

BOARD OF WATER SUPPLY
COUNTY OF MAUI

REGULAR BOARD MEETING
MINUTES OF NOVEMBER 18, 2021

The regular meeting of the Maui County Board of Water Supply was held online via BlueJeans, on Thursday, November 18, 2021. Recordings of the meetings are viewable at <https://www.akaku.org/boards-commissions/>.

I. CALL TO ORDER

The meeting was called to order by Chair Dean Frampton at 1:30 p.m.

II. ROLL CALL

Members present: Dean Frampton, Chair
Nalani Kaninau, Vice Chair
Norman Franco
Buddy James Nobriga
Antonette Eaton
Juanita Reyher-Colon

Members excused: Joseph Aquino

Staff present: Jeffrey Pearson, P.E., Director
Kristina Toshikiyo, Deputy Corporation Counsel
Sherilyn Otsubo, Secretary to Boards/Commissions

III. APPROVAL OF MINUTES

Member Eaton asked who decides what gets included into the minutes and if it's just a summary of what goes on during the meeting because she's concerned that some of her comments were left out and she had to point that out.

Chair Frampton replied that the minutes are drafted by the board secretary and then it's sent to the board for review.

Member Eaton stated that everyone should be able to see the draft and she was a little perplexed about why her comments were not included in the first place.

Chair Frampton replied that he can't speak for the board secretary, but it was a draft and a start and he's glad that Member Eaton was able to clarify and add more detail.

Director Pearson added that the minutes are reviewed by his support and then by himself.

Member Reyher-Colon moved to approve the minutes of October 21, 2021.

Member Franco seconded the motion.

The motion passed with 5 ayes.

IV. TESTIMONY FROM THE PUBLIC

Lucienne de Naie testified that she's a long time East Maui resident who lives in the Huelo area. They don't get any service from the Board of Water Supply, but they do have streams that are supposed to have water in them. Some do some of the time and some don't. This matter of the Temporary Investigative Group (TIG) talking about moving the management of our state public water resources in East Maui, which includes the seven streams that flow through her extended neighborhood, is a good idea to start talking about. A&B is a legacy company, but they don't really farm here anymore. There's a consortium of corporations from Canada and the U.S. mainland that are going to be taking over the leases for the East Maui water. The county should figure out what its role is in the twenty first century for the 30-year leases. It was mentioned during the APT meeting that leases are not amendable. She thanked the board for looking into what the options might be for a public resource to have management or co-management by a public entity. The county should define the role that it has, other than just a customer of public water delivered by somebody else.

Member Franco asked how the testifier is getting her water now.

Ms. de Naie said that most of her neighbors get water from the sky. They have rights to take water from a stream, but there's only one community pipe and its capacity is about ten families. She purchased a place that had a well and she shares water with her neighbors when there is no rain.

Member Franco asked if there are any diversions of the streams in her area.

Ms. de Naie said that most of the streams in the Huelo area are still diverted and this is the main source of water that Mahi Pono is depending upon in this area.

Vice Chair Kaninau asked if she had data for the stream diversions.

Ms. de Naie replied that there is not a lot of current data. There used to be gauges on many of these streams in the 1930's, but they went out of business in the 1970's. There is a new report that gives some tentative flows and depending on the rain and most of the flow is taken because there's four levels of ditch.

Vice Chair Kaninau asked if any of the streams have stream flow all the way to makai.

Ms. de Naie said that all of them do when it rains, but when they're diverted severely at the top, it can't recover after water is taken out four times at four different elevations. But they are certified as mauka-makai streams by the water commission.

Dick Mayer testified that there were no links for the water rates agenda item so it's difficult for the public to give testimony. Secondly, the East Maui area is going to be having an auction to see who will be administering that water and the Department of Land and Natural Resources (DLNR) mentioned that the county should be initiating contact with them regarding what the county's role will be and what it would like to be. If there's a scenario where A&B gets the lease for 30 years and then transfers that to Mahi Pono, what will the rate be for the county to take water from the ditch? We have a bargain at six cents and the Kula Ag Park also gets its water from the same system. He requests that the water department and the board initiate contact with DLNR, make sure that in the conditions of the auction, a statement be made regarding the discussion of water rates and how the county will be able to get its water.

Member Franco asked who would be the party responsible for initiating discussions with DLNR.

Mr. Mayer replied that he thinks the County Council and the water department could do it. He is concerned about the long-term implications for the county on the prices they would have to pay. We need to make sure the county and the general public are protected, particularly the farmers who may be competing unfairly with water that Mahi Pono may get.

