

Approved by Commission on
Water Resource Management
at the meeting held on
2-18-15

MINUTES
FOR THE MEETING OF THE
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: January 28, 2015
TIME: 9:30 am
PLACE: DLNR Board Room
Kalanimoku Bldg.
1151 Punchbowl St., Room 132
Honolulu, Hawaii 96813

Acting Chairperson Jonathan Starr called the meeting of the Commission on Water Resource Management to order at 9:36 am.

The following were in attendance:

MEMBERS: Mr. Jonathan Starr, Mr. Michael Buck, Mr. Kamana Beamer, Ms. Denise Antolini, Ms. Virginia Pressler, M.D.

ABSENT: Mr. Milton Pavao

STAFF: William Tam, Roy Hardy, Dean Uyeno, Rebecca Alakai, Malie Beach-Smith, Lenore Ohye, Patrick Casey, Jeremy Kimura, Robert Chenet, Ayron Strauch, Paul Eyre, Neal Fujii, Robert Chenet, Ryan Imata

COUNSEL: Linda Chow, Esq.

OTHERS: Pam Bunn, Summer Kapau-Odo, Jonathan Scheuer, Susan Mukai, Dean Nakano, Andrew H. Choy, Dan Purcell

A. APPROVAL OF MINUTES

November 19, 2014

MOTION: (Buck / Antolini)
To approve the minutes.
UNANIMOUSLY APPROVED.

B. ANNOUNCEMENTS

Acting Chair Jonathan Starr welcomed new commissioner Virginia "Ginny" Pressler. He introduced the other commissioners and Water Commission staff.

Roy Hardy (Program Manager, Ground Water Regulation) thanked Paul Eyre for his service to the Commission and the wealth of experience he has brought to the job.

Mr. Eyre praised the commissioners and staff for their work. He talked about the significance of the Water Code and what a great privilege it was to work for the Commission.

Deputy Director William Tam said Mr. Eyre always asked the hard questions and sought the hard facts.

Acting Chair Starr thanked former Chair William Aila Jr. The other commissioners expressed their appreciation for Aila and the great work he was able to achieve at DLNR.

C. UPDATES

1. Na Wai Eha (Appurtenant Rights)

On December 31, 2014 a provisional order was issued adopting the hearing officer's amended recommendations and revising Exhibit 7. The appurtenant rights quantification process should be done by late spring 2015.

Commissioner Buck asked if the original order changed the status of the contested case.

Deputy Tam said "correct."

Commissioner Beamer asked how someone who is currently farming taro can enter into the appurtenant rights process.

Deputy Tam said those individuals should apply and submit an application. There is no deadline to file for appurtenant rights. There will always be new applications for water uses, but there are deadlines to deal with the first group of applicants. Others will be processed later.

Acting Chair Starr asked how quantifications will be processed.

Deputy Tam said the next phase will determine how much water is needed on each parcel to grow taro.

Dr. Lawrence Miike (Hearing Officer) said the first step looks for evidence that water was used to grow taro at the time of the Great Mahele in 1848. An estimate is made about actual water use. There has to be some flexibility in deciding how much water is awarded to each parcel.

Commissioner Beamer noted that there are quantification studies on water needs for growing kalo.

Deputy Tam said the facts will shape the Commission's decisions.

Acting Chair Starr asked about the severance of appurtenant rights.

Deputy Tam said the issue will be discussed after the fact record is developed.

Dr. Miike added that there are no objections to standing.

Commissioner Beamer asked about those who have not been involved in the process up to this point.

Deputy Tam said applicants who apply for water use after the fact will be addressed by the Commission in the form of an enforcement action.

2. East Maui Instream Flow Standards Contested Case Hearing (on remand from Hawaii Supreme Court)

In 2001, Native Hawaiian Legal Corporation (“NHLC”) representing taro growers petitioned to amend the instream flow for 27 streams in East Maui. An agreement was reached in which 8 streams were given water for the taro growers. The remaining 19 streams were the subject of Commission dealings. Eventually the Commission put some water back into 6 or 7 of the 19 streams. The case was overturned by the Hawaii Supreme Court. The case of the 19 streams was pushed back to the Commission. The Commission recently approved that the case look at all 27 streams, including the original 8. Any decision made on the 19 streams is void, but the agreement still stands for the first 8 streams. The hearings will begin in March 2015. A pre-hearing conference will be held before the March hearings to discuss the sequence of witnesses. An additional individual has been added to the list of parties.

