

PUBLIC HEARING MINUTES  
BOARD OF WATER SUPPLY  
Thursday, July 15, 2010

The Board of Water Supply, County of Kaua'i, held a public hearing at its office in Līhu'e on Thursday, July 15, 2010 at 10:10 a.m.

Chairperson Randall Nishimura stated that this Public Hearing was for the purpose of receiving written and oral testimony and comments from interested persons regarding the proposed amendments to Rules and Regulations to Part 1, Rules of Administrative Practice and Procedure. Copies of the proposed Rules Amendments are available online and were also located outside the Board Room.

DOW Deputy County Attorney Andrea Suzuki then read the rules of procedure that applied to this hearing.

As there were no questions to the procedures, Chairperson Nishimura opened the hearing.

On roll call, the following Board members answered present:

**BOARD:** Mr. Randall Nishimura, Chairperson  
Mr. Dee Crowell  
Mr. Leland Kahawai  
Mr. Raymond McCormick  
Mr. Roy Oyama

Absent & excused: Mr. Ian Costa  
Mr. Donald Fujimoto

**STAFF:** Mr. David Craddick  
Mr. Keith Aoki  
Mr. Paul Ganaden  
Mr. Gregg Fujikawa  
Mr. Keith Fujimoto  
Mr. Dustin Moises  
Ms. Faith Shiramizu  
Ms. Marites Yano  
DOW Deputy County Attorney Andrea Suzuki  
First Deputy County Attorney Amy Esaki

Absent & excused: Mr. William Eddy

The secretary also read the following Public Hearing notice:

**NOTICE OF PUBLIC HEARING**

The Board of Water Supply of the County of Kauai ("Board") will hold a public hearing at its Board Room located on the second floor of the Kauai County Department of Water's

Microbiology Lab Building, 4398 Pua Loke Street, Lihue, Kauai, Hawaii, on Thursday, July 15, 2010 at 10:00 a.m., or soon thereafter, for purposes of hearing and receiving public testimony and comments from all interested persons regarding the following item:

PROPOSED AMENDMENTS TO THE RULES AND REGULATIONS OF THE BOARD OF WATER SUPPLY, COUNTY OF KAUAI, STATE OF HAWAII

Part 1, Rules Of Administrative Practice And Procedure

<u>Section I - General Provisions:</u> .....	New Section
<u>Section II - Meetings:</u> .....	New Section
<u>Section III - Officers And Their Duties:</u> .....	New Section
<u>Section IV - Committees:</u> .....	New Section
<del>Section I</del> <u>Section V - Public Information</u> .....	Revised Section No. only
<del>Section II</del> <u>Section VI - Procedure For Adoption, Amendment Or Repeal Of Rules</u> .....	Section Revisions
<del>Section III</del> <u>Petition For Adoption, Amendment Or Repeal Of Rules</u> .....	Section combined with Section VI
<del>Section IV</del> <u>Section VII - Declaratory Rulings Of The Board</u> .....	Section Revisions
<del>Section V</del> <u>Section VIII - Decisions And Orders Of The Board</u> .....	Revised Section No. only
<del>Section VI</del> <u>Section IX- Administrative Hearings Procedure</u> .....	Section Revisions

A copy of the proposed rule amendment will be mailed to any interested person who requests a copy and pays the required fees for the copy and the postage. Requests may be made by calling the Water Manager's Office at (808) 245-5408, or by submitting facsimile requests to (808) 246-8628. Requests may also be made up to and including the date of the public hearing.

The proposed rule amendments may be reviewed in person between the hours of 7:45 a.m. to 4:30 p.m., Mondays through Fridays (excluding State of Hawaii holidays), at the Water Manager's Office, 4398 Pua Loke Street, Lihue, Kauai, Hawaii. Proposed rule amendments may be reviewed any time up to and including the date of the public hearing.

All interested persons may submit data, views, arguments, or other testimony orally or in writing, or both, concerning the proposed rule amendments. Data, views, arguments, or other testimony may be submitted any time up to and including the date of the public hearing, or at the public hearing itself. Data, views, arguments, or testimony may be submitted by e-mail to [rmiura@kauaiwater.org](mailto:rmiura@kauaiwater.org), by facsimile to (808) 246-8628 or by U.S. mail to the Water Manager's Office, whose address is Kauai Department of Water, 4398 Pua Loke Street, Lihue, Kauai, Hawaii 96766.

The Board may impose a time limit for each person presenting testimony at the hearing. Should you have any questions, please do not hesitate to call the Water Manager's Office at (808) 245-5408. The Water Manager's facsimile number is (808) 246-8628.

BY ORDER OF THE BOARD: Randall Nishimura, 2010 Chairperson

## **DISCUSSION**

Chair Nishimura noted that, as required by Sunshine Law, these proposed changes were sent to the Small Business Regulatory Review Board (SBRRB) and we received a response from them indicating that they have reviewed it and determined that it does not impose any perceivable impact on small business.

Chair Nishimura requested Manager Craddick report his findings and allow for questions from the staff and the Board.

