

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

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

Member Tim Johns called the meeting of the Board of Land and Natural Resources to order at 9:09 a.m. The following were in attendance:

MEMBERS

Mr. Jerry Edlao
Mr. Ron Agor
Ms. Taryn Schuman

Mr. Tim Johns
Mr. Samuel Gon III

STAFF

Ms. Charlene Unoki, LD
Ms. Kimberly Mills, OCCL
Mr. Dan Polhemus, DAR
Mr. Dean Aoki, CO

Mr. Sam Lemmo, OCCL
Mr. Dan Quinn, SP
Mr. Ed Underwood, DOBOR

OTHERS

Mr. William Wynhoff, AG's Office
Ms. Dawn Chang, Item K-4
Mr. Jim Shon, Item K-5
Ms. Elizabeth Stack, Item K-5
Ms. Lee Stack, Item K-5
Mr. Jack Gilmare, Item K-5
Mr. Bob Liljestrand, Item K-5
Mr. TJ Kwan, Item K-2
Ms. Melissa Ling-Ing, Item J-2
Mr. Ziggy Livnat, Item F-1
Ms. Greta Aeby, Item F-2
Ms. Stephanie Fried, Item F-2

Ms. Linda Chow, AG's Office
Mr. Earl Matsukawa, Item K-2
Mr. James Case, Item K-5
Ms. Frances Mossman, Item K-5
Mr. Alan Stack, Item K-5
Mr. Bill Tam, Item K-5
Ms. Patricia McHenry, Item K-5
Mr. Peter Lee, Item J-2
Mr. Gary Ka'aihui, Item J-2
Mr. David Lonborg, Item F-2
Ms. Marti Townsend, Item F-2
Mr. Frank Stanton, Item F-2

Mr. Ross Smith, DOT

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

Member Tim Johns announced he was filling in for Interim Chairperson Allan Smith.

Item A-1 Minutes of July 13, 2007

Member Schuman recused herself. Moved to defer due to more changes.

Deferred. (Agor, Gon)

Item K-4 Request for a time extension for Conservation District Use Permits (CDUP) OA-3360 and ST-3176 for Sandwich Isles Communication to build a statewide Submarine Fiber Optic Cables system with landings at Waimea, Kaua`i, TMK (4) 1-2-02:032; Makaha, O`ahu, TMK (1) 8-4-02:047; Sandy Beach Park, O`ahu, TMK (1) 3-9-15:001 & offshore of TMK (1) 3-9-012; Oneali`i Homesteads, Moloka`i, TMK (2) 5-4-06:019; Wahikuli, Maui, TMK (2) 4-5-21:015; Makena, Maui, TMK (2) 2-1-7:072; and Kawaihae, Hawai`i, TMK (3) 6-1-04:020.

Mr. Sam Lemmo, Administrator for Office of Conservation and Coastal Lands (OCCL), reported on item. Staff believes Sandwich Isles Communication has just cause and recommends the Land Board approve their request to extend the permit until July 27, 2010 for completion and initiation for July 27, 2007. Member Johns asked which is recommendation for '08 or '07? Did they start construction today? Mr. Lemmo replied it's an extension to initiate until July 27, 2008 and to complete July 27, 2010 which is the goal. Ms. Dawn Chang, representing the applicant, concurs with staff's submittal as amended.

Unanimously approved as amended. (Schuman, Gon)

The recommendation was amended to reflect a change to the deadline to initiate construction from July 27, 2007 to July 27, 2008.

Item K-5 Request to Waive Oral Request for a Contested Case Hearing, and Appointment and Selection of a Hearing Officer to Conduct All Hearings for One (1) Contested Case Hearing (OA-08-02), regarding Conservation District Use Application (CDUA) OA-3413 for the Liljestrand Single Family Residence (SFR), located at 3300 Tantalus Drive, Honolulu, Island of Oahu, Subject Parcel TMK: (1) 2-5-011:008.

Member Johns recused himself and turned the matter over to Member Agor.

Mr. Sam Lemmo of OCCL clarified agenda Item K-5 is submittal Item K-6. He reported on the submittal. There was a public hearing and afterwards a written petition was received for a contested case hearing from the Stacks. It is Mr. Lemmo's understanding when staff receives a petition and it's not timely or there was no oral request for a contested case hearing the rule allows staff to come to the Land Board and ask to waive the oral request. The petition was submitted within 10 days of the public hearing. And if the Board chose to waive that staff would like to authorize the Chairperson to select the Hearing Officer. A petition from Friends of Tantalus came in after the submittal was completed. It asked to waive the oral request for a contested case hearing. At the public hearing the hearing officer read the procedures for declaring an intent to file a contested case hearing. The Stacks were at the public hearing and they did not ask for the contested case hearing. The Liljestrand family says the Stacks do not have any financial or legal interests in their property and they are not adjacent property owners. The Liljestrands say the petition's interests are not distinguishable from those of the Tantalus community and the general public. They are saying the conduct of a contested case hearing will shut down any public discussion. The Liljestrands asked not to approve the waiver and to invoke the mediation provision. Member Gon asked did the written request for a contested case hearing come in shortly after the public hearing? Mr. Lemmo replied it came in 10 days after the hearing which is required for the written request. Member Gon replied not everyone knows the requirements for a contested case. He would like the board to take this into consideration.

