

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

DATE: December 17, 2019
TIME: 10:00 am
PLACE: Kalanimoku Building
DLNR Board Room 132
1151 Punchbowl Street
Honolulu, Hawai'i 96813

Chairperson Suzanne D. Case called the meeting of the Commission on Water Resource Management to order at 10:07 a.m.

MEMBERS: Ms. Suzanne Case, Dr. Bruce Anderson, Mr. Michael Buck,
Mr. Neil Hannahs, Mr. Wayne Katayama, Mr. Paul Meyer

STAFF: Deputy M. Kaleo Manuel, Dean Uyeno, Roy Hardy, Lenore Ohye,
Charley Ice, Neal Fujii, Rebecca Alakai, Nicholas Ing,
Patrick Casey, Ryan Imata, Rae Ann Hyatt

COUNSEL: Ms. Cindy Young

EXCUSED: Dr. Kamana Beamer

All written testimonies submitted at the meeting are filed in the Commission office and are available for review by interested parties.

A. APPROVAL OF MINUTES

November 20, 2019

DEFERRED

B. ACTION ITEMS

- 1. Authorize the Chairperson to Negotiate and Enter into a Memorandum of Agreement with the Water Board of the County of Hawai'i for the Kaloko Deep Monitor Well Project**

PRESENTATION GIVEN BY: Mr. Nicholas Ing

Mr. Ing – presented the submittal item, stated the summary of request, and provided the background information relating to the deep monitor well and terms of the MOA between the Water Board of the County of Hawai‘i and the Commission. The Attorney General’s Office has advised that this BLNR declaration is sufficient and determined there is no significant effects and therefore an exemption declaration is not needed.

Chair Case – *<asked if the County was present>*

Ms. Lenore Ohye – replied that the County was at their Water Board meeting and supported the MOA

Chair Case – *<asked if there are any questions from Commissioners or public testimony; being there were none, asked for a motion to approve>*

MOTION: (HANNAHS/KATAYAMA)

To approve B-1 as submitted

UNANIMOUSLY APPROVED

C. FOR INFORMATION ONLY

1. G14-01 Penalty Guideline

PRESENTATION GIVEN BY: Mr. Roy Hardy, Groundwater Program Manager

Mr. Hardy – presented the item and gave a PowerPoint presentation on the background, current guidelines of G14-01 and next steps of the penalty guideline. The goals of the guideline system are to: a) deter violations; b) remove the economic benefit of violations; c) provide fair treatment of the regulated community; and d) offer the violator a chance to undertake a beneficial alternative, under proper conditions, in a partial or total replacement of a cash penalty. The guideline applies to Commission programs which include but are not limited to: 1) measuring and data reporting; 2) various permits; 3) violations, 4) instream use protection program; 5) instream flow standards.

The guideline is only for use by Commission personnel and is not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the Commission on Water Resource Management. The Commission’s staff expects to change the guideline as it gains experience with the implementation. We have legal authority under HRS 174C-15 and Admin Rule 13-167-10 that allows the issuance of fines up to \$5,000 for violations following under the legal authority.

Touched base on the penalty calculations and methods and went over the mitigative components such as: how significant the impact was on the resource, attempt to remedy the violation without notice, good faith effort to remedy, timely reporting, and diligence.

QUESTIONS

Commissioner Buck – what’s the rationale for an extra fee in the water management area?

Mr. Hardy – it’s a sensitive area and is a management area; meaning it’s been designated and need to pay attention to it more with water use permits in those areas.

Commissioner Buck – it’s not the date of the actual violation but how long the condition of the violation lasted?

Mr. Hardy – when it occurred.

Commissioner Buck – what’s tolling?

Mr. Hardy – a stopped period of daily fines.

<with regards to VI. Alternative Settlement bullet point under “must result in”>

Chair Case – is it “and” or “or?”

Mr. Hardy – those are all “or.”

Commissioner Hannahs – does this apply also to surface water?

Mr. Hardy – yes, anything under the code and rules.

Commissioner Hannahs – the goals don’t speak of a real job; a real job is to protect this public trust asset; what’s the worst thing that could happen in which you would cite someone?

Mr. Hardy – something that’s willful; those that know about it and do it anyway and results to damages to the resource significantly.

Commissioner Hannahs – is there a nexus between these penalties and that impact?

Mr. Hardy – yes, it’s discussed in the mitigation gravity component of it, it’s not spelled out in the beginning.

