

BOARD OF WATER SUPPLY  
County of Maui  
Regular Meeting  
Thursday, May 17, 2007  
9:00 a.m.  
Planning Department Conference Room  
First Floor, Kalana Pakui Building  
250 South High Street  
Wailuku, HI 96793

I. Call to Order

Chair Kenneth Okamura called the May 17, 2007 Board of Water Supply meeting to order at 9:05 a.m.

II. Attendance

Board Members Present:

Vice Chair Lee Aldridge  
Michael Howden  
Marion Haller  
Scott Luck  
Carl Holmberg

Excused:

Kui Lester  
Phyllis Robinson

Others present:

Kim Willenbrink, Legislative Analyst, Council's Water Resources Committee

III. Announcements

A. None.

IV. Approval of Minutes

A. April 26, 2007 Meeting

Vice Chair Aldridge asked to make the following corrections. Page 9, 4<sup>th</sup> paragraph, 2<sup>nd</sup> line, the word "project" should be inserted between "individual" and "basis" Then in the same paragraph, 4<sup>th</sup> line the word "and" should replace "the".

Chair Okamura stated if there are no further corrections or additions the minutes stand approved as read.

V. Testimony from the Public

A. None.

VI. Unfinished Business

A. None.

VII. Communications

A. None.

VIII. Director's Report

Member Howden asked for an update on the Dual Line project, Na Wai Eha and East Maui. Director Eng stated that his meeting with the State Department of Ag and NRCS scheduled a couple of months ago was cancelled. He does have something coming up in June and hopes to meet with them then.

IX. Other Business

A. Verbal Update on Pookela Well.

Director Eng stated they had a successful 48-hour test and discovered there are some bugs that need to be squared away. There are a number of punch list items that the contractor has to address. He anticipates by next month or so everything will be completed.

B. Discussion with Corporation Counsel regarding Ordinance No. 3446, A Bill for An Ordinance Relating to the Duties of the Board of Water Supply, giving authority to the Board to hear and determine appeals from decisions or orders of the Director of Water Supply.

At this time Corporation Counsel distributed the following documents to the board.

1. Ordinance No. 3446
2. Subchapter 8, Appeals to the Board
3. Subchapter 5, Contested Case Procedures
4. Subchapter 6, Post Hearing Procedures

Deputy Corporation Counsel Edward Kushi stated that by this ordinance the Council gave back the authority for this board to hear appeals from decisions or orders of the director. In a nutshell, the Council gave back what the charter took away.

Though the ordinance does state that for an aggrieved person to file an appeal they shall file an appeal fee as set forth in the annual budget, the Council has yet to establish a fee. They had recommended a fee of \$300.00 per appeal which is the same amount as the appeal fee as the Board of Variances and Appeals. This is not in the budget as yet. If anyone should file an appeal today, there would be no fee.

The appeal fee is not a penalty. It is to cover administrative costs because there will be times when a court reporter will be at the meetings.

The handouts include Subchapter 8, Subchapter 5 and Subchapter 6 of the Rules of Practice and Procedure for the Maui County Board of Water Supply which is still in existence. These subchapters pertain strictly to appeals.

Subchapter 8 mirrors the language of the ordinance, however in certain areas they differ. Where there is a difference then the ordinance would supersede it. For example in §16-102-79 for the Board to reverse or modify a decision or order of the director, the existing rules states it must be by a two thirds majority vote. The Council in its wisdom changed it to majority vote.

Member Howden asked if that meant the majority of the members present. Mr. Kushi replied that it is the majority of members that the board is entitled to. For example if there were only 6 members a majority would be 4 but this board is entitled to 9 members so the majority is 5.

Subchapter 5 is the rules on how to conduct contested case procedures. His office has always taken the position that any appeal before an agency board which can be further appealed to the circuit court would be a contested case proceeding. That being the case, there are certain rules and regulations on how to conduct such a contested case hearing.

If the appellant/customer or even the department is dissatisfied with the board's decision they can appeal to the circuit court. Then a record of what happened is needed. This subchapter provides the procedure in conducting the appeals. Not all appeals will include all of these motions, subpoenas, etc.

