

with amendments
Approved by Commission on
Water Resource Management
at the meeting held on

JAN 23 2013

MINUTES
FOR THE MEETING OF THE
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: December 19, 2012
TIME: 9:00 am
PLACE: DLNR Board Room
Kalanimoku Bldg.
1151 Punchbowl St., Room 132
Honolulu, Hawaii 96813

Chairperson William Aila, Jr. called the meeting of the Commission on Water Resource Management to order at 9:02 am.

The following were in attendance:

- MEMBERS:** Mr. William Aila, Jr., Mr. Ted Yamamura, Mr. William Balfour, Mr. Jonathan Starr, Ms. Loretta Fuddy, Mr. Neal Fujiwara
- ABSENT:** Mr. Sumner Erdman
- STAFF:** William Tam, Lenore Ohye, Roy Hardy, Jeremy Kimura, Charley Ice, Robert Chenet, Jonas Burgon, Ryan Imata
- COUNSEL:** Colin Lau, Esq.
- OTHERS:** Nomi Carmona (Babes Against Biotech), Pono Kealoha, Kaleo Manuel (Department of Hawaiian Home Lands), Dan Nellis (Dole), Gary Paracuelles (Dole), Mark Takemoto, James Macey, Yvonne Izu (Moriyama, Lau & Fong), Wayne Tanaka (Office of Hawaiian Affairs), Christopher Smith, Mitsuko Hayakawa (GMO Free Oahu), Karly Williams (Babes Against Biotech), Tom Nance

A. APPROVAL OF MINUTES

November 21, 2012

MOTION: (Balfour / Starr)
To approve the minutes.
UNANIMOUSLY APPROVED.

B. ANNOUNCEMENTS

Deputy Director William Tam announced Robert Chong's retirement from the Water Commission and commended him on his work on appurtenant rights.

Commissioner Starr and Chairperson Aila thanked Robert for his hard work.

C. PLANNING**1. Request to Authorize the Chairperson to Enter Into a Contract Agreement to Update the Water Resource Protection Plan**

SUBMITTAL PRESENTATION by: Jeremy Kimura

The Water Resource Protection Plan is one of the main components of the Hawaii Water Plan. The Hawaii Water Plan provides effective coordination and long-range planning between state and county agencies to set limits for water use. The Water Resource Protection Plan was last updated in 2008 and should be updated every five years. New information and data has become available that includes, the Rainfall Atlas of Hawaii update, interim instream flow standards for Maui, new recharge data for Maui and the Big Island, new estimates for sustainable yields, a statewide conservation plan, online water use reporting, and opportunities for reuse water. Climate change needs to be considered in future planning as well. The Water Commission would like to create a Water Resource Protection Plan that is more holistic in nature. Other initiatives within the Department of Land and Natural Resources (e.g.: "the Rain Follows the Forest" and dam safety rules) will also be included in the update.

RECOMMENDATION:

That the Commission:

1. Authorize the Chairperson to enter into a contract agreement and to approve funding not to exceed \$250,000 to update the Water Resource Protection Plan.
2. Authorize the Chairperson to make sure further amendments or modifications to the contract agreement as may be necessary to accomplish the goals described herein, provided that any amendment or modification does not require additional Commission funding.

The terms of the agreement will be subject to the approval of the Chairperson and the Attorney General.

(DISCUSSION)

Commissioner Starr commended staff on the proposed update. He asked who the contractor would be.

Mr. Kimura said the contract would be between the Water Commission and a private consultant who would help draft the plan. The consultant would also assist with public hearings and stake holder outreach meetings.

Commissioner Balfour asked if the entire \$250,000 would go to the consultant.

Mr. Kimura replied "yes."

Commissioner Balfour said he hoped the money would not be spent on reinventing the wheel since much of the generic information can be found in the older plans.

Mr. Kimura responded that many of the plans are piecemeal. A lot of the work will focus on creating a holistic document.

Commissioner Yamamura asked if it will require the counties to update their Water Use and Development Plans.

