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

DATE:	FRIDAY, JANUARY 13, 2006
TIME:	9:00 A.M.
PLACE:	KALANIMOKU BUILDING LAND BOARD CONFERENCE ROOM 132 1151 PUNCHBOWL STREET HONOLULU, HAWAII 96813

Chairperson Peter Young called the meeting of the Board of Land and Natural Resources to order at 9:08 a.m. The following were in attendance:

MEMBERS

Mr. Peter Young
Mr. Gerald DeMello
Mr. Ron Agor
Mr. Tim Johns
Mr. Toby Martyn
Ms. Taryn Schuman

STAFF

Mr. Richard Rice, DOBOR
Mr. Sam Lemmo, OCCL
Mr. Russell Tsuji, Land
Mr. Curt Cottrell, DOFAW
Mr. Bill Stanley, DOFAW
Ms. Charlene Unoki, Land
Mr. Eric Hirano, Engineering
Ms. Dawn Hegger, OCCL
Mr. Dan Quinn, State Parks
Mr. Scott Fretz, DOFAW
Mr. Dave Smith, DOFAW

OTHERS

r. William Wynhoff, Deputy Attorney General
s. Linda Chow, Deputy Attorney General
. Peter Schall, J-1, J-2
. Robert Oakrider, J-1, J-2
. Phil Hauret, J-1, J-2
Bob Hampton, J-1, J-2
Jim Tolson, J-1, J-2
Janet Ely, J-1, J-2
John Whalen, K-5
Gary Nakamura, K-5
Paul Gaynor, C-3
Mr. Virgil Adonis, J-1, J-2
Mr. Rick Egged, J-1, J-2
Mr. Alan Cambra, J-1, J-2
Mr. Robert Finley, J-1, J-2
Mr. Clayton Tsuchiyama, J-1, J-2
Ms. Cappy Fasi, K-5
Mr. Warren Bucher, K-5
Mr. Gil Keith-Agaran, K-6
Mr. Mitch Hirano, D-10

Mr. Steven Lim, K-2
Mrs. Mary Carroll, K-2
Mr. Bob Graham, K-2
Mr. Tim Lui-Kwan, K-3
Mr. John Sutton, K-3
Mrs. Maureen Gapp, K-4

Mr. David Carroll, K-2
Ms. Keolani Hanoa, K-2
Mr. Earl Hanoa, K-2
Mr. Garrett Saikley, K-3
Mr. Bill Barber, K-3
Mr. John Gapp, K-4

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

Item A-1: November 18, 2005 briefing

Member Martyn recused himself.

Unanimously approved as submitted by the remaining Board members (Johns/DeMello).

Item A-2: November 18, 2005

Member Martyn recused himself.

Unanimously approved as submitted by the remaining Board members (Johns/Schuman).

Item A-3: December 9, 2005

Motion to defer due to lack of quorum.

Unanimously approved to defer (Johns/Agor).

Item J-1: Issuance of Right-of-Entry Permit to Hilton Hawaiian Village LLC, Waikiki Oahu, Public Right of Way as shown on Map 4 of Land Court Consolidation 64; Grant of Easement to the Board of Water Supply Waikiki Oahu, Public Right of Way as shown on Map 4 of Land Court Consolidation 64; Grant of Easement to Hawaiian Electric Company, Waikiki Oahu, Public Right of Way as shown on Map 4 of Land Court Consolidation 64.

Member Johns recused himself.

Richard Rice, Administrator for the Division of Boating and Ocean Recreation (DOBOR) made it known the purpose of this submittal is to issue a right of entry to the Hilton Hawaiian Village to construct and maintain water and electrical easements. Hilton seeks to install certain water and electrical lines under the Public Rights of Way in order to service the Grand Waikikian, the Duke Kahanamoku Lagoon and the Ala Wai Small Boat Harbor. Upon completion of the construction project the Hilton will be asked to grant an easement to the Board of Water Supply and Hawaiian Electric Company, Inc. for on going maintenance of these lines. Mr. Rice recommended the Board authorize the issuance of a right of entry to Hilton Hawaiian Village LLC and its contractors covering the subject area, following the completion of the Water Line Improvements authorize the issuance of a non-exclusive, perpetual easement to the BWS covering the subject area and following the

completion of the Electrical Improvements, authorize the issuance of a non-exclusive, perpetual easement to Hawaiian Electric Company covering the subject area.

Item J-2: Issuance of Right-of-Entry Permit to Hilton Hawaiian Village LLC, Waikiki Oahu, Tax Map Key: (1) 2-3-037: 012, 021; Grant of Easement to the Board of Water Supply Waikiki Oahu, Tax Map Key: (1) 2-3-037:012, 021; Grant of Easement to Hawaiian Electric Company, Waikiki Oahu, Tax Map Key: (1) 2-3-037: 012, 021.

Member Johns recused himself.

Mr. Rice pointed out this submittal is similar to the previous submittal in that the Hilton would like to request a right of entry to construct water and electrical lines in the subject area. This submittal is also requesting redirection of the drainage which is currently flowing to all areas. The Hilton will construct a drainage system which will allows water to be properly deposited into a captured culvert system with separation boxes that will eventually flow into the harbor. Mr. Rice recommended the Board authorize the issuance of a right of entry to Hilton Hawaiian Village LLC and its contractors covering the subject area, following the completion of the Water Line Improvements, authorize the issuance of a non-exclusive, perpetual easement to the Board of Water Supply and following the completion of the Electrical Improvements, authorize the issuance of a non-exclusive, perpetual easement to Hawaiian Electric Company covering the subject area.

Peter Schall, former Senior Vice President and Managing Director of the Hilton Hawaiian Village Resort & Spa and currently a consultant to Hilton Hawaiian Village, LLC and the Grand Waikikian development project appeared before the Board to provide testimony is support of staff's submittal. Mr. Schall indicated the Honolulu City Council awarded a permit for the subject area to Hilton 3 ½ years ago after proper notice and public hearings were held. Today, Hilton is simply seeking to implement and satisfy certain conditions of those permits and is asking the Board for a right-of-entry permit and easements to install and maintain utilities beneath portions of Dewey Land and a right-of-entry permit and easements to install and maintain utilities in the Duke Kahanamoku Lagoon area. Mr. Schall indicated there are individuals present today from the Ilikai Association of Apartment Owners (Ilikai Owners Association) who would like to provide testimony with regards to traffic and traffic management in and around Dewey Lane but he believes this issue is the responsibility of the Department of Transportation not the Board. With respect to a future submittal relating to this issue, Mr. Schall noted that Hilton will be coming back to this Board at the end of this month for consideration and approval relating to the widening of Dewey Land and certain pedestrian and vehicular access easement. In closing, Mr. Schall confirmed Hilton is committed to cooperating and maintaining an open dialogue with the Ilikai Owners Association while moving forward with the Grand Waikikian development project. Mr. Schall requested the Board approve the utility submittals before them and allow Hilton to move forward with this critical part of the Grand Waikikian development project.
Virgil Adonis, a co-chair of the Filipino International Trade Exposition of the Filipino Centennial Commission testified in support of a joint use agreement for Hilton Hawaiian Village. He believes this is a win win situation for all concern and will be a better utilization of the subject property. Mr. Adones believes any improvement to a tourist facility is a welcome event that should be supported by the community. Mr. Adones spoke of Hilton's effort to work with the community.

Mr. Young communicated to those present that the submittal before the Board today does not deal with a joint use agreement with Hilton Hotels but deals with a right-of-entry and utility easements.

Robert Oakrider, a long time resident of the Ilikai Hotel Building confirmed with the Board that today's hearing dealt with the easement to Hilton for underground utilities. Mr. Oakrider noted the Hilton has been a very good neighbor and is doing the right thing. He believes the new addition to the Hilton will be an enjoyable and attractive addition to the neighborhood.

Rick Egged, a member of the Waikikian Improvement Association spoke in support of Items J-1 and J-2 as necessary first steps to moving this project along. He believes the project in general is a good one and urges the Board not to delay this project.

Phil Hauret, Land Agent with HECO spoke in support of the submittal but had some comments on the easement. He let it be known that HECO does not believe they need an easement over Dewey Lane because based on material they've reviewed Dewey Lane appears to be a public road right-of-way owned by the Department.

Alan Cambra, President of the Association of Owners of the Ilikai Apartment Building (Ilikai) testified in opposition to Hilton's request for the State of Hawaii to enter into a joint use agreement and related grants of easements and permits to allow for certain improvements to be made to Dewey Lane. Mr. Cambra explained with respect to the creation of a new intersection at Ala Moana and Dewey Lane, the Ilikai's concern is with the proposed access and usage of Dewey Lane. Mr. Cambra believes the expansion of Dewey Lane and the creation of a new intersection at the corner of Ala Moana Boulevard and the expanded Dewey Lane must be considered in tandem and unless the Ilikai's concerns are addressed their association will be in opposition to proceeding with any portion of the widening of Dewy Lane, including the proposed grants of easements.