Member Howden asked if the Board overrules the director, who does Mr. Kushi represent. Mr. Kushi stated that if an appeal comes to this body then he will be assigned to the board. Another attorney from the litigation office would be assigned to represent the department.

Subchapter 6 describes post hearing procedures, regarding briefs, oral arguments, findings of fact, issuance of the decision and orders. All this is in preparation of a possible appeal of any board action or decision.

Member Howden stated that people have the right to appeal in 30 days from the point where the director denies their request. When does the 30 days start?

Mr. Kushi stated that they would take the position that the effective date of ordinance is May 4, 2007 which gave the board jurisdiction to hear appeals, then you would go back 30 days. For example if the director's decision was issued April 20<sup>th</sup> before the ordinance became effective it is within the 30 days of today.

Member Haller asked if making any informal recommendation is no longer appropriate and only this formal appeals process is now appropriate.

Mr. Kushi replied that if the applicant or an aggrieved person wants a formal action that can be defended and appealed then they should follow this formal procedure. There is nothing to prevent an applicant to come before this board and not go by this formal appeal.

Member Haller asked if there is a mechanism to inform people once they receive a decision that there is a thirty day limit to the appeal process.

Mr. Kushi stated that they are planning to sit down with the department to discuss this and put it into writing stating that you have the right to appeal this decision etc.

Member Luck asked regarding the ordinance's standards of appeal if the board votes to overturn the director's decision, would the board need to clearly support one of these 3 issues.

Mr. Kushi replied yes. These are the factors that would justify the board's decision. And conversely if you don't find anything then the board must affirm the director's decision.

Chair Okumura asked if all the paperwork has to be in place in order to fill out an application for appeal. Mr. Kushi replied that he wasn't sure if the board has an appeal form. He would say any sort of written request appealing a decision suffices then the department would set up a schedule.

Member Luck stated that if there was a case before them they need to take into account that they will be setting precedent, so if they ruled one way on a case and another case came before them with the same identical facts would they then revert back to using the same criteria? Mr. Kushi stated that if 2 cases are identical hypothetically he would say yes because if you don't you would be treading on the doctrine of equal protection. He further stated that the board should be aware that

they can appoint a panel or a contested case hearings officer to hear the case outside of this room and have that officer make a recommendation to this board.

Member Luck asked is the board's ruling not final? Can someone appeal the board's decision? Mr. Kushi stated that now if someone appeals pursuant to this ordinance and you hear that appeal, they can take it to the circuit court. Member Luck asked if they have further responsibilities after that. Would they be called in to appear in court? Mr. Kushi replied, it is possible, but they would be indemnified as long as the members stay within their bounds.

Mr. Kushi stated that because these appeals are considered contested case hearings he would advise the board they should not discuss this matter with the applicants or their representatives outside of board hearings. Don't do any private investigations. If you do you might taint or spoil the hearing itself.

Vice Chair Aldridge asked if a board member has specific knowledge of an individual case and it does not preclude that member from being part of the appeal decision, is it his or her responsibility to share that information with the rest of the Board.

Mr. Kushi replied that he would advise any board member to disclose that information especially if there is a financial interest in a certain case. The decision would have to be made by the board whether to let you continue. If it is a close call then you would ask the Board of Ethics for a ruling.

#### C. Discussion of Departmental Staff Reports for Appeals Before the Board.

The Chair stated that in the past it has been requested that more information be provided with these reports. He would like to see more maps that are related to the case so that the client doesn't have to bring their own map.

Vice Chair Aldridge agreed. He would like to see a well prepared presentation from the staff with regard to all background and facts of the appeal but on the other had he doesn't want that to become an excuse for not bringing the matter before the board.

Member Luck stated that maybe the staff may need more time to prepare even if it does delay things.

Director Eng stated that the staff report is based on what is in the files and finds them well summarized. Though he does take it a step further and will ask individuals within his department for clarification. What they cannot control is what the aggrieved brings to this board.

#### D. Discussion regarding the Issue of Water Source Allocation.

Vice Chair Aldridge stated that the question he had arose from the discussion on the Upcountry water system and the lack of source capacity. His question is how do we determine source allocation? When is that allocation applicable? How do you determine how much water a customer is going to use? When do you say that customer is entitled to that amount of water? Is it based on water meter size? When is it that you actually dedicate that amount of water to the customer? Is it when they put a lateral in? Or is it when they apply for a meter?