Manager Craddick gave an overview of the proposed rule amendments. He stated that the changes were primarily "housekeeping". Manager Craddick reported that the intent of the rule amendment (Rule) is to detail the practice and procedures by which the Board of Water Supply of the County of Kauai (Board) conducts itself in terms of public hearings and rule making procedures, as well as in terms of general administrative duties. The Rules will update the procedures used by the Board to hear and to receive written and oral public testimony. The procedures are administrative in nature, such as: establishing the duties of the board members; establishing more detailed processes for rule making; establishing more detailed processes for handling contested case hearings; and acknowledging Robert's Rules.

# **DEPARTMENT OF WATER, COUNTY OF KAUAI RULES AND REGULATIONS**

## **PART 1 RULES OF ADMINISTRATIVE PRACTICE AND PROCEDURE**

The following rules shall govern administrative practice and procedure before the Department of Water of the County of Kauai (hereinafter referred to as the "Department") and are promulgated pursuant to the provisions of Chapter 91, Hawaii Revised Statutes.

### **SECTION I – GENERAL PROVISIONS**

1. Authority. The rules herein are established pursuant to Chapter 91, Hawaii Revised Statutes and shall govern administrative practice and procedure before the Board of Water Supply, County of Kauai.
2. Construction. These rules and regulations shall be construed to secure the orderly, just and efficient determination of every proceeding before the Board of Water Supply, County of Kauai. These rules and regulations should be read in conjunction with the provisions of Hawaii Revised Statutes, and the Charter of the County.
3. Parliamentary Authority. Robert's Rules of Order, Revised, shall be the parliamentary authority unless otherwise provided for under these Rules.
4. Suspension of Rules. Unless otherwise required, the Board may waive or suspend, by majority vote, any rule or procedure established herein for good cause.
5. **DEFINITIONS**
  - a. "Board" shall mean the Board of Water Supply of the County of Kauai; the Board shall constitute the Board for purposes of Chapter 91, Hawaii Revised Statutes.

- b. “Contested case” means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for Board hearing.
- c. “Department” shall mean the Department of Water, County of Kaua’i.
- d. “Hearing”
  - i. “Board Hearing” refers only to such hearing held by the Board immediately prior to a judicial review of a contested case as provided in Section 91-14, HRS.
  - ii. “Public hearing” means a quasi-legislative hearing regarding the adoption, repeal and amendment of rules and ordinances and a means to solicit general public input on matters before the Board pursuant to the Hawaii Revised Statutes.
- e. “Hearing officer” means any person or persons designated as authorized by the Board to conduct a hearing for the purpose of taking testimony and to report his or their findings of facts and conclusions of law with his or their recommendations to the Board on matters that are within the jurisdiction of the Board.
- f. “HRS” refers to Hawaii Revised Statutes.
- g. “Intervenor” means a person who petitions to intervene in a contested case proceeding and is admitted as a party.
- h. “Meetings” means the convening of the Board for which a quorum is required in order to make a decision or to deliberate toward a decision upon a matter over which the Board has supervision, control, jurisdiction or advisory power.
- i. “Party” means each person or board named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any court or board proceeding.
- j. “Persons” includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than boards.
- k. “Petitioner” means a person who seeks permission or authorization which the Board may grant under statutory or other authority delegated to it; and a person seeking relief not otherwise designated in these Rules.
- l. “Presiding officer” means and shall include any member of the Board or a hearing officer duly designated as such. Unless otherwise designated, the Chairman shall be the presiding officer.
- m. “Rule” means each Board statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedures, or practice requirements of the Board. The term does not include regulations concerning only the internal management of the Board and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to Section 91-8, HRS, nor intra-board memoranda.

## SECTION II – MEETINGS

### 1. Meetings

- a. Regular meetings. Regular meetings of the Board shall be held in the Department of Water’s Board Room or at any designated place during the third week of each month, or on a date to be determined by the Board.
- b. Special meetings. Special meetings may be held at such other times, as the Board shall, by motion or resolution duly adopted and entered in the journal, designate. Special meetings may be called at any time by the Chairperson or a majority of the Board who shall state the objects thereof and the acts and businesses of the Board at such special meeting shall be confined to such subjects.
- c. All meetings of the Board shall be opened to the public except executive sessions, which shall be held only upon the consent of two-thirds majority of the members

present and voting. Executive sessions shall be limited as provided for in Section 92-5, Hawaii Revised Statutes.

- d. Standing committees. The standing committees of the Board shall meet separately on regular board meeting days and/or as deemed necessary by the chairperson of the committee. The majority of the members of the committee may call special meetings at any time.
2. Attendance. No member shall absent himself from the service of the Board unless she/he shall have leave, or be sick and unable to attend.
3. Quorum. Unless otherwise provided by law, A a majority of the members of the Board shall constitute a quorum thereof but the final passage of all bills and resolutions will require the affirmative vote of four Board members.
4. Disclosure. Whenever a conflict of interest or other ethical question is raised by anyone regarding any member of the Board, the affected member shall promptly make full disclosure of the circumstances to the Board. When a member is deemed by the Board to have a conflict of interest, that member shall be disqualified from voting in all actions relating to such matter.
5. Adjournment. Meetings may be adjourned at any time by a majority vote of members present. Unless otherwise specified in the motion, every adjournment shall be deemed to be the next regular meeting of the Board.
6. Reconsideration. When a motion has been once made and carried in the affirmative or negative, only a member who voted with the prevailing side may move, at the same meeting, or at the next meeting, to reconsider it for the purpose of permitting the correction of a hasty, ill-advised or erroneous action, or to take into account added information or a changed situation that has developed since the taking of the vote. Such motion shall take precedence over all other questions except a motion to adjourn.
7. Computation of time. In computing any period of time under the rules herein, by notice, or by any order or regulation of the commission, the time begins with the day following the act, event, or default, and includes the last day of the period unless it is a Saturday, Sunday, or legal holiday in which event the period runs until the close of business or the next day which is not a Saturday, Sunday, or holiday, unless otherwise specified.