Commissioner Hannahs – might the gravity or cost of the impact be well more than the fines? This is what we’re dealing with. The fines tend to be a slap on the wrist when you think of the overall cost of the benefit to the person violating as well as having a huge real estate value, for instance versus the cost to the public trust asset. I’m trying to reconcile numbers, relate them in a rational way to either those impacts and what it takes to cure it.

Chair Case – that would be a restitution requirement which is different from the fine.

Mr. Hardy – it's on the part of the damages that's in the flow chart; if it gets to that point, its separate; you damage it, how you're going to fix it? It's a different calculation and we haven't fleshed that out yet.

Commissioner Hannahs – we have the authority to address it but not the guidelines?

Mr. Hardy – yes

Commissioner Hannahs – in your next steps, that's covered under minor/major or CRVS?

Mr. Hardy – yours is probably major, under worst thing that can happen, reconciling it we thought about and also flushing it out more and this issue of damages, we need to go about being consistent on assessing like we have with the penalty.

Chair Case – it is two different things?

Mr. Hardy – yes

Commissioner Buck – we have ability to go over the \$5,000 max?

Mr. Hardy – not for the penalty, but it talks about damages; that's separate.

Commissioner Anderson – I applaud you for putting this together, it's good to have consistent guidelines and the important programs could use some rationale with what you're recommending, good work with that. In the Health Department we have fines that range up to \$25,000 per day, per violation. It is our true hammer and often a case where we run up many days of violations, we're also looking at getting responsible parties for millions of dollars in penalties. The worst case scenario is what if someone puts a damn up on the stream, and basically stops the flow entirely? Everything dies downstream and the \$5,000 penalty to go after that is nothing.

The two cases we talked about last week where someone did some stream bank alterations; I guarantee just the construction alone on those projects was \$100,000, just to move the rocks. Again, \$5,000 is less than you pay to get a permit to do it; it's really a hard one to work with. One suggestion I would have in your penalty policy, that you not allow as an alternative, any of the fines to be offset by fixing the problem, that's a separate issue. They need to fix the problem and then you penalize on top of that; otherwise they're just going to do the work and if they get caught, they'll just use the monies that was going to pay for the fines to remedy the situation.

In all the penalty policies in the Health Department, you'd fix the problem, you can't apply any of the penalty toward fixing the problem you've created, which I think is an important deterrent. I think there's a fundamental problem that you have a cap on the number the penalties you can assess. One advantage you have is there are other agencies involved in those grievous problems that you might have. I know you're working with the Clean Water Branch to see if we can figure a way to come together and come up with penalties in those cases where there are water quality violations on top of allocation issues. There's potential and I'm pleased you're doing that. I do think in the most grievous situation where a major

alteration is occurring, the \$5,000 is nothing, they're going to do it and say go fine me and not do anything about it.

I wonder if it's a legal issue, the authority the Commission has to require remedial action if they do violate the laws and whether we do have the ability to go in and order them to fix the issue without having large penalties to assess as a deterrent or as way to force them to do what we want.

Another good example is our sewer treatment plants, we fined millions of dollars which are ultimately put into recycled water and other projects which I think were beneficial. We wouldn't have been able to force the County into that if they didn't otherwise have to pay large amounts for the penalties incurred because of the violation of their permit. You have to have the high penalty amount in order to force a responsible party into action. Not sure if your penalty policy applies to a single party or more; often the case we don't site just the landowner, we'll site the contractor and everyone else who should've known; I'm not sure if your policy speaks to that. Can you fine them each individually or separately or just one \$5,000 amount? These are some issues you need to think about with what you have.

It's great you're putting this together but there's lots of issues you need to think about as you refine this policy; and most importantly, I don't think the fine should be that you should look at an alternative settlement. You never want to allow the fine to be used to correct a problem that it created. You may need to go to the legislature to jack that fine up because you're not going to effectively come up with a good policy; that cap seems very low.

Commissioner Meyer – Bruce is probably way ahead of us because of years in the (Health) department. I feel strongly that some of the issues we deal with, are a magnitude and importance to our community and the public trust resource. For example, contamination of an aquifer in a place like O'ahu would be a complete disaster and would hamper the community foreseeable future. Those are the kinds of issues we really are considering when we're looking at is our program a realistic deterrent and a force in working towards cooperation and collaboration? It's complicated and difficult and will take a little more thought required for further action. I would encourage that we look to that approach.

