

Approved by Commission on  
Water Resource Management  
at the meeting held on  
January 22, 2014

**MINUTES  
FOR THE MEETING OF THE  
COMMISSION ON WATER RESOURCE MANAGEMENT**

**DATE:** November 20, 2013  
**TIME:** 10:00 am  
**PLACE:** DLNR Board Room  
Kalanimoku Bldg.  
1151 Punchbowl St., Room 132  
Honolulu, Hawaii 96813

Chairperson William J. Aila, Jr. called the meeting of the Commission on Water Resource Management to order at 10:05 am.

The following were in attendance:

**MEMBERS:** Mr. William J. Aila Jr., Mr. William Balfour, Mr. Jonathan Starr,  
Mr. Ted Yamamura, Mr. Milton Pavao, Mr. Kamana Beamer

**ABSENT:** Ms. Loretta Fuddy

**STAFF:** William Tam, Roy Hardy, Lenore Ohye, Dean Uyeno, Neal Fujii,  
Paul Eyre, Jonas Burgon, Rebecca Alakai, Charley Ice, Robert Chenet,  
Patrick Casey

**COUNSEL:** Colin Lau, Esq.

**OTHERS:** Jonathan Scheuer, Joycelyn Self, Clydette Self, Taewong Kim  
(Environmental Communications), Moana Kea Klausmeyer-Among,  
Julianna Kohl, Keith Kohl, Wise Nicola, Nancy Nicola, Jordan Inafuka,  
Lori Buchanan, Colleen Suyama, Wayne Tanaka (OHA), Al Frenzel,  
Scott Abago, Luigi Manera, Desmond Manaba, Micah Kane

**A. APPROVAL OF MINUTES**

October 16, 2013

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

**B. ANNOUNCEMENTS**

William Tam, Deputy Director (Commission on Water Resource Management) restated the 10:00am start time and gave an update on vacancies. CWRM can continue to recruit, but the hiring freeze issued by Budget and Finance ("B&F") is still in effect.

**C. ADMINISTRATION**

The January Commission Meeting has been rescheduled for January 22, 2014.

**D. GROUND WATER REGULATION**

- 1. Norman Rizk, Resubmittal for a Ground Water User Permit, Papohaku-Rizk Well (Well No. 1015-001), TMK 5-1-006:072, WUP No. 937, Future (Agricultural) Use or 0.015 mgd, Kaluakoi Ground Water Management Area, Molokai**

SUBMITTAL PRESENTATION by: Charley Ice

Charley Ice (Ground Water Branch, Commission on Water Resource Management) introduced Item D-1 as request from Norman Rizk for a water use permit. Due to questions raised by the commissioners at the July 2013 meeting, Mr. Rizk has further researched his needs and changed his request from 0.006 million gallons per day ("mgd") to 0.015 mgd. At the July 17, 2013 meeting, commissioners had expressed concern that the withdrawal requested may not provide enough irrigation water after de-salting. One commissioner noted that de-salting through reverse osmosis typically requires twice as much water. The applicant anticipates using brackish water – not pure sea water. In order to irrigate his citrus trees, the applicant needs to provide 5,000 gallons per day ("gpd"). To obtain that much from de-salting, he must start with a withdrawal of and an additional 10,000 gdp. Therefore the new request is for 0.015 mgd.

Commenting on the original proposal, the Department of Hawaiian Home Lands ("DHHL") stated that the effect of ground water withdrawals on the near shore environment and related practices were established during litigation on Molokai. CWRM believes this statement is incomplete. A letter from the applicant to DHHL is provided as Exhibit 7. The Office of Hawaiian Affairs ("OHA") commented that the applicant did not adequately address gathering rights. However, the applicant asserts that his property is not located on or near traditional gathering sites. No specific gathering rights have been identified at this location. The applicant states that there is no limu, salt collection, or near shore fishing in the area. The 2008 Water Resources Protection Plan ("WRPP") estimates that 36% of the ground water in the Kaluakoi Aquifer is recharged and that 64% flows through and discharges into the ocean. The impact of pumping on the near shore discharge is estimated to be negligible. Marine scientists contend that there are four primary factors that influence gathered resources in the near shore environment. They are 1) substrate on which things may grow or live; 2) turbidity (murkiness of the water); 3) nutrients; and 4) current in the vicinity. Ground water discharge is a secondary factor. In other cases on Molokai such as Waiola and Kukui, discharge has been concentrated basal water from springs or fishponds. In these cases, the water is 94% fresh. The amount of discharge is negligible. The gathering rights identified as potentially threatened in this case are generic and not specific to this location. No other agencies commented on gathering rights in the area. The applicant has been advised by top cultural experts who say that the project should not impact gathering rights. No practitioners have come forward to identify specific resources that are affected. The potential impact on gathering rights is minimal.

