This is when they ordered the consolidated CCH

MINUTES
FOR THE MEETING OF THE
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: February 15, 2006
TIME: 9:00 A.M.
PLACE: KALANIMOKU BUILDING
CONFERENCE ROOM 132
1151 PUNCHBOWL STREET
HONOLULU, HAWAII 96813

CALL TO ORDER

Chairperson Peter Young called the meeting of the Commission on Water Resource Management to order at 9:03 a.m.

ROLL CALL

The following were in attendance:

MEMBERS

Mr. Peter Young
Ms. Meredith Ching
Mr. Neal Fujiwara
Mr. James Frazier
Dr. Lawrence Miike
Ms. Stephanie Whalen

Excused: Dr. Chiyome Fukino

STAFF

Dean Nakano, Roy Hardy, Ed Sakoda, Lenore Nakama, Ryan Imata, Dean Uyeno, Charley Ice, Kevin Gooding

COUNSEL

Randy Ishikawa, Esq.
Linda Chow, Esq.

OTHERS

Teresa Dawson, Dan Polhemus, Gordon Tribble, Bill Moore, ~~Bill Tam~~, Dr. Jonathan Scheuer, Kapua Sproat, Megan Wells, Jane Lovell, Linnel Nishioka, Steve Bowles, George Tengan, Avery Chumbley, Donald O'Connor, Mike Robertson, Steve Spengler, Kaeo Duarte, Ron Englund, Bob Acree

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

APPROVAL OF MINUTES

January 11, 2006

MOTION: (Frazier/Whalen)
To approve the minutes
UNANIMOUSLY APPROVED

E. STREAM PROTECTION AND MANAGEMENT

1. Application for a Stream Channel Alteration Permit (SCAP-KA-392), County of Kauai, Department of Public Works, Kilauea Stream, Kilauea, Kauai (TMK: 5-2-09 & 5-2-11)

Presentation of Submittal: Ed Sakoda

RECOMMENDATION:

That the Commission approve a stream channel alteration permit for the replacement of Kilauea Stream Bridge (TMK: 5-2-09, 5-2-11) Kilauea, Kauai. The permit shall have a term of two years subject to the Commission's standard permit conditions in Exhibit 5.

MOTION: (Whalen/Fujiwara)
To approve as recommended by staff
UNANIMOUSLY APPROVED

2. Application for an After-the-Fact Stream Channel Alteration Permit (SCAP-OA390), and Declaratory Ruling, City and County of Honolulu, Department of Facility Maintenance, Wailupe Stream, Aina Haina, Oahu, (TMK: 3-6-005, 12, 15, 16, 17)

Presentation of Submittal: Ed Sakoda

DISCUSSION:

Commissioner Miike asked what the difference was between an exemption with these conditions and a stream channel alteration permit?

Mr. Sakoda stated that if we gave the applicant a permit to do this work and they repeat and do it again, whether it's 2 years or 5 years, they would have to apply for another permit.

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Commissioner Miike asked what does the permit require that is different from the exemption with these conditions?

Mr. Sakoda answered that it was not any different except that they will have to re-apply.

RECOMMENDATION:

That the Commission adopt a Declaratory Ruling, DEC-ADM06-S11, exempting the excavation and reshaping of Wailupe Stream, Aina Haina, Oahu, from the requirement for a stream channel alteration permit provided that the applicant:

1. Shapes the channel in a manner required by the subdivision agreement between the Aina O Haina subdivision and the City and County of Honolulu;

2. Configures the bed of the channel directing streamflow toward one of the toes of the banks to provide shade and pools for aquatic life; and

3. Coordinates with the Department of Health to address and implement practices to minimize water pollution.

MOTION: (Whalen/Ching)
To approve submittal as recommended by staff
UNANIMOUSLY APPROVED

G. NON-ACTION ITEMS

1. Lalakea Alternative Mitigation Project (LAMP) Six month Oral Presentation by Kamehameha Schools and Bishop Museum

Dr. Ron Englund from the Bishop Museum (BM) and Mr. Kaeo Duarte from Kamehameha Schools (KS) made the presentation. This is the third and final year of the Lalakea Alternative Mitigation Project.

Dr. Englund explained that the study areas are up and downstream of the Lalakea diversion and the study is trying to find out what happens after stream flow is restored in Lalakea and Hiilawe Streams. There is a scientific research component and an educational community participation component in this project. Their mission is to examine the natural processes of flow in Hiilawe and Lalakea Streams and to provide educational opportunities to native Hawaiian students on the Big Island. An immediate response to the restoration was increased baseflow from zero to 2-3 cfs. There were high flows in March and December's dual gages. They were installed in October to make sure that they continue to operate. Dr. Jim Parham has been in Honolulu working with CWRM on stream flow models. Lalakea will hopefully be a prototype model for examining aquatic animal habitat responses to changes in stream flow over time.