Director Eng stated that currently the allocation is when the meter is issued. As far as the amount of demand for a single family the department uses 600 gallons per day (gpd). On special projects they go further to evaluate the water demands especially on larger projects.

Back in the 60's and 70's laterals were installed when lots were subdivided and perhaps meters weren't issued then. Currently an allocation happens when a meter is available to be issued.

Member Howden stated that he was recently given documents for the Piiholo Well which would give Maui Land & Pineapple a net of 45% of the water from the proposed well at Piiholo. They would be jumping the Upcountry Water Meter List by being able to move water wherever they want. How are we allocating these water resources when we are so desperately in need of water Upcountry and giving 45% of that to a private entity?

Director Eng asked the chair if he wanted to discuss this topic now because he can address it. The Chair stated yes, because it is related to allocation.

Member Howden stated he just brought it up to put it on the table since we will be discussing it at the next meeting.

Director Eng stated that Maui Pine would end up with about 1/3 of the capacity, 75% of the 45%. It is one the more favorable deals that he has reviewed. On top of that Maui Pine will be paying for the cost of the new well, control tank and most of the waterline.

Vice Chair Aldridge stated that 600 gpd for single-family he presumes is for a typical 5/8 to 3/4 inch meter. Does the Department actually have an amount of water that is required to meet the 1000 or more meters that are on the Upcountry List? If we require a thousand gpd, simple math tells us we would need a million gpd.

Director Eng replied that his assumption is right. It is greater than a million gallons because some of the applications are for multiple meters. His staff does have that estimate and they can provide it to you.

Member Holmberg asked how many times have private water agreements been worked out, for example the Dowling development in Pukalani.

Mr. Kushi stated that he wasn't involved in the Dowling well. The Piiholo agreement is the only one he recalls that is privately done.

Vice Chair Aldridge asked what is the assumed sustainable amount that you use to guarantee a certain source allocation? What is it that the Department uses as its basis for the amount of water that it can currently allocate to Upcountry users?

Director Eng stated it is a little complicated in Upcountry because of the surface water plants. Groundwater is easier to determine a basis of allocation. Generally for groundwater it is 2/3 of 2/3 or 45%. Surface water plants are different. You have different trains of membranes and basically you would use a factor of 2/3 availability. But that doesn't always hold true because of the availability of actual source. We have to be conservative on how we look at available water in Upcountry.

Member Holmberg asked if the Department will be using Pookela Well to replace ditch water or will you hold the groundwater in place and only use it when the ditch dries down?

Director Eng stated that because of the cost to operate Pookela will guide their operational plan. But they will rely on Pookela when the ditch is down. As much as possible they want to control the electricity costs.

#### E. Discussion regarding Issues Related to the Upcountry 60-Day Rule.

Mr. Kushi stated that for the Board's information the rule is §16-106-04, paragraph b, which states "Premises that are not on the priority list and have expended funds in reliance upon official assurances dated before November 2, 1994, or have any pre-existing rights associated with the premises entitling the premises to water service shall be allowed sixty days from the effective date of this rule to pay for or reserve an allocation of service capacity pursuant to subsection 16-108-9(b) of chapter 108 of the board's rules. Thereafter such rights shall terminate."

The Board at the time they passed this rule put a time limit for all those people that the Department didn't know who they were. All of these people who had developments or improvements and were waiting for meters. But for whatever reason, did not apply for one. The people who came in or who should have come within 60 days, they were placed separately from the priority list. They are before the priority list.

The rule making process went through a series of public hearings in the Upcountry area, the Central area, Molokai, and Lanai. The Board did its public hearing procedures. Thereafter the draft rules are sent to the mayor's office. The mayor

tentatively approved the rules and sent it to the council. The council reviewed this rule and they approved it. It then went back to the mayor who signed off on it. That was the procedure for rule-making at that time.

Whether or not the 60 days was too long or too short, the rule is what it is and to this day it stands. All of these rules are in the process of being codified into ordinances. They are before the council committee right now. Maybe at this time the council may change this rule. Unless forced by a court, his office would advise the Department to go by this rule. Therefore it creates all these appeals to this board.

Member Luck asked was it proper or sufficient to have posted in the Maui News solely? If someone was in the hospital in a coma for that 60-day period when it is only in the Maui News and they never had a chance to respond, was that really sufficient?

Mr. Kushi stated that within the Upcountry Meter Issuance Rule there is a procedure for this board to review, to waive or modify requirements of the rule. There are circumstances where the board may consider granting relief. In §16-106-08, Waiver or modification. The board by a two thirds vote of its entire membership may waive or modify requirements of this rule when not contrary to the public's health, safety or welfare, and when the board finds:

- (1) Strict application of the rule would cause an absurd, unfair or unreasonably harsh result;
- (2) The board finds the circumstance or condition is unique or exceptional, and the board would grant the same request if made by every similarly situated applicant; and
- (3) The resulting action of the board will be without detriment to existing users.

When this board became advisory, the issue became did this board have the power to overrule any decision to modify this rule? Now since the council passed the ordinance regarding appeals, anything is subject to appeal, including the interpretation of this rule.

Vice Chair Aldridge asked for clarification, the only notice given was through the newspaper, is that correct? There were no letters that were issued to homeowners in the Kula area?

Mr. Kushi replied not to his knowledge and asked Herb Chang if he recalled. Mr. Chang stated that there were no mass mailings.

Vice Chair Aldridge stated that one of the reasons there were no mass mailings was because it wasn't known specifically who might be eligible in that area for this. So when someone comes before the board and say they did not receive a letter or an



individual notification it was because there never was individual notification given to anybody. It was only through the newspaper.

Mr. Kushi stated that had the Department known of someone who would have fit in this rule then he would say that person would have a good case.

Vice Chair Aldridge asked was the priority list initially established in 1994?

Mr. Kushi replied yes, though the rule references a March 16, 1993 date when the Upcountry system was found to be in a shortage. The water shortage may have gone back further than that.

Member Luck asked do we know how many people are on the 60-day list? Mr. Kushi clarified that statement by saying the question is how many applicants have reservations pursuant to the 60-day rule.

Mr. Chang replied that he did not have that information.

#### F. Discussion on Status of Upcountry Water Meter List.

Member Haller stated that she went to the website to find the water meter list and couldn't find it until she contacted the staff for help. It is in an obscure place. You have to know to go Engineering, and then you have to know where to find it in Engineering. If you use the search engine and put in "water meter list" it doesn't give you anything.

This water meter list is part of what puts a cloud over the department. There is a sense that it is a secret and no one knows when they are going to get a water meter or if they are ever going to get a water meter or how many water meters does this represent. You have no indication if this is for fifty water meters or for one water meter. Is there any plan to provide more clarity on just how many water meters this list represents?

Director Eng stated that he personally would want to give the community hope. He wants these people to feel that the Department is trying to do its best but he thinks that right now the list itself is appropriate for most people. If someone does have a specific question or needs an estimate of when they can expect a meter he could provide that.

Member Howden asked if the board could have in the next 60 days or so an understanding of what the Upcountry List means in terms of water resource allocation. Director Eng stated that they could provide that to the board at the next meeting.

Member Haller stated that her understanding is if one is on the list and then changes the request, that request is added as a new request to the bottom of the list and not amending the original request. The list has some duplication in it. Is this correct?

Director Eng stated that is correct and this list is not totally accurate. There is some duplication.

Member Luck commended the Department in getting this list on-line. This gives people hope and gives them the confidence that their application hasn't been lost. It might be nice to have something on the front page of the site that says "to see the water list click here" or something like that. Also does anybody know how many people got meters in the last calendar year?

Director Eng stated that Mr. Chang indicates zero. The last time meters were issued was in 2004. In anticipation of Pookela wells the Department issued about 200 domestic meters.

Member Haller asked do you have any plans to issue water meters from this list in the future?

Director Eng replied that the Department is still evaluating the operations of Pookela Well and they are trying to come up with a plan to issue some additional meters. He wants to be conservative because we are now approaching the drought period for Upcountry. Hopefully in the next month or two we can perhaps announce some meter issuance.