RECOMMENDATION:

Staff recommends that the Commission:

APPROVE the issuance of Ground Water Use Permit no. 937 to Norman Rizk for the reasonable and beneficial use of 0.015 million gallons per day of brackish ground water for Agricultural use from the anticipated Papohaku-Rizk Well (Well No. 1015-001).

Subject to:

- a. Standard water use permit conditions listed in Attachment B; and
- b. Special Conditions:
  1. Prior to issuing any permits, Applicant shall document consultation with the Department of Health regarding any necessary compliance with rules concerning injection of desalting by-products
  2. In the event that the tax map key at the location of the water use is changed, the permittee shall notify the Commission in writing of the tax map key change within thirty (30) days after the permittee receives notice of the tax map key change.

(DISCUSSION)

Commissioner Starr asked about the criteria for approving a proposal within a ground water management area.

Mr. Ice reiterated that the water will be used to irrigate citrus trees, which would be classified as a "reasonable use."

Commissioner Starr said the application mentions municipal water. However, the applicant does not want to rely on the municipal system.

Mr. Ice replied that rates for municipal water are quite high on the west end of Molokai. The applicant likes the idea of being independent.

Commissioner Beamer asked what happens to the brine after it is discharged.

Mr. Ice said the question of discharge would be an issue for the Department of Health ("DOH"). A special condition was added to the recommendation that requires the applicant to consult with the DOH beforehand. He said he believes the applicant is planning to put in a discharge well.

Commissioner Beamer asked if desalinization permits had been issued in the past and if the Commission has done research on the impacts of brine.

Mr. Ice replied that de-salting is not uncommon. Brine tends to mix with sea water once it reaches the ocean. In this case, the applicant will not be de-salting pure salt water.

Commissioner Starr asked what would happen if the applicant started pumping more than the allocated 0.015 mgd.

Mr. Ice avowed that water users are required to submit monthly water use reports, with the exception of enforcement fines for permit violations.

Commissioner Starr asked if staff could organize a briefing on the differences in water use reporting in designated versus non-designated water management areas.  
Mr. Ice said statewide reporting is in the works.

Roy Hardy (Ground Water Management Branch Chief) confirmed a briefing on water use reporting for the December 2013 meeting.

Commissioner Balfour commented that DHHL does not report their water use and is exceeding their allocations. He articulated the need for enforcement.

Commissioner Beamer asked about the fishpond.

Mr. Ice replied that there is no existing pond.

Commissioner Starr asked if the fishpond would be built.

Mr. Ice said the applicant is proposing the construction of a fishpond.

Commissioner Beamer asked if the item before the Commission was related to the Kukui case on Molokai.

Deputy Tam replied "no." The Kukui case involves the central Molokai water system. In the case of Mr. Rizk, the applicant is requesting brackish water – not potable.

Luigi Manera, a consultant for the applicant, clarified that there is no municipal water system on the west end of Molokai. The fishpond would be used for shrimp.

Chair Aila asked how much of the 0.015 mgd would be used for the shrimp pond.

Mr. Manera replied "more than half."

Commissioner Starr asked for a more detailed description of the shrimp pond.

Mr. Ice clarified that Mr. Foster (Item D-2), not Mr. Rizk is proposing the shrimp pond.

Mr. Manera commented on the lack of water on the west end of Molokai. Both applicants would like to have their own source of water.

Commissioner Beamer asked what would be done with the brine.

Mr. Manera said an injection well would be used to discharge the brine.

Lori Buchanan (resident of Molokai) testified in opposition to Item D-1 and Item D-2. She cited court cases that substantiated cultural practices and gathering rights in the area. The public trust includes protection of native and traditional Hawaiian practices. The applicant

must prove that native Hawaiian rights are not affected by the project. Letters that were written to the Commission in 2009 express concerns with de-salinization and well construction in west Molokai. Chloride levels in the Kaluakoi aquifer are high and continue to rise. Ms. Buchanan displayed a map identifying both the Rizk and Foster properties along the shoreline. Papohaku beach is slated for conservation by DLNR. Ms. Buchanan stated that she collects opihi along the coastline and knows of other people who engage in traditional gathering. The properties are makai of the highway. Municipal water is available, but the applicant does not want to pay the high rates. If approved, the applicant would have his own source of water, thereby increasing property value. Ms. Buchanan encouraged the commissioners to advocate for the precautionary principle. She was unaware that the applicant had changed his original request and was seeking an increase in water use. She requested that meetings involving Molokai issues be held on Molokai.

Commissioner Starr asked Ms. Buchanan what a meeting on Molokai would look like.

Ms. Buchanan replied that many people would show up to a meeting. Water matters are a huge issue on Molokai. Shrimp ponds on Molokai are vulnerable to birds – both native and non-native. Birds may inter-breed and impact native populations.

Commissioner Yamamura asked the Deputy AG about notice on the agenda item.

Deputy AG Lau replied that it does not appear to violate Chapter 92 “Sunshine Law” under the Office of Information Practices (“OIP”) standards.

Commissioner Beamer asked about publishing in the Molokai Dispatch.

Mr. Ice said that in previous years, the Commission has published in the Honolulu Advertiser. The Molokai Water Working Group requested that the Commission publish in the Maui News since it was more widely distributed at the time of the request. The Commission will look into other publishing options, including the Molokai Dispatch.

Commissioner Beamer commented that some of the testimony refuted the claim that traditional and customary gathering is taking place in the area. He asked Ms. Buchanan if she agreed with that statement.

Ms. Buchanan said she disagrees.

Chair Aila asked if the injection of the brine would impact traditional and customary practices in the area.

Ms. Buchanan replied that the commissioners are obligated to uphold the precautionary principle. The impacts of the brine are still unknown.

Luigi Manera, a consultant for the applicant, said the location of the well is more than 1,500 feet from the shoreline. He said he has never seen anyone pick opihi or limu.

Desmund Manaba (resident of Molokai) testified that the shrimp pond will not have a substantial impact. There is a sewage treatment zone near the alleged opihi collection site and the fishing remains prosperous.

Chair Aila asked if Mr. Manaba was aware of any studies about the impact of brine on the near shore fishery.

Mr. Manaba replied "no."

Commissioner Beamer asked if Mr. Manaba had used de-salinization in his shrimp farms.

Mr. Manaba replied "no," but the salinity levels after de-salinization would be ideal for any type of aquaculture.

Chair Aila asked if the by-product could be used for aquaculture.

Mr. Manaba replied "yes."

Commissioner Pavao asked if the well had been drilled.

Mr. Ice replied "no."

Commissioner Pavao asked if the conditions of the permit required a review of the pump installation.

Mr. Ice said "yes."

Commissioner Pavao stated that over-pumping would be difficult after the pump had been installed.

Commissioner Yamamura commented that landowners are entitled to certain rights. There appears to be sufficient conditions that will provide adequate safety to the proposed use. He moved to approve the staff's recommendation.

Commissioner Pavao seconded the motion.

Commissioner Beamer expressed his concern about the brine and how it would affect traditional and customary rights.

Commissioner Starr spoke out against the motion. The marine environment on the west end of Molokai is sensitive. The area is dry and there is little runoff into the water from rain. Cumulative impacts could result if more property owners decide to drill wells, desalinate and inject brine into the ocean.

Commissioner Pavao reiterated his motion to approve the submittal based on staff's investigation. He expressed concern that the Commission may be over-reaching in its duties and authority.

Commissioner Beamer disagreed with Commissioner Pavao and stated that the Commission has a duty to examine the management of the wells and the impact on traditional and customary rights.

Commissioner Pavao said he objects to the Commission examining personal rights of ownership. He said he respects the issue of gathering rights.

Chair Aila said the Commission has an obligation to ask the hard questions and look into the secondary and tertiary impacts.



**MOTION: (Yamamura / Pavao)****To approve the submittal.****(Yamamura, Balfour, Pavao = aye); (Starr, Beamer, Aila = opposed)**

Commissioner Balfour recommended that the commissioners go out into the field to view the projects listed on the agenda to better understand the issues.

Commissioner Beamer agreed and suggested that meetings take place on the island affected by the agenda item.

Deputy Tam explained that budget restrictions make it difficult to travel to the neighbor islands. In some cases, the Commission is required to meet on the island affected, but for routine matters it is not mandatory.

Commissioner Starr suggested asking the Legislature for more money.

Mr. Ice asked about recourse for the applicant.

Chair Aila reiterated that 4 votes are required to approve the submittal. Therefore, the application is not approved. He encouraged the applicant to investigate the impacts of brine on the near shore waters.

Commissioner Yamamura pointed out that one of the special conditions identified in the staff recommendation is to consult with DOH.

Chair Aila clarified that secondary impacts on traditional and customary practices could be impacted by the brine. Therefore, the Commission must abide by a precautionary principle until more studies can be done.

Commissioner Yamamura said he agreed with the Chair, but thought the issue of brine should be taken up by DOH. CWRM is primarily concerned with the well.

Commissioner Beamer said DOH is ill-equipped to handle the issue of traditional and customary rights.

Commissioner Yamamura asked who is responsible for conducting a study on the impacts of brine on the near shore environment and traditional and customary rights.

Chair Aila said while it is not the responsibility of the applicant, it is in their best interest to examine the issue. The Commission staff is charged with investigating.

Commissioner Pavao asked if it was common practice to inject the brine below sea level to minimize the impact.