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There is also the educational component with three major areas of inquiry by the students; habitat, biota, and measuring stream flow. BM is also working with KS as well as the charter school out of Waimea. Studies include educational field trips, invasive species removal, and a fish diet study to see what they eat. BM has a three-year study to assess the impact of stream flow restoration and collecting data since July 2003. There was an immediate increase of flow in March following restoration and BM has been able to continue to collect data for a wide range of biota starting with the algae and fish. Data collection has been enhanced in their educational program with a $50,000 grant from the National Oceanic and Atmospheric Administration, thus allowing BM to make more field trips to Waipio, involves more students and collects data that will be used in the report.

The last educational and research field trip is scheduled for late May or June 2006. BM will be doing a data analysis and report write up targeted for June through December 2006. The first draft of the final report to CWRM will be submitted by January or February 2007.

C. GROUND WATER REGULATION

5. Petition For Ground Water Management Designation, Mahukona Aquifer System Area, Kohala Aquifer Sector Area, Island of Hawaii

Presentation of Submittal: Ryan Imata

A letter that was received from the petitioner was distributed to the Commissioners. The letter requested that this petition be withdrawn. Mr. Imata briefly summarized this petition for ground water management designation at the Mahukona Aquifer System Area for the benefit of those that flew in from the island of Hawaii.

DISCUSSION:

Commissioner Miike stated that presently the Mahukona Aquifer does not have enough water use to designate.

Mr. Steve Bowles, co-convener of the Waimea Water Roundtable (WWR), spoke as a private citizen and also as a member of this group. He is concerned that the petition was filed frivolously. He stated that the application should be re-titled, "A Review of Water Resource Reports" not "A Water Resource Report" because it was a literature review and not a new study. Mr. Bowles explained that the WWR has always had an open door policy and people from various parts of the island are welcomed to come and exchange thoughts. The group tries to be an educational group and help individuals come to better decisions in water resource management. However, the petitioner never approached the WWR. He did however, receive an anonymous request to review some "report". He found the request offensive in it's anonymous nature.

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Mr. Bowles agrees with staffs' recommendation that this application be denied and requested that some time limit preventing re-submittal of this frivolous petition.

Mr. Bill Moore, Vice President of the Kohala Ranch Development Corporation and the Kohala Ranch Water Company, stated that these companies are the targets of the petition. He stated present well field capacity is 3 mgd. He encouraged the denial of this petition rather than allowing it to fester. Mr. Moore thanked the staff in appreciation of the work that went into this project.

Commissioner Frazier suggested a rule change to extend the petition by thirty days.

Acting Deputy Director Dean Nakano stated that if this petition was withdrawn from the agenda by the petitioner, no further action by the Commission is required. However, the petitioner may come back the following week or month and re-apply with the same information with the Commission having to answer within 60 days. Staff can fall back on the information and the work they already accomplished unless the petitioner can provide something new.

Chairman Young stated since its withdrawn CWRM should respect that and no further action/discussion on this item was made.

1. **Maui Department of Water Supply, APPLICATIONS FOR WATER USE PERMITS, Mokuhau Well 1 (5330-09, WUP 700) TMK: 3-3-2:24, Mokuhau Well 3 (5330-11, WUP 701) TMK: 3-3-2:24, Waiehu Heights Well 1 (5430-01, WUP 697) TMK: 3-3-2:28 Waiehu Heights Well 2 (5430-02, WUP 698) TMK: 3-3-2:28, Waihee Well 1 (5431-02, WUP 695) TMK: 3-2-17:31, Waihee Well 2 (5431-03, WUP 696) TMK: 3-2-17:31, Waihee Well 3 (5431-04, WUP 703) TMK: 3-2-17:18; with David Singer, Existing Uses, Iao Ground Water Management Area, Maui**

Presentation of Submittal: Charley Ice

Mr. Ice amended Table 2, page 4 of the original submittal because it was constructed with erroneous data originally submitted by MDWS in 2003. MDWS had discovered errors in its reporting of monthly pumpage due to meter errors. Following recalibration, they subsequently re-submitted corrected figures for pumpage data from these wells through two updates, on October 7, 2004 and December 29, 2004. The updated data were used to recalculate the updated figures represented in the amended Table 2 and the period of the 12-MAV is computed to include the entire month of July 2003. Table 2 was amended as shown:

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Table 2. Comparison of Computed 12-MAV in MGD for captioned wells

Well	WUP	7/**31**/03 12-MAV	amount requested*	12/31/05 12-MAV*	12/05 12-MAV less 7/03-12-MAV
5330-09 Mokuhau 1	700	**1.810**	1.994	2.893	1.083
5330-11 Mokuhau 3	701	**2.308**	2.221	1.092	(-1.216)
5430-01 Waiehu Hts1	697	**0.163**	0.165	0.221	0.058
5430-02 Waiehu Hts2	698	**1.142**	1.415	1.240	0.098
5431-02 Waihee 1	695	**1.525**	1.480	3.197	1.672
5431-03 Waihee 2	696	**2.514**	2.439	1.077	(-1.437)
5431-04 Waihee 3	703	**1.423**	1.513	1.675	0.252
		10.885	11.227	11.395	0.510
*compared with 7/31/03 12-MAV			(+**3.1**%)	(+**4.7**%)	

Chairman Young stated that on the amended recommendation A, there is a July 21, 2003 date but on the submittal and amendments to Table 2 it states the entire month of July so it should be July 31, 2003.

