



National Park Service  
U.S. Department of the Interior

Kaloko-Honokōhau  
National Historical Park

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## Kaloko-Honokōhau

IN REPLY REFER TO:  
L54 2015-05

25 MK  
March 17, 2015

Carty S. Chang, Chairperson  
Commission on Water Resource Management  
P.O. Box 621  
Honolulu, HI 96809

Subject: Petition for Declaratory Orders

Dear Mr. Chang:

I respectfully submit this petition for declaratory orders to the Commission on Water Resource Management pursuant to Hawaii Administrative Rules §13-167-81. The petition seeks to clarify whether an "area" other than a "hydrologic unit" as defined by the State Water Code can be designated a water management area. The petition is submitted to aid in our exploration of alternative paths of actions that may be taken in order to minimize risks to non-consumptive public trust uses of water in the area of Kaloko-Honokōhau National Historical Park. This question was initially raised by the National Park Service in a meeting with Commission staff on June 14, 2010, and then by Commissioner Pavao in the December 10, 2014 Commission meeting.

In December, 2014, the Commission issued a Preliminary Order requesting that the County of Hawai'i and the National Park Service meet, with participation of the Commission staff, and "explore and negotiate alternative paths of action, other than ground water designation of the Keauhou aquifer ..." I am pleased to inform you that our first meeting occurred on March 3, 2015 in Kona and that a second meeting is scheduled for March 31, 2015. These discussions would be greatly assisted by an expeditious ruling on the above-noted question of law.

Representatives of the National Park Service can be present at the Commission's April 15, 2015 meeting to provide additional information and answer questions regarding the petition. We are also available to speak to Commission staff and the Department of the Attorney General as needed. Please contact Bill Hansen (970) 225-3537 with any questions regarding this submittal.

Sincerely,

3532

Tammy Ann Duchesne  
Superintendent

encl: Petition for Declaratory Orders  
cc: William P. Kenoi, Mayor, County of Hawai'i

RECEIVED  
COMMISSION ON WATER  
RESOURCE MANAGEMENT  
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**BEFORE THE COMMISSION ON WATER RESOURCE  
MANAGEMENT OF THE STATE OF HAWAII**

In the Matter of:                    )     NATIONAL PARK SERVICE’S  
PETITION FOR                        )     PETITION FOR DECLARATORY  
DECLARATORY ORDERS            )     ORDERS

Pursuant to Haw. Admin. R. §§ 13-167-81 (1988), the National Park Service (NPS) petitions the Commission on Water Resource Management (“Commission”) for declaratory orders regarding the applicability of specific statutes and rules to the designation of a water management area by the Commission. As the Hawaii Supreme Court noted in *Citizens Against Reckless Development v. Zoning Board of Appeals*, 159 P.3d 143, 155-156, the underlying state statute, HRS § 91-8 (2014), “is meant to provide a means of seeking a determination of whether and in what way some statute, agency rule, or order, applies to the factual situation raised by an interested person.” The afore-mentioned rule provides in relevant part that “petitions [for the issuance of declaratory orders] shall cite the statutory authority involved, shall include a complete statement of the facts, reasons, or grounds prompting the petition together with full disclosure of the petitioner’s interest \* \* \*.”

**REASONS FOR THE FILING OF THE PETITION**

The genesis of this petition arises from the uncertainty surrounding the interpretation of the term “area” in the statutory provision (§ 174C-41) of the state water code that authorizes the Commission to designate a water management area. This provision provides:

When it can be reasonably determined, after conducting scientific investigations and research, that the water resources in an **area** may be threatened by existing or proposed withdrawals or diversions of water, the commission shall designate the **area** for the purpose of establishing administrative control over the withdrawals and diversions of ground and surface waters in the **area** to ensure reasonable beneficial use of the water resources in the public interest. (emphasis supplied)

Despite using the term “area” three times in this section, the water code does not contain any independent definition of the term. Although § 174C-3 does define a “water management area” as “a geographic area which has been designated pursuant to section 174C-41 as requiring management of the ground or surface water resource, or both,” no definition of the term “geographic area” is subsequently provided. Although the definition of a “water source” contained in the code does reference the term “area”, it does so only in order to explain that a water source may include “an area such as a watershed defined by topographic boundaries, or a definitive ground water body.” § 174C-3. Finally, the administrative rules promulgated by the Commission likewise do not provide any definition of the term “area”.<sup>1</sup>

This uncertainty regarding the meaning of the term “area” as it relates to the designation of a water management area recently gave rise to a dialogue between Commissioner Milton Pavao and representatives of the NPS (Paula Cutillo and Jonathan Likeke Scheuer) at a public meeting of the Commission on December 10, 2014, that underscores the importance of clarifying this term for the purposes of designating a water management area. The meeting at which the dialogue took place was held to allow the Commission to review the Preliminary Findings of Fact regarding a petition filed by the NPS to designate the entirety of the Keauhou Aquifer System as a water management

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<sup>1</sup> Although the term “hydrologic unit” is defined by the Code and appears primarily in Part III – Hawaii Water Plan, the focus of that part of the code is on long term planning. Thus, when discussing the geographical bounds of a water management area, the code uses the term “area” and not “hydrologic unit”.

area and to hear public testimony regarding the petition. The above-referenced transcribed discussion is set out below, as we have transcribed it from a digital audio recording of the hearing provided by Commission staff (file named “Keauhou 12-10-14 Part II (NPS) WMA.WMA” provided by Katie Ersbak to Jonathan Scheuer):

40:30 Pavao: So you just want to designate the basal aquifer?

40:42 Cutillo (faintly): Yes, I...

40:45 Scheuer: I mean it, it, you know, I, I’m going to suggest that (Pavao starts speaking)

40:48 Pavao: Could this be worked out, is this something that could be worked out with the Commission staff to ensure that the basal wells, um, adhere to the concerns of the National Park?

41:00 Scheuer: I think that you are starting to ask questions that might pertain to the powers and duties of your Commission under the Code and that this would be a robust conversation in executive session with your attorney general.

41:12 Cutillo: And I would just like to add that we did approach the Commission staff about designating just the basal aquifer, I think two or three years ago we had a conversation with the Commission about that and they told us at the time that it was not possible because that’s not, um, an official management unit.

This dialogue vividly illustrates the timeliness of the NPS petition, especially in light of the Commission’s directive in its December 29, 2014 Preliminary Order regarding the NPS petition to designate the Keauhou Aquifer System that “alternative paths of action, other than groundwater designation of the Keauhou aquifer to address the issues in these proceedings” be explored. Compliance with that directive would be substantially aided by the issuance of declaratory orders by the Commission on whether an “area” other than the entire Keauhou Aquifer System could be designated as a water management area in order to protect the public trust resources located within Kaloko-Honokohau National Historical Park.

Therefore, for the reasons set forth above and in order to more fully explore “alternative paths of action”, the NPS respectfully requests the Commission issue

declaratory orders determining whether the following constitute an “area” susceptible to designation pