

**MINUTES FOR THE
MEETING OF THE
BOARD OF LAND AND NATURAL RESOURCES**

DATE: FRIDAY, JULY 13, 2007
TIME: 9:00 A.M.
PLACE: KALANIMOKU BUILDING
LAND BOARD CONFERENCE ROOM 132
1151 PUNCHBOWL STREET
HONOLULU, HI 96813

Interim Chairperson Allan Smith called the meeting of the Board of Land and Natural Resources to order at 9:02 a.m. The following were in attendance:

MEMBERS

Mr. Allan Smith
Mr. Jerry Edlao
Mr. Ron Agor

Mr. Rob Pacheco
Mr. Tim Johns
Mr. Samuel Gon III

STAFF

Ms. Charlene Unoki, LD
Ms. Kimberly Mills, OCCL
Mr. Dan Polhemus, DAR
Ms. Athline Clark, DAR

Mr. Sam Lemmo, OCCL
Ms. Dawn Hegger, OCCL
Mr. William Andrews, DOBOR
Ms. Jan Mulvey, DOBOR

OTHERS

Ms. Julie China, AG's Office
Mr. Vince Kanemoto, AG's Office
Mr. Greg Mooers, K-4
Mr. Bob Duncan, D-3
Ms. Sherry Kobayashi, D-3
Ms. Yvonne Izu, D-3
Mr. Shaun Corston, F-1
Ms. Seema Balwani, F-2

Ms. Linda Chow, AG's Office
Mr. Randy Ishikawa, AG's Office
Mr. John Higgins, D-3
Ms. Mary Serrao, D-3
Mr. Jim Whylen, D-3
Ms. Marty Townsend, F-1
Mr. Keola Lindsey, F Items

{Note: language for deletion is [bracketed], new/added is underlined}

Item A-1 Minutes of June 22, 2007

Member Johns amended Noah to Noa.

Unanimously approved as amended (Pacheco, Edlao)

Item C-1 Request for Final Approval of Programmatic Safe Harbor Agreement Covering Hawaiian Goose, Duck, Moorhen, Coot and Stilt for Participants of USDA Farm Bill Conservation Programs and Accompanying Incidental Take Licenses

Item requested by Mr. Paul Conry of Division of Forestry and Wildlife (via e-mail) to be withdrawn.

Withdrawn (Johns, Gon)

Item K-4 Conservation District Use Application (CDUA) KA-3399 for the Proposed Morrow Living Trust Single Family Residence Located at Haena, Island of Kauai, TMK:'s (4) 5-9-003:010 and 045

Member Agor recused.

Mr. Sam Lemmo, Administrator of Office of Conservation and Coastal Lands introduced Randy Ishikawa from the Attorney General's Office (AG). Mr. Lemmo reported this is a CDUA and the landowners are David and Linda Morrow. The project involves consolidation of two parcels into one parcel and the owners would like to build a single family residence. He gave background. Mr. Lemmo asked the Land Board to amend the staff submittal beginning on page 7 starting at the analysis to the end of the staff report, but retaining the recommendation which is for denial. He stated this is a convoluted case. Staff has been working closely with the applicant and the Attorney General's Office to resolve a number of issues. He recommends amending the submittal starting from the second paragraph under the analysis section until page 13. Member Johns asked if copies will be provided? Mr. Ishikawa replied yes, copies of this will be provided for the record. Mr. Lemmo explained in a brief summary, staff is asking to reject the application on three reasons.

1. The involvement review process has not been completed.
2. Staff has an issue whether this is a developable lot. Under the Haena Hui policy the Board stipulated that if you have a good house lot in Haena you would be permitted to build one single family residence, but that didn't extend to every lot. It is not considered a good house lot which is questionable whether it can be developed.
3. As the project was proposed a portion of the house located in a limited subzone and in this particular situation houses are not permitted in a limited subzone.

The Staff Submittal must be amended by replacing the entire Analysis, Discussion, and Conclusion sections with the following as submitted for this meeting:

- 1) The environmental review process under Chapter 343, Hawaii Revised Statutes, has not been completed.
- 2) The parcel is not a good house lot as delineated in the DLNR's Haena Hui policy. The OCCL notes that on January 23, 1981, the Board of Land and Natural Resources (BLNR) adopted a policy on single family residences in the Conservation District in response to the Haena Hui petition that was approved by the Kauai courts in 1967, without the prior approval of the BLNR (the BLNR's Haena Hui policy). The petition created 123 lots. The BLNR subsequently adopted a policy of allowing one (1) house per lot within the Haena Hui petition approved by the courts in 1967. The OCCL notes Haena Hui is a special case and is the only place in the State of Hawaii that the BLNR adopted a policy whereby lot owners in the subject partition area "would" be granted a permit provided that the lot was a "good house lot," because not all of the lots were capable of supporting single-family residential development.

Past inquiries pertaining to the potential for residential development on parcel # 45 revealed that it is not a "Good House Lot" in the Haena Hui inventory. Because the parcel has not been identified as a "Good House Lot," the site does not automatically qualify for a single family residence pursuant to the BLNR's Haena Hui policy.

- 3) The current plans call for a significant portion of the single family residence to be built in the Limited subzone of the Conservation District in an area outside of a floodplain or coastal high hazard area. The OCCL further notes the parcel is located in the State Land Use (SLU) Conservation District, and falls within both the Resource and Limited subzones. It appears subject parcel 045 is bisected by the resource and limited subzones and subject parcel 10 appears to be wholly located in the Resource subzone.

While it is correct that a single family residence in the Resource subzone of the Conservation District may be permitted by the BLNR, HAR §13-5-24(c), the BLNR retains discretion to approve or not approve such a permit. HAR §13-5-34.

In contrast, single family residences in the Limited zone of the Conservation District are prohibited except "in a floodplain or coastal high hazard area that conforms to applicable county regulations regarding National Flood Insurance Program and single family residential standard as outlined in this chapter." HAR §13-5-24. This particular restriction on single family residences in the Limited subzone of the Conservation District in areas outside of a floodplain or coastal high hazard area has been upheld in *Waimea Bay Associates One, LLC v. Young, et al.*, 438 F. Supp. 2d 1186, 1191-1192 (D. Hawaii, 2006). In that case, the U.S. District Court observed that the general restriction on building in the Conservation District was justified as the State had a legitimate government interest in conserving, protecting and preserving important natural resources of the State. The court further determined that the exception allowing for single family residences only in a floodplain or coastal high hazard area was also rationally related to

this objective because “the DLNR may have determined that the construction of single family residences in floodplains and coastal high hazard areas in compliance with county regulations pose less of a threat to the natural resources within the Limited subzone than the construction of single family residences within other areas of the Limited subzone.” *Id.* at 1193.