The staff recommendation was also amended accordingly as follows:

STAFF AMENDED RECOMMENDATIONS:

A. That the Commission approves the water use permits for the reasonable-beneficial municipal use of the following Maui Department of Water Supply basal wells, computed as the 12-MAV as of July **31**, 2003:

Mokuhau Well 1 (5330-09, WUP 700),	**1.810** mgd
Mokuhau Well 3 (5330-11, WUP 701),	**2.308** mgd
Waiehu Heights Well 1 (5430-01, WUP 697),	**0.163** mgd
Waiehu Heights Well 2 (5430-02, WUP 698),	**1.142** mgd
Waihee Well 1 (5431-02, WUP 695),	**1.525** mgd
Waihee Well 2 (5431-03, WUP 696),	**2.514** mgd
Waihee Well 3 (5431-04, WUP 703),	**1.423** mgd

subject to the standard conditions in Exhibit 13 and the following special condition:

1. Should alternative permanent sources of water be found for these uses, then the Commission reserves the right to revoke this permit, after a hearing.

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DISCUSSION

Commissioner Ching asked for clarification on the implication of giving them the use as of 2003. She wanted clarification on the incremental amount between that and what they are using now and does MDWS have to come in as a new use permit?

Mr. Ice stated that was correct. He also said stated that they wanted to protect the existing uses and that amount is protected in this action.

Chairman Young asked if the Commission should change it by noting the wells and giving the total rather than the item per well.

Mr. Tengan stated that he wanted to do that originally but was advised not to because of the way the applications are filed by well. The MDWS has to spread the water pumpage throughout the aquifer. The pumping has been done in the Waiehu and Mokuhau areas. Prior to the designation they added on the Waihee Wells through Wailuku Ag, a well was drilled in Waikapu and would be placed in production and another one in the Iao area. This is all intended to go back to staffs' recommendation years ago that the department spread its pumping. Eventually, MDWS hopes to abandon the use of the Wailuku Shaft and are working with the developers on additional wells so that the shaft can be replaced. This will provide more distribution of water and better protection of the aquifer.

Ms. Jane Lovell, Deputy Corporation Counsel and legal representative for the County of MDWS stated that they were pleased with staff's initial report which recommends a finding that MDWS has satisfied all of the criteria with their applications. She said that the staff report indicated that all objections to the MDWS applications have been resolved. They do not have a dispute with respect to the original numbers that were originally submitted that Mr. Tengan has asked the Commission to approve.

However, Ms. Lovell stated that it is difficult to deal with amendments that deal with the numbers received just five minutes before the hearing. Her recommendation is that the Commission approve the original applied for total amount that was requested, which was the best figures they had as of the date of designation and deal with the figures that helped trigger designation. Ms. Lovell also stated the Chairman and acting Deputy Director have the authority to adjust those figures as necessary after consultation and working together with MDWS and its legal counsel. These issues are too complicated and important to be scrambling with these new adjusted figures and trying to figure out what impact it will have going forward. It causes concern of how technically we would have to apply for new uses. Ms. Lovell stated that they think it was existing uses and applied for them under existing uses.

Ms. Lovell believes that there is a mechanism for allowing the Chairperson, the acting Deputy Director and MDWS for working together after-the-fact to make small adjustments that might be necessary. For the record, Ms. Lovell asked that any staff submittals or

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correspondence etc., on these matters be directed to her attention. There was an unfortunate situation where Ms. Lovell received staff submittal for item C3 and not for C1 or C2. The Director received all of them and they both thought they had received the same. Ms. Lovell would like to work closely with staff and the Commission.

Commissioner Miike also stated that they were going back and adjusting the entire month of July 2003. He understood the revisions in the reporting but he did not understand the calculations that came out of it.

Ms. Lovell stated that they had the same problem and that was the reason for suggesting that they accept the figures that they originally applied for and work with the Chairman and staff to resolve some of the numerical issues.

Commission Miike stated that whatever the resolution of that issue, it is obvious that since July 31, 2003, more households have been served and water usage increased. They would have some projections of future water use in the next 2-4 years. Before the department submitted to the Commission staff those revisions, staff had slightly less than the July 31, 2003 total amount that what your department has been asking, 11.163 versus 11.227 mgd. Regardless of what we say or approve for existing uses for July 2003, you would still have to apply for additional uses.

Ms. Lovell stated that they would have to have some legal and factual basis for calling a particular amount the new use versus an existing use, and that is why they prefer to go with the numbers that were the best numbers as of the date of designation. They don't want to get into a definitional debate.

Commission Miike stated that there are not many existing users beside the next application and MDWS. Everything else will be new uses. The issue is the quantity of water being used. He stated that they were using more water now than what was the existing use in 2003.

Ms. Lovell stated that they could work out the mathematical issues through a cooperative work group where they could have more time rather than to do it on short notice, at the same time not wanting to hold up the application.

Mr. Ice stated that all the numbers have been reconciled and they should be correct now.

Commissioner Whalen asked when were the calibration of meters done, and isn't the calibration of meters to make sure the meters are reading correctly? If calibration were done recently, wouldn't we have to back-calculate the re-calibrated numbers in 2003 not really knowing when the meters malfunctioned?

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Mr. Ice stated that his understanding was that it had occurred after the date of designation. Commissioner Whalen stated that it was not the quantity of water that was in question but the calculation of it. Therefore, the argument for new uses is not affected.

Commissioner Ching asked the Chairman if there was a simple explanation between the 2 sets of numbers?

Chairman Young stated the number 11.227 is to the end of June 2003 12-month MAV based on the old data. The calculations with corrected data ending in July 2003 was the basis for the staff amendment to 10.885. The 11.227 are using the old calibration, which the department has recognized. He stated that they still wanted us to use the unadjusted calibration.

Ms. Lovell stated that the original erroneous numbers are the numbers which triggered designation.

Chairman Young stated that they learned of the mistake in the calibration after designation.

Ms. Lovell responded that they do not want to go back and undo the designation. If one set of numbers were used to trigger designation, then we should use those same numbers.

Chairman Young asked even if those numbers are wrong?

Commissioner Whalen also asked, if the corrected numbers were used would Iao have been designated?

Miss Lovell stated she would not like to go there.

Commissioner Miike stated that there was at least the 90% criteria for designation; there was obviously some controversy happening. In the past pumpage was over 100%. Commissioner Miike thinks the Commission should approve these existing use permits.

Mr. Tengan stated that this was a major issue at that time, he recalls sitting in a meeting with Mr. Agaran as the Chair, the statement that was made, "as soon as the withdrawals from Iao reaches 18 million gallons, that's an automatic trigger for designation, no other consideration."

Chairman Young stated that there were other triggers in place for designation.

Ms. Lovell stated that pumpage hit the trigger number (18 mgd). If those were the numbers that were accepted at the time to trigger, we're not trying to undo that, let's continue to use those numbers now. She is aware that the calibration has produced a different set of numbers going forward.

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Chairman Young stated that they could agree and not rescind the designation and yet use the correct figures.

Ms. Lovell suggests getting together and working this out in a way that makes sense for everyone concerned.

Commissioner Miike asked Ms. Lovell why is she so worried over this difference when they still have to come in for a new use permit for anything over and above what they are using now and into the future.

Mr. Tengan stated that there is no assurance to the department that they would be getting their water use permits approved.

Chairman Young stated that the Commission cannot commit because they don't have the applications.

Mr. Tengan suggested a compromise now would be to accept their original erroneous figures and proceed with designation.

Commissioner Miike stated that designation has already occurred.

Mr. Tengan stated that if we are to use the old figures there is no controversy except that the numbers are incorrect. He also said that events had gone on so quickly that before he knew it the aquifer was designated. He was not aware that there was a board meeting going on.

Commissioner Miike stated that he was around at that time and remembers being out voted 4 to 1 against designation. The irony is that without designation more conditions were placed on the department than under designation in order to avoid designation.

Mr. Tengan stated that the former administration wanted to operate under non-designated basis. He has since changed his mind and can see the benefits of the aquifer being designated. Things were done by the department that shouldn't have been. For example, the United States Geological Survey (USGS) study is a State function to find out how much water is available in the aquifer. However, the department agreed to enter into a $1 million contract with USGS. Mr. Tengan asked the State for support in helping to fund this study but has received none.

Commissioner Ching asked Ms. Lovell for some clarification on their recommendation. She asked Ms. Lovell if she wanted the Commission to approve the numbers subject to some adjustment based on discussions with CWRM staff, abiding by those adjustments.

Ms. Lovell asked for some flexibility to meet and work through the mathematical calculations and reach some mutual agreement. We would ask the Commission to give the

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Chairman and Deputy Director and our department to move forward as long as the number is no more than our department and no less than what the Commission has.

Commissioner Whalen did not understand "working out", because of the unknown dates of the un-calibration. What kind of discussion is going to come up with the difference between 10.885 and the 11.227, what's the basis of a compromise?

Ms. Lovell stated that the in-between numbers were created by an interpolation, but was not sure if it was linear or polynomial. She asked to see the formula or work papers to check for accuracy however, the computers could not communicate and time was limited.

Mr. Ice stated that CWRM staff would be happy to work with Ms. Lovell.

Chairman Young asked Mr. Ice if he would amend the recommendation of the third column of numbers in the submittal?