Chair Aila replied that the salinity of the brine is estimated to be higher than normal salt water.

Mr. Ice said the brine is saltier than sea water. The expectation is that the brine would be diluted when it mixes with sea water. However, there are still some unanswered questions.

Commissioner Beamer commented that the brine is denser and could settle on the bottom, potentially impacting the surrounding marine environment.

**2. Richard Foster, Resubmittal for a Ground Water User Permit, Papohaku-Foster Well (Well No. 0916-02), TMK 5-1-007:048, WUP No. 977, Future (Agricultural) Use for 0.011 mgd, Kaluakoi Ground Water Management Area, Molokai**

SUBMITTAL PRESENTATION by: Charley Ice

Mr. Ice pointed out the differences between agenda Item D-2 and Item D-1. The Foster application (D-2) will inject the brine from the de-salinization process into a fish pond. There will be no injection or discharge into the ocean.

**RECOMMENDATION:**

Staff recommends that the Commission:

APPROVE the Applicant's request for Ground Water Use Permit no. 977 to Richard Foster for the reasonable and beneficial use of 0.011 million gallons per day of brackish ground water for Agricultural use from the Papohaku-Foster Well (Well No. 0916-002).

Subject to:

- a. Standard water use permit conditions listed in Attachment B; and
- b. Special Conditions:
  1. Prior to issuing any permits, Applicant shall document consultation with the Department of Health regarding any necessary compliance with rules concerning injection of desalting by-products or aquaculture discharge.
  2. Prior to issuing any permits, the Applicant shall document consultation with the Department of Agriculture's Aquaculture Program regarding any necessary compliance with rules and proper preparation of an aquaculture plan to protect the nearshore environment from negative impacts.
  3. If the tax map key at the location of the water use is changed, the permittee shall notify the Commission in writing of the tax map key change within thirty (30) days after the permittee receives notice of the tax map key change.

**(DISCUSSION)**

Desmund Manaba said the brine would need to be mixed with fresh water in order to be used for aquaculture. Water issues on Molokai are contentious. Mr. Manaba commended the applicant for using his own money to drill a well for fresh water.

Commissioner Starr asked Mr. Manaba to describe the fish pond.

Mr. Manaba described the design of the fish pond and the filtration process.



Commissioner Starr asked if any of the water would go into an injection well.

Mr. Manaba said some water would have to be discharged.  
Commissioner Beamer asked if the fish could survive in the brine.

Mr. Manaba clarified that the water from the well would be brackish.

Chair Aila asked about the salinity of the water.

Luigi Manera, a consultant for the applicant, said the water is too salty to be considered brackish.

Chair Aila clarified that the water would still be considered brackish.

Commissioner Starr expressed concern about using freshwater to dilute the brackish water.

Mr. Ice said the applicant is requesting 6,000 gallons for the fish pond and 3,000 gallons for irrigation.

Commissioner Starr asked what the applicant is intending to inject.

Mr. Manaba replied that the byproduct from the desalinated water would be pumped into a separate "standing pond" to neutralize. The water could be used in a closed system. If there is no room for the byproduct in the standing pond, it must be injected somewhere else.

Chair Yamamura pointed out staff's special condition that the applicant consult with the Department of Agriculture ("DOA") about aquaculture. He questioned whether the issue was the kuleana of the Commission.

Chair Aila explained that the process needs to be spelled out.

Mr. Ice said the science is not clear about the impact of the brine. Staff is trying to find a balanced approach based on the facts.

Dan Purcell encouraged the Commission to start using video conferencing during their meetings.

Lori Buchanan (resident of Molokai) said another pond would be required to store the excess water and byproduct. She expressed concern about the chemicals used to clean the system and pointed out the importance of the precautionary principle when issuing water use permits.

Commissioner Starr asked if people on Molokai would attend a meeting that used video conferencing.

Ms. Buchanan said the room on Molokai is very small, but people would attend. In rural communities it is extremely important to make use of video conferencing.

Commissioner Starr made a motion to deny the application.

Commissioner Pavao disagreed with the motion and reiterated the special conditions identified by staff.

Chair Aila reiterated the need for more information and the impact of injection wells on gathering practices and natural resources. The Commission has a duty to investigate traditional and customary practices. The DOH and DOA may not.

Commissioner Beamer restated the need for additional information and study.

Chair Aila said the Hawaii Supreme Court is charged with conducting independent analysis.

Commissioner Starr added that prior decisions should not dictate the decisions made today. More studies are needed.

**MOTION: (Starr / Beamer)**

**To deny the application.**

**(Starr, Beamer, Aila = aye); (Yamamura, Balfour, Pavao = opposed)**

Deputy AG Lau and Deputy Tam recommended that a vote on the application be made to add clarity to the process.