As it is conceded that the area where the house is being built is located outside of the floodplain, the only issue remains whether the area where the single family residence is to be sited is within a coastal high hazard area. 44 C.F.R. §9.4, part of the federal regulations relating to the National Flood Insurance Program, defines Coastal High Hazard area as, “the areas subject to high velocity waters including but not limited to hurricane wave wash or tsunamis. On a Flood Insurance Rate Map (FIRM), this appears as zone V1-30, VE or V.” In this case, the identified site for the single family residence is located within Zone X on the FIRM maps, and not within the areas classified by FEMA as a Coastal High Hazard Area.

Mr. Lemmo reiterated the staff’s recommendation remains the same which is to deny this application. Randy Ishikawa of the AG’s Office clarified and updated the Board that staff and AG has been in extensive discussions with the applicant through his counsel. They have made progress, but have not resolved everything. These 3 issues are remaining. The applicant does not dispute the environmental review process is complete. They are disputing the application and the relevance of the Haena Hui policy on this application. And they are contesting staff’s interpretation and application of the limited subzone rule.

Member Pacheco asked how is a good house lot designated? Mr. Lemmo replied if we have a contested case and it moves forward this might be a major issue. The court in 1967 developed an exhibit which included all 123 lots and there were different categories each lot was placed into. Member Pacheco asked it is court record? Mr. Lemmo replied yes, there is court record of it. There are good house lots and poor house lots. Member Johns asked the way we are going to proceed is, the 180 day period expires in a couple weeks which is part of the problem, right? Staff is asking the Board to deny on these three grounds? Then the applicants will ask for a contested case, work it out, and then bring some resolution to us after the 343 has been complied with? Or during that process? Mr. Ishikawa replied he believes it will be during that process. Member Johns asked (directing to Mr. Mooers) are you okay with this?

Mr. Greg Mooers, Land Use Planner representing the Morrow family explained they have requested for a contested case hearing which was submitted yesterday. They are requesting a contested case on a 90 day continuance to complete the negotiations in this regard. Member Johns replied okay. Member Pacheco asked you are asking for a contested case as well as a 90 day continuance? Mr. Mooers replied correct. Member Johns stated you really don’t need that because.... Mr. Ishikawa interrupted saying the 90 day period is by rule or statute.

Member Pacheco asked could you explain the different subzones and the points the client brings up with not being in the flood zone? Mr. Lemmo explained Mr. Ishikawa is the expert on this because he recently defended the DLNR on a law suit regarding Waimea Bay Associates. Mr. Ishikawa added which is pending with the 9th Circuit Court. Mr. Lemmo reported in 1994 when staff rules were adopted Chapter 13-5 there was an allowance for a single family residence in the limited subzone where previously it was not allowed. The reason for that was because it was felt a limited subzone had certain constraints to develop these areas for single family residential use, slide, flood, what have you, common natural hazard related constraints. The Board wanted to, he thinks, loosen it up and allow some potential development in these areas. In the plain areas or flood zone areas you may apply for a single family residence, but you may not necessarily get the permit. The reason they did that was because the counties who regulate lands adjacent to State conservation areas were approving permits for single family residence in the plain provided you complied with the flood zone ordinances and the V-zone compliance which is building your residence up high. They loosened it up, but the problem is they didn't loosen it up with respect to building single family residences in the limited subzone. Basically what happened was if you could show you had a lot in a flood zone or high hazard area you could apply for a house. But if it was not in a flood zone or high hazard area you could not apply for a house and could be denied. In some cases lots are split, sometimes a portion of a lot is in a coastal high hazard area and sometimes not. This is the kind of issue we are struggling with right now. Member Johns noted some of the former board members, Member Inouye in particular, felt that it seemed counter-intuitive that it's okay to build in a limited subzone in a high hazard area. You can only build in a flood zone? Why is that? Why do we have a rule that says that? Member Pacheco asked whether this was made in the rules and is not a policy? Mr. Lemmo replied it's a rule. The case that Mr. Ishikawa just argued and this is exactly what he was arguing, the court basically said the rule is rationale. Mr. Ishikawa reiterated yes there is rationale for the rule and the court said so. Member Johns and Pacheco replied okay.

Member Edlao asked what is the problem in this case? Mr. Lemmo replied the problem in this case is the lot is bisected by the zone boundary. Part of it is in the conservation and part is in the limited zone. The line in this case is somewhat arbitrary. He doesn't even know how it was drawn. Mr. Lemmo did the boundary interpretation on it, but it was based on his best judgment at the time. It was really difficult to locate the boundary in this case. What happens is the limited portion in this parcel as you read is not in the plain or high coastal hazard area. It is located outside of it and according to our rule we are not allowed to give a permit for it unless the owners petition to make a change of the section or move the house out of that section. Don't know if we should talk more about this since it's going to a contested case hearing.

Member Johns moved to approve staffs recommendation as amended. Member Pacheco second. Mr. Mooers clarified you've voted to deny to approve a contested case? Member Johns replied that comes later. We can't approve it today because the request was made today. It needs to be processed.

Chairperson Smith informed Mr. Greg Mooers, representing David and Linda Morrow, that if they wanted to contest the finding they must 1) orally request a contested case before the end of the board meeting and 2) to submit a written request for contested case within ten (10) days of the board meeting.

Unanimously approved as amended (Johns, Pacheco)

Item D-3 Grant of Perpetual, Non-Exclusive Easement, Land License and Construction Right-of-Entry to Haseko (Ewa), Inc. for Drainage Channel Purposes, Offshore of Honouliuli, Ewa, Oahu, Tax Map Key: 9-1-11:seaward of 03.

Ms. Charlene Unoki representing Land Division reported there are no changes. Haseko is requesting to excavate a drainage channel through State submerged lands to benefit the Ewa Beach community along Papipi Drive and Papipi Road, as well as Haseko's Ocean Point project runoff. Mr. Michael Lee, intervener, has appealed the Board's decision on the CDUP with the First Circuit Court. In the event that the Board's decision gets overturned, Haseko is willing to restore that area if it happens. Staff is requesting permission to proceed with this land license and easement. Staff is also requesting a deposit from Haseko for the amount of \$17,775 which Haseko has agreed to pay.