### **SECTION III – OFFICERS AND THEIR DUTIES**

1. Chairperson:
  - a. Ex-officio members are voting members of the Board but cannot serve as Chairperson.
  - b. The Chairperson shall be the presiding officer of the Board of Water Supply. In the absence of the Chairperson, and so long as the Chairperson is temporarily unable to perform his/her duties, the Vice-Chairperson will act as Chairperson of the Board of Water Supply. In the absence of both the Chairperson and Vice-Chairperson, the line of succession to acting Chairperson shall be the Secretary of the Board, Chairperson of the Finance Committee, then the Chairperson of the Rules Committee. It shall be the duty of the presiding officer:
    - (1) To open all meetings of the Board at the appointed hour by taking the chair and calling the meeting to order;
    - (2) To call for the approval of the minutes of the preceding meeting when a quorum shall be present;
    - (3) To maintain order and proper decorum in debate;
    - (4) To announce the business before the Board in the order prescribed by those rules;
    - (5) To receive and submit all matters properly brought before the Board, call for votes upon the same and announce the results;
    - (6) To receive all communications, resolutions petitions and other matters addressed to the Board and present them to the appropriate committee;
    - (7) To appoint all committees, unless otherwise ordered by the Board;
    - (8) To authenticate by his/her signature all acts of the Board;
    - (9) To do and perform such other duties as may be required by law, or as may properly appertain to such office;
    - (10) To make known all Rules of Order and to decide all questions of order, subject to an appeal to the Board.

- c. It shall also be the duty of the Chairperson to take into consideration such matters as shall not be within the scope of the duties or powers of any standing committees of the Board, as may be referred to her/him by the Board and to report her/his opinion thereon, together with such recommendations relative thereto as she/he may deem advisable.
  - d. The Chairperson shall also be responsible for the preparation of the agenda of the regular and all special meetings of the Board. The agenda is subject to amendment at the meeting only by approval of the majority of the members present.
2. Vice-Chairperson:
- a. Ex-officio members are voting members of the Board but cannot serve as Vice Chairperson.
  - b. The Vice-Chairperson shall do all of the duties of the Chairperson in the absence of the Chairperson.
3. Secretary: It shall be the duty of the Secretary:
- a. To read bills, resolutions and other matters to the Board, if so required.
  - b. To be handled by the staff and covered by amending "Duties of the Manager".
  - c. To review and send copies of the minutes of the last meeting to the Chairperson and each member of the Board as part of the next Board Meeting's agenda packet.
  - d. To have charge of all records of the Board and be responsible for the same.
  - e. To perform all other duties required by law, or any rule or order of the Board.

#### SECTION IV - COMMITTEES

1. Committees. There shall be three (3) types of committees:
- a. Standing committees, which shall consist of at least three (3) members each.
  - b. Special committees, which shall consist of at least three (3) members each.
  - c. Committee of the whole.
2. Committee Organization
- a. All committees of the Board, contemplated under these Rules, shall be appointed by the Chairperson of the Board of Water Supply, subject to confirmation and approval by a majority vote of the members of the Board present, unless otherwise ordered by the Board.
  - b. All committees of the Board shall be chaired by a Board member. The first Board member named on a committee shall be the chairperson. The chairperson shall call meetings of such committee and preside over the same.
  - c. No Board member shall serve as chairperson of more than one standing committee of the Board.
  - d. Committees shall be under the control and subject to the orders of the Board and shall faithfully carry out such orders.
  - e. Vacancies on the standing committees shall be filled by the Chairperson of the Board and confirmed by the Board of Water Supply.
  - f. All Board members shall be noticed on scheduled meetings of all committees and are encouraged to attend such meetings.
  - g. A majority of the entire membership to which the committee is entitled shall constitute a quorum and the majority vote of the membership shall be necessary to take any action.
3. Standing Committees. There shall be two (2) standing committees:
- a. Finance Committee; and
  - b. Rules and Policy Committee.
4. Special Committees. All special committees shall consist of three members, unless otherwise ordered by the Board, and shall be appointed by the Board from time to time as occasion requires, serving until discharged after finally reporting on the special matter referred to it by the Board.

