

FOR THE MEETING OF THE  
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: July 15, 2009  
TIME: 9:00 a.m.  
PLACE: Kalanimoku Building  
Board Room 132

Chair Laura Thielen called the meeting of the Commission on Water Resource Management to order at 9:04 a.m.

The following were in attendance and/or excused:

**MEMBERS:** Ms. Laura Thielen, Dr. Lawrence Miike, Mr. Neal Fujiwara, Ms. Donna Kiyosaki, Mr. Sumner Erdman

**STAFF:** Ken Kawahara, Ed Sakoda, Roy Hardy, Lenore Ohye, Ronnie Torres, Ryan Imata, Robert Chong, Dean Uyeno, Charley Ice, Chui Cheng

**EXCUSED:** Dr. Chiyome Fukino

**COUNSEL:** Linda Chow, Esq.(1<sup>st</sup> item) and Colin Lau, Esq.

**OTHERS:** Jane Lovell (County of Maui, Deputy Corporation Counsel), Taryoung Kim (ECI), Karen Chun (State DOT)

Agenda items were taken out of order: A.2., C.1., A.1., C.2., D.1., D.2., and B.  
(Note: language for deletion is ~~strikethrough~~, new/added is underlined.)

**A. APPROVAL OF MINUTES**

**1. May 20, 2009**

**MOTION:** (Fujiwara/Miike)

**TO APPROVE THE MINUTES.** (Fujiwara, Miike, Thielen and Erdman. Kiyosaki not present at the time of vote.)

**UNANIMOUSLY APPROVED.**

**C. GROUND WATER**

- 1. Clarification of the Commission's Reasoning in Granting the Motion Approved at the February 18, 2009 Meeting, Agenda Item D.2, for Mr. Bryan Sarasin, Mr. John Varel, Maui Department of Water Supply (MDWS), Applications for Water Use Permits:**
- Waihee-Sarasin Well (Well No. 5631-08), Future (Domestic and Agricultural) Use of 0.051 mgd, WUPA 853, TMK 3-2-007:016**
- Waihee-Varel Well (Well No. 5631-07), Future (Domestic and Agricultural) Use of 0.041 mgd, WUPA 825, TMK 3-2-001:001**
- Iao Tank Site Well (Well No. 5230-03), New (Additional Municipal) Use of 0.802 mgd, WUPA 846, TMK 3-5-001:021**

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**Mokuhau Well 3 (Well No. 5330-11), New (Additional Municipal) Use of 0.589 mgd, WUPA 847, TMK 3-3-002:024**

**Waikapu Tank Site Well (Well No. 5131-01), New (Additional Municipal) Use of 0.900 mgd, WUPA 848, TMK 3-5-004:099**

**Iao Tunnel - Kepaniwai (Well No.5332-02), New (Additional Municipal) Use of 0.840 mgd, WUPA 852, TMK 3-3-003:003**

Commissioner Kiyosaki said she had discussed this with Deputy Ken Kawahara but wanted to put on record the discussion regarding this agenda item. There were a lot of concerns raised about the public and non-public trust issues especially domestic versus municipal use, and the 60% guideline that was set regarding the portion of municipal use that is for domestic purposes, and whether or not that's a public trust. It seemed as though when the motion was actually in front of the Commission in terms of the meeting minutes, it did not reflect the fact that the Commission wanted to make sure that the staff submittal and write-up, which she believed could lead some people to believe that the Commission was agreeing with certain statements made in there, was not what the Commission wanted to vote on as far as the motion. Commissioner Kiyosaki stated that her only concern with this submittal is that she's not sure how this is amending the motion or if it is. It's a clarification so years later when people look back at this particular item and how it was addressed. Commissioner Kiyosaki wondered if this clarification stands on top of the motion and was not sure how to clarify this for the record because that was the whole purpose of this. That, when someone looks at it, they may not have necessarily read through all of the transcript of what was said before the motion was approved, so the motion needed to stand on its own merit, need to be able to be self explanatory. That was the reason for this. She just wants to make sure that we're not selling ourselves short.

