

**MINUTES FOR THE
MEETING OF THE
BOARD OF LAND AND NATURAL RESOURCES**

DATE: FRIDAY, APRIL 27, 2007
TIME: 9:00 A.M.
PLACE: KALANIMOKU BUILDING
LAND BOARD CONFERENCE ROOM 132
1151 PUNCHBOWL STREET
HONOLULU, HI 96813

Chairperson Peter Young called the meeting of the Board of Land and Natural Resources to order at 9:10 a.m. The following were in attendance:

MEMBERS

Mr. Peter Young
Mr. Ron Agor
Mr. Samuel Gon III

Mr. Tim Johns
Mr. Jerry Edlao
Ms. Taryn Schuman

STAFF

Mr. Eric Hirano, ENG
Mr. Paul Conry, DOFAW
Ms. Tiger Mills, OCCL
Mr. Russell Tsuji, LD
Mr. Gary Moniz, DOCARE

Mr. Sam Lemmo, OCCL
Mr. Tim Lee, HP
Ms. Athline Clark, DAR
Mr. Dan Polhemus, DAR

OTHERS

Mr. Colin Lau, AG Office
Ms. Heidi Guth, OHA
Ms. Mari Thompson, KUHEA
Ms. Stephanie Fried, Environmental Alliance
Mr. Mike Tosato, NOAA Fishery Service
Mr. Michael Carroll, Attorney

Mr. Paul Horikawa, Attorney
Ms. Katherine Graham,
Mokuleia Beach Colony
Mr. Paul Nelson, past
Mokuleia Board Member
Ms. Jeanne Wood, Mokuleia
Resident

{Note: language for deletion is [bracketed], new/added is underlined}

The Land Division corrected a typographical error in the title Agenda Item D-7, by amending TMK from (3) 2-1-07:26 to (3) 2-1-07:36.

Item A-1 Minutes of April 13, 2007

Member Schuman recused herself.

Unanimously approved as amended (Johns, Agor)

Item F-3 Request for Authorization and Approval to Implement Adoption of the PAPAHAUMOKUAKEA MARINE NATIONAL MONUMENT Joint Permit Form for Permitted Activities Within the Northwestern Hawaiian Islands State Marine Refuge;

and

Request for Delegation of Authority to the Chairperson or Authorized Representative of the Department of Land and Natural Resources to Act as Signatory for Co-Trustee STATE OF HAWAI'I on Permits to be Issued for Activities Outside State Lands and Waters but Within the PAPAHAUMOKUAKEA MARINE NATIONAL MONUMENT

Mr. Dan Polhemus, Administrator of Division of Aquatic Resources, reported a request for authorization approval to implement adoption of Papahanaumokuakea Marine National Monument Joint Permitting Form. It was developed by a series of negotiations between representatives of the State of Hawaii and co-trustees: the Department of the Interior and the Department of Commerce. In the submittal is the outcome of the Memorandum of Agreement signed between these parties on the 8th of December 2006. Signatories were Governor Lingle, Secretary of the Interior, Kempton and Secretary of Commerce, Guitierrez. In this document it specified the development of joint permitting documents and protocols. That process has been going on for the last 5 months. It has consumed a large amount of time at all agencies. This includes an aggregate of 50 plus hours of official meetings by teleconference, conference calls, and face to face meetings with all representatives including NOAA National Ocean Service, NOAA National Marine Fisheries Service, Department of the Interior National Wildlife Service, the Office of Hawaiian Affairs (OHA), Department of Aquatic Resources (DAR), and Department of Forestry and Wildlife (DOFAW). There have been countless additional hours of individual agency staff time put into this. We have a document that has gone through tremendous amount of discussion, tremendous amount of balancing between the relative authorities, relative admissions, and the relative policy approaches of all the different entities put together by the Presidential Proclamation to co-manage the Marine National Monument. Ms. Athline Clark can address any questions to the underlining process and policy that went into this document. Mr. Colin Lau, representing the Attorney General (AG), can address the specific language developed by the Attorney General's office and address any questions regarding the underlying legal issues.

Ms. Athline Clark, representing Division of Aquatic Resources (DAR), reported the representatives did two processes in looking at the permit. First process is contained in

the Land Board handouts and submitted on the website as a comparative chart which looks at all the State conditions. Staff did a comparison of State Conditions to the new proposed General Conditions under the General Permit Template. Some of the conditions have been rewritten and some are not deleted, but are not contained in the regular permit because they will be part of regulations instead. Some conditions have been moved to Special Conditions because they will not be applicable to all permits. The representatives wanted to develop a Permit Template that had a series of General Conditions for every type of permit and have a series of Special Conditions that would still apply. Every permit will have Special Conditions. State Conditions, as previously existed, will not go away. In looking at the 6 permit types, not all will have the conditions applicable, but all permits will have some General Conditions applicable. That was how the division was done. The representatives had legal counsel from Office of the White House, Counsel of Environmental Quality, Department of Justice, Department of NOAA, Department of the Interior, State Attorney General and OHA. Each of those agencies has representatives here to comment as needed on the process.

The representatives looked at the Biological Disease and Transfer Protocols and formed a working group. That group worked with the latest information that was available from the research and dive community to develop new and innovative protocols that are state of the art for both Disease and Transfer of Alien Species and those are attached to the Land Board Agenda. This group based it on a whole series of reviews, literature search, and asked a number of people to look at and provide comment on the protocols from a myriad of different sources. We have people from that working group here to answer any additional questions. There are a couple permit conditions which they are still working on wording and those are noted. Everything has been incorporated or will be in a Special Condition. In a few instances, representatives tightened up the language to make it more enforceable than it currently is. When the representatives get the Special Permit Conditions it will be as enforceable as possible.

Member Edlao asked what permit fees charged? Is it one flat rate or is there a different fee structure for research? Ms. Clark responded currently there is no fee for the permit. Member Edlao then asked why is that? Ms. Clark stated the representatives did not set up a fee structure within the regulations for the State and there are difficulties on the Federal side with some of the permits having a fee set for them. There has been discussion about how they could change that and are looking at another tier of regulations to make that possible. Staff would have to change the regulation. Member Edlao thought it would help to defray costs. Mr. Polhemus interjected in absence of a special fund it would go into a general fund. It might not directly reimburse the agency for the cost of these services.

