

County of Maui Water
Supply

BOARD OF WATER SUPPLY

COUNTY OF MAUI

SPECIAL BOARD MEETING

Held at the Kahului Shopping Center, 65 West Ka'ahumanu Avenue,
Unit 29, Kahului, Maui, Hawaii, commencing at 9:00 a.m., on
September 19, 2002.

REPORTED BY: JEANNETTE W. IWADO, RPR/CSR #135

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A T T E N D A N C E

CHAIRPERSON: PETER RICE

BOARD MEMBERS: KENT HIRANAGA

GINNY PARSONS

JONATHAN STARR

MICHAEL VICTORINO

EXCUSED :

CLARK HASHIMOTO

ADOLPH HELM

HOWARD NAKAMURA

MICHAEL NOBRIGA

DIRECTOR :

DAVID CRADDICK

DEPUTY DIRECTOR :

GEORGE TENGAN

DEPUTY CORPORATION COUNSEL :

EDWARD KUSHI , JR .

BOARD SECRETARY :

CATHY HOWARD

FISCAL OFFICER :

HOLLY PERDIDO

ENGINEERING :

HERBERT KOGASAKA

ELLEN KRAFTSOW

IWADO COURT REPORTERS , INC .

TRANSCRIPT OF PROCEEDINGS

BOARD OF WATER SUPPLY

SPECIAL MEETING

SEPTEMBER 19 , 2002 , 9 : 00 A . M .

CHAIRMAN RICE: I'm going to call to order the
special meeting of the Board of Water Supply, County of Maui.

It is --

VOICE: Oh, there's no reporter.

CHAIRMAN RICE: Sorry.

VOICE: Can't start now.

CHAIRMAN RICE: Recess.

(Whereupon a brief recess was taken)

CHAIRMAN RICE: Okay, I'm going to call to order the
special meeting of the Board of Water Supply, the County of

Maui. It is Thursday, September 19th, past 9:00 a.m. We're at

the Kahului Shopping Center. In attendance are Board Members Kent Hiranaga, Mike Victorino, Ginny Parsons, Jonathan Starr, myself, Peter Rice, the Director, David Craddick, Counsel Ed Kushi, Jr., staff, members of the public.

We are here today not to accept or reject the SEIS.

We are here today to receive the SEIS from our consultants, Mink & Yuen. Mr. Mink is here to present the final SEIS to us, and to answer questions the Board Members may have. This item had been and will be agendaed for the next two regularly scheduled Board meetings, which means, I believe, September

26th and October 8th, at which time at the final meeting it

would be appropriate if there is a motion to accept or reject.

I think it's important for this Board to realize

that as the accepting body for this particular document, that

it is important for us to review it, ask questions. It is

possible that we can send portions back to be redone, and it is

possible we can ask for additional information to be included

before we accept it. So once it's accepted it's our document,

so I think it's important that questions are asked and concerns

are raised. And as I said, if we need additional information,

then we should request it and include it in the final before we

approve it. So, that having been said, Mr. Mink, welcome.

MR. MINK: Thank you.

CHAIRMAN RICE: If you would, if you could come forward and give us a brief statement about the final document and anything you think is important for us to know.

MR. MINK: Well, my statement will really consist of the -- not really the defense, but a little explanation of what we have accomplished in this SEIS. We have looked at every possible piece of information. We have researched any investigation that has ever been done in East Maui and adjacent counties, and we have conducted our own investigations. We

have taken into account all of the questions that were raised in the original EIS, and I think we have answered everything satisfactorily.

We have shown, beyond any reasonable doubt, that the stream will not be affected by pumping from the deep aquifer, the Honomanu aquifer. And we have shown also, perhaps not beyond a doubt, as clear as the doubt about the streams, that the coastal waters will not be untowardly affected either.

There is nothing else that can be done with this SEIS.

Everything has been taken into consideration.

As I said, every piece of information that has ever

accumulated about the Haiku area and areas adjacent to it have been considered. It's easy enough to speculate about things that, you know, there are, is no information about. And a good deal of the criticism, at least that I have read in the letters coming from different parties, is speculation. And we have attempted to put that speculation to rest, and I believe that we have done so. If there are any questions, I would be very happy to answer them.

CHAIRMAN RICE: Mr. Starr?

MR. STARR: Yes, I'm-- I do have some questions. I

think it's a very good, very thorough document, and I'd like to praise and thank you for the wonderful work that has gone into it. I do have some concerns, and I'd say a lot of those concerns stem from the fact I don't have the legal or the technical background really to understand all of the details surrounding the process. And I think that I'm more concerned with process than substance at this point.

And I know that there were comments that the opportunities for comment and -- were not, were not given to the extent that maybe some of the members or complainants might desire, and that their concerns and comments were not

specifically discussed to their satisfaction. So I'm wondering how we might best put that to rest, because I do feel that it's important for the community, affected community to have their say, and to be answered in their comments.

MR. MINK: Well, in our responses to the comments I think that we have addressed essentially everything. Some of the comments, of course, are very repetitive coming from different people, they're asking the same things. So perhaps some of the letters were shorter than the others, but referred back to the full explanation of the letter -- the full explanation.

The fullest explanation is given in several letters:

The one that responds to the University of Hawaii's Environmental Center, one to the USGS comments, and one to the Meyer comments. Those responses, at least from a technical point of view, cover all of the matters that have been brought up. I don't know how we go beyond that. One of the letters mentioned that we haven't taken into consideration, for instance, anecdotal comments. When you're doing scientific study, anecdotal comments are interesting, but they're not necessarily strong evidence of anything.

You know, as a child I remember the river where I

grew up near as being huge. I went back six months ago, and it's a small river. So that, you know, you get into a situation where you have to differentiate between what is the actual evidence that one considers, and this is evidence that is done by scientific studies. And we have gone through all of that, going all the way back to Stearns, and before that.

CHAIRMAN RICE: Mr. Craddick?

MR. CRADDICK: One thing that I believe that was going to be added to this is the transcript from the public meeting that was held after the Draft EIS which was prepared,

and discussions with OEQC. I think Mink & Yuen have agreed that they would include that because of the comments, the comments and public information, so that will also be included in this.