5. Committee of the Whole. The Board may, from time to time, resolve itself into a committee of the whole whenever any matter shall be referred to such committee. Upon the adoption of the motion to that effect, the Chairperson shall call some member to take the chair, or may retain the chair if such is the wish of the Board.
6. Committee Reports.
  - a. All committee reports shall be submitted in writing.
  - b. Whenever any matter shall be referred to a committee it shall be the duty of such committee to make diligent inquiry into all of the facts and circumstances connected with such matter. If necessary, the County Attorney may be consulted, witnesses shall be summoned and examined, documents and records shall be searched and everything shall be done to bring all facts pertaining to such matter before the Board.
  - c. The report of the committee on any matter shall state findings of facts and conclusions based thereon, together with a distinct recommendation as to the disposal of such matter.
  - d. Whenever a committee shall report to the Board, recommending the expenditures of water funds for items covering payrolls, general expenses, or specific improvements, the adoption of such reports shall require the affirmative vote of four members.
  - e. The standing committees and the committee of the whole shall send a copy of any of their committee reports requiring finances to the finance committee for study and report

## **SECTION I SECTION V- PUBLIC INFORMATION**

1. The public may obtain information as to matters within the jurisdiction of the Department by inquiring at the office of the Department. Copies of rules and regulations shall be made available to the public at a price to be fixed by the Department to cover mailing and publication costs. Submittals or requests shall be made by addressing the same to the Manager and Chief Engineer.
2. Since the Department of Water has limited judicial functions, no formal rules of practice need be adhered to. No particular forms or instructions are prescribed.

In all matters concerning the affairs of the Department, any person affected by any action of the Department or by any action of the employees or agents of the Department shall first take up the matter with the Manager and Chief engineer. The affected person may, thereafter, write a letter to the Board of Water Supply, addressed to the Chairman of the Board, stating his grievance and the relief sought. The matter will then be put on the agenda of the Board at the earliest practicable time.

## **SECTION II SECTION VI - PROCEDURE FOR ADOPTION, AMENDMENT OR REPEAL OF RULES**

1. All rules and regulations of the Department shall be adopted and shall take effect in accordance with Section 91-3 and Section 91-4, Hawaii Revised Statutes; provided, however, that such procedure for the adoption, amendment and repeal of rules shall not be applicable to the adoption, amendment and repeal of rules pertaining purely to the internal procedure, organization and order of the Department and/or the Board.
2. Motion. The Board may, at any time on its own motion, initiate proceedings for the adoption, amendment, or repeal of any rule or regulation.

## **SECTION III - PETITION FOR ADOPTION, AMENDMENT OR REPEAL OF RULES**

3. Petition. Any petition submitted Any interested person or agency may submit a petition under Section 91-6, Hawaii Revised Statutes, requesting the adoption, amendment or repeal of a rule. shall be made by letter addressed to the Board of Water Supply, County of Kauai. The letter shall state clearly and concisely the relief sought, the name, title and address of the person to whom

correspondence or communication in regard to the request is to be addressed. The petition will be placed on the agenda for a meeting of the Board to be held at the earliest time practicable.

4. Content of Petition. The petition shall be made by letter addressed to the Board of Water Supply, County of Kauai. The letter shall state:
  - a. The name, title, telephone number and address of each petitioner;
  - b. A statement of the nature of each petitioner's interest;
  - c. It shall clearly and concisely state the relief sought; a draft or the substance of the proposed rule or amendment or a designation of the provisions the repeal of which is desired; and
  - d. A statement of the reasons in support of the proposed rule, amendment, or repeal.

The petition will be placed on the agenda for a meeting of the Board to be held at the earliest practicable time.

5. The petitioner will be notified of the time and date that he or his authorized representative may appear before the Board. Within 30 days of the receipt of the petition, the Board will either deny the petition in writing, stating its reasons for such denial, or initiate proceedings to effectuate the adoption, amendment or repeal requested. The petitioner will be notified of the time and date that he or his authorized representative may appear before the Board.
6. Notice of Hearing. Prior to the adoption of any rule, authorized by law, or the amendment or repeal thereof, the Board shall give at least ~~twenty (20)~~ thirty (30) days' notice for a public hearing. This does not apply to any adoption, amendment, or repeal of a rule relating to rates fixed by the Board of Water. In the case of adoption, amendment, or repeal of a rule relating to rates fixed by the Board, the Board shall give at least twenty (20) days notice.
  - a. Content of Notice. A notice of the proposed adoption, amendment, or repeal of a rule or regulation shall include:
    - i. Date, time and place where the public hearing will be held;
    - ii. A statement of the substance of the proposed adoption, amendment, or repeal of the rule or the proposed rates and charges to be considered thereat.
  - b. Service.
    - i. The notice shall be mailed to all persons who have made a timely written request of the Board for advance notice of its rule-making proceedings; and
    - ii. Notice shall be published at least once in a newspaper of general circulation published in the County of Kauai.
7. Filing and taking effect of rules.
  - a. Each rule hereafter adopted, amended, or repealed shall become effective ten days after filing with the County clerk.
    - i. If a later effective date is required by statute or specified in the rule, the later date shall be the effective date; provided that no rule shall specify an effective date in excess of thirty days after the filing of the rule as provided herein.
    - ii. An emergency rule shall become effective upon filing with the County clerk for a period of not longer than one hundred twenty days without renewal unless extended in compliance with Section 91-3, Hawaii Revised Statutes, if the Board finds that immediate adoption of the rule is necessary because of imminent peril to the public health, safety, or morals. The Board's finding and brief statement of the reasons therefore shall be incorporated in the rule as filed. The Board shall make an emergency rule known to persons who will be affected by it by publication at least once in a newspaper of general circulation in the County within five days from the date of filing the rule.
8. Emergency Rule. Notwithstanding the foregoing, if the Board finds that an imminent peril to the public health, safety, or morals or to livestock and poultry health requires adoption, amendment or repeal of a rule upon less than twenty three days' notice of hearing, and states in writing its reasons for such finding, it may proceed without prior notice or hearing upon such



abbreviated notice and hearing as it finds practicable to adopt an emergency rule to be effective for a period of not longer than one hundred twenty days without renewal.

