

MINUTES
FOR THE MEETING OF THE
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: **October 18, 2010**
TIME: **9:00 a.m.**
PLACE: **Kalanimoku Building**
 DLNR Board Room 132
 1151 Punchbowl Street
 Honolulu, Hawaii 96813

Chair Laura Thielen called the meeting of the Commission on Water Resource Management to order at 9:04 a.m.

The following were in attendance and/or excused:

MEMBERS: Ms. Laura Thielen, Dr. Chiyome Fukino, Mr. Neal Fujiwara, Mr. William Balfour, Jr., Ms. Donna Kiyosaki

STAFF: Roy Hardy, Dean Uyeno, Chui Ling Cheng, Lenore Ohye, Neal Fujii, Ryan Imata, Charley Ice

EXCUSED: Dr. Lawrence Miike, Mr. Sumner Erdman

COUNSEL: Linda Chow, Esq.

OTHERS: Alan Oshima (AMO Consulting), Meredith Ching (A&B), Camille Kalama (NHLIC), Isaac Moriwake (Earthjustice), Pam Bunn (PJP/NOA)

A. APPROVAL OF MINUTES

1. September 23, 2010

MOTION: (Fujiwara/Balfour)

To approve the minutes. (Dr. Fukino was not at the meeting when vote was taken.)

UNANIMOUSLY APPROVED.

B. ANNOUNCEMENTS

Personnel: Acting Deputy Director Lenore Ohye mentioned that the Stream Protection Management Branch Chief position was approved to be filled and the Commission is currently accepting applications both internally within the department as well as externally. Today is the end of the recruitment period, and if there are a sufficient number of qualified applicants, interviews will be conducted. If not, the recruitment period will be extended. Deputy Ohye thanked Chair Thielen for her support for getting this position approved to be filled.

Commissioner Kiyosaki's appointment: Deputy Ohye stated that Commissioner Kiyosaki's appointment ends June 30, 2011. A public notice was published statewide and staff will continue with that application process. (Copies of public notice distributed.)

Intermediate Court of Appeals: Deputy Ohye said the Intermediate Court of Appeals ruled in the Waiahole contested case. They rejected two of three points on appeal and the only point remanded to the Commission was the allocation of 0.75 mgd to Puu Makakilo and staff will be working with their attorney general on the next steps.

Drought: September 2010 year-to-date precipitation amounts are still well below normal for most of the rain gauges in the state. Especially dry conditions are occurring in Maui and the Big Island. Trade winds, showers and shear line related rainfall brought relief to parts of the state, and a few rain gauges recorded near to above normal rainfall for the month of September. However, the drought conditions continue on the leeward sides of Maui, Molokai and the Big Island with ratings ranging from abnormally dry to extreme drought. In addition, exceptional drought which is the highest ranking, continues from Kawaihae to Waimea regions and Pahala to South Point regions on the Big Island. Right now we are in La Nina, which is generally expected to bring wetter conditions.

Na Wai Eha: For Waihee stream, Deputy Ohye reported that the Commission, through their Decision & Order (D&O), set the instream flow standard at 10 million gallons per day (mgd) immediately below the diversion on Waihee Stream. On October 13, staff went out with U.S. Geological Survey (USGS) and measured the releases after shims had been installed to adjust the flow. Deputy Ohye distributed copies of the photo showing the re-engineered structure. On October 13, staff and USGS confirmed that there was 10.47 mgd at the USGS selected measuring point. While the order said 'immediately downstream of the diversion', USGS surveyed Waihee stream for about 2,000 feet below the Spreckles ditch diversion and located a site about 1,500 feet downstream. Waihee Stream has many large boulders and it was difficult to find a good cross section for monitoring.

On South Waiehu Stream, there was a Stipulation and Order that the commissioners signed about two months ago, to slow down the IIFS implementation so that a series of measurements could be made. According to the order, about a week ago, the order required that if the flow in the diversion ditch was less than the 0.9 mgd amount that was set for the instream flow standard on South Waiehu, that all the water would then be released into the stream to meet the instream flow standard or at least to the extent of the available flow. On October 13, the stream flow in the diversion ditch was measured at 0.87 million gallons per day, so per the Stipulation and Order, all of that water was released back to the stream. Deputy Ohye stated that currently, there is no water flowing in the kuleana ditch and the parties are aware of the situation.

Chair Thielen asked in regards to the Na Wai Eha and the release updates if there will be a quarterly in-depth report that will be in writing at the next meeting in November. Deputy Ohye confirmed that there will be an update then. Chair Thielen said that if the parties are interested in filing something they can.

In reference to the Intermediate Court of Appeals decision, Chair Thielen asked Deputy Ohye or Deputy AG Linda Chow to provide an explanation on what was to be reconsidered. Deputy AG Linda Chow said she would have to have read the Decision and Order to do that. Deputy Ohye understood that the order recommended 0.75 million gallons per day be allocated for Puu Makakilo's proposed golf course. At this point there is no golf course on the site, and a very small amount of water has been used for dust control. Puu Makakilo's response to staff's inquiry regarding nonuse is that they did not want to move forward with the expense to construct a golf course because they were uncertain about the allocation. Their water use permit is subject to the four-year nonuse revocation clause, and there is four years of nonuse, so staff is also pursuing that on a separate track. Deputy Ohye stated that she believed the court vacated that allocation decision.