**MOTION: (Starr / Beamer)**

**To approve the application.**

**(Yamamura, Balfour, Pavao = aye); (Starr, Beamer, Aila = opposed)**

The vote was three (3) to three (3). Four (4) votes are required to approve the motion. The application is not approved.

**E. STREAM PROTECTION AND MANAGEMENT**

- 1. Application for a Stream Channel Alteration Permit (SCAP.3842.6), County of Maui, Department of Public Works, Haiku Road Culvert Replacement, Lilikoi Gulch, Haiku, Maui, TMKs: (2) 2-7-003:056 (por.) and 2-7-020:009 (por.)**

SUBMITTAL PRESENTATION by: Rebecca Alakai

Commissioner Yamamura asked to be recused from Item E-1.

Rebecca Alakai (Planner, SPAM Branch, Commission on Water Resource Management) introduced Item E-1 as a proposal to reconstruct a portion of the existing culvert along Haiku Road on Maui. The culvert collapsed in 2007 after a powerful storm. The construction consists of grading to repair existing embankments, reconstruction of a portion of the existing culvert, and develop a means to slow down the water exiting the culvert. Lilikoi Gulch is an intermittent stream that is dry most of the year. There are no endangered or threatened birds, plants or aquatic species and no indication of traditional or customary practices. The proposed action triggered an environmental assessment ("EA"). On March 23, 2013 a final EA and Finding of No Significant Impact ("FONSI") were published in the Environmental Notice by the Office of Environmental Quality Control ("OEQC"). The proposed improvements will reduce future damage to the drainage way, protect public safety, and prevent erosion and sediment from entering downstream waters.

The improvements are not expected to have an adverse impact on existing uses in the area.

**RECOMMENDATION:**

Staff recommends that the Commission:

Approve a Stream Channel Alteration Permit (SCAP.3842.6) for the County of Maui, Department of Public Works' Haiku Road Culvert Replacement, Lilikoi Gulch, Haiku, Maui, TMKs: (2) 2-7-003:056 (por.) and 2-7-020:009 (por.) subject to the standard conditions in Exhibit 5.

**(DISCUSSION)**

Commissioner Starr asked if there are any riparian or endemic species mauka of the project site or along the stream.

Ms. Alakai replied not to her knowledge.

Commissioner Starr requested that the Division of Aquatic Resources ("DAR") report to the Commission if endemic or native species will be potentially impacted by future projects.

Ms. Alakai said DAR supports the project.

Commissioner Balfour asked why the culvert was not repaired sooner.

Colleen Suyama testified that water has eroded the bank along Haiku Road since 2007.

**MOTION: (Pavao / Beamer)**  
**To approve the submittal.**  
**UNANIMOUSLY APPROVED.**

**2. Application for a Stream Channel Alteration Permit (SCAP.3851.3), City and County of Honolulu, Department of Design and Construction, West Loch Golf Course Drainage Improvements, Honouliuli Stream, Ewa, Oahu, TMK (1) 9-1-017:060**

**SUBMITTAL PRESENTATION by: Rebecca Alakai**

The West Loch Golf Course was designed as a recreational facility and flood control project. Honouliuli Stream runs through the project area. The stream was designed to carry a 10-year flood. However, large rain events flood the golf course and lead to closures. The Stream Channel Alteration Permit ("SCAP") intends to improve drainage by capturing and removing silt from smaller rain events to maintain the stream capacity for larger storms. Flooding and silt deposits on the golf course will also be reduced. The project proposes to replace an existing ford crossing and golf cart path with a box culvert to improve stream flow. Improvements will also accommodate run-off. The stream is listed as intermittent. The watershed is 23 square miles and the stream is 32 miles long. The stream is highly degraded in its

lower reaches. No fish were observed on-site. The proposed activity is not anticipated to have a significant impact on the aquatic species or activities in the area.

RECOMMENDATION:

Staff recommends that the Commission:

Approve a Stream Channel Alteration Permit (SCAP.3851.3) for the City and County of Honolulu, Department of Design and Construction's West Loch Golf Course Drainage Improvements, Honouliuli Stream, Ewa, Oahu, TMK (1) 9-1-017:060 subject to the standard conditions in Exhibit 5.

(DISCUSSION)

Commissioner Starr reiterated his request to have the Division of Aquatic Resources ("DAR") report to the Commission if endemic or native species could be impacted.

Commissioner Balfour noted that the stream is filled with debris, especially after heavy rain events. He recommended that the City & County of Honolulu clear the stream of debris and vegetation on a regular basis to avoid future flooding.

Taewong Kim (Environmental Communications Planning Consultant) agreed with Commissioner Balfour's recommendation. The Department of Enterprise Services ("DES") is aware of the issue and has procured equipment for a regular maintenance program. The improvements are intended to mitigate flooding concerns.