Member Johns asked if the Board approves this permit form today will it in no way invalidate the earlier refuge rules that the Board already passed nor change the Land Board process where the Board approves permits as they come to us now? Ms. Clark replied correct. Member Johns continued if you are suggesting that a permit were requested for activities in State waters then there will be a Special Condition Addendum attached to the General Permit and that would come to the Land Board for approval like it

has in the past? Ms. Clark responded yes and not just for State waters it would be Special Conditions for any permit anywhere out there. Member Gon asked it would come to the Land Board? Ms. Clark replied unless it is not in State waters then it would not necessarily come to the Land Board. The Board doesn't have jurisdiction there. Member Johns added the Board doesn't want to give up whatever model we have established on how we want to manage State waters as part of the Monument. The Board doesn't want this generalized permit to somehow water that down. Ms. Clark replied the General Permit Conditions are in some cases going to supplant the current conditions under the State. They will not water down the State regulations, but they will not be the same conditions the Board applied previously. Member Johns questioned if the Board approves this we will in fact be changing what we've approved already with regard to our permitting process? Ms. Clark answered you will be changing the conditions only in terms of how they are written, not in terms of the regulatory or authority process.

Mr. Colin Lau, representing the Attorney General's office reported Athline is correct and everything she says is basically what he would say in terms of legal counsel. He pointed out what the difference is between what the representatives are looking at for approving something that's been imbedded quite extensively line by line, paragraph by paragraph with the attorneys for the past 4 months which makes the process even longer. As for what the conditions that the representatives are supplanting, basically the terms of conditions in the prior NWHI State Marine Refuge permit were never imbedded by the AG's office although they are based directly on the rules. The AG's interpretation of those rules might be slightly different, that is why some of the conditions have been reworded and reorganized to reflect certain categories and activities will be subject to Special Conditions aside from what you are looking at. Example: Discharges of waste or water are all subject to law. Applicants cannot do that and its going to be in any Special Condition where applicable. Chairperson Peter Young interjected even if it may not be listed as a condition in the permit because it may still be a regulation, rule or law you still can't do it. Mr. Lau replied right. We're looking at the general form of the permit. You don't have to put every law on the books into the permit or address everything. Member Johns asked as long as the permit language doesn't say something that would allow somebody to do something or to conflict? He doesn't want to approve a permit form that would create some ambiguity with regard to what our jurisdiction and what our rules are. With the way this process is set up with the co-trustees this is the only public process that is established at this point. Ms. Clark answered right. In many ways this new language strengthens what happens because it has been imbedded, by as Colin Lau says, by 12 different attorneys from different agencies. The new language that's being suggested in the General Conditions is tighter and more legally binding language. The same would happen to the Special Conditions. If it is not as tight as can be that is the goal. It is not to take away Special Conditions, but to tighten it so it is even more legally binding and can be enforced by all the co-trustees.

Mr. Polhemus noted the permit documents the State previously had were interim instruments that were developed in a relatively short time frame following the signing of the rules that protected State waters in the NWHI. Staff knew at that time we would progress toward a co-managerial relationship with a Federal entity in terms of the

National Marine Sanctuary. Subsequently, it became a co-management arrangement in a National Monument with 2 Federal entities. The point is those documents were not developed in close collaboration with the Attorney General's office. It had certain ambiguities and certain aspects which staff probably should have done differently had staff engaged with the AG's office from the start. When staff had gone back into this process all the attorneys from all the agencies were involved right from the get go. The result is the language is considerably tighter and we have been assured by the Attorney General's office preserves the State's authorities and interests and doesn't give anything away. Member Johns stated that was his main concern in regard to the earlier permit form. Mr. Polhemus answered we are not in the position to judge the legality and that is an Attorney General's job. Member Johns asked can you point me where there is language in the General Permit specifically says it doesn't change in the rules part any of our existing? Actually, not the permit, but the refuge rules that they passed. Mr. Polhemus replied that's in the MOA. Ms. Clark added it's in the Proclamation and in the Federal Register that the jurisdictions remain intact. All the legally binding documents have specific language that state that the jurisdiction remains intact. Mr. Polhemus clarified the Proclamation addresses jurisdiction and the MOA addresses authority.

Ms. Heidi Guth, advocate for Native Rights for Office of Hawaiian Affairs (OHA), came before the Board a couple months ago with a lot of concerns. Chairperson Young made sure OHA had adequate representation in this process. People have been willing to listen to their concerns and came at it at a legal aspect as well as their beneficiaries' concerns. She was part of the team that helped work on the General Permit Conditions and she would agree she has no problem with this General Permit. However, she would like the Board to consider the option of the Special Permit Condition because that is how OHA is coming about this. Staff has requested some of the Federal attorneys to reopen the application process itself to look at the Application Form and the Application Guidelines to make sure they can ask better questions as the intent. Staff is drafting language currently to address specific concerns like bio-prospecting and things like that. Which were addressed in the State permit, but were not imbedded by the AG's office and is now being imbedded by all these other attorneys, but there are options to get in protection. She is in an awkward position because she is part of the community, part of this management board for the Monument, but she is still the advocate for Hawaiians. She will be reviewing the do not send documents and she is advocating for OHA's beneficiaries that they need to be part of the public process, too. As much as the Board has the authority to assure the State regulations and requirements are available and completely covered by the Special Permit Conditions. She urges us to do that and allow the public review process to be complete.

For the General Permit, State laws don't have impact on the Federal agencies while the Federal laws have an impact on the State. That is why the Special Permit conditions for activities in State waters. Member Johns inquired how do you get your public input when you do your reviews? Ms. Guth answered no, anything for review goes to her office, then it's assigned out to her OHA staff, and then staff consults with various beneficiaries who have expertise in those areas. Then they incorporate those comments into staff's comments and they send it back to DLNR staff. Member Johns asked your beneficiaries

don't have a public meeting like this to weigh in on? Ms. Guth replied no that is why the Land Board Meeting is so important. Member Edlao asked when does the public get to see the information? Mr. Polhemus replied the permits come in and are sorted and then sent out for review. The lag is between the receipt of our permit coordinator and when it gets to OHA. He isn't sure how long that is but it should be timely because staff is on a 90 day process from receipt to when it comes back to the Board. After they get initial review, those reviews are synthesized and sent it out to various people with different concerns that form the basis for the submittal. The public will see the submittal. Member Edlao asked when? Mr. Polhemus continued that is an open question because they are still talking with Office of Information Practices (OIP) about that. Technically, it's posted like any Land Board submittal. Chairperson Young added we want to work on a program because of the overall 90 day review. His goal is to have a public review at about 45 days. At 45 days prior to action staff will be posting it on the DLNR website. He requested with OIP about what needs to be withheld and what is private information. Staff has a response from them now and in the next week OIP will be working with staff to work on getting the process going to get the public review at about 45 days. The internal review as well as the Agency review and get some comments on that. Member Edlao asked is that something the Board has to act on to ensure to have that 45 day? Chairman Young replied there will be times when there maybe quicker action. It isn't fair to say there will always be a 45 day review, but it is fair the Board could support the idea wherever possible to make the effort to get a 45 day public review.