Mr. Kimura said the update of the Water Resource Protection Plan will help *inform* the counties next update to their Water Use and Development Plans. The Water Commission needs to ensure that the counties have base line data to inform their updates.

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

D. GROUND WATER REGULATION

1. **Dole Food Company, Revocation of Water Use Permits (8.957 MGD), Waialua Ground Water Management Area, Oahu**
 1. **GWUP 942 (3307-01 to 10, Pump 2) Waialua Sugar; Well TMK 6-7-002:014 (1.957 mgd)**
 2. **GWUP 960 (3307-07 and -11 to 14, Pump 2A) Waialua Sugar; Well TMK: 6-7-003:019 (2.000 mgd)**
 3. **GWUP 961 (3404-01, Pump 17) Waialua Sugar; Well TMK: 6-4-001:001 (2.000 mgd)**
 4. **GWUP 943 (3407-04 to 06, -14 & 15, Pump 1) Waialua Sugar; Well TMK: 6-7-002:014 (2.000 mgd)**
 5. **GWUP 944 (3407-11 & 12, Pump 7 B&C) Waialua Sugar; TMK: 6-6-025:001 (1.000 mgd)**

SUBMITTAL PRESENTATION by: Charley Ice

Agenda Item D-1 is revisiting an issue from the October 2012 meeting. In October the Commission had looked into voluntary cutbacks and revocations for the Dole Food Company (Dole). Staff reviewed the complete 2-year history of the request. The December 3, 2012 deadline to submit a completed application was not met. Staff is asking for a complete revocation of the remaining 9.000 million gallons per day (mgd). Dole requested an extension after the deadline and submitted applications on December 10, 2012. While there is some reported use for one of the wells, on average the last four year 12-month moving average (12-MAV) was zero. Four years of non-use does not qualify as a reasonable-beneficial use and would warrant revocation.

RECOMMENDATION:

That the Commission:

1. Recognize that Dole currently meets its agricultural irrigation needs with surface water from Lake Wilson; and

2. Revoke Dole Food Company's Water User Permits for 8.957 million gallons per day of water for Agricultural use in accordance with Attachment B.
3. Recognize that Dole may at any time file a new application for a water use permit for an actual use.

(DISCUSSION)

Commissioner Balfour asked about the new figures that suggested recent usage.

Mr. Ice said the new application does suggest usage but it has not been verified.

Chairperson Aila asked for clarification on the staff recommendation. He asked if the applicant could reapply.

Mr. Ice said "yes."

Dan Nellis (Operations Director for Dole Foods) commented that Dole uses more than 43,000 gallons per day (gpd). Mr. Nellis said Lake Wilson irrigates Dole pineapple. However, there are farmers who depend on the well water from Dole. The new numbers are in the most recent applications, which were turned in after the deadline. Mr. Nellis said Dole would also seek opportunities to allocate for back-up. Lake Wilson water will not satisfy all of Dole's needs.

Tom Nance pointed out the actual pumpage numbers that were not submitted to the Water Commission. There are pumps that are not used unless the ditch water is unavailable. Mr. Nance recommended that these pumps be allocated at 0.0 mgd and be turned on in an emergency situation.

Commissioner Fujiwara asked why Dole had not submitted monthly water use reports.

Mr. Nance said he did not know why the numbers had not been reported.

Commissioner Fujiwara asked about back-up.

Mr. Nellis commented that some of the wells provided water for sugar cane. The Wahiawa Ditch never provided all of the water. Tenant farmers now occupy the land and use some of the water. Dole is trying to limit pumping from the wells and use mostly ditch water.

Commissioner Fujiwara asked how long it would take Dole to submit their current numbers.

Mr. Nellis replied within the next month.

Commissioner Balfour said the pumps and reservoir need to be kept separate. The two pumps that back-up the reservoir are not currently used but would be used in the event of an emergency.

Commissioner Yamamura asked Mr. Ice if he was comfortable offering Dole an extension.