Member Johns asked there is no court order based upon the appeal that would prevent us from proceeding? Did you get a stay or TRO? Ms. Unoki replied no not yet.

Mr. John Higgins, resident of Ewa Beach, reported attending all the meetings regarding the Ewa Beach well and drainage. The government agencies who tested the water for the drainage reported it would not harm the coastline and there are no safety concerns. Therefore, he sees no reason for this not to be allowed. The elementary school floods and children are walking through it. The infrastructure was put in by Haseko at a great cost born by them, which saves the City and County a lot of money and are ready to cross this property once this plan has been approved. Member Gon asked Mr. Higgins if he had any problems with staff's recommendation? Mr. Higgins replied no.

Mr. Bob Duncan, resident of Ewa Beach, reported his children attended the elementary school. He has put in sidewalks to the cafeteria to keep the children from getting muddy when it floods. He has asked for this (drainage) 25 years ago and has been at all the meetings. He is all for it.

Ms. Mary Serrao, resident of Ewa Beach since 1959, reported she is in support of this drainage. Haseko had completed phase one and she lives in front of where all the flooding had started. The portion not done is at the Ewa Beach Elementary School. She knows Haseko is running the drainage from the Papipi Road area and she thinks it will be a good thing for Ewa Beach.

Ms. Sherry Kobayashi, principal of Ewa Beach Elementary School, reported she is here to support Haseko to go forward with the project. She explained how her campus floods a foot of water during a rainy day. This project will alleviate some of the problems for the school and the residents. Member Johns asked what is the student population? Ms. Kobayashi replied about 300 this year.

Mr. Jim Whylen, resident of Ewa Beach, reported he has 2 children who attended Ewa Beach Elementary and was a former board member of the Ewa Beach Neighborhood Board. He supports the project and Haseko. He asks for the Board's support.

Mr. Kai Markell, Director of Native Rights, Land and Culture at the Office of Hawaiian Affairs (OHA), reported on the importance of this issue to his office and beneficiaries. In 1993 the Land Board went through a CDUA for Haseko's Marina which is next door to this drainage outlet. OHA's suit was based on DLNR not assessing traditional customary practices and resources out in that area. That suit went to the Supreme Court. In 1998 the Supreme Court came back to the Land Board and said you didn't do your job which is to properly assess these constitutionally protected traditional and customary practices of the Native Hawaiian people and the resources that these practices rely upon. In 2000, the Land Board went through hearings, again, to look at that one specific issue with regard to that marina. And what happened, again? The findings concluded no more nothing. No more spiritual sites, no fishing village, and no burials where that marina was coming through. Seven months later Hawaiian homeless man was digging on the beach to make a cooking pit and finds iwi (bones). Seven months after Land Board says nothing is there! These iwi turns out to be an ali'i wahine (woman chief), two lineal palaoa (whale tooth necklace) in her hand which are descended from the opu'u Oahu chiefs. Who is she? She was found in the middle of the beach where the marina would come through. What is the significance of those opu'u? That is Oahu chiefs. Is she Chiefess Oneula? Is she Kanekapolei? The Oahu Chiefess Peleiholani? He related the connection to Punalu'u, Ka'u and the honu (turtles). What is the spiritual relationship? It's not just about the limu (seaweed). He then related how individuals restored the limu and taught the children about limu. There are documented facts of Queen Liliuokalani planting limu. He feels for Papipi Road which the county should have addressed years ago. He agreed about the problem of children having to walk through a flooded school. But asked why does the Hawaiian culture has to suffer? He expressed how findings stated there were nothing and its ok? How do you expect Papipi Road drainage to impact the reef when there is a football size marina right up to that beach? Of course, there will be no problem with Papipi. He asked the Board to use your discretion. You may proceed with this approval at this point if you are comfortable with your discretion. No amount of bound can undo the harm if the court comes back and says, no it was wrong. You can not put the rock back. Pau already. Apologized for his 'eha (pain) and thanked the Board for allowing him to speak

Member Johns explained when the Board approved the CDUP they did make additional changes to reduce the impact to the near shore waters. Not everything Mr. Markell talked about, but the Board tried to make changes to the proposed D&O to try to protect the near shore waters for a lot of the purposes that was described and that's on appeal. But other

issues, when they had the CDUP they thought these were addressed and hopefully they were right. Mr. Markell replied it's interesting another burial showed up a couple weeks ago from a homeless person digging and despite the archaeological surveys finding nothing. It's our homeless people who are finding these kupuna out there. He appreciates Member Johns explanation. Member Gon stated his appreciation of Mr. Markell's willingness to voice this, he knows....Mr. Markell interrupted I don't mean to bring the kamaha to the table, but appreciates the Board for listening.

Member Pacheco asked for clarification of the appeal or court case of the impacts? Ms. Linda Chow of the Deputy Attorney General's office asked did you want to hear from DLNR attorney or Haseko's attorney? Member Pacheco replied whomever. Member Gon added let's double attorney then. Ms. Yvonne Izu attorney representing Haseko reported she represented Haseko in the contested case and the case is on appeal. The intervener, Mr. Lee, did file an appeal in the case. He didn't ask for a stay on the decision and orders either of the Board or the court. Member Johns asked what are the general grounds of the appeal? Is he doing it per se? Ms. Chow explained no, Mr. Lee is represented by Native Hawaiian Legal Corp. Ms. Izu explained the exceptions that Native Hawaiian Legal Corp. took to the hearing officer's recommendation that were presented to the Board are repeating the same objections on appeal. Member Johns asked based primarily on? Ms. Izu replied based mostly on factual issues that were found by the hearing officer. Member Johns asked water quality? Ms. Chow replied water quality from the storm water. Member Johns affirmed right. Then stated he didn't recall any archaeological issues by the intervener. Ms. Chow replied that it was not as a significant issue. Ms. Izu replied that's correct. As a matter of fact, Mr. Markell was offered as a witness and he did submit written testimony in the case. Haseko willingly accepted his testimony without cross examination and it was entered into the record. His testimony was in the record for the hearing officer to consider. Member Johns asked OHA didn't intervene or appeal? Ms. Chow replied no. They did not. She reminded the Board if there are any remains found in the course of construction, Haseko, as part of their easement or licenses under law are required to stop to report it. Then record proper procedures for discovery of any remains. Member Johns asked whether the intervener could have asked for a TRO or preliminary injunction or stay or something. Ms. Chow replied yes it is provided per statute.