Commissioner Buck asked about the timeline.

Dr. Miike said the evidentiary phase should be completed by May 2015. The hearing officer should have a recommendation ready to present to the Commission by the fall of 2015.

3. Petition to Designate Keauhou Aquifer as a Ground Water Management Area

Roy Hardy (Program Manager, Ground Water Regulation) reiterated the December 10, 2014 recommendation. Hawaii County has responded to the January 15, 2015 deadline with a draft Water Use and Development Plan (“WUDP”). The Commission staff has prepared comments in response to their draft plan. The recommendation for mediation between the County and the National Park Service (“NPS”) is taking shape. The NPS does not feel comfortable having a mediator.

Commissioner Buck said he hoped Commission staff would not need to coordinate the mediation meetings between the County and NPS.

Deputy Tam said former Chair Aila met with Mayor Billy Kenoi after the December 10, 2014 meeting. Commission staff was under the impression that those mediation meetings were being scheduled.

Tammy Duchesne, Superintendent, Pu'uhonua o Honaunau & Kaloko-Honokohau National Historical Parks, assured the commissioners that the NPS intends to work with Hawaii County to find a solution. NPS has contacted the Hawaii Department of Water Supply (“HDWS”) to set up a meeting. The HDWS Water Board has agreed to accept the NPS recommendations outlined in NPS’s January 8, 2015 letter.

Commissioner Beamer asked about the use of a mediator.

Ms. Duchesne said the NPS prefers to meet first with technical experts to understand the alternatives and develop a legally enforceable framework.

Connie Chow (attending on behalf of the Hawaii County Water Board) clarified that the Water Board has not agreed to every recommendation in the NPS letter from January 8, 2015. HDWS is willing to move forward in the mediation process and is hopeful that a mediator could help facilitate discussions. She said Commission presence at those discussions would be helpful.

Acting Chair Starr asked if HDWS would begin discussions without a mediator.

Ms. Chow said HDWS is willing to move forward with discussions, but believes a mediator may be helpful if the discussions do not lead to a result.

Commissioner Buck encouraged the HDWS and NPS to finalize their discussions and mediation by mid-May 2015.

4. West Kauai surface water investigation

Steve Spengler from Element Environmental has conducted several site visits. Presentations about the system have been made to staff and the parties. Future repairs to the system to address the claim of "waste" are being discussed.

Dean Uyeno (Program Manager, Stream Protection and Management) said Mr. Spengler has done spot measurements, but more data collection is planned through the installation of long-term transducers. A future site visit has been put on hold, but Mr. Spengler can present his findings in a presentation.

Acting Chair Starr asked if the access issues had been resolved.

Mr. Uyeno said they are awaiting a firm commitment from the Department of Hawaiian Home Lands ("DHHL").

Commissioner Buck asked for a presentation at a future meeting.

Deputy Tam said some of the water that is diverted is needed to run the hydroelectric facility and the pumps that control and prevent saltwater intrusion.

Commissioner Antolini asked if the presentation could be made at the February meeting.

Deputy Tam said "yes."

Acting Chair Starr questioned the use of public trust water for hydroelectric.

D. PRESENTATIONS AND BRIEFINGS

1. Red Hill Task Force briefing, evaluation and options (including research, monitoring, and remedial requirements)

Gary Gill, Environmental Health Deputy Director at the Department of Health ("DOH") updated the Commission on the Red Hill situation. The Red Hill Task Force recently issued a report to the 2015 Legislature. Two new monitoring wells have been installed by the Navy. Petroleum has been detected in those wells. It is

not clear how big the ground water plume of contamination has become or where it is headed. The Legislature has the opportunity to pass laws or extend the work of the Task Force. DOH and the Environmental Protection Agency ("EPA") have regulatory authority over the tanks. However, their oversight is limited. They are working with the Navy to sign a compliance agreement that contains a statement of work including maintenance and upgrading of the tanks. The agreement should be finalized by March 2015. The best way to mitigate the threat of the tanks to the groundwater is so double-line them with leak protection. Future upgrades to the tanks are uncertain.

Commissioner Antolini asked about the consent agreement.

Deputy Gill said it is an administrative order on consent. The parties are DOH, EPA, and the Navy. It is not clear who from the Navy will sign the document. A public hearing is required before it becomes final.

Commissioner Antolini asked that the timeframe for public comments be stretched to 60 days.

Commissioner Buck asked if the recommendations from DOH are in the Governor's package.

Commissioner Pressler said DOH has made certain commitments.

