

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

DATE: March 17, 2006
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 9:10 a.m.

ROLL CALL

The following were in attendance:

MEMBERS

Mr. Peter Young
Ms. Meredith Ching
Mr. Neal Fujiwara

Dr. Chiyome Fukino
Dr. Lawrence Miike
Ms. Stephanie Whalen

STAFF

Dean Nakano, Roy Hardy, Ed Sakoda, Kevin Gooding, Dean Uyeno, Lenore Nakama

COUNSEL

Mr. Colin Lau, Esq.

OTHERS

Kapua Sproat, Dr. Jonathan Scheuer, Manabu Tagomori, Linnel Nishioka, Mayor Alan Arakawa, Jane Lovell, Ming Ding, Steve Anthony

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

B. ANNOUNCEMENTS

Acting Deputy Director Dean Nakano stated that the February 15, 2006 minutes were not available at this time and will be provided at the April meeting for consideration.

Mr. Ed Sakoda stated that Tim Steinberger of URS Consulting Engineers notified staff that the Kauai Marriott had some problems with culvert collapses from the heavy rain. In order to get material to fix this they have to cross Huleia Stream that runs into Nawiliwili Bay. Working under the Governor's emergency authorization, he informed the Commission that they would bring the area back to its normal state after completion of the project.

E. STREAM PROTECTION AND MANAGEMENT

1. Application for a Stream Channel Alteration Permit (SCAP-OA-385), South Punaluu Bridge Replacement, Punaluu Stream, Oahu, TMK: 5-3-002:039(por), 5-3-003:001(por) and 5-3-004:001(por)

Presentation of Submittal: Ed Sakoda

Mr. Sakoda stated that under Standard Stream Channel Alteration Permit Condition Number 4, generally 6 months are allotted for the project to get started; however, in this case because there are other permits involved and more time was requested, an extension to 12 months was granted to get the project started.

Commissioner Miike asked if this is the stream that was damaged in the recent flood and would this affect the timetable or delay the project. Mr. Sakoda stated that it was not the same stream and that this project would start within the year.

RECOMMENDATION:

That the Commission approve a stream channel alteration permit for the replacement of South Punaluu Bridge, TMK: 5-3-002:039(por), 5-3-003:001(por), and 5-3-004:001(por). The stream channel alteration permit will be valid for two years and subject to the standard conditions for stream channel alteration permits in Exhibit 3.

MOTION: (Whalen/Ching)

To approve submittal as recommended by staff.

UNANIMOUSLY APPROVED

C. GROUND WATER REGULATION

- 1. Clarification to the Combined Contested Case Hearing for the Petition To Amend Interim Instream Flow Standards of Waihee, Waiehu, Iao, & Waikapu Streams, Iao Ground Water Management Area High-Level Source Water Use Permit Applications, and Complaint C04-31 Regarding Waste of Surface Water, Wailuku, Maui, and Commission Delegation of Authority Allowing the Hearings Officer to Appoint a Mediator for Complaint C04-31 Regarding Waste of Surface Water, Wailuku, Maui**

Commissioner Meredith Ching recused herself from item C1.

Presentation of Submittal: Roy Hardy

RECOMMENDATION:

That the Commission:

1. Clarify that the action taken by the Commission on February 15, 2006 included the waste complaint (C04-31) as part of the combined CCH.
2. Direct the hearings officer to first establish all parties for all issues through the standing, prehearing, and intervenor procedures as specified through the CCH process. Any party who is denied standing by the hearing officer for any issue will be afforded an opportunity to be heard by the Commission before final parties for the combined CCH are established.
3. Clarify that once the final parties for the combined CCH are established, the specific parties involved in the waste complaint (C04-31) shall enter the mediation process and the remainder of the combined CCH shall be put on hold until the mediation process is completed.
4. Authorize the hearings officer for the combined CCH to appoint a mediator, with the appropriate administrative help from staff, to begin the mediation process for the waste complaint (C04-31).
5. Clarify that upon completion of the mediation process for the waste complaint C04-31 the combined CCH shall continue.