Mr. Jim Shon representing Friends of Tantalus reported he attended the public hearing and didn't understand the oral request had to be made there. His organization feels strongly against spot zoning of conservation land because of the impacts on the community related to increased traffic, higher property taxes and setting a precedent with commercialization of a residential area. Tantalus residents are affected by this and encourage the Board to accept staff's recommendation.

Mr. Lemmo cautioned the Board not to get into issues regarding the merits of this case at this time. The process is if you were to waive this and approve the staff report staff would then look for a hearing officer. The hearing officer would set up a hearing on standing. There would be a notice in the paper and at that time everyone would have an opportunity to submit the petitions. The hearing officer will consider the merits of the petitions and he would make a recommendation on who might have standing or not. He asked speakers to be very brief.

Mr. James Case, resident of Tantalus, reported his history there and urged the Board to waive the lack of oral notice. There should be a public contested case hearing.

Mr. Lemmo asked for the applicant, but instead the following individual came up. Ms. Elizabeth Stack is a petitioner and close neighbor reported she didn't know what a contested case hearing was and she opposed any commercial business in a conservation district.

Ms. Frances Mossman, a land planning consultant processing the permit for the Liljestrand family, clarified the family wants to focus on the proposal for a mediated settlement rather than a contested case. She explained the issues which the community wants to address should be in a collaborative forum. The Hawaii judiciary is proceeding more with mediation which would reach a settlement agreeable to all parties rather than a combative court like process. She stressed the use of mediation.

Ms. Lee Stack, Tantalus neighbor and petitioner, reported people are opposed to the application with concern and feel it is best through a contested case hearing.

Mr. Alan Stack, Tantalus neighbor, reported he is not one of the petitioners. He didn't understand what a contested case was. If Ms. Mossman's intent was to open dialogue with everyone then she should have done it from the beginning. She spoke alone at the public hearing. He feels it best to have a contested case.

Member Gon asked does the Board's acceptance of staff's recommendation preclude any mediation or are we locked into a contested case? Mr. Bill Wynhoff of the Office of Attorney General (AG) replied there isn't any reason why they couldn't pursue mediation during a contested case hearing or before unless the contested case is deferred. Member Gon asked if the party so chose they could enter into mediation and the Board could go with the recommendation of staff? Mr. Lemmo agreed with Bill.

Mr. George Ruse, a resident of Round Top, asked for a contested case and reported submitting testimony at initial Land Board Meeting.

Mr. Jack Gilmore of Palolo Valley reported he knows the Liljestrand house and attended last public meeting. The family is willing to talk to the neighbors and wish to go to mediation.

Mr. Bill Tam representing the Stack family in the contested case asked to proceed with staff's submittal because as a matter of law a sanctioned mediation outside of a contested case would violate its due process. Once the parties are determined then mediation could happen within the contested case. Mr. Lemmo explained the neighbors could talk amongst themselves.

Mr. Bob Liljestrand explained the family has tried on numerous occasions to come to a compromise with the neighbors. He asked the Board to deny the waiver and mediate instead.

Unanimously approved as submitted. (Schuman, Edlao)

Item K-6 Request to Appoint and Select a Hearing Officer to Conduct All Hearings for One (1) Contested Case Hearing (KA-08-01) regarding OCCL's recommendation that the Board deny CDUA KA-3399 for an SFR in Haena, Hanalei, Kauai, Subject Parcel TMKs: (4) 5-9-03:010 & 045.

Member Agor recused himself.

Mr. Sam Lemmo of OCCL reported agenda Item K-6 is actually submittal Item K-5 and gave submittal background. Staff requested approval.

Ms. Patricia McHenry, representing the applicant, reported she is here to answer questions.

Unanimously approved as submitted. (Gon, Edlao)

Item K-2 Conservation District Use Application (CDUA) OA-3412 Regarding a Portion of the Kaloi Gulch Drainage Improvements by HASEKO, Located at the Oneula Shoreline/Submerged Lands, Ewa, Oahu, Makai, Subject Parcels TMKs:(1) 9-1-011:007 & (1) 9-1-12:025

Mr. Sam Lemmo of OCCL reviewed submittal and reported a change of drainage through golf course. It would flow every 10 years during the largest storm events and any sediment flowing into the ocean will dissipate in a short time. Staff recommended approval with some conditions as noted.