Deputy Gill said the Governor and Legislature can approve an emergency appropriation from the Barrel Tax. The rule-making process is cumbersome, but amendments can be made.

Acting Chair Starr said the tanks pose a threat to Oahu's drinking water supply.

Deputy Gill said there is no proven technology to double-line the tanks at Red Hill. It will take years to come up with a range of solutions that are practical. The statement of work and agreement are evolving based on data and analysis not currently available.

Acting Chair Starr asked about the likelihood of a tank blowing out and the value of taking measures to prevent 12.5 million gallons of jet fuel from leaking into the groundwater.

Deputy Tam said staff could investigate the life cycle of the tanks.

Deputy Gill addressed the risk of a catastrophic release. Prior to the most recent release, historic documentation from the Navy indicates that jet fuel has leaked out of the tanks. The Navy routinely assesses and maintains the tanks. However, to eliminate the risk, the tanks need to be decommissioned. If a tank ruptures it will seep through the bedrock into the groundwater. The underground tunnel is a direct pathway to the Navy's drinking water supply. These issues are of concern to the Honolulu Board of Water Supply ("HBWS"). All of these are inherent risks so long as this facility is in operation.

Acting Chair Starr requested a study of the tanks and the probability of a catastrophic failure.

Deputy Tam said staff could work on a plan.

Commissioner Antolini noted the multiple bills before the 2015 Legislature.

Deputy Gill said there is a bill to extend the work of the Task Force.

Commissioner Antolini said an analysis and recommendation from staff may help augment the bills already in motion. She said regular updates from staff would be sufficient.

Acting Chair Starr agreed and said he would like to move toward a solution.

Dan Purcell thanked Deputy Gill for his work on the Task Force. Senate Bill ("SB") 1168 seeks to address the design and construction of the tanks. The tanks were designed to deform. The design paperwork has been lost. There was no discussion about possible sabotage or security at the site.

2. Central Oahu Non-potable Water Master Plan, Phase II, Refinement of Opportunities Report

Neal Fujii (Water Commission, State Drought and Water Conservation Coordinator) explained the scope and objectives of the plan. The project includes Wahiawa, Kunia and the major water users in Central Oahu. The Commission became interested in the issue when the plantations were transitioning away from sugar to other agricultural uses and forms of development. A framework of opportunities was proposed to give options to decision makers. The plan identifies non-potable demands to alleviate the use of potable water and promote the Commission's policy of highest and best use. Key areas were identified as potential opportunities including the Kunia Road corridor and former Galbraith lands. Many areas are using the same source of water. The key stakeholders in some of these areas tend to be landowners with control of the water (i.e.: Agribusiness Development Corporation and the Waiahole Ditch). Much of the water demand is related to agriculture and landscaping/golf course. There are significant challenges ahead. These include high expected capital costs, competitor pricing issues, lack of coordination between key stakeholders, public safety and health concerns about using recycled water on crops. The report will be posted to the website soon. Funds can be leveraged through collaboration with stakeholders. Outreach and education is essential to future success.

Acting Chair Starr asked staff to come back again to provide an update.

3. Legislative update on proposed DLNR budget

Deputy Tam said the Governor's budget is asking for ceiling increases. No legislation or initiatives are being proposed. The Department is not asking for Capital Improvement Project ("CIP") funds.

E. STREAM PROTECTION AND MANAGEMENT**1. Approval to Hold a Contested Case Hearing and Delegate Authority to the Chairperson to Appoint a Hearings Officer for the Surface Water Use Permit Applications in the Na Wai Eha Surface Water Management Area, Maui**

Dean Uyeno (Program Manager, Stream Protection and Management) gave some background on the Surface Water Use Permit Applications ("SWUPA"). Na Wai Eha was designated as a Surface Water Management Area in March 2008. Existing water users were given a year to file existing surface water use applications. The Commission received 125 surface water use permit applications, of which 115 were accepted. Subsequently, 85 permits for new use were submitted. The water use permit process was delayed due to the Instream Flow Standards ("IFS") and appurtenant rights. In April 2014 there was a mediated agreement regarding the IFS for Na Wai Eha. In October and November 2014 hearings were held on Maui for the provisional recognition of appurtenant rights. A provisional order was issued. Another provisional order will be issued should additional information or claims be made.

Commissioner Buck asked if the deadline to file additional information was the end of January 2015.

Mr. Uyeno said yes. There is one applicant that filed additional information but the recommendation stayed the same. The SWUPAs are the third phase in the process. New and existing uses need to be looked at in conjunction with appurtenant rights.