Mr. Polhemus asked staff has a variety of submittals that come before this Board; if you make a precedent of putting the NWHI permits out at 45 days does that set a precedent for other things? People might think their houses or businesses are important and say we want 45 days as well. Chairperson Young replied that is more a policy than a statute. There are some applications that come before the Board that actually has a public hearing before it comes to the Board for action. He doesn't think it would be precedence then.

Member Johns asked is the confidential information in the applications information the Land Board takes into account when approving the permit? How does that work? Mr. Polhemus stated it can be. If its pre-decisional personal information should be withheld once a permit has been granted or comes up as a submittal and staff decides to put it forward through the Board's approval. Public interest is heightened and at that point some of that information may become disclosed. Member Johns stated you can see what the issue is. Then he asked let's say the Land Board is making a decision on a permit and you're keeping information from us because someone says its confidential how is the Land Board going to make the decisions? Mr. Polhemus replied the Land Board will see all the information the question is whether the public will see everything you see?

Ms. Mari Thompson, representing Kuhea Hawaiian Environmental Alliance, reported they have some serious concerns with the joint permit. With all the effort and discussion time given the public was not consulted at all during the development of the joint permit. In comparing the current State's Permits, General and Special Conditions and what is suggested for the joint permits, there are significant changes. One of the changes that concern her is Permit Template page 2, No. 4 talks about what would happen if an

applicant violated the permit and what type of retribution or punishment would be taken against the applicant which is immediate cessation of activities. State rule says the Board shall deny application based on the past violation while in the Federal Joint Permit, it tends to consider denying a permit. The State rules it has to deny a permit. It's these shifts in the standard that concern them because State rules for the State refuge is the most protected. It is a visionary refuge and representatives need to do all they can to ensure the high standard of protection is maintained. Ms. Thompson suggested having a joint permit for whoever wants to access State waters would have an additional set of Special Conditions along with the General Conditions. At the Jan. 26, 2007 Board Meeting, where the Board went over in detail every permit condition, should be the standards staff applies to every permit to access State waters. Staff should use the permit guidelines or instructions imbedded by the AG's office. People will use it to inform their decision. It is important to lay out what the Board's intents are. She suggested the Board formally adopt the permit guidelines and instructions and conditions that they have been working on up to this point. To establish this is the standard we want to maintain and that we have no intent of deviating from that.

Ms Thompson also suggested we formally adopt the OIP opinion that was referenced earlier. In that letter it linked a specific standard for ensuring transparency and public involvement which staff really need. The OIP opinion is significant enough that staff should adopt it formally. She agrees to always have 45 days is hard. Staff should allow room for modifying them as the case may be, but as a general standard we should embrace that. Ms. Thompson is concerned the Board is not going to be kept in the loop of the decision making. For example: the suggestion staff will be the one to review the permits to access the Monument in general, but not State waters. She understands there is no jurisdiction, but she is confused. If the Board doesn't have jurisdiction to sign off on a permit to access Federal waters in the Monument, of which they are co-trustees, then how will the staff? Staff is an extension of the Board's authority. If they can't sign off the Board can't sign off. Because the Board is co-trustees the Board should have the authority to sign off on that. In order to manage the State waters we should have a comprehensive view of all access to the NWHI and that includes going over permits accessing only Federal waters. If you are going to sign off on it you better know what it says. Not signing off on it means you don't agreeing with it. She thinks it's important as far as maintaining the authority of the State and the Board of Land & Natural Resources and as well as working together hand in hand with the Federal agencies.

Member Johns asked the AG representative who is the co-trustees? Mr. Lau answered the Land Board has the decisional authority through chapter 171 and specifically Land we have jurisdiction over in the NWHI out to 3 miles. Beyond 3 miles State doesn't have jurisdiction, it's a Federal concern. Member Johns asked what other obligations do we have as co-trustees of a Monument that includes land and water outside of what the State of Hawaii generally has jurisdiction over? Mr. Lau replied based on the Memorandum of Agreement says that based on the State's jurisdiction shall not be administered to enlarge. We are not enlarging beyond 3 miles on when we signed as co-trustees. However, the Federal co-trustees would normally only issue a permit under their jurisdiction prior to enter into the MOAs they now want us to sign off to their form with regard to their terms.

We don't have the authority to normally sign off on it, but the Federal is asking us to. In terms of the liability no we are not because the jurisdiction is signed off. Member Edlao asked then why sign off? Mr. Lau replied because the whole idea behind co-trustees is a concerted, coordinated effort between each of the entities. Member Gon added in light of a better situation the life of a co-trustee we were opposed to a particular permit that did not involve State waters what would be the authority impressed? That would be based on the co-trustees. It wouldn't have any grounding or authority. Member Johns asked what a co-trustee means? Because he is a trustee and he works for trustees when you take on trustee fiduciary obligations you can't just say I don't have the authority to stop something, but that doesn't mean you look the other way. And if we're the trustee is it ok for us to say just because we don't have the authority to stop something once we consented to be a trustee shouldn't we be looking at what our fiduciary obligations might be with regard to commenting on what happens with the rest of the trust assets? Mr. Lau replied we think we had input to things beyond our State jurisdiction, but as for if we have any real authority to stop a permit base on that? Member Johns answered no he doesn't think we do. I just wanted to say is it enough to say we don't have any authority so we won't get involved. Mr. Lau answered probably. Member Johns continued if the land Board is the trustee implementation tool. Mr. Lau stated correct.