Member Franco is concerned that everybody is looking for somebody else to initiate the process. Could the Board of Water Supply start the ball rolling?

Mr. Mayer said that it would be in the board's purview to initiate the process of negotiations between the county and the state. He doesn't know if the board has authority since they are only an advisory board. The board may have to recommend to the Director of Water Supply, the County Council, or the Mayor that they initiate this.

Member Eaton said that when we mention these leases, we always associate it with water, but it's actually land leases.

Mr. Mayer said it's the right to harvest the water on that land.

Member Eaton stated that they're asking for a thirty-year lease but don't forget about HB 499 which extends land leases by the State of Hawaii for another sixty years. If Mahi Pono doesn't get the land leases, they'll still have access to water, but Mahi Pono will not give the county water if they don't get the leases. The county needs to do something in order to be a co-partner of these leases because the county and its residents cannot be held hostage by Mahi Pono.

Member Nobriga thanked Mr. Mayer for pointing out the six-cent contract because that's a very important factor for agriculture to survive. What about drilling wells? The streams don't always flow and the county could still bring up groundwater.

Mr. Mayer replied that there are four sources of water. One is the water coming off those four leased areas in East Maui. Second is the area between those leased areas where there are several streams flowing that are not controlled by the leased

areas. Third is groundwater and fourth is the sources that the Piihola and Olinda water systems get. All need to be looked at there are different implications for each. Rates is a very important issue and the six-cent agreement is until 2025. Bringing up groundwater is a very expensive operation and groundwater would affect rates.

Chair Frampton closed public testimony.

V. UNFINISHED BUSINESS

A. Discussion of water rates and rate structure.

Chair Frampton stated that there wasn't a link for this item because this is something that the board wanted to keep on the agenda on a regular basis as a reminder that our primary purpose is to advise the department on the water rates and the budget. He would like to ask Councilmember Keani Rawlins Fernandez to attend our next meeting to follow up, in particular the fourth tier of water users. He would like to increase those rates for the high-end users. The department will get more income for development of additional source and conservation efforts, and for the people who don't want to use that water, it'll be a method to encourage conservation.

B. Discussion of proposed Charter Commission amendment regarding the addition of a Department of Administrative Law Judges.

Deputy Corporation Counsel Toshikiyo stated that the Charter Commission approved the proposed amendment to establish, with amendments, the Office for Administrative Law Judges. It will not be revisited with the remaining time that they have. The next step will be going to the County Council for review.

Chair Frampton moved this item to the end of the agenda.

VI. OTHER BUSINESS

A. Discussion by Sandy Baz, Managing Director, on the Board of Water Supply's Temporary Investigative Group (TIG) report.

Managing Director Baz thanked everyone who assisted with the production of the TIG report. It presents a lot of good factual information for them to be able to evaluate moving forward. Right now, the administration is concentrating on the Wailuku Water Company (WWC) purchase and final negotiations. Once that is completed, their next task would be looking at this water system and evaluating if it should be a county municipal asset for the people. With the auction of the lease going on right now, it would be seem timely for the county to interject now, but the administration is not ready to do that.

Member Franco stated that time is of the essence and if we neglect to step in and show some interest to DLNR then we're doing a tremendous disservice to the people who depend on that water. I recommend that the administration send

a letter saying that the county would consider acquiring that system and to hold off on the auction until the county can make a definite decision.

Member Eaton asked Managing Director Baz if he knew when the last Memorandum of Agreement (MOA) that the county had with A&B, HC&S, Mahi Pono was.

Managing Director Baz said he would have to defer to the department.

Member Eaton said it was in 1973. She understands that WWC is a priority right now, but shouldn't a priority also be on the water that's supplying most of Maui County? There's a letter from Mahi Pono stating that if they don't receive the leases, they won't be able to provide water to Upcountry.

Managing Director Baz said that he was not aware of any letter. Our system depends a portion of the water that's delivered through the EMI ditches and it is critical for us. He will discuss this with the department.

Member Eaton mentioned that if the county is not willing to take on the whole responsibility, would they be willing to work with a non-profit or government agency on getting the leases? If the county or some other agency has input in it, Mahi Pono will still get their water, they just won't be in control of the water. Nobody is against Mahi Pono or agriculture. The people who are trying to get this moving are against the idea of a foreign agency having control of the public trust resources of a small island. If the county is not ready right now to make a decision, an option is to go with another agency to provide a co-partnership.