9. Federal Requirements. The requirements of this section may be waived by the Chairman whenever the Board is required by federal provisions to promulgate rules as a condition to receiving federal funds and the Board is allowed no discretion in interpreting such federal provisions as to the rules required to be promulgated; provided that the Board shall make such adoption, amendment, or repeal known to the public by publishing a statement of the substance of the proposed rule at least once in a newspaper published in the County of Kauai prior to the waiver by the Chairman.

## **SECTION IV SECTION VII- DECLARATORY RULINGS OF THE BOARD**

1. Petition.
  - a. Any petition submitted person may submit a petition under Section 91-8, Hawaii Revised Statutes, requesting a declaratory ruling of the Board as to the applicability of any statutory provision or of any rule, will be submitted by letter clearly presenting the views of the petitioner with respect to the questions raised or relief sought, addressed to the Board of Water Supply, County of Kauai. The letter shall also give the address of the person to whom correspondence or communication in regard to the request is to be addressed. The petition will be placed on the agenda for a meeting of the Board to be held at the earliest time practicable.
  - b. Notwithstanding the other provisions of this section, the Board may, on its own motion or upon request but without notice or hearing, issue a declaratory order to terminate a controversy or to remove uncertainty.
2. Content of petition. The petition shall be submitted by letter addressed to the Board of Water Supply, County of Kauai. The petition shall be submitted by letter addressed to the Board of Water Supply, County of Kauai. The petition need not be in any particular form but it shall contain:
  - a. The name, address and telephone number of each petitioner;
  - b. A statement of the nature of each petitioner's interest, including reasons for the submission of the petition;
  - c. A designation of the specific provisions, rule or order in question;
  - d. A complete statement of the relevant facts;
  - e. A statement of the position or contention of the petitioner; and
  - f. A memorandum of authorities, containing a full discussion of the reasons, including any legal authorities, in support of such position or contention.

The petitioner will be notified of the time and date that he or his authorized representative may appear before the Board. Any petition which does not conform to the foregoing requirements may be rejected by the Board.

1. Non-issuance of a declaratory order. The Board may for good cause refuse to issue a declaratory order. Without limiting the generality of the foregoing, the Board may so refuse where:
  - a. The question is speculative or purely hypothetical and does not involve an existing situation or one which may reasonably be expected to occur in the near future.
  - b. The petitioner's interest is not of the type which provides standing to maintain an action in a court of law.
  - c. The issuance of the declaratory order may adversely affect the interest of the County in any litigation which is pending or may reasonably be expected to arise.
  - d. The matter is not within the jurisdiction of the Board.
2. Request for Hearing.
  - a. A hearing is not required for the purposes of resolving a petition for declaratory judgment.

- b. The Board may, however, in its discretion, order a hearing for the purposes of resolving a petition for a declaratory ruling.
  - c. Any petitioner or party in interest who desires a hearing on a petition for a declaratory ruling may submit a request for a hearing to the Board.
    - a. The petitioner or party in interest shall detail in his request the reasons why the matters alleged in the petition, together with supporting affidavits or other written briefs or memoranda of legal authorities, will not permit the fair and expeditious disposition of the petition, and, to the extent that such request for a hearing is dependent upon factual assertions, shall accompany such request by affidavit establishing such facts and shall deposit with the County such amounts as deemed necessary to cover applicable publication costs.
    - b. It is within the Boards discretion to grant or deny a request for a hearing on a petition for a declaratory ruling.
  - d. In the event a hearing is ordered by the Board, the rules relating to hearing procedures before the Board shall govern the proceeding.
3. As soon as reasonably practicable after the appearance of the petitioner before the Board, the Board will make its ruling and inform the petitioner in writing, either denying the petition for declaratory order and stating its reasons therefore, or issue a declaratory order. Upon the disposition of the petition, the petitioner shall be promptly notified.
  4. If the ruling is contested, the petitioner shall so inform the Board by letter addressed as provided in Paragraph 4 2 above, and the Board will serve notice of and conduct a hearing in the manner prescribed in Section 91-9, Hawaii Revised Statutes.

## **SECTION V SECTION VIII- DECISIONS AND ORDERS OF THE BOARD**

Decisions and Orders of the Board shall be served by mailing certified copies to the party to the proceedings or his authorized representative. When service is not accomplished by mail, it may be made by delivery of a certified copy thereof to such party or his authorized representative.

## **SECTION VI SECTION IX- ADMINISTRATIVE HEARINGS PROCEDURE**

### **I. DEFINITIONS**

- A. "Board" shall mean the Department of Water and/or Board of Water Supply of the County of Kauai; the Board shall constitute the Board for purposes of Chapter 91, HRS.
- B. "Board hearing" refers only to such hearing held by the Board immediately prior to a judicial review of a contested case as provided in Section 91-14, HRS.
- C. "Contested case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for Board hearing.
- D. "Party" means each person or board named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any court or board proceeding.
- E. "Persons" includes, individuals, partnerships, corporations, associations, or public or private organizations of any character other than boards.
- F. "Rule" means each Board statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedures, or practice requirements of the Board. The term does not include regulations concerning only the internal management of the Board and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to Section 91-8, HRS, nor intra-board memoranda.