DISCUSSION:

Commissioner Miike had a procedural question regarding the sequence. A standard hearing is held to decide who the parties are. The parties that have standing participate in the mediation and the CCH. Any party denied standing could appeal to the Commission to be included. The CCH is then placed on hold and the mediation goes to a separate

mediator. When the mediator's report comes in, does the Commission then decide what to do with the recommendations or is it placed on hold until the CCH is completed and all come to the Commission. If there is a recommendation by the mediator, can the hearings officer act on that subject to the CCH?

Commissioner Miike stated that if the waste complaint contained some action that the mediator recommends merely precipitously, we wouldn't want to hold that while the CCH continues.

Mr. Hardy stated that any issues where the parties come to an agreement is a final determination. Issues that are not resolved would continue with the CCH.

Commissioner Miike stated that if the mediator makes a recommendation, some action could be taken prior to it being finally resolved or addressed in the CCH. The CCH will then deal with the whole matter.

Mr. Hardy stated that if a recommendation comes out and the parties don't agree, it may or may not go straight to the Commission. Staff would feel more comfortable if the recommendation had the full support of the parties and mediator prior to going to the full Commission but it would be up to the hearings officer to make that decision.

Commissioner Miike further noted the timing issue that if the parties don't agree yet the mediator has a recommendation, such a recommendation could be implemented 1) after the CCH is over or 2) before the CCH begins. The second issue would be if the mediator's recommendation should be 1) decided by the Commission prior to the CCH continuing or 2) delegated to and decided by the hearings officer until the larger issues are resolved by the CCH.

Ms. Kapua Sproat, attorney with Earthjustice (EJ) representing Hui O Na Wai Eha and Maui Tomorrow Foundation, Inc. stated the issues that Commissioner Miike raised was one of concern to Ms. Sproat and her clients, and was surprised to see this on the Commission's agenda. They were very pleased with the outcome of the last meeting and thought that the parties had collectively come to an agreement to move forward. Ms. Sproat stated that the recommendation was slightly different from their recollection of what happened at the February 15, 2006 Commission meeting. Ms. Sproat's clients expressed concerns regarding the need for immediate relief with regard to the citizen complaint. Ms. Sproat thought that the Commission had prioritized acting on that specific complaint.

Ms. Sproat also raised concerns for the need of attorneys especially EJ attorneys to be able to work directly with Commission staff in order to encumber existing funding that's available for USGS studies. Ms. Sproat stated that they did not want to limit that ability to a single combined CCH. She also stated that they had issues with combining

everything into a mammoth contested case because they thought it would raise ex parte communication issues.

A proposal on page 2 of their testimony is how they would request the Commission to move forward. This proposal was also circulated to the parties that would be affected; HC & S, Wailuku Water Company, Office of Hawaiian Affairs (OHA), and the Maui Department of Water Supply (MDWS). MDWS and OHA support the recommendation, HC & S has no objections, and the Wailuku Water Company has some questions. A meeting will be convened after a formal response is received.

Ms. Sproat stated that they are requesting that there be 2 separate CCHs. Ms. Sproat stated the staff's concern and desire to determine parties. Instead of a single CCH they would breakout the waste complaint, the Commission can appoint a hearings officer and mediator and order the parties into mediation before commencing the CCH.

If we're not going anywhere in mediation, we would not want to waste the 60 or 70 days. We would just want to move forward with the CCH. The reason we would prefer this as to combining it into one is because there are issues of interim relief. If the parties, through mediation, were to agree on some issues but not everything, the hearings officer can take action on those matters. We then could reduce the scope of the CCH if there has to be one and move forward in regard to those issues. Our concern is if we place everything into a single combined CCH that there are many more difficult issues that will be raised in a context of setting IIFSs, especially with beneficial instream needs. We don't want to hold up any kind of interim relief while we resolve the other issues.

