

BOARD OF WATER SUPPLY
COUNTY OF MAUI

REGULAR MEETING
MINUTES OF JULY 18, 2019
(with hyperlinks to documents)

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, July 18, 2019.

CALL TO ORDER

The meeting was called to order by Chair Chan Hodges at 1:32 p.m.

ATTENDANCE

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

Staff present: Jeffrey T. Pearson, P.E., Director
 Robert DeRobles, Planner VI
 Edward S. Kushi, Jr., First Deputy Corporation Counsel
 Jennifer Oana, Deputy Corporation Counsel (portion of the meeting)
 Gaye Hayashida, Commission Support Clerk

Chair Chan Hodges announced that the air conditioning was not working and due to the sound from the fan, she asked that the speakers use the microphones.

APPROVAL OF MINUTES

Minutes of June 20, 2019

Chair Chan Hodges asked for a motion to approve the [minutes of June 20, 2019](#) as submitted.

Motion: Member Frampton

Second: Vice Chair Nakashima

Discussion: Member Frampton stated that at the start of last month's

meeting the chair had asked members to raise their hands and wait to be acknowledged. He wants to reiterate the chair's request and also ask that members acknowledge the chair's authority to let the discussion run smoothly and fairly.

Vote: Unanimous. Motion passed. The minutes of June 20, 2019 was approved.

At this time, the chair stated that people may have heard that representatives from Mahi Pono will be at this meeting and that is why there is a full house in the audience today.

Chair Chan Hodges proceeded to give a little background on this matter. She said that the board has been requesting Mahi Pono come to a meeting since March. A letter was sent to Ryon Paton at that time but they did not come.

The board did receive a letter from Grant Nakama, Operations Manager, dated July 1, 2019, via Director Pearson. Then on Monday, the chair received an email stating that 4 representatives of Mahi Pono will be attending but she had some concerns about the Sunshine Law regarding giving notice to the public. And now an email was received this morning from Mahi Pono stating that due to the board chair's concerns that they did not give enough notification (time) and that their attendance at this meeting could potentially violate the Sunshine Law, they will respect the chair's concerns and refrain from attending today's meeting.

Chair Chan Hodges explained that she did not ask them not to attend. She specifically said that the board would like to ask them questions but they would not be able to give a presentation. If they had contacted the board last Wednesday then there would be time to place them on the agenda.

TESTIMONY FROM THE PUBLIC

Stan Franco, who acknowledged that Board of Water Supply Member Norman Franco is his brother, testified on the letter from Grant Nakama and the whole issue of water. He was very disturbed by the last line, "That said, if a RP is successfully obtained ... the County will continue to receive water for the Upcountry Maui community." He believes they are telling the County of Maui that if they don't get the revocable permit they are not giving water to the county for Upcountry. He was deeply disturbed by this and he stressed that we have to change the way we do things. We need to have the water under the control of the County of Maui. Water is the primary issue with housing infrastructure. How can we plan housing developments if the water systems are controlled by Mahi Pono, Wailuku Water Company and other entities?

Kehau Filimoeatu said she is disappointed that Mahi Pono is not here. She wanted to speak to them face to face, "what happened, where they was, and when they coming?" She wanted to know if they had seen the ho'ailona, or a sign that it's all ready for them. She cannot see why they are not tending the soil right now.

[Simon Russell, Hui O' Malama 'Aina](#), read from his written testimony on agenda items, VI, A and V, B.

[Dave DeLeon](#), read from his written testimony on agenda items V, B and VI, A.

Dick Mayer, thanked the board for putting the documents on the website. He hoped that the board would get a copy of the EIS that is being prepared for the East Maui water leases. Regarding the TIG, he would like it have broad authority to look at not only at the county purchasing the system but also look into a public utility much like Maui Electric to take it over. And the TIG should also include members of the public to help get through all the items.

It is very unclear to the public as to who is calling the shots on the many issues relating to this. Is it the Canadian PSP, who own the land? Is it Trinitas who runs Mahi Pono? Is it Mahi Pono? Is it A&B? We do not know who actually has the authority to make decisions. This board should find out.

