

BOARD OF WATER SUPPLY
COUNTY OF MAUI

REGULAR MEETING
MINUTES OF JUNE 20, 2019

To Provide Clean Water Efficiently

The regular meeting of the Maui County Board of Water Supply was held at the Department of Planning Conference Room, 250 South High Street, Wailuku, Maui, on Thursday, June 20, 2019.

CALL TO ORDER

The meeting was called to order by Chair Chan Hodges at 1:30 p.m.

ANNOUNCEMENT

Welcome New Board Member Antonette G. Eaton

Ms. Eaton, who prefers to be called “Toni”, works for the State and is Maui born and raised. Her ohana is from Kaupo so the issue of limited water resources is very important to her. Ms. Eaton added that she is very appreciative to be on this board.

The chair asked the other board members to introduce themselves to Ms. Eaton.

At this time, Chair Chan Hodges announced that the Board’s [Review and Comment](#) on Draft Maui Island Water Use and Development Plan (WUDP) has been posted to the [Board of Water Supply](#)’s web page.

The chair also reminded the board members to raise their hands or say “Chair” to be called on so that everyone will have a chance to speak. This will help keep the discussion concise and on track.

ATTENDANCE

Members present: Shay Chan Hodges, Chair
Joseph Aquino
Toni Eaton
Dean Frampton
Norman Franco
Zoltan Milaskey
Dr. Hanna Mounce
Buddy James Nobriga

Staff present: Jeffrey T. Pearson, P.E., Director
Edward S. Kushi, Jr., First Deputy Corporation Counsel
Caleb Rowe, Deputy Corporation Counsel (Portion of the meeting)
Gaye Hayashida, Commission Support Clerk

APPROVAL OF MINUTES

Minutes of May 16, 2019

Chair Chan Hodges asked for a motion to approve the minutes of May 16, 2019.

Motion: Member Franco moved to approve the minutes of May 16, 2019

Second: Member Aquino

Discussion: Chair Chan Hodges stated that regarding the board's letter to private purveyors it was written in the minutes that members would give a list but actually it was that the chair would draft a letter for members to review.

Vote: Unanimous. Motion carried. The minutes of May 16, 2019 was approved with correction.

TESTIMONY FROM THE PUBLIC

Simon Russell, Hui 'O Mālama 'Āina LLC, who is a second generation family farmer, did not support HB 1326. He is happy it did not pass and spoke about the Carmichael case that was overturned by the Intermediate Court of Appeals. He said he is concerned about the future of our water security and supports of the board's idea to perhaps declare imminent domain and purchase the water delivery system in East Maui from the owner. He also spoke about the bottling and exportation of our waters out of Hawaii. Mr. Russell also submitted [written testimony](#) prior to the meeting.

Dick Mayer, commented on the East Maui leases. He asked about the county's relationship with East Maui Irrigation Company, to A&B, etc. Regarding Kamole Weir, he wanted to know what kind of a contract is now going on and how long will it last, and what is the agreement with lands owned by A&B around Waikamoi? He believes the deadline to negotiate is coming up. Mr. Mayer wants these agreements made available to the public so that they can give input. He urged the board to request a copy of the draft EIS that A&B is drawing up for the leases. He also asked that the Map of the Upcountry Maui Watershed Project (aka Upper Kula Dual Ag Line) be made available to the public. He suggested that this board make a link to documents on the agenda as does every other big commission so that the public can make comments.

There being no further public testifiers, the chair closed Public Testimony.

UNFINISHED BUSINESS

At this time, the chair took up the item regarding HB 1326 and Alternative Options for Ensuring Water Delivery first. She then asked Director Pearson for an update.

Discussion regarding Status of HB 1326 and Alternative Options for Ensuring Water Delivery

Director Pearson stated that he hasn't spoken to Mahi Pono since the Carmichael decision on Tuesday. He did speak to Grant Nakama, Mahi Pono representative, 2 weeks ago and Mr. Nakama has promised to give him a clear direction at the end of this month. He thinks there will be some action, some excitement, and some better direction at the next board meeting but in the meantime, he is trying to hold off any discussion and let Mahi Pono do their thing and then communicate with him in the following weeks. Hopefully he will have something concrete by then. This is where we are now. The director feels the department has a good relationship with Mahi Pono and he feels they are going to do the right thing because they are community conscious.

Chair Chan Hodges stated that we know this (Carmichael) decision is going to be appealed and the legal battle isn't going to end anytime soon. She asked, at what point can we feel secure if we don't take some control over the water system?

The director pointed out that the agreements Mr. Mayer referred to is one method though not the best method but it provides some assurance. The other testifier mentioned that the 3 surface water sources we have are managed by private entities and there are issues with these systems right now. But the department is doing its best and we need to start with the short term. It is not only what Mahi Pono brings to the table but there are other options such as what this board has discussed i.e., condemnation and the many other options that Corporation Counsel has brought forward also.

Member Milaskey said he would like to push the county to do cost benefit analyses and engineering studies so that we have those tools available when it comes to negotiating.

Member Eaton asked, why wasn't it an option for the county take over the ditch delivery system when HC&S went out of business?

Director Pearson answered that in June 2018 CWRM came to a decision based on the hearings officer's decision and fully restored water to the streams that were part of the contested case. The other streams were restored at different levels based on what the commissioners thought were adequate to meet traditional customary practices, biological and aesthetics, and public trust purposes. The contested case resolved a lot of those issues with water being returned to the stream. The fact that Mahi Pono and EMI are both part of the ownership of this EMI ditch system, they fully expect to use this ditch for their diversified agriculture. In the Wailoa Ditch there's 18 million gallons a day (mgd) down to 16 and a half mgd is all that is being diverted. If they divert too much and there's no place for the water then that is considered waste which goes against the state constitution. So the diversion amount is very low.

Member Eaton wanted to know who monitors the stream flows? How do we know that the streams are getting the amount of water that they should be getting?

The director stated that the State Water Commission's Stream Protection and Management (SPAM) Branch has staff that monitors surface water but for the most part it is more self-monitored due to staff shortage. The field personnel does go out to do measurements so there is some data collection and they may even look at some continuous monitoring which you can access via the web to look at real-time flows. It is not being monitored every day by someone from the commission.

Chair Chan Hodges said that it is her understanding from people who live out there that those ditches are not being maintained and asked are there agreements in place related to that or is it just up to the owner? She stated that since Mr. Mayer brought up the subject of licensing, agreements, transparency and community input, she asked if the department is willing do something like that so the community would feel like they are being heard?

Director Pearson replied that the only agreement they have is for the delivery of water to Kamole Treatment Plant. And because they are a public utility, most products that come through the department can be provided to the public but he will defer to Corporation Counsel. As for Mahi Pono coming to the board, once the department gets a better direction on what is going on, he hopes they would be happy to come.

Mr. Kushi stated that as far as the water service delivery agreements, they were updated recently. The county had to do a new agreement in the expansion of the Kula Ag Park. These agreements are only with A&B because Mahi Pono did not exist at that time. It not only covered the Kula Ag Park but also covered all of the diversions up there and extending the terms. So this can be produced to the board.

Motion: Member Franco moved to have the board establish a sub-committee to look at the feasibility of taking over the delivery system that Mahi Pono currently owns.

Second: Member Aquino

Discussion: Member Aquino wanted to include in the motion that the monitoring system or committee be transparent to the community.

Member Milaskey said that would be overstepping the board's boundaries as it is a state agency that is in charge of monitoring and regulating stream flows.

Member Mounce liked the idea of an investigative committee she felt that it is a state matter. She added that it is not unusual for a private company to be responsible for their own monitoring.

Member Eaton pointed out that water is a public trust and is not a property of EMI, and we, the people of Hawaii cannot let them monitor themselves when comes to public trust.

Member Franco explained that this matter is about taking over the delivery system and not monitoring stream flow.

The chair asked Director Pearson if the public has access to the monitoring data. Director Pearson replied that the information would be through the State Water Commission though they do not have data on every stream. But anyone can go to the commission to get the information.

Chair Chan Hodges stated that these are 2 separate issues and suggested they can later ask CWRM to come and speak to them about monitoring stream flows.

Member Franco asked the chair to call for a vote on his motion to establish a sub-committee to look into the feasibility of taking over the delivery system which was seconded by Member Aquino. The chair agreed with the motion but she wanted to add that there are a lot of studies out there that the board can build on.

Member Nobriga asked to add to the motion that they not only look at buying the system but also look at the feasibility of other means of getting the water from the ditch to the end user.

Mr. Kushi explained that if a Temporary Investigative Group (TIG) is created, the board will need to define who the members will be and who will chair it. The TIG has to be less than a quorum of members. The board must describe the scope of the investigation. The TIG is not subject to Sunshine Law and they can contact whoever they want but the TIG must report back to this board. Once the whole board gets the report they can review it but cannot act on it until the next meeting.

He added that he needs to make a point. This is being done for public information purposes, so they need to come up with a possible recommendation, but to who? The administration or the council? Because if you're talking about condemnation, only the council can approve a condemnation action.

Member Franco stated that the mayor and council control the money for the county but now they will have information on alternatives and then make the final decision.

Mr. Kushi also pointed out that Mahi Pono now knows that this board is going to form a group to buy them out. How is that going to react?

The chair replied that it might motivate them more.

Member Frampton supports Member Nobriga's suggestion of widening the scope of the study. He believes there is a process in place and Mahi Pono is working hard to make something work and doesn't fault them for not coming to this board yet. Most people have their minds made up. You are either going to support Mahi Pono or not. He is comfortable in giving them more time to work with the facts.

Director Pearson said he has discussed different options with Corporation Counsel and condemnation was one of them. But he is not going to say what the options are because he wants to respect Mahi Pono and do his best to negotiate in good faith with them. At this point, Member Franco said it is not about condemnation but rather a feasibility study to provide information so we can make a decision whether it is feasible to purchase, but it is not to condemn.

The chair reiterated that whatever happens we need a reliable, resilient plan to ensure that we can get the water to the customers and that we can honor what we need to do in East Maui. So we have to look at the bigger picture and how far we can go as a committee and it may be worth opening up the discussion.

At this time Deputy Corporation Counsel Caleb Rowe gave the board an update on the *Healoha Carmichael v. Board of Land and Natural Resources* case.

This case originally stems from 2014.

- The BLNR had issued a set of revocable permits to East Maui Irrigation Company and Alexander and Baldwin.
- Circuit Court Judge Nishimura ruled that there was no authority for the BLNR to continue issuing revocable permits under the statutory system that existed at the time. She ruled that the amount of time that passed since the original revocable permits were issued in 2001 was not temporary in nature as a matter of law. Therefore, that basis was no longer valid.
- The County of Maui appealed and also filed a Motion for Stay Pending Appeal, which basically means the county could continue taking water at status quo until the Intermediate Court of Appeals (ICA) renders an

opinion in that decision. That stay only applied to the County of Maui and the Department of Water Supply. It did not apply to EMI and Alexander and Baldwin.

- There was legislation back in 2015 that gave some statutory authority for continuations of revocable permits to A&B and EMI. And this past legislative cycle, there was an attempt to further extend that period which died in committee. There some concern that at the end of year, A&B and EMI were going to have no authority to continue taking water from those streams. However, the stay was still in a place so at least until the ICA ruled we would have been protected.
- The ICA overruled what Judge Nishimura did in the First Circuit Court which buys the county and the department some time to determine what to do. They ruled that whether or not these revocable permits were temporary, this is an issue of fact that should not have been determined by Judge Nishimura at that time. This means that in order to make a determination there needs to be basically a full trial, there needs to be more information, there needs to be a formal fact finding as to whether or not the 18 years mean that it is not temporary in nature and there needs to be a finding of fact done as to whether or not it is in the best interest of the state.
- The revocable permits fall under 171-58, which is what allows the BLNR to issue temporary month to month permits for a period of up to one year. However, there's also a provision, HRS 171-55, which states that, "notwithstanding any other law to the contrary, the Board of Land and Natural Resources may issue permits for the temporary occupancy of state lands under conditions and rent which will serve the best interest of the state and the board may allow the permit to continue on a month to month for additional one year periods". This provision says there can be temporary occupancy of state lands for longer than that one year period.
- There is language in the ICA ruling that is beneficial to the county. It appears that the BLNR might have a basis for finding that it is in the best interest of the state base on the fact that the Department of Water Supply gets their water from there.
- What this means is that 171-55 and 171-58 is still valid under this decision. The earlier decision was overturned by the ICA and as long as the BLNR determines that these are temporary permits and that it is in the best interest of state to continue them, they can continue to issue the permits until this issue goes back to trial or until it gets appealed to the Hawaii Supreme Court.
- At the very least the county has some flexibility time-wise to figure out how they are going to resolve this issue.

Discussion regarding Status of HB 1326 and Alternative Options for Ensuring Water Delivery continued

The motion was restated by Member Franco.

Motion: Member Franco moved to establish a sub-committee of the Maui Board of Water Supply or TIG, to look into the feasibility of purchasing and maintaining the EMI delivery system and watershed, and look into other alternatives to meet the needs of the community.

Second: Member Aquino

Discussion: Member Nobriga would like the board to keep in mind that Mahi Pono is fairly new. He believes the holdup to come to the table has not been theirs but rather the legislature's. He is not against the motion but would like this motion be postponed until the next meeting.

Member Franco said believes we should look at all alternatives. This is just to get more information. This is not a confrontational thing, it is an educational thing. It is not personal, it is a numbers game. We're just looking at the numbers at this point. He doesn't see a need at this point to defer it.

Director Pearson appreciates Members Frampton's and Nobriga's comments. He does not think this motion will deter any discussion that they are having. So he is not opposed to going forward with this sub-committee.

Mr. Kushi stated that the possibility of forming a TIG is not on the agenda. He suggested that this matter be properly agendized, discussion and formation of a Temporary Investigative Group.

Amended Motion: Member Franco withdrew his original motion and moved to defer the creation of a sub-committee (TIG) to the next meeting.

Chair Chan Hodges noted that this will be placed on next month's agenda to form a TIG.

Second: Member Nobriga

Discussion: No further discussion

Vote: Unanimous. Motion carried. The creation of a sub-committee (TIG) will be placed on next month's agenda.

Discussion regarding the Invitation to Mahi Pono Principals

Chair Chan Hodges informed the board members that another invitation letter to Mahi Pono was going to be sent but Mr. Kushi had some concerns and asked to have it run by the mayor and the managing director. She and Managing Director Sandy Baz had a very long conversation about it and he did not think it was an issue but he sent it to the mayor to look at. The M.D. later informed her that the mayor would not like the letter be sent out yet. She asked for clarification but she never got further clarification beyond that the mayor just wanted them to wait.

Director Pearson stated he has no comment on this matter.

The chair stated that one of the main questions in the letter was related to whether Mahi Pono was going to insure that we had delivery of water to Upcountry Maui regardless of how HB 1326 or whether they would stop the water.

Member Frampton asked if the same request was made to EMI.

The chair said no, this was just going to Mahi Pono.

This matter will be carried over to the next month's agenda.

OTHER BUSINESS

Discussion regarding [Draft Invitation Letters to Private Water Purveyors](#)

The chair drafted a letter to the private water purveyors. Part of the discussion at the last meeting was to not be confrontational and to be open to general discussion. It is important to know what the water purveyors are doing but she didn't put it in the letter because she wanted it be more general and broad. She asked if anyone had any comments.

Member Frampton said that he read in the previous minutes about the fact that the county had to step in to provide water to these private companies. But he recalls only 1 or 2 instances where this did happen. So he wanted it to be clear that this is more of an exception than the rule.

Chair Chan Hodges then read the letter to the board members. She was focusing on having a coordinated approach.

Member Frampton said that these private water companies are under the State of Hawaii Safe Drinking Water Branch and suggested that they be copied on this letter.

Motion: Member Franco moved to have this letter sent out and copy the State Safe Drinking Water Branch

Second: Member Milaskey

Discussion: None.

Vote: Unanimous. Motion carried. Letter to the private water purveyors will be sent out.

Discussion with Department Staff regarding Water Disinfection, i.e., Chlorine v. Chloramines

Director Pearson asked the division head of the water treatment plants to be here and give a brief discussion on this matter.

Tony Linder, Water Treatment Plants Division Chief, stated that the Upper Kula system is unique as compared to the other 5 plants in that the disinfectant that we use is a mixture of chlorine and ammonia. The reason is because of the length of the distribution system i.e., it has to go from the Olinda WTP all the way to Kanaio. And the main reason is because there are a lot of organics in that water coming from the Waikamoi rainforest. Organics tend to react with free chlorine to form a disinfection by-product as opposed to chloramines. This is regulated by the Department of Health. Using chloramines in lieu of free chlorine has been used in the United States since the 1930's. It is accepted and proven and it doesn't form disinfection by-products as with free chlorine.

Member Mounce stated that the reason for this being on the agenda was not so much the justification of it being safe and being used elsewhere but she wanted a map added to the county website that shows whose households are being affected by this. There is a lengthy discussion of chloramines on the website and makes reference to Upper Kula but people wonder if their house is affected.

Director Pearson stated that they can follow up and get something that has more detail of the Upper Kula system.

Discussion regarding [Map of the Upcountry Maui Watershed Project](#) (aka Upper Kula Dual Aq Line)

Member Franco stated that Mr. Mayer made a good point of posting the map. This came about at one of the Upcountry public meetings. He was told that there is line that the county never used and he wanted to know why.

Director Pearson said that this was a federal project in coordination with the state. He understands that when it was completed the county would maintain it and charge a fee to cover the cost of maintenance. The state had issues in getting easements to continue the work. And he heard there wasn't a lot of farmers who were willing to use this line.

Receipt of Board Member request for agenda items to be placed on future agendas

1. Creating a Temporary Investigative Group
2. Department of Water Supply's Strategic Plan discussion with staff

3. CWRM Data on Instream Flow
4. Keep Unfinished Business items on the next agenda

DIVISION REPORTS

[May Division Operational Reports](#)

Chair Chan Hodges stated that they received a notice regarding a drought in Upcountry Maui and asked the director to explain the 90 day declaration period.

Director Pearson explained that when you declare a drought there are 90 days where farmers have a lag time. They don't need to react to any of the drought requirements or restrictions. After 90 days the county can get a stronger hammer. Right now the department is recommending a 10% water reduction but the farmers have 90 days.

Member Mounce asked if the maintenance of the ditches is reflected in their water reports. Is the water flowing through the ditches?

The director replied that he never made the comment that ditches aren't being maintained. As far as our water use and the need for water at our treatment plant, we are getting the water that we need to treat so they must be maintained to get the water to our treatment plant.

Member Mounce asked if there were a flow issue with maintenance then we might see more pumping of groundwater on these tables.

The director explained that the Kamole plant is pumping 4 million gallons a day and if you look back a month and half ago there times we weren't pumping at all due to wet weather and no over use. It is a balancing act.

ADJOURNMENT

There being no further business the regular meeting was adjourned at 3:08 p.m.

Prepared by:

Gaye Hayashida
Commission Support Clerk

Approved for distribution:

Jeffrey T. Pearson
Director