Member Johns asked did Division of Aquatic Resources (DAR) look at it and conclude there are no significant impacts expected? Mr. Lemmo replied yes that is what they concluded. Member Johns asked did the Office of Hawaiian Affairs (OHA) comment? Mr. Lemmo replied OHA had no comments. Member John asked are you comfortable with the water quality issues in terms of the need for monitoring? Mr. Earl Matsukawa consultant of Wilson Okamoto Corp. for Haseko answered yes Haseko will continue monitoring. There is a water quality monitoring requirement pursuant to the Hoakalei Marina which is expanded to include this area. Member Johns asked then the sampling sites are outside this discharge point? Mr. Matsukawa replied correct. Member Edlao asked will you be maintaining it? Mr. Matsukawa answered it is a city park therefore the city will maintain it. He presented a brief overview of the proposal and drainage of the area. Member Johns asked Mr. Lemmo are you ok with water flowing into the ocean than to flood the park? Mr. Lemmo replied not wise to flood in the park, but yes into the ocean .

Mr. TJ Kwan, staff attorney with Native Hawaiian Legal Corporation, representing Mr. Michael Lee who is a native Hawaiian cultural practitioner and limu gatherer. Mr. Lee believes this application will significantly impact his cultural practices and traditional and customary rights. They object to the Land Board granting of this application and request for a contested case hearing. This is an oral request and in 10 days they will submit a written petition for a contested case. Member Johns reported once the request is in the Board should not take any more testimony. He reminded Mr. Kwan to get the paperwork in.

No action due to oral request for Contested Case Hearing.

Item K-1 Conservation District Enforcement File HA-06-61 Regarding an Unauthorized Structure on State Accreted Land, by Robert McKnight, Located at Kapaahu, Puna, Island of Hawaii, Seaward of Subject Plats (3) 1-2-028 & 029, Pacific Paradise Oceanfront Estates.

Mr. Sam Lemmo of OCCL requested a deferral.

Deferred. (Gon, Edlao)

Item K-3 Conservation District Use Application (CDUA) MA-3400 Regarding the After the Fact Wailuku County Estates Water Storage Tank with Associated Improvements and Subdivision of Land by CGM, LLC., Located at Wailuku, Maui, Subject Parcel TMK:(2) 3-3-002:001

Mr. Sam Lemmo of OCCL reported Mr. Tim Lui-Kwan requested withdrawal.

Withdrawn. (Edlao, Agor)

Item K-7 Request for a Third Time Extension for Conservation District Use Permit (CDUP) OA-2504 for a Commercial Aquaculture Facility at Dillingham Quarry, for Mr. Ronald P. Weidenbach, dba Hawaii Fish Company, P.O. Box 1039, Waialua, Hawaii 96791-1039, at Kaena, Waialua District, Island of Oahu, Subject Parcel TMK: (1) 6-009-001: 003 & 033.

Mr. Sam Lemmo of OCCL reported on submittal background. He explained the State owns the land and Mr. Ronald Weidenbach holds the general lease. Staff recommends a 5 year extension to May 23, 2012 with annual reporting. Mr. Ron Weidenbach, the applicant, reported the area in use is 18 acres on a revocable permit. Member Johns stated staff should give someone else an opportunity to use this. Mr. Lemmo answered he had no indication of any interest.

Unanimously approved as submitted. (Edlao, Agor)

Item J-2 Request for Preliminary Approval to Amend Hawaii Administrative Rules, Section 13-233, as they Relate to Motor Vehicle and Parking Rules

Mr. Ed Underwood, administrator for Division of Boating and Ocean Recreation (DOBOR), reported submittal background. He explained this is to standardize the rules and better manage it. Certain harbors have more needs than others therefore staff would like to apply rule as the need arises. Staff proposes to re-write the rules to hire a private vendor to run the parking and amend the current fee structure to tie in with the City & County. Member Johns asked have there been public meetings and what were the responses? Mr. Underwood replied there have been 3 informational meetings at the Ala

Wai Small Boat Harbor. There are two user groups: surfers & canoe paddlers and boaters. Staff will reserve 130 stalls by the helipad for public use only. The boaters felt there is no need for parking changes. DOBOR sent out a survey to all the Ala Wai Small Boat Harbor mooring tenants and asked if there was a need for a parking management plan. The results were sixty percent in favor, forty against. Member Johns asked the helipad parking will not be part of the rule? Mr. Underwood replied no. Staff wanted to go to the legislature to set it up as a park, but unsure how to go about it. Member Johns asked how do you prevent hotel or construction workers from parking there? Mr. Underwood explained right now there is nothing against it. That is why staff wants to change the rule. The use of signage stating "for recreational & harbor use only," but how to monitor it. It needs more enforcement. Staff is proposing the helipad area be closed to all vehicles that are not issued a valid permit from 11pm to 5am because of a lot of activity. Member Johns asked did they have meetings at other harbors? Mr. Underwood replied just at the Ala Wai because he felt it would be most affected. But Ke'ehi Boat Harbor has a lot of activity at night, too. Not much for neighbor island harbors except maybe Honokohau, Lahaina and Ma'alaea. Member Edlao asked are there hearing master for each county or one for everything? Mr. Underwood replied could be both.