As for the lease agreement between A&B and Mahi Pono, there are many sections that are left blank so we do not know what the fine print is in the agreement. We do not know if there are other agreements besides the purchase agreement. This board should request a list and copies of all these documents.

Albert Perez, Maui Tomorrow, addressed the letter from Grant Nakama. He said he was not happy when he read it because it implied all 35,000 people living Upcountry were relying on Mahi Pono getting a RP. That is not true because most of that water supplying that system comes from Waikamoi except during drought periods. He said the letter is misleading. They don't understand that you don't need a RP for diversions on their own lands. There are diversions that were grandfathered in that they still have access to. That needs to be clarified.

He supports the establishment of a TIG. This is an opportunity to support our public trusts. He doesn't support the idea of the county owning the water systems but he supports idea of another entity that would be partially insulated from politics. We should be exploring compliance with the public trust and we need to have a neutral engineering firm assessing the condition of that ditch system.

CORRESPONDENCE

[Letter from Grant Nakama, Operations Manager, Mahi Pono to Director Jeffrey Pearson, dated July 1, 2019](#)

Chair Chan Hodges asked Director Pearson to explain the context of the letter.

Director Pearson stated that in previous meetings he tried to keep things close to the vest because he didn't know the direction that Mahi Pono was going. He did press

them to give the department some direction and they said they would have something by July 1st.

This letter, dated July 1, 2019, states that once they get a revocable permit, water will be provided to the Department of Water Supply for the Upcountry residents.

He is not completely happy with it because it is still open ended. He will continue to work with Mahi Pono in the event that they are not successful in getting a RP and will work with Corporation Counsel and Mahi Pono to look at other options.

Member Frampton asked the director if this letter felt threatening in any way, as one testifier stated that he felt deeply disturbed by it.

The director replied that he never took it as threatening and felt that it was somewhat encouraging but still open ended.

Member Eaton stated that according to Mr. Perez, they are grandfathered in and they don't need the RP.

Director Pearson stated that what Mr. Perez was referring to is that they are grandfathered in as far as the need for diversion works.

Mr. Perez explained that right after the water code was adopted there was a 2 year period in which people could register their diversions. On state lands you need a revocable permit but if you have registered diversions on private lands then you don't need a revocable permit.

Member Franco asked, what kind of oversight do we have on Mahi Pono's activities?

The director replied that there is not much oversight on the department's part but the State Water Commission manages stream flows and diversions. They do their best to ensure that the IIFS that was set a year ago is met. The department does monitor the ditch flow that comes into the Kamole forebay (reservoir) for the treatment plant and if there are any issues there the department will speak to A&B or EMI.

Member Eaton said she is not convinced that Mahi Pono is doing what they're supposed to be doing. She implores the department to look into helping them with the RP because she is not convinced that getting the RP will benefit the people of Maui.

Chair Chan Hodges asked, what is the department's communication with Mahi Pono and why is it that the board is not being communicated with? This letter from Grant Nakama, which is not addressed to the board, was passed to the members by Director Pearson. Did Mahi Pono ask the director to pass it on in lieu of responding directly to the board?

Director Pearson said that when he received the letter, he believed that the most prudent thing to do would be to share it with the board.

Chair Chan Hodges pointed out that at the last meeting, the director said that there will be some action, some excitement and better direction at the next board meeting but in the meantime he will hold off any discussion and let Mahi Pono do their thing and they will communicate with him in the following weeks. She wants the public to understand what is going on between the department and Mahi Pono and how the board can get information more directly.

Director Pearson explained that he will not air in public all his meetings with Mahi Pono. There are no secrets but that doesn't mean everything must be out for everyone to comment on. The excitement he was referring to was what was coming out on July 1st (referring to the letter from Grant Nakama). It is not the greatest because there are some open-ended issues and there are a lot more work to be done. At least they have given the department some direction and he will continue to work with Mahi Pono and support the efforts for the revocable permit.

The chair said that this letter says very little and sounds like a threat. What direction did this provide the department in terms of the negotiations?

The director stated that there was clear intention that they, whether it will be A&B, EMI or Mahi Pono, are going to acquire a revocable permit. He does not see this letter as threatening. He saw it as beginning the steps for working together towards getting reliable source of water for the Kamole Treatment Plant.