Mr. Ice responded by saying that staff would go with the amount that MDWS requested, which is 11.227 mgd. The understanding is that staff will be working with the new use applications that will reflect the new and properly adjusted numbers.

Dr. Jonathan Scheuer from the Office of Hawaiian Affairs (OHA) stated that the reason they were able to resolve their concerns was that Commissioners Miike and Frazier allowed additional time to work with the County. He also discussed two minor points on the staff submittal; the first, attachment two were responses to questions through former Deputy Yvonne Izu from Commissioner Miike. Former objections were transmitted in a former letter and updated at a later date. Second, OHA still contends that basal withdrawals affect springs in the area. However, OHA has withdrawn their objections.

Ms. Kapua Sproat, an attorney with Earthjustice (EJ) thanked the Commissioners and staff for their time, patience and extensions enabling them to work together with the Mayor of Maui County, and MDWS to craft an agreement that addressed their clients and OHA's concerns.

Ms. Sproat stated that the settlement has three parts: (1) implementation of conservation measures to reduce MDWS demand, (2) commitment to complete update of counties water use and development plan, (3) seek restoration mauka-makai streamflow in Iao, Waihee and Waiehu Streams. In regard to the third settlement, the Mayor agreed to get a commitment from the Wailuku Water Company or seek acquisition to the system through condemnation to restore flow. EJ supported the applications and asked the Commission to move forward and issue permits.

Ms. Sproat presented an amendment to staffs' submittal on page six, number four. She stated that public testimony was submitted regarding the impacts of these issues. She suggested that it could be amended to read, "Contrary to public testimony the

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Commission has not identified any streams or springs as being affected by basal well withdrawals."

Commissioner Miike also added that municipal use is in "the public interest and the applications are for domestic use of the general public."

Commissioner Miike moved to amend staff recommendation to approve as existing use the individual well allocations from the applicant's original request that total 11.227 mgd and incorporate the other changes as recommended to the submittal.

FINAL AMENDED RECOMMENDATIONS:

A. That the Commission approve the water use permits for the reasonable-beneficial municipal use of the following Maui Department of Water Supply basal wells, computed as the 12-MAV as requested by MDWS.

Mokuhau Well 1 (5330-09, WUP 700), 1.994 mgd
Mokuhau Well 3 (5330-11, WUP 701), 2.221 mgd
Waiehu Heights Well 1 (5430-01, WUP 697), 0.165 mgd
Waiehu Heights Well 2 (5430-02, WUP 698), 1.415 mgd
Waihee Well 1 (5431-02, WUP 695), 1.480 mgd
Waihee Well 2 (5431-03, WUP 696), 2.439 mgd
Waihee Well 3 (5431-04, WUP 703), 1.513 mgd

subject to the standard conditions in Exhibit 13 and the following special condition:

1. Should alternative permanent sources of water be found for these uses, then the Commission reserves the right to revoke this permit, after a hearing.

MOTION: (Miike/Fujiwara)
To approve staff recommendation as amended
UNANIMOUSLY APPROVED

2. Living Waters Land Foundation, LLC, APPLICATION FOR WATER USE PERMIT, Waihee Mauka Well (Living Waters #1, 5531-01), TMK: 3-2-013:015, WUP No. 704, Future (Agricultural) Use for 0.020 mgd, Iao Ground Water Management Area, Maui

Presentation of Submittal: Charley Ice

RECOMMENDATIONS:

A. That the Commission approve the water use permit for the reasonable-beneficial agricultural use of 20,000 gallons per day for the Waihee Mauka/Living Waters

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Well #1 (5531-01), subject to the standard conditions in Exhibit 9 and the following special conditions:

1. Should an alternate permanent source of water be found for this use, and then the Commission reserves the right to revoke this permit, after a hearing.

2. In the event that the tax map key at the location of the water use is changed, the permittee shall notify the Commission in writing of the tax map key change within thirty (30) days after the permittee receives notice of the tax map key change.

DISCUSSION:

Ms. Megan Wells spoke on behalf of Living Waters Land Foundation. She stated that a tenant was promised a ten-acre farm and needs irrigation water. She wants to live there and needs to obtain water for her parcel, for eventual residential use.

Commissioner Miike stated that if the use changed to single homeowner domestic use, there would be no need to come to the Commission for a water use permit for that use.

MOTION: (Ching/Fujiwara)
Approval of staff recommendation
UNANIMOUSLY APPROVED

3. Motion to Hold a Combined Contested Case Hearing for the Petition to Amend Interim Instream Flow Standards of Waihee, Waiehu, Iao, & Waikapu Streams; Iao Ground Water Management Area High-Level Source Water Use Permit Applications; and Citizen Complaint Regarding Waste of Surface Water, Wailuku, Maui. Commission Delegation of Authority Allowing the Chairperson to Appoint a Contested Case Hearing(s) Officer

Commissioner Meredith Ching recused herself. – why?