Ms. Thompson continued the question whether you have jurisdiction or authority or not is a very important one. If the Board decides it does then it should lie with the Board and not with staff. This is a 3 way marriage where everybody's interests are co-mingled. The way the permit is written now you are empowering one of your designees (one of your staff members) to make a decision about your marriage. If this decision is going to be made on behalf of the State it should come before the Board.

To highlight some other concerns. Looking at permit template on page 4, No. 12 another example like No. 4 where State Law is violated by the joint permit. It's talking about the disposal of hazardous waste. Towards the middle it says "No such material may be left in the Monument after the departure of the permittee unless it has been previously approved by Monument staff." This means anywhere in the Monument whether State or Federal waters. If someone has hazardous waste and they need to leave it there they could just call Monument staff which would be DLNR, DAR or one of the Federal agencies and ask if they can leave it there. And staff would say yes they can. She thinks that is a significant decision. She is concerned with leaving that decision up to staff with no notification given to DLNR at all.

Mr. Polhemus stated the Attorney General indicated this does not violate State law. He commented "he believes this mis-states condition No. 12 which in fact does put responsibility on any permittee rather than any other contingencies which the co-trustees were trying to consider. It is important to recognize a joint and cooperative effort is envisioned upon devise of territorial concerns jeopardizes the entire effort. Member Johns replied it doesn't answer the question. Mr. Polhemus added the contention is it violates State law. Member Johns says it doesn't violate State law. It looks inconsistent. If State law prohibits this how can it be approved by Monument staff? Mr. Lau answered the concerned could be addressed in the permit approval process that if they are going to bring hazardous materials into the NWHI that it should be made known

ahead of time with the various co-trustees and they can weigh in then there will be some future contingency where for whatever reason they might have to leave the monument early and their research will follow them out. We tried to cover as many contingencies as possible. It is a remote contingency. It would be addressed within that application and that activity. Then thinking about special conditions how that would apply on how that material can be dealt with. To the extent that prior arrangements may be made that is only reason why that condition was left in. Member Johns reported we could never be prior arrangement where hazardous materials could be left in State waters and still be consistent with our rules. Is that right? Mr. Lau that's true. It could be a Federal concern or issue. Member Johns then stated right then the Feds could agree to leave it there for a week or whatever, but if it is in State waters it will violate. Mr. Lau replied correct. Mr. Polhemus interjected Member Johns just put a Special Condition in. That's what the Special Conditions are for. The permit has to apply across the board to the 3 jurisdictions where certain clauses might not look quite perfect on the State's stand point, but we could address those at the Land Board with a Special Condition. Whereas as you pointed out the Federal partners might be ok. Member Gon stated he could also envision for example in a user end state jurisdiction leaving sharp or hazardous material at a location for a Kure, but it would be in violation of State law if that remain to be the case. But in the course of a season there's anticipated storage of those materials there and a final removal. You could have those kinds of contingencies in which the violation is not ultimate. You've got temporary conditions set up by the Monument staff with their approval and with a plan to deal with the material. Ms. Thompson added this highlights the significance of the decisions we are making and the reasons why we need to have as much check off as possible. We are talking about whether the Feds will be the ok with removal of hazardous wastes for example. Then leaving it up to DLNR staff's decision on whether we agree with that. As it is this is the only opportunity to have the public be involved. This document highlights what happens when the public is not involved and we have these kinds of inconsistencies. That is the reason why we need to have the actual Board to check off on permits to access Hawaiian waters.

Mr. Polhemus stated that the signatory should come to the Chairperson of BLNR and would not necessarily come before the full Board. It would still be a submittal. We would still run it internally with a staff review like any other review. It would come with a recommendation to the Chairperson. It could be an approval or a denial the Chairperson could sign off either way yes it would be a decision. It could be a deferred.

Stephanie Fried, representing Environmental Defense, reported. She would agree with the OHA representative and the attorney from KUHEA. Passed out handouts. When there are two Federal agencies and a State agency coming together the Federal agency can't bow down to the State agency. The general conditions on this permit page one stipulates that activities will be carried out in accordance to the Monument rules alone. The applicant is not signing up to work under State rules. Federal law is much loser on this where you could discharge, but State would not allow. She would concur with the OHA attorney's suggestion to have required special conditions for activities in State waters. She would not approve this general conditions package without that language in it. All activities will be subject to these conditions. The last refinement was on January

26, 2007 during the NOAA permit hearings where the Board went through the whole list and made it clear what we wanted in and out. It's very important because that NOAA permit has never been release to the public. They have not seen it. Not a single permit has been released. In the submission given to you there were many errors and flawed. She pointed out on a chart an example of permit holders. Under State Permit Conditions item 9 the State has stated affirmatively no food, chemical; waste will be described in State waters. The Monument language is not a prohibition on dumping, but a prohibition of dumping without a permit. You can get a permit for dumping in Federal waters, but you cannot get a permit with the State. It's not a fair comparison. The waste log was eliminated because it did not meet Federal. Instead it's replaced with a monthly report.

Mr. Mike Tosato, regional administrator for NOAA Fishery Service reported outside of the State waters where the Federal authority and jurisdiction lies and characterizes the policy discussion on that issue. The co-trustees made a policy statement where they want this Monument because it is special. It's a never before tried Federal and State National Marine Monument that as a policy we want to do all activities as co-trustees.

Mr. Polhemus stated some permits could take a couple weeks to six or seven weeks. Some permits are more complex than others. If staff sees problems in the initial review we may have to request a consultation with the people who are submitting the permit in which case we sit down with them and work out a whole range of issues. We want to bring a well imbedded non-controversial permit before the Land Board at the best extent as possible. If we see red flags we'll resolve it before it goes to submittal.