Member Franco asked, (referencing the Grant Nakama letter) who are we talking with? Are we talking to Mahi Pono? A&B can do it? Or EMI can do it? It's very confusing. And that is why the board needs to form a TIG to get to the bottom of this as to who is calling the shots.

Director Pearson explained that because the Court of Appeals vacated the 2016 First Circuit Court judgment, Carmichael v. BLNR, it goes back to as it was in the past, back to square one, which is A&B and EMI can now apply for a revocable permit.

Member Frampton stated that according to the EMI Water Delivery Agreement, EMI has a contract to provide water to the County of Maui and until such time the revocable permits are terminated that they will continue to do so. He asked Mr. Kushi if his interpretation is correct.

Mr. Kushi stated the agreement with EMI goes back to an initial agreement in 1973. The premise of that 1973 agreement is that their ability to deliver water to the county is dependent upon these licenses. So now if those licenses disappear, he's not sure what happens to this agreement. If they don't have the licenses then how can they deliver water unless the source of the water comes before the state lands?

UNFINISHED BUSINESS

Discussion regarding the Invitation to Mahi Pono Principals

Chair Chan Hodges explained that the board sent a letter and Mahi Pono never responded. Then they decided to attend a meeting without being asked and then they decided they were not going to show up. She asked Director Pearson if he knows if they are going to follow, process, and let the board know a week prior to a meeting so that they can be placed on the agenda.

Director Pearson said his impression is that they are well aware of the Sunshine Law and they did not tell him that if they plan to come to another meeting. He hopes that they would come. Regardless of how they are reacting to the board, he is still trying to work with them to ensure a water source for the Upcountry residents.

The chair stated that the only reason this board asked Mahi Pono to come is because they were not communicating with the community. So as a board whose job is to be transparent and to help make sure that we have access to water, it was an important role for the board to step into. If they were to do a press release tomorrow saying they are going to have an event where everyone is invited and everyone can ask questions then that would resolve the issue. It is not because they need to report to the board.

She asked, who is Mahi Pono? Who are the individuals making the decisions? Who made the decision to write this letter? Who made the decision to send the email on Monday? Who made the decision to not show up today? We have no idea.

Member Eaton wanted to know who whose lands are the diversions on.

The director explained that Mahi Pono is required to move from a revocable permit to a long term lease because many of these diversions are on state lands.

Member Eaton said her biggest concern is that they are holding their ditches as hostages.

Director Pearson disagreed. Mahi Pono is saying that if they are not allowed to have a revocable permit for diversions that are on state lands then they legally will not be allowed to divert water from those lands. Therefore, if they cannot divert water then there will be no water in the ditch. This is a worst case possibility.

Chair Chan Hodges asked the board members if they should write another letter saying the board was disappointed that Mahi Pono did not show up. Is it worth the board's trouble?

Member Eaton said no.

Member Frampton suggested that an invitation should also be sent to EMI because they are the ones with the expertise. If the question is water delivery, then they are better suited to answer. If the question is ag in the Central Maui plain and Mahi Pono is going to farm, then it would be appropriate for Mahi Pono to answer.

Member Mounce stated that a response from the board that they did meet the deadline is very important. Even if we are not requesting that they come, we should say we appreciate they met the deadline and that they are always welcome to be on an agenda and leaving it open would be prudent.

Chair Chan Hodges stated that the board can draft a new letter and draft a letter to EMI and place them on the next agenda.

Mr. Kushi pointed out that under Item VI. F, there is a draft response to Grant Nakama. This would serve as an invitation and the board can act on it today.

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

The chair stated that HB 1326 still remains dead. She asked if there is any update on the Carmichael case.

Director Pearson replied that he has no further knowledge on this.

Member Mounce asked Director Pearson to clarify what Mr. Perez said that the public has this perception that Mahi Pono is delivering most of the water used by Upcountry residents and that's not true; it is coming from Waikamoi. When she reads these water reports, she is not interpreting it the same way. As she sees it, the county is getting a lot of water from that ditch. She asked the director to respond to that.