Member Pacheco asked lets say this was approved today, will that court process happen in a time frame before Haseko begins construction? If Haseko lost the appeal would they put it (diggings for drainage) back. Then why even go there if there is any chance? Was it a big time delay? Ms. Izu replied possibly. You have to understand there is a possibility of 3 tiered appeals. First appeal is to the Circuit Court and they have a schedule she thinks ... Ms. Chow added the briefing will be completed in October. Ms. Izu replied right. That's a briefing. After that you don't know how long it will take for the judge to render a decision. Once the Circuit Court renders a decision, whoever loses at the Circuit Court can take a further appeal to the Intermediate Court of Appeals. She has had experience in land use cases which appeals at the Appellate Court level has taken 5 years or more. Haseko wants to move forward with this, as you heard from the community, because they have waited a long time for this. They have waited many,

many years of being flooded out. As you know the rainy season is coming up at the end of the year and they really would like to see some relief for this winter. When the marina case went to appeal, of course, Haseko was not willing to move forward because there was no way to undo cutting of the shoreline and dredging in the ocean. In this case, they are excavating a very small amount, in the rocky shoreline. Should the court say this is wrong. You shouldn't put this drainage channel there, it is quite simple to fill in that channel and not have storm water go through there. That is the reason Haseko opted to take the risk and go forward with this.

Member Edlao asked what has been done about the iwi that was recently found? Ms. Izu replied the iwi that was found about a month ago was found on State lands on the west side of Oneula Beach Park. It is not within the project site.

Unanimously approved as submitted (Johns, Agor)

Item D-1 Consent to Assign General Lease No. S-3595, Richard Alister Wilson, Assignor, to Opportunity Management Hawaii, Inc., Assignee, Waiakea, South Hilo, Hawaii, Tax Map Key: 3rd/2-2-50:86.

Ms. Charlene Unoki of Land Division reported staff has no changes.

Unanimously approved as submitted (Pacheco, Johns)

Item D-2 Authorization to Obtain a Right-of-Entry from East Maui Irrigation Company, Limited., a Hawaii corporation, and Delegation of Authority to Execute a Right-of-Entry at Pauwalu, District of Hana, County of Maui, Hawaii, identified as Tax Map Keys: (2) 1-1-8:07 & (2) 1-1-8:10.

Ms. Charlene Unoki of Land Division reported staff has a monitor and the monitor needs permission to go onto East Maui Irrigation Co. (EMI) property and this is why staff is asking to enter into this Right-of-Entry with EMI. Member Johns asked who is the monitor? Ms. Unoki replied Morris Atta.

Unanimously approved as submitted (Pacheco, Gon)

Item D-4 Resubmittal – Consent to Assign General Lease No. S-5376, Ronald K.S. Wong, Shirley Wong, Shawn C. Kadooka and Dominic K. Kadooka, Assignor, to Shawn C. Kadooka and Dominic K. Kadooka, Assignee, Waimanalo, Koolaupoko, Oahu; Tax Map Key: (1) 4-1-008:079.

Ms. Charlene Unoki of Land Division reported staff has discussed the assignment with the Department of Hawaiian Home Lands and they have no objections. We require the Board's consent to finish the assignment. There are no changes to the submittal.

Unanimously approved as submitted (Gon, Agor)

Item J-1 Issuance of Revocable Permit for the Operation of a Trailer Boat Storage Facility to Waianae Ice House Partnership, Located at the Waianae Small Boat Harbor, Island of Oahu.

Ms. Charlene Unoki of Land Division reported. Member Johns asked are they ok with this? Ms. Unoki replied she thinks he is.

Unanimously approved as submitted (Gon, Johns)

Item J-2 Request to Write-Off Uncollectible Accounts

Mr. Bill Andrews, Property Manager for Division of Boating and Ocean Recreation (DOBOR) sitting in for Mr. Ed Underwood. He reported background. Member Johns asked who the principals were for #8 and #9? Ms. Jan Mulvey of DOBOR replied Ronald Uehara was who the letters were addressed to.

Unanimously approved as submitted (Johns, Pacheco)

Item J-3 Approval in Principle of Direct Lease to Honolulu Marine LLC for Constrection of a Shipyard and Limited Right-of-Entry at Keehi Small Boat Harbor, Oahu, Tax Map Key: (1) 1-2-025:por.024.

Mr. Bill Andrews of DOBOR reported background. Member Johns asked what he thinks the estimated cost the lessee will spend on this? Mr. Andrews replied staff would have to go to appraisal and review on that. Member Johns asked what was the reason for going to a direct lease as oppose to a ? (can't hear) lease? Mr. Andrews replied that went back to 2005 and there was a senate confirmed resolution. It was before his time. Member Johns stated he didn't think senate has the ability to order the Board to enter into a lease. He doesn't think that is what they are doing in their resolution. They are saying you have the authority. Member Gon asked was this an under-utilized authority and they just wanted to....Member Johns interrupted yes. He didn't know why the senate did that. But we have the ability to enter into a direct lease under Chapter 171-51b anyway. Maybe they're telling the Board it is a good idea. Member Johns asked for the boating guys, you are comfortable this is a good fit for what is going on in the harbor right now? Mr. Andrews replied yes right now. There is an area north of that they would like to expand, but it's taken right now for other use. The Marine Education Center had some discussion to move the balance to Honolulu Harbor to the area DOBOR utilizes right at the boat

ramp. Then move DOBOR further to the south side where the motor cross track is going in.

Unanimously approved as submitted (Johns, Pacheco)

Item F-4 Request for Authorization and Approval to Issue a Papahānaumokuākea Marine National Monument Research Permit to Dr. Greta Aeby, University of Hawai‘i, Hawai‘i Institute of Marine Biology (HIMB), for Access to State Waters to Conduct Coral and Fish Disease Research Activities.

Mr. Dan Polhemus, Administrator for Division of Aquatic Resources (DAR), reported background. The Division strongly supports this research based on its scientific merits. Staff realizes there is an issue with the applicant in this permit that she allegedly violated a prior permit. Division of Conservation and Enforcement (DOCARE) investigated and there is a draft submittal being prepared by DAR. It has yet to come before the Land Board or before a court. Blaine Rogers of DAR has been in discussions with U.H.’s general counsel. Staff is asking this permit submittal be deferred in order for further discussion to see if they can work out a solution in regarding the alleged violations. If not, staff will come back to the Land Board with the submittal as originally intended.