Mr. Peter Lee representing the surfers reported the problem at the Ala Wai is limited parking. The hotel and construction workers park in the recreational spaces and get picked up by a shuttle. Another solution is parking meters like at Kapiolani Park. These meters could curb illegal parking. The problem is enforcement of parking spaces for recreational users. Place a guard there instead because parking meters can get stolen. They need a public hearing and a way to enforce this.

Ms. Melissa Ling-Ing, surfer, reiterated the major problem is enforcement referring to Mr. Lee's comments. She referred to the parking problem with hotel & construction workers which is worst during canoe season. She doesn't believe parking meters are the solution and explained surfers surf for four hours or more and its inconvenient to paddle in to feed the meter. Ms. Ling-Ing stated 130 stalls are not enough unless they add a row of parking along the slips.

Mr. Gary Ka'aihui, surfer, agreed private parking and parking meters are not the solutions. He described the parking problems and wants some way to monitor. Member Edlao asked are you opposed to time limits of 3 to 4 hours? Mr. Ka'aihui replied no. It's a first come first serve basis.

Member Johns stated under the proposed rules it will give more enforcement ability to take control of the parking. But as for the helipad parking there will be no changes. Mr. Underwood replied yes. Member Johns and Member Gon urged users to attend the hearings.

Unanimously approved as amended. (Gon, Edlao)

Amended the recommendation to change the term hearing master to hearing masters.

Item J-1 Request for Approval to Enter into a Contract with Tetra Tech EM, Inc. for a Baseline Environmental Study of the Waianae Coast, Oahu

Mr. Ed Underwood of DOBOR reported due to conflict of interest staff cancelled contract with previous company because one of the owners had vessels moored at the Waianae Small Boat Harbor. Staff reviewed the RFPs and selected Tetra Tech.

Unanimously approved as submitted. (Schuman, Gon)

Item F-1 Request for Authorization and Approval to Issue a Papahānaumokuākea Marine National Monument Special Ocean Use Permit to Ziggy Livnat of For the Sea Productions, for Access to State Waters to Conduct Commercial Photography Activities

Mr. Dan Polhemus, administrator for Division of Aquatic Resources (DAR), reported on submittal. He noted that permittee has been to the Monument on an education permit which states cannot use for commercial use and would need a special use permit. Staff doesn't feel it will be a problem. Member Johns expressed concern with possible commercialization. Mr. Polhemus replied understood. This is the discretion of the Board. Member Edlao said he wants to see the results. Mr. Ziggy Livnat explained everything he does is used for education and conservation.

Unanimously approved as submitted. (Edlao, Agor)

Item F-2 Enforcement Action Involving Violation of Northwestern Hawaiian Islands Research, Monitoring, and Education Permit # DLNR.NWHI06R008 by Dr. Greta Aeby of the Hawai'i Institute of Marine Biology

Mr. Dan Polhemus of DAR reported U.H. Office of General Counsel submitted a written request for a contested case hearing and he recommends deferring this case. Member Johns stated he has the letter and it requested for a contested case.

Mr. David Lonborg, Office of General Counsel at U.H. representing Dr. Greta Aeby, is concerned that deferral of Item F-2 is a deferral of Item F-3. Deferring Item F-3 is denying it based on allegations made that have not been proven by a contested case hearing. Member Johns asked whether Mr. Lonborg wanted the Board to ignore Item F-2 while considering Item F-3? Mr. Lonborg replied yes. What Dr. Aeby wanted the Board to do was to set aside the allegation of violation and consider Item F-3 on its merits. Mr. Lonborg stated the Board is being asked in the enforcement matter to find the violation and to impose two sanctions: one is a fine, the other is a denial of permit for this year. He stated that it was very clear in the record in front of the Board that the reason they were asked to deny the permit this year is because of the violation, and apart from that

allegation, staff would be recommending approval of the permit application. Member Johns replied right. Maybe they would and maybe they wouldn't. He asked couldn't there be other reasons why, beyond the actual finding of the violations? Couldn't there be other reasons why the Board would be justified in deferring action on Item F-3? He didn't think Mr. Lonborg is saying that the Board does not have that discretion. Mr. Lonborg said the only reason the Board would not take up Item F-3 is because of the allegation of a violation last year. The facts are relatively straight forward. Member Johns reported that the Board did not want to get into the facts if Dr. Aeby is asking for a contested case hearing on Item F-2. Mr. Lonborg shouldn't be making his argument on Item F-2 if he is asking for a contested case. Member Johns stated the question is, assuming if the Board doesn't act on Item F-2, what to do about Item F-3? The Board has to act in light of the entire record and what other information the Board might have because the Board must take into account all information. The Board must judge in a discretionary way whether to give a discretionary permit.

