

MINUTES
FOR THE MEETING OF THE
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: October 20, 2020
TIME: 9:00 am
PLACE: Online via Zoom
Meeting ID: 993 1338 8384

Chairperson Suzanne D. Case called the meeting of the Commission on Water Resource Management to order at 9:01 a.m. and stated it is being live streamed via YouTube for public viewing due to the ongoing Covid-19 pandemic; and noted the meeting was set to take live oral testimony and any written testimony would be acknowledged when the submittal items come up. Chairperson Case also read the standard contested case statement.

MEMBERS: Chairperson Suzanne Case, Dr. Kamana Beamer,
Mr. Michael Buck, Mr. Neil Hannahs, Mr. Wayne Katayama,
Mr. Keith Kawaoka, Mr. Paul Meyer

COUNSEL: Mr. Colin Lau

STAFF: Deputy M. Kaleo Manuel, Mr. Roy Hardy, Ms. Lenore Ohye,
Mr. Dean Uyeno, Dr. Ayrton Strauch, Mr. Charley Ice,
Ms. Rae Ann Hyatt

OTHERS: Mr. David Bills (Bills Engineering), Mr. Andrew Chianese (for
John and Linda Hayama), Mr. Paul Grable (LBCH Law,
Representing Structural Hawaii Inc.), Mr. Vincent Raboteau,
(Native Hawaiian Legal Corp., for 'Ahonui Homestead
Association), Ms. Mahina Poepoe, Mr. La'akea Poepoe,
Ms. Lori Buchanan, Dr. Jonathan Scheuer (for Dept. of Hawaiian
Home Lands <DHHL>)

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

102020 00:03:01

A. APPROVAL OF MINUTES

September 15, 2020

PUBLIC TESTIMONY – None

**MOTION: (KATAYAMA/KAWAOKA)
To approve minutes as submitted
UNANIMOUSLY APPROVED**

102020 00:03:47

B. ACTION ITEMS

- 1. Approval of Stream Channel Alteration Permit Application (SCAP.5383.3) by the City and County of Honolulu for the Installation of an Anchored Gabion Retaining Wall, and Find that SCAP.5383.3 is Exempt from Hawaii Revised Statutes, Chapter 343, Mānoa Stream, Mānoa, O‘ahu, TMK: (1) 2-9-044:064; 2-9-066:042 and 043**

PRESENTATION GIVEN BY: Mr. Dean Uyeno, CWRM Stream Protection & Management Branch

Mr. Uyeno presented the submittal item, summarized the request and provided some background information. The stream bank below the 7-foot by 3-foot box drains eroding, resulting in undermining of the drain outlet structure. The project proposes to stabilize the stream bank near the outlet.

Agency comments were received by DLNR Aquatic Resources, DLNR Engineering and U.S. Fish and Wildlife. No public comments were received.

The Applicant stated, “project BMPs will be monitored closely during construction to ensure that native stream fauna are not impacted by water quality impairments and that stream flow is to be maintained at all times so as not to impede stream passage of native species” also, traditional and customary rights will not be affected. The Applicant also stated, “in the event that evidence of cultural, historical, or traditional rights of Native Hawaiians is uncovered during construction, work will be halted and the DLNR-SHPD will be notified.”

The proposed action triggers an EA because it uses County funds. However, per Hawaii Administrative Rule (HAR) §11-200.1-15(a) some actions, because they will individually and cumulatively probably have minimal or no significant effects, can be declared exempt from the preparation of an EA. The proposed channel alterations should not interfere substantially and materially with existing instream or non-instream uses or with channel alterations previously permitted.

Mr. Uyeno continued with the staff review and recommendations

102020 00:13:47

QUESTIONS

Commissioner Katayama – asked on the timeline of the project, from start to finish.

Mr. David Bills, Project Manager, Bills Engineering – starting within the next 4-6 months and the actual construction period will be 3-4 months.

PUBLIC TESTIMONY – None

Chairperson Case asked the Commissioners for a motion for item B-1 as submitted

MOTION: (HANNAHS/MEYER)

To approve B-1 as submitted.