# **I. CONTESTED CASE HEARING OR "BOARD HEARING"**

## **A. NOTICE OF HEARING**

### **1. Content of Notice**

- a. Date, time, place and nature of hearing.
- b. The legal authority under which the hearing is to be held.
- c. The particular sections of the statutes and rules involved.
- d. An explicit statement in plain language of the issues involved and the facts alleged by the Board in support thereof. If the Board is unable to state such issues and facts in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved, and thereafter upon application, a bill of particulars shall be furnished.
- e. The fact that any party may retain counsel if he so desires and the fact that an individual may appear on his own behalf, or a member of partnership may represent the partnership, or an officer of an authorized employee of a corporation or trade or association may represent the corporation, trade, or association.

### **2. Service of Notice**

- a. All parties shall be given written notice of hearing by registered or certified mail with return receipt requested at least fifteen (15) days before the hearing.
- b. If service by registered or certified mail is not made because of the refusal to accept service, or the Board has been unable to ascertain the address of the party after reasonable and diligent inquiry, the notice of hearing may be given to the party by publication at least once in each of two successive weeks in a newspaper which is printed at least twice weekly in the county affected by the proposed action.
- c. Notwithstanding the requirements of this section, notice by publication shall be provided pursuant to Section 91-3, HRS, if the hearing also involves the adoption, amendment, or repeal of rules, or if otherwise required by law.

## **B. MODIFICATION OF PROCEDURES BY STIPULATION**

Any procedure in a contested case may be modified or waived by stipulation of the parties and informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

## **C. PROCEDURES IN CONDUCTING THE HEARING**

### **1. Pre-hearing Motions and Conferences**

- a. **Pre-hearing Motions.** The Board may, prior to the hearing, consider and rule on all motions filed by any party to a contested case.
  - (1) **Notice.** All parties shall be informed in writing by the moving party, of the time, date, and place for the pre-hearing motion.
  - (2) **Certificate of Service.** The moving party shall be required to file with the motion, a certificate to the effect that notice was given.
- b. **Pre-hearing Conferences.** The Board may, at the request of an interested party, or on its own initiative, conduct a pre-hearing conference to define issues of law and fact, to stipulate to those issues

which are not contested, to stipulate to the admission of certain evidence, and to settle other matters which would help expedite the hearing.

- (1) **Notice.** All parties shall be informed in writing by the moving party, of the time, date, and place for the pre-hearing conference.
- (2) **Certificate of Service.** The moving party shall be required to file a certificate to the effect that written notice of the pre-hearing conference was given

## 2. **Convening the Hearing**

- a. **Presiding Officer.** The chairperson of the Board or one of the members, shall preside at the hearing. The presiding officer controls the course of the hearing, disposes of matters that normally and properly arise in the course of the hearing, and takes all other actions authorized by law that are deemed necessary to the orderly and just conduct of a hearing.
- b. **Calling the Hearing to Order.** The presiding officer will identify the case by name and number, state for the record a brief description of the nature and subject matter of the hearing including the authority therefore, and shall then briefly outline the procedures to be followed.
- c. **Identification of Parties and Counsel.** The presiding officer shall request all parties to identify themselves and their counsel. Where a party is represented by more than one counsel, only one counsel shall be permitted to cross-examine a witness or to state any objections or to make closing arguments.
- d. **Parties; Intervenors.** The Board shall determine and find on the record whether all parties, including intervenors, have a bona fide interest in the subject matter.
- e. **Intervention**
  - (1) **Who May Intervene.** All persons who can demonstrate that they will be so directly and immediately affected by the proposed change that their interest in the hearing is clearly distinguishable from that of the general public shall be admitted as parties upon timely written application for intervention.
  - (2) **Method of Filing; timing.** Petitions to intervene shall be in writing and in conformity with these rules. The petition for intervention with certificate of service shall be filed to the Board at least seven (7) days prior to the hearing for which notice to the public has been published pursuant to law. Untimely petitions for intervention will not be permitted except for good cause shown.
  - (3) **Contents of Petition.** The petition shall state:
    - i. The nature of the petitioner's statutory or other right;
    - ii. The nature and extent of petitioner's interest;
    - iii. The specific issues to be raised or contested by the petitioner in the contested case hearing; and
    - iv. The effects of any decision in the proceeding on petitioner's interest.

If applicable, the petition shall also make reference to the following:

- v. Other means available whereby petitioner's interest may be protected;
- vi. Extent petitioner's interest may be represented by existing parties;
- vii. Extent petitioner's interest in proceeding differs from that of the other parties;

- viii. Extent petitioner's participation can assist in development of a complete record;
  - ix. Extent petitioner's participation will broaden the issue or delay the proceeding; and
  - x. How the petitioner's intervention would serve the public interest.
- (4) **Consolidation of Parties.** Petitioners deemed by the Board to have similar intervention requests may be consolidated as a single party represented by a single counsel or agent.
- (5) **Denial of Intervention.** Leave to intervene shall be freely granted, provided that the Board may deny intervention when, in the Board's sound discretion, it appears that:
- i. The position of the applicant is substantially the same as the position of a party already admitted to the hearing; and
  - ii. The admission of additional parties will render the hearing inefficient and unmanageable
  - iii. The intervention will not aid in the development of a full record and will overly broaden issues.
- The Board shall issue a written statement stating as such.
- (6) **Opposition to Intervention.** If any party opposes the request for intervention, the party shall file their objection or state their objection for the record.
- (7) **Appeal from Denial.** An applicant who has been denied intervention may appeal such denial to the circuit court pursuant to Section 91-14, HRS.