Mr. Lonborg replied understood absolutely. If the Board prefers to take it this way what he could do is withdraw his request for a contest case hearing and with the Board's permission reinstate it at the close of the item today. If the Board feels it needs to get to the merits of Item F-2 in order to act on Item F-3 then [we] the Board needs to do that. Mr. Lonborg testified that there has been plenty of time for the Board to consider [it] the factual background for Item F-2 contained in the Land Board submission from January. The Board could have resolved this before today. U.H. does not think it is fair to the University, the researcher or to the Monument. This is research the Board wants done. We don't think it's fair to say we have an allegation that is finally coming before the Land Board for action at the last meeting before this year's cruise. Now a year and 2 months after the events happened the Board is going to defer, which is the same as denying the permit based on what happened last year. Member Edlao reported it wasn't the Board's idea to bring this to the very end. The Board wanted to deal with this when it first came up, but it got deferred. Mr. Lonborg replied understood. He explained when the submittal came out January 12, 2007 he and his client were caught unprepared. They wanted to research and initiate some contacts. During that period they were trying to come to a compromise and worked with staff. There was no contact from February until right before July 13, 2007 Land Board meeting until Mr. Lonborg contacted (DOCARE) staff. The documents before the Board today are the same documents from January. He and his client have tried very hard to work with staff. He doesn't want to slam staff because the intention of this work is important. It needs to be done and there needs to be strict enforcement of the rules. With today's submission they think this balance has been struck wrong. The timing puts them in a position where their researcher faces losing a year of work.

Member Edlao exclaimed he understands what he is saying about the importance of the work. But it is also important to protect the monument and that is what the Board is charged to do. To protect and preserve. When there is a violation the Board can't take it lightly. Mr. Lonborg replied they are in agreement about the importance of protecting the monument and enforcing the rules. They don't think a violation happened here. Member Johns asked the alternatives you are putting out are 1. contested case on Item F-2, act on

it, and give the permit for Item F-3? Or the alternative is to withdraw the request for a contested case. Then at the end of the action of Item F-2 and F-3 decide if you'll ask for a contested case? Can we even do the second one? Because if he already knows that he's possibly going to ask for a contested case and if he doesn't get the results of what his client wants then all this information we are taking and acting isn't there a rule we shouldn't act on...Mr. Bill Wynhoff of Office of the AG interrupted he doesn't think the Board has the mechanical rule. They talked about it from time to time. Because if someone asks for a contested case you have to defer, we definitely don't have that. It's very clear that once you have it on the agenda if people want to testify you have to take the testimony. Member Johns added the concern is obviously the information given in this setting is not the same type of information that the Board would get under a contested case. It puts the Board in a position where someone could make the argument that we relied on extra judicial information when we made our decision. Mr. Wynhoff stated Sunshine rules require that once an item is on the agenda that a member of the public insists on testifying they must be allowed to testify. Member Edlao asked if the gentleman says he wants a contested case now would it be right for the department to ask for a deferral and the Board ask for a deferral in the meantime? Member Johns replied the Board can defer. Based on counsel, if Mr. Lonborg withdrew the request for a contest case we went ahead and moved on it then asked for the contested case later it would be ok. It would not taint the contested case. Mr. Lonborg asked if we could address Item F-3 first then return to F-2? Member Johns replied no, he doesn't think so. Mr. Lonborg stated he will withdraw the request for a contested case at this time. Member Johns asked if Ms. Linda Chow has any comments? Ms. Linda Chow of the Office of the Attorney General replied not at this time. Go forward with Item F-2 and if the Board has any questions she'll answer them.

Mr. Polhemus reported submittal background. Staff recommends a fine of \$1,000. Member Johns asked whether there were any allegations which surfaced during the investigation? Ms. Chow reported yes, there were other allegations that surfaced, but conclusions on those allegations have not yet been reached by the investigators or the department. But DAR felt confident in going forward with this violation at this time based on its own investigation. Member Johns asked then there are other allegations being investigated which are pending and not for the Board to act on today? Ms. Chow replied correct. Member Schuman asked if the Board acts on this today will it impact on the additional violations later should it be decided there might be additional violations? Ms. Chow replied correct. Member Johns asked we are not foreclosed? Ms. Chow added she doesn't believe so. Member Edlao asked we will visit those additional violations later on? Ms. Chow replied once the conclusions have been made and if the department wants to go forward. The department needs to conclude its investigation.