Chair Thielen said that the last paragraph in the staff's submittal is the attempt to provide that clarification. This would be supplemental to the minutes of the meeting and the motion that were voted on. This clarification of the Commission's intent is that the Commission wanted to be clear that their decision of the approval of the agenda item was not based on the Commission defining public trust and non-public trust uses or categorical prioritization uses. Chair Thielen added that it wasn't necessarily aligned with the staff's submittal write-up so that the intent was to find language to make it clear.

Commissioner Kiyosaki said she totally agreed with the language of the last paragraph of the staff's submittal and added that her only concern was that it is not an amendment to the motion which would be a whole different set of issues that the Commission needed to address which unfortunately may be a little too complicated at this point in time. Commissioner Kiyosaki said she is okay with it, and that she just needed to understand how this will be used. Commissioner Kiyosaki added that it teaches her a very valuable lesson that when we do amendments to motions we need to as a commission be very clear on what language we want to put in the motion.

Chair Thielen asked if there were anyone from the public to testify on Item C.1.  
Chair Thielen suggested taking up the approval of the February 18 minutes first.

### **A. APPROVAL OF MINUTES**

#### **2. February 18, 2009**

**MOTION:** (Kiyosaki/Fujiwara)

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**TO APPROVE THE MINUTES.  
UNANIMOUSLY APPROVED.**

**Item C.1. VOTE:**

**Clarification of the Commission's Reasoning in Granting the Motion Approved at the February 18, 2009 Meeting, Agenda Item D.2, for Mr. Bryan Sarasin, Mr. John Varel, Maui Department of Water Supply (MDWS), Applications for Water Use Permits**

**MOTION:** (Kiyosaki/Miike)  
**TO APPROVE THE SUBMITTAL.  
UNANIMOUSLY APPROVED.**

Deputy AG Linda Chow left the meeting and Deputy AG Colin Lau was present for the remainder of the meeting.

**C. GROUND WATER**

**2. Karl Toubman and Kathie Pomeroy; Application for After-the-fact Pump Installation Permit; Honopueo Well (State Well No. 7448-07), Installed Pump: 3 gpm for Agricultural Use, TMK 5-4-009:024, Island of Hawaii**

Presentation by: Ryan Imata

**RECOMMENDATION:**

That the Commission:

- A. Find the applicant in violation of HRS §174C-84(a) and HAR§13-168-7(a).
- B. Impose a fine of \$150 on the applicant as summarized in Exhibit 6, payable within 30 days.
- C. Deny the issuance of an after-the-fact Pump Installation Permit for the existing pump.
- D. Require the applicant to cause a new Pump Installation Permit application to be submitted by a licensed pump installer within 30 days, upon which a permit will be immediately issued, subject to the following special conditions:
  1. The existing installed 3 gpm pump shall be removed and reinstalled within 30 days, and a Well Completion Report Part II shall be submitted within 30 days of completion of that work.
  2. The permittee will be allowed to install a new pump of up to 30 gpm within 2 years.
- E. Suspend any current, pending or future applications related to Toubman/Pomeroy until the fines are paid and the applicant/driller completes the removal/reinstallation of the 3 gpm pump for this well.

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Applicants are not here.

Commissioner Erdman asked if the herbal medicine farm/nursery used water from the Kohala Ditch prior to the earthquake. The applicant was not available to answer questions, but Ryan Imata stated that he didn't think that they did. Commissioner Erdman asked if the Kohala Ditch was fixed. Mr. Imata stated that the last information available indicated that the ditch was mostly repaired but flow was not restored. Commissioner Erdman asked if there's no water. Mr. Imata said he thought there was partial water but it's not all there. Commissioner Erdman asked if they had another water source. Mr. Imata answered no. Commissioner Erdman asked if they are an ongoing business. Mr. Imata said he believes so.

Commissioner Miike asked Deputy Attorney General (AG) Lau if the commission can actually approve a permit before a permit is actually applied for because that's what the request is. Mr. Imata explained that the applicant actually applied for an after-the-fact permit so they have a permit application but is not sure if the Commission would consider that as a complete permit because technically permits are to be applied for by the licensed contractor. Mr. Imata said staff is requesting to deny the after-the-fact permit and just require them to apply for a pump installation permit. Commissioner Miike asked if they can deny the after-the-fact but still approve a permit before it's actually submitted to Commission.