CHAIRMAN RICE: Okay, any other questions for Mr.

Mink at this point? Thank you, John.

MR. MINK: Thank you.

MR. STARR: Can I -- can I ask that he stay?

CHAIRMAN RICE: Oh, yeah, yeah, he's going to stay the entire meeting. I did want to -- I skipped accidentally over the public testimony section. I want to note for the

record that a letter was received, a copy you have in front of
you, dated September 18th from Mr. Isaac Hall. So consider it
additional testimony in writing. Is there any other public
testimony, members of the public?

Sir? Come, please. John, why don't you slide over
and let him have the hot seat there.

MR. GLENN SHEPHERD: Hi, John. Can I go off record
for a quick moment, having something to do with kind of
non-water?

CHAIRMAN RICE: No, it has to be with the agenda.

You can talk about this --

MR. GLENN SHEPHERD: Okay, this it has to do with
the agenda.

CHAIRMAN RICE: Okay.

MR. GLENN SHEPHERD: But it's circuitous. I just
want to let you people know that this guy sitting on the
right-hand side of me flew things called Mosquito Bombers. I
think you're probably all too young to know what the hell those
things are, but they were made out of plywood. The Brits made
them. They did all kinds of crazy things during World War II.
We're fortunate to have this guy here. Okay, now, back on
record. (Laughter).

CHAIRMAN RICE: Just for the record, Mr. Victorino remembers what he's talking about.

MR. VICTORINO: Not that I'm old enough, but I've been a World War II buff, and I studied many years. Because we know why Amer -- why Hawaii and America is the way it is today, go back to world War II, it gives you all the background. Go ahead.

MR. GLENN SHEPHERD: Yes. With regard to this report --

CHAIRMAN RICE: Your name, sir, for the record?

MR. GLENN SHEPHERD: Yeah, my name is Glenn

Shepherd. With regard to this report, is it going to be available to the public for perusal? And if so, can we have some feedback by knowledgeable persons in the community with regard to the report?

Now, I say this, with the years I've spent as a scientist, giving somebody one set of data, and depending on the circuitousness of the information involved, you can easily come up with at least a couple of different answers. This is a very naughty situation, trying to play with things that are out of sight and out of mind, like where's that water going?

And it's down there a couple of hundred of feet or so. And

what's it like down there, and how is it affected by this

stream? This stream, how does it affect the other one?

Multiple things that have to be looked at.

But we want to have the privilege of seeing this

report so that we can make a study, too. Now, that has nothing

to do with being against Mr. Mink's report, it's just the way

science works. It's the Court of Science, we call it, and we

don't always come up with the correct answers any more than a

courthouse does. But we get closer to it, so we want to have

that privilege of doing so. Thank you very much.

CHAIRMAN RICE: Any questions, Board Members, of Mr.

Shepherd? Thank you, Mr. Shepherd. Mr. Starr?

MR. STARR: Yeah, I have some. I have a number of areas of concern, and they mostly regard the process. And they are questions I'd like to ask, but I don't really feel comfortable expressing my concerns because I don't want to create ammunition against this document. On the other hand, I don't really feel comfortable discussing the, you know, the meat of the document in executive session either, because -- so I'd like to get a better understanding of the process from Corp Counsel.

And I do feel that whichever, you know, that our process in reviewing this and making any changes or corrections and then ultimately accepting it, is going to require our having legal counsel that's representing this Board. Because once we sign off on it, it's no longer the Director's or Mink's document, but it becomes our document. We sign off on it, so it's as though we're making all of these statements. And I, for one, take that responsibility very seriously.

And, you know, I know the degree of complexity involved in this and also in the past history, and

I don't know if it would really be fair to saddle our Corp

Counsel with the need to go and go through the learning curve

on all of that, because I know he's got other duties as well.

So, first of all, I'd like to ask our Corp Counsel

representative what the right process is for discussing this,

because in doing so, I don't want to damage the document with

the wrong conversation. And second of all, you know, what his

feelings are as far as how we should proceed. And I'd also

like him to give us a better understanding of the process. I

know that there have been in letters some attacks on the

process portion of it, as well as the substance, and I'm more

concerned with the correct process.

CHAIRMAN RICE: Mr. Kushi?

MR. KUSHI: Mr. Chair, for the record, have you
closed public testimony?

CHAIRMAN RICE: Yes. Any other public testimony?

Okay, we'll close the public testimony.

MR. GLENN SHEPHERD: Yes, I have one. I'm not sure,
should I come up and do it or what?

CHAIRMAN RICE: Yes, when you are up here, speak
your mind.

A VOICE: Get lost.

CHAIRMAN RICE: Mr. Shepherd again.

MR. SHEPHERD: Yes, my name is Glenn Shepherd. It has to do with your deliberations. I hope you don't go to the extremes of having an executive council, executive meeting. That's a singular society, and this is a participatory document that we're looking at. It's a process. If you exclude the public and you make decisions in secret, we don't like it. We want to know what it's all about. So give it another thought before you go behind closed doors to do this, that you really give it a hard thought, because this is information that should be out to the public, and let them decide.

Now, you people are all appointed by people who are elected, and we didn't elect those people to have them pass it on down the line to have secret societies. There's enough of that going on, anyway. So let's have it out in the open, we want to hear it. If you've got something that you're reluctant to say, well, tough luck. We want to know. So none of this business of having executive sessions, that's an anathema to a democracy. Thank you.

CHAIRMAN RICE: Is that it for public testimony?

Okay, I'm going to close public testimony. Thank you, Mr.

Shepherd.

MR. SHEPHERD: Are you going to have a closed session?

CHAIRMAN RICE: No. Mr. Shepherd, just so the record -- hopefully you can rest assured that we have scheduled this item for two more meetings for the purpose of not rushing through it without the public having adequate opportunity to comment. And just also for your information, there is an ongoing lawsuit, so there may be times when we need to consult with our attorney about the lawsuit, but the discussion of the document will be taking place in public.

MR. SHEPHERD: I disagree. We want it all out in the open, the good, the bad, and the indifferent.

CHAIRMAN RICE: I understand your comment, thank you. Mr. Craddick?