Chair Case – (Roy) your legal authority memo has a \$1,000/day figure for both the statute and other, so that should be \$5,000?

Mr. Hardy – yes, should be \$5,000 – the rules have been updated and is from 2014 and those updates are recent.

Commissioner Hannahs – for clarity – is that what you meant with the difference between restitution and penalty?

Chair Case – a case-by-case thing that comes before the Commission.

Commissioner Hannahs – when I mentioned earlier, you said you lacked the guidelines for it, is there anything you need from us?

Mr. Hardy – we haven't gone there yet.

Chair Case – they will still bring those to the Commission.

Commissioner Katayama – (*directed to Bruce*) do you have the ability to violate the incident? Some things sound more procedural where they didn't get a permit or the work is more administrative as per something that is catastrophic that needs a cease and desist or immediate remedy, whether by the owner or third party, to stop the issue from happening or getting worse.

Chair Case – we have an example, from OCCL with an unpermitted seawall structure and went to court to get a mandatory cease and desist.

Commissioner Katayama – that will be outside of this.

Chair Case – yes, it would be.

Commissioner Anderson – there are legal remedies; there's the ability of a cease and desist order to stop whatever's happening and follow up with an issue of notice of violation; then a possible consent agreement which would specify what remedies are required in a time frame, etc. It's a complicated process depending on the situation, sometimes its simple; and penalties you would want to set administratively, whatever the case maybe. In the grievous situations, you have a party that can't afford to remedy the problem, what do you do? They can't pay fines or are stuck with only \$5,000 fine and say sorry I can't pay. You'll still have a problem you can't fix. I don't have a good solution for it but having a larger hammer is always helpful. I think you're going to deal with a lot of the smaller issues with what you got, but there's potential.

Red Hill for example, we can cite them for one (1) spill up to \$25,000 and any remedial action there is going to be millions of dollars. The aquifer is for intensive purposes, lost to future use and stuck with not having much to work with and assess penalties. A lot of our loss has to do with the loss of our water resources which is a huge issue. We don't have a lot of tools to go after someone who's created a problem like that, other than trying to be proactive and prevent that from occurring. I foresee scenarios where you would want larger penalty authorities.

We have authorities in the Health Department that help to protect water resources; the Underground Injection Control Program for example protects drinking water sources; that program was developed nationally; and we have large penalties we can assess. A lot of things we worry about here, there are other authorities that can be imposed. For the stream diversions and types of things the Commission works with where no one else has jurisdiction, and people have blatantly violated the law intentionally and not having the clout to go after them, we also have criminal penalties, you could go to jail. There's lots of remedies and deterrents in many environmental laws that we don't have in the laws that pertain to the water resources here, I think should be considered.

I urge when you get to some of these issues, call the Clean Water Branch and ask people like Larry Lau, who spent most of the time working on water penalty policies. Some elements to help flush out the issues is to not mix the penalties with remedial action.

Mr. Hardy – we’re just talking guidelines here and DOH has rules, we still have a ways to go.

Commissioner Anderson – and a good start and the guidelines you’re developing for all programs, then we have rules, then the statute authorities; but they all have guidelines.

Commissioner Buck – why don’t we try to raise the cap and what’s the number we should be looking at and we’re not sure if we have the authority once we get into those issues. What’s your recommendation if you could raise the cap?

Mr. Hardy – I’d be consistent with general public and contractors, etc., \$25, 000.

Commissioner Anderson – that’s what the federal law requires and we have to at least be as stringent as the federal laws. If the federal clean water act says \$25,000 per day / per violation, our state statutes have to mirror that. Unfortunately, in this situation I don’t know if there are many federal laws applicable to most of the water management issue we’re working with. In keeping with the spirit of those, I would ask for an increase in the maximum, at least \$10,000 which is what we have in some of our statutes; maybe \$20,000. What would help if it is per day, per violation; is where you’ll get the leverage in getting your penalties to a point where it’s a deterrent.

Mr. Hardy – I feel similarly; when you get into the daily fines, then it starts racking up. There hasn’t been a million-dollar fine by the Commission in the past, but pretty close to it; because of the type of violation, and the violator took the alternative. It’s when you issue a cease and desist when you issue a notice of violation, when the clock starts ticking and how they respond to that. If they don’t, it racks up fast.