Deputy AG Lau asked if the applicant is willing to amend their application from the 3 gpm to the 30 gpm. Mr. Imata said yes; however it's not an amendment on their application, it will be a new application because they did have a new contractor for the 30 gpm work. Chair Thielen asked if they had an equivalent to a homeowner's exception where the owner can file the application or it has to be done by a licensed contractor. Mr. Imata said the owner can file the application and a letter of assurance will be issued. It will not be accepted as a complete application but staff can issue the permit once the contractor signs the permit. However in this case, staff is not recommending that the Commission approve the future permit but recommending that the Commission require the applicant to submit a pump installation permit application for the 30 gpm work.

Commissioner Miike said that he understands that but staff is asking the Commission to approve it now and once staff submittal is submitted then you get a permit, and is asking a legal question if they can do that. Deputy AG Lau said that you cannot without an application. Ryan Imata said they are not requiring the Commission to approve the permit; the provision for delegation to the Chair to approve the permit would still be valid. Commissioner Miike questions if delegation can be made to the Chair, that approval of a permit that has to come before the Commission. His basic question is if the Commission can do that and if we can do that can we just amend the after-the-fact. Mr. Imata said that staff is recommending to deny the after-the-fact permit. Commissioner Miike said the only thing before the Commission is the after-the-fact permit whether we can use that vehicle to do what staff is recommending, but that would mean that we would say we would approve it subject to you taking it out and putting it in by a licensed contractor. If they are using the pump right now, then the main concern is to get it reinstalled quickly under a licensed contractor. Mr. Imata said that's why staff is recommending that the well owners apply for a new permit.

Chair Thielen asked if an amendment wouldn't be more appropriate as opposed to rejecting an after-the-fact permit to say that. Mr. Imata said it might, except that he thinks that after-the-fact would sanction the installation whereas we're not sanctioning the installation, we're saying that we

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want the well owner to pull it out and reinstall it. Commissioner Miike asked if we can say that they can continue the use of that but within 30 days you need to have your submittal and license contractor, etc. But we cannot approve all of it, only the after-the-fact.

Chair Thielen asked why the applicants weren't here today. Mr. Imata said he spoke to them and that he emailed the submittal and she emailed back saying she would email him if she had any questions. Chair Thielen asked if they understood what the staff recommendation is and asked what their response was. Mr. Imata said the owner was actually kind of relieved that the fine would be \$150. Chair Thielen asked if she understood what was being recommended is that they cannot use this pump. Mr. Imata said yes, clarifying it would take effect after the 30 days if no 30 gpm pump application was made. Chair Thielen asked if they plan on submitting a new application with a licensed contractor. Mr. Imata said that would be the requirement. Chair Thielen said she understands that's a requirement but when staff spoke with the owner, did she understand that that's what you're saying and is that what they're saying they're going to do? Mr. Imata said that the applicant has the submittal and assumes that she understands that that's what the requirement is. Mr. Imata added that he can't really speak for her.

Commissioner Erdman stated that if the existing 3 gpm was the only source of water for a farmer and he was under the understanding that his water would be cut off for two years, he would have a hard time believing that they totally understand the situation unless they have another water source. Chair Thielen said that they may be focusing on the fine and thinking \$150 fine and that's it. So the applicant may not understand that the water may be at risk of being cut off. Mr. Imata said, in staff's recommendation the requirement to submit the application is within 30 days, it's a maximum of 30 days, so conceivably they could submit the application right after the meeting. The pump installer could come out, and pull the 3 gpm and reinstall it, and wouldn't be cut-off. Commissioner Erdman said for a solar panel to run the 3 gpm pump is a lot smaller than a solar panel needed for a 30 gpm pump, and they are bringing in electrical power. That puts them at the whim of HELCO and he's going to guess that that's not going to take place in 30 days when the cost of doing it comes in, they might take a look at upgrading their solar even looking at wind proposals as well. This is not saying they're not going to have water for two years but really is.