MR. CRADDICK: The documents that you have, one copy is at the OEQC, I believe, and we have a copy in our office so people can come in and look at it. But this is not a final copy until any comments that we may get from the Board are completed. So we have not produced copies for everybody who commented. We have not sent it out to libraries. There have already been a few people who have come in and looked at it in

our office, but it is available there. If somebody wanted a copy, I expect we would be charging 25 cents a page to produce it, whatever they wanted.

But the documents that you have there are from the Supplementary EIS, prepared by Mink & Yuen. You have the original EIS prepared by Norman Saito, you have the East Maui Plan also prepared by Norman Saito, and you have some reports that are cited in the Mink & Yuen report that are not our reports. And somebody, you know some, you know, whether you can just go ahead and copy them. If there would be a copyright infringement on that, I don't know. But we did not copy those

and include them in the report because they are available to the public from USGS. That's the information you have before you, and then they are all available to the public in our office.

CHAIRMAN RICE: Thank you, Mr. Craddick. Mr. Kushi, could you proceed?

MR. KUSHI: Mr. Chair, in response to Member Starr's questions and inquiries, I'm going to say that this is based on my understanding of the matter, the case filed, the legal suit that's still pending. And if Mr. Mink or David Craddick would

like to comment or correct me, please step in as soon as possible.

However, my understanding of the situation is that we are at the point where -- and please, the first distinction is this: In the scheme of Chapter 343 on Environmental Impact Statements, not Environmental Assessments, there's an agency and there's an accepting authority. In this case, the agency is deemed to be the Department who has prepared a document called an EIS. In this case, a Supplemental EIS. The Department went out through the Board's approval and hired a consultant to do a Supplemental EIS. It did do a Draft

Supplemental. It was published as -- OEQC published a note of the availability of the Draft.

Based on that, the process provided for a comment period, that the agency receive comments. It responded to the comments. And now we're at the point where the agency, through its consultants and its staff, has produced a final document for a Final Supplemental EIS, Final EIS, for the accepting authority's review, acceptance, rejection, whatever.

In the scheme of this case, on this Chapter 343, the Board of Water Supply is deemed to be the accepting authority. That was through a delegation of the governor. In the usual

situation it's either the governor or the mayor, depending on the use of state or county lands. In this case, both the Mayor and the Governor delegated that authority to your body.

By accepting, assuming you accept the document, contrary to what Member Starr said, it's not your document, it's still the agency's document. It's the agency's project.

In our scheme of things in the County Charter, there is one Department of Water Supply made up of the Board and the Department. In the scheme of Chapter 343, you can't have the same so-called entity do the document and acceptance itself for the EIS. They do it all the time for the environmental

assessment, however. So are you following so far?

CHAIRMAN RICE: Yes.

MR. KUSHI: So we're at this point where the agency, the Department, has produced a document. And it, of course, it did it six, seven years ago, and that was challenged. So now we've done the document again, called a Supplemental Environmental Statement. We're at the point where we're presenting it to the accepting authority, being the Board. At that point in time the Board accepts it or rejects it, whatever it is.

I'm assuming if you reject it the agency will go back and do another rework on the document and come back in. On the other hand, assuming that you accept it, acceptance means that you have enough information in the document before you to say, "Go ahead with the project." That you have enough information, that you've looked at two sides of every issue. In a non-traditional sense, you are looking at a document to authorize a project.

So assuming that you accept the Supplemental, then the process provides that OEQC has a monthly notice. It publishes a notice that the document has been accepted by the

final authority. At that point in time, there's a sixty day legal challenge period. We may go through the same thing again as we did six, seven years ago. Maybe that's the situation.

You're almost at the end of the final document, and Director Craddick is correct in that when we say "final document," that is from the agency's standpoint. You may not like what is in there. You may want to get further comments and direct them back to the agency for it to produce something else for your review. Notwithstanding that, if you finally decide that you are not going to accept it, you're going to reject it, you need to have specific findings as to the reasons

why you're not accepting it, and it has to be also published,

it has to be in writing, and it has to be published, it has to

be in writing, it has to be issued to the OEQC.

CHAIRMAN RICE: Mr. Starr?

MR. STARR: Yeah, how does this process that you've

described notch in with the ongoing litigation and the order of

the judge in that pending litigation?

MR. KUSHI: Mr. Chair, Member Starr, when you say

"litigation," there are two separate cases, and I'm sure we're

talking about Civil Number 93-0734, which is the Coalition vs

Board of Water Supply. The other civil case is involving the

Haiku Well, which is Civil Number 97-0047, which has a Final Judgment. So for purposes of a response, I'm talking about the first.

In that case, back in 1994 -- the case was filed in '93, in that case in '94 the judge ordered a ruling of Motion for Summary Judgment, Partial Summary Judgment. In essence, the Court said the document that was presented to the previous board back in '92-'93 and accepted, in the Court's opinion it was deemed inadequate. In its ruling it says it basically ordered the Agency, as well as the Board of Water Supply,

ordered the Agency to produce that document, to go back and do another document, a Supplemental EIS, and to address -- I'm using the Court's words in its order in 1994, it basically said that --

MR. STARR: Can we recess?

CHAIRMAN RICE: Oh, yes. Why don't you hold that thought, Mr. Kushi. We'll take a quick break.

(Whereupon a brief recess was taken)

CHAIRMAN RICE: Back in order. Let the record show that the court reporter has arrived. Mr. Kushi, please.

MR. KUSHI: Mr. Chair, as I was saying, I was

referencing the order, civil number 93-0734 entitled Order on Plaintiff's Motion for Partial Summary Judgment and slash or For a Preliminary Injunction on Count One. It's filed in the Second Circuit Court, August 23rd, 1994. And I believe it is in your document there somewhere.

MR. STARR: Could someone help us find it?

MR. CRADDICK: It's in the appendix.

MR. STARR: Exhibit 1?

MR. CRADDICK: I believe so, somewhere near the front.

CHAIRMAN RICE: What's the date of it?

MR. KUSHI: August 23rd, 1994.

CHAIRMAN RICE: I can't find the date here. Is it the one stamped by Joe Cardoza? No, Mossman. And it's dated December 9th?