Chair Thielen said that staff, following-up on this Commission's instructions on examining the four-year nonuse, will be coming back to this Commission with a recommended process.

Item E1 was taken out of order and was presented before item C1.

Dr. Fukino arrived at 9:15 a.m. after Item E1 started.

E. NON-ACTION ITEM

1. Briefing on Commission's Irrigation Water Requirement Estimate Decision Support System (IWREDSS) Irrigation Model and 12-Month Moving Averages

Presentation by: Roy Hardy

A copy of the power point is included for the records.

Chair Thielen said she thinks it would be good to include some of this information in new commissioner(s) briefing packet so they understand where the recommendations are coming from. These are guidelines based on best available data. Each time an application comes in, the staff will be using the guidelines, but will also be speaking with the applicant to get better information about the area to see if there should be any considerations factored in. But, it's important for the commission to start with something. Chair Thielen commented that, regarding rainfall, it became apparent during the east Maui case that there was a decline over the 60 to 90 year period. When the Water Resource Protection Plan was updated, we found that many of the estimates for the aquifers had changed. Some of the changes were because of new data. Other changes were based on looking over old models, redoing the modeling and finding there were some mathematical errors that needed to be corrected, so that changed the sustainable yield numbers for a number of aquifers. And it's very likely as this rainfall atlas is updated that there's going to be some significant changes. It would be difficult for the Commission to quantify the long term impacts on the aquifers; with the water use you'll never have a final answer, you'll always have to go back and re-evaluate because the weather systems are not static. Everything's changing. It's an ongoing effort to be good water managers.

Commissioner Kiyosaki commented that we need to be careful and continue to compare actual uses against the model predictions to avoid 'garbage in garbage out' results.

Commissioner Balfour commented that he strongly believes that a 3 year moving average should be considered rather than a 12-month moving average.

C. STREAM PROTECTION AND MANAGEMENT

1. Action on the Request for a Contested Case Hearing before the Commission on Water Resource Management by Native Hawaiian Legal Corporation, on Behalf Na Moku Aupuni O Koolau Hui, and the County of Maui, Department of Water Supply

Presentation by: Dean Uyeno

Dean Uyeno presented the summary and noted that specifically the petitions are referring to Waikamoi, Puahokamoa, Haipuaena, Punalau/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula, Puakaa, Waiohue, Paakea, Kapaula and Hanawi. He then went on to highlight key dates in the background leading up to the petition.

RECOMMENDATION:

That the Commission deny the petitions for a contested case hearing filed by the Maui DWS and NHLC, on behalf of Na Moku, as it is clear there was no requirement for the Commission to hold a contested case hearing prior to making a decision on the amendment of interim IFS for the 16 hydrologic units in east Maui.

TESTIFY:

1. Camille Kalama, Esq. Native Hawaiian Legal Corporation (NHLC) on behalf of Na Moku Aupuni O Koolau Hui: Ms. Kalama said the staff's opinion is that the amendment does not affect any rights, duties, or privileges of the parties but noted that for Waiahole I the Supreme Court looked at this issue and noted that specifically in that case the parties were appealing the Commission's decision regarding both permit applications for existing and new uses and also petitions to amend interim instream flow standards. And the Court said that while statutes and rules do not require a hearing with respect to the petitions to amend interim instream flow standards, constitutional due process still mandates a hearing in that instance because individual instream and offstream rights, duties, and privileges are at stake. And considering the fact that there are existing diversions in these streams it's not as if there's going to be a permit process that would then allow the diversion to happen. Rather, the diversions are ongoing and so these interim instream flows do determine how much water is left in those streams and how much is allowed to be diverted from those streams. So, the rights, duties, and privileges of the parties in this case are affected.

MOTION: (Kiyosaki/Balfour)

To approve the submittal. (Dr. Fukino is included in this vote.)

UNANIMOUSLY APPROVED.

D. GROUND WATER

1. Request for Clarification on Water Use Permit, Iao Tunnel (Puako) (Well No. 5330-02), TMK (2) 3-3-034:034, WUP No. 691, Existing Use of 0.100 mgd, Iao Ground Water Management Area, Maui

Presentation by: Charley Ice

RECOMMENDATION:

Staff recommends that the five-year period begin at the date of permit approval, namely June 10, 2010. The five-year period would therefore expire June 9, 2015.

Chair Thielen commented that given the contested case hearing process and the length of time it took to reach a decision she thinks people were, when it was first issued obviously thinking there would be a final decision on this and a timetable for making a final determination.

MOTION: (Balfour/Fijiwara)
To approve the submittal.
UNANIMOUSLY APPROVED.

F. NEXT COMMISSION MEETINGS (TENTATIVE)

1. November 17, 2010
2. December 15, 2010

Chair Thielen said the November meeting will be the time for the update for the implementation on the various instream flows and the staff to come back for the process for the Commission for the four-year non-use.

G. The meeting was adjourned at 10:02 a.m.

Respectfully submitted,

KATHLEEN OSHIRO
Secretary

APPROVED AS SUBMITTED:

LENORE N. OHYE
Acting Deputy Director

Civil No. 19-1-0019-01 (JPC)

Defendant A&B/EMI's Exhibit AB-130

FOR IDENTIFICATION _____

RECEIVED IN EVIDENCE _____

CLERK _____