

MINUTES  
FOR THE MEETING OF THE  
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: April 16, 2009  
TIME: 9:00 a.m.  
PLACE: Kalanimoku Building  
Conference Room 132

Chairperson Laura H. Thielen called the meeting of the Commission on Water Resource Management to order at 9:09 a.m.

The following were in attendance and/or excused:

**MEMBERS:** Ms. Laura Thielen, Mr. Neal Fujiwara, Mr. James Frazier, Ms. Meredith Ching, Dr. Chiyome Fukino

**STAFF:** Ken Kawahara, Ed Sakoda, Roy Hardy, Lenore Ohye, Robert Chong, Denise Mills, Neal Fujii

**EXCUSED:** Dr. Lawrence Miike, Ms. Donna Kiyosaki

**COUNSEL:** Julie China, Esq.

**OTHERS:** Koa Kaulukukui (Earthjustice); Jeff Eng (DWS, County of Maui); Yvonne Izu (Morihara Lau & Fong); Pam Bunn (Office of Hawaiian Affairs); Jan Lovell (Maui DWS); Isaac Moriwake (Earthjustice); Gordon Tribble (USGS); Kapua Sproat (UH)

**A. APPROVAL OF MINUTES**

1. February 18, 2009  
To defer approval of the minutes since commissioner who had a concern was not present.

MOTION: (Ching/Fukino)  
UNANIMOUSLY APPROVED TO DEFER.

2. March 18, 2009

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

Chair Thielen said there was a request to move up agenda item D1 Declaratory Ruling related to the Na Wai Eha Surface Water Management Area.

Commissioner Ching recused herself from item C1.

Minutes

**C. STREAM PROTECTION AND MANAGEMENT**

1. Declaratory Ruling No. DEC-MA09-S12, Surface Water Use Permit Applications, NA WAI EHA SURFACE WATER MANAGEMENT AREA, MAUI

Presentation by: Ed Sakoda

**RECOMMENDATION:**

Staff recommends that the following declaratory ruling be adopted:

Section 174C-51(1)(B), HRS does not apply to the water use permit applications for the Na Wai Eha Surface Water Management Area because the interests of the applicants are not as lessees, licensees, developers, or any other persons with a terminable interest or estate in the land which is the water source of the permitted water. This would include applicants who are claiming rights or interests such as kuleana, appurtenant, traditional and customary, contracts for delivery of water, or similar interests that pertain to the water and not the land underlying the water. As such, the landowner is not required to be a joint applicant on the application and the signature of the landowner is not required. Information as to the name and address of the source landowner is still required to be provided on the permit application. This would not apply where a specific applicant is a lessee, licensee, developer or has some terminable interest in the land which is the water source of the permitted water.

**TESTIMONY:**

1. Pam Bunn of the Office of Hawaiian Affairs (OHA) said that OHA, the community groups represented by Earthjustice, the County of Maui and Wailuku Water Company all agreed on this declaratory rule. They also worked with staff and deputy AG. Pam Bunn said OHA has one suggestion to make to the language (handout distributed) which is the last statement in the declaratory rule that starts “this would not apply...” this sentence seems to be referring to the previous sentence and for clarification purposes would like to have this sentence moved.

2. Yvonne Izu of HC&S agrees with OHA’s clarification of moving the last sentence. HC&S’s concern is with the statement that starts “This would include applicants...”, and wanted to verify that this was not an exclusive list of people that would not be required to obtain the landowner signature. HC&S is not claiming kuleana, appurtenant, or traditional and customary rights, but has something more than a mere contract for delivery of water with Wailuku Water Company. They want it clarified that so long as HC&S does not fall into the category of being a lessee, licensee, developer, or has some terminable interest in the land which is the water source of the permitted water, that HC&S would not be required to obtain the landowner’s signature.

Chair Thielen asked if HC&S raised this concern with staff and the deputy AG. Ms. Izu replied, no.

3. Jane Lovell of the County of Maui and its Department of Water Supply, stated that they have complete agreement between all warring parties. It is surprising that Wailuku Water

## Minutes

Company, OHA, the community groups represented by Earthjustice and the County were all able to read the statute the same way; and in their discussion with the commission staff and their legal advisors, eventually got to the point where they are today. Ms. Lovell urged the Commission to adopt the staff's recommendation with the clarification as proposed by OHA. Jane Lovell raised an issue that under the proposed declaratory ruling the name and address of the source landowner is still required to be provided on the permit application. The County doesn't have a problem with that except for the practicality of trying to determine where the source is. Because if you're dealing with a well, you got a specific site, but if you're talking about a system of streams and ditches and auwai that connects into some of the ditches, it may be difficult for a particular applicant to determine who the source owner is. The County has been approached by several kuleana users in the Waihee area wondering if the County is a landowner of the source of their particular water. We would not want the applicant to have to do a survey, or specific GIS coordinates, or have to somehow determine where a particular source of water is. The County supports staff's recommendation with the proposed language change from OHA.