MR. CRADDICK: If nothing else, it's in Isaac's letter as exhibit 1 right here, if you look at Isaac Hall's letter.

CHAIRMAN RICE: August 1994?

MS. PARSONS: August 23rd.

CHAIRMAN RICE: Okay, go ahead, Mr. Kushi.

MR. KUSHI: Let me refer to page 2 of that document

under paragraph A-1, where the court basically said that it determines that the final EIS is inadequate in that it does not fully address important environmental issues, such as water contamination, impact upon stream flow, and other issues raised by plaintiff, and it goes on and on. And it also includes an injunction that until we do a follow-through with the order we are not to proceed with the project.

Your attention is directed to page three at the end of the top paragraph under C, where it basically is part of that -- it is part of the order. But subparagraph C states,

process permit applications, or C, permits for the project.

Basically don't process permit applications or seek permits for the project until and unless an adequate supplemental EIS is prepared and accepted and is in compliance with Chapter 343.

So this is what we're doing now.

When they say in compliance with Chapter 343, that's the schedule I had previously outlined, and we are going through that process right now. That is not to say we're going to go back to the court to have the court approve the final EIS, because that's not in the Chapter 343. However, we may go back to the court, we may be forced to go back to court if

there's a legal challenge. But at this point, you know, it's a general rule of law. Judges do not substitute their judgment for administrative agencies in the first instance. They let the boards and commissions do their thing, and then upon review they look at the adequacy. But in the first instance they do not substitute their judgments for administrative agencies.

CHAIRMAN RICE: Thank you, Mr. Kushi. I think, members of the Board, I think there are some key words here that we need to address. One is "not approve." The acceptability of the document is what this body is charged with doing, and the statute tells you what acceptability is, and I

will read that in a minute. The other key word here is

"adequacy," and the adequacy of the EIS is what was

challenged. It's not the approval of it, it's the adequacy of

it. Does it adequately define and address impacts. That's

what the document is all about.

So before we accept it we want to be comfortable

that it adequately addresses. It doesn't -- it is not a

document that says forever nothing will ever happen. That's

not what it says. It addresses impact so that you can make

decisions, and it outlines impacts that might affect the

community. That's the purpose of an EIS.

So if we're comfortable that it addresses the impacts, then we can accept it, provided that there are other things that are part of acceptability. And I think it's important because it's defined here, and I don't have a copy of this, it's not in the book. This is from the Administrative Rules Chapter 200, "Acceptability of a statement shall be evaluated on the basis of whether the statement, in its completed form, represents an informational instrument which fulfills the definition of an EIS and adequately discloses and describes all identifiable environmental impacts and

satisfactorily responds to review comments."

MR. CRADDICK: From what section is that, Peter?

CHAIRMAN RICE: 11-200-23. It's part of Chapter

200, the Environmental Impact Rules Statement, Subchapter 7.

"A statement shall be deemed to be an acceptable

document by the accepting authority or approving agency only if

all the following criteria are satisfied:

(1) The procedures for assessment, consultation

process, review, and the preparation and submission of the

statement, have all been completed satisfactorily as specified

in this chapter;

(2) The content requirements described in this chapter have been satisfied;

(3) Comments submitted during the review process have received responses satisfactory to the accepting authority, or approving agency, and have been incorporated in the statement."

So that's what we're here to do. So one, if we find that the document adequately describes and identifies the environmental impacts, then we can move onto the acceptability of it. Mr. Craddick?

MR. CRADDICK: None of the Board Members were here

in 1994, and I don't know if it would be helpful to give kind of a little overview of the whole, what the East Maui project is from the beginning to where we are right now, if that would be helpful for you.

CHAIRMAN RICE: Members? Please, Mr. Craddick.

Three minutes or less. Just kidding.

MR. CRADDICK: I think I can do that. Okay, the East Maui Water Development Plan is a project developed to bring 10 million gallons per day of groundwater not affecting stream flow from East Maui into the Central Maui water system. The water will provide for implementation of the community plan

at current levels of demand through the year 2020. The Central Maui water system, which the East Maui plan would serve, currently serves Kihei, Makena, Wailuku, Kahului, and part of the Haiku-Paia community plan areas.

Upon implementation of the EM plan, Haiku will be a part of the Central Maui water system. Portions of the EM plan, which are the Hamakuapoko Wells I and II, by previous environmental assessment will continue to serve Upcountry, the Upcountry water system, during drought conditions, unless the Board decides otherwise.

Current community plans call for the development of water in the East Maui area, and the 1990 Water Use and Development Plan discusses the need to establish a well field in the Haiku aquifer system, which is part of the EM plan, in order to meet the demands of the Central Maui water system. As was noted earlier, the supplemental EIS that's been prepared is a result of a court challenge to the original EIS.

There was some clarification of the order which is in the appendix 19.3. That's the only clarification that we've had so far. And in that it just allows us to do the monitoring that the court required. And a side issue, the West Kuiaha

tank, which was actually planned prior to the EM plan being constructed. And because that tank is there, some wells were put around it. Not vice versa, the tank isn't coming because of the wells.

And finally I said look, because the Dowling well is already in there we would agree that we won't even hook this tank up to the EM plan if that's what it takes to get it done, and that's what happened.

Anyway, the subject final supplemental EIS also has the benefit of data that was collected through the USGS Board of Water Supply and State Water Commission. We all joined

together to do a study between 1994 and 1999, which is called the Groundwater Occurrence and Contribution to Stream Flow Northwest Maui, Hawaii, and there's a second report, Groundwater and Surface Water in the Haiku Area. Those studies, although referenced in the supplemental EIS, are not part of it. They have been handed out to you. That's what I referred to earlier.

In addition to these studies, Corporation Counsel tried to get the project moving by hiring Tom Nance of Water Resource Associates to redo the Supplemental EIS. This work included only the Hamakuapoko wells, and the court informed us

that we could not parcel the project. However, one important study that was done that was applicable to the whole project was called the Assessment of Impact to Water Quality and Marine Community Structure from the Proposed East Maui Development Plan prepared by Marine Research Consultants for Tom Nance, Water Resource Associates. That report is included in here, and I believe it's 19.9.