UNANMIOUSLY APPROVED

102020 00:15:00

B. ACTION ITEMS (CONT'D)

- 2. Action on the Petitions Requesting a Contested Case Hearing Before the Commission on Water Resource Management Filed Separately by John and Linda Hayama, Structural Hawaii, Inc., and HH Constructions Inc., on Agenda Item B-1 of the March 17, 2020 Meeting (Request Imposing a Fine Against the Applicant - Structural Hawaii, Inc., Landowner - John and Linda Hayama, and Contractor - HH Constructions Inc., for Altering a Stream Channel Without a Permit as Required in HRS §174C-71(3)(A) and HAR §13-169-50) For the Installation of a Gabion Retaining Wall, Hayama Residence, Mānoa Stream, Mānoa, O‘ahu, TMK: (1) 2-9-037:085; and Delegation of Authority to the Chairperson to Appoint a Hearings Officer**

Commissioner Kawaoka recused himself from submittal Item B-2

Commissioner Katayama – requested clarity on the process in the scope of determining a contested case hearing and proposed to go into Executive Session.

MOTION: (KATAYAMA/MEYER)

To go into Executive Session.

UNANMIOUSLY APPROVED

At 9:17 a.m. the Commission went into Executive Session pursuant to 92-5(a)(4), Hawaii Revised Statutes, in order to consult with its attorney on questions and issues pertaining to the Commission’s powers, duties, privileges, immunities and liabilities.

RECONVENE: 10:26 a.m.

Chairperson Case thanked the public for their patience while in Executive Session to sort out the procedural parts and summarized the matter of B-2.

Chair Case – This matter, agendized as Item B-2, is whether to grant a contested case that was requested by the parties on the fine that was approved by the Commission at the March 17, 2020 CWRM (Commission) meeting. The substance of this matter was heard

in the March meeting before the COVID shutdown and the meeting was via teleconference. There was a public testimony option, but no public testimony was received at that time. It was a long discussion, well over an hour and at the end of it, the Commissioners unanimously approved the fine on this matter and also approved an after-the-fact permit with conditions, allowing the work to proceed with conditions. It granted two (2) years for completion. After that decision, the parties requested a contested case hearing. This item on the agenda is a procedural step in that the question is whether to grant a contested case or not as in the staff recommendation; so that's a contested case in the allocation of the fine; that's the staff recommendation today.

We didn't have a request for oral testimony on this, but we did have written testimony that came in. To the extent the written testimony would've dealt with the procedural matter of whether to grant a contested case that's relevant here; but to the extent that written testimony addresses actions that are currently going on or have taken place since the March meeting, that is not the subject of this agenda item. However, I am going to ask staff to review those testimonies and to inspect the property. Please check to see whether the work that's going on is consistent with the after-the-fact permit with conditions that was granted in March. If there is any issue with that, that would be a matter for the CWRM staff to address and potentially bring back to the Commission at a future date if there is another violation going on.

In any case, we want to make sure any community concerns are heard so we'll take that testimony as reports and deal with that matter. Otherwise, we will proceed and I'll entertain a motion to accept the staff recommendation which is to grant the contested case and delegate the authority to designate a hearings officer to the Chairperson. I will also say that we don't have to delegate this matter to a hearing officer; we can hear it with the full Commission in a contested case proceeding, that's not in a regular sunshine meeting; that's the quasi-judicial proceeding that the Commission does not have to delegate it to a hearing officer.

We want to make sure this is progressing as the parties have asked for more time to come up with some agreement on this. Although the motion is to delegate the authority to designate a hearings officer to the Chair, the Chair does not have to do that, and can go ahead and schedule the next meeting within a month or so; the next hearing on the contested case with all Commissioners and parties to make sure this proceeds expeditiously.

With that Commissioners, I'll entertain a motion and any corrections or modifications.

Commissioner Buck – motion to approve B-2 as submitted by staff with the caveat that the Chairperson has an ability to appoint a hearings officer or hear the contested case in front of the full Commission.

Chair Case – asked for a second.

Commissioner Meyer – seconded with a proviso that the matter is heard at our next convenient time at approximately one month.

PUBLIC TESTIMONY

Written testimony for item B-2 was received by Mr. Michael Weidenbach, Mr. Tom Iwanicki, Mr. Tom Wiedenbein, Ms. Cheryl Burghardt, and Ms. Jodie Pataray

MOTION: (BUCK/MEYER)

To approve B-2 as submitted by staff with amendments.