Commissioner Miike stated that one option would be if the parties could not come to an agreement the mediator would submit its report. The Commission or if delegated to the hearings officer, can look at the mediator's recommendations and make a decision on that. The only difference between that and what EJ is proposing is that that decision process itself becomes part of a CCH where you have both sides arguing again in front of the hearings officer or Commission.

Ms. Sproat stated the way they had hoped that it would take place, is that they could do it in the process of the CCH. A hearings officer and mediator would be appointed, and a determination of parties in standing would be made. Mediation would be the first step.

Commissioner Miike stated that if there were no agreement at the mediation, the parties would then come before the Commission or the hearings officer and then make a determination on the waste complaint. Once that is issued, then move on to the other part.

Ms. Sproat stated that their only concern with that is that they respectfully disagree with the Attorney General's (AG) opinion referring to the ex parte communication concerns

and believe that is still an issue. The people that would be held responsible would be the attorneys themselves, including Ms. Sproat.

Ms. Sproat had concerns discussing substantive issues regarding the IIFSs that may result in a total or partial settlement of that particular case with staff if that's in the context of the CCH. Ms. Sproat did not think this is permissible. If it was procedural issues that would be one thing but she had concerns about discussing other issues that could result in a settlement.

Commissioner Miike asked if the standing hearing would determine the parties for both or would there be two standing hearings? Two cases would be two standing hearings but if the issues are similar and the same hearings officer the Commission could take notice of declarations or testimony that was provided with regard to a citizen complaint. This might expedite the process and make the second a lot shorter.

Commissioner Fujiwara asked staff's opinion about the hearings?

Mr. Hardy stated that staff sees it in terms of efficiency to have one standing hearing for all parties since the issues are all related.

Chairman Young asked if we could have one standing then address the waste issue first and agree to resolve that first then take it to the Commission for action. It would be like having two.

Ms. Sproat stated that the only concern would be the ex parte communications as she feels there is a line that would be crossed and they would not do that.

Commissioner Miike stated that the only thing that is different is whether two standing hearings would be needed, one after the other on the same day.

Acting Deputy Director Dean Nakano stated that we're trying to accomplish the same goals. If it means separating it to two hearings but have them scheduled on one day as Dr. Miike stated, one after another, we can culminate that and move on with the waste complaint, and we'll achieve the same goal.

Commissioner Whalen asked if there was any other procedural duplication or lack of efficiency in having two rather than one.

Ms. Sproat stated that with regard to the mediation, they would like the Commission to expedite this as soon as possible. It's been a month since the last Commission meeting and it takes time to appoint the mediator and hearings officer. The Commission was urged to act as soon as possible.

Commissioner Miike asked if one could ask for a CCH purely on a waste complaint. You can ask for a CCH on a WUP but if we bifurcate they are separate issues, Commissioner Miike stated that he was not sure if there is legal authority for a CCH waste complaint.

Ms. Sproat checked into that and believes that there is legal authority for a CCH waste complaint. If the Commission determines whether a CCH is necessary, it will be ordered and a motion made from the Commission determining that a CCH is necessary.

Ms. Linnel Nishioka representing Hawaiian Commercial and Sugar Company (HC&S) in this process, stated that they have no objections to what Ms. Sproat is proposing, no objection to the March staff's proposal and no objection to the February Commission action that was done.

Ms. Nishioka's two concerns on the mediation was that the more parties one admits to a mediation the lower the chances are that you will have a successful mediation. The second concern on the mediation level is that it would be inappropriate if the mediator proposes any type of interim relief in terms of a restoration. If there were an agreement between the parties for an interim restoration there would be no objection because that would be between the parties. If there is no agreement between the parties and the mediator takes it upon his/herself, to make that one of their recommendations then for due process issues we would have an objection that should go to a CCH. Ms. Nishioka also stated that they were not sure what recommendations the mediator would arrive at if there is no agreement between the parties to the extent that it would affect HC&S's current use of water. We would not want it to just go to the Commission without any further hearings.