Mr. Ice replied that there may be other options in staying enforcement.

Commissioner Yamamura commented that an extension would only be granted with the understanding that there would be no further allowances.

Commissioner Starr said he would not want to see the farmers penalized for Dole's unwillingness to share information. However, Dole should have been reporting their water use. He asked if there was a mechanism to avoid revocation for the farmers if Dole were able to submit a complete application in a timely manner.

Deputy Tam commented that the applicant will not use more than 2.06 mgd in the short-term. A new application was received and filed. The Commission could decide to stay the enforcement action, pending confirmation of the information provided by Dole. The enforcement on the amount Dole claims to be using is subject to confirmation.

Commissioner Starr asked if it made more sense to change the revocation amount to 6.897 mgd (8.957 – 2.06 mgd).

Deputy Tam asked if the 43,000 gpd was included in the 8.957 mgd.

Commissioner Starr amended staff's recommendation to revoke 6.897 mgd. If 2.06 mgd is not found to be valid, the Commission may act to revoke the remaining 2.06 mgd at the January 2013 meeting.

MOTION: (Starr / Fujiwara)
To approve the submittal as amended.
UNANIMOUSLY APPROVED.

2. Monsanto Company, Applications for:

- 1) Ground Water Use Permit;**
- 2) Well Construction Permit; AND**
- 3) Pump Installation Permit**

For 2.636 MGD. For Future Emergency Back-up to an Existing Ground Water Use Permit, Agricultural Use, Kunia Farm Well No. 1 (Well No. 2402-06), TMK (1) 9-2-001:001, GWUPA No. 954, Waipahu-Waiawa Ground Water Management Area, Oahu

SUBMITTAL PRESENTATION by: Deputy Director, William Tam

Item D-2 has been before the Commission three times. It is a request by Monsanto Company for 2.636 mgd of water from the Waipahu-Waiawa Ground Water Management Area as a source of back-up for the potential loss of water from a failure of the Waiahole Ditch. The principle concern is whether or not the emergency provisions are adequate. The Agribusiness Development Corporation (ADC) has informed the Commission that they will finish the design and construction work on the siphon in the summer of 2014. The Commission has withdrawn a request for a declaratory ruling. The application is for a 1) Well Construction Permit 2) Pump Installation Permit, and 3) Ground Water Use

Permit. The Water Use Permit presents a serious problem because it would set a precedent for granting double permits for a limited water resource. There would be no basis to deny other applications, which could put a strain on allocations in Central Oahu. A Water Use Permit will remain indefinite unless there is a period of four years of non-use. A current water use permit exists for the Waiahole Ditch. Granting a second water use permit is a water banking proposition, which is untenable under the Water Code.

RECOMMENDATION:

That the Commission:

- A. DENY Monsanto's Application for a Ground Water Use Permit.
- B. APPROVE Monsanto's applications for a Well Construction Permit and a Pump Installation Permit, but only after Monsanto obtains a contractor who signs the application and SUBJECT TO THE TERMS AND CONDITIONS set forth in this Submittal.
- C. DIRECT AND REQUIRE Monsanto to prepare and file an "Emergency Plan" as set forth in this Submittal.

ALL PROVIDED that the following terms and conditions are met:

1. Monsanto shall submit an "Emergency Plan" to address potential failures to the Waiahole water system that currently supplies Monsanto with water.
2. The Emergency Plan shall include and describe the following:
 - a. The time that Monsanto can operate without Waiahole water if the Waiahole Ditch System (or different parts of the system) fail;
 - b. The kinds of failures and estimated time to repair each;
 - c. All the information required by a Water Use Permit Application;
 - d. A statement by Monsanto verifying that it will pump its wells in a manner that ensures no harm to any third party;
 - e. Such other terms and conditions as the Chairperson may prescribe.
3. Staff will present Monsanto's Emergency Plan to the Commission for consideration and approval. If the Commission's approves the Emergency Plan, the Commission will authorize the Pump Installation Permit.
4. If an emergency (as defined in the "Emergency Plan") occurs, Monsanto shall notify the Commission immediately and request authorization to turn on the pump.
5. Upon such notification, Monsanto shall be able to immediately activate and use the pump to replace permitted Waiahole water