Commissioner Buck – the final guidelines, do you see that as a public document?

Mr. Hardy – it’s public but it’s just a guideline and doesn’t carry the weight of rules or statutes.

Commissioner Buck – I’m assuming any legislative action in increasing fines is not a fun thing to do.

Commissioner Hannahs – potentially the cost of doing business you can expect some resistance from certain sectors.

Chair Case – but this is a per day, per violation.

Mr. Hardy – technically there could be multiple violations.

Commissioner Hannahs – who knows what the Legislature or anyone would ask you; getting a sense of a track record if you have it; the cost to the public trust of violations. If the purpose of the penalty is to deter it, then there must be a significant relationship between the penalty and the potential cost to the public. What do we do with the monies and how much have been collected over the years?

Mr. Hardy – not at the top of my head, but it goes into a special fund which is used for a multitude of things.

Commissioner Anderson – for the Health Department, it goes into a environmental response revolving fund and it could be used for an oil spill or dealing with a problem where you can't identify a responsible party but need to clean up something; the legislation seems to support that. For response to Mike's question, we would never have the penalty authorities that we have if it weren't for the fact that federal law drove it, we had no choice but to do it. The legislation will not like the idea of raising the fines and overall get a lot of push back. I do think there is some consideration needed for that, down the line you may want to think about raising that.

Commissioner Hannahs – if our intentions are to increase that, then having a good place for it to go could be an attractive argument

Chair Case – any other questions? If not, thank you very much.

2. 2019 Well Construction and Pump Installation Permit Report

PRESENTATION GIVEN BY: Mr. Roy Hardy, Groundwater Program Manager

Mr. Hardy – presented the item and provided a PowerPoint presentation on the processes, applications and completion reports. There is a legal authority HRS 174C-81-87 that provides the process for well construction and pump installation regulation and construction permits to follow the standards and completion reports. For the process, a licensed contractor must apply; DOH required to review, must comply with well construction standards (2004), once work completed the contractor must file a completion report; if we can, we'll go out and inspect (on O'ahu), and lastly which is specified in the code, the landowner is responsible for water use reporting, defects or abandonment. Other factors may delay acceptance and approval such as CDUP (Conservation District Permit), SMA (Special Management Area), SHPD (State Historic Preservation) requirements, and or denials from Commission; otherwise the process is administrative or ministerial.

QUESTIONS

Commissioner Buck – the ministerial, is that discretionary?

Mr. Hardy – its non-discretionary; if you follow the standards and compliant with other legal requirements.

Commissioner Buck – refresh my memory with the case on Big Island, we found that the County had no ability to control wells on private land, yet we do have discretionary ability to approve wells; at that time you said it was ministerial as long as guidelines are followed and we don't put any resource type issues into approval of wells. I think we talked of "why not" if we think people are putting wells in places that's inappropriate, because we do the Commission can approve wells, why have we decided it's ministerial based on the type of

well and conditions rather than the location of the well? Have we made it ministerial? When I read the law, it doesn't say it's just ministerial; the Commission has approval to approve wells and potentially the location of the wells; and I think it came into play on the Big Island – you used well permits to encourage people to do different things.

Mr. Hardy – it's a case-by-case thing and there are other issues that come up at the staff level. For example, if a well goes in next to a stream, part of the standard is a pump test is needed, assess what is the impact; and if there's evidence from the pump test you're taking water from the stream, then need to amend instream flow standard. In some cases, it doesn't go any further and the well is sealed.

Chair Case – (to *Commissioner Buck*) your question is if it's a ministerial process can we put discretionary conditions in and approve?

Commissioner Buck – I think historically the Commission never saw a lot of well permits; it was all done at staff level so providing they met guidelines; I know the Big Island issue brought this out.

Mr. Hardy – up until 1997 it did come to the Commission. When the well standards did come up, the feeling of the Commission at that time, because there were so many (and you'll see some of the numbers), if it would all come to the Commission on a monthly basis, it's a lot. The feeling was if you're following the standards and doing the pump test which helps to assess impacts, like streams or GDEs (Groundwater Designated Ecosystem) which is an emergent issue. In Kona as part of that, we added another box – Aha Moku; out at Kona in the Keauhou area, to have them review for TNC. We've been experimenting and consulting with them. So, it's a case by case thing and we do look a lot of other issues that's related. Some don't manifest themselves until after the well is drilled because you don't know what you're going to find.