The basic findings of that report is that the potential affect of the proposed project on water chemistry and marine community structure revealed that there appears to be no

potential for negative impacts to marine ecosystems in the near shore region of East Maui. And as has been mentioned by John Mink there, data collected, and drilling the supplemental EIS well showed no interaction between stream flow and basal groundwater, which is the water they developed through the EM plan.

The water contamination was also addressed and the water contamination, although an issue in the original one, has now been mitigated by the settlement agreement between the Board of Water Supply versus Shell Oil Company in September 1999, and that settlement agreement is also part of the EIS.

Now, there is a possibility for the Board to decide to relocate the wells. As you know, in that settlement agreement it requires us going to the plaintiffs in that case and allowing them to say whether they will agree to allow a well to be put where we want it to be put. And the reason for that is because they have to pay the cost of cleanup if the well ends up being bad.

So the actual location of the well is still what I would call up in the air. It's open to some decision by or action by this Board where they, if the plaintiffs say that they won't pay for or they want us to relocate a well, then

they would have to pay the relocation cost and any additional environmental work that is required.

And also, because of that there's been a new law that has been passed subsequent to the court order in 1994, which is it requires a cultural study. That cultural study, because the wells are up in the air as to their location, that is not being done and that's identified as an un -- what do they call it here? Unresolved issue. And that will be resolved at the time an actual well site is finally noticed.

Another issue is the visual impacts by the tanks and wells. Obviously nothing specific can be done there, either.

What we are going to try and do is show some pictures of existing well sites to show what those look like, and the effort will be to mitigate those visual impacts.

So that's kind of an overview of the whole project there and where we are on at least those two items that are what are called in the supplemental EIS as being unresolved.

But to my knowledge, in consultation with Mink & Yuen they have hired legal advisors, and in their opinion they have met all the legal procedural requirements in preparing the supplemental EIS.

CHAIRMAN RICE: Mr. Starr?

MR. STARR: Yes. I, for one, believe that this is an area where we should be working with outside counsel to represent the Board and make sure that on this pass what we do finally accept is something that will survive, will survive challenge, and I'm not sure if what we have now will or not.

You know, the areas that I have a question about, they're minor areas in terms of the study, the document, but I think especially regarding process they're areas that could very well cause us to be -- to end up in the same position that the Board was nine years ago.

If we do get outside counsel, one thing that I would like to be certain of is that that counsel would be able to represent us if there is a legal challenge, which there most likely will be. And I know at a previous meeting it had been mentioned that only Corp Counsel can do litigation unless something happened, and I forget what that was.

I'd like to ask another question of Ed, which is whether if we were to go with the proper funding approvals from the County Council and hire outside counsel on this, whether they would be able to -- they would be able to represent us in court and through any litigation. I just want to be clear that

this is -- I have full confidence in Corporation Counsel, and especially in Ed, who I think does a really good job for us, but I know the amount of time required.

And also the continuity issue is such that I think everyone would be best served if we had someone who could devote the time necessary and will have the continuity to make sure that from this point on there's only one individual or firm who would be carrying it through and not possible changes, as we've had. We've had like four or five different Corp Counsel representatives handling it, and that doesn't help us. The memory, you know, the continuation of memory is not there.

CHAIRMAN RICE: Mr. Kushi, I think the question was in the event that we hire outside counsel to help assist us in evaluating our position, would they be allowed to represent us in court and subsequent legal actions or challenges. Is that right, Mr. Starr?

MR. STARR: Yes.

MR. KUSHI: Well, Mr. Chair, I guess I'm confused that is it the question or is it the situation where you want to retain special outside counsel now at this point before acceptance?

CHAIRMAN RICE: Yes.

MR. KUSHI: Or in the event a legal challenge is
filed?

CHAIRMAN RICE: I think before acceptance. Mr.
Starr, is that correct?

MR. STARR: Yes. I'm thinking of doing that, of
suggesting to my fellow Board Members that we do that at this
point. But I want to -- if we did that I want to be assured
that we would be able to continue that relationship if we end
up in litigation.

MR. KUSHI: Well, if that's the case, I would frame

the request to counsel, County Council, to retain outside special counsel to represent the Board and the Department in the current litigation, which current litigation by court order required you to do a supplemental EIS, and continue on that matter. In that case, that counsel would represent you in your deliberations in accepting the document, which is part of the court order. And after that is done, assuming that's done, hold your breath. And when a legal challenge comes, I'm assuming the legal challenge would be based on the same lawsuit or on the same matter.

The question becomes, or the situation would enter

when you do approach the County Council, as I said before, they need to accept that -- there needs to be established a need for special counsel, whether it's time, expertise, specialty.

Those are factors that the Council will look at in approving any request for special counsel.

Normally, in my experience, from what I know, the Council usually signs off on requests for the Board of Water Supply, knowing that the Board will pay for it. That's a logistic matter. But assuming, again, that they have the responsibility and the authority to say yes or no. Again, our office's position is that, as I said before, we are obligated

to continue representing the Board as well as the Department.

But again, this issue -- the Council may find that there is a special need or necessity.

CHAIRMAN RICE: Mr. Victorino?

MR. VICTORINO: So let me make this clear then.

What we're -- what fellow Member Starr is suggesting is that before we proceed in getting any, or as we proceed in getting some legal as well as some expertise in these documents from a firm or attorney, or whomever, we also make sure that the Council would approve, if litigation became necessary, that

that person could continue with us in the litigation. Is that what you're saying, Mr. Starr?

MR. STARR: I believe that our request would be limited to what we would need in dealing with the prior litigation and reviewing this document. And then if we ended up in a further litigation we would probably have to go back for more funding. I don't know if we can foresee what our representation in litigation -- which may be quick or it may drag on for years -- will cost us.

MR. VICTORINO: So in other words, we're looking at the present litigation, whomever this entity would be, to come

in, review that, making sure that we are in compliance or acceptability, and moving on. And if that document was accepted by us, whatever it turned out to be, then was challenged in court, this attorney would continue with us in any future litigation, if that was necessary.

MR. STARR: Yes, sir. I feel that this is a special case, different from most EIS's or even SEIS's, because in doing this we're complying with an order of a judge, and I want to be sure that we've complied with his order. That what we're submitting is consistent with the court order and the court action so that we're not automatically -- if it's not, I think

we're automatically thrown out of the ballpark.