Member Johns made a motion to approve the recommendations with some amendments. On No. 2 he would like to ask that monthly reports be given to the Board and be made available to the public for the permits that will be signed by the Chairperson or designated representative. Mr. Polhemus replied he believes that is required under State law. Member Johns continued Change Condition No. 3 from quarterly to monthly. He then asked do we need to do a rule change to do that? Mr. Lau replied no. Add another condition that there will be a set of special conditions staff will bring to the Board to clarify activities in State waters and those special conditions will be consistent with State law, rules, regulations, and the Land Boards decision on January 26, 2007. Mr. Polhemus asked are you talking about the NOAA permit? He noted the NOAA permit was never signed by the applicant therefore it was never fully executed which is the reason why it was never released. It's not a valid permit. The applicant was unwilling to sign that permit. Therefore they don't have a management permit for State waters. Member Johns asked is it because the applicant wasn't comfortable with the conditions the Land Board came up with on January 26, 2007? Mr. Polhemus replied he can't speak for the applicant. Member Gon added nonetheless it's those conditions we're preserving. We want those conditions as stated from the January 26, 2007 meeting for that permit. Chairperson Young added its coming before the Land Board and can be addressed. Mr. Polhemus stated those conditions were largely based on the language as noted was not fully imbedded by past AGs. Those AGs had certain concerns. Member Johns asked what to do with the time issue? Chairperson Young stated it is his intent to have the 45 day public review and we should do that. If the Board wants to have as a policy

statement that would encourage the same thing for a 45 day public review wherever possible. Member Johns replied he'll add that as additional conditions. All the 2007 permits will be made available to the public. Mr. Polhemus replied all the 2006 permits already have been made available to the public and 2007 yes.

Unanimously approved as amended (Johns, Edlao)

Item I-1 Request for Approval to Enter Into a Reburial Agreement with EW Kahala Beachfront LLC for the Human Skeletal Remains of Two Individuals Interred at 4577 Kahala Avenue, Honolulu, Hawaii, 96816

Unanimously approved as submitted (Johns, Schuman)

Item L-1 Authorization to Enter Into a Memorandum of Understanding Between the State of Hawaii, Department of Land and Natural Resources; and the United States Department of Agriculture, Natural Resources Conservation Service, and various City and County of Honolulu Agencies, Regarding the Manoa Watershed Project

Unanimously approved as submitted (Johns, Agor)

Item D-12 Set Aside to the Department of Transportation for Addition to Honolulu Harbor Purposes and Transfer of General Lease No. S-4488 to Department of Transportation, Harbors Division, Honolulu, Oahu, TMK: (1) 1-2-25:17.

Mr. Tsuji, administrator for Division of Land, reported a transfer of lands at Sand Island known as Snug Harbor over to Dept. of Transportation, Harbors Division. The lands are currently encumbered with the lease therefore the lease will be transferred as well. Member Johns stated the Board request they report back to the Board on how the relocation efforts are.

Moved to approved with additional condition. The Land Board amended Staff's Submittal by adding a Recommendation No. 3 as follows:

"3. DOT-Harbors will keep the Land Division staff apprised of its negotiations with the University of Hawaii on relocating the Marine Center, and upon arriving at an agreement, the Land Division staff will report to the Land Board the substance of the agreement to relocate the University of Hawaii marine Center."

Unanimously approved as amended (Johns, Agor)

Item D-4 **Reconsideration of Rent under General Lease No. S-5206 to Kapaa Congregation of Jehovah's Witnesses, Lessee, for Church Site and Related Religious Purposes, Kapaa, Kauai, TMK: (4) 4-6-14:110.**

Unanimously approved as submitted (Agor, Gon)

Item D-15 **Issuance of Land Patent in Confirmation of a Portion of Land Commission Award No. 2715 to Hinau, situate at Wailau, Koolau, Molokai, TMK: (2) 5-9-006:005.**

Unanimously approved as submitted (Johns, Agor)

Item D-10 **Termination of LOD No. S-27016 Issued to Caine Enterprise (Hawaii) Corporation and Grant of Term, Non-Exclusive Easement to Paradise Ridge Limited Partnership for Access and Utility Purposes, Kamaole, Wailuku, Maui, TMK: (2) 3-9-004:061 por.**

Mr. Tsuji of Land Division reported he had no changes.

Mr. Paul Horikawa, attorney representing the applicant, indicated that they might be requesting consent to mortgage the easement in the future.

Unanimously approved as submitted (Agor, Johns)

Item D-13 **Amend Prior Board Action of July 14, 2000 (D-1), Rescind Prior Land Board Approval and Set Aside to Housing and Community Development Corporation of Hawaii for a Senior Project With Assisted Living and/or Healthcare Support Services and a Management Right-of-Entry, Kaakaukui, Oahu, TMK: (1) 2-1-51: portion of 9**

Member Schuman recused herself.

Mr. Tsuji reported he had no changes.

Unanimously approved as submitted (Gon, Johns)

Item D-14 **Amend Prior Board Action of August 24, 2001, Item D-29; Issuance of Lease to Yee Yuen Trust for Private Noncommercial Pier Purposes Pursuant to Kaneohe Bay Piers Amnesty Program, Kaneohe, Koolaupoko, Oahu, TMK: (1) 4-5-104:022.**

Unanimously approved as submitted (Johns, Schuman)

Item D-16 Approval for leases, easements, licenses, revocable permits, concessions, or rights of entry pursuant to Hawaii Revised Statutes Section 171-11 covering lands set aside by Governor's Executive Order Nos. 0980 dated March 25, 1942; 2089 dated May 23, 1963; 2944 dated December 5, 1978; and 3778 dated July 26, 1999 as described hereinafter.

Unanimously approved as submitted (Johns, Edlao)

Item K-1 Conservation District Enforcement File OA-07-31 Regarding Alleged Unauthorized Repair/Reconstruction of a Boulder Retention Within the Conservation District Located at Mokuleia, Island of Oahu, TMK (1) 6-8-003:018

Member Schuman recused herself.

Mr. Sam Lemmo, administrator for Office of Conservation and Coastal Lands, reported this is a violation case regarding unauthorized construction of a boulder retention within the Conservation District at Mokuleia, Island of Oahu. He had received a letter from Michael Carroll requesting a 30 day extension to enable them to respond to the violation notice. The owners need additional time to obtain an engineering evaluation of the existing structure and to respond to the charges that were brought against them. It's customary to entertain the request.

Member Johns asked will the owners ask for a contested case anyway? If they are the Board should just do it.

Mr. Lemmo replied he has no problem with the extension.

Ms. Katherine Graham, a board member of the Mokuleia Beach Colony and a former President, reported the prior owners, children and grand children have put up this unauthorized sea wall. Their sea wall is legally permitted with public access to the residents of Mokuleia Beach. They need help because it's not safe; they don't have access to the beach, and hinges on their property values. The 30 day request came up after owners were notified over a year ago, but there was a problem and it came 48 hours ago. They had at least a year to bring in an engineer.

