner's signature as soon as possible.

Ms. Lovell stated that if the Commission denied MDWS' declaratory ruling, they would have to appeal that decision.

Dr. Jonathan Likeke Scheuer from the Office of Hawaiian Affairs (OHA) expressed concern that the enforcement of this requirement on this issue seems to be selective, because OHA has objected to a large number of water use permit applications in this case as well as on the Island of Oahu because they

are incomplete. They are not incomplete because there were no signatures; they are incomplete because the applicants wholly failed to respond to the application form.

Commissioner Whalen asked about the 1-year deadline. Staff stated that the present statute basically states that all existing uses have a 1-year deadline to file from the date of the public notice. In this case it was exceeded. However, there were further provisions in the statute to allow late filings.

Commissioner Ching asked for a better understanding from the AG why HAR §13-167-27 is not applicable and what our exposure is if we were to allow amendments to permits.

Deputy Attorney General, Linda Chow stated that the Commission has the authority to allow amendments; however, where there is a specific statutory provision that says that you cannot allow late filings past the 1-year deadline, it is our (AG) opinion that you cannot allow an amendment that would contravene a specific statute on that issue, a rule cannot be used to override a statutory prohibition. Ms. Chow also clarified that if the application is not complete by the deadline then it cannot be considered as having met the requirements for that filing. Any amendment or change to that application that would make it complete would not have met that filing deadline, so it cannot be timely.

Commissioner Ching asked if there was a way to take action if a request was not complete and timely. Ms. Lovell stated that if an incomplete application is late, there's no question, but the MDWS application was filed before the deadline. It was according to staffs' interpretation of the rule that it was incomplete because it lacked the second signature. If an incomplete application is automatically deemed a late application, then every other application that is incomplete must be deemed late. Ms. Lovell also stated that had they known that staff was going to take a position that an application that was missing the second signature was going to be deemed late, that the interpretation was going to be "incomplete", and always and invariably equals "late", they (MDWS) could have condemned the property and become the landowner. The signature then would have been sufficient and they could have gone forward.

Mr. Hardy stated in his recollection that staff has never accepted water use permit applications without complete signatures. Commissioner Whalen asked if there was any request accepted without a signature by the deadline. Mr. Hardy stated that those that came in without the signature, were acknowledged and returned as incomplete but never came back with the signature to complete the application at a later time. Staff is consistent in their process.

Commissioner Whalen asked if the condemnation were to take place would it have been completed in a timely manner. Ms. Lovell stated that they would have

had to have an emergency meeting and it would have taken about 3-4 weeks, and that we (MDWS) would have had that opportunity had we been told that without the second signature on our application that it was going to be deemed late.

Commissioner Miike agreed with the AG's opinion that if MDWS wants to appeal that is their right.

Mr. Scheuer clarified that all applications are deemed complete as long as all blanks are filled in.

Mr. Hardy cleared up the distinction on completeness of the application. He also stated that the form would be updated.

RECOMMENDATION:

Based on the foregoing, staff recommends that the declaratory ruling requested by MDWS be denied. Instead, staff recommends that the following declaratory ruling be adopted:

MDWS's water use permit application for Wailuku Shaft, as submitted on July 2, 2004, was incomplete because it lacked the co-applicant landowner's signature. By the time a complete application was filed on September 14, 2004, the one-year period allowed for filing applications for existing uses had elapsed. Pursuant to the Hawaii Supreme Court's ruling in the Waiahole Ditch case, the Commission lacks the authority to accept any late filing of an existing use permit application. Because of this lack of authority, the issues of abandonment and estoppel are irrelevant. Further, that HAR §13-167-27 cannot be used to amend two applications to change the status of timely or untimely filing as the one-year deadline for applying for existing uses had expired.

MOTION: (Miike/Dela Cruz)
To approve as recommended by staff
UNANIMOUSLY APPROVED

NON-ACTION ITEMS

Professor Denise Antolini introduced Professor Joseph L. Sax, Professor of Environmental Regulation at Boalt Hall Law School, University of California Berkeley. He has a distinguished career that includes teaching and scholarships in many fields and is known as the expert in environmental law and has written many articles on water law. Professor Sax also authored an article in 1970 on Public Trust Doctrine, the issue of which became the cornerstone of the Waiahole Ditch Contested Case Hearing.

1. Presentation by Professor Joseph L. Sax, "Living with and Implementing the Public Trust Doctrine."

ANNOUNCEMENTS

Mr. Sakoda stated that the second remand of the Waiahole Contested Case Hearing was held on April 5, 2005. Written closing arguments are due April 26, 2005, followed by oral closing arguments before the hearing officer on May 3, 2005. May 17, 2005 is the deadline for the parties to file the Findings of Fact, Conclusions of Law, and Decision and Order to the Commission. Staff will then put together the proposed Findings of Fact followed by another hearing before the Commission.

Mr. Sakoda reported that some questions regarding Central Maui streams, from Waihee to Waikapu, would be answered after additional information is received, and that staff is continuing investigation on this matter.

Next Commission Meeting (Tentative)

1. May 25, 2005
2. June 15, 2005

The meeting was adjourned at 11:07a.m.

Respectfully submitted

PAULYNE ANAKALEA
Secretary

Approved as submitted:

DEAN A. NAKANO
Acting Deputy Director