Member Haller stated that she supports the director's conservative estimate because we don't want to go into a drought situation.

Vice Chair Aldridge stated that it is distressing to see this list continue to grow and asked, are there no other sources in funds where Department might seek to develop some of its own sources? It sounds like you would need at least 3 more of the Pookela wells to try to cut down this list to a sizeable number.

Director Eng stated that particularly in the Upcountry area the Department probably have maxed out on surface water sources. Groundwater sources are probably the direction we need to continue to do. A problem would be the site availability and that's why sometimes we have to deal with developers and large landowners.

Member Howden asked what about East Maui water? Are we not entitled to more of the water that comes through the ditch system?

Director Eng stated that we do have an agreement with A & B for the Wailoa Ditch. We have a one year notice where we can take more from the Wailoa Ditch. If there are more available from Wailoa Ditch we could draw from that.

Member Howden stated that an Earth Justice brief indicated that HC&S has claimed that it is reducing its need for water by drip irrigation and other agricultural protocols. He would suggest that is an untapped resource to which the public has every right to that water.

Chair Okamura stated that if you look at those daily water reports you will notice that Wailoa Ditch is very volatile. It could be running a 100 million gpd and the next day it is down to 35. It goes down very fast.

Member Howden stated that the Board and the Department should foster intelligent use of all water resources.

Member Luck asked does this list include the qualified 60-day applicants? Mr. Kushi replied no.

Member Holmberg stated that given the vast amount of re-zoning and land speculation it is kind of a given that this list is going to increase. It is not necessarily the Department's fault that this list gets longer. It is just a matter of the economics of the situation.

#### G. Discussion on Current Department Criteria for Agriculture Water Rates.

Holly Perdido stated that the handout explained the Department's procedures. The definition to get Ag rates one must be actively engaged in crop production, stock raising or dairy farming to derive farm income on county zoned or state designated ag lands.

When people come to apply they have to fill out the application, turn in a form to the Planning Department to find out if they are state designated or Ag dedicated. If it is not Ag zoned then they are denied. Inspectors are sent out to look at the property if Ag is actively going on. If the applicant's G.E. license or licenses are not in the same name as the customer's account then that would be a disqualification.

Every year renewals are sent out and those who want to renew just fills out a form. The Department does not re-inspect. If they do not send the form back then they have start all over.

Member Howden asked if golf courses count as agriculture? Ms. Perdido stated that golf courses have their own water sources and they do not get the Ag rates.

Member Howden asked if gentlemen estates get inspections? Ms. Perdido stated that is in a grey area. They wish they had a better definition for Ag. But if these people do have Ag crops and they do show income then the Department has to approve them.

Member Howden asked what about kuleana homesteads in rural lands? Ms. Perdido stated that if they are not on Ag or state designated Ag land they would be denied.

Member Haller asked what about stock raising? Would it have to be for consumption? Ms. Perdido stated that what they look at is whether they are selling and actively raising livestock. If they are then they will be granted.

H. Receipt of Board Member Request for Agenda Items To Be Placed on Future Agendas.

1. Memorandum of understanding with A & B
2. E-mail communications from non-board members to Board members
3. Kaupo Water issues and update
4. Planning Commission's assessment of water issues for new developments
5. Robin Knox presentation
6. Piiholo Well Agreement
7. Dual Line, Na Wai Eha and East Maui system
8. Arrange tour of water system facilities for BWS members in the next 3 or 4 months
9. Update and current status of site selection of deep aquifer well

X. Division Reports

Vice Chair Aldridge asked regarding the Upcountry Water report on May 9 and 10, 14 millions gallons was dropped out of the reservoirs, primarily out of Waikamoi #1 and #2 reservoirs, even though the demand for those days were basically the same. What happened? Where did the water go?

Director Eng stated that he will look into it.

XII. Adjournment

The May 17, 2007 Board of Water Supply meeting was adjourned at 10:51 a.m.

Prepared and submitted by:

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Gaye Hayashida  
Commission Support Clerk

Approved on: \_\_\_\_\_