

MINUTES
FOR THE MEETING OF THE
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: September 27, 2011
TIME: 9:00 am
PLACE: DLNR Board Room
Kalanimoku Bldg.

Chairperson William Aila, Jr. called the meeting of the Commission on Water Resource Management to order at 9:07 a.m.

The following were in attendance:

MEMBERS: Mr. William Aila, Jr., Dr. Lawrence Miike, Mr. William Balfour, Jr., 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. Sumner Erdman

COUNSEL: Linda Chow, Esq.

OTHERS: Dr. Thomas Giambelluca, Deborah Solic, Isaac Moriwake, Pam Bunn, Leo Asuncion, Melissa Iwamoto, Marnie Meyer, David Penn, Jonathan Scheuer, Jim Wood, Jocelyn Doane, Yvonne Izu, Dr. David Jung, John Carroll, Ron Okazaki, Dora Okazaki, Carl Okazaki.

A. APPROVAL OF MINUTES

July 20, 2011

MOTION: (Fujiwara/Fuddy)
To approve the minutes.
UNANIMOUSLY APPROVED.

B. ANNOUNCEMENTS

Deputy Tam announced that the next Commission meeting will be held on October 26, 2011.

C. UPDATES AND BRIEFINGS

1. Present and Possible Future Patterns of Rainfall in Hawaii: The New Rainfall Atlas of Hawaii and Projections of Future Changes by Dr. Thomas Giambelluca, Department of Geography, University of Hawaii at Manoa

Presentation by Thomas Giambelluca.

Deputy Tam introduced Dr. Thomas Giambelluca of the University of Hawaii, Department of Geography. Dr. Giambelluca presented his research on the Rainfall Atlas of Hawaii and other findings on trends in Hawaiian precipitation, temperature, and other related atmospheric features. His powerpoint presentation summarized his research on how unequivocal human caused global warming and climate change in Hawaii may affect the water resources of the State. The Rainfall Atlas of Hawaii is available online at <http://rainfall.geography.hawaii.edu/>.

Minutes

Dr. Giambelluca's powerpoint presentation is filed in the Commission office.

Dr. Giambelluca stated that consideration should be taken when making decisions regarding water use permitting and land development and explained the observed drying trends since the 1970's and changes and uncertainties related to reduced rainfall, increased temperatures, ENSO, PDO, reduced cloud capture, increased transpiration and sea-level rise. In reference to the relationship between rainfall, recharge, and streamflow Dr. Giambelluca explained that, in general, it will be warmer with less water available. He also stated the Commission should be concerned about invasive strawberry in recharge areas as they reduce recharge.

Giambelluca went on to describe the update to the 1986 rainfall atlas to include and concentrate on data since then up to 2007 and the availability of the analysis, results, and interactive maps available on the website. The final written report will be available soon. This information will assist the Commission in refining sustainable yield estimates in the future.

D. CONTESTED CASE

1. Na Wai Eha (Maui) Surface Water Area Management Proceedings.
Appurtenant Rights Process: Establish process to address notice, determination of appurtenant rights, and quantification of water needs to meet appurtenant rights in Na Wai Eha due process proceedings for surface water use permits

Presentation by William Tam

Commissioner Miike asked if an appurtenant rights claim can be contested.

Deputy Tam stated that third parties who can demonstrate a legal interest in a particular parcel have the right to challenge whether that parcel has an appurtenant right.

Commissioner Miike asked why the Commission is waiting to determine surface water use permit allocations to make an appurtenant rights quantification determination. The amount of water available to meet an appurtenant right's claim will depend on competing interests and how much water is currently available.

Deputy Tam stated that the amount of water used to grow taro at the time of the Mahele will determine the appurtenant right quantification. However, the amount of water associated with that parcel may vary according to current conditions.

Commissioner Miike noted the complexities of determining the appurtenant right quantification as part of the surface water use permitting process.

Deputy Tam stated CWRM may bifurcate the quantification phase; however, it has to first determine whether a parcel has an appurtenant right.

