

MINUTES  
FOR THE MEETING OF THE  
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: July 20, 2011  
TIME: 9:00 am  
PLACE: DLNR Board Room  
Kalanimoku Bldg.

Vice Chair Lawrence Miike called the meeting of the Commission on Water Resource Management to order at 9:08 a.m.

The following were in attendance:

**MEMBERS:** Mr. Lawrence Miike, Mr. William Balfour, Jr., Mr. Sumner Erdman, Ms. Loretta Fuddy and Mr. Neal Fujiwara

**STAFF:** William Tam, Robert Chong, Neal Fujii, W. Roy Hardy, Ryan Imata, Lenore Ohye and Dean Uyeno.

**EXCUSED:** Mr. William Aila, Jr.

**COUNSEL:** Cindy Young, Esq.

**OTHERS:** Ryan Tam, Travis Hylton, Laura Mau, Ron Rickman

**A. APPROVAL OF MINUTES**

June 29, 2011

Vice Chair Miike amended page 4, last paragraph of the June 29, 2011 minutes:

Deputy Tam asked the Commissioners if there are matters on which they would like to be briefed. Vice Chair Miike asked if the implementation of the Na Wai Eha Decision with respect to Waiehu Stream was still suspended. Ms. Ohye stated that the stipulation was still in effect. Vice Chair Miike recommended limiting the suspension to a specified period of time [~~limited accommodation~~]. Ms. Ohye explained that the parties in the Na Wai Eha case [~~water use permit applicants~~] stipulated to the suspension through their attorneys. Other users had not participated [~~have not yet applied~~]. Vice Chair Miike stated that the non-participants had adequate information but chose not to participate in the Na Wai Eha case. The implementation of the IIFS for Waiehu Stream should not be suspended indefinitely to accommodate them [~~non-applicants are unnoticed~~]. Deputy Tam said that the public hearings on the permit applications will continue in October. Vice Chair Miike stated that the Attorney General's opinion is that any person who wanted to be part of the contested case had to apply before the end of the first day [~~close~~] of the public hearing. However, he is of the opinion that, since the public hearing is still open, anyone can still apply. He noted that he disagreed with the Attorney General's opinion. Vice Chair Miike asked if an appurtenant rights hearing was scheduled. Deputy Tam stated that a hearing has not been scheduled due to the complex issues and suggested an appurtenant rights briefing. Vice Chair Miike asked staff to provide a timeframe and the number of current applicants and non-applicants. Additional briefings include 1) status of dam safety rules and 2) Na Wai Eha stream flow update.

**MOTION:** (Fujiwara/Erdman)

To approve the minutes.

UNANIMOUSLY APPROVED AS AMENDED.

**B. ANNOUNCEMENTS**

Lenore Ohye updated the Commissioners on the current budget and funding. CWRM's organizational chart was distributed. The Survey Branch was abolished. At the Governor's request, DLNR will contribute \$1.3 million to meet the State's budget shortfall. CWRM's FY 2012 share is \$114,000. To meet the \$114,000 target reduction, CWRM proposes to 1) eliminate the Ground Water Regulation Branch's Engineering Technician position, and 2) fund a portion of the U.S. Geological Survey Cooperative Agreement through Special Funds (currently funded entirely by General Funds). Within CWRM, the Survey Branch geologist position will be moved to the Ground Water Regulation Branch.

CWRM is requesting Budget & Finance to lift the hiring freeze on four of its nine vacant positions. Priorities are: 1) Hydrologist VI position in the Ground Water Regulation Branch, 2) Hydrologist III position in the Stream Protection and Management Branch, 3) Branch Chief for the Stream Protection and Management Branch and 4) Information Technology Specialist in the Ground Water Regulation Branch, which supports all branches for GIS services.

Na Wai Eha answering briefs were filed in the Hawaii Supreme Court. Reply briefs are due on August 8, 2011. Copies will be distributed to the Commissioners. Appeals are filed with the Intermediate Court of Appeals (ICA). Appeals from the ICA then go to the Supreme Court. The Supreme Court chooses to hear cases upon judicial review. There was a stay in the ICA for a period of time while the Supreme Court considered whether to hear the Na Wai Eha case. The Supreme Court decided to hear the Na Wai Eha case. All briefs will be filed in the Hawaii Supreme Court. They are due in August.

The East Maui case is in the ICA. The ICA granted a thirty day extension to August 8, 2011 to file answering briefs. Vice Chair Miike explained that the East Maui case involves a procedural issue. The Commission declined to grant the parties' request for a contested case hearing.

August Commission Meeting: 1) proposal/schedule to designate the surface water area of windward Oahu as ordered by the Supreme Court, 2) rainfall atlas and recharge presentation by Thomas Giambelluca and 3) appurtenant rights briefing.