Bob Hampton, President of the Waikiki Beach Activities spoke in support of the easements and permits Hilton is seeking from the Department. Mr. Hampton specifically noted his support for the drainage improvements for the lagoon.

Robert Finley, Chairman of the Waikiki Neighborhood Board noted the topic of the Hilton's improvement project has appeared before his Board as an agenda for the past three years. He stated the Hilton have been very forth right with their plans.

Jim Tolson, President of the Chamber of Commerce of Hawaii testified is support of Hilton obtaining the subject easements as requested in Items J-1 and J-2.
Clayton Tsuchiyama, Senior Vice President and Chief Financial Officer of MC&A (a local destination company) spoke in support of Hilton's request to expand and improve Dewey Lane. Mr. Tsuchiyama noted Hilton has been responsible managers as well as very good corporate citizens who are supportive of the community.

Janet Ely, President and CEO of the Alzheimer Association provided testimony in support of the easements requested by the Hilton.

Unanimously approved Items J-1 and J-2 as submitted by the remaining Board members (Martyn/Schuman).

Item K-5: Alleged Unauthorized Construction of Shoreline Structure(s) at Keehi War Memorial, Keehi Lagoon, Oahu, TMK: seaward of (1) 1-1-003:04.

Sam Lemmo, Administrator for the Office of Conservation and Coastal Lands (OCCL) clarified that the subzone of the subject area should listed as "Resource". He noted on July 2005, OCCL received information regarding possible shoreline violations at the War Memorial Park. Their investigation revealed three main alleged Conservation District violations:1) Concrete Drainage Canal built in 2000; 2) Shore Structure A (Mauka Seawall) build in 2004; and 3) Shoreline Structure B (Makai Seawall) built in 2004. The Keehi Memorial Organization (KMO) a tax-exempt 501(c)(3) has retained a perpetual lease for the Keehi Lagoon Memorial Property via the Pacific War Memorial Commission. Staff has considered the merits of the case with respect to the Department and Board's criteria and finds that the structures should be removed. He communicated the wall and drainage were constructed without permits after the adoption of the "no tolerance" policy. Although Mr. Lemmo recommended the removal of the unauthorized structures he disclosed that the structures are not thought to have a negative impact on the sandy beach and to adjacent down drift properties due to the existing conditions present at the site. The primary concern with the shoreline structure is the "locking up" of sediment resources that would normally be delivered to the beach through natural erosion. In this case, there is minimal to no sand in the littoral system and the area behind the seawalls is composed of dirt fill and would serve no practical benefit to allow this material to erode to the beach. In addition, the quality of the shoreline recreational resources is low due to the muddy nature of the stream mouth environment, diminished water quality, mangrove river bank and limited recreational opportunities. Mr. Lemmo recommended the Board find the alleged violated the provisions of Title 13-5 Hawaii Administrative Rules, and Chapter 183C, Hawaii Revised Statutes by failing to obtain the appropriate approvals for the construction of a shoreline structure and be subject to the conditions listed in staff's submittal.

Cappy Fasi who spoke on behalf of the KMO requested that the coastal encroachments be allowed to remain in place as is. Ms. Fasi went on to speak of the history of the Keehi Memorial and how it was developed. In 1961, the first master plan for the area was submitted and Ms. Fasi noted four important points 1) the area complement the Keehi Lagoon Park; 2) plans called for a majestic memorial to be erected to the heroic dead; 2)2 ½ acres would be set aside exclusively for use by youth groups and the community for camping and outdoor activities; 3) a modest rehabilitation facility would be maintain for the DAV; and 4) the park had to be self sustaining. In July 2005 the KMO submitted an updated master plan for the area which was approved in November of 2005.

John Whalen, representing KMO pointed out most of the lands around the lagoon are filled lands, not natural shorelines. The site was created from fill from the construction of the H-1 freeway.
Mr. Whalen provided the Board with a State Land Use Map which shows the configuration of the property in relation to the land use boundaries. He pointed out the urban and conservation district lines do not necessarily follow the contours of the property itself or the shoreline. Mr. Whalen reminded the Board the original master plan for the area was adopted in 1961 and last year KMO was asked to submit a current master plan which was approved in November of last year.

Warren Bucher, a coastal engineer spoke of the alleged encroachments. He pointed out the seawall was constructed to protect part of the shoreline and the drainage canal was constructed to direct water run-off from the area. The seawall is a CRM wall which is made up of cement, rock and masonry which is a typical type of wall used in Hawaii. Mr. Bucher provided maps of the seawall and drainage structure. Mr. Bucher feels the seawall should be allowed to remain in place as it protects

the land fill area from erosion and potential degraded water quality (due to erosion). He also noted the seawall would not affect the sandy beach as the beach there is not natural and the sand is not sand but instead crushed coral. He announced safety is a big issue for KMO and feels the seawall provides some security. With regards to the drainage canal, Mr. Bucher noted the soil in the area is soggy and needs to be drained out or the area will remain unusable. He believes the drainage channel has minimal or no impact on stream flow as the end of the channel barely touches the water. As far as shoreline configuration, he feels there would be no change. If KMO is asked to remove the seawall and the drainage canal Mr. Bucher feels the immediate result would be a lot of debris in the water, more pollution in the water, shoreline erosion would occur behind the wall and recreation areas to wet to be used.

Mr. Whalen made reference to the Department's "No Tolerance Policy" which states "the policy of no tolerance means that all structures that encroach on conservation district beaches that are illegal built or illegal repaired following the announcement date will be torn down or a form of compensatory mitigation will be applied." Based on the department's policy, Mr. Whalen feels that not all structures need to be torn down. He feels the board can exercise discretion on how the policy is applied especially since the structures serve a public benefit and the removal of the structure would be contrary to good coastal zone management practices. With regards to mitigation, Mr. Whalen feels the structures themselves area form of mitigation as it stops the erosion of the embankment.

Gary Nakamura, an officer of KMO testified on behalf of the members present at the hearing. Mr. Nakamura acknowledged that the subject facilities were built through the dedication of volunteers. He asked the Board when making a decision today to keep in mind the history and intent of the law which is to preserve and maintain the property of Hawaii. Mr. Nakamura stated there was no willful intent to disregard any regulations or laws that were imposed by the Department. Their primary intent in building these subject structures were to reduce liability, to maintain the property and to make the property availability to the youth of Hawaii at no cost. Mr. Nakamura believes the removal of the subject structures would not benefit the State or the youth of Hawaii and asked the structures be allowed to remain in place. In closing he noted the law was not made to punish people but to preserve the land.

The Board amended the following

1. Amend Recommendation 3)

"That upon payment of the fine by the alleged, within sixty [~~(60) days~~] 6 months of the date of the Board's action, the alleged shall [~~remove the structure and restore the shoreline area to its previous condition~~] submit a Conservation District Use Permit for the structures and/or subdivision and process it diligently thereafter;

2. Amend Recommendation 4)

"[~~If the structure is not removed within sixty (60) calendar days~~] If the Conservation District Use Application is not filed within six (6) months, fines of $2,000 per day shall accrue on the landowner until these conditions are met; and

3. **Amend Recommendation 5)**

"That in the event of failure of the alleged to comply with items [~~B and C, and D~~] 2, 3 and 4, the matter shall be turned over to the Attorney General for disposition, including all administrative costs."

Unanimously approved as amended (Johns/Martyn).

Item L-1: Approval of Amendment to the Plan of Operation for Puna Geothermal Venture, Geothermal Resources Mining Lease R-2, Kapoho, Puna, Hawaii.

Unanimously approved as submitted (Johns/Schuman).

Item E-1: Selection of Projects for Federal Grant Awards through the Land Water Conservation Fund Program for Fiscal Year 2005 and Proposed Change to a LWCF Application from Fiscal Year 2004.

Members Johns disclosed he is the Chairman of the Advisor Board for the Trust for Public Lands.

The Board amended the Recommendation Section by adding

"4. Approve State Parks' application for the LWCF grant funds totaling $688,891 and authorize an appraisal for the acquisition of 1,129 acres at Pupukea-Paumalu."

Unanimously approved as amended (Schuman/Johns).

Item E-2: Annual Renewal of Revocable Permit (RP) SP-0201, Lanihuli Community Development Corp., Malaekahana State Recreation Area, Island of Oahu.

Item E-3: Forfeiture of Mobile Food Concession Agreement No. SP-0051, Dana Y.K. Shim-Palama dba Aloha Valet Services, Concessionaire, Kalaheo, Kauai, TMK: (4) 1-2-02-024 (a portion of).

Unanimously approved as submitted (Johns/Schuman).

Item K-6: Conservation District Use Permit Violation Regarding the Construction and Operation of a Wind Farm and Associated Facilities to Supply Wind Generated Electricity at Kaheawa Pastures, Ukumehame, Maui, TMK: 4-8-01:01 & 3-6-1:14.