Isaac Moriwake (Earthjustice) thanked the Commission staff for addressing the appurtenant rights determination in the Na Wai Eha surface water management areas. Mr. Moriwake asked the Commission to consider oral history/testimony as relevant information to assist in its appurtenant rights determination. He noted his concern regarding the public notice costs and asked that the Commission not require the applicants to pay for that expense. Mr. Moriwake believed that if an appurtenant right claimant is cultivating kalo in the traditional manner, the claimant's current use is sufficient for an approximation of how much water such rights need.

Minutes

Pam Bunn (Alston Hunt Floyd & Ing) on behalf of the Office of Hawaiian Affairs concurred with Mr. Moriwake's statements. She stated that the appurtenant rights process needs to be streamlined. Clarification is needed regarding page 4 of the staff submittal, which provides that people need to file both an existing and new use petition to claim an appurtenant right. She agreed with Commissioner Miike that separating the appurtenant right determination from the appurtenant rights quantification is not necessarily efficient. Mr. Tam suggested separating the appurtenant rights quantification from other water use permit applications will address that issue.

David Penn testified to the importance of the relationship between instream flow standards and water quality standards to accommodate appurtenant water rights. He proposed posting all appurtenant water rights applications on the Commission's website. He encouraged the Commission to evaluate the information hydrogeographically as opposed to a case-by-case parcel approach.

Yvonne Izu (Moriwaka Lau & Fong) referred to the types of evidence that could be presented and proposed to change other title history "in support" of claim to other title history "relating" to the claim. She commented that the 10 working days deadline to file written objections may not be sufficient.

Discussions will continue regarding notice issues and the documentation demonstrating that an appurtenant right has been reserved or extinguished.

Mr. Tam explained that CWRM will not be conducting public hearings because the proposed process to determine appurtenant rights is a due process proceeding.

Commissioner Miike stated that CWRM request's the Commission approve the proposed process. The Commission will then determine 1) whether a particular parcel has an appurtenant right and 2) how much water is required on the parcel.

MOTION: (Miike/Fuddy)

To approve the submittal.

UNANIMOUSLY APPROVED.

E. STREAM PROTECTION AND MANAGEMENT

1. Mediation or Binding Arbitration for Complaint/Dispute Resolution (CDR.2769.8), Application for After-the-Fact Stream Channel Alteration Permit, Stream Diversion Works Permit and Petition to Amend Instream Flow Standard (SCAP.2898.8), Ainako Branch Stream, Hilo, Hawaii, TMKs: (3) 2-5-025:005, 014 and 006, 2-5-024:028, 029 and 045

RECOMMENDATION:

That the Commission:

A. Complaint/Dispute Resolution:

1. Order mediation pursuant to HAR §13-167-83 to 92 or binding arbitration to address CDR.2769.8 if either mediation or binding arbitration is mutually agreeable to both parties. If mediation is approved by the Commission, the final report shall be ready within 115 days (January 20, 2012,) unless otherwise extended by the Commission.

Minutes

B. Permit Violation:

1. Find that the applicants, Leslie Aina Weight and (Robert) Scott Henderson, are in violation of Hawaii Revised Statutes §174C-71(3)(A) for (1) patching four leaks in Ainako Branch Stream in 2007 and 2008: (2) constructing 450 linear feet of rock retaining wall in 2008 including the lower reach of Branch Stream #1b; and (3) constructing a 3,000 gallon ornamental pond in 2008, and (4) constructing a 4,900 gallon ornamental pond in 2008 in Ainako Branch Stream without obtaining a SCAP and SDWP from the Commission.
2. Fine the applicants \$700 for the violations listed in B.1.
3. Require that the applicants install a means to measure the amount of water that is diverted by flood control gate on a monthly basis and submit a water use report on an annual basis to the Commission.
4. Issue a written warning to the applicants indicating any future violations involving the alteration of stream channels or stream diversions without the necessary stream channel alteration permit or stream diversion works permit and petition to amend the instream flow standard may be considered repeat violations with fines up to \$5,000 for each day of violation.