- f. **Reading of Rights.** The rights of all parties shall be carefully explained to all parties, including their right to counsel, to present evidence, and to cross-examine. All parties shall acknowledge on the record, their full understanding of these rights.
- g. **Stating Objections.** Before proceeding with the hearing, all parties shall be required to state for the record any objections they may have to any of the pre-hearing proceedings, and particularly the form and substance of the notice of hearing.
- h. **Accurate Record.** To insure an accurate record, a tape recorder or other reliable recording equipment may be used. The decision to hire a court reporter or stenographer is left to the discretion of the Board. It shall not be necessary to transcribe the record unless requested for the purposes of rehearing or court review.

### **3. Presenting the Case; Rules of Evidence**

- a. **Order of Appearance.** The party initiating the hearing and with the burden of proof has the right to open and close. Other parties, including intervenors, will be allowed to present their case in an order agreed upon or as decided by the presiding officer.
- b. **Swearing in Witnesses.** Prior to giving testimony, the witnesses shall be sworn in by the presiding officer. (See Section 612-12, HRS).
- c. **Testimony.** Each interested person shall, before testifying, state his name, address and shall give such information respecting his appearance as the presiding officer may request. The presiding officer shall confine the testimony to the matters for which the hearing was called. In order to allow persons an equal amount of time to

testify, or to prevent repetitious testimony, the presiding officer may limit the amount of time for testimony per individual or per issue. Each witness may be subject to questioning by the Board and all parties. A person may submit written comments during the hearing or for such period of time after the close of the hearing as determined by the presiding office.

- d. **Rebuttal.** After all parties have rested their case, each party will be allowed to present rebuttal evidence in the same order as they presented their case in brief.
- e. **Ruling by Presiding Officer.** The presiding officer will make all rulings on points of law, including the admissibility of evidence, the merit of objections or motions, the granting of continuances, the limiting of testimony or witnesses, and other rulings authorized by law that are deemed necessary to the orderly and just conduct of the hearing and which do not involve the final determination of the proceedings. Such rulings may be reviewed by the Board in determining the matter of its merits.

f. **Rules of Evidence**

- (1) **Admissibility and Exclusion.** Any oral or documentary evidence may be received, but the Board shall, as a matter of policy, provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.
- (2) **Record Supported by Evidence.** No sanctions shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence.
- (3) **Privileges.** The Board shall give effect to the rules of privilege as recognized by law.
- (4) **Marking of Evidence.** All evidence shall be marked for identification with the parties' name and number or letter.
- (5) **Copies.** Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available; provided that upon request, parties shall be given an opportunity to compare the copy with the original.
- (6) **Cross-examination.** Every party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts.
- (7) **Official Notice.** The Board may take notice of judicially recognizable facts. In addition, the Board may take notice of generally recognized technical or scientific facts within their specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed.
- (8) **Burden of Proof.** Except as otherwise provided by law, the party initiating the hearing shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion.
- (9) **Standard of Proof.** The degree or quantum of proof shall be a preponderance of the evidence.

**g. Closing Arguments**

- (1) Each party, including intervenors, shall be allowed to present closing arguments in the same order as they presented their case in chief. The party initiating the hearing and having the burden of proof may speak last. The presiding officer may set a time limit for closing arguments.

**4. After Closing Arguments; Decisions and Orders**

- a. **Decision in Writing.** Every decision and order adverse to a party to the proceeding rendered by the Board in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law.
- (1) If any party to the proceeding has filed proposed findings of fact, the Board shall incorporate in its decision a ruling upon each proposed finding so presented.
- (2) Parties to the proceeding shall be notified by personal delivery or mailing, a certified copy of the decision and order and accompanying findings and conclusions within a reasonable time to each party or attorney of record. With the personal delivery or certified mailing, the contested case is closed and the thirty-day period for court appeal pursuant to Section 91-14, HRS, begins to run.
- b. **Matters Outside the Record.** No matter outside the record shall be considered by the Board in making its decision. No official of the Board in a contested case shall consult any person on any issue of fact except upon notice and opportunity for all parties to participate, save to the extent required for the disposition of ex-parte matters authorized by law.
- c. **Decision-makers Not Present.** Whenever in a contested case, the officials of the Board who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the Board itself, shall not be made until a proposal for decision containing a statement of reasons and including the determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present arguments to the officials who are to render the decision, who shall personally consider the whole record or such portion thereof as may be cited by the parties.

**II. RULE MAKING HEARING OR "PUBLIC HEARING"**

**A. NOTICE OF HEARING.**

Prior to the adoption of any rule authorized by law, or the amendment or repeal thereof, the Board shall give at least twenty (20) days' notice for a public hearing.

**1. Content of Notice**

- a. Date, time and place where the public hearing will be held.
- b. A statement of the substance of the proposed rule.