UNANIMOUSLY APPROVED among the six (6) Commissioners present

102020 01:35:02

B. ACTION ITEMS (CONT'D)

3. Action on Petitions Requesting a Contested Case Hearing Before the Commission on Water Resource Management Filed by Ahonui Homestead Association, The Department of Hawaiian Home Lands, and Mahina Poepoe on Behalf of Kūpeke Ahupua‘a On Ground Water Use Permit Application GWUP No. 1094 by Maui Department of Water Supply For An Increase in Allocation from ‘Ualapu‘e Shaft (Well No. 0449-001) From 0.185 mgd to 0.350 mgd, ‘Ualapu‘e, Moloka‘i, Hawai‘i, and Delegation of Authority to the Chairperson to Appoint a Hearings Officer

PRESENTATION GIVEN BY: Mr. Roy Hardy, CWRM Groundwater Branch

Mr. Hardy introduced himself and stated this submittal item is similar to B-2 in that it's a procedural matter and request to go into a contested case but with a different subject; a groundwater use permit application on the island of Moloka‘i.

To summarize what staff is asking, there's two parts granting a contested case hearing; the three (3) petitions and the main contested case hearing request filed by Ahonui Homestead Association (Exhibit 2A), The Department of Hawaiian Home Lands (Exhibit 2B) and Mahina Poepoe on behalf of Kūpeke Ahupua‘a (Exhibit 2C).

Chairperson acknowledged the oral testifiers to be let into the meeting to hear the subject matter properly.

The subject matter is Exhibit 1; a Ground Water Use Permit Application (GWUPA) No. 1094 by the Department of Maui Water Supply from the ‘Ualapu‘e Shaft (Well No. 0449-001) on the island of Moloka‘i. The request is to increase their existing water use permit that was established back in the 1990's, from 185,000 gpd to 350,000 gpd.

The first part of this staff request is to grant a contested case hearing for these three (3) petitions. The second part is delegating authority to the Chair to appoint a hearings officer.

I'm not going into the details of the application or petitions itself, simply because this is a procedural matter, other than to say the application was accepted as complete back in April

of this year and was duly noticed twice, published in the paper of May 20th and 27th; and we received objections to the application by the June 10th deadline of this year.

Whenever there's a timely objection to a ground water use permit or any water use permit for that matter, surface water included, then a public hearing needs to be scheduled and held. And that hearing, there was notice published on August 5th and a Zoom hearing was held August 25th. At that hearing, the request for contested case was made by the petitioners and followed up with written petitions within the 10-day timeframe deadline at the close of the hearing.

This takes us straight to the recommendations as the petitioners are from Moloka'i and have interest in the 'Ualapu'e area. The staff is recommending to consolidate and grant the contested case petitions of the Ahonui Homestead Association, The Department of Hawaiian Home Lands and Mahina Poepoe (on behalf of Kūpeke Ahupua'a) and secondly, delegate authority to the Chairperson to appoint a hearings officer to conduct the contested case hearing.

Chair Case – thank you. What's on the agenda is whether to approve the contested case request. The substance of it is not on the agenda and the substance of it would be the subject of the contested case. What I'm going to ask is that any questions that the Commissioners ask of staff or people who are present to testify orally, and any testimony by members of the public including the petitioners, be solely limited to the question of whether or not there is a right to a contested case in this matter. That's what Commissioners will hear.

Commissioners do you have any questions of staff; then will go to public testimony?

102020 01:40:18

QUESTIONS

Commissioner Beamer – Roy, thanks for the presentation. For my own clarity, this was at a public hearing in which you were presenting on the potential to increase a groundwater withdrawal for a permit; is that right?

Mr. Hardy – correct.

Commissioner Beamer – so staff was there, no Commissioners were there, but it was at an open public meeting – okay I got it, thanks Roy.

102020 01:41:12

Chairperson Case reiterated that testimony should be only on the question of whether there is a right to a contested case hearing.

PUBLIC TESTIMONY

Ms. Mahina Poepoe, behalf of Kūpeke Ahupua‘a – Aloha, I’m Mahina Poepoe for item B-3 intervener for the ‘Ualapu‘e Well request for an increase. I honestly didn’t know what to expect, so I wanted to call in just in case I needed to be here. Thank you for your time and attention today and I do believe that our application has merit for a contested case and that’s about it. After hearing the previous things that were said, I understand it a little better now, so I just wanted to be here to support our position.

Deputy AG, Colin Lau wanted to clarify on the application as it states... “Mahina Poepoe on behalf of Kūpeke Ahupua ‘a”

Chair Case – asked Mr. Poepoe if he has anything to add on the question whether to consolidate and grant the contested case request?

Mr. La‘akea Poepoe – I’m just here to provide answers if any questions arise; thank you.