Commissioner Starr asked if the recommendation could be amended to include a maintenance program.

Deputy Tam replied "yes" and suggested requiring a periodic maintenance report.

Mr. Kim asked if the condition could be applied to the end-user ("DES") and not the applicant ("City & County of Honolulu").

Commissioner Pavao asked if the Commission staff would be burdened with overseeing the maintenance.

Deputy Tam replied that the Commission staff would not oversee the maintenance.

Commissioner Starr asked about the design of the culvert.

Mr. Kim said the current concrete pipes would be replaced by rectangular boxes.

Commissioner Chair explained that the rectangular shape gives more surface area for the drainage.

[Commissioner Yamamura left the meeting at 1:05pm]

Commissioner Pavao asked if the boxes would help support the road.

Mr. Kim said they would serve as structural support for the golf cart path.

Deputy Tam read aloud the amendment to the recommendation. "The City shall prepare a plan for a regular and routine maintenance plan to ensure that the storm drain structure remains open and clear to pass storms flows. The City shall submit an annual report to the Commission describing the maintenance work and identifying any problems encountered."

**MOTION: (Starr / Beamer)**

**To approve the submittal with the amendment.**

**UNANIMOUSLY APPROVED.**

**3. Carolee and Blake Kolona's Request for a Contested Case Hearing on Pacific Links Hawaii, LLC's Application for a Stream Channel Alteration Permit (SCAP.3645.3), Makaha West Golf Course Improvements, Makaha and West Makaha Streams, Makaha, Oahu, TMKs: (1) 8-4-002:053, 055, and 067**

SUBMITTAL PRESENTATION by: Rebecca Alakai

Additional testimony was distributed for Item E-3. On May 22, 2013 the Kolonas submitted their request for a contested case hearing. Both the Kolona's request and the Makaha SCAP were deferred at the May 2013 meeting. The matter was presented again at the August 21, 2013 meeting. The Kolona land is located upstream of the Pacific Links project. Staff believes that the project will not impact the upstream mauka lands. The Kolonas do not have a right to a contested case hearing. The stream does not flow through the Kolona property. A person must have a property interest in order to qualify for a contested case. The Land Court Order of 1951 (No. 10157), which the Kolonas claim as an easement right, is actually an encumbrance on their land. There is no evidence to suggest that the project will adversely affect upstream properties.

**RECOMMENDATION:**

Staff recommends that the Commission:

Deny the petition for a contested case hearing filed by Carolee and Blake Kolona.

**(DISCUSSION)**

Commissioner Balfour asked if the recommendation was based on a legal opinion.

Ms. Alakai responded "yes." The recommendation is based on the AG's opinion, which is confidential.

Al Frenzel (representing Blake Kolona) said the Kolonas were off-island and unable to attend the meeting. He asked the commissioners to support the request for a contested case. Although the AG opinion may be legally correct, it is just an opinion. He made reference to the 1951 Land Court Order and said the stream runs next to the Kolona property. Mr. Frenzel said flood studies are pending and could provide more information about the valley and potential impacts. Homeowners are paying for flawed construction projects and illegal grading that have changed the flow of water. There is no adequate drainage system for Makaha Valley. Residents would like Pacific Links to fix the

flooding problems.

Commissioner Balfour asked who wrote the AG opinion.

Deputy AG Lau said he did not write the opinion, but it came from his office.

Keith Kohl (property owner in Makaha) testified in support of the Kolona's request for a contested case. The AG opinion does not erase or change the Land Court Order of 1951. He referenced flood maps and said the stream runs through the Kolona property. Mr. Kohl asked who would qualify as a third party.

Commissioner Balfour asked if the Kolonas would have any recourse if the Commission chose to deny the request for a contested case.

Chair Aila said Mr. Kolona could appeal to the Circuit Court.

Deputy AG Lau said he could not offer legal advice.

Commissioner Balfour made a motion to go into executive session.

Commissioner Beamer reiterated staff's recommendation that the Kolonas do not have standing and therefore do not qualify for a contested case.

Mr. Kohl asked who could request a contested case.

Clydetta Self (resident of Makaha) referenced the SCAP's claim that no construction will take place in the stream. She cited the materials to be used during construction and read aloud the 1951 Land Court Order.

Chair Aila repeated the AG's opinion stating that the Kolona's easement right is actually an encumbrance on their property. An encumbrance is not a beneficial property interest belonging to the landowner.

Julianna Kohl (property owner in Makaha) cited the 1951 Land Court Order and said it includes the Kolona property. She cited Hawaii Revised Statute ("HRS") 501-1 Land Court jurisdiction, proceedings, location, rules, and practices, which states "exclusive jurisdiction."

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

Micah Kane (Chief Operating Officer, Pacific Links) testified in response to the previous testimony. He suggested that the Pacific Links staff and the residents ho'oponopono.