3. Isaac Moriwake of Earthjustice had nothing more to add to what's already been said.

Chair Thielen said there were three suggested changes; 1) OHA's language clarification, 2) County of Maui's practical concern and 3) HC&S's clarification on the intent, and asked for staff's and deputy AG's input. Ed Sakoda stated that he agreed with OHA's changes for clarification and felt that HC&S's concern was not necessary because the language does not exclude anything that's not listed; it just listed examples of some of the types of applicants. He acknowledged Maui County's concern of requiring the name and address of the source landowner, but the signature is still required by the Water Code on the permit application. He agreed that when you're talking about surface water, the source may be from multiple streams over multiple landowners so it could be a challenge for people to fulfill that requirement for surface water. Ed Sakoda said it wasn't a problem in this specific case. Chair Thielen asked if the language in this ruling could be a problem in other cases where there is a surface water system. Mr. Sakoda said this would apply to Na Wai Eha but if another surface water management area comes up where there is a problem then there would be another declaratory ruling. Chair Thielen asked if it could possibly come up as a problem for any portion of Na Wai Eha surface water management area. Mr. Sakoda did not think it would be a problem. Chair Thielen said the question she's asking is about water use applications for the Na Wai Eha surface water management area. The last sentence requires that information as to the name and address of the source landowner be provided on the permit application and asked if there are any instances in the Na Wai Eha surface water management area where somebody may have difficulty identifying the source landowner, because we're dealing with surface water.

Kapua Sproat, director of the Environment Law Clinic at the University of Hawaii, reported that the clinic has been assisting some of the members of the community in completing their water use permit applications. It is hard for some folks to identify exactly what source and who the landowner is for a particular source landowners. They have been using GIS, property tax information records in trying to identify the source. It could prove more difficult for the average person who might not have internet access or access to tax map key records. Kapua Sproat asked if there was an understanding on the part of the Commission that the information on the name and address of the source landowner would be provided to the best of the applicant's knowledge with the understanding that if for some reason, they try to the best of their ability to fill out the

## Minutes

form but have to wait for the research to determine that actually it was right on the dividing line between two parcels and it was a different landowner, then the application itself would not be deemed incomplete but could just be corrected.

Chair Thielen asked how many source landowners are there. Ed Sakoda said there are diversions off the streams and not off the ditch system that will have different source landowners. There may be about a dozen but was not sure how to revise the declaratory ruling to accommodate that. Kapua Sproat suggested that the sentence 'Information as to the name and address of the source landowner is still required to be provide on the permit application.' to be amended to read 'Information to the best of applicant's knowledge regarding the name and address....'. Deputy AG Julie China said when they sign off on the application they are signing off to the best of their knowledge and Ed Sakoda pointed out that right above the signature block there is a statement 'to the best of your knowledge'.

Chair Thielen asked deputy AG about the question of including "but not limited to". Deputy AG China said it could be put in but felt it wouldn't make a difference, or could put 'would include but not be limited to'. This would be inserted in 174C-51(1)(B), in the second sentence, 'This would include *but not be limited to* applicants who are claiming...'

Chair Thielen recapped the changes to be the handout proposed by the Office of Hawaiian Affairs as distributed, plus the amendment proposed by HC&S of adding "*but not be limited to.*"

MOTION: (Frazier/Fukino)

To approve the submittal as amended. (Frazier, Fukino, Fujiwara, Thielen) Ching abstained from vote.

APPROVED AS AMENDED.

## **B. ANNOUNCEMENTS**

Deputy Ken Kawahara announced that the geologist position for the instream use protection section was proposed to be abolished in the budget that was submitted to the House. Copy of budget worksheet was distributed. The geologist position and the \$529,046 budget reduction were restored in the House version that was transmitted to the Senate on March 16. The Senate version however, abolished the geologist position and reduced the budget by \$529,046 (same as the original reduction). Deputy Kawahara said staff continues to actively pursue Federal matching money.

Rainfall and Drought: There have been near to normal rainfall on Maui and the eastern Big Island in March and there is some improvement in drought conditions. However, drought continues to impact some areas on Maui, Molokai, Lanai, and portions of the South Kohala, North Kona and south Kona districts.

Staff is still awaiting the Bureau of Reclamation's response to the four proposals for emergency drought assistance that were submitted in November. Copy of Act 238 and the status of the projects approved by the Commission were distributed.

## Minutes

East Maui Streams Update – Deputy Kawahara reported that staff conducted their 7th visit on April 6-8. On day 1, staff met with representatives from the Department of Agriculture (DOA), the Maui Office of Economic Development and the Maui Farm Bureau, as well as with several farmers that use water from the Kula Agricultural Park, to get a better understanding of their farm practices and water needs. On day 2, staff went out with the Maui Department of Water Supply (DWS) and also accompanying was staff from the DOA, to visit the upper and lower Kula Water Treatment Systems (including intakes of the Waikamoi Flume) and also saw the Maui DWS treatment facility at Kamole Weir. On day 3, HC&S staff took our staff and DOA staff to see HC&S’ facilities including one of their hydropower plants, the sugar mill and power plant operation and food-grade sugar production facility at Puunene, and to several cane fields looking at the various stages of growth, from seed-cane fields to fully-mature fields ready for harvest.