Mr. Michael Carroll, attorney for the owners, explained the reason for the extension is they received notice of the violation earlier this month. In response to the allegation, the owner would like to get an engineer to evaluate the condition of the wall. And prepare a response to members of the Board. With regard to the improvements, his client did with respect to the wall, a large storm came in during the winter where several trees collapsed and large cracks appeared in the foundation. The owner's mother who lives in the house is very elderly. The owner went in and repaired the wall as best as he could and had a qualified contractor do the work. The wall is in better condition than it was before the

improvements. The owners did meet with DLNR staff last week and suggested they go forward with the process of re-engineering the wall and go through the process of re-permitting it. And, the owners plan on going forward with that process.

Member Johns asked is it possible to have this structure made legal?

Mr. Lemmo replied no. Staff met with the owners and he made it clear that the wall is illegal from staff's perspective and the wall has to be removed which is consistent with our policy that this Board established. What staff told the owners to do is if they wish to build a wall they should file an application with the County. In the meantime, there needs to be action to remove the wall.

Member Johns reported the Board is not going to allow a wall in the Conservation District. If you think you're going to be able to do that, it's not going to happen. If the owner is going to have the engineer convince DLNR to have a wall in a Conservation District it won't work.

Mr. Carroll answered his client is concerned with how close the home is to the shoreline area. Member Johns asked then that is the exception? Mr. Carroll replied no the issue is to protect the property. He thinks a neighbor years ago had built without a permit to construct a wall and exacerbated the problem with the wave action against his client's property. The Mokuleia side coast is all hardened and ends at his client's property. The owner is hopeful going through this process they will be able to obtain a permit and address everyone's concerns. He will submit a request to defer this matter.

Ms. Graham replied it has taken Mr. Carroll's client 2 years to evaluate this. They haven't had access to the beach because of their locks. Mr. Carroll stated he believes the wall is in better condition than before the work was done. There was a violation about 2 years ago. DLNR asked them to remove the rocks on the beach and that was done.

Member Johns asked what are you going to do if the Board doesn't approve the 30 day extension? Mr. Carroll replied they would be forced to request a contested hearing. Member Johns inquired if that happened the wall will not be removed until completion of the contested case hearing process or settlement is reached. Is that right? Mr. Lemmo answered that is his understanding.

Member Johns informed the community to think about if we say no to the 30 days today and we go into a contested case mode then that is quasi-judicial it could take several months. Maybe 6 months to a year. If there is any chance in the 30 days there could be some kind of agreement reached for the preferences of his client and at the same time the violation issue can be cured within those 30 days with the use of an engineer. As far as the public is concerned, the only way you can get out within 60 days is if they don't ask for a contested case today. It sounds like they will ask for one. Is that a fair statement?

Mr. Lemmo replied yes. Obviously, they will ask for a contested case hearing. Even if there is an opportunity to reach a settlement about the wall without having to do the

contested case even that will take some time to complete. Don't know how long that will require. The owner will have to file an application with the County which involves their own set of hearings and review. Then payment of fines because of inoperative uses and the owner would need to remove the remnants of the offending structure.

Member Johns asked what would the benefit be for the deferral today? Mr. Lemmo replied the owners wanted to talk to an engineer about what some of the long term alternatives might be. Then they might be in a better position to decide if they need to ask for a contested case hearing or not. Or cooperate with the Department.

Chairperson Peter Young asked the benefits be addressed for the neighbor is concern about having access? Maybe the engineers can address that? Mr. Lemmo replied that could be one of them. Mr. Carroll added they would be happy to discuss the concern with the neighbors in regards to the wall. In addition they would like to present their position to the members of the Board and ask for the 30 day extension. Mr. Lemmo reported what the owners to know need shouldn't take longer than 30 days to acquire that knowledge for the purpose of this proceeding. Member Johns asked how about 2 weeks? Is that too short? Mr. Lemmo replied no. If this is important to the owners they can do a qualitative review. He should suggest going with that.

A neighbor stated she spoke with the owners personally. The owners did extend their wall so folks could not walk on their wall. They said the neighbors were trespassing. This has been happening for years. One day a crane was brought in to move the boulders in. Chairperson Young stated we need to do this procedurally. We recognize the violation. If we go into a contested case hearing it will stay there and it will take time. There will be some resolution, but we don't know what that is. Or there is an opportunity for the neighbors to talk about it to see if there is a resolution that we can address it next month which we don't know what that is.

Neighbor replied they kept piling up the boulders without desisting.

Member Johns asked why is the fine so small? Mr. Lemmo said because they can only fine someone \$2,000 per violation. They violated the stop work order on several occasions and they were notified in writing that they were in violation and they failed to stop. We had proof of it and we could only prove it 3 or 4 times they were working when they weren't suppose to. The rule states if you don't stop and continue working after notice you will be fined \$2,000.

Another neighbor added the safety issue is terrible. All that concrete is coming up in chunks. They all have cut their feet getting across those boulders and Jeannie had sprained her ankle. Someone could break a leg or get thrown in by a wave.

Mr. Lemmo stated people need to understand the situation cannot remain as is for perpetuity. There is going to have to be a change it is going to have to be acceptable or from an engineering perspective and public safety perspective. That's going to be the

outcome of this case. Chairperson Young added that could be done cooperatively or by contested case hearing.

Mr. Paul Nelson past Mokuleia board member reported he doesn't think anyone wants to disturb Miss Dailey or make life difficult for her. But the first collapse of the walls happened 2-1/2 years ago a complaint was made and the rocks were not moved for a year and a half. There was no effort to do this. When they were finally put back the rocks were put back in a haphazard way by a bunch of guys that were not engineers or even had licenses. What assurance can we have that another 30 days enduring which we talk with them as if we cooperate. What assurance do we have that this is just a seeking for delay? Chairperson Young replied in 30 days the Land Board will remember these conversations. Mr. Nelson stated they have talked with DLNR and it has been mentioned that at some point an engineered sea wall could go in. We've even cooperated to the point of thinking that a walk way could be down below the level of eye sight of their home and yet still be safe. He asked what do we have to discuss with them in the next 30 days? That is his problem. Chairperson Young answered Mr. Carroll indicated he wanted to get an engineer and in that process is committed to working with you.