Managing Director Baz responded that there are models available to look at on partnership agreements on water delivery systems. For Upcountry, a portion of our water comes from the land that the leases are being auctioned off for, but some of the water in that comes from the ditch doesn't. It would be a very complicated negotiation on what we would be acquiring and what we actually need for the community.

Member Eaton said that you won't be negotiating with Mahi Pono for anything other than their diversion systems, which is gravity fed. What you're negotiating is the maintenance and repair of the easement to these ditches.

Managing Director Baz said that the ditch system that brings the water to our treatment plants and our intakes is something that they have to figure out who owns that and who has access to it. It's going across private property and state property so how would the county get the water? If the county gets the leases and the water gets provided to the county and the county has the right to harvest the water, they would then have to work out how that water would get into the system because that is not a part of the auction.

Member Eaton said that Mahi Pono is claiming that if they don't get the license then the county will not get water, but neither will Mahi Pono. If Mahi Pono says that the county can't use their ditches or diversions, then how are they going to get water to their thirty thousand acres, because no water will be supplied to their

lands. It's in everyone's best interest to work together, but Mahi Pono is saying that if the county doesn't support them and they don't get the leases, then Upcountry will not get the 12 million gallons per day, which they have stated in a letter.

Managing Director Baz said that he hasn't seen that letter, but they are partners in this and he believes they're doing a good service with the agriculture they're doing. It would take a little more time than what they have in order to deal with how that would work. There is also a concern that if this is an option, then the county is competing for that with them, creating a situation where both of them have to pay more.

Chair Frampton asked Director Pearson if the leases have to specify who gets the water?

Director Pearson said that he doesn't know the specifics on these leases but he can discuss what the agreement that's in place is and what potentially would happen if they get the long-term leases. The agreement will not run out in 2025. Corporation Counsel Caleb Rowe mentioned to the County Council that the agreement was completed on September 14, 2018 and as long as there's a revocable permit or some type of permit for EMI/A&B to receive water for the ditch, they will provide water to the county per the earlier 1973 agreement. If BLNR grants EMI a long-term lease, this agreement may be terminated on no less than twelve months prior notice. During that period, the parties shall negotiate in good faith for a long-term replacement of this agreement and be executed concurrently with the effective date of the termination of this agreement. If they get the lease, then they will discuss rates and they likely will be higher.

Member Franco asked Managing Director Baz if water is a public trust and if he was a public servant.

Managing Director Baz replied yes.

Member Franco said that it's high priority that as a public servant, he should take care of the public asset, which is water. They need to start the process and hire an appraiser like they did for WWC.

Member Eaton mentioned that DLNR said that if the county wants to do something, they should see BLNR as soon as possible and ask what it would take for the county to take over the leases. The auction is not very viable, but an agreement between the two government agencies is doable.

Managing Director Baz said that he'll contact BLNR and discuss this, and hopefully next month he can give the board an update on the WWC acquisition, as well as an update with the auction.

V. B. Discussion of proposed Charter Commission amendment regarding the addition of a Department of Administrative Law Judges.

Chair Frampton returned to this agenda item.

Deputy Corporation Counsel Whittaker stated that the Charter Commission put together a TIG to look into the Administrative Law Judges to see if any board or commission needed to be excluded. The TIG has determined that no board or commission should be excluded, so if that passes then all the board's powers relating to contested cases would be transferred to the Administrative Law Judges. At the next meeting in two weeks, the commission will debate and discuss the TIG's findings, so the board can provide written and oral testimony at that time. Secondly, they'll also be discussing the board's recommendation to be independent. If you testify on behalf of the board, you should take a vote now, or you can testify as individuals. He recommends that you indicate that you are testifying on your own behalf and not on behalf of the board, but that you should identify yourself as a member of the Board of Water Supply. The meeting will be on December 2 at 9:00 a.m. on BlueJeans.

Chair Frampton asked if the board is unified then they can discuss how they want to message that sentiment.

Member Franco said that they are dealing with accountability and the issues that the board has dealt with affects personal lives. It's important that we keep close contact with the public and their issues concerning water. He would vote to exempt the Board of Water Supply from the amendment. The department gets its money from its customers, so if you have a complaint, you should be able to go to the department instead of to an entity that's not connected to the customer base.

Member Nobriga said that he understands the logic behind the proposed amendment, but in regards to the board, they are a voluntary group of individuals from different districts of the county. Every contested case is uniquely different and they take on these cases, not as lawyers, but as people of the community trying to understand the community. The board works with the department and advises them on how we feel this situation should be handled. If you take that power away, then what's left for the board because everything else is advisory and recommendations.