Mr. Lemmo refreshed the Board's memory by reminding them on January 24, 2003 the Board approved a CDUA MA-3103 for a wind farm and associated improvements at Ukumehame, Maui. Subsequently on June 24, 2005 the applicant requested modifications to the permit some of which were approved by the Board. Construction plans for the access road were approved on August 29, 2005 and construction work was initiated on the access road on or around August 30, 2005. Mr. Lemmo went on to reveal on September 27, 2005, the Department issued a Notice and Order to cease all road construction. The reason for the stop work order was to investigate potential permit violations and to prevent a potential sedimentation event due to an impending rain storm and any

future rain storms. The alleged violation involved improper road construction and failure to contain earth material within the approved project alignment. As a result of this unauthorized action, the Department asked Kaheawa Wind Power (KWP) to reduce the width of the road to the original road width. On October 7, 2005, OCCL received and approved the plan to reduce the road width and imposed a number of conditions. In the approval letter sent to KWP by the Department it noted that the Department would process a violation case for the unauthorized fill that was pushed over the side of the road. Mr. Lemmo pointed out there are two major violations: 1) the expansion of the access roadbed beyond the width of the approved construction plans and 2) the spoiling of the slope and gulch with borrow material from the road cut. Although it may not be possible to remove the cut material from the slope and gulch as it may cause additional damage, Mr. Lemmo is instead requesting a penalty based on the cost to remove the excess cut material from the slope. Mr. Lemmo recommended the Board find KWP in violation of Chapter 183C, HRS and Title 13-5, HAR for unauthorized road work and pushing earth material into a gulch and is subject to the conditions listed in staff's submittal.

Gil Keith-Agaran, representing KWP appeared before the Board to provide testimony. Mr. Keith-Agaran let it be known KWP believes strongly in the benefits that renewable energy brings to the State of Hawaii and understands that the benefits of the project can not be fully realized if the development and construction of this project are not handled properly. He pointed out from the beginning KWP has stated that its goal was to construct a model project and has acted in good faith throughout the design, entitlement and construction stages of this project to meet that goal. Mr. Keith-Agaran confirmed KWP has met every request from every agency for additional surveys or studies in an effort to satisfy all parties. As background information Mr. Keith-Agaran communicated that KWP began construction based on the approved plans. On September 28, 2005 KWP received a Notice & Order to cease any further improvements on the access road until mitigative and Best Management Practices (BMP) were in place to protect the resources. KWP ceased work immediately as instructed. Mr. Keith-Agaran disclosed that KWP was not contacted or consulted during the inspections of September 23 & 26 and that those inspections were not carried out by State personnel with engineering credentials. On September 28, 2005, KWP management and its contractors met with the local DLNR land agent and personnel from the Department of Health (DOH). A site inspection was conducted and the DOH representative confirmed verbally that all Best Management Practice's were in place. Because of an impending storm, KWP took immediate voluntary measures to ensure as much protection was put in place as possible before the storm arrived. KWP 1)shaped and bermed all areas under construction to control water flow; 2) added several hundred feet of additional silt fencing, and 3) built two levels of rack dam silt filters in the Malalowaiaole gulch. KWP also flew their civil engineer from Oahu to Maui to inspect the site and recommend any additional measures that could be taken. All of this was done voluntarily. After the threat of the storm passed DLNR conducted an additional site inspection and determined that KWP had two non-conforming issues; a section of access road apparently wider that called for in the plans and excess fill material from the cut slope exceeding the bottom of the fill slope as depicted in the construction plans. KWP inspected this situation and found that the contractor had made an inadvertent error and that excess material was in the fill slope and some material had reached the bottom of the gulch. Over the next several days KWP worked with DLNR to develop a remediation plan and provided a $200,000 bond to guarantee the completion of the work. KWP also requested that DLNR assign an engineering representative to the project to strengthen communications and oversight and KWP offered to pay that expense. Since that time, there has not been any deviation from the construction plans that has not been reviewed, discussed and documented with the concurrence of DLNR engineering. On January 2, 2006, KWP notified the Department that the remediation was complete. In summary, Mr. Keith-

Agaran believes KWP acted responsibly and took immediate and voluntary action beyond what was required to mitigate any negative effects of its construction on the environment. Mr. Keith-Agaran acknowledge an unintentional mistake was made during the construction but when the mistake was discovered, KWP took immediate actions to rectify the situation. Remediation of the affected area has been completed at KWP's expense and with DLNR's oversight and approval. In addition the access road which is being constructed at a cost to KWP of approximately six million dollars, while necessary for construction of the facility actually belongs to the State. However while KWP takes responsibility for the activities at the site, there is nothing in KWP's activities to warrant a punitive action by the Board. The alleged damage has been repaired and KWP has offered to reimburse DLNR for administrative engineering costs and is willing to reimburse the DLNR for its other administrative costs. KWP does take issue with the staff position that the DLNR engineering review cost be characterized as a fine. In closing, KWP request the Board consider administrative costs of $7100 as a more appropriate alternative to punitive fines and that the Board eliminate the $10,350 of punitive fines.

The Board questioned Mr. Lemmo on how he arrived at a remediation fine of $8,350. Mr. Lemmo indicated in resource damages cases, restoration costs has been used as a proxy for a penalty. He indicated KWP would pay the penalty to the Department and we would decide what actions to take.

Mr. Keith-Agaran believes his client has done enough work to remedy the damage that was caused. He also pointed out his client's engineers have concern about whether the boulders should be removed from the gulch.

The Board amended

1. Recommendation 1)

"The permittee violated the provisions of Chapter 183C, Hawaii Revised Statutes (HRS), and Chapter 13-5, Hawaii Administrative Rules (HAR) , in two (2) instances by failing to obtain the appropriate approvals for unauthorized road widening and for the spoiling of the slope and gulch with borrow material form the road cut. The permittee is fined a total of $2,000 for the road widening and [~~$8,350~~] <u>$2,000</u> for the spillage on the slope and gulch."

2. Recommendation 3)

"The permittee shall pay all fines (total [~~$17,450~~] <u>11,100</u>) within thirty (30) days of the date of the Board's action;"

Unanimously approved as amended (Johns/Martyn).

Item C-3: Request for Approval of the Kaheawa Pastures Wind Energy Generation Facility Habitat Conservation Plan and Accompanying Incidental Take License and Implementing Agreement.

Curt Cotrell, Na Ala Hele Program Manager and Scott Fretz, Wildlife Program Manager with the Division of Forestry and Wildlife appeared before the Board. Mr. Fretz notified the Board there is an issue concern the adequacy of the financial guarantee that was provided by the applicant to comply

with the Habitat Conservation Plan (HCP) and Incidental Take License. A final review was conducted by the solicitor for the Fish and Wildlife Service and approval was received from the Endangered Recovery Species Committee (ERSC) which will resolve the issue in question. Mr. Fretz recommended the Board amend the Kaheawa Pastures Wind Energy Generation Facility Habitat Conservation Plan and accompanying Incidental Take License and Implementing Agreement to require an increase in the amount of the letter of credit financial guaranty to $1,000,000 if the un-mitigated take of any species should ever rise to the "Notably Higher than Anticipated" level, either annually or a cumulative total and if in subsequent years the level of take declines back to the anticipated level or lower, the letter of credit can likewise be reduced back to $500,000 and approve the amended Habitat Conservation Plan and accompanying Incidental Take License and Implementing Agreement by the required two-thirds vote of the authorized membership subject to the review and approval as to form by the Attorney General.

Paul Gaynor, CEO of UPC Wind (one of the sponsors of Kaheawa Wind Power) acknowledged he has reviewed an is in agreement with the proposed changes to the HCP. Mr. Gaynor reminded the Board at its meeting on June 24, 2005 the Board gave final approval of the draft HCP and since that time, they've begun implementing all the conditions in the draft HCP which included a public hearing and comment period. Mr. Gaynor pointed out this process has taken a lot of time and they are running out of time. He reminded the Board they need to acquire the State and Federal Incidental Take License by February 1, 2006 or their creditor will find them in default. He asked the Board if they are inclined the approve the HCP he would like the Department to deliver the State License to them by January 31, 2006.

Mr. Fretz informed the Board the Department can not issue the State Incidental Take License until the Federal License is issued.

Bill Stanley, of DOFAW indicated that once the Board approves the HCP the paperwork will be forwarded to the Attorney General's Office for final review as to form. Upon approval the Chairperson has the authorization to sign the Incidental Take License but the License will not be valid until the US Fish and Wildlife Service License is issued. Mr. Stanley believes the Department can meet the January 31 deadline but he has no control as to when the Federal License will be issued.

Linda Chow, Deputy Attorney General working on this submittal informed the Board she has no problem completing the review of the HCP by January 31.