This was a good opportunity for our staff to look at other non-instream uses. Deputy Kawahara said he would like to plan a site visit for the commissioners. Deputy Kawahara would be recommending to the commissioners to do a site visit to some of the Na Wai Eha sites, especially the surface water management as well as what’s going on with the contested case to get a good picture of the field conditions.

National Hydrography Dataset (NHD) and Watershed Boundary Dataset (WBD) Stewardship Conference in Lakewood, Colorado: The USGS and its partners have made a huge investment in the NHD and the WBD. The USGS invited staff to participate in this and provided funds for the conference, hotel and airfare for the conference.

### OUTREACH:

Staff will speak at a May 14 Lorman Seminar on “Integrating Water Law and Land Use Planning”. Commissioner Miike is also on the agenda and will be giving a talk entitled “Decision Making Process of the State Water Commission”.

Staff met with the Iolani Roboraiders middle-school students who presented their version of stormwater reclamation and reuse projects that will be on display at the Iolani Fair on April 17 and 18 and entered at the upcoming national robotics competitions taking place in Ohio.

Staff will be making a presentation at the 2009 American Water Works Association Hawaii Section annual conference and exposition on Oahu. This presentation will highlight the recently completed stormwater reclamation and reuse appraisal study, which was funded by the U.S. Department of Interior, Bureau of Reclamation. We will also be presenting a draft of the 5 year update to the Hawaii Well Construction and Pump Installation Standards for public review and comment.

## C. GROUND WATER

- 1. Grace Pacific Corporation, Cancellation of Water Use Permit (WUP) NOs. 068 and 080, Wells C-1, C-2, C-3, and B-1 (Well Nos. 1906-03 to -06), TMK (1) 9-1-014:002, Malakole Aquifer System Area, Oahu**

Presentation by: Denise Mills

## Minutes

### RECOMMENDATION:

That the Commission:

1. Permanently cancel Water Use Permit Nos. 068 and 080.

Commissioner Frazier asked if there were standards for sealing the wells. Denise Mills said yes there are and it is contained in the well construction standards. Commissioner Frazier inquired how we would know that was done to the standards if it was done back in 2005. Ms. Mills explained that they are required to get a well construction permit for well abandonment and did apply for the permit, the permit was approved, and they did the work. To follow up the work and check if it was done in accordance with the standard, they have to submit a well abandonment report and it submitted and filed, and staff accepted the work as complete.

MOTION: (Frazier/Fujiwara)  
To approve the submittal.  
UNANIMOUSLY APPROVED.

### E. PLANNING BRANCH

1. **Request for Approval to Modify Memorandum of Agreement with Central Maui Soil and Water Conservation District to Extend the Period of Agreement and Clarification of Delegation of Authority Regarding Act 238, SLH 2007, Disbursement**

Presentation by: Neal Fujii

### RECOMMENDATION:

Staff recommends the following:

1. That the Commission approve a modification of the June 6, 2008 memorandum of agreement with CMSWCD (Planning and Engineering Study for Stormwater Reclamation in Maui County – Kula District) extending the period of agreement to December 31, 2011; and
2. That the Commission clarify its delegation of authority to the Chairperson to include modifying and amending existing memoranda of agreement with drought mitigation project sponsors to disburse drought mitigation funds appropriated under Act 238, while complying with conditions imposed in the original delegation of authority in the December 19, 2007 Commission meeting.

Commissioner Ching asked if the amendments include amending the costs of the contract or is it tied in to the original Memorandum of Agreement. Neal Fujii said they would come back to the Commission for any cost modifications. Chair Thielen said it is limited to that Exhibit 2 and that includes the project cost.

## Minutes

Commissioner Frazier asked if all funds were encumbered. Neal Fujii said there was \$4,000,000 appropriated and that approximately \$10K to \$15K out of the \$4M was not encumbered. Funding was lapsed because the actual cost of some of the projects was lower than the estimate; and also because funding for some projects could not be encumbered within the short time-frame for procuring and encumbering the funding (before the end of the fiscal year).

MOTION: (Fujiwara/Ching)  
To approve the submittal.  
UNANIMOUSLY APPROVED.

### **F. NEXT COMMISSION MEETINGS (TENTATIVE)**

1. May 20, 2009
2. June 17, 2009

Meeting was adjourned at 9:51 a.m.

Respectfully submitted,

KATHLEEN OSHIRO  
Secretary

APPROVED AS SUBMITTED:

KEN C. KAWAHARA  
Deputy Director