Ms. Marty Townsend of KUHEA urged the Board not to defer since a draft submittal to deny a permit for a year was before the Board on January 12th. She said denial does not prevent Dr. Aeby from coming before the Board for future permit applications. Member Johns stated that deferring does not give it to her. Ms. Townsend said the violations will set a precedent for future permittees. Member Johns asked what if the criminal or civil actions conclude there was no violation? Are you asking us to deny the permit on the basis of allegations she did something wrong as opposed to finding that she did something wrong? Member Pacheco asked for clarification of the rule language requiring denial of the permit? Ms. Townsend replied it is in sec. 13-60.5-6 (a)(3) that the Board shall consider whether an applicant has violated or not complied with a term or condition, and shall deny an application based on past violation. Member Johns asked if that conclusion that there has been a violation or non-compliance is in accordance with due process? Ms. Townsend gave further discussion against deferral.

Mr. Dave Lonborg, from U.H. Office of General Counsel, said this is a matter of deferral at this time and wants to work this out very quickly in the limited time to do this. He wishes resolution in the time available before the cruise.

Motion made to defer. All approved deferral. (Johns, Edlao)

Item F-1 Request for Authorization and Approval to Issue a Papahānaumokuākea Marine National Monument Education Permit to Carlie Wiener, State of Hawaii, Department of Land and Natural Resources, Division of Aquatic Resources (DLNR/DAR), for Access to State Waters to Conduct Education and Outreach Activities.

Mr. Dan Polhemus of DAR reported this is an education permit from one of their DAR staff and gave background.

Ms. Marty Townsend of KAHEA reported the following applies to the rest of the permits submitted. They are concerned with the bioprospecting language on condition #8 and the cumulative impact of research activities in the NWHI. And, to add these three additional conditions: a daily collection log, an incident reporting procedure and a prohibition of waste water dumping within State waters. Member Johns asked what did the Board vote on because he wasn't at the June 8th meeting? Mr. Polhemus replied the Board voted on a clause in one of the special conditions which was fully imbedded by the State and Federal partners. By OHA's request, the language was crafted by OHA and the AG, which made direct reference to bioassay and bioprospecting. This caused a considerable amount of consternation within certain constituencies. After some debate it was agreed to remove the reference to bioassay or bioprospecting and simply say "not for commercial purposes" which would encompass such activities without directly listing them. Member Johns asked and this is what the Board voted on? Mr. Polhemus replied yes and all future permits will utilize that language.

Member Johns asked what did the Board do about the special conditions? Mr. Polhemus replied the Board voted to accept the set of special conditions fully imbedded by the AG, general counsel offices, and respective Federal agencies. Member Johns asked does KAHEA's testimony ask you to change those again? Mr. Polhemus replied he has not seen the testimony which was provided to the Board. Member Pacheco said the testimony regarding waste water dumping is law. Staff can't put everything that's not legal or all the laws in the permit. Ms. Townsend reported KAHEA's concern is currently waste water dumping is allowed in Federal waters and it's unrealistic to expect scientists to read the law. By putting it in the permit conditions a statement that says "while you're maybe allowed to dump in Federal waters you are not allowed at all to dump in State waters." is prevention. Member Pacheco asked isn't it NOAA who operates the ships and are in charge of all that? It's not the scientists who go out and dump sewage. It's the operators of the ship. And wouldn't you think NOAA knows the laws to operate the ships? Ms. Townsend replied these are regular people like us who aren't lawyers or administrators operating the ships and this is one opportunity to prevent something that could have a disastrous affect. It just makes it clear.

Mr. Polhemus reported both our Office of the Attorney General and the White House Counsel on Environmental Quality have recommended against restating the law within the context of special conditions. They consider it superfluous and unnecessary.

Mr. Shaun Corston, Acting Superintendent of Papahānaumokuākea, spoke on behalf of NOAA. He clarified a misunderstanding of waste water dumping in the monument. The NOAA ships do comply with current environmental regulations. They treat all waste water coming out. If talking about black water discharge it goes through MSD systems. There is no problem with the treatment systems on any of these vessels. There have been some misunderstandings articulated in previous Land Board meetings as well as in the press. Member Edlao asked if the ships recycle plastics, aluminum cans or are they dumped in the ocean? Mr. Corston replied no they are not discharging garbage plastics they are in compliance with MARPOL Annex 5 and plastics discharge. Within the monument they cannot dump or discharge. Whether or not if they are all recycling all aluminum cans he didn't know and would need to check. He can say for the Hi'ialakai there is an effort to advance greening measures on board the ship.

Member Johns moved to approve. Member Pacheco second.

**Unanimously approved as submitted (Johns, Pacheco)
With the understanding that the bioprospecting language be
consistent with the Board's action of June 8, 2007.**

**Item F-2 Request for Authorization and Approval to Issue a
Papahānaumokuākea Marine National Monument Conservation and
Management and Research Permit to Seema Balwani, National
Oceanic and Atmospheric Administration, Pacific Island Fishery
Science Center, Coral Reef Ecosystems Division (CRED), for Access
to State Waters to Remove Derelict Fishing Gear and Conduct
Ecosystem Research Activities.**

Mr. Dan Polhemus of DAR reported background. Staff will be conducting a pilot test with an electronically powered unmanned aerial vehicle to determine whether this could work for a non-invasive census of monk seals and other mega fauna in the monument. Chairperson Smith asked aerial vehicle? Mr. Polhemus explained yes it's an unmanned aerial vehicle which is launched from the ship and recovered from the water. He noted this was originally part of the permit application. Because of reviewer concerns regarding the gasoline powered version and possible gasoline escaping when picked up from the water, it was withdrawn. Then it was determined an electrically powered version could be used that didn't have such issues and it was asked if this could be put back in. Member Gon asked the version he has does not show this. At least not in the intended activities where the applicant had withdrawn this portion, but it's described later? Mr. Polhemus replied yes what had happened was the applicant applied for it had reviewer concerns, withdrew it, and then realized late in the process they could use an alternative UAV that satisfied reviewer concerns. The submittal does not accurately reflect what the applicant now wishes to do. The piece they originally applied for is still operational. Overall, trying to test non-invasive technologies is useful. Fewer human impacts on the beaches and shorelines the better.

Member Gon asked the artificial reef matrix structure retrieval, was that a planned retrieval or a correction? Mr. Polhemus replied it was a planned retrieval. Those things have to sit in place for a time to accumulate critters. This is pursuant to what the Land Board approved last year for the census of marine life. Member Johns asked this is going to come up on all these permits regarding the cumulative initiative and any research plan. Mr. Polhemus reported Randy Kosaki is currently chairing the effort to put together the research plan for the Monument. And that is already in progress and was discussed recently. It looks like it's on a parallel track to be completed at least in draft form for the public comment at or near the same time as the management plan for the Monument. Member Johns asked next January? Mr. Polhemus replied correct. Member Johns asked when next season's set of permits come to the Board you're going to have... Mr. Polhemus interrupted presumably we're going to have both a management plan and a research plan. Member Johns added and it will address the cumulative impacts and then be proactively driven by those plans as opposed to what pre-existed. Mr. Polhemus replied you will certainly have a prioritization of activities. Staff did give the Board an assessment based on the permits that came in for researcher days per atoll which was presented to the Board by Wayne Haight. Member Johns replied right and they appreciate that. The two cumulative impacts are one thing, but in terms of a proactive plan that has priorities and what management directives or goals are as important to the Board. They are separate, but are related. Mr. Polhemus added he has been chasing the system since the Monument designation because when staff was going forward with the sanctuary designation they were getting the policy in place and then create a protected area. The president came along and, in some ways, did them a favor by creating a protected area, but at the same time caught staff flat footed on some of the policy development which is still in progress. And, that is why you see the current dynamics. Member Johns replied that is an explanation the Board would probably be less receptive to instead of going forward. Mr. Polhemus replied he expects you'll be less receptive as time goes on.

Member Edlao asked the applicant when they go out have they come across any recyclable material? Plastics, bottles, cans like that? Ms. Seema Balwani replied a lot of cans and bottles end up on the beaches on shore of the atolls. Staffs picks up the conglomerates and puts them in a container and bring them back for recycling. Member Edlao emphasized the need to recycle wherever possible. Ms. Balwani clarified they do not bring back the plastics because the ships don't have the capacity on board. Mr. Polhemus added the sheer volume that washes up on the Northwest Hawaiian Islands is shocking. It would take 15 Hi'ialakais to bring out all the debris and six months later it would all be there again. And he reiterated the researchers pack out everything that is brought in.

Mr. Keola Lindsey, advocate of the Native Rights and Agriculture Division of OHA reported DAR staff has bounced OHA's comments on this permit application back to them as though its solely OHA's responsibility to educate permit applicants on Hawaiian culture and traditions. OHA believes the majority of that responsibility initially falls on the applicants as they go through their permit application process. That begins with them not only consulting with the Office of Hawaiian Affairs, but with members of the Native

Hawaiian community. OHA understands that efforts to seek knowledge about traditions and cultures from individuals is a very delicate thing and it can't happen in one sitting. But the applicants should be prepared to go through that process and gain that traditional cultural knowledge as they work on their permit applications that require them to explain how their research is going to enhance cultural knowledge within Hawaii. His second comment is that Native Hawaiian community members have indicated that once the research materials are finished with, it be given back to practitioners for proper caring and eventually be put back however they see fit. They understand that process needs to be worked out, but through consultation with native Hawaiian community members they hope they can identify a process that everyone agrees to and provide that respect for these specimens. The reason for that is Hawaiian traditions indicate that natural resources are cultural resources and the beginnings of man begin with the coral polyp as emphasized in the kumulipo. These are things that should not be disposed of and should be cared for by those who have that knowledge.

Member Johns replied he agrees 100%. The monument is special because it is imbued with the cultural sensitivity that a lot of the other protected areas in the federal system never had. He would be interested to see why or how the cultural practitioner on board or the cultural protocols ahead of time and after how those are integrated into the co-trustees development of the special conditions and/or management plan or research plan going forward. It's been part of the reserve for a long time. He asked has it been dropped? Mr. Polhemus replied no. He explained OHA has a representative that sits on the management board who is Heidi Guth. These issues come up frequently as was pointed out. Staff hasn't been accommodating OHA hasn't been perfectly reconciled as of yet. Before anyone goes up there they are required to have a cultural briefing and that is already part of the permit process. DAR is not properly equipped to educate on culture their expertise is lies in natural resources and biology. They do look to OHA for guidance to the resources which that the researchers could obtain the degree of knowledge they would like to have. The degree for which OHA is directly involved versus simply say here is the path you go down, but how you choose to follow that path is your decision. That is being worked out. In regard to specimens, it's very expensive to go to the monument to obtain them. At this point researchers tend to voucher them indefinitely. It can be used by various researchers for various projects. Once they have a sample you want to use it fully. If there comes a time when a specimen becomes no longer used, scientifically, then they will be glad to convey it back to the native Hawaiians for the proper protocol in terms of returning it to the environment from where it came. Member Johns replied that needs to be built into it if it hasn't already. Mr. Polhemus answered staff is working on a material transfer agreement that essentially is the loan form. That governs specimens. Both parties, State and Federal, claim underlying title. That document states although the research took it out, they can use specimens, but they don't own them.

Member Pacheco asked where in the management plan are the cultural protocols addressed? Mr. Polhemus replied they are worked in as a permitting process and are addressed there. OHA has been involved with the joint permit since the start of the monument. They are integrated fully in the process. Member Gon asked that integration

notwithstanding, he detected in the comments Mr. Lindsey made, a feeling that although OHA is an active partner in this, that they shouldn't completely bear the responsibility that cultural needs are met. Mr. Lindsey replied OHA absolutely acknowledges their shared responsibility in educating others, but emphasized shared responsibility not sole responsibility. Member Gon replied he does empathize with Mr. Polhemus's comments that DAR staff is not the best body to take the lead to work out the details of what proper cultural protocols should be. Then maybe OHA is in a better position to. Some of the comments were if OHA could help by compiling a list of cultural practitioners and a set of resources or briefing materials that would provide consistency. Some researchers are barely or not even aware or even opposed to the idea of the cultural value of Papahānaumokuākea. He puts it back to OHA again. Mr. Lindsey replied definitely. OHA is willing to assist and use any expertise and resources they have. But there will be times when they may not have all the resources and shouldn't be the end all for consulting with the Hawaiian community.