The Board amended the Habitat Conservation Plan for Kaheawa Pastures Wind Energy Generation Facility Ukumehame, Maui, Hawaii as follows

1. Page 61:

"To further ensure the success of the mitigation effort, Kaheawa Wind Power will establish a $100,000 Seabird Contingency Fund that will be made available prior to construction of the proposed turbines. The value of the fund will be adjusted at 2.5% ~~for inflation~~ over the 20-year term of the HCP. ~~license. ; indexed to the US Consumer Price Index All Urban Consumers. For budgeting purposes in 2005, an increase of 2.5% annually for 20 years is assumed, for.~~ This results in a total maximum of $163,861.64 (if left unused through year 20). If drawn upon at any time, the 2.5% would continue to accrue on the remaining balance. The fund will be available to implement adaptive management strategies to ensure mitigation is commensurate

with take. If at the end of the 20-year period, mitigation implemented is not commensurate with take, any remaining funds will be used to continue to implement mitigation measures."

2. Page 63-64:

"To further ensure the success of the mitigation effort, Kaheawa Wind Power will establish a $264,000 Nene Contingency Fund prior to construction of the proposed turbines. The value of the fund will be adjusted ~~for inflation~~ at 2.5% over the life of the project ~~indexed to the US Consumer Price Index All Urban Consumers. For budgeting purposes in 2005, an increase of 2.5% annually for 20 years is assumed, for.~~. This results in a total maximum of $432,594 (estimated 2025 dollars) over the 20-year term of the HCP. If drawn upon at any time, the 2.5% would continue to accrue on the remaining balance. If at the end of the 20-year period, the Hanaula Nene population is smaller than the population existing at the time the permit is issued as a direct result of project operations, the Nene Contingency Fund will be available to construct an additional new release pen, to operate this new pen for up to five years beyond the life of the project, and to supply the new pen with up to 50 Nene."

3. Page 66:

"To further ensure the success of the mitigation effort, Kaheawa Wind Power will establish a $20,000 Bat Contingency Fund that will be made available prior to construction of the proposed turbines. The value of the fund will be adjusted at 2.5% ~~for inflation~~ over the term of the HCP ~~license indexed to the US Consumer Price Index All Urban Consumers. For budgeting purposes in 2005, an increase of 2.5% annually for 20 years is assumed, for.~~. This results in a total maximum value of $32,772.40. If drawn upon at any time, the 2.5% would continue to accrue on the remaining balance. The funds will be available in the event that adjusted take exceeds the estimated 20 bats or as required to implement adaptive management strategies to ensure mitigation is commensurate with take. The fund will be used to fund on-the-ground measures such as, but not limited to, implementation of technologies to reduce the likelihood of collisions with the wind turbines and protection of roost sites as agreed to by USFWS and DLNR. If at the end of the 20-year period, mitigation implemented is not commensurate with take, any remaining funds will be used to continue to implement mitigation measures."

4. Page 76:

"The applicant is offering other financial assurances as well. Kaheawa Wind Power will provide a rolling letter of credit (LC) or bond in the amount of $500,000, which will be available to fund mitigation in the unlikely event of a revenue shortfall or, in the worst case scenario, bankruptcy. The LC will name the USFWS and DLNR as beneficiaries. The LC will have a term of four years, and will be automatically renewed prior to expiration, unless it is determined to no longer be necessary by the USFWS and DLNR. In the event of a revenue shortfall or bankruptcy the LC could be drawn upon by the USFWS or DLNR to fund any outstanding mitigation obligations of the project. This LC would be in addition to the $1.5M LC already in place for DLNR to fund turbine removal and site restoration in the event of bankruptcy. During the first 10 years of operation, the value of the LC or bond would increase to $1,000,000 in the event that unmitigated take at the Notably Higher Take level occurs for any species, either annually or as a cumulative total. At the end of year 10, and in subsequent years,

if the $1,000,000 bond is in place, the applicant, in cooperation with the DLNR and USFWS, will conduct an assessment to determine whether the value of the bond is sufficient to assure funding over the remaining years of the HCP. The assessment will be based upon an accounting of the amount spent to date, relative to the maximum $3.76M amount. The maximum amount of the bond would be the difference between these two, although the actual amount would be determined by DLNR and USFWS at the time the assessment is made.

The applicant will establish an additional, single bond or letter of credit for the value of the three contingency funds ($384,000). The amount of the bond will increase at 2.5% annually over the term of the HCP. If contingency funds are used, the amount of the bond would be reduced accordingly, and the net amount would continue to increase at a 2.5% annual rate."

5. Attachment III, Implementing Agreement

Change date to January 12, 2006

6. Section 4.1.1:

"(c) Permittee will pay the mitigation obligations described in Appendix 11 of the HCP out of (1) project operating revenues; (2) a bond posted in the amount of the contingency funds described in the HCP ("Contingency bond"); (3) a bond posted in the amount of $500,000 ("Mitigation bond"); and (4) a Guaranty Agreement provided by third-party equity holders in the project. The Mitigation Bond shall be renewed each year for the full amount of $500,000 for the life of the project.

(d) FWS, DLNR and Permittee shall review the amounts of the two bonds during the annual meetings held pursuant to Chapter VI, Implementation, of the HCP. If circumstances warrant, in accordance with the HCP, the amounts of the bonds may be decreased, increased or eliminated during the annual meetings. If unmitigated Notably Higher Take is occurring, either during any given year or cumulatively, then Permittee shall increase the amount of the $500,000 Mitigation Bond to $1 million. If unmitigated Notably Higher Take continues to occur during Year 11 or thereafter, the Parties agree during the annual meeting to evaluate the adequacy of the Mitigation Bond based on the amount of mitigation funds already spent in relation to the total mitigation obligation of $3.76 million for the project. If FWS/DLNR believe an increase in the Mitigation Bond is warranted after the amount of the Mitigation Bond has been increased to $1 million pursuant to this paragraph, FWS/DLNR may require an increase in the Mitigation Bond amount. FWS/DLNR will consider the following factors in deciding whether such an increase is warranted: length of time the project has operated under the Notably Higher Take scenario; difference between the total project mitigation obligation of $3.76 million and $1 million; financial condition of Permittee; and Permittee's history of performance of mitigation obligations.

(e) The Guaranty Agreement provided by Permittee shall be for the maximum amount of $3.76 million, which is the total amount of estimated costs of all mitigation and monitoring measures, including contingency funds, that may be expended in the unlikely event that Notably Higher Take occurs for all four species covered under the HCP, as described in Appendix 11 to the HCP. In no event shall the Guaranty Agreement provide a guarantee for, or the Permittee be obligated to pay, more than $3.76 million for mitigation over the life of the project. The

maximum Guaranty Agreement amount will be reduced over time by the actual amount expended by Permittee for mitigation and monitoring."

7. Section 8.1:

"[~~Permitee-initiated a~~]Adaptive management. [~~Permitee~~]Parties will implement the adaptive management provisions in Chapter VI and Appendix 10 of the HCP when changes in management practices are necessary to achieve the HCP's biological goals and objectives or to respond to monitoring results or new scientific information as provided for in the HCP. [~~Permittee will make such changes without awaiting notice from FWS/DLNR, and will report to FWS/DLNR on any actions taken pursuant to this section.~~]"

8. Section 8.3:

"[~~Reductions in mitigation~~]No reduction in conservation benefit. Permittee will not implement adaptive management changes that may result in less mitigation than provided for Covered Species under the original terms of the HCP, unless FWS/DLNR first provide written approval. The amount of money spent on mitigation may be less than the estimated amounts included in Appendix 11 of the HCP, provided the mitigation is sufficient to provide a net conservation benefit to the species. Permittee may propose any such adaptive management changes by notice to FWS/DLNR, specifying the adaptive management modifications proposed, the basis for them, including supporting data, and the anticipated effects on Covered Species, and other environmental impacts. Within 120 days of receiving such notice, FWS/DLNR will either approve the proposed adaptive management changes, approve them as modified by FWS/DLNR, or notify Permittee that the proposed changes constitute permit amendments that must be reviewed under Section 12.2 of this agreement."

Unanimously approved as amended (Johns/Martyn).

Item D-10: Grant of Term, Non-Exclusive Easement to Snowed Inn Hostelry, Inc. for Seawall and Filled Land Purposes, Kahana, Lahaina, Maui, TMK: (2) 4-3-19:seaward of 47.

Mitch Hirano, attorney representing the landowner asked the Board to reconsider the fine for the illegal encroachment onto State land. Mr. Hirano noted the rock revetment was in place in 1977 and in 1980 the land was reconsolidated and sold by quite claim deed to the upland owner. He feels that at the time the land was sold an easement over the portion of the rock revetment on submerged lands should have been obtained in order to complete the land consolidation and remedy the encroachment issue. Mr. Hirano pointed out the current landowner made improvements to the rock wall which was deemed a conservation district violation which they paid a fine.