RECOMMENDATION:

That the Commission a) determine a contested case hearing is required for the hearing and determining of all surface water use permit applications and then integration of all three stages into a recommendation to the Commission; and b) delegate authority to the Chairperson to appoint a Hearings Officer to address the Surface Water Use Permit Applications and these tasks in the Na Wai Eha Surface Water Management Area, Maui.

(DISCUSSION)

Commissioner Buck asked how the timeframe for integrating all three processes.

Mr. Uyeno said once the hearing officer is on board, they will help push things forward. Some of the analysis for the water use permits and claims have been done. New claims may require additional investigation. There is also the balancing of water use requests with the appurtenant rights.

Commissioner Buck said community expectations on Maui are high. He commented that contested case hearings are not always user-friendly to the general public.

Acting Chair Starr said water use permits issued after designation have been different. There is concern regarding appurtenant rights and what will happen to existing users. He asked if staff has planned any Maui informational meetings for the public that are not part of the contested case.

Mr. Uyeno explained that public hearings for the surface water use permit applications have been held in the past, but few people have attended. Staff can certainly do more to make information available online.

Deputy Tam suggested posting a prospective narrative and timeline outlining the next steps in the process on the Commission's webpage.

Acting Chair Starr reiterated his desire to have a public meeting on Maui.

Mr. Uyeno said a public hearing will be scheduled for the fall, so that could be an opportunity for public outreach.

Acting Chair Starr encouraged staff to schedule something sooner.

Commissioner Antolini asked about the recommendation to determine that a contested case hearing is required and is it Commission *sua sponte* (of its own accord).

Deputy Tam said it is required by law.

Commissioner Antolini asked that the Commission be briefed on the steps that are anticipated.

Pam Bunn, representing the Office of Hawaiian Affairs ("OHA") recounted the history of the case. In 2004, a petition was issued to amend the Interim Instream Flow Standards ("IIFS") for Na Wai Eha. Ten years later the process is still ongoing. The designation of Na Wai Eha as a surface water management area in 2008 was historic, but the community is still waiting for their water use permits. She urged the commissioners to vote in favor of the staff recommendation.

Commissioner Buck asked if there was anything the commissioners could do to make the process more transparent.

Ms. Bunn said in the past, all contested case meetings were open to the public to watch. There are many ways to involve the community through video, etc.

Acting Chair Starr encouraged Ms. Bunn to share her ideas and suggestions.

Summer Kapau-Odo, representing Earthjustice on behalf of Hui O Na Wai Eha and Maui Tomorrow Foundation testified in support of the recommendation and joined in OHA's comments.

Commissioner Antolini asked if she had any recommendations for the process moving forward.

Ms. Kapau-Odo said Earthjustice would be happy to share their thoughts.

Mr. Hardy commented that the long wait since 2008 mentioned by Pam Bunn actually goes even further back to the groundwater designation related to Na Wai Eha.

Acting Chair Starr said it is important to create a framework and structure for the process.

Mr. Hardy said staff is looking to be more expeditious and learn from the past. However, each case is different.

Dan Purcell raised concerns regarding the contested case process. He cited other cases that appeared to mismanage the process. He asked that the meetings be noticed properly.

Acting Chair Starr commented on his involvement with contested cases.

Commissioner Pressler asked if Chapter 91 should be revised.

Deputy Tam said now is probably not the most appropriate time to have the conversation.

Commissioner Antolini asked Deputy Tam to explain the process moving forward.

Deputy Tam explained that the hearing officer will organize a hearing with all the parties. The meeting will be noticed and public to those who wish to attend. A due process hearing will allow the applicants to present their case. The hearing officer will process the information and issue a proposed order, which the parties can comment on. The Commission will review and have the opportunity to hear from the parties again before making a decision.

Commissioner Pressler said the process appears to be well defined.

Deputy Tam said there is an abundance of due process.

**MOTION: (Buck / Antolini)
To approve staff's recommendation.
UNANIMOUSLY APPROVED.**

Acting Chair Starr spoke about the uncertainty of appointments and joined the other commissioners and staff in acknowledging the work and leadership of Deputy Director William Tam.

Acting Chair Starr adjourned the meeting at 12:35 pm.

Respectfully submitted,



KATIE ERSBAK
Private Secretary to the Deputy

APPROVED AS SUBMITTED:



W. ROY HARDY
Acting Deputy Director