C. Application for After-the-Fact Stream Channel Alteration Permit, Stream Diversion Works Permit and Petition to Amend Instream Flow Standard (SCAP.2898.8):

1. Defer action on this after-the-fact application for a Stream Channel Alteration Permit, Stream Diversion Works Permit and Petition to Amend Instream Flow Standard pending the final report for the mediation or binding arbitration of CDR.2769.8.

OR

2. Approve an After-the-Fact Stream Channel Alteration Permit, Stream Diversion Works Permit and Petition to Amend Instream Flow Standard (SCAP.2898.8), Ainako Branch Stream in Hilo, Hawaii at TMKs: (3) 2-5-025:005, 014 and 006, subject to the standard conditions in Exhibit 18 and the following special condition:

Issuance of the permit is subject to payment of the fines under Recommendation A Permit Violation within 30 days. Failure to pay the fine within 30 days of Commission action may result in further fines and violations.

Standard Conditions 4 to 8 do not apply to this permit.

Deputy Tam recused himself from submittal E1 due to his prior association with Alston Hunt Floyd & Ing.

Staff presentation by Robert Chong. Roy Hardy explained the mediation process as outlined in the State Code and as a tool available to the Commission. Commissioner Miike asked if the parties were agreeable to mediation or binding arbitration.

Deputy Attorney General Linda Chow explained that binding arbitration typically involves an arbitrator and the parties must agree to the arbitrator's final decision. She stated that the Commission is authorized to conduct mediation; however, the parties may enter into binding arbitration but it has to be agreed to by both parties.

Minutes

Mei-Fei Kuo of Alston Hunt Floyd & Ing stated that 1) the applicant would like to request that the Commission approve the after-the-fact application as recommended in the staff submittal and that there was no need to defer the application, 2) the four tasks that were undertaken were non-consumptive and the additional work done relating to the retaining wall helps prevent erosion, 3) the applicant appreciates staff's recognition of several mitigating factors and agrees to pay the \$700 fine with the condition of no contest and no admission to the violations, and 4) the applicant agrees that standard conditions 4 through 8 should not apply to this permit. Ms. Kuo believed that the patching of the four leaks in Ainako Branch Stream was a maintenance issue and should not require a permit. However, if the Commission finds this task requires a permit, she requested the following violation under Gravity Components on page 11 of the staff submittal be deleted because there was no loss of water because the patches to the leaks in the stream helped keep water in the stream:

Applicability to Violation:

Components A-F: None applicable, but not listed is the potential harm to downstream users if there is a link between patching the leaks and loss of streamflow downstream from the patches.

Regarding Item #3 for the Permit Violation, Ms. Kuo stated that Mr. Henderson had built and was using a device for measuring stream flow since 2009.

Ms. Kuo went on to discuss the complaint/dispute resolution regarding the sluice/flood gate:

1) the flood gate and rock dam diversion were properly registered in 2010 with the Commission as pre-existing, and 2) her clients provided witness statements, photos and maps as evidence that the sluice/flood gate was in place in the 1950s when the Weight family purchased the property. She stated that the sluice/flood gate may have been in place as far back as the 1920s based on Hilo Sugar Plantation's map which showed a temporary flume.

Ms. Kuo stated that the decrease in water flow were attributed to: 1) the lack of heavy rainfall, 2) the County had built a flood control canal in the 80's-90's, 3) in 1996 the Board of Water Supply began withdrawing approximately 3 million gallons of water from Piihonua Well C, and 4) earthquakes in the 1960s and 1970s caused cracks in the lava and affected the water flow.

Mr. Carroll objected to Ms. Kuo's reference to the map she presented to the Commission.

Ms. Kuo stated that the map is an exhibit in the staff's submittal. Ms. Kuo explained that: 1) her clients referred to branch stream 2 as a dry canal because it is not a stream and only flowed when it rained, 2) there is no physical connection between the property survey line and Ainako Stream, 3) branch stream 1a did not exist, and 4) the 1954 Ossipoff plan shows the connection of the branch stream to Ainako Stream at the culvert. She referred to the 1957 and 1958 photos in Exhibit 8 of the staff submittal with a lines drawn in to show where branch 1a allegedly was located. She stated that there were trees and grass but no stream shown in the photos.