Ryan Imata clarified that staff is not comfortable with the owner installing the 3 gpm pump on their own, and is recommending to just have the contractor come out, pull it and reinstall it right after they pull it. Staff understands that the electrical power is going to take some time and they also don't have funding to put in the 30 gpm pump, and that's why they are giving them the standard two year period to do so. Mr. Imata said he's not sure staff's recommendation is causing them hardship in terms of cutting off their water. Mr. Imata said if they put in the application today, we've already sent the 3 gpm out for review, so we can issue the permit today and fax it back to them, and they can pull it today, reinstall it and they'll have water. Chair Thielen said she understands that they have 30 days to put in the application but up to two years to swap out the actual pump. Mr. Imata explained that they have 30 days to put in the application and 30 days to reinstall the 3 gpm. Chair Thielen mentioned that the concern that this commissioner has is that they won't be able to get to reinstall and done within 30 days and asked what would be a timetable realistic for the reinstall. Commissioner Erdman said 90 days. Ryan Imata said the contractor that the applicant is working with is going to leave for the mainland next week and won't be back until September.

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Commissioner Miike asked if they could use the after-the-fact permit to approve the 3 gpm, subject to their pulling and reinstalling the current pump and then later they can come for the 30 gpm. So we can approve the after-the-fact with a fine but with the understanding the condition for the approval is to pull and reinstall the pump. Mr. Imata said that he would like the assurance that they have a licensed contractor. Commissioner Miike added that they can have an after-the-fact approved but subject to their reinstalling with a licensed contractor within 90 days. Commissioners Erdman and Kiyosaki agreed that that makes more sense.

### AMENDED MOTION:

- A. Find the applicant in violation of HRS §174C-84(a) and HAR§13-168-7(a).
- B. Impose a fine of \$150 on the applicant as summarized in Exhibit 6, payable within 30 days.
- ~~C. Deny the issuance of a Pump Installation Permit for the existing pump.~~

~~D. C. Require the applicant to cause a new Pump Installation Permit application to be submitted by a licensed pump installer within 30 days, upon which a permit will be immediately issued, subject to the following special conditions: Approve an after-the-fact Pump Installation Permit, subject to the following special condition:~~

1. The existing installed 3 gpm pump shall be removed and reinstalled by contractor with a C-57, C-57a or A license within 30 90 days, and a Well Completion Report Part II shall be submitted within 30 days of completion of that work. Staff shall be notified prior to commencement of work.

2. ~~The permittee will be allowed to install a new pump of up to 30 gpm within 2 years.~~

~~E. D. Suspend any current, pending or future applications related to Toubman/Pomeroy until the fines are paid and the applicant/driller completes the removal/reinstallation of the 3 gpm pump for this well.~~

Chair Thielen asked if there was anyone from the public to testify on this item.

Mr. Imata asked if we want them to notify us prior to because part of the issuance of a new permit would entail the notification on their part to us when they would start the work. In this case, we would not know who the contractor is. Commissioner Miike asked isn't the requirement that they do that as a mandate, they have to let you know who the contractor is. Mr. Imata said there would not have had provisions in an after-the-fact for them notifying us of who the licensed contractor is, wanting to know whether it is a C-57, C-57a or A license contractor before they did it. Chair Thielen said the requirement does say it is subject to a licensed contractor. Roy Hardy added that part of staff's concern is that some of the licensed contractor has outstanding issues with staff; those that haven't turned in completion reports so we typically hold up future permits, it's a policy we've followed for many years to get them to comply with the requirements before we issue future permits to them. Basically complete their other work before working on someone else's well. Otherwise there will be well log reports are in arrears. A contractor may have a license but should be in good standing. Chair Thielen said that would be separate from the applicant and you guys should be

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taking action in those other cases, you're talking about a contractor whose not filing reports and it may be for a different client, then you need to be going back under those permits and taking action make sure you get those reports done; why would you put this client over a barrel because they happen to have the same contractor. Mr. Hardy said staff does not encourage contractors who perform poorly to go out a do more work. We can bring them to the commission technically with violations but we've worked with them this way pretty well, once we let them know they have missing items. Just let us know who the contactor is, we have a listing of things that may be outstanding and say can they get these reports done, they do and comply, and then we issue the permits.