Mr. Lonborg explained what happened. Dr. Aeby had 2 small healthy live coral samples and kept those coral alive for later work on the ship. Her plan was to return those coral back to French Frigate Shoals where she got them before the ship left. There was a change in plans beyond her control and she didn't have the opportunity to return the coral. Dr. Randy Kosaki raised the issue are those coral samples a permit problem? Dr. Aeby replied she didn't know. Dr. Aeby wasn't thinking about permit issues and only

focused on what was happening on the ship. The issue is did Dr. Aeby violate the condition of her permit that says “no transportation of live organisms within or outside the Monument.” He read the conditions related to returning the samples to their environment prior to cessation of activity and taking care not to damage corals. He says there is a conflict between these conditions. She had to destroy those samples to meet the “transportation” condition, but it would be against the “not to damage coral” condition. He referred to due process in his letter testimony. The question is does Dr. Aeby have to stop research in the Northwest Hawaiian Islands? That is why it is a critical matter for the University.

Mr. Lonborg and Member Edlao discussed the violations and Dr. Aeby as a great researcher. Member Johns clarified that the Board has the ability to take into account all circumstances when it makes a decision on a discretionary permit. A violation is not the only reason under which the Board can deny a discretionary permit. Mr. Lonborg disagreed and stated the only reason DAR was even asking to deny a discretionary permit is because of the violation. Mr. Polhemus reported it’s actually the Hawaii Administrative Rules governing our waters that stipulates that. The Board is not being asked by DAR to set up this contingency. It’s inherent in the rule. Member Johns explained that one reason to deny a permit mandatorily is because of a finding of a violation, which is law. There are other ways to deny permits. The Board could take into account other information separate from the finding of a violation and subsequent banning under the regulation of law. Mr. Polhemus replied absolutely. He clarified DAR is not asking these issues be linked. The nature of the law requires they be linked. It is not DAR’s discretion. Member Johns replied the law doesn’t say the Board shall ignore information like this when it makes a decision. Mr. Polhemus answered not at all. Member Gon asked for clarification in the process. Even if the Land Board finds the violation and imposes the fine that doesn’t conclude the finding because you have the opportunity for a contested case that will make the absolute decision on whether or not there was a violation and a fine. He read staff’s recommendation regarding “if the Board finds a violation they must deny the permit application” which is not necessarily the case because the Board’s finding is not the conclusive step. Mr. Lonborg confirmed that is the analysis he would ask the Board to adopt.

Member Gon asked the AG is that the right interpretation? Member Johns asked before there is a request for a contested case is it a final decision under the Price v. Zoning Board of Appeals? Ms. Chow replied she hasn’t looked at Price v. Zoning for awhile, but if the Board finds a violation and there is no specification in the rules as to how the Board makes that finding, if the Board finds a violation has occurred, that consideration may be carried over despite the fact there had been a request for a contested case. Because the contested case did not stay the decision of the Board. It goes into another form or medium. Member Johns asked is that finding final because it can be appealed? They have the ability to appeal to the circuit court don’t they? Ms. Chow replied they have the ability to appeal a contested case decision to the circuit court. Member Johns asked they don’t have the ability to appeal an imposition of a fine? Ms. Chow answered only if they go through the contested case first. Member Johns concluded then the Board’s decision absent a contested case is final. Ms. Chow replied yes. Mr. Wynhoff (AG) asked is it Ms.

Chow's suggestion or advice if the Board acts today and says there is a violation then it will not have discretion when it moves back to Item F-3? Ms. Chow replied yes. Member Johns asked do you have any comments on his position if the Board doesn't find a violation either it's in contested case mode or they don't act on it that they have the ability to deny the permit for whatever reasons? Ms. Chow agreed absolutely. It's a totally discretionary permit. If the Board finds other reasons for denying it they are more than able to act on those reasons. She addressed the deferral issue. Because it is a discretionary permit it is within the purview of the Board to grant it, deny it or defer it. The fact that the deferral affects Dr. Aeby's time frame is not binding on this Board. The Board can exercise their discretion in any manner. Member John added the description of the facts that there was no conspiracy on the agency's part to delay this to the point where she is put in this position. Ms. Chow replied correct.

Mr. Lonborg disagreed with Ms. Chow that the Board is bound under the Administrative Rules. He explained what will happen with a delay. Nothing. The issue is to get this resolved. Mr. Lonborg related more history and discussed the permit from the first year. This is an inadvertent violation. It is not good for U.H. or for the monument. Member Johns stated there was no intent. She didn't drive the boat. Member Edlao and Mr. Lonborg discussed reporting by researchers and the position the Board is in.