**C. STREAM PROTECTION AND MANAGEMENT**

1. Re-Application for Stream Channel Alteration Permit (SCAP.3246.6), County of Maui Kaholopo'o Bridge Replacement, Haneo'o Gulch, Hāna, Maui, TMK: (2) 1-4-007:004

Staff presentation by Robert Chong.

RECOMMENDATION:

That the Commission approve the applicant's Stream Channel Alteration Permit (SCAP.3246.6) for County of Maui Kaholopo'o Bridge Replacement at Haneo'o Gulch in Hāna, Maui, TMK: (2) 1-4-007:004, subject to the standard conditions in Exhibit 5 and the following special condition:

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The applicant shall obtain written concurrence from the State Historic Preservation Division indicating the applicant has a detailed mitigation plan and hired a qualified archaeologist to monitor the construction work. A copy of this written concurrence shall be submitted to the Commission prior to construction activities.

Commissioners Erdman and Fujiwara questioned the ten years and the subsequent permit extensions since the permit was first granted. Laura Mau, Senior Planner with Wilson Okamoto Corporation and the representative for the County of Maui explained that the extensions were for the SMA and not for the SCAP.

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

### D. PLANNING

1. Request to Enter into a Joint Funding Agreement with U.S. Geological Survey for Statewide Hydrologic Data Collection and Water Resource Monitoring for Federal Fiscal Year (FFY) 2012

Staff presentation by Jeremy Kimura.

#### RECOMMENDATION:

Staff recommends that the Commission:

- 1) Authorize the Chairperson to enter into a joint funding agreement with the U.S. Geological Survey in FFY 2012 to undertake the specified monitoring activities, and
- 2) Delegate authority to the Chairperson to modify the list of monitoring stations to delete stations from the joint funding agreement if other cooperators can be found.

Mr. Kimura distributed staff's amended recommendation:

- 1) Authorize the Chairperson to enter into a joint funding agreement with the U.S. Geological Survey in FFY 2012 to undertake the specified monitoring activities, and
- ~~2) Delegate authority to the Chairperson to modify the list of monitoring stations to delete stations from the joint funding agreement if other cooperators can be found.~~
- 3) Delegate authority to the Chairperson to modify the list of monitoring stations if other cooperators can be found or if additional federal funds become available provided that the Commission's share does not exceed \$487,760.

Vice Chair Miike asked about the source of money for Special Funds. Deputy Tam stated that funds are generated from lease rents from state lands within the DLNR, Land Division.

Commissioner Balfour asked about CWRM's \$487,760 share for data collection. Mr. Ron Rickman, U.S. Geological Survey, oversees the basic data collection. He explained that the big expense is maintaining the database. In addition to archiving and updating the database,

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USGS tries to enhance public access. For flood alert purposes, stream flow sites are real time. Although CWRM does not rely on this data, others use it. There are increasing costs associated with maintaining such data. Mr. Rickman suggested that USGS find other partners who rely on flood warning data (such as County agencies) to help fund some of the monitoring stations. Commissioner Balfour was not convinced.

Commissioner Fujiwara asked 1) Who is responsible for soliciting cooperators? and 2) Are state and county agencies the only partners? Mr. Kimura stated that USGS primarily solicits other cooperators. In the past USGS could not partner with private entities. Mr. Rickman commented that until two years ago, USGS could not partner with non-governmental agencies.

Mr. Fujiwara asked if private entities could fund projects through state agencies. Mr. Rickman said it has been done with the DLNR, Engineering Division. Some of the dam safety land owners have given money to DLNR to support the USGS. The rules require such gifts benefit more than the landowner or the owner of the stream. For example, Kauai Coffee funds part of the gage for Wainiha River which is a critical flood warning station for Kauai. It is in both the national and county interest to gage the stream. This is a new practice. It is a burden on the private party because it has to register with the Governor and the federal government.

Commissioner Erdman proposed amending the staff's recommendation that CWRM fund stations in areas of serious disputes wherever practicable and possible. Citing the Na Wai Eha case, the Commission was required to make a decision with inadequate information.

Vice Chair Miike explained that the staff's proposed recommendation was not a mandate. However, it should take potential disputes into consideration when CWRM seeks to change the list of streams to monitor.

Ms. Ohye commented that last year given the decline, CWRM and USGS did evaluate the network of gages to be maintained. USGS helped CWRM determine priority stations by assigning codes to every station that is monitored; the stations were coded for 1) climate change stations, 2) gages CWRM has to monitor for regulatory purposes, 3) stations that are needed to ensure adequate coverage across the State or 4) areas where CWRM foresees future conflicts. She agreed with Vice Chair Miike. Staff believes stations coded flood frequency could be funded by the Civil Defense since CWRM is not primarily responsible for flood warnings.

Deputy Tam noted Commissioner Erdman's proposed recommendation as an admonition to monitor gages in places where CWRM anticipates serious disputes. He added that CWRM is working with Oceanit to receive water use reports electronically which will give CWRM the mechanism to concentrate on enforcement efforts and generate money to offset costs.

Vice Chair Miike proposed to amend staff's amended recommendation: Delegate authority to the Chairperson to modify the list of monitoring stations provided that the Commission's share does not exceed \$487,760.

**MOTION:** (Fujiwara/Erdman)

To approve the submittal.

UNANIMOUSLY APPROVED AS AMENDED.

**E. UPDATES AND BRIEFINGS**

Deputy Tam announced that Public Hearings on the County of Hawaii Water Use and Development Plan (WUDP) will be held on August 3 and 4, 2011. The Commission needs to notice if two or more Commissioners attend the hearings. The Hawaii County adopted the Hawaii WUDP by Ordinance. It will be ready for adoption by the Commission following the public hearing process.

1. Briefing on the Appurtenant Rights Process (for Na Wai Eha, Maui Water Use Permit Applications)

Deputy Tam briefed the Commission on the proposed appurtenant rights process. The process to bifurcate the appurtenant rights in two parts: 1) whether a parcel has appurtenant rights and 2) quantification of the surface water rights. Appurtenant rights have been recognized by the Courts without exceptions since the Mahele as a right to use water on primarily kuleana lands or for loi in production at the time of the Mahele. Quantification of that right depends upon the location. By contrast a riparian right is shared use. The test for appurtenant use is the amount of water necessary to grow crops on the land as it was at the time of the Mahele. Hawaii Supreme Court recognizes appurtenant right as a constitutionally protected right.

The notice provisions will include: 1) notice to all surface water use permit applicants, 2) notice to all parties who registered their use in the eighties and 3) notice to the Counties and County Mayors.

The burden of proof is on the applicants to prove their case through: 1) land commission awards for loi granted circa the Mahele, 2) water source historical data, 3) Mahele documents, 4) kama`aina testimony, and 5) surveys.

Vice Chair Miike stated that the applicant is going to have to produce such documents because if the applicant is claiming appurtenant rights he/she is going to have to show where their water is located. Deputy Tam stated problems may arise where there are 1) substitute auwais subsequent to the Mahele and 2) people built ditches that moved water and resulted in the water being shared. Quantification of the amount of water accompanying an appurtenant right will not be determined until the second phase.

Vice Chair Miike's understanding was that because an appurtenant right can be applied for at anytime and the deadline for an existing surface water use permit application has passed, any subsequent applications will be considered after the applicants who have met the deadline have had their cases heard, and will be treated like a new use.

Discussions will continue in August 2011 whether to consider appurtenant rights together with the original surface water use permit applications for existing use. A public hearing notice will be published in September 2011 with a ninety day deadline for interested parties to file applications and supporting documents, giving the parties who have not applied an opportunity to file their applications.

Commissioner Erdman questioned the procedures regarding 1) the applicants who met the deadline and filed a surface water use permit application for existing uses and those who did not file an application and 2) a formula for deciding the water allocations.

Deputy Tam stated that the quantification of the amount of water will be within the surface water use permit general quantification and the burden of proof will be on each applicant to show that on his/her parcel based upon the evidence and Land Commission Awards. Under the McBryde

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decision, the Court recognized method used to grow taro at the time of the Mahele is presumptively the amount of water needed to grow crops today. If the applicant uses that method today, he/she should receive a similar duty of water. Deputy Tam noted that one of the challenges is the amount of water that may be available today may be different in total quantity than it was at the time of the Mahele.

Vice Chair Miike noted that until the Supreme Court rules on the instream flows, the Commission will not know how much water may be available for use.

**F. ADMINISTRATIVE AND OTHER BUSINESS**

1. Notice re: SCAP (2864.3) for Honolulu High-Capacity Transit Corridor Project

Robert Chong noted that staff received: 1) comments from Hawaii's Thousand Friends (HTF) regarding the Honolulu High-Capacity Transit Corridor and 2) a response from the City and County addressing HTF's concerns. Copies were distributed to the Commissioners and filed in the Commission office.

**G. NEXT COMMISSION MEETINGS (TENTATIVE)**

1. August 17, 2011
2. September 21, 2011

Meeting was adjourned at 10:16 a.m.

Respectfully submitted,

KATHY YODA

APPROVED AS SUBMITTED:

WILLIAM M. TAM  
Deputy Director