**MOTION: (Starr / Pavao)**  
**To approve the submittal and deny the request for a contested case.**  
**UNANIMOUSLY APPROVED.**

[Commissioner Beamer left the meeting at 2:25pm]



**4. Joycelyn Self and Clyde Phillips' Request for a Contested Case Hearing on Pacific Links Hawaii, LLC's Application for a Stream Channel Alteration Permit (SCAP.3645.3), Makaha West Golf Course Improvements, Makaha and West Makaha Streams, Makaha, Oahu, TMKs: (1) 8-4-002:053, 055, and 067**

SUBMITTAL PRESENTATION by: Rebecca Alakai

The Self-Phillips property is located downstream of the golf course. The request for a contested case hearing was submitted at the August 21, 2013 meeting. They must also qualify for a contested case by providing proof of a property interest. Over the last 80 years, grading and agriculture activities have diverted the historical stream bed more than 100 feet north of the Self-Phillips property. The Makaha stream does not pass through the Self-Phillips property and is located on someone else's property. The area is subject to flooding, but there is no evidence that the upstream activities will affect flooding or adversely affect their property. The property is not located in the stream, but may be located in a floodplain.

RECOMMENDATION:

Staff recommends that the Commission:

DENY Petitioners Joycelyn Self and Clyde Phillips' request for a contested case hearing on the West Makaha SCAP.

(DISCUSSION)

Commissioner Starr asked about the current FEMA flood rating.

Ms. Alakai said the property is currently rated "XS." "X" indicates that flood insurance is optional and the property is located in a 500 year floodplain.

Commissioner Starr asked about flooding history in Makaha.

Ms. Alakai replied that the makai portion of the stream has changed over the years. Aerial photos seem to indicate heavy grading over the past 80 years. In 1975 the developer bulldozed the stream and turned it into a construction road. The subdivision was built and a berm was constructed that diverted the stream. The current location of the stream is now north of the petitioner's property.

Commissioner Starr asked if the Self-Phillips property may have run along the stream at one time.

Ms. Alakai said it was possible. However, that is not the case today.

Clydette Self (resident of Makaha) objected to the staff recommendation. She asked if it was customary or common practice for the Deputy Director to sign for the Chairperson.

Chair Aila replied "yes, when the Chairperson is out."

Ms. Clydette Self said it could be viewed as a conflict of interest. She noted the Land Court Order of 1951 and said her mother's property runs to the middle of the stream. She

cited FEMA text and said flooding and upstream human development may alter the stream channel and floodplain.

Joycelyn Self stated that she is required to have flood insurance.

Chair Aila reiterated the AG's opinion and said the easement they claim is actually an encumbrance on their property. An encumbrance does not represent a property interest or a property right.

Ms. Clydette Self expressed her concern that staff was not fighting for the rights of the property owners and helping the applicant instead.

Chair Aila said there is not sufficient proof that the project will impact their property downstream.

Commissioner Starr pointed out that the AG opinion does not sufficiently address the standing issue. The applicant asserts a property interest in the contested case request.

[Deputy AG Cindy Young takes over for Deputy AG Lau at 2:50pm]

Al Frenzel testified in support of the contested case request. He said the illegal grading activity upstream has had a detrimental effect on the property owners downstream. If the SCAP is approved it sanctions the illegal grading and limits Ms. Self's ability to sue.

Keith Kohl testified in support of the contested case request and said Ms. Self has showed sufficient proof that her property runs to the middle of the stream. He critiqued Pacific Link's project proposal and said the applicant acknowledges that the stream splits and is susceptible to flooding.

A licensed engineer and representative from Wilson Okamoto clarified that the golf course will not change the current FEMA flooding models or existing conditions. The width of the floodplain and the velocity of the water does not change.

Julianna Kohl cited the engineering report and named the property owners who would be affected by the project. She expressed her concerns about future flooding in the valley.

Chair Aila recited the names of the property owners listed in the engineering report. Ms. Self's property was not listed.

Dan Purcell asked if maps and visual aids could be shown to the audience. He expressed concern about issues of quorum and commissioners leaving in the middle of testimony.

Chair Aila said the meeting will continue as long as there is quorum.

Ms. Joycelyn Self said she was aware that her property was in the stream at the time it was purchased. She disagreed with the AG's opinion and said she has a right to contest.

Chair Aila asked Rebecca Alakai if she could clarify the boundaries of the stream.

Ms. Alakai stated that there are historic photos of Makaha Valley available on the UH coastal erosion website. In 1928 there was a stream channel and no subdivision.

However, it is not clear if this is the original stream. At this time, the surrounding area is shown as being heavily graded. In 1975 roads were constructed and the stream was bulldozed. In the 1980s the stream starts to return north of the Self property. The streambed has moved north over time and the floodplain continues to change.