The last thing for the standing hearing, Ms. Nishioka stated that preferably she suggested the hearing be done in one day whether it's bifurcated or another way. It's an expense for my clients to travel twice to basically argue the same thing. Ms. Nishioka agrees with the interpretation from the AG's office regarding the ex parte communication. Ms. Nishioka agrees that there should be one hearings officer if there should be two separate hearings. There still may be duplication between the two hearings because of the related matters. Ms. Nishioka feels confident that if issues were brought up in the waste complaint and the parties are basically the same we could proceed with the other two without having to go through the issues in the waste complaint.

Commissioner Whalen asked if there were two separate hearings would you have to repeat yourself in the second hearing even though you said it in the first?

Ms. Nishioka stated that the hearings officer could incorporate the first record into the second hearing.

Commissioner Miike stated that if there were no successful mediation they would rather argue the case in a CCH setting rather than let the mediator or hearings officer make a recommendation to the Commission.

Ms. Nishioka answered by saying that the mediation is to see if there can be an agreement, if there is no agreement then the mediator should not have any recommendations other than there was no agreement with the parties. At this point the question should be whether or not there should be a CCH for a waste complaint? Ms. Nishioka stated that if the people feel that it's not appropriate to have a CCH for a waste complaint they can make a motion to dismiss the CCH in front of the hearings officer.

Ms. Sproat mentioned their concerns about duplication and making sure that everything is efficient as possible as most of us have limited time and resources. In addition, we also share the concern of the larger the number of parties in mediation the more difficult it would be.

Ms. Jane Lovell, Deputy Corporation Counsel, representing the MDWS stated that they agree with the proposal that's been submitted by EJ as to the procedural aspects and don't think there will be unnecessary duplication as there could be one hearing date with basically one following the other. The exhibits and written testimony could be offered for both cases at the same time.

One concern Ms. Lovell stated was that of a mediator making a recommendation to this body in that the mediation must proceed in a neutral way. The parties have to be free and keep their secrets to the mediator and be completely open and honest about their chances of success. Ms. Lovell thought they would be inhibited from doing so if the mediation fails and the mediator is going to do anything other than to report where the parties were able to agree and what issues remain for resolution. The hearing officer's job is to report back to the Commission and make recommendations. We would have no objection to that but would have problems with the mediator doing anything other than presiding over the mediation and trying to help bring about a resolution.

Dr. Jonathan Likeke Scheuer representing OHA stated that OHA does agree with the recommendation made by EJ.

Commissioner Whalen had a procedural question in that, if there are two CCH and the subject matter is implied, do they proceed along at the same time?

Chairman Young answered no.

Commissioner Whalen then asked if there would be separate hearing for each.

Chairman Young stated that the first would be on the waste complaint.

Commissioner Miike stated that the waste CCH goes forward and the hearings officer gives a recommendation and the Commission votes. In the second phase, they still have to look at the water that was dealt with in the first part because it's going to be a file determination about instream flow standards and water use permits. It may modify the first part. Commissioner Miike stated that he thinks everyone would want a resolution on the waste complaint before a normal amount of times passes. Commissioner Miike also stated that the second CCH would be taking a look at making a determination on IIFSs and WUPAs. The waste complaint right now applies to an off stream use, the second CCH would make a final determination on the off stream use so it may affect the waste complaint.

Chairman Young clarified Ms. Sproat's recommendation, taking her two lists, 1-6 and 1-3 and replace that with all of the text from the recommendation.

Acting Deputy Dean Nakano stated that it would be okay to incorporate the proposed recommendations by EJ but we should leave items 4 and 5 with respect to staff's recommendation, authorizing the hearings officer to appoint a mediator and clarify that the mediation process for the waste complaint shall continue.

Chairman Young said that it would no longer be combined but just CCHs.

Ms. Sproat then stated that if the Commission would like to hold two separate standing hearings but on the same day, under the second number three, it should say, "after the determination of parties."