- not available to Monsanto, provided that the emergency upon which Monsanto is acting, is an emergency covered in Monsanto's Emergency Plan. The right to pump shall continue until the Commission has the opportunity to act on the Applicant's Remedial Action Plan (as set forth below).
6. Not later than 10 calendar days (or the next business day if the date falls on a weekend or holiday) after Monsanto notifies the Commission of an "Emergency" under its approved Plan, Monsanto shall submit a "Remedial Action Plan" describing the problem, estimating how long it will take to fix it, alternatives to the lost source, and a plan of action. If the repair is estimated to take longer than one year, the applicant shall also apply for a water use permit for the well.
 7. Monsanto shall conduct any required pump tests in accordance with the Hawaii Well Construction and Pump Installation Standards, and submit the results within 24 hours of completing the test.
 8. Monsanto shall provide and report all information requested by the Commission on a regular and timely basis.
 9. If the "emergency" is not one described and covered in an approved emergency plan, then Monsanto shall notify the Commission, submit its Remedial Action Plan within the same 10 calendar day period. However, the Applicant's right to pump shall not extend beyond 45 days, unless otherwise approved by the Commission.
 10. At any time, the Commission reserves the right and may issue orders to cease pumping the well or require additional testing requirements (monitoring water levels in adjacent monitor wells, etc.), to ensure that there are no harmful effects of pumpage on the aquifer and third parties.

(DISCUSSION)

Commissioner Fujiwara asked about revoking the permit after four years of non-use.

Deputy Tam confirmed his statement, but said a permit cannot be granted for a non-use.

Yvonne Izu (Moriwara, Lau & Fong) encouraged the Commission to seek the advice of the Attorney General. The emergency provision is not sufficient and Deputy Tam has a different interpretation of the statute. Ms. Izu said Monsanto has proposed special conditions that address staff's concerns.

Chairperson Aila asked if other users could apply for water use permits if Monsanto's request was approved.

Ms. Izu acknowledged the possibility of other users requesting a source of back-up, but said the cost of drilling a well would prohibit many users from following through. A back-up source of water is essential for agriculture.

Wayne Tanaka (OHA) said the Office of Hawaiian Affairs agrees with staff's concerns and recommends that Monsanto replace Waiahole Ditch water with water from the Waipahu-Waiawa Aquifer.

Pono Kealoha testified against Monsanto. He encouraged the Commissioners to research Monsanto and turn down their request.

James Macey testified against the construction of the well and worries about the levels of chromium-6 in the water supply. He requested that the water be tested.

Nomi Carmona (Founder, Babes Against Biotech) disclosed Monsanto's poor environmental record and listed off the harmful chemicals linked to Monsanto's farming practices. Hawaii is the test site for open-air GMO chemicals that contaminate the ground water. Ms. Carmona said she does not believe Monsanto should have access to Hawaii's water and asked that the Commission not give them any more power.

Mitsuko Hayakawa testified on behalf of GMO Free Oahu. She requested that the Commission not approve Monsanto's request. Ms. Hayakawa is concerned about the contamination of a public resource that could put her children at risk. Monsanto's presence in Hawaii does not benefit the public.

Karly Williams (Babes Against Biotech) strongly opposed Monsanto's request for water and said the company disregards public safety. Ms. Williams is concerned about the safety of her family and future offspring.

Commissioner Starr explained the purpose behind a Water Management Area. He said Monsanto is drilling wells on Maui. However, their request for water will not come before the Commission because Maui is not a designated Water Management Area.

Ms. Williams said she was not aware of that fact.

A member of the public asked Commissioner Starr who gave Monsanto permission to drill wells on Maui.

Commissioner Starr said water use permits issued by the Commission pertain to Water Management Areas. Maui is not a designated Water Management Area.