Chair Aila asked where the footage of the boat floating down the stream had been taken.

Ms. Alakai said the location is not clear based on the footage.

Commissioner Starr asked if a request for a contested case can be made ahead of an action.

Deputy Tam said it is important to understand the context in which a contested case arises. In the context of the Water Commission, a requestor of a contested case is providing additional information about a particular item before a decision is made. As a matter of process, the Commission cannot make a judgment and then have the appeal.

Deputy AG Young said the item typically comes first, before a decision about a contested case is made. In the case of the Land Board, the Board approved a permit prior to the granting of a contested case. If the Makaha SCAP was denied by the Water Commission, Ms. Self may want to withdraw her request for a contested case.

Deputy Tam disagreed and said the right to a contested case is decided before a decision on the merits of an application. The contested case itself is the opportunity to present evidence before decision-making. As a matter of due process, it is wrong to have a trial after the judge has made a decision.

Commissioner Starr asked if the merits of an application would be discussed if a contested case is granted beforehand.

Deputy Tam replied that a hearing's officer is appointed and both sides are allowed to present evidence. A recommendation is made by the hearing's officer and the Commission votes on the merits. If the Commission were to vote on the merits of an application before a contested case, they have already expressed their opinions and therefore their decision could be seen as bias.

Deputy AG Young clarified that an applicant cannot begin work on a particular project until the contested case has been resolved.

Commissioner Balfour asked if the requestor can appeal to the Circuit Court if the Commission denies a contested case hearing.

Deputy Tam replied "correct."

Commission Balfour asked if the requestor can appeal to the Circuit Court if a contested case is granted, but the hearing's officer does not rule in their favor.

Deputy Tam said the requestor can appeal to the Circuit Court in both instances. The first appeal would relate to the denial of the contested case request. In the second example, the requestor is appealing the decision made by the Commission based on the recommendation of the hearing's officer.

Chair Aila said the denial of the contested case could be appealed to the Circuit Court. The Circuit Court would decide if the Commission made the right decision procedurally to deny the contested case.

Deputy Tam said if the Commission denies the contested case request, they would then decide on the merits of the application. If the Commission grants the contested case, the merits decision is at a standstill until a decision about the contested case is resolved.

Commissioner Balfour asked about the timeframe for a contested case.

Deputy Tam said the hearing's officer would set up a schedule for the hearing. A good hearing's officer can resolve a contested case in a few months.

Commissioner Starr asked about the outcome of the Land Board decision in which a contested case was granted after a permit was approved.

Deputy AG Young said the Land Board granted the permit and subsequently granted the contested case request. A contested case was scheduled, evidence was presented and the hearing's officer made a recommendation to approve the permit. The Land Board agreed with the hearing officer's recommendation.

Deputy Tam interjected that the Land Board process was wrong and should not be used as an example.

Deputy AG Young read HRS Chapter 91 regarding contested cases and due process. According to the rules, an oral or written request for a contested case hearing must be made by the close of a Commission meeting at which the matter is scheduled for deposition. The person requesting a contested case must file a written petition within 10 days of the meeting. "Standing" requires the requestor to have an adequate interest in the issue.

Deputy Tam added that someone has standing if they have a liberty or property interest that could be adversely affected by the application as proposed. There must be a connection between the action and the requestor's interests.

Commissioner Starr said Ms. Self filed her request in a timely manner and appears to have standing. He made a motion to grant the contested case.

Commissioner Pavao spoke against the motion and said the flooding is already occurring. To speculate that the project will cause greater flooding is illogical.

**MOTION: (Starr / Balfour)**

**To grant a contested case to Joycelyn Self and Clyde Phillips.  
(Starr, Balfour, Aila = aye); (Pavao = opposed)**


The vote was three (3) to one (1). Four (4) votes are required to approve the motion. There is no action.

5. **Application for Stream Channel Alteration Permit (SCAP.3645.3), Mākaha West Golf Course Improvements Mākaha and West Mākaha Streams, Mākaha, O'ahu, (TMKs: (1) 8-4-002:053, 055, and 067)**

**MOTION: (Starr / Balfour)**  
**To defer Item E-5 to December 18, 2013.**  
**UNANIMOUSLY APPROVED.**

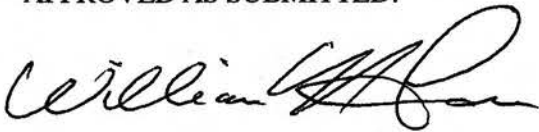
Chairperson William J. Aila, Jr. adjourned the meeting at 4:10 pm.

Respectfully submitted,



KATIE ERSBAK  
Private Secretary to the Deputy

APPROVED AS SUBMITTED:



WILLIAM M. TAM  
Deputy Director