Mr. Tsuji also questioned why these issues were not resolved back in 1980 when the applicant purchased the reclaimed lands. With regards to the $500 fine, Mr. Tsuji noted that it was a standard condition on all encroachment issues and if this issue was resolved in 1980 Mr. Hirano's client would still be assessed the fine.

Unanimously approved as submitted (Johns/Schuman).

Item K-2: Conservation District Enforcement File HA 05-19 Regarding Construction of a Single Family Residence Not in Accordance of Approved Construction Plans & Mitigative Measures to Reduce Impact to the Natural Resources Located at Hokukano, Ka'u, Island of Hawaii, TMK: (3) 9-5-016:036.

Member Johns recused himself.

Mr. Lemmo let it be known this item was deferred from the Board meeting of September 23, 2005 in order to review the records of the February 23, 2001 Board meeting regarding the approval of the Conservation District Use Permit. Upon advice from the attorney general office they indicated that the Board has the power to 1) Revoke the permit for failure to comply with all permit conditions; 2) Require the landowner to build according to the original plans and 3) Require the landowner to submit plans to connect the two separate structures. Mr. Lemmo pointed out there was one other issue that has come up in which the previous landowner was in the middle of land exchange when he passed away and this exchange was never consummated. Part of the agreement to the land exchange required the previous landowner to file for subdivision/consolidation for the land exchange. Mr. Lemmo recommended the Board find the landowner in violation of Chapter 183C and Chapter 13-5, Hawaii Administrative Rules and is subject to the thirteen (13) conditions listed in staff's submittal.

Mr. Steven Lim, attorney for the landowner, (David and Mary Carroll) appeared before the Board. Mr. Lim handed the Board a packet involving this case and went over it. He pointed to two letters in his packet which stated that if a hedge were planted along the Carroll's mauka property line between the house and the highway it would greatly reduce the community's concern. With regards to the area being used by turtles to nest, Mr. Lim confirmed he has consulted with Dave Gulko of the Division of Aquatic Resources and Larry Katahira of the National Park Services on this issue. Mr. Lim asked that before his clients be required to do any light mitigation plan they be able to work with Mr. Gulko and Mr. Katahira to conduct a study on turtle nesting. Moving on to address the issue of the Carroll's grading beyond the original footprint, Mr. Lim provided a affidavit from Michael Tonini stating that the Carroll's did not impact the area outside of the previous graded area and a declaration from Jas Bahadur Rai taking responsibility for placing a one foot high dry stack rock wall around the edge of the property so no one would drive over the edge. Mr. Lim acknowledged his client did not follow the approved plans submitted to the Department and has no problem with the recommended fines by staff but they have issue with the subdivision requirement. Mr. Lim believes the former landowner was required by the Board to prepare the necessary mapping and obtain approval from the County of Hawaii to consolidate the two subject parcels. He also pointed to his Exhibit S which is a letter from the Chairperson of DLNR instructing the Department of Accounting and General Services (DAGS) to prepare the necessary mapping and approvals from the County for consolidation of the two parcels. Mr. Lim believes the issue of consolidating the two parcels should not fall upon his client since the previous landowner and DAGS failed to complete the task. Should the Board require the consolidation of the property DAGS should do so per the Department's letter to DAGS dated July 6, 1977. Mr. Lim went over his suggested changes to the staff's recommendations.

Keolani Hanoa, a community member and former member of the Hawaii Island Burial Council appeared before the Board to provide testimony. Ms. Hanoa feels this case isn't about personality conflicts but the violation of State Land Use Laws. Ms. Hanoa asked that copies of Mr. Lim's written testimony be made available to her. She also pointed out the Carroll's applied for an exemption of the SMA permit as there was to be no tractors or grubbing in the conservation area which in fact occurred on the property. Ms. Hanoa believes the main issue in this case is the non-compliance to the original

CDUA of a single family dwelling which called for one wing. She reminded the Board we can not make new laws to break laws. With regards to the letters of community support submitted by the Carroll's attorney, Mr. Hanoa let it be known they are only two people in the community and do not represent the views of the rest of the community. Ms. Hanoa informed the Board she is an advisor under Cindy Orlando, the Superintendent for Volcano's National Park and was told that Larry Kitahara can not participate in private matters such as this. Ms. Hanoa believes the Board is incapable of coming to the legal questions or getting answers because truth and integrity is not important and has stated that Kau Preservation has no other stance then to file litigations on this house.

When questioned by the Board Ms. Hanoa stated her belief is that there should be no house on the subject Conservation Land but if the State made a mistake in allowing the Carroll's to build their home the Carroll's should receive compensation from the State and the house should be removed.

Bob Graham, a resident of Kau announced that what's been going on here is the condoning of one violation after another without anything being done. Mr. Graham disclosed that the subject area is on record as being a cemetery and nothing has been done. He has been to the subject area and feels the home is a beacon that will blind you and must surely effect the turtles. He disclosed at the December 7, 2004 community meeting a lot of people turned out in opposition to the subject home being built.

Earl Hanoa, a life long resident of Kau let it be known as a youngster in the early 1970's he did not see a lot of grubbing in the subject area. He feels that the Carroll's desecrated the land by grubbing the land and the Board needs to set things straight. Mr. Hanoa stated that Kau is the last undeveloped land in the State and needs to protected.

The Board amended the following Recommendations

1. **Recommendation 6)**

   "[~~The landowner shall submit to the Office of Conservation and coastal lands potential shades and hues of brown, gray, or green for painting of the Single Family Residence to blend in with the surrounding environment within 90 days of the Board's action~~] To mitigate views of the Single Family Residence, the landowner shall submit to the Office of Conservation and Coastal lands a revised landscaping plan which mitigates view impacts, including a listing of all proposed plantings which will be implemented within 90 days of the Board's action:"

2. **Recommendation 7)**

   "[~~Upon approval, the landowner shall paint the Single Family Residence within 90 days of approval~~] To determine the potential impacts of lights from the Single Family residence on Hawksbill Turtle nesting behavior in the area, the landowner shall, in consultation with the State Department of Land and Natural Resources-Division of Aquatic Resources and the national park Services-Hawaii Volcanoes National Park-Resources Management prepare and submit a report to the Office of Conservation and Coastal lands within 90 days of the Board's action;"

3. Recommendation 8)

"[~~The landowner shall submit to the Office of Conservation and Coastal Lands a residential light screening and mitigation plan within 90 days of the Board's action~~] If it is determined by the Department of Land and Natural Resources-Division of Aquatic Resources and the Nation Park Services-Hawaii Volcanoes National park-Resources Management that the lighting from the Single Family Residence has a significant impact on the Hawksbill Turtle nesting behavior in the area, the landowner shall submit to the Office of Conservation and coastal Lands, a residential light screening and mitigation plan within 90 days of that determination;"

4. Delete Recommendation 9)

"[~~Upon approval, the landowner shall implement the residential light screening and mitigation plan within 90 days of approval;~~]

5. Delete Recommendation 10)

"[~~There shall be no outside lighting on the north and east sides of the SFR;~~]

6. Recommendation 11)

"[~~That an After the Fact Conservation District Use Application be filed for the subdivision/consolidation for the land exchange of December 8, 1975 with the State of Hawaii~~] 9. Staff shall work with the permittee cooperatively to determine the need for a subdivision/consolidation for the land exchange;

7. Renumber Recommendation 12)

"[~~12~~] 10. That in the event of failure of the alleged to comply with any order herein, the landowner shall be fined an additional $2,000.00 per day until the order is complied with; and"

8. Renumber Recommendation 13)

"[~~13~~] 11. That in the event of failure of the landowner to comply with any order herein, the matter shall be turned over to the Attorney General for disposition, including all administrative costs."

Unanimously approved as amended by the remaining Board members(Demello/Agor).

Item D-15: Approval in Principle of Direct Lease to Coalition for Specialized Housing for Low-Income Rental Housing Purposes, Waimano, Oahu, TMK: (1) 9-7-19:35.

Unanimously approved as submitted (Martyn/Agor).

Item D-2: **Amend Prior Board Action of October 16, 1992, Item F-14, The Direct Sale of Abandoned Road Right-of-Way; Set Aside to Trail Alignment to Division of Forestry and Wildlife, Na Ala Hele Program, Wailua, Kauai, TMK: (4) 4-2-07: abutting 12.**

The Board amended the Title to Read

"Amend Prior Board Action of October 16, 1992, Item F-14, The Direct Sale of Abandoned Road Right-of-Way."

Unanimously approved as amended (Agor/DeMello).