Presentation o Submittal: Roy Hardy

RECOMMENDATION:

That the Commission:

1. Determine that a contested case hearing is required for the Iao Ground Water Management Area High-Level Source Water Use Permit Applications as listed in Exhibit 3;

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2. On its motion, order that the contested case hearing initiated through the Iao Ground Water Management Area High-Level Source Water Use Permit Applications be combined with the Petition for Interim Instream Flow Standard Amendments and citizen complaint regarding the waste of surface water in the Wailuku area, as filed by Earthjustice; and

3 are combined

3. Authorizes the Chairperson to appoint a hearings officer for the combined contested case hearing described in recommendation 2.

DISCUSSION:

Mr. Hardy stated that the proceedings are to be held on Maui with the times and places to be announced. Staff is recommending that the authority to hire a hearings officer be delegated to the Chairperson.

Commissioner Miike stated that he was still not clear as to how much water is being used where and by whom.

Ms. Kapua Sproat, attorney for Earthjustice representing many parties in various proceedings including Hui O Na Wai Eha and Maui Tomorrow Foundation, thanked the Commission and staff for taking to heart the clients request for action on the interim instream flow standard amendments and citizen complaint.

Ms. Sproat suggested that a contested case hearing is premature. She stated that the Water Code mandates the Commission to take action on the citizen complaint before a contested case hearing is initiated. Ms. Sproat urged the Commission to take action or deny it so they can seek alternate relief. She stated that combining the citizen complaint with the contested case would not resolve the waste issue in a timely manner. It would abdicate the Commission's responsibility to take action and effectively deny their request, as the request is for immediate interim relief.

Ms. Jane Lovell, Deputy Corporation Counsel for MDWS, stated that the County agrees with moving forward with mediation instead of a contested case hearing for the waste complaint. It would be beneficial and also imperative to resolve waste issues before going to the other issues.

Dr. Jonathan Scheuer of OHA stated that OHA is in agreement with the positions taken by Ms. Sproat from EJ and Commissioner Miike that waste matters must be dealt with first. There must be balance and when there is no water in the streams, there is obviously no balance.

Ms. Linnel Nishioka, attorney representing Alexander & Baldwin (A&B), Hawaiian Commercial and Sugar Company (HC&S), and East Maui Irrigation (EMI) in these multiple proceedings stated her clients are not asking for a contested case hearing. They

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are there just to be a party should the Commission decide to combine the actions. Ms. Nishioka stated that her clients are using 50 mgd from the system and have justified to the Commission the amounts of water they are using. Ms. Nishioka feels that HC& S operations are not wasting water.

Mr. Avery Chumbly, President of Wailuku Water Company, stated that they stand by their petition for a contested case hearing and urged the Commissioners to consider ordering mediation over the waste complaint. He emphasized that there is no waste in their operations.

Ms. Megan Wells of Living Waters Land Foundation stated that ditch water has been unavailable for 150 acres of their macadamia nut acreage. She also stated that she observed dumping.

Commissioner Miike asked the Deputy AG whether an immediate timetable must be set if the Commission approved a contested case.

Ms. Linda Chow, Deputy AG, stated that taking up the waste issue could be done if the hearings officer decides that it is a preliminary matter that must be resolved prior to proceeding on the rest of the case. Ms. Chow stated that it's not recommended to do litigation piece meal; however, if it's a final order on an issue and not an interim order, it may be sent to the Commission for approval.

Ms. Sproat suggested that the Commission handle the citizen complaint first and the high-level water use permit applications second, but separately, so that the citizen complaint could be addressed. The reason being that she wanted to be able to continue to work with staff on different issues regarding the interim instream flow standard amendment and studies with the U. S. Geological Survey. Ms. Sproat believes that once a contested case starts, the parties would be limited in the inability to interact with staff.

Dr. Jonathan Scheuer stated that the waste issue should be addressed first. If not, the hearings officer and Commission would be listening to this during the entire contested case. If the waste issue was addressed that resulted in some restoration, some of the concerns would be alleviated.

Acting Deputy Director Dean Nakano stated that if a hearings officer(s) were appointed, he/she would have the ability to undertake the waste complaint first as an initial step in the CCH proceedings.

Chairman Young stated that there are 2 options to amend Recommendation 2: "any mediation or contested case would address the complaint first; or a contested case hearing with mediation prior to contested case to see if the issues could be resolved before moving on to a combined high-level source and IIFS, CCH."

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Commissioner Miike suggested that the 2nd option "we address and resolve the waste complaint by a hearings officer and we authorize contested case proceeding for the petitions and the water use permit applications, and the Chairman be authorized to appoint one or more hearings officers to address these issues."

Chairman Young stated that the combined contested case hearing on the IIFS amendment petition and high-level WUPAs would happen after a decision has been made on the waste complaint. The Chair could delay the appointment of the hearings officer as the mediation continues. Chairman Young stated that if it cannot be resolved, there would be a contested case hearing. If the Commission finds out early that mediation is not going to work, then no time is lost.