Ms. Kuo stated her clients are willing to make a good faith effort towards mediation. Binding arbitration is not appropriate in this situation. If mediation fails, respondents would prefer a hearing before the Commission.

John Carroll, attorney for Mrs. Okazaki, Mr. Okazaki, Dr. Jung et al. commended staff's efforts in sorting out the complexities of the issues before the Commission. Mr. Carroll asked the Commission to deny the applicants' application for a stream diversion works permit. He stated

Minutes

that his clients did not receive written notice regarding the registration of the sluice gate that should have been registered in 1987. He noted that the gate was registered after his clients filed a lawsuit in 2010. Mr. Carroll advised his clients to accept binding arbitration.

Mr. Carroll and his clients asked that the sluice gate registration be rescinded because the registration was obtained with inaccurate information.

Deputy Attorney General Chow stated that an agency decision can be reconsidered.

Roy Hardy stated that the Commission did not certify any registered diversions or declared water uses other than a few on Molokai.

Mr. Carroll noted his objections regarding 1) construction/repair of the retaining wall, 2) construction of the 2 ponds, 3) sluice/flood control gate, and 4) staff recommendation C2 on page 12 of the staff submittal.

Ms. Kuo noted that the complainants objected to the sluice/flood control gate and unidentified obstructions in Ainako Stream. She stated that the applicants' application is for the patching of the retaining wall and the 2 ponds. According to CWRM staff's investigation, patching the leaks in Ainako Stream and construction of the 2 ponds were non-consumptive construction work and did not affect the streamflow.

Chairperson Aila, Jr. asked for a motion to go into Executive Session to consult with legal counsel at 11:36 a.m.

MOTION: (Balfour/Fuddy)
To go into Executive Session.
UNANIMOUSLY APPROVED.

Chairperson Aila, Jr. reconvened the meeting at 11:48 a.m.

Ronald Okazaki testified that: 1) in 1960 Ainako Stream was a flowing stream and 2) the decrease in branch stream flow was attributed to work done on the branch stream. He was concerned that the amount of water flowing near his property was being completely controlled.

Dora Okazaki and David Jung noted the inaccuracies of the applicants' landscape maps. Ms. Okazaki stated that the current flood control gate was relocated upstream from a previous different downstream location. She is concerned because now the lowering and raising of the gate reduces water flow to the residents below Kokea Street.

Carl Okazaki testified that during the 1970s – 1980s the stream along his property flowed consistently and filled a number of pools.

Chairperson Aila, Jr. stated the Commission went into executive session to ask for legal advice because the issues are complex and arbitration or mediation does not appear to be mutually agreeable to both parties. Chairperson Aila, Jr. then entertained a Motion from the Commission members to enter into a contested case hearing.

MOTION: (Fuddy/Balfour)
To enter into a contested case hearing.
UNANIMOUSLY APPROVED.

Minutes

Commissioner Miike asked to amend the Motion to include appointment of a hearings officer be delegated to the chairperson. The amendment was unanimously approved.

Chairperson Aila, Jr. excused himself at 12:03 p.m. and designated Commissioner Miike to continue the meeting.

2. Application for Stream Channel Alteration Permit (3232.8), Installation of a Weir in Ainako Branch Stream, Hilo, Hawai'i, TMK: (3) 2-5-024:029

Staff Presentation by Robert Chong.

RECOMMENDATION:

That the Commission approve Stream Channel Alteration Permit (SCAP.3232.8) Installation of a Weir in Ainako Branch Stream, in Hilo, Hawai'i at TMK: (3) 2-5-024:029, subject to the standard conditions in Exhibit 6.

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

F. ADMINISTRATIVE OTHER BUSINESS

G. NEXT COMMISSION MEETINGS (TENTATIVE)

1. October 26, 2011
2. November 16, 2011

Vice Chair Miike adjourned the meeting at 12:06 p.m.

Respectfully submitted,

KATHY YODA

APPROVED AS SUBMITTED:

W. ROY HARDY
Hydrologic Program Manager