And my major area of concern is to make sure that we're in compliance with this court order, which is fairly diffuse because it's based on a letter written by USGS, which is somewhat, I don't know, the letter is kind of maybe folksy or something. It's not technical and to the point that such documents usually are. And I'm concerned over whether our description of the protocols regarding the monitor well are consistent with that USGS letter and the court order. I'm not sure if they are or not. That's an area where I think we would like to have some -- I would like to have some expertise, legal

expertise.

MR. VICTORINO: Another point of clarification. If we were to proceed on that route, you did mention that this would be coming up in future agendas both on the 26th as well as October 8th. Can we still proceed on these for public comments of that nature, or do we have to wait until we get somebody to look at it? I mean, you know, now we are going into different areas.

CHAIRMAN RICE: I think, my personal opinion, if we decide to engage outside counsel we'd probably defer any action

until we got a report, because what if we decided to change it? Maybe we said okay, we might want additional information.

Why are you shaking your head "no," Mr. Craddick?

MR. CRADDICK: It's your choice, but I think you know the ramifications of that.

CHAIRMAN RICE: Ramifications, Mr. Craddick?

MR. CRADDICK: Well, we have concerns over Iao Aquifer and the pumping that is going on there. And if we don't have an alternative source, what that can mean to the designation issue. So there is an agenda item C on here to begin the process of getting an attorney for any legal

challenges.

But the issue that has just been raised by Mr. Starr is a technical issue, it is not a legal issue, whether the monitor well that was done is in compliance with that letter. And that question can quite easily be directed to Mr. Mink right here and now, and he can answer it.

CHAIRMAN RICE: Excuse me, I don't get it now. You just said the consequences of our doing what? If we decide --

MR. CRADDICK: What you're talking about is going through -- just the process of going through trying to get an attorney right now will take sixty days. So we're way down the

road past the time when the Water Commission is going to come out with their findings on Iao.

CHAIRMAN RICE: What's that got to do with this?

MR. CRADDICK: This is an alternate source of water.

CHAIRMAN RICE: Yes, but if it's challenged in court, as you yourself said we can expect it to be, we are not any different than we are now.

MS. PARSONS: Excuse me, court?

CHAIRMAN RICE: I'm talking to Mr. Craddick.

MS. PARSONS: Okay.

MR. CRADDICK: Again, you know, delaying this

process will not be helpful to you.

CHAIRMAN RICE: I'm trying to understand your comment as to why. You're making kind of veiled threats here, but you haven't provided any information as to how our willingness to ensure that we have a defensible document affects the Iao Aquifer.

MR. CRADDICK: Assuring yourself that you have a defensible document, you have an attorney that's been working with that. The other attorneys with Corp Counsel that have been working on this I believe are accessible by Corp Counsel

to advise on this. And the technical issues are going to remain the technical issues in this. The process portion of this can quite easily be resolved in the next one or two meetings, if you need additional help on that. But to start preparing for a legal challenge and getting the proper attorney for that, that's not going to be a simple process.

CHAIRMAN RICE: I didn't say it was. You still didn't answer my question. I said how does any action that we do that delays this affect the Iao Aquifer and the potential designation? That's the comment that you made. That's the answer I want to know.

MR. CRADDICK: Not having additional sources of water is going to create a problem in that area, I believe.

CHAIRMAN RICE: Who is saying we don't have additional source? We have made an effort to comply with the judge's order. We simply want to know that that document is going to be defensible. That has nothing to do with -- we have not made a decision that we are not interested in East Maui, we have not made a decision that we don't have additional source. In order to utilize that source we need to comply with this process.

MR. CRADDICK: I'm just saying right now the process

for you to hire an attorney outside of Corp Counsel is not a simple one. Maybe after the election it will be simplified a little bit. It will still take a long time.

CHAIRMAN RICE: That has nothing to do with the other comment you made. I realize it may be a time consuming issue. Ginny?

MS. PARSONS: Mr. Kushi, on this court order that we have on page three, it's the court order that we were reviewing on page three, at the bottom it says it is not necessary to grant the plaintiff's motion for a preliminary injunction, and this motion is for now denied. Does that mean that once we've

done the supplemental EIS and we've gotten that ready to go we
can go forward because we don't have an injunction against it?
What will happen when they go to court, does that mean that we
stop the well?

MR. KUSHI: I'm sorry, I'm not following you.

MS. PARSONS: Well, I'm looking at the fact -- I
haven't seen the original motion so it's hard for me. I'm just
looking at what the judge ordered. At the bottom he's saying
it is not necessary to grant the plaintiff's motion for
preliminary injunction, so apparently they asked for an

injunction to stop all work, and he's saying that's denied.

He's just telling us in this order that we have to do the

supplemental EIS and comply with that.

MR. KUSHI: Okay, I understand. I guess we go back

to the previous page two, under A, Order on Motion for Partial

Summary Judgment. If you go down the line to the bottom of the

page, subparagraph three, it basically says the court is

ordering that the defendants and all those acting under them

are prohibited from doing all of these things, from

implementing. Then it goes on to the next page. That's an

order prohibiting. In essence, that's the injunction. And it

says, "until and unless an adequate Supplemental EIS is done."

So in that case, by the court's main substance of the order

their motion for preliminary injunction is moot, we couldn't do

it anyway.

MR. VICTORINO: Mr. Chair?

CHAIRMAN RICE: Yes, Mr. Victorino.

MR. VICTORINO: Continuing, Mr. Craddick, I'm

curious with the Chair's comment and your comment. What

specific -- and I guess I'm really looking for the specific

ramifications of bringing in -- not only looking for additional

legal challenges, but to help us make sure that this document,

which Mr. Mink and his people have worked very hard in doing a great job on, but making sure that this document is acceptable to the respondees, the defendants in this case, so that we do not have to start over again.

I mean I understand the Iao portion, and yet I don't understand, okay. I understand you're saying if this doesn't seem to be going through, the Water Commission might say, "Wait a minute now, Maui Water Board of Supply, you guys don't have any additional," and so they may get all over you about Iao. That may be a different subject. I want to make sure I that understand that.