2. **Service of Notice**

- a. The notice shall be mailed to all persons who have made a timely written request of the Board for advance notice of its rule-making proceedings; and
- b. Notice shall be published at least once in a newspaper of general circulation published in the County of Kauai.

B. **PROCEDURES IN CONDUCTING THE HEARING**

1. **Convening the Hearing**

- a. **Presiding Officer.** The presiding officer shall be the Chairman of the Board, or in his absence, by another member designated by the Board. The presiding officer controls the course of the hearing, disposes of matters arising in the course of the hearing, and takes all other actions authorized by law that are deemed necessary to the orderly and just conduct of a hearing.
- b. **Accurate Record.** To insure an accurate record, a tape recorder or other reliable recording equipment may be used. The decision to hire a court reporter or stenographer is left to the discretion of the Board. It shall not be necessary to transcribe the record unless requested for the purpose of re-hearing or court review.

- c. **Order of Public Hearing.** At the commencement of the hearing, the presiding officer may acknowledge the notice of hearing and shall then conduct the proceeding in the following manner:

- (1) Staff Findings. The Department shall present its findings.
- (2) Questions of Staff Findings. Staff findings shall be subject to questioning by the Board.
- (3) Open Hearing to Public. The presiding officer shall suspend the rules and the hearing shall then be opened to the public. Members of the public wishing to testify shall be subject to questioning by the Board. All interested persons shall be afforded the opportunity to submit data, views, or arguments, orally or in writing. The following procedure shall be followed when opened to the public:

- (a) Anyone wishing to testify is required to register with the presiding officer prior to the presiding officer calling the meeting to order;
- (b) Anyone testifying is entitled to the floor only when recognized by the presiding officer;
- (c) Anyone testifying shall state his name, address, and whom they represent and if they are registered lobbyists in compliance with HRS Chapter 97, Lobbyist Law;
- (d) The presiding officer shall confine the testimony to the matters for which the hearing was called;



- (e) Anyone testifying shall refrain from direct questioning of the Board and shall direct any remarks or questions to the presiding officer;
- (f) Anyone with written testimony may be given priority at the discretion of the presiding officer;
- (g) Oral presentation shall be limited to three (3) minutes per speaker; extended time may be granted by the presiding officer. The presiding officer shall have the prerogative to set the speaking time for each witness and may also set the order of speakers, speaking for or against any proposition, and may notify the speaker of the expiration of his speaking time, 30 seconds before such expiration;
- (h) Anyone may speak a second time on the same question or subject, at the discretion of the presiding officer;
- (i) The presiding officer shall grant to persons who have not registered, time to speak following the registered speakers;
- (j) Anyone speaking may be subject to questioning by the Board. Questions by the Board shall be permitted only at the discretion of the presiding officer;
- (k) The presiding officer may restrict or terminate the speakers' right to the floor for intemperate or abusive behavior or language;
- (l) The presiding officer may ask for the removal of anyone who willfully disrupts a meeting to prevent and compromise the conduct of the meeting.

d. **Admissibility.** The Board shall not be bound by technical rules of evidence.

## 2. **After the Hearing**

- a. The Board may make its decision at the public hearing or announce the date as to when it intends to make its decision.
- b. Upon adoption, amendment, or repeal of a rule, the Board shall, if requested to do so by an interested person, issue a concise statement of the principal reasons for and against its determination.
- c. The adoption, amendment, or repeal of any rule by the Board shall not be subject to the approval of the Mayor of the County of Kauai.
- d. Filing and publication of rules shall be in accordance with Chapter 91, HRS.

## C. **EMERGENCY RULE**

~~Notwithstanding the foregoing, if the Board finds that an imminent peril to the public health, safety, or morals or to livestock and poultry health requires adoption,~~

amendment, or repeal of a rule upon less than twenty days' notice of hearing, and states in writing its reasons for such finding, it may proceed without prior notice or hearing upon such abbreviated notice and hearing as it finds practicable to adopt an emergency rule to be effective for a period of not longer than one hundred twenty days without renewal.

**D. FEDERAL REQUIREMENTS.**

The requirements of this section may be waived by the Chairman whenever the Board is required by federal provisions to promulgate rules as a condition to receiving federal funds and the Board is allowed no discretion in interpreting such federal provisions as to the rules required to be promulgated; provided that the Board shall make such adoption, amendment, or repeal known to the public by publishing a statement of the substance of the proposed rule at least once in a newspaper published in the County of Kauai prior to the waiver by the Chairman.

**Testimony:**

On query by Chair Nishimura, it was noted that no one from the public signed up to testify at this public hearing and that no written testimony was submitted.


Since there was no one to testify and with nothing more to add to the record, Chair Nishimura closed the public hearing.

Chair Nishimura noted that the Board intends to make the decision regarding adoption at the next Board meeting, August 19, 2010.

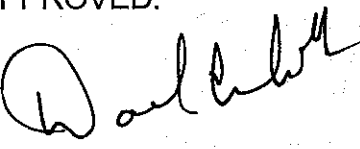
**ADJOURNMENT**

There being no other business, Chair Nishimura closed the public hearing at 10:18 a.m.

Respectfully submitted,

  
Carol Beardmore  
Board's Commission Support Clerk

APPROVED:

  
David R. Craddick, P.E.  
Manager and Chief Engineer

cab