Vice Chair Kaninau stated that the director follows the rules when making his decisions, and the issues that the people are appealing are sometimes 20 plus years old, so the rules don't always apply. The board can make decisions with a broader insight and they see the cases through the community's eyes, therefore they can decide what's best for the community.

Member Reyher-Colon agrees with the rest of her commissioners. Taking away a community process from the board and giving it to the legal experts can sometimes taint the process and discourage people from pursuing their needs and having their voices heard.

Member Eaton said she had no comment on this issue.

Chair Frampton added that the appeals process is a process where you're judged by your peers and it gives the board a chance to apply some justice to an area that is often very difficult. At the end, the department and the appellants still have an

option to go further and seek court action. Being that the board is unanimous on their feeling on this topic, how should the board proceed.

Member Nobriga made a motion to have both written and verbal testimony stating that the Board of Water Supply not be involved in an amendment that takes away its powers to hear contested cases.

Member Franco seconded the motion and said that the chair should represent the board at the meeting.

The motion passed unanimously.

Chair Frampton asked if anyone else would be testifying at the meeting.

Members Franco, Reyer-Colon and Nobriga said yes, depending on what time the item was taken up.

Member Nobriga said that he would testify as an individual.

Member Reyer-Colon would testify as an individual and as a member of the board. She will also submit written testimony.

Chair Frampton said it would be great if everyone could provide written testimony and oral testimony if they are able.

Member Franco likes the concept of endorsements and if someone from a previous contested case can say something about the process and if they like what the board does, it could help the cause. The board is a customer-based organization serving the needs of our customers who have a legitimate complaint.

Chair Frampton will work with the board secretary to come up with a letter on behalf of the board.

Deputy Corporation Counsel suggested that the chair get all of the board's input for the letter now since there wouldn't be enough time to review and approve the letter before the December 2nd meeting. She also mentioned that another part to the amendment would be that the board will have the ability to review the decisions of the Administrative Law Judges and have 90 days to provide comment. If no action is taken within the 90 days, the recommended decision will become final.

Vice Chair Kaninau said that as far as the amendment regarding the board becoming semi-autonomous, she doesn't feel like the board is there yet. Eventually, but not yet.

Member Franco stated that the board operated as a semi-autonomous board for many years, then there was a power play which made the board an advisory board. We are serving the customers and board should have the power to address the problems and resolve them without worrying about the politics involved. If the

board is going to wrestle the problems of water, it should be semi-autonomous.

Member Nobriga agrees with both Members Kaninau and Franco. But it would be a huge undertaking. Members that sign up to be on this board didn't sign up for that kind of level of commitment. The board is a long way away from that.

Deputy Corporation Counsel pointed out that this discussion about the board's semi-autonomous position is not on the agenda.

Chair Frampton said that members can testify as individuals at the December 2nd meeting.

B. Approval of the Board of Water Supply's 2022 Meeting Schedule.

Member Reyer-Colon moved to accept the meeting schedule. She stated that she may have a conflict with two of the dates, but she would try to attend.

Member Nobriga seconded the motion.

The motion passed unanimously.

Vice Chair Kaninau left the meeting at 2:59 p.m.

VII. DIVISION REPORTS

Director Pearson reported that the official end date to the Stage 1 water shortage was October 22nd. The Pookela Well is running and the department is managing the levels at the Piiholo Treatment Plant. The Olinda Treatment Plant is still down due to maintenance of the raw water storage. Notices have been sent to customers that the Olinda Treatment Plant will start up on or around Monday. Upgrades are being done to Phase 10 pumping, which is the lower pump stations, to pump water up to the lower Kula system starting at Makawao Town.

Member Franco said that President Biden recently signed into law the infrastructure bill that would make money available to communities for things like water transmission lines.

Director Pearson said that there would be a delay in getting the money to filter down to the communities. There are billions available for water system improvements, but they haven't done the research for directing it to the department, but some funds will be available in the next year or two.

Chair Frampton acknowledged that Jason Hew has been confirmed as our newest board member and thanked him for listening in on this meeting.

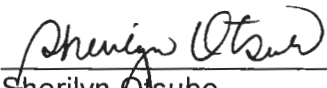
VIII. NEXT MEETING DATE AND TIME

December 16, 2021 at 1:30 p.m.

IX. ADJOURNMENT

There being no further business, the regular meeting was adjourned at 3:04 p.m.

Prepared by:



Sherilyn Otsubo
Commission Support Clerk

Approved for distribution:



Jeffrey T. Pearson, P.E.
Director