Chairperson Aila said the county of Maui would handle those permits.

Commissioner Starr explained that anyone can drill a well as long as they adhere to the standards set forth by the Water Commission. However, there is limited oversight in non-designated areas.

The member of the public asked why the Water Commission did not issue permits for drilling wells in non-designated areas like Maui.

Roy Hardy (Commission on Water Resource Management) said he would send the member of the public information to answer his question.

Commissioner Yamamura made a motion to move into Executive Session.

Commissioner Starr asked if Deputy Tam could join.

Deputy AG Colin Lau said an Executive Session is attorney-client privilege. He referenced an opinion letter from the Office of Information Practices (OIP).

Commissioner Starr said this was not the case on the Maui Planning Commission. He asked Deputy AG Lau to cite the OIP opinion letter.

[BREAK]

Deputy AG Lau read the OIP opinion letter (03-12, July 14, 2003) regarding the attendance of non-board members at an Executive Meeting. It concludes that non-board members can be present at an Executive Meeting so long as their presence is necessary to carry out the purpose of convening the Executive Meeting. It is left to the discretion of the Commission to decide whether or not they wish to allow another party to participate.

Commissioner Starr offered an amendment to the motion on the floor. He asked that Deputy Tam be allowed to attend the Executive Meeting.

MOTION: (Starr)

To allow Deputy Tam to attend the Executive Meeting of the Commission on Water Resource Management.

The motion was not seconded.

MOTION: (Yamamura / Balfour)

To go into Executive Session.

UNANIMOUSLY APPROVED.

[EXECUTIVE SESSION]

Commissioner Starr moved to separate the well construction and pump installation permit from the ground water use permit.

MOTION: (Starr / Fuddy)

To separate the well construction and pump installation permits from the application for a ground water use permit.

2 ayes (Starr, Fuddy), 2 nays (Yamamura, Fujiwara), 2 abstain (Aila, Balfour)

The motion does not carry.

Commissioner Starr made a second motion to call the question on Monsanto's application for a water use permit for 2.636 mgd of ground water for emergency back-up irrigation. He clarified that this motion would include all three requests for a well construction, pump installation, and water use permit. A vote for this motion is a vote to approve Monsanto's application. A vote against this motion would deny Monsanto's application.

Deputy AG Lau explained that this is an "all or nothing" vote.

Commissioner Yamamura asked for clarification.

Chairperson Aila said the vote is to either approve or deny the application for all three actions. It is *not* a vote to approve staff's recommendation.

Commissioner Starr explained that the Commission received an application from Monsanto for a well construction, pump installation and water use permit. The Commission is voting to approve that application.

Commissioner Yamamura asked if the Commission was voting to approve the application.

Chairperson Aila said "yes."

MOTION: (Starr / Fujiwara)

To approve the application.

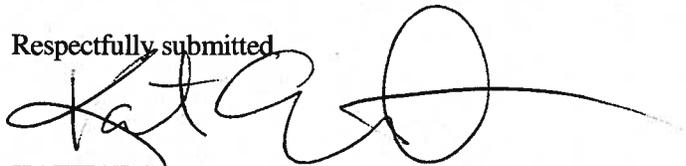
3 ayes (Balfour, Yamamura, Fujiwara), 3 nays (Fuddy, Starr, Aila)

[At the January 23, 2013 CWRM Meeting the Commission amended the description of the action to read as follows:]

The motion to approve the application failed for lack of a majority.

Chairperson Aila, Jr. adjourned the meeting at 11:40 am.

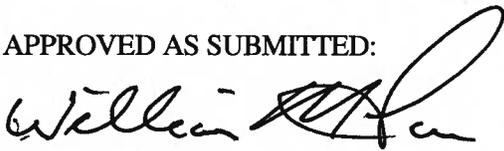
Respectfully submitted,



KATIE ERSBAK

Private Secretary to the Deputy

APPROVED AS SUBMITTED:



WILLIAM M. TAM

Deputy Director