Acting Deputy Director Dean Nakano stated that we would not need five recommendations but four. The submittal will be amended by EJs recommendations. Specifically we will be replacing and amending the submittal from the second page of Ms. Sproat's letter from, "Regarding the Waste Complaint" to the end of the second three regarding the IIFS petition and WUPAs for the high-level dike sources.

AMENDED RECOMMEDATION:

Regarding the Waste Complaint:

- (1) Prioritize acting on the Waste Complaint, doing so before taking action on the IIFS petition and permit applications for the high-level dike sources;
- (2) Determine that a contested case is necessary;
- (3) Authorize the Chair to appoint a Hearing Officer to oversee this process;
- (4) Specify that the Hearing Officer has the power to determine relevant parties;
- (5) Order the Hearing Officer to appoint a mediator, and order the parties into mediation before commencing the contested case; and
- (6) If mediation proves fruitless, immediately begin the contested case in

order to provide expeditious relief.

Regarding the IIFS petition and water use permit applications for the high-level dike sources:

- (1) Determine that a contested case is necessary regarding the IIFS Petition and high-level dike sources, but that this contested case is separate from the contested case/mediation regarding the Waste Complaint;
- (2) Authorize the Chair to appoint a Hearing Officer;
- (3) Delay the start of the contested case to allow the parties time to work with Commission staff regarding ground and surface water studies by USGS, for which funding has already been approved.

MOTION: (Whalen/Fujiwara)
To approve as amended by staff
UNANIMOUSLY APPROVED AS AMENDED

G. NON-ACTION ITEMS

1. Update on Waihee and Iao Aquifer System

Presentation by Kevin Gooding

Mr. Kevin Gooding presented a PowerPoint presentation discussing Commission decisions on Iao and Waihee, pumpage in the Waihee-Iao Aquifer System, water levels and chlorides in the Waihee Aquifer System, Iao Pumpage and data on the transition zone from the Waiehu deep monitor well, and update on the two Water Commission deep monitor well projects in the area, and the Central Maui Ground Water Availability Study.

Mr. Gooding stated that a liaison committee meeting was held on March 14, 2006 for the USGS Central Maui Ground Water Availability Study. The project is on schedule and a draft report will be out in October 2006 with the final out in September 2007.

Ms. Kapua Sproat, attorney with EJ representing Maui Homeowners Association with regard to the designation of the Waihee and Iao Aquifers that was filed in July 2001, stated that in February 2004, the Commission modified the triggers for designation of Waihee. The understanding was that the Kanoa test hole trigger was rescinded based upon a number of conditions that included limited pumping and signing of a Memorandum of Agreement (MOA) with Maui County to limit pumping to 4 mgd. What we see now based on the current numbers is that the MOA hasn't been finalized and the pumping is beyond that.

Ms. Sproat asked that since the conditions of rescinding the trigger for automatic designation of Waihee were never completed and pumping is beyond, what action if any, would the Commission take? Will there be follow-up at another meeting?

Mr. Roy Hardy stated that staff's recommendation was to set the trigger at 4.5 mgd; however, all the triggers were rescinded by the Commission and a request made to keep it below 4 mgd. There was no MOA but a reduced number that was less than what the staff was recommending. The work on the model continued and is ongoing.

Acting Deputy Director stated that the action taken by the Commission was to rescind all the triggers and request that MDWS maintain pumpage at a 4 mgd level. We recognize that pumpage is at 4.6 mgd and the need for continued vigilance in the area, including efforts by the CWRM to secure funding to drill two additional monitor wells in the area.

H. NEXT COMMISSION MEETINGS (TENTATIVE)

1. April 19, 2006
2. May 24, 2006

The meeting was adjourned at 10:23 a.m.

Respectfully submitted,

PAULYNE K. ANAKALEA
Secretary

Approved as submitted:

DEAN A. NAKANO
Acting Deputy Director