With the example with a well next to a stream; if the water levels are the same or very close and you do the pump test and see how the water is reacting, you can tell it's affecting the stream. In other cases, you're going to the geology where the water in the well is hundreds of feet below, and the stream is flowing on-top of impermeable perch so when they do the pump test, they don't see that interaction. You don't know until the well is drilled. In the course of that testing if it comes up, it would come back to the Commission for an IFS amendment.

Commissioner Anderson – as I recall back in 1997, it was a workload issue. One thing might be worth considering (for example) is if it's a critical WMA, which includes additional requirements of review; you could for example for any new wells that has questions on the sustainability of the resource, that there's a second more thorough review in those areas.

Mr. Hardy – Keauhou is an example of that but still don't know until you drill. We're finding fresh water under the salt-water and didn't know about that.

Commissioner Meyer – is there any limitation or guidance on the duration of your review period?

Mr. Hardy – we’re not getting into the details here, this the general approach this is more of the Clift notes or summary of the process in a simplistic manner. The code says it’s the driller supplying the permit. The contractor needs to be licensed; and in any project, you want to do your planning first and get your permits in order before you go to bid with the contractor. There was a lot of that prior to the adoption of the standards and during the course, that issue came up.

(continued the slide presentation – from page 4 to the end)

Commissioner Meyer – what’s the process do we decommission or force the decommission of a well?

Mr. Hardy – they didn’t start drilling; it time lapsed - over the two-year period; number of reasons.

Chair Case – in the chart that shows the 90% approval, the 10% are they withdrawn or denied?

Mr. Hardy – that’s the difference of what was submitted and approved; many didn’t reach completion and or had various issues.

Commissioner Hannahs – based on your estimation, is this system working well and nothing from the board – just informational?

Mr. Hardy – it’s working well, could always be better and trying to be better as we find out more information; given what we’ve accomplished, I think the drillers are the focus point. It’s been working with the guys out there and a lot of times they are policing each other because they know how the system works.

Commissioner Hannahs – what about policy guidance or resources to perform your role, need nothing further from the Commission – it’s just for information?

Mr. Hardy – I don’t want to say “no”; it’s always good to get a different perspective as there’s always issues that’s changing as well. It’s working right now but will say that many of the old-time drillers are retiring and new guys are coming in and need to keep a close watch on them as they’re not as familiar with the process. For the most part, where we are now compared to before the standards, I think it’s working.

Commissioner Anderson – in the WMA (Water Management Areas) are you handling the permitting differently than you do everywhere else?

Mr. Hardy – in terms of well construction it’s the same statewide, the beginning of the pipe issues, the resource. In the WMAs you have the additional requirement and pay attention to the end of the pipe issues. They’re treated differently because they need additional permits in WMAs, they need Water Use Permits; but not everybody like individual domestic users, they’re exempted from WUP; but are watching closely how they’re constructing the wells.

Commissioner Anderson – it's not enough to warrant a special review as you see it – they're not withdrawing enough water to make a difference?

Mr. Hardy – special review comes in management areas where we start talking about getting on top of them with Water Use Reporting as everyone is supposed to do that statewide and with limited resources we need to focus and in areas we designated, requires more focus. Even people exempted from WUP, they need to report. That's one of the reasons for the outreach program. The first task was to do all the WMAs, sit down with all those we know have a well and applied and those existing before the Commission came about; show them how to report online and get their information in. In that sense it's more review but not specific to the application but more managing the resource.

Chair Case – asked for Public Testimony

Mr. Charley Ice, Groundwater Branch – (*comment*) in response to your question of the ministerial aspect, this question comes up with some frequency, and want to point out 1) we are interacting with applicants often and proactively anticipating problems when they arise and apprise people that there may be issues coming up so they're aware of possibilities they may face; 2) all permits have a proviso that the Commission has the right to alter or revoke a permit depending upon what we see in the outcome.

As Roy pointed out, we often don't know what to expect until the well is actually drilled; so the ministerial part is to issue the permit, but we always had to back in what we can cover.

D. NEXT COMMISSION MEETINGS (TENTATIVE)

January 21, 2019 (TUESDAY)

February 18, 2019 (TUESDAY)

This meeting was adjourned at 11:25 pm.

Respectfully submitted,



RAE ANN HYATT
Secretary

OLA IKA WAI:



M. KALEO MANUEL
Deputy Director