Dr. Greta Aeby, Assistant Researcher with U.H./HIMB related her background and history regarding coral research disease. She explained how she obtained samples and the ship's change in schedule without informing her. It was out of her control. She was unaware of the policy changes. She has been working in the NWHI for the past 4 years without any problems. Dr. Aeby expressed shock when she was told about the January 12, 2007 Land Board Meeting. She is unclear of the conditions and agreed it was her fault for what she did. She believed all her tagging work done last year will be lost if this permit is denied.

Member Gon asked about situation of coral in the bucket? Member Johns said Dr. Randy Kosaki directed Dr. Aeby to cut off water to the tank. Mr. Lonborg explained Dr. Kosaki was cautious of permit issues on board the ship and thought it was a problem. Dr. Aeby replied she wished Dr. Kosaki said something to her. Mr. Polhemus added can't keep corals alive after collecting.

Ms. Marti Townsend of KAHEA related her written testimony. She suggested broadening the investigation to seek an external investigation of DAR, have a state audit, add preventive language to the permit in the refuge and waste water language. She expressed we don't want to set a precedent with other researchers who violate. Asked why wasn't DOCARE contacted immediately? It is unfair to place staff in conflict with permittee. She would like an independent investigation. Member Johns asked defer Item F-2? Ms. Townsend replied no and explained why. She commented on issues Mr. Lonborg brought up regarding an incubator on board. No reason to have one on board. We need to assess and enforce permits.

Mr. Polhemus clarified there was no overlap of tenure between him and Dr. Aeby in reference to when she was in DAR.

Ms. Evelyn Cox, affiliate faculty with HIMB, testified and said Dr. Aeby is a professional and ethical researcher and she feels legal issues get in the way of research.

Ms. Stephanie Fried, Technical Advisor for KAHEA, reported the Board should deny the permit because Dr. Aeby was there for the creation of the permit and should know these conditions. Ms. Fried gave testimony history and reiterated Ms. Townsend's points regarding DOCARE and an independent investigation. She said the HIMB report was missing an entire day by Dr. Randy Kosaki. Member Johns stated we should bring Dr. Kosaki here. Ms. Fried elaborated more regarding researchers violating and trying to get around the permit.

Mr. Frank Stanton, a Marine Biologist with Leeward Community College, reported Dr. Aeby has the resources to protect the coral in the monument. He expressed his testimony of how the permit agencies are unclear and the ambiguity with the Office of Attorney General.

Mr. Lonborg reported he had a different understanding of closed system versus open system. As for the due process, they are not compelling the Board to give them a permit. He reiterated the submission.

Motion made to move to Executive Session.

12:25pm: Adjourned for Executive Session to discuss its legal rights, duties, privileges, and obligations relating to this matter with our attorney. (Edlao, Gon)

12:47 pm – Reconvened.

Member Johns explained this discussion is better flushed out via a contested case hearing. Member Gon stated he finds it unfortunate a well meaning researcher should find herself in such a situation. As a Board member he is bound by the necessity of regulation. Member Edlao said to Dr. Aeby not to take this personally and a mistake was made. He was impressed by her research and reiterated Member Gon's comments regarding regulation. He commended her and not to be discouraged.

Unanimously approved. (Edlao, Schuman)
All voted yes.

Mr. Lonborg reinstated his request for a contested case hearing.

Item F-3 Conditional Request for Authorization and Approval to Issue a Papahānaumokuākea Marine National Monument Research Permit to Dr. Greta Aeby, University of Hawai'i, Hawai'i Institute of Marine Biology (HIMB), for Access to State Waters to Conduct Coral and Fish Disease Research Activities.

Mr. Dan Polhemus of DAR, reported it is a conditional request to approve, but DA wants to defer. Mr. Lonborg replied deferral is denial. Member Johns replied the department will not stop the investigation.

Mr. Frank Stanton testified about unfortunate results will affect important research.

Ms. Marti Townsend of KAHEA urged to deny now, but still need to protect the resources. It's forcing the Board into a position. Member Gon replied this situation is not B&W. Careful research is immense responsibility. Member Johns agreed with Member Gon and welcomes the contested case hearing. He believes the Board did right because it would be better heard in a contested case hearing.

Ms. Stephanie Fried urged to deny the permit and reiterated risk is a problem.

Dr. Aeby reported time is an issue on the reefs.

Deferred. (Gon, Edlao)

Item D-1 Issuance of Right-of-Entry Permit to State of Hawaii, Department of Health, Kauai District Health Office on Lands Encumbered by Revocable Permit No. S-7310, por. which includes Upper Kapahi Reservoir, Kapaa Homesteads, 1st Series, Kawaihau, Kauai, Tax Map Key: (4) 4-6-07:11.