Commissioner Miike recommended that staff recommendation be revised to authorize the Chairperson to appoint both a mediator for the waste complaint and a hearings officer for a combined contested case hearing on the Iao Ground Water Management Area High-Level Water Use Permit Application and the Petition to Amend Interim Instream Flow Standards. The mediation over the waste complaint should be addressed first and a recommendation be brought to the Commission prior to the start of the contested case hearing.

Chairman Young stated that, in any event, the contested case on the high-level and the interim instream flow standards would be delayed until the mediation process is completed.

AMENDED RECOMMENDATION:

That the Commission:

1. Determine that a contested case hearing is required for the Iao Ground Water Management Area High-Level Source Water Use Permit Applications as listed in Exhibit 3;
2. On its motion, order that the contested case hearing initiated through the Iao Ground Water Management Area High-Level Source Water Use Permit Applications be combined with the Petition for Interim Instream Flow Standard Amendments and order mediation on the citizen complaint regarding the waste of surface water in the Wailuku area, as filed by EJ, provided that mediation on the waste complaint proceed as initial step in the CCH process; and
3. Authorize the Chairperson to appoint a hearings officer or officers and mediator or mediators for the combined contested case hearing described in recommendation 2.

MOTION: (Miike/Whalen)
To approve staff recommendation as amended
UNANIMOUSLY APPROVED AS AMENDED

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4. Donald O'Connor, APPLICATION FOR AFTER-THE-FACT WELL CONSTRUCTION / PUMP INSTALLATION PERMITS FOR MANAWAI-O'CONNOR WELL, (WELL NO. 5616-09), TMK 2-8-003:044, VIOLATIONS, AND FINES, Manawai Place, Manawai, Makawao, Maui

Presentation of Submittal: Charley Ice

RECOMMENDATION:

That the Commission:

A. Find Donald O'Connor in violation of:

1. HRS 174C-84, for 1) construction of a well and 2) installation of a pump and pumping equipment without required permits;

2. HRS 174C-82 & 86 and HAR 13-168-12, for 3) well construction by an unlicensed contractor, and 4) pump installation by an unlicensed contractor;

3. HRS 174C-82 & 86 and HAR 13-168-12 for 5) for not following the approved Hawaii Well Construction and Pump Installation Standards; and

4. HRS 174C-82 & 85, for 6 & 7) for failing to file acceptable well completion reports.

B. 1. Impose a fine of **$223,500** for the violations in A, to be paid in 30 days. If the fine is not paid, daily fines shall continue for violation A.3. until the well is shown to contain no contaminants, as determined by the Department of Health, or is sealed by a licensed driller.

Or

2. Impose an alternative settlement for the violations in A, consisting of
   a) a **$2,500** fine and
   b) require that water quality testing for EPA-regulated new source analysis, including MPA analysis, acceptable to the Department of Health, be completed, analyzed, and certified by a qualified independent lab, with results reported directly to Commission staff and to be shared with the Department of Health.
   Based on the lab results, staff will return to the Commission with subsequent recommendations for action. Whatever the water quality testing reveals, staff shall notify and share results with well owners in the affected area accordingly.

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C. Order Mr. O'Connor to identify the well driller so that staff can follow up on enforcement action with the driller. Failure to do so will result in further fines and enforcement actions.

D. Forward a copy of the Commission's decision to the Department of Health Safe Drinking Water Branch and to DOCARE.

E. Suspend any current, pending or future applications by the landowner until the fines are paid and the applicant/driller completes the permitting and remediation processes for this well.

DISCUSSION

Mr. Donald O'Connor, applicant, distributed additional information on the well in question. Mr. O'Connor stated that he started this process in September 2004 when he applied and was approved for a Special Management Area Minor Permit. He asked if there were any other permits required to drill a well and was informed that if there was no structure (building) there were no other permits required. An employee from the Maui Planning Office stated that she had never seen a permit application for a well as long as she was working there so Mr. O'Connor proceeded.

Mr. O'Connor stated that from the beginning he was very open as far as drilling goes. He was not hiding its location as the drilling occurred right out in the open. At the recommendation of staff member, Mr. Kevin Gooding, Mr. O'Connor started the water quality testing for EPA identified contaminants that should be done in two weeks.

Commissioner Miike noted on the top of page nine that it states the well must also be properly grouted; however, it is not mentioned in the recommendation. He asked if this was implicit.

Mr. Ice responded that it was.

Commissioner Frazier also stated that a violation of the standards has occurred and is not mentioned in the recommendation. However, it was clarified that staff had visited the site but cannot determine if a standards violation has occurred as the well has been completed.

Mr. Mike Robertson, licensed contractor filing the complaint of this illegal well drilling, stated his appreciation of staff's efforts to manage the water resources. He explained through his experience as a driller an example of two contaminated wells on the North Shore of Maui. He knows of one other drilling experience where the bedrock/caprock was fractured by dynamite and by tools left by another the driller providing an entry point for contaminates in the area. Mr. Robertson has been constructing proper wells in the area for 15 years and knows the area well. He was asked for advice by an anonymous person over the phone about a drilled 8" hole that had collapsed at 400' depth and wanted

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to case it at 6" and drill on the side of that near the water table. Mr. Robertson recommended that the drilling not proceed, as it needed a well construction permit and it is presently an illegal well.