Mr. Nelson replied my apprehension is they had 30 years to hire an engineer to evaluate the wall. As the issue of the wall has escalated there have been more opportunities for him to do this. It's suspicious to them when it's come to this all of a sudden he wants to 30 days to hire an engineer he could have hired 30 years ago.

Chairperson Young stated he understands your concern. There's a chance to get something resolved in 30 days and that's not a long time. Especially when it's been a long issue. But he is concerned with the frustration you will go through that nothing changes for a long time when it goes into contested case. It may end up in contested case 30 days from now and that frustration may only start with a delay in 30 days. Then you have this initial hope. Its either going work to a resolution by working with you or it goes to contested case and you'll be frustrated. Whether contested case starts today or 30 days from now.

Ms. Jeanne Wood is an owner and part-time resident of Mokuleia reported her concern is access. This will go on and on. She asked is there any method they can use now to get legal access to the beach while this process is going on? Chairperson Young suggested that should be your initial discussion during this interim. However it works whether you use this initial 30 days or through the contested case process. Chairperson Young asked is there some way to get some limited access over where you are to where you want to be? Ms. Wood if we are denied the access during this 30 days do we have any recourse? Chairperson Young replied we are not the body to determine that. He thinks the message has been sent and received of the concern. Mr. Carroll added they will work with them to resolve this issue. Mr. Nelson stated he will go along with the 30 days. As long as they get access and if there is a really clear plan and DLNR will likely approve that plan for a safe sea wall and public passage. He doesn't see cooperating much more.

Chairperson Young reported he has every expectation that if it doesn't go well in 30 days and it comes back to the Board we'll see you again and it won't be the same frame of mind. The Board will hear a lot stronger statements about this? This will be late May. If you go into a contested case it will take a long time and you would have to hire a lawyer and it will not be cooperative.

**Moved to defer for 30 days.
Deferred (Johns, Agor)**

Item K-2 Time Extension Request for Conservation District Use Permit (CDUP) KA-3142 for a Single Family Residence Located at Haena, Island of Kauai, TMK: (4) 5-9-005:020

Unanimously approved as submitted (Agor, Gon)

Item M-1 Conveyance of Parcels 10B and 11A, Honolulu-Pearl harbor Road, Prison road Section, F-44 (3), Honolulu, Oahu, Tax Map Key: (1) 1-5-13:8 Abutting parcel Tax Map Key: (1) 1-5-13:5

Item M-2 Conveyance of Remnant 3, Hawaii Belt Road, NRH 14-C & 14-D, North Hilo, Hawaii, abutting parcel Tax Map Key: (3) 3-2-3:2

Item M-3 Issuance of a Revocable Permit to Eugene Gillis dba Excavation Services, Keehi Industrial Lots, Kalihi-Kai, Honolulu, Oahu

Unanimously approved as submitted (Johns, Gon)

Item C-1 Acceptance of Hearing Officer's Report on a Public Hearing for Two Proposed Additions to the Forest Reserve System on Kauai, and Approval and Recommendation to Governor for the issuance of Executive Orders: 1) Addition of approximately 9,216 acres to Puu Ka Pele Forest Reserve, Waimea District, Kauai; 2) Addition of approximately 142 acres to the newly designated Mana Plains Forest Reserve, Waimea District, Kauai.

Item C-2 Authorize the Department to Enter into a License Agreement with the U.S. Coast Guard for Use of Lehua Island to Conduct Ecosystem Restoration Activities

Unanimously approved as submitted (Gon, Johns)

- Item D-1** Amend Prior Board Action of October 28, 2005 (D-3), Grant of Perpetual Non-Exclusive Easement to the Department of Water, County of Kauai for Overflow Drainage and Channel Purposes, Omao, Koloa, Kauai, TMK: (4) 2-7-04:11.
- Item D-2** Cancellation of Governor's Executive Order 2709 and Reset Aside to the County of Kauai for Police Substation and Teen Center Purposes and Issuance of a Management Right-of-Entry, Koloa, Kauai, TMK: (4) 2-8-08:17.
- Item D-3** Amend Grant of Non-Exclusive Easement S-5674 to Charlotte A. Seyer, Kapaa, Kawaihau, Kauai, Hawaii, TMK: (4) 4-6-04: Portion 28.
- Item D-5** Cancellation of Governor's Executive Order No. 896 to the Board of Supervisors of the County of Kauai and Reset-Aside to the County of Kauai for Maintenance Base Yard, Public Affair and Recreational Purposes and Issuance of a Management Right-of-Entry, Waioli, Halelea, Kauai, TMK: (4) 5-5-03:02.
- Item D-6** Rescind Prior Board Action of March 22, 1996 (Item D-1), Direct Sale of a Perpetual, Non-Exclusive Easement to Douglas Hardy Knowlton and Patricia Ross Knowlton for access and utility purposes, Olaa Summer Lots, Puna, Hawaii, TMK: (3) 1-9-03:Kalaninauli Road.
- Item D-8** Issuance of Month-to-Month Revocable Permit to Kove's Equipment Rental LLC, Waiakea, South Hilo, Hawaii, TMK: (3) 2-2-50:81.
- Item D-9** Amend Prior Board Action of January 25, 2002 (D-18), Approval of a Set Aside to the Division of Forestry and Wildlife; Approval of Set Aside to the Division of State Parks; Approval of natural Resources management Guidelines and priorities for State Lands at Puu Waawaa and Puu Anahulu, North Kona, Hawaii, TMKs: (3) 7-1-1:1, 6, 4; 7-1-2:1, 8, 13; 7-1-3:1, 2, 16; 7-1-4:1, 18.
- Item D-11** Issuance of Management Right-of-Entry Permit to the Division of Forestry and Wildlife and Delegation of Authority for the Issuance of Right-of-Entries at Moanalua Valley, Oahu, TMKs: (1) 1-1-12:2, 15, 35 and 1-1-13:1, 2.