Mr. Lindsey reported his testimony stands for rest of the agenda items.

Member Johns moved to approve. Member Edlao second.

Unanimously approved as submitted (Johns, Edlao)

With the understanding that the bioprospecting language be consistent with the Board's action of June 8, 2007.

Item F-3 Request for Authorization and Approval to Issue a Papahānaumokuākea Marine National Monument Research Permit to Dr. Ruth Gates, University of Hawai'i, Hawai'i Institute of Marine Biology (HIMB), for Access to State Waters to Conduct Coral Disease and Coral Bleaching Research Activities.

Mr. Dan Polhemus reported on submittal background.

Mr. Keola Lindsey reported appreciating the efforts of one applicant from Agenda Item F-1 who consulted the OHA and went outside into the Native Hawaiian Community to consult with others outside of OHA's reach. Mr. Dan Polhemus reported she is an employee of DAR and was encouraged to consult with the Hawaiian Community and she did it. If OHA wants this staff member be exemplary and explain how she did it and the best way to do this. Member Pacheco asked if this is something that works maybe it could built into the management plan? Mr. Polhemus replied absolutely it provides a basis for discussion and policy.

Unanimously approved as submitted (Johns, Pacheco)

With the understanding that the bioprospecting language be consistent with the Board's action of June 8, 2007.

**Item F-5 Request for Authorization and Approval to Issue a
Papahānaumokuākea Marine National Monument Research Permit
to Jennifer Salerno, University of Hawai‘i, Hawai‘i Institute of
Marine Biology (HIMB), for Access to State Waters to Conduct Coral
Microbial Pathogen Research Activities.**

Mr. Dan Polhemus, Administrator of DAR, reported that all these items are for the same cruise on the Hi‘ialakai in August. He gave background. He noted this is an area of increasing concern. The idea you might have microbes and bacteria that work hand-in-hand with disease and might get into these systems and weaken the corals. It certainly seems to be happening in the Caribbean.

**Unanimously approved as submitted (Johns, Pacheco)
With the understanding that the bioprospecting language be
consistent with the Board’s action of June 8, 2007.**

**Item F-6 Request for Authorization and Approval to Issue a
Papahānaumokuākea Marine National Monument Research Permit
to Dr. Hans Van Tilburg, National Oceanic and Atmospheric
Administration, National Marine Sanctuary Program, Maritime
Heritage Program (MHP), for Access to State Waters to Conduct
Maritime Archaeological Survey Activities.**

Mr. Dan Polhemus of DAR reported on submittal background and that it is long standing research.

**Unanimously approved as submitted (Johns, Pacheco)
With the understanding that the bioprospecting language be
consistent with the Board’s action of June 8, 2007.**

**Item F-7 Request for Authorization and Approval to Issue a
Papahānaumokuākea Marine National Monument Research Permit
to Dr. Stephen Karl, University of Hawai‘i, Hawai‘i Institute of
Marine Biology (HIMB), for Access to State Waters to Conduct Coral
Genetics Research Activities.**

Mr. Dan Polhemus of DAR reported background.

Member Gon commented after reviewing the set of research items related to the health of coral reef, he wanted to point out that this board is although concerned with the human impacts on the Northwest Hawaiian Islands, Papahānaumokuākea, we should be cognizant of how important some of these research items are with regard to understanding what the processes are and what the threats are. And that well we don’t

want any capricious visits to the place the list he has seen seems like a serious list of items that reflects the needs of that place. Member Johns stated for us non-scientists it would be easier for us to evaluate this in the context of a management plan. Member Gon agreed. Mr. Polhemus added clearly acknowledged. Although, you can put boundaries around a place, you can claim it is protected and manage it very stringently, invasive species, marine debris, coral disease and climate change are all still going to find their way up there. No amount of regulation will stop them. You have to be able to understand the affects that those large scale stressors are having on your system and then try to manage them as best you can.

Member Johns asked are these the last set? Mr. Polhemus replied there are permits coming up for research and monitoring program of the Coral Reef Ecosystem Division which is largely observational. It's a long term monitoring program that spans the Pacific and one phase occurs at the Northwest Hawaiian Islands. Member Edlao asked a lot of these researches are continuation configures? Mr. Polhemus replied most of these permits were approved by the Board last year and there are continuations. But important to note if you look at the numbers of specimens staff are asking for, they are ceilings asked for last year and the researchers are working within the bonds of those previously established ceilings. Member Edlao asked did staff get feed back from them on what happened on previous research? Mr. Polhemus replied yes staff had provided a HIMB quarterly full color report on these projects. He hoped staff sent them to every member of the Land Board, but assumed they didn't. Member Edlao asked could they please provide them to the Board members. Staff replied they will do that.

Unanimously approved as submitted (Johns, Pacheco)

With the understanding that the bioprospecting language be consistent with the Board's action of June 8, 2007.

Item K-1 Conservation District Enforcement File HA 06-08 Regarding Unauthorized Multiple Tree Removal by Matthew B. Ornstein Located at Laupahoehoe, North Hilo, Island of Hawaii, TMK: (3) 3-6-002:033

Mr. Sam Lemmo, Administrator of Office of Conservation & Coastal Lands (OCCL), reported the first letter sent in stated the landowner didn't have a problem. The second letter stated they changed their mind and they did have a problem. They did cut a lot of trees. He didn't have a problem with the payment, but he couldn't base it on a letter and the landowner is not here. To reduce the fine is not consistent with how staff runs these kinds of cases. He defers to the Board. And staff doesn't have a problem with payment plan type situations.

Member Pacheco asked wasn't the Nature Conservancy trying to get through an invasive species law to allow cutting of invasive species in the conservation district? What ever happened to that? Mr. Lemmo replied there was a bill proposed to allow the removal of invasive trees without a permit. Member Johns stated whether it is invasive or not you should use good forestry practices. Mr. Lemmo replied yes, but not all the trees are

invasive and might not be native. Member Gon asked looking at the pictures it looked like they were clearing a path. Did the landowner voice what their motivation was? Member Pacheco replied refer to Exhibit 8 regarding old Hawaiian ruins. Mr. Lemmo replied normally staff would not reduce it. The only reason you would reduce it is the owner is saying he can't pay. Whether or not that is a legitimate reason to reduce it or not is the Board's judgment. Member Edlao replied and asked it says 60 days. Why don't we just extend it further? Mr. Lemmo replied give them more time to pay. Chairperson Smith read from the second letter what the landowner wants which is less fine and a payment plan. Mr. Lemmo explained he didn't have a problem giving him a longer period to pay, but it's an additional thing to keep track of.