Item D-1: **Amend Prior Board Action Dated January 25, 1985 under Item F-11, Issuance Direct Lease to Hawaii Methodist Union and Hawaiian Association of Seventh-Day Adventists, Waimea, Kauai, TMK: (4) 1-4-02; 24, 55, 56, 57 & 58.**

Item D-3: **Amend Prior Board Action of February 13, 1981, Agenda Item F-2, Direct Sale of Remnant to Anthony De Mattos; Manowaiopae Homesteads, North Hilo, Hawaii, TMK: (3) 3-6-09:Portion of Homestead Road Reserve.**

Item D-4: **Rescind Prior Board Action for the Sale of Flume Right-of-Way Reservation to John A. McCall and Marla Y. McCall, Manowaiopae Homesteads, North Hilo, Hawaii, TMK: (3) 3-6-06:91.**

Item D-5: **Cancellation of General Lease No. S-5552, Hamakua-North Hilo Agricultural Cooperative, Lessee, Kemau 2nd, Hamakua, Hawaii, TMK: (3) 4-3-05:01.**

Item D-6: **Consent to Assign General Lease No. S-4962, Robelto Kaleianuinui Martines, Assignor, to Rose M. Olsen, Assignee, Milolii-Hoopuloa, South Kona, Hawaii, TMK: (3) 8-9-14:07.**

Item D-7 **Consent to Assign General Lease No. S-4964, Mona K. Kahele, Personal Representative of the Estate of Abel Pepe Kahele, Lessee/Assignor, to Sheldyn Elizabeth Baniaga, Assignee, Milolii-Hoopuloa, South Kona, Hawaii, TMK: (3) 8-9-14:10.**

Item D-8 **Grant of Perpetual, Non-Exclusive Easement to Brian Burke for Access and Utility Purposes, Makawao, Maui, TMK: (2) 2-1-5:portion 77.**

Item D-9 **Amend Prior Board Action of February 23, 2001 (Item D-8) Grant of Term, Non-Exclusive Easement to Lawrence A. Lance and Mary C. Lance for Encroachment Purposes; Ahuakeio, Hana, Maui, TMK: (2) 1-5-5:07.**

Item D-11: **Re-submittal – Acquisition of a Perpetual, Non-Exclusive Subsurface Communication Easement from the City and County of Honolulu, and Set Aside to the Department of Accounting and General Services; Mililani Street, Honolulu, Oahu, TMK: (1) 2-1-25:04 (Portion of adjacent roadway).**

Item D-13: **Re-submittal – Amend Prior Board Action of September 26, 1986 (Agenda Item F-9) – Set Aside to City and County of Honolulu for Solid Waste Collection Site, Waimanalo, Koolaupoko, Oahu, TMK: (1) 4-1-09:283.**

Item D-14: **Amend Prior Board Action of November 19, 2004 under Agenda Item D-4, for Grant of a Term Non-Exclusive Easement to Patricia Watanabe for Seawall Purposes, Kaneohe, Koolaupoko, Oahu, TMK; (1) 4-4-18:82 seaward.**

Item D-16: **Amend Prior Board Action of October 14, 2005 (Agenda Item D-12), After-the-fact Approval of Lease of Federal Property with the Secretary of the Air Force on behalf of the Department of Education, for Public School Purposes, Hickam Air Force Base, Oahu, TMK: (1) 9-9-01:13 (Portion).**

Item D-17 **After the Fact Approval of the Leasing of Private Property, and After the Fact Extensions of the Lease, for the Mauna Kapu Communication Station in Makakilo, Oahu.**

Unanimously approved as submitted (DeMello/Martyn).

Item D-12: **Grant of Perpetual, Non-Exclusive Easement to Hawaiian Electric Company, Inc. for Access and Utility Purposes, Auwaiolimu, Honolulu, Oahu, TMK: (1) 2-2-03:13.**

Member Johns recused himself.

Unanimously approved as submitted by the remaining Board members (Agor/Schuman).

Item M-3: **Issuance of Revocable Permits to The Associated Press; DR Partners dba Stephens Media Group; Oahu Publications, Inc. dba Honolulu Star-Bulletin; Gannett Co., Inc. dba The Honolulu Advertiser, at the State Capitol, 415 S. Beretania St., basement level, Honolulu, Hawaii 96813.**

Unanimously approved as submitted (Johns/Schuman).

Item M-1: **Conveyance of Remnant Parcels 4-A and 4-B, Kauai Belt Road, at Hanamaulu, Lihue, Kauai, Tax Map Key: (4) 3-8-8:Road (Portion).**

Item M-2: **Conveyance of a portion of the Road Remnant H-1, adjacent to Mamalahoa Highway, Federal Aid Project No. WPH 8-F, REMNANT H-1-A, County of Hawaii, Tax Map Key: (3) 8-3-13:Road.**

Item M-4: **Amendment to Prior Land Board Action of January 28, 2000, Under Agenda Item K-2 Regarding Second Amendment to Harbor Lease No. H-98-2, Issued to Aala Produce, Inc., dba Aala Ship Service, Adjacent to Pier 32, Honolulu Harbor, Oahu.**

Item M-5: **Amendment to Lease No. DOT-A-77-0031 U.S. Federal Administration Kahului Airport.**

Unanimously approved as submitted (Johns/Schuman).

Item K-3: Enforcement File No. OA-06-12 Regarding Alleged Unauthorized Placement and Storage of Two Containers and Signage on State of Hawaii Encumbered Lands - Paiko Lagoon Wildlife Sanctuary, Kuliouou, Island of Oahu, TMK: (1) 3-8-001:073 and 001.

Mr. Lemmo stated on August 8, 2005, OCCL, DOFAW and the Division of Conservation and Resource Enforcement (DOCARE) staff conducted a site inspection of the subject parcel. The inspection revealed two large containers on the subject parcel. Staff also noted tree debris pushed over the bank towards the ocean, landscaping of the area and placement of unauthorized signage. Although the violations were not major violations because the area is in a protective subzone staff viewed any violation as being a seriously violation. After the submittal was written. Mr. Lemmo had time to sit down with staff from DOFAW and it was revealed that DOFAW did not get the cooperation they needed from Mr. Saikley in fact DOFAW felt they were being let on. After the meeting with DOFAW, Mr. Lemmo requested some changes to his recommendation which included a fine of $2,000 for stockpiling of dirt, increasing the landscaping fine from $100 to $2,000 and a $2,000 fine for storage of construction material.

Dave Smith, of DOFAW pointed out the landscaping should be removed from the site since it is made up of non-native species.

Tim Lui-Kwan, attorney representing the landowner appeared before the Board. Mr. Lui-Kwan stated his client spoke to staff at OCCL and requested the specific dates the photos in the submittals were taken. To this day Mr. Saikley has yet to receive those dates. Mr. Lui-Kwan came today prepared to address the violations in staff's submittal but feels blind sided by the additional fines staff is requesting. Mr. Lui-Kwan went over the chronology of events. He stated by saying that Mr. Saikley purchase property in 2002 and at that point began communicating with Mr. Smith with regards to the care of the sanctuary. In Mr. Saikley's conversations with the Department they discussed what types of plantings would be used on the subject area. With regards to staff's report, Mr. Lui-Kwan does take issue with staff stating that his client dumped dirt on the subject land as well as when landscaping violation occurred and what was seen by staff when they went out to the property on August 8, 2005. With regards to extensive landscaping, Mr. Lui-Kwan confirmed the plants are long gone (planted in Spring of 2003). As far as the dumping of the dirt, he states that his client has never been told about the dirt. In fact they deny that they brought dirt onto the subject parcel. Mr. Saikley stated that he has never been told by the Department to remove the dirt. Addressing the placement of the unauthorized signage, Mr. Lui-Kwan communicated that Mr. Saikley's yardman installed one "No Trespassing" sing but took it down upon the request for the Department. He believes the Department is citing his client for other signage that were placed on the property by others as those signs were in place prior to Mr. Saikley purchasing his property. Mr. Lui-Kwan went on to mention in early August 2004, Mr. Saikley received a message from Dave Smith stating that it appears that his client had installed a gate and erected "No Trespassing" signs at the beginning of the driveway which his client denies doing. Mr. Lui-Kwan admits that during construction/renovation of Mr. Saikley's property his client contacted Mr. Smith by telephone and asked if he could bring a trash bin on to the subject property. Mr. Smith said it was okay and he believed it would be no problem to obtain a right-of-entry permit to bring in the trash bins . Mr. Lui-Kwan is not here today to contest the placement of the trash bin but is frustrated with staff not contacting his client to try and resolve these violations. Addressing Mr. Lemmo's claim that Mr. Saikley was uncooperative, Mr. Lui-Kwan made it known that he believes

Mr. Smith did not speak to Mr. Saikley or his partner but instead spoke to their gardener about the violations. Mr. Saikley's understanding is that the yardman spoke to Mr. Smith in 2003 and was asked to remove the "No Trespassing" sign and the gardener complied.

Mr. Lui-Kwan requested a contest case hearing.

John Sutton, of Sutton Construction took responsibility for the dumpsters that were placed on the subject parcel. He informed the Board that there was a change in personnel managing the job when this problem occurred. Mr. Sutton noted his intent is to be a good caretaker of the land and expressed an interested in working with the Department to keep the area clean.

Motion to defer.
Unanimously approved to defer (Johns/DeMello).