We want counsel to help us make sure this document is in acceptance. That's what the first thing was. With the predication that that continues on if there are additional legal challenges, that they can continue on with us. But the main purpose is to make sure we're clear on this from a legal-technical point. That's what we're looking at. Now you're saying no. Tell me why no.

MR. CRADDICK: I'm not telling you no, you don't need to get some legal assistance.

MR. VICTORINO: Okay, thank you.

MR. CRADDICK: To determine whether we have complied with OEQC requirements, Corp Counsel is more than capable of doing that. I mean it's not a complicated document, these administrative rules that we have to comply with. It's tedious, and to the uninitiated, just making the comment, the procedure for assessment, consultation, process review and preparation and submission of the statement have all been completed satisfactorily, as specified in this chapter, no lawyer is going to be able to tell you whether you have done that, because it rests on technical issues.

Now, you have heard both John Mink and our attorney

say that as far as they know, we've complied with that. You are going to hire another attorney and he's going to say as far as they know, you've complied with it. You are not going to know until you get into court. So if you believe you are going to court, then obviously you want to start the process of hiring an attorney. The quicker you get them on board, the more educated they're going to be. But time does not work in your favor on delaying this, delaying the inevitable decision until next year sometime when an attorney maybe can give you an opinion on the documents that are before you.

CHAIRMAN RICE: Ginny?

MS. PARSONS: Mr. Mink, I notice that you had an attorney on your -- in your budget that you discussed with. And did he review -- he's reviewed this EIS and that issue that we're discussing, has he looked at that?

MR. MINK: Yes, he reviewed it and we had a conference, and he had a few suggestions. But it meets all of his assessments. I don't know what an additional outside counsel would be able to say, other than what Mr. Ben Matsubara has already said.

MS. PARSONS: Could he provide you with a letter and maybe that might be sufficient for Mr. Starr?

MR. MINK: I could ask him for one, certainly.

MS. PARSONS: That he's reviewed it. We've paid for one attorney, that should be sufficient, as far as I'm concerned. Because in essence, our funds that go to Mr. Mink cover the budget that he covers an attorney with. And if his attorney is going to tell him that it's complying, and our Corp Counsel is saying that it's complying, that should be sufficient. I do agree that we do need some outside counsel to go forward if we have to go to court at a later date.

MR. STARR: I really believe that it's imperative

that we make sure that this document as accepted by this Board be successful, and I really have doubts whether as it stands now it will be. I mean if my fellow Board Members want, I'll be happy to particular through just a number of things that I notice on superficial reading. You know, I have a little reluctance to do it, but I'll be happy to do it if they want to hear them at this time.

But I really feel that these areas should be looked at. And this is not something we should rush into, because if we approve it and it's found lacking, then we're probably years away. Whereas if we spend a couple of months and a couple of

thousand dollars to make sure we get it right, and fine tune it, I think we will be in a good position to move ahead. So my suggestion really is to be cautious and proceed in a very well-considered way.

I've heard a number of reasons from David why we had to rush it, and why we should change our agenda schedule for the next meeting from the 22nd to the 24th, and this and that, and I don't -- I think our job is to make sure we get it right, not to get it fast.

CHAIRMAN RICE: Ginny?

MS. PARSONS: I just feel that we've had a great

deal of time, Jonathan, to give Mr. Craddick any kind of information we had questions on and let him respond to them. And as I recall, there was a meeting where I'm the only one that brought up the fact that the community plan didn't seem to be as well addressed as I'd like to have seen it. But you can't just keep delaying tactics to get this done when you have had sufficient time to respond to some of the things that you thought should have been in it, and give Mr. Craddick or Mr. Mink time to respond to what your concerns were.

I mean I definitely would like to see your concerns or hear your concerns, but I think that they're going to be

ultimately the people that are going to respond to them, and they should have been directed to the Director a long time ago.

MR. STARR: A number of my concerns have been repeatedly brought up in front of the Board. I don't know if other Board Members remember the numerous discussions.

Unfortunately, I don't have the minutes with me of those meetings but I do have them in my office, of a number of meetings where it was discussed and agreed about measuring the amount of water sitting in the bottom of the hole every

morning. And the Director had both verbally and also in writing agreed that that was part of the protocol. But I'm not sure if that's the way it's set out in all of this documentation.

I am not just talking about the basic EIS, I'm also talking about letters from the Director to various parties and lawyers. And I think that by possibly not being clear on the description of that protocol that it's consistent with the court order and also the original description by -- the original description letter that was signed by William Meyer, that in itself puts us in a difficult position.

Also, you know, I'll mention in Mr. Meyer's comments of July 30th, you have to remember he is the one who wrote the basis for the protocol for the monitor well. And then on page 2 of his comments he said it would appear from information presented on page 42 of the SEIS that the protocol followed while drilling the monitor well was not that which was recommended. And then he goes on with more technical wording.

Now, you know, I'm not desirous of trying to answer that question right here today, but I think that this is something that we should make sure that it is properly answered in the document that's finally accepted, because otherwise that

in itself will blow the thing out of the water.

There's also the matter about the judge saying that,

I'm sorry, it's the duty of the preparer to endeavor to develop a fully acceptable EIS prior to the time the EIS is filed with this office, through a full and complete consultation process, and shall not rely solely on review process to expose environmental concerns. But plaintiffs have requested to be consulted parties, and whether they have been consulted or not is a function of the process. And whether or not their comments are viable or not is not the issue, but the fact that they were not consulted parties in the process I think is

enough to cause us to get into difficulties. And that's a process issue that I think we should definitely answer properly before we accept it.

And as I said, I don't want to get into discussing these issues in depth today, but I do want to create, make sure that we get it right before we're done.

CHAIRMAN RICE: Mr. Victorino?

MR. VICTORINO: You know, Mr. Chair, first of all, I know Mr. Craddick wants to respond to that. But I'd like to call for a recess because I think we need to do some other

things, and I want to ask a couple of questions before we get further on.

CHAIRMAN RICE: Short recess.

(Whereupon a brief recess was had).

CHAIRMAN RICE: Back in order. Mr. Hiranaga?

MR. HIRANAGA: Mr. Chair, so is it my understanding that this has basically been presented to us today for review and discussion and comment?