Member Pacheco asked what about community service? Has that ever been done? Member Johns joked what, cut trees?! All laugh. Member Edlao stated why don't the Board extend it then and let the landowner know they have to stay on the payment plan and if they miss then...Mr. Lemmo added then they would have to come back to the Board. Member Pacheco suggested instead of keeping track, why not have an extended period of time to pay it off. Member Edlao replied give him 6 months to pay the \$2500. Chairperson Smith commented this is very reasonable. Mr. Lemmo replied he understands the landowner's concerns, but to purchase a big property like that they must have some kind of money.

Member Edlao moved to amend the time period from 60 days to 6 months to pay off. Member Pacheco second.

**Unanimously approved as amended (Edlao, Pacheco)
Extend payment to 6 months.**

Item K-2 Appointment and Selection of a Hearing Officer for Contested Case OA-07-06, in Regards to Conservation District Enforcement File OA-07-31 for Unauthorized Repair/Reconstruction of a Boulder Retention by Michael Dailey Located at Mokuleia, Island of Oahu, TMK: (1) 6-8-003:018

Mr. Sam Lemmo of OCCL reported background referring to the Dailey case on the North Shore. He has the petitions not included in the staff report, one on behalf of Daily and one from the neighboring condominium association. Staff will defer to the AG on how to deal with the neighboring petition. Chairperson Smith asked going in the same direction? Mr. Lemmo replied generally speaking you don't have third party people asking for contested case hearings on enforcement cases. When the hearing officer commences the hearing they'll have a hearing outstanding and at that point then the officer will consider whether the neighbor should be a party or not. Member Pacheco asked how are the hearing officers appointed? How does that happen? Chairperson Smith replied there is a battery of them that are qualified and we've used them in the past. For instance, the last one we chose was for Papipi Road. He left the room to take an important phone call. He deferred to Member Johns. Member Johns replied the Board has the authority to do it,

but normally it is delegated to the Chair and he does it. Member Edlao explained the Board wants certain person and if he is not available then it comes back to the Board. Member Johns replied the Board authorizes the appointment and then the Chair chooses amongst the people. Mr. Lemmo stated staff has a big folder of potential hearing officers depending on availability and fee staff will present three at the top and then the Chair will choose.

Unanimously approved as submitted (Pacheco, Johns)

Item K-3 Extend the Processing Period an Additional 90-Days for Conservation District Use Application (CDUA) HA-3405 to Develop a Sustainable Commercial Koa Timber Forestry Operation in South Hilo, Hawaii, Papaikou and Paukaa Districts, Island of Hawaii, TMKs: (3) 2-7-001:001 and (3) 2-8-001:002

Mr. Sam Lemmo of OCCL reported on staff submittal. The problem is and it's alluded to in the staff report was a lot of issues came up on the draft and on the impact statement. They are going to require a lot more time to address those concerns. They will make the changes to the environmental document, submit the final EIS and then we'll have 30 days to review the final EIS for adequacy. Member Pacheco asked are we required to give the 90 days and if we didn't and they couldn't resolve those things they would come back. If the Board denies this now staff would come back recommending denying it because of the unresolved issues? Mr. Lemmo replied you could do that. It seems to him we need to give them a chance and the purpose of the extension in the law is when you have to do an EIS its anticipated the process takes longer than 180 days there is a provision allowing for extensions. Member Gon asked the authority? Does it limit us to 90 days? Mr. Lemmo replied that is all they are asking for. The AG's advice is we can't go more. Member Gon asked even if we anticipate it? Mr. Lemmo replied it will not be enough. It would have to come back and ask for another extension.

Unanimously approved as submitted (Pacheco, Johns)

Item L-1 Permission to Hire Consultants for DLNR CIP Projects

Item L-2 Certification of Election and Appointment of West Oahu Soil and Water Conservation District Directors

Item L-3 Permission to Hire Civil/Environmental Engineer for Wetland Restoration at Pouhala Marsh State Wildlife Sanctuary, Island of Oahu, Funded by DOFAW Wildlife Operating Funds

Item L-4 Request for Authorization for the Geological Survey, United States Department of the Interior (USGS) and its Agents, Employees, and Consultants, to Enter Upon Private Property for the Purposes of

Investigating, Installing, Operating, and Maintaining Remote Sensing Gauges, and Related Instrumentation Equipment, Conducting Inspections and Hydrologic, and Hydraulic Calculations on and around Streams, Dams, and Reservoirs located within the State of Hawaii pursuant to Hawaii Revised Statutes Chapter 179 and Authorize the Chairperson to negotiate and execute agreements with the USGS for FY 2007 & 2008

- Item M-1** **Conveyance of a portion of the Road Remnant Old Government Road, adjacent to New Volcano Road, Federal Aid Project No. F-2(4), County of Hawaii, Tax Map Key: (3)1-7-19: Road.**
- Item M-2** **Issuance of a Direct Lease Schuman Aviation Company, Honolulu International Airport**
- Item M-3** **Amendment No. 2 to State Lease No. DOT-A-05-0026 Application for Additional Space Dorvin D. Leis Co., Inc., Honolulu International Airport**
- Item M-4** **Issuance of a Hangar Facilities Lease to Andrew Doughty Lihue Airport, Island of Kauai, State of Hawaii**

Unanimously approved as submitted (Johns, Gon)

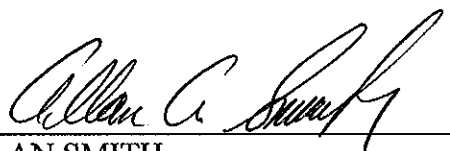
There being no further business, Interim Chairperson Smith adjourned the meeting at 11:00 a.m. Tapes of the meeting and all written testimony submitted at the meeting are filed in the Chairperson's Office and are available for review. Certain items on the agenda were taken out of sequence to accommodate applicants or interested parties present.

Respectfully submitted,



Adaline Cummings
Land Board Secretary

Approved for submittal:



ALLAN SMITH
Interim Chairperson
Department of Land and Natural Resources