Commissioner Miike asked if they can do an amendment to D where a license contractor, whose name should be reported to the commission prior to starting work. Commissioner Fujiwara commented that wouldn't this be administrative and it doesn't necessarily have to be in the motion. Commissioner Miike said it would be good to be said that they have to let staff know when they would begin.

Ryan Imata then said, amend D to say approve after-the-fact subject to the existing installed 3 gpm pump shall be removed and reinstalled by a licensed contractor within 90 days. Chair Thielen included, and that staff shall be notified of the contractor prior to the work commencing.

Deputy AG Colin Lau asked for clarification that the application that was submitted was for 3 gpm and not amended to 30 because the submittal supplemental information says to amend. Mr. Imata said that it wouldn't have constituted a complete application because it wasn't signed by a licensed contractor.

**MOTION:** (Miike/Erdman)  
**To approve the submittal as amended.**  
**UNANIMOUSLY APPROVED.**

## **D. STREAM PROTECTION AND MANAGEMENT**

### **1. Request for Approval of Supplemental Contract Amendment to Contract No. 57085 and to Clarify Delegation of Authority to the Chairperson to Include Modifying and Amending Contract No. 57085, Statewide Inventory of Stream Channel Alterations**

Presentation by: Dean Uyeno

## **RECOMMENDATION:**

1. Staff recommends that the Commission approve the Supplemental Contract Amendment to allow the time of performance to be extended for Contract No. 57085, Statewide Inventory of Stream Channel Alterations, that is, to exercise the first of two (2) options to extend for a period of six (6) months, effectively extending the time of performance of this Contract to January 31, 2010.

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2. Staff recommends that the Commission clarify its delegation of authority to the Chairperson to include modifying and amending the existing Contract for Professional Services for Contract No. 57085, Statewide Inventory of Stream Channel Alterations.

**MOTION:** (Erdman/Fujiwara)  
**TO APPROVE THE SUBMITTAL.**  
**UNANIMOUSLY APPROVED.**

**2. Application for a Stream Channel Alteration Permit; Department of Transportation, Castle Hills Access Road Drainage Improvements and Streambank Stabilization, Kapunahala Stream, Kaneohe, Oahu; TMKs: (1) 4-5-024:002 to 005 and (1) 4-5-108:068 to 074**

Presentation by: Robert Chong

RECOMMENDATION:

That the Commission approve a Stream Channel Alteration Permit for the State Department of Transportation's (DOT) Castle Hills Access Road Drainage Improvements and Streambank Stabilization, Kapunahala Stream, in Kaneohe, Oahu at TMKs: (1) 4-5-024:002 to 005 and (1) 4-5-108:068 to 074.

The permit shall be subject to the Commission's standard conditions in Exhibit 8.

**MOTION:** (Fujiwara/Erdman)  
**TO APPROVE THE SUBMITTAL.**  
**UNANIMOUSLY APPROVED.**

**B. ANNOUNCEMENTS**

Deputy Kawahara thanked outgoing commissioner Meredith Ching and introduced incoming commissioner Sumner Erdman, and also recognized returning commissioner Neal Fujiwara who was confirmed for a second term. Deputy Kawahara also mentioned that the deadline for applications for the filling of the vacant position created by the passing of Jim Frazier was June 30<sup>th</sup> and that recently have received the names of the nominating committee members who will review the applications. The secretary who works with the nominating committee will contact the four members and the applicants' names will be sent over to the Governor's office.

Deputy Kawahara also shared that staff, Denise Mills, a hydrologist resigned in large part to the planned furloughs. She was responsible for ground water regulation in Leeward Oahu and Kauai. She was the lead person for the well construction standards update, so the timeline set for the public draft may be delayed, but we plan to stick to our initial timeline of having the standards ready by November.

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Drought conditions exist across the state ranging in intensities from DO (abnormal dry) to D3 (extreme drought). Maui and the Big Island are the hardest hit with most impacts to the agricultural sector. The National Weather Service Climate Prediction Center issued an El Nino advisory with the following synopsis: El Nino conditions will continue to develop and are expected to last through the Northern Hemisphere Winter 2009-2010. In Hawaii, El Nino is associated with below-normal rainfall in the winter and spring during the year following the El Nino.