Unanimously approved as submitted (Johns, Schuman)

Item F-1 Request for Approval to Amend contract No. 52740 to Provide \$45,000 in Federal Funds for a University of Hawaii Project Titled "Local Action Strategy to Address Land-Based Pollution Threats to Hawaii's Coral Reefs" (Contract Period: 9/15/05-3/30/08)

Unanimously approved as submitted (Johns, Gon)

Item F-2 Request for Final Approval of Temporary Five-Month Closure to Bottomfishing for All State Marine Waters Surrounding Existing Bottomfish Restricted Fishing Areas within the Main Hawaiian

Mr. Polhemus reported the National Marine Fisheries has determined that the necessity of additional mortality reduction in this fishery exceeds that can be provided by the State. The new network of bottom fishing the Board had approved in 9 Dec. 2006. At the most recent meeting of the Western Pacific Fisheries Management Council options were explored as to how to deal with this additional necessity for further mortality reduction. In light of the reauthorized Magnuson's/Steveson's act which was passed in Jan. 2007 the council in consultation with the Pacific Islands Regional office National Marine Fisheries determined they would like to make a transition to attack based fishery. That's a total allowable catch which means they set the total catch for the year end of the fishery. Once that catch is breached that fishery is shut down until the next fishing year. It will take 2 years to get attack based management in place. Therefore an interim action is necessary to provide interim management for 2007-2008. The Federal Government determined the proper interim action would be a summer closure of 5 months from May to September. They have asked the State to mirror this closure in State waters. We have been asked directly by the Assistant Director of National Marine Fisheries Service, Dr. William Hogarth, in Washington, D.C. to do this. In addition, staff has found through our staff's own analysis were we not to mirror this closure the current efforts in Federal waters would redistribute into State waters and our resources can't absorb that additional pressure. Therefore staff is asking the Board to approve this measure. We have here Mr. Mike Tosato from National Marine Fisheries who can speak about the Federal side.

Chairperson Young one of the big concerns is the enforcement issue. We are getting to the point where we don't want the fisheries to get in an over fished state. We do not want to shut down the fishery. We want to be able to get back to a sustainable fishery. But we also don't want to be the lead on enforcement from a designation that is coming from the Feds. So how can we resolve that? Mr. Mike Tosato replied we can resolve that a couple ways. He can assure the feds will not leave the State or DOCARE hanging and expect them to be the only ones enforcing[,] State rules. And to lean heavily upon them to [enforce] assist Federal through the JEA (Joint Enforcement Agreement) to enforce Federal rules and leave them all alone. Like DOCARE enforcement resources are scarce within the islands. He assures the Board it is a priority with the Fisheries. The coordination is in place and the closer has started. The Federal has a JEA in place with the State.

Chairperson Young stated with the seasonal closure enforcement becomes somewhat easier because if anyone has a fish it's not out of season so you can't catch it. If we don't do this we won't know where the fish was caught.

Mr. Tosato answered correct. That is why it needs to be a State and Federal closure. There are 2 sources for fish, ~~in~~ imports or NWHI. Monitoring ways that we know of.

Chairperson Young asked would NOAA be doing dock side enforcement? Or will they be relying on DLNR to do dock side enforcement. Mr. Tosato replied NOAA can do dock side enforcement if there is a provision in Federal law that prohibits the possession of fish taken from Federal waters they can take a range of activities. Including dock side enforcement, including marketplace enforcement, business records, etc. to track the fish. Chairperson Young explained please remember the JDA was not signed with this over fishing anticipation in mind. It was not in place nor was it anticipated. We appreciate the Federal funding. Is there possibly an amendment? Mr. Tosato replied the not sure the duration of the agreement. It is annual. It needs to be modified that is the discussion. Mr. Gary Moniz, Chief of Law Enforcement at DLNR, commented this puts a new burden on DOCARE. He spoke to his Federal counterparts in the National Marine Fisheries enforcement said if they find a violation they will call DOCARE to do the enforcement because they can't do it now. The issue of Federal dock side enforcement will be difficult because they can't prove if it is from State or Federal waters. Where did the fish come from? The issue of possession and sale is not covered in this measure. Don't want to set DOCARE up for failure with this issue. They need a robust public education campaign that is more than pretty pictures. Have it in Tagalog, Samoan, Vietnamese, etc. Speaking to his Federal and DAR counterparts, ~~that~~ this is a critical component to have these people on board to work with them[.], as oppose to catching them. Also this is a night time fishery. ~~[When its night time enforcement is not of their]~~ When you do night time fishery enforcement and someone is fishing that in itself is not a violation. These areas will still be open to fishing we need to prove if they caught bottom fish. He'll send a list of issues to the Chairperson. DOCARE wants the Board to know that this is not going to work unless these issues are addressed and dealt with. DOCARE still needs to sit with the AGs to find out where they come from in terms of enforcement.

Chairperson Young asked recognizing all the challenges with at least having a consistent closer period, doesn't that make enforcement a little easier to be able to prosecute? Because it would be very difficult if somebody should bring a boat full of fish caught in State waters. Mr. Moniz replied there are some assumptions there. If he bet on it it wouldn't fly. In a criminal context if we aren't clear where it would be its on shaky ground. On a civil matter if it came before the Board that may be different. DOCARE recommended seasonal closers 10-12 years ago and therefore supports this. They support the fishery, they just want to know what the expectations are for DOCARE.

Member Johns asked do we need to amend the recommendation for them to start rule making or not? Mr. Polhemus stated this is one of a sweep of actions that has to happen for the envisioned management of this fishery. There already has been intense discussion

of a motion going forward on a full rule package that will accommodate all the aspects of the required changes.

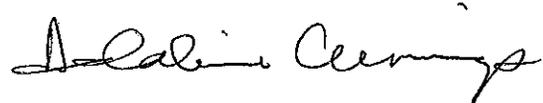
**Unanimously approved as [~~deferred~~] amended with added condition. “Departments expedite rule making process to be consistent with the Board’s decision.”
(Johns, Edlao)**

Item D-7 Consent to Assign General Lease No. S-3170, Leonard D. Sutton and Jane L. Sutton, Assignor, to Leroy Binyan and Ruth Binyan, Assignee, Waiakea, South Hilo, Hawaii, TMK: (3) 2-1-07:26.

Unanimously approved as [~~submitted~~] amended (Johns, Agor)

There being no further business, Chairperson Young adjourned the meeting at 11:42 a.m. Tapes of the meeting and all written testimony submitted at the meeting are filed in the Chairperson’s Office and are available for review. Certain items on the agenda were taken out of sequence to accommodate applicants or interested parties present.

Respectfully submitted,



Adaline Cummings
Land Board Secretary

Approved for submittal:



ALLAN SMITH
Interim Chairperson
Department of Land and Natural Resources