CHAIRMAN RICE: That's correct.

MR. HIRANAGA: Okay. My personal opinion is we hire an expert consultant to provide an expert opinion and an expert

report, and you do that because you are not an expert in that field. So if our consultant is saying that the supplemental EIS is complete and it complies in his opinion, I have no reason to believe it does not. Also, if Corp Counsel says it meets with their review, and the Director says it meets with their review, I have no reason to believe otherwise, because I am not an expert in preparing a supplemental EIS. So my opinion is I don't see a need at this point to be looking for outside counsel.

If we receive a challenge to the Supplemental EIS,

which is probable, I think at that point we then have to

determine whether outside counsel is necessary because of that challenge. But I think we're kind of, in my opinion, jumping the gun. If we don't have faith in our consultant we should not have retained him in the first place. We were not part of that selection process. If he's saying he's satisfied, I'm satisfied. If Corp Counsel says they're satisfied, I'm satisfied. If the Director says he's satisfied, I'm satisfied.

CHAIRMAN RICE: Thank you. Mr. Craddick?

MR. CRADDICK: In response to that, and for the

record, since Mr. Starr and myself talked during the recess, I

myself feel so strongly that this is an adequate document, and I also feel very strongly that it will be challenged no matter what you do. No matter what you do, you hire an attorney, whatever you do it's going to be challenged. I believe we will win that challenge this time around. And if we do not win that challenge I will submit my resignation to this Board, and I will put that on the record. That's how strongly I feel that we have an adequate document before you.

CHAIRMAN RICE: Thank you, Mr. Craddick. Mr.

Victorino?

MR. VICTORINO: I will say this much, as a coach and as a player of many different athletic endeavors, when someone is that strongly committed that they're willing to put their whole career on the line for it, then I'll probably have to say I will side with that person. If you think so, then we will go along with you.

MS. PARSONS: Second.

CHAIRMAN RICE: /* Ginny, what were you going to say?

MS. PARSONS: I second that.

CHAIRMAN RICE: Mr. Starr?

MR. STARR: So what we have here is now we have the

Director in a position to try to drag the thing out as long as

he can, (laughter) so then years from now while the courts are

still going back and forth over it he can still have a job. So

I would like to have him set a maximum time limit, say 12

months. If it's not approved in 12 months will you then --

MR. CRADDICK: I am not in a position to predict --

MR. STARR: How about ten years? Give us a time

limit.

MR. CRADDICK: I'm not in a position to predict what

the court will do.

MR. VICTORINO: The courts do make it intangible.

CHAIRMAN RICE: Mr. Kushi, Board Member Hiranaga made a statement that I'm not so sure I heard you make. He said that if Corp Counsel says that this document is adequate then he's supportive, but I didn't hear you make that statement, nor your office make that statement.

MR. KUSHI: What I said is that in my review of the documents and the case and the process, I feel confident that the procedures have been met, the procedural process has been met to get to this point. I would never say that the document is adequate, that's your job.

MR. VICTORINO: Uh-huh, okay.

MR. KUSHI: And this is why we've scheduled at least
three meetings on this thing.

CHAIRMAN RICE: I just wanted to be sure.

Mr. Hiranaga?

MR. HIRANAGA: I guess for clarification purposes,
what I meant was I don't expect Corp Counsel to be an expert in
the contents of the EIS, but if they're satisfied that the
process has been met and they're satisfied that the process has
been met, I'm willing to go forward. The expert as far as

content of the document is the consultant who prepared it.

MR. VICTORINO: Mr. Chair, what else do we need to do? I mean we can sit here and talk, but what do we need do to move to the next step, which is our next meeting?

CHAIRMAN RICE: We don't have to have do anything. It's going to be agendaed for at least two more meetings, so there will not be -- a motion to accept it or deny would not be appropriate until the last meeting. So we're here to comment and discuss, and if there are no more then we will adjourn.

Ginny?

MS. PARSONS: I'd like to make a motion that anyone

with any type of questions or concerns within the EIS contact the Director in writing and copy the Chair so that these can be addressed, and that they be addressed before the next meeting adequately.

CHAIRMAN RICE: Any second to that motion?

MR. HIRANAGA: Mr. Chair, I don't think it's necessary.

MR. VICTORINO: I don't think it's necessary either, that's why I'm not going to second it.

MS. PARSONS: I'd like to make a suggestion that if anybody has any comments or any questions or concerns with this

document as we have it here today that they, in writing to Mr. Craddick and to Mr. Rice, copy Mr. Rice their concerns. And that Mr. Craddick respond in a timely manner before the next meeting. And not the night before, but within enough time that other issues can be brought forward.

MR. STARR: I have a number of concerns and comments, but I will not make them in writing because, frankly, I don't want to give any ammunition to people who may be contesting this, because they can take my comments at that point and use them directly to attack this document. So I do have comments and concerns, but I will not be making them in

writing and bringing them to the Director and Chair. Thank
you.

MS. PARSONS: Then I'd suggest that you have a
meeting with Mr. Craddick and discuss them one-on-one before
the next meeting, because all we're doing is taking up a lot of
time with these innuendos, and they're utterly innuendo at this
point until you make it a direct point to have it addressed.

And if it isn't addressed and if it is something that's of
relevance, then it should be in the EIS. And you're not doing

the public any good by having it up here and not expressing it,

and it needs to be discussed.

Why take up the public time, dollars, money, time discussing something that's an innuendo? It's still an innuendo. Go to the Director, go to the consultants, discuss them specifically, and if it's valid they need to be addressed. And if it's not valid then they need to tell you why it is not valid and they need to give you a complete determination. Don't bring it back to the Board and discuss it in front of the Board.

MR. STARR: Ginny, I understand you're trying to

tell me what to do, but I will not take your advice. I have no

desire to discuss these matters with the Director for a number
of reasons. Thank you.

CHAIRMAN RICE: Kent?

MR. HIRANAGA: I would just like to ditto Miss
Parson's comments.

CHAIRMAN RICE: All right, any other questions or
comments to be raised on the SEIS? Okay, the meeting is
adjourned.

(The proceedings were concluded at 10:00 a.m.)

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