Ms. Lori Buchanan – Aloha honorable Chair Case and honorable Commission members. First, mahalo for all the service you do for all of our communities in the State of Hawai‘i, I really appreciate your service. I am a member of Kūpeke Ahupua‘a, a 501(C)(3) organization whos’ mission is to restore the Ahupua‘a of Kūpeke with the adjacent Kūpeke fishpond, a 33-acre fishpond. I believe the upper region of the over 300-acres of the Ahupua‘a in which we represent, is also part of the East Moloka‘i Watershed partnership. If granted the contested case hearing, we are positive that we are able to show that the current application by the Department of Water of Maui County would have adverse impact on our nearshore resources of our fishpond which is in close proximity to the project site. We feel confident that we will be able to show that at such time in a hearing. We really appreciate your time and we really ask for support in our chance to convey all of that to Commission members, Mahalo.

Dr. Jonathan Likeke Scheuer, Representative for Dept. of Hawaiian Homelands – Aloha mai kakoū Chair Case and Commissioners, I’m here on behalf of William J. Ailā, Jr., and the Hawaiian Homes Commission and the Department of Hawaiian Home Lands. The Department supports the staff’s recommendation to grant the contested case hearing and appoint a hearings officer. I’d be more than happy to address any specific questions as to the disputes over law or fact that we believe justifies a granting of a contested case in this matter, Mahalo.

Mr. Vincent Raboteau, Native Hawaiian Legal Corporation for Ahonui Homestead Assn. – Good morning Chair Case and Commissioners. I’m here on behalf of Ahonui Homestead Association and we support the staff recommendations to proceed with the contested case hearing as we believe that Ahonui members interests are adversely affected by the County’s water use permit application.

Chairperson Case asked if they were questions by Commissioners to members of the public (none) - then asked if Commissioner Katayama had a question

Commissioner Katayama – reviewing the petitions of the parties and looking at the action, I'd like to make a motion to move into Executive Session to discuss the path forward in terms of the contested case process.

MOTION: (KATAYAMA/BUCK)

To go into Executive Session.

UNANMIOUSLY APPROVED

At 10:49 a.m. the Commission went into Executive Session pursuant to 92-5(a)(4), Hawaii Revised Statutes, in order to consult with its attorney on questions and issues pertaining to the Commission's powers, duties, privileges, immunities and liabilities.

RECONVENE: 11:43 a.m.

Chairperson Case noted that staff presentation was taken and also public testimony on B-3 and asked Commissioners on how they want to proceed.

Commissioner Hannahs – made a motion to approve the recommendation of staff; 1) consolidate and grant the contested case petitions of Ahonui Homestead Association, Department of Hawaiian Home Lands and Mahina Poepoe on behalf of Kūpeke Ahupua'a, subject to the determination of parties being reserved to the hearings officer; 2) to delegate authority to you, the Chairperson to appoint a hearings officer for the contested case hearing.

Chair Case – clarified the amended motion to make clear that Mahina Poepoe is on behalf of Kūpeke Ahupua'a and the other is you're reserving the issue of standing for further determination in the contested case.

Commissioner Hannahs – as is normal practice, correct.

Chair Case – asked for a second

MOTION: (HANNAHS/BEAMER)

To approve B-3.

UNANMIOUSLY APPROVED

D. NEXT COMMISSION MEETINGS (TENTATIVE)

November 17, 2020 (Tuesday)

December 15, 2020 (Tuesday)

This meeting was adjourned at 11:45 a.m.

Respectfully submitted,



RAE ANN HYATT
Secretary

OLA I KA WAI:



M. KALEO MANUEL
Deputy Director

B-2 – WRITTEN PUBLIC TESTIMONIES

From: Cheryl B
Sent: Monday, October 19, 2020 2:58 PM
To: DLNR.CW.DLNRCWRM dlnr.cwrn@hawaii.gov
Subject: Hayamas

Quite simply.
The Hayamas pay a fine that is equitable to the damage caused.
All of the rocks etc. are removed from the stream immediately.
The contractor/construction agency is also fined and not allowed to get permits in the future.
The DLNR and others will do a better job at following through on permitting allowed by people.
It's an everyday issue in our islands. There are people ready to desecrate and destroy that which does not belong to them.
C. Burghardt
D. Green

From: jpataray001
Sent: Monday, October 19, 2020 5:29 PM
To: Hyatt, RaeAnn P; DLNR.CW.DLNRCWRM <dlnr.cwrn@hawaii.gov>
Subject: Manoa Property with Manoa Stream Interference

I'm writing in regards to the property in which the back yard is up against Manoa stream & they've placed a platform into the stream in order to perform their construction.