Staff met with the Oahu, Maui, and Big Island Drought Committees to review drought mitigation strategies and to discuss the update of the counties' multi-hazard mitigation plans.

Staff was notified that the Bureau of Reclamation is developing criteria on a national level for prioritizing emergency drought assistance requests. The criteria may be available as soon as August, at which time staff will be notified on the status of the decision regarding the four proposals for emergency drought assistance that were submitted in November 2008.

Several members of the Kauai community submitted petitions to designate the entire island of Kauai as surface and ground water management areas. Staff is requesting additional information to support the justifications of those petitions.

East Maui Streams Update – Staff conducted Site Visit #8 on June 22 to 23, 2009. Deputy Kawahara participated on the first day only. Deputy Director and staff met with Maui Land & Pineapple company staff and looked at their operations; met with DOA Deputy and visiting the Kula Agricultural Park; visited the Department of Hawaiian Home Lands development in Upcountry Kula to better understand the areas where East Maui stream water is being used.

Na Wai Eha Surface Management Areas Update: Staff conducted a site visit on July 13 and 14, 2009. On the first day, staff met with Wailuku Water Company and Hawaiian Commercial and Sugar Company staff and visited the main features of the ditch system including most of the intakes along all four streams and various other points of interest along the system. On the second day, staff met with Earthjustice and OHA staff (working on GPS mapping of the auwai system) and visited many of the applicants and auwai systems related to applications for Surface Water Use Permits for Existing Uses (Existing Use Applications).

Relating to the Existing Use Applications: Objections have been filed for all the Existing Use Applications. The Water Code requires that a hearing on the objections be held when there is an objection to an Existing Use Application by a person with proper standing. Because objections have been filed, the time period that the Commission has to act on the application is extended from 90 days to 180 days. The first Existing Use Applications were accepted on April 12, 2009, so the 180 days period is October 13, 2009. The Commission may hear the objections in its entirety or refer the matter to a delegated hearings officer.

Na Wai Eha Contested Case: The Hearings Officer's proposed Findings of Fact, Conclusions of Law, and Decision and Order have been distributed to the commissioners. A briefing is to be scheduled with the Deputy Attorney General and the Commission should hear oral arguments from the parties.

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On June 18, 2009, staff did an outreach presentation on the Water Commission's programs and activities to the Windward Community College students and staff, who requested the briefing in relation to watershed and ahupuaa management. Staff's overview of planning regulation, and survey data collection emphasized that surface water management activities are appropriate for watershed and ahupuaa water management. Ground water management is very different and often may not lend itself to similar topographic constraints associated with the ahupuaa concept as water can naturally move underground between valleys.

Budget: Due to the budget shortfall, and in addition to the previous reductions and restrictions statewide, the State looked at a three day a month furlough for the current and next fiscal years. This would save the State approximately 13.8% in labor costs. The furloughs were successfully challenged in court and the State is considering an appeal to the Court's decision. The State is also proceeding with contract negotiations with the unions since the bargaining agreements expired on June 30<sup>th</sup> of this year. In addition, the State is considering layoffs if necessary to meet the budget shortfall. Hopefully it doesn't come to that, but there are indications that the State revenue continues to decline.

Specifically, how does this impact the CWRM? Deputy Kawahara explained that if the furlough plan does go through, the CWRM office will close on the first three Fridays of the month unless there is a holiday in one of those three weeks, then the office will close the fourth Friday. We are getting our operating budget in payroll and operating in quarterly allotments instead of the typical annual allotment. Our payroll quarterly allotments have been reduced by 13.8%. We are preparing for this in case furloughs and layoffs don't go through. For data collection, USGS Cooperative agreement is usually annual. But due to the quarterly allotment, we are looking at quarterly agreements. The next meeting on the Council of Revenues is scheduled for August 27. Depending on the projections, additional restrictions may come. Staff will actively continue to pursue Federal matches to stretch out limited dollars.

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

1. August 19, 2009
2. September 16, 2009

Respectfully submitted,

KATHLEEN OSHIRO  
Secretary

APPROVED AS SUBMITTED:

KEN C. KAWAHARA  
Deputy Director