On another occasion, Mr. O'Connor had asked Mr. Robinson for an estimate to drill his well. Mr. Robertson recommended that he get his SMA then they could proceed. Mr. Robertson never heard from him again. He stated that there are others on the island drilling illegally. Mr. Robertson testified he specifically told O'Conner he needed a well construction permit before his well was completed.

Mr. Robertson recommends that the violation be resolved and the potential for contamination be removed. This is serious.

After having heard this discussion of an illegal well, Commissioner Frazier asked if staff would change the recommendation to be more specific of correcting an illegal well? Acting Deputy Director Dean Nakano recommended that the applicant seal the present well and re-drill a new well with the assurance that it will be properly constructed to remove concerns regarding the integrity of the existing well.

Mr. Sakoda asked the driller if the existing well could be drilled out and replaced with a properly constructed well. Mr. Robertson said possibly if the present well has no contaminants. They won't know until they actually dig into the ground.

Mr. Robertson responded to questions on how much it would cost to remediate or seal the well. He suggested between 30-50 thousand dollars.

When Commissioner Miike asked Mr. O'Conner to identify the driller of this illegal well, he responded by stating that he wrote the phone number for "Don" and just today gave it to staff.

Commissioner Whalen moved that the Commission accept the recommendation of the staff using B2 with amendments. Recommendation should now read, "Based on lab results and additional well construction information and proposal on how to deal with the existing well with a licensed contractor, staff will return to the Commission with subsequent recommendations for action, not just the lab results but additional well construction information." There is no approval on the permit. The well should not be used except for testing.

Commissioner Fujiwara stated that this would be Mr. O'Connor's choice, whether to plug the existing well, apply for a well permit and use a licensed driller to make the well correct.

Commissioner Ching stated that there should be a time frame on this as each day they run the risk of contamination.

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Ms. Lenore Nakama, recommended that the applicant file with staff within 30-60 days an application to seal or modify the existing well by a licensed driller to standards, which can then be processed by staff administratively. If he fails to meet the deadline or meet administrative permits, staff can then bring this matter back to the Commission.

Commissioner Miike asked that a revised recommendation that a $2,500 fine be payable immediately and deny the after-the fact permit, and 60 to 90 days for reporting to the Commission after evaluation by a licensed contractor to seal or modify the existing well to standards.

Ms. Nakama stated again that her suggestion was to have the fine $2,500 payable in 30 days and deny the after-the-fact and to have 60 or 90 days for the applicant to file either an application to seal this existing illegal well or an application to modify it to standards by a licensed driller.
Dr. Miike agreed to this.

AMENDED RECOMMENDATION:

That the Commission:

A. Find Donald O'Connor in violation of:

1. HRS 174C-84, for 1) construction of a well and 2) installation of a pump and pumping equipment without required permits;

2. HRS 174C-82 & 86 and HAR 13-168-12, for 3) well construction by an unlicensed contractor, and 4) pump installation by an unlicensed contractor;

3. HRS 74C-82 & 86 and HAR 13-168-12 for 5) for not following the approved Hawaii Well Construction and Pump Installation Standards; and

4. HRS 174C-82 & 85, for 6 & 7) for failing to file acceptable well completion reports.

B. ~~1. Impose a fine of **$223,500** for the violations in A, to be paid in 30 days. If the fine is not paid, daily fines shall continue for violation A.3. until the well is shown to contain no contaminants, as determined by the Department of Health, or is sealed by a licensed driller.~~

~~Or~~

2. Impose an alternative settlement for the violations in A, consisting of
a) a **$2,500** fine to be paid in 30 days and
b) Require a licensed well contractor to file an application for either:

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1) Well sealed by an abandonment or
2) Well modification to meet the Hawaii Well Construction and Pump Installation Standards within 60 days

C. Denied the after-the-fact well construction/pump installation permit.

D. Order Mr. O'Connor to identify the well driller so that staff can follow up on enforcement action with the driller.

E. Forward a copy of the Commission's decision to the Department of Health Safe Drinking Water Branch and to DOCARE.

F. Suspend any current, pending or future applications by the landowner until the fines are paid and the applicant/driller completes the permitting and remediation processes for this well.

MOTION: (Whalen/Ching)
To approve staff recommendation as amended
UNANIMOUSLY APPROVED AS AMENDED

H. NEXT COMMISSION MEETINGS (TENTATIVE)

1. March 15, 2006
2. April 19, 2006

Chairman Young distributed CD's by Kepa Maly.

The meeting adjourned at 1:35 p.m.

Respectfully submitted

PAULYNE K. ANAKALEA
Secretary

Approved as submitted:

DEAN A. NAKANO
Acting Deputy Director

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