It's my understanding that there will be a zoom meeting held tomorrow regarding this property. Is it possible to submit my attached photos along with a complaint of littering. This project has been ongoing for years. There is little to no progress shown on their work. In the meantime, they have been negligent & reckless with their construction materials.

The attached photos were taken in July 2020. Downstream from the property, approximately 50-100 yards away, these materials were seen scattered throughout the stream. These are the same materials found on and around their area of work. This is not only an eyesore but it is destructive towards our ecosystem within manoa stream.

My questions are, can we get a completion date of this project and hold them to it without any further delays? Also, can the property owner and contractor be held 100% responsible for the immediate clean up of any mess of the surrounding areas as well as present an action plan on how they plan on preventing this from reoccurring in the future?

Additionally, is there a way to hold these parties responsible on a daily bases with daily accruing fines if they are found not in compliance with the terms of any regulations and requirements?

Thank you for your time & thank you for your help in this matter.

Jodie Pataray

Good morning Ms. Hyatt,

Concerning contesting the fine imposed on the Hayama Trust and contractors HH Constructions Inc. for purposefully polluting and obstruction a section of Manoa Stream adjacent to their property at 3148C E. Manoa Road, I'm encouraged by the office of City Council Chair Ms. Ann Kobayashi to submit my personal views on the matter.

As a working resident of Manoa Valley since 1974, when I began my love of the valley and its namesake , stream while employed as a groundskeeper at Paradise Park, I was horrified to view the massive addition and clearly intended blockage of our free-flowing stream. That this affront has continued even after the owners and contractors were fined and ordered to cease, is, at minimum a justification for imposition of far larger fines and other harsher measures to insure that this negative and dangerous impact will cease and be appropriately reversed at the expense of the Hayama's and the contractors involved.

I also note, that the opposing side of the stream bed includes posted signage warning of the unstable nature of the stream bed. With that condition existing, the massive addition of construction fill by the Hayama's on the opposite side and extending nearly the full width of the stream bed, will almost certainly place greater risk of destructive erosion to that opposite side and to the stream overall, and put existing residences up and downstream from the Hayama residence at further risk of erosive impacts.

The Hayama residence, from my observation this morning, appears to be either a new construction of an expansion of an existing construction. If the claim by the Hayamas is that stream erosion put their residence foundation at risk, requiring emergency authorization of remediation, it may be worthwhile to confirm whether or not the new construction of the home, or expansion of it on the edge of the stream, may have contributed to or caused the erosion in the first place. If that proves to be the case, should not the Hayama's responsibility for that condition be noted?

I submit that the Hayama's contestation of their prior fine is unwarranted and should be denied, and that it would be highly appropriate that further stronger fines and measures be imposed upon them, and their contractors, at this time.

With kind regards,
Michael Weidenbach
East Manoa Road, Honolulu, HI 96822

Aloha,

I am writing to express my concern for the alteration of Mānoa stream. Our waters and land are our most precious resource and they are a public good, not to be modified at the whims of random homeowners or unscrupulous construction companies with a long history of bad behavior. The alteration disrupts ecology and puts other people's homes at risk of flooding. The recklessness exhibited by the Hayama's and HH Construction Inc is inexcusable and must be handled swiftly and with the 'āina in mind.

Mahalo nui,
Tom Iwanicki

From: Tom Wiedenbein
Sent: Monday, October 19, 2020 2:08 PM
To: DLNR.CW.DLNRCWRM <dlnr.cwrn@hawaii.gov>
Subject: Testimony October 20, 2020

Dear Commission on Water Resource Management,

I am a resident of the State of Hawai'i and of the City and County of Honolulu. I am writing today regarding Submittal B2 at the October 20, 2020 CWRM meeting. I am vehemently opposed to the actions of the Hayamas and HH Construction, and am demanding that stronger action be taken against both parties. Hawai'i's natural resources are not within the purview of individuals to modify or destroy, and the destruction caused to Manoa Stream must be fully repaired.

Additionally, as a punitive measure, improvements to the stream (to be determined) must also be made in order to further conserve the natural resource that was impacted by this move. Finally, the fine against the Hayamas should be increased to \$1M. Modification of public natural resources without permit and without community input cannot be tolerated, and these types of abuses of our public resources will continue and worsen if decisive action is not taken.

Thank you for your time.