Unanimously approved as submitted. (Edlao, Schuman)

Item D-2 Issuance of Right-of-Entry Permit to the State of Hawaii, Department of Transportation, Highway Division for Test Boring Purposes on Lands Encumbered by Revocable Permit No. S-7408 to Coco Palms Ventures LLC, Wailua, Kawaihau, Kauai, Tax Map Key: (4) 4-1-05:17.

**Unanimously approved as amended. (Edlao, Schuman)
Staff submitted wrong Exhibit A. Replaced Exhibit A.**

Item D-3 Issuance of Right-of-Entry Permit to United States Department of the Interior on Lands Encumbered by General Lease No. S-5372, Kapapala, Ka'u, Hawaii, Tax Map Key:3rd/9-8-01:02.

Item D-4 Consent to Assign General Lease No. S-5447, Maizie Kaaumoana Roberts, Assignor, to Laurie Kuuipo Antony, Assignee, Kikala-Keokea, Puna, Hawaii; Tax Map Key: 3rd/1-2-43:47.

- Item D-5** **Consent to Revocable Permit of Lands under Governor's Executive Order No. 3283 to George S. Lavenson Jr., M.D., R.V.T., Lahaina, Maui, Tax Map Key: (2) 4-5-21:portion 16.**

- Item D-6** **Issuance of Right-of-Entry Permit to the United States Army Corp of Engineers (USACE) for Investigation and Remediation Purposes on Lands Encumbered by Revocable Permit No. S-7368 to Alexander and Baldwin, Inc., Pulehunui, Wailuku, Maui, Tax Map Key: (2) 3-8-008:001**

- Item D-7** **Extension of Approval in Principle of Direct Lease to Coalition for Specialized Housing for Low-Income Rental Housing Purposes, Waimano, Oahu, Tax Map Key: (1) 9-7-19:35.**

- Item D-8** **Mutual Cancellation of General Lease No. S-5764, Joseph P. O'Reilly and Katherine A. O'Reilly, Lessees, Kaneohe, Oahu, Tax Map Key: (1) 4-6-01:13 seaward.**

- Item D-9** **Amend Prior Board Action of July 14, 2006, Under Agenda Item D-9, Acquisition of Lands and Set Aside to the Department of Land and Natural Resources, Division of Forestry and Wildlife for Habitat Restoration and Marsh Wildlife Sanctuary Purposes, Kawainui Marsh, Kailua, Oahu, Tax Map Keys: (1) 4-2-13:22; 4-2-16:portion 1, 5, and portion 6; and**

Ratification of the Subagreement and Acknowledgment of Local Cooperation Agreement between the State of Hawaii, Department of Land and Natural Resources and the City and County of Honolulu

Unanimously approved as submitted. (Edlao, Schuman)

- Item E-1** **Request from the Good news jail and Prison Ministry to use the Large Pavilion at the Wailoa River State Recreation Area in Hilo, Hawaii, for a Fundraiser Luau**

- Item E-2** **Request for Approval to Enter into an Agreement with Pioneer Hybrid International, Inc. for Water Sharing at Russian Fort Elizabeth State Historical Park, Waimea, Kauai**

Mr. Dan Quinn, Administrator for State Parks, reported on submittals.

Unanimously approved as submitted. (Edlao, Schuman)

Mr. Quinn also reported Koke'e permittee wanted a briefing scheduled.

Item L-1 Approval for Additives to Construction Contract - Job No. F54B609A, Wailua River State Park, Marina Roadway and Parking Lot Resurface, Wailua, Kauai, Hawaii

Mr. Dan Quinn of State Parks reported for Engineering Division.

Unanimously approved as submitted. (Agor, Edlao)

Item H-1 Request for Authorization and Approval to Implement the Department of Land and Natural Resources' Language Access Plan.

Mr. Dean Aoki, ADA Coordinator, reported on submittal.

Unanimously approved as submitted. (Agor, Edlao)

Item M-1 Consent to Sublease of Lease No. DOT-A-91-21 Pacific Aviation Services, Inc. to Air Molokai Nui, Honolulu International Airport

Item M-2 Issuance of Master Lease FAA Agreement No. DTFAWP-07-00044, Federal Aviation Administration (FAA) United States of America (USA) Honolulu International Airport

Item M-3 Consent to Sublease - lease No. DOT-A-79-0018 Paradise HB, LTD. To UPS Supply Chain Solutions, Inc. Honolulu International Airport TMK (1) 1-1-72-05 (Portion of)

Mr. Ross Smith of Department of Transportation reported on submittals.

Unanimously approved as submitted. (Schuman, Agor)

There being no further business, Member Tim Johns adjourned the meeting at 1:10 p.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 A. SMITH
Interim Chairperson
Department of Land and Natural Resources