Director Pearson explained that if you look at the most [recent Upcountry Water Report](#) (as of July 18, 2019). On the left side it discusses the availability and on the right side it shows the demand. Under Treatment Facilities, Piiholo is the workhorse. It is the mid-level water treatment plant and is providing 1.6 mgd. Olinda is the upper treatment plant and has the ability to treat about 2 mgd from the Waikamoi system. They have storage for 100 million gallons. Kamole which gets water from the Wailoa Ditch is right now treating 4 mgd. When we have drought or near drought conditions this is the better reliable water because it is coming all the way around the side of the mountain through EMI's ditch system. There are 3 sources of water that feed our surface water for Upcountry. They are Olinda, mid-level Piiholo, and lower level Kamole.

Member Mounce said what she is hearing from the director is that we do not have the other sources to fill this gap.

The director said that in times of drier weather that is correct.

OTHER BUSINESS

Discussion and possible action regarding Forming a Temporary Investigative Group (TIG), Appointment of Members and Setting the Parameters of this TIG which will be to Explore the Feasibility of Purchasing and Maintaining the EMI Water Delivery System and to Examine Other Alternatives of Getting Water to End Users

The chair said that she wrote a short description of the [purpose and scope of the Temporary Investigative Group of the Board of Water Supply](#), unfortunately, she did not submit it in time to be on the agenda as a hyperlink, though the board members did receive a copy.

Motion: Member Franco made a motion to form a Temporary Investigative Group (TIG)

Second: Member Eaton

Discussion: Chair Chan Hodges noted that Councilmember Sugimura received communication to place on the agenda a similar type TIG item which would have then gone to Councilmember Lee's committee. The chair said she spoke to Councilmember Lee and the council member said she was not going to place this on the Water and Infrastructure Committee's agenda as she felt that she did not have enough information on this issue. Though she did encourage the board to pursue this matter and then provided the chair with resources and general advice.

Councilmember Sugimura texted her saying that she is interested in what happened. Apparently the council member heard that Mahi Pono was going to be at this meeting and was interested in holding community meetings regarding these issues.

Member Franco asked, where will the TIG get funds to hire an outside engineer?

Mr. Kushi replied that it will have to go through the procurement process. Since this board is attached to the Department of Water Supply the TIG must ask the director if the department has available funds.

Member Mounce asked, if this allows for non-board members to be on this TIG.

Mr. Kushi responded by saying no. The TIG is only made up of board members.

Member Nobriga believes that once you open the door you never know what's going to happen. He stated that this TIG will be looking into taking control of the ditch systems away from Mahi Pono. He believes that the county should not be the owner of these water systems. If you take the water away from one of the biggest land owners on Maui, do you really expect them to plant anything?

Chair Chan Hodges explained that the board will not be able to come to some conclusion and make it happen. This will require a process where the board will make a recommendation to the council. Chances are there will be some money attached to this. Even if the council were to approve it, the mayor would have to implement it. The purpose of this TIG is to investigate, find out what the various issues are, and find possible solutions.

Member Mounce agreed that the county is not the right fit to take over the system. She is in favor of forming this TIG because we owe it to the community who asked us to investigate this.

Vote: Ayes - 7, Abstain - 1. Motion carried. A Temporary Investigative Group (TIG) has been formed for the purpose of exploring the feasibility of purchasing and maintaining the EMI water delivery system and to examine other alternatives of getting water to end users.

The chair made suggestions for appointments to this committee. She asked that Members Franco, Aquino, Eaton and her sit on this TIG.

Motion: Member Frampton moved to accept the appointment of Members Franco, Aquino, Eaton and Chan Hodges to this TIG committee.

Second: Member Aquino

Discussion: Member Frampton hopes that this committee would consider the economics of purchasing the EMI system. He reiterated that EMI does not own the water but rather the delivery system. The county pays only 6 cents per thousand gallons which is almost free. He did the math and found that the county pays approximately \$65,000 a year for over a billion gallons but it costs EMI \$2 million a year to run it. He is in favor of this investigative committee and especially the second part which is to investigate other alternatives.

Vote: Unanimous. Motion carried. Chair Chan Hodges and Members Franco, Aquino and Eaton have been appointed to the TIG.

At this time, Chair Chan Hodges asked for nominations for chair and vice chair of the TIG.

Mr. Kushi advised that only the 4 members on the TIG should vote on this.

Motion: Member Aquino nominated Norman Franco to be the chair of this TIG.

Second: Member Eaton

Discussion: None

Vote: Unanimous. Motion carried. Norman Franco is the chair of the TIG committee

Motion: Member Eaton nominated Shay Chan Hodges to be the vice chair of the TIG.

Second: Member Aquino

Discussion: None

Vote: Unanimous. Motion carried. Shay Chan Hodges is the vice chair of this TIG.

At 2:55 pm, the board took a short recess to give staff time to set up for the next agenda item. The meeting reconvened at 3:02 pm.

Discussion with Department Staff regarding the Department of Water Supply Strategic Plan which is intended to provide long-term guidance for fulfilling the department's mission to "Provide Clean Water Efficiently"

The Department of Water Supply Strategic Plan is intended to provide long-term guidance for fulfilling the department's mission to "Provide Clean Water Efficiently".

Robert DeRobles, Planner VI, Water Resources and Planning Division, gave a [power point presentation on the Strategic Plan](#). He stated that the strategic plan is essentially a document used to communicate effectively in an organization to achieve goals.

After Mr. DeRobles' presentation, the chair stated that both she and the vice chair were interviewed by the consultants of the project and she was extremely impressed with them, the questions they asked, and what was going on. But because of the limited

time left, Chair Chan Hodges suggested that the board move on and she asked Mr. DeRobles to come back to another meeting and report on the next phase of this project.

Director Pearson noted that the former Director Gladys Baisa is in attendance and he acknowledged that this plan was initiated by her.

Discussion regarding Stream Flow Monitoring

The chair noted that this was brought up by Member Aquino and there was some confusion as to whether the board wanted someone from CWRM to come and give a presentation.

Director Pearson volunteered to ask CWRM staff to attend a future meeting

Discussion regarding Leases and or Agreements with [EMI](#) and [A&B](#) relating to Kamole Weir and Waikamoj

Chair Chan Hodges asked if any member had a question or comment on these leases. There were no questions from the members.

The chair asked if these leases are the sum total of the county's relationship with A&B?

Director Pearson said that he would have to do research on this because there may be more leases that he may not be aware of.

Chair Chan Hodges said that it looks like the leases are renewed around the fall of every year and the current one will be up in a couple of months.

Mr. Kushi noted that on page 2 of the Upcountry Maui Agricultural Park Water Delivery Agreement, under Term, it says that this agreement "...shall have a one-year term that shall automatically renew every year..." But it does say subject to EMI's continued receipt of permits and if they get a long-term permit then the county is going to get a long-term lease. As it is now, it is automatically renewed and at 6 cents per thousand gallons it is something you don't want to touch.

Chair Chan Hodges asked to have this matter placed under Unfinished Business for the next meeting.

Discussion regarding Agenda Item Public Postings, Timeline for Posting Attachments from Past Meetings, and Other Transparency Discussions

The chair thanked staff in getting the documents up on the county's website (Document Center). This is very helpful to the public in terms of understanding what the board is doing.

She added that public participation is important because there is a certain distrust of government but her personal experience with the staff of the Water Department is that we have some knowledgeable, hardworking staff doing a really great job. So if people know what is happening and feel like they are part of the process then we can start to build trust.

Discussion regarding Drafting a [Response Letter](#) to Grant Nakama, Operations Manager, Mahi Pono

Member Frampton stated that he would have been more comfortable if this document was clearly marked as Draft. He believes there is value in this board because members have differing opinions. So when we generate documents for public viewing we need to make sure it is of the body and of the board, and that the board took a vote on it. He said that when he saw the letter online it looked original.

The chair apologized and agreed with Member Frampton that it should not have been on letterhead. She also likes the fact that we do have a very diverse board.

Member Nobriga asked, why is the board sending a response letter to Mr. Nakama when the letter is addressed to Director Pearson?

Chair Chan Hodges replied that Director Pearson passed this letter on to the Board and the board was promised that a response was coming in July. Also, Mr. Nakama was responding to all the issues that the board has been raising in their original letter.

Member Nobriga felt it is not the board's responsibility to write a letter to Mr. Nakama but they could make recommendations to the director so he can respond. The director can share his response to the board at the next meeting.

Member Mounce stated that the board did ask Director Pearson to reach out to Mahi Pono and he brought their response back to the board.

Member Frampton, referring to the draft letter to Mr. Nakama, stated that these are hard hitting questions and he believes these are questions they cannot answer with any degree of certainty. He would like to invite them to come to have a dialogue. Sending them a set of questions ahead of time would help. But the tone of the response letter makes him uncomfortable.

Chair Chan Hodges believes the July 1st letter from Mr. Nakama was not very helpful. It didn't respond to what the board wants.

Member Franco stated any kind of communication is better than no communication. He believes the response letter is appropriate. It will let them know that the board is still open to hear from them.

The chair suggested re-writing the letter with something more general, basically asking them to come to a meeting that is properly noticed. The letter can be very brief if that is what the board wants.

Member Aquino stated that we are missing the point. It has become Mahi Pono versus the board. We should state that the community has questions and therefore the board is inquiring on behalf of the community. The word community should be included in this letter.

Member Mounce suggested the board should tell Mahi Pono that we appreciate the letter of July 1st but there are questions on your intentions that we cannot answer.

Mr. Kushi stated that this board is responding to Mr. Nakama's July 1st letter to Director Pearson, which the director chose to disclose to the board. A response from the board to Mr. Nakama is proper. It is not illegal, although the tenor of the letter may be a little threatening to Mahi Pono but they chose to write to the director and the board's questions are legitimate. Whether they come to the board is up to them.

Member Frampton stated that the most recent communications to Mahi Pono have been somewhat hostile. Discussions from members about condemnation have been passionate and a statement was made that we cannot be taking orders or let them run our ship. These are passionate words. In addition, there was a Maui Time article that was pretty aggressive towards Mahi Pono from the board. But the board did not take a vote on that. He did not like this message that was being sent on behalf of the board. And now there is this draft letter has been made public. In his opinion, the messages and interactions from this board has been pretty negative towards Mahi Pono.

Member Franco responded by saying that the board is following the will of the community. There are a lot of questions out there. If they just communicate then there won't be this problem.

The chair said she understood Member Frampton's concerns but she is frustrated they have not communicated to the board. It is common courtesy to respond by saying, "thank you very much. I'm so sorry but we cannot make it." There are some very simple things Mahi Pono can do by press release or community meeting where they clearly states who is in charge and what you can rely on. She added that she likes Member Mounce's idea.

By consensus from the board members present, Member Mounce will edit the letter and incorporate questions from members into the letter. The members will email their questions and comments to her.

Deputy Corporation Counsel Jennifer Oana expressed concerns about Sunshine Law violations if the members are contacting each other.

Mr. Kushi said it should be a one-way contact and told Member Mounce not to respond back to the emails, no discussion back. And Member Mounce will collate the questions. He also told the chair that whatever Member Mounce comes up with do not put it on the agenda as a draft. It is to be decided by the board. It will be the same agenda item but do not put the draft response.

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

1. Discussion on public communications regarding water restrictions. Background on how the public is informed by the department and how we can get the word out better.
2. CWRM staff at a future meeting.
3. Invitation to Mahi Pono Principals and HB 1326 under Unfinished Business are off the agenda.
4. Discussion regarding leases and agreements with EMI and A&B is moved to Unfinished Business

DIVISION REPORTS

[June Division Operational Reports](#) (copies available upon request)

There was no discussion on this agenda item.

Chair Chan Hodges stated that she will not be present for the August 15th meeting so she asked if the meeting could be moved to August 22nd.

Staff will look into reserving the conference room for August 15th.

ADJOURNMENT

There being no further business the regular meeting was adjourned at 4:00 p.m.

Prepared by:

Gaye Hayashida
Commission Support Clerk

Approved for distribution:

Jeffrey T. Pearson
Director