Item K-4: Enforcement File No. HA-04-37, Regarding Alleged, Unauthorized Grubbing and Grading, Tree Removal, Construction of Pathway, and Removal of Rocks to Create a Pond on Privately-owned land Located in the State Land Use Conservation District, Puna, Island of Hawaii, TMK: (3) 1-5-010:032.

Mr. Lemmo conveyed on January 5, 2003, DOCARE investigated a complaint of 1)an area 140' x 75' had been cleared approximately 70 feet from the shoreline; 2) a hole approximately 10 feet wide and 10 feet deep had been dug; 3) a path approximately 70 feet long and 16 feet wide extended from the cleared area east to the shoreline and 4) piles of rocks were left on the path and appeared to be removed from the shoreline area. On January 14, 2003, Maureen. Gapp went to see staff from DOCARE at the Hawaii Branch at which time she admitted conducting the work. Mr. Lemmo clarified that it has taken a long time for this case to appear before the Board due to the Gapp's profession which takes them out of the country. At the time the case was ready to be taken to the board the Gapp's indicated they would be out of the country for 1 to 1 ½ years. On November 2, 2005 staff sent a letter to the Gapp's asking that they contact the Department and on November 4, 2005, Mrs. Gapp contacted staff as well as faxed a letter. Mr. Lemmo recommended the Board find the John and Maureen Gapp did in fact authorize, cause or allow four (4) unauthorized violations to occur on the subject parcel and is subject to the conditions listed in staff's submittal.

Maureen Gapp, representing the landowner submitted to the Board a timeline of the events that have transpired. She noted on January 9, 2003 she was contacted by the Department regarding unauthorized work. A day later she contacted Mr. Lemmo to discussed what had occurred. On January 14, Mrs. Gapp met with DOCARE and gave a statement. Later that month on January 27, 2003, Mrs. Gapp sent a letter to Mr. Lemmo and Chris Yuen (Planning Department) regarding what had happened and that she would be leaving the State for 1 to 1½ years but made arrangements to have all correspondences sent to them. In July 2005 she received a letter from the Department saying the case was being reviewed and staff would be in touch. On September 13, 2004 Ms. Gapp received a call from Dawn Hegger that the hearing date was set for September 24, 2004 and which time they purchased tickets to travel to Oahu. On September 22, 2004, Ms. Gapp spoke with Tiger Mills and was informed her case was not on the agenda. In October 2004, Mr. and Mrs. Gapp left the State and pretty much forgot about the case when the arrived back to Hawaii in late January. Mrs. Gapp acknowledged the next time she heard from the Department was in November 2005 when she received a letter from Mr. Lemmo indicating he had not heard from them since February 2003. Mrs. Gapp informed the Board the subject property location is in an area called the Makut Tidepools due to

existing Tidepools. In the 1980's the then property owner bull dozed the lower portion of the property to create a orchard farm which did not developed. In November 2002 when the Gapp's purchased the property they had no intention of building a home but instead went to clean the property of the large amount of debris. Due to the fact that they had no intentions of building a home, the Gapp's never inquired about the permitting process and didn't know what they could and could not do on the property. Mrs. Gapp believed it was okay to clean the property of debris. Mrs. Gapp acknowledged they removed debris, rubbish and albezia trees but they deny moving rocks to create a pond and creating a pathway.

Mr. Lemmo informed the Board the DOCARE report regarding this violation was not included as part of the submittal due to attorney client privilege but Mr. Lemmo revealed that the DOCARE officer investigating this incident indicated the rocks were encrusted with coral material and appeared like they came out of the water. Furthermore he remembers the report stating that the pathway and pond were excavated as a favor to the Gapp's by a friend.

The Board amended the following

1. **Recommendation 1)**

   "That John and Maureen Gapp violated the provisions of Chapter 183C, Hawaii Revised Statutes (HRS), and Chapter 13-5, Hawaii Administrative Rules (HAR), in [~~four (4)~~] <u>three (3)</u> instances by failing to obtain the appropriate approval for the alleged unauthorized grubbing and grading action; 2) [~~rock removal for the pond's creation~~] tree removal; 3) construction of a pathway on subject parcel TMK: (3) 1-5-010:032 within the Conservation District. John and Maureen Gapp are fined [~~$8,000.00~~] <u>$5,000.000</u> for [~~four (4)~~] <u>three (3)</u> conservation District violations."

2. **Recommendation 3)**

   "That John and Maureen Gapp shall pay all fines [~~$9,000.00~~] <u>$6,000.00</u> within thirty (30) days of the date of the Board's action."

Unanimously approved as amended (Demello/Johns).

The Board advised the Gapp's that they have a right to a contested case hearing and should they chose to they would need to follow up their verbal request with a written application which should be filed within 10 days.

The Gapp's requested a contested case hearing.

Item C-1: **Request for Approval to Hold Public Hearing on Proposed Amendments to Hawaii Administrative Rules Chapter 13-209 (Rules Regulating Activities within Natural Area Reserves.**

Item C-2: **Request for Approval to Enter into Eighteen Contracts to Implement the Hawaiian Invasive Species Council Research and Technology Grant Program Projects: with the Bishop Museum for "Implementing Early Detection;" with the University of Hawaii for a Study of "Dinoflagellates in Ballast Water;" with the**

University of Hawaii for a Study of "Invasive Ant Control;" with the USDA National Wildlife Research Center for Determining "Rodenticide Efficacy;" with the USDA National Wildlife Research Center to Research a "Brown Tree Snake Attractant;" with the University of Hawaii for Finding "Erythrina Gall Wasp Parasitoids;" with the USDA National Wildlife Research Center for Testing "Brown Tree Snake Baits;" with the University of Hawaii for "Invasive Species Database Enhancements;" with the Hawaii Department of Agriculture for "Management of Erythrina Gall Wasp;" with the USDA Agricultural Research Service for "Nettle Caterpillar Lure Applications;" with the University of Hawaii or Tri-Isle Resource Conservation and Development for a "Coqui-Free Certification Program;" with Bishop Museum for "Aquatic Invasive Species Expertise;" with McClay Ecoscience for a "Miconia Biocontrol Survey in Mexico;" with the USDA Institute of Pacific Islands Forestry or the University of Hawaii to Survey for a "Himalayan Blackberry Biocontrol;" with the USDA Institute of Pacific Islands Forestry or the University of Hawaii for a "Miconia Biocontrol Evaluation;" with Colorado State University to Study "West Nile Virus in Parakeets;" and with the US Fish and Wildlife Service or the National Wildlife Research Center to Refine a "Multi-Pest Exclusion Fence"

Unanimously approved as submitted (Johns/Schuman).

Item K-1: **Waive the Timeliness of Written Requests for a Contested Case Hearing & Appointment and Selection of a Hearing Officer to Conduct All Hearings for One Contested Case Hearing Regarding Conservation District Use Application (CDUA) HA-3250 for the Commercial Use of Hand Quarried Volcanic Ash Located at Pu'u Nene, Kaohe, North Hilo, Island of Hawaii, TMK: (3) 3-8-001:001.**

Unanimously approved as submitted (DeMello/Johns).

Item L-2: **Approval for Award of Construction Contract – Job No. F00CF35A Individual Wastewater System Improvements at Akaka Falls State Park Hilo, Hawaii.**

Item L-3: **Approval for Award of Construction Contract – Job No. J00CF64A ADA Barrier Removal, Mauna Kea SRA, North Hilo, Hawaii.**

Item L-4: **Approval for Award of Construction Contract – Job No. J00CH87B ADA Barrier Removal, Kekaha Kai State Park, Kona, Hawaii**

Item L-5: **Approval for Award of Construction Contract: Job No. J00CF29A, Kukaniloko Birthstones State Monument ADA Barrier Removal, and Job No. J00CF23A, Puu O Makuka Heiau State Monument ADA Barrier Removal, Oahu, Hawaii.**

Item L-6: **Approval for Award of Construction Contract – Job No. J00CF54B Wailua River State Park, Kuamoo Road Facilities ADA Barrier Removal Wailua, Kauai, Hawaii.**

Item L-7: Approval for Award of Construction Contract – Job No. J00C105A Wiliwili Nui Trail ADA Barrier Removal Honolulu, Oahu, Hawaii.

Unanimously approved as submitted (Johns/Schuman).

There being no further business, Chairperson Young adjourned the meeting at 2:10 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,

Terry Crowell

Terry Crowell

Approved for submittal:

PETER T. YOUNG
Chairperson
Department of Land and Natural Resources

MINUTES FOR THE BRIEFING OF THE BOARD OF LAND AND NATURAL RESOURCES

DATE: THURSDAY, JANUARY 12, 2006
TIME: 4:00 P.M.
PLACE: KALANIMOKU BUILDING
LAND BOARD CONFERENCE ROOM 132
1151 PUNCHBOWL STREET
HONOLULU, HAWAII 96813

Chairperson Peter Young called the meeting of the Board of Land and Natural Resources to order at 4:13 p.m. The following were in attendance:

MEMBERS

Mr. Peter Young
Mr. Toby Martyn
Ms. Taryn Schuman
Mr. Gerald DeMello
Mr. Ron Agor

STAFF

Ms. Holly Leong, Personnel
Ms. Yara La Madrid-Rose, State Parks
Ms. Tiger Mills, OCCL
Mr. Robert Masuda, CO
Mr. Morris Atta, Land
Ms. Lauren Tanaka, State Parks
Mr. Randy Kennedy, DOFAW
Ms. Debbie Ward, CO
Mr. Mike Constantinides, DOFAW
Mr. Dean Aoki, CO
Ms. Juliet Kazanjian, Fiscal
Mr. Francis Oishi, DAR
Ms. Jennifer Bethel, CO
Ms. Betsy Gagne, DOFAW
Ms. Jolie Wagner, DOFAW
Mr. Curt Cottrell, DOFAW
Ms. Jeannie Fujikawa, CO
Ms. Athline Clark, DAR
Ms. Christen Mitchell, DOFAW
Mr. Gary Moniz, DOCARE

OTHERS

Mr. Kepa Maly
Mr. Sam Gon
Mr. Clyde Namu'o
Ms. Theresa Dawson
Mr. Manu Boyd
Ms. Haunani Apoliona
Mr. Jonathan Scheuer
Ms. Diana Leone

Chairperson Young pointed out at the December meeting of the Commission on Water Resource Management, Kepa Maly spoke to those present about the cultural importance of water. After hearing Mr. Maly's twenty minute presentation, Mr. Young invited him to conduct a presentation before the Board dealing with the cultural importance of Hawaii's natural resources. The presentation began with Manu Boyd and Sam Gon recited an ole.

Mr. Boyd performed an ole that asked the question "Where is the Water of Kane" to which the reply is that the water of Kane is everywhere – it's at the rising sun, the setting sun, the mountains, the valley's the ocean, the stream's, the rainbow's, the springs of the earth and the rain. The ole ends by saying water sustains life, water is everywhere and water is important.

Sam Gon performed an ole regarding the changes that happen to the land and how we can make the correct changes for the resources that are on the land and in the water. Prior to the ole Mr. Gon chanted about how the lands are decorated with the beauties of the forest which are fed by the mist of the tradewinds.

As background information Mr. Maly disclosed he was raised on Oahu and Lanai. His kupuna on Lanai were born in 1892. His wife's kupuna was an esteemed woman of Hawaiian history. Over his lifetime Kepa has been spent time with kupuna's to gather their stories. It is Mr. Maly's wish for the Office of Hawaiian Affairs to capture the voices of our kupuna's in detailed oral history programs because once they die the experiences die with them.

If those present get nothing else from his presentation Mr. Maly wants everyone to remember when people talk about issues of land, water and the ocean in the truest sense of the Hawaiian context they are speaking about family, their gods. He stated people can not focus on only what was lost. Mr. Kepa's presentation dealt with the knowledge he has obtained over the years but he noted that not all knowledge comes from one school but he will speak on what he has learned. Mr. Kepa told those in attendance that we must share our knowledge with others so it can be passed on to future generations. Mr. Kepa asked those present to keep the knowledge he has shared with them that is good but if he says something offensive that they do not agree with to please set it aside.

Mr. Maly spoke of a book titled "Fragments of Hawaiian History" by John Papa Ii. He spoke of Mr. Ii's role in life which was to tend to the children and grandchildren of Kamehameha I. He observed the last human sacrifice at Papaenaena, witness the reawakening of the heiau and the putting to sleep of the heiau after the death of Kamehameha I. In the 1860's Mr. Ii wrote a series of articles for a Hawaiian language newspaper and these articles have been translated into "Fragments of Hawaii." Mr. Kepa questioned if the articles were fragmented at the time Mr. Ii wrote those articles it would mean that changes would have already occurred to the original work.

Mr. Maly went on to talk about the issue of land ownership. He pointed out in 1848 to 1855 when native tenants of the land were granted the right under a western system to private land ownership many Hawaiian's applied for land they lived on and were actively working on. But during that time 5,000 of those Hawaiians died and their claims were lost. So when dealing with land issues, Mr. Maly asked the Board to remember that a lot has happened but the Board needs to be able to listen to the issues while putting aside people's anger so that they can read through

the issues and understand it. While we need to understand what tradition is at the same time we need to do what we can to save something because so much has been lost.
Mr. Maly encouraged the Board to read an ethnographic study he conducted dealing with the native traditions, lore's and historical accounts of Mauna Kea. This seven hundred page document consists of native and historical accounts of Mauna Kea and it does not include any science. (Mr. Maly also conducted a study on the oral history of Sacred Falls.) He spoke of Mauna Kea being likened to a sacred landscape in which each part contributes to the integrity of the entire mountain. Mr. Kepa let it be known he has spoken with Hawaiian's that worked the mountain during the time of construction and they've stated that no burials were found or disturbed during construction phase. Upon speaking with kupuna's regarding on this issue he noted many of them feel that what's there is there and we can't do anything about it but, those using the mountain need to show us that they can be good stewards of the land by taking care of and respected it. The kupuna's also asked that no other construction be allowed on Mauna Kean instead we should make good use of what is already there.

Mr. Maly indicated when Hawaiians look at land, its family, it's and embodiment of the gods. M Kepa spoke of a tutu that was taught to call upon the gods before traveling into the mountains. Should the mist come down upon them while traveling in the mountains it might mean they've done something wrong. Tutu then stated they would proceed to communicate with the gods telling the gods they were lost and asked for help. Through this story Mr. Maly is not saying we should live like they did in the past but to recognize that maybe we are not the masters of the lan but if we are good servants to the land we'll be rewarded by the resources from the land, the foo

Mr. Maly asked the Board when making decisions regarding the land and the water to remember it is not just a commodity. He noted the western way of looking at the environment is to measur how much you can get out of the land because they are detached from the land, but Hawaiians have a cultural attachment to the land so they view it differently. Mr. Maly told the Board they must arrive at a balance in order for the land to provide for future generations.

Mr. Maly invited those present to ask questions which he would try to answer. Questions were raised dealt with beach access, construction at Mauna Kea, and the items found at Forbes Cave.

Haunani Apoliona, Chairperson of the Board of Trustees of the Office of Hawaiian Affairs (OHA) told the Board they were happy to be here to listen to Mr. Maly's presentation. Ms. Apoliona spoke of having the same concern the Board has which is to protect the land. She mad it known through today's presentation she can appreciate the job that the Board has. Ms. Apoliona let it be known if we can honor, respect and accept the genealogy and lineage of Hawa it will make the decision process easier. She told the Board the view of OHA is to "talk story" t avoid any disconnect so things can be solved the right way.

Mr. Maly ended the presentation by asking everyone to remember this phrase, "O Ka mea maka malama, o ka mea maika'i ole, ka pae ia" which translates to "Keep the good and set the bad aside."

There being no further business, Chairperson Young adjourned the briefing at 5:56 p.m. T
the meeting and all written testimony submitted at the meeting are filed in the Chairperson
Office and are available for review.

Respectfully submitted,

Terry Crowell

Terry Crowell

Approved for submittal:

PETER T. YOUNG
Chairperson
Department of Land and Natural Resources

United States Department of the Interior

Hawaii Volcanoes National Park
P. O. Box 52
Hawai'i National Park, HI 96718-0052
808/985-6000
808/967-8186 (FAX)

In Reply Refer to:

March 8, 2006

RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS
2006 MAR 13 A 8: 52
DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

Samuel J. Lemmo, Administrator
Department of Land and Natural Resources
Office of Conservation and Coastal Lands
P.O. Box 621
Honolulu, Hawaii 96809

Dear Mr. Lemmo,

We are in receipt of copies of various communications between your office and Attorney Steven S.C. Lim, regarding enforcement compliance relative to construction of a single family residence within the conservation district located at Hokukano/Ka'alaike, Ka'u, Island of Hawaii.

This is to advise you that the National Park Service does not serve as consultants for private property owners in disputes with your agency and it was inappropriate to identify our participation as a mitigative measure in this regard.

Additionally, we note that in the minutes of January 13, 2006, a statement was made by Keolalani Hanoa in which she "informed the Board she is an advisor under Cindy Orlando, the Superintendent for Volcanoes National Park and was told that Larry Katahira cannot participate in private matters such as this." These minutes need to be corrected to reflect that Ms. Hanoa does not represent Hawaii Volcanoes National Park or my office as an advisor or in any official capacity in regards to these matters or any others.

To date we have received no official communications from your agency regarding this matter. All future communication on this issue needs to be directly with my office.

Sincerely

Cindy Orlando

Cynthia Orlando
Superintendent

cc: Tiger Mills, OCCL
Steven Lim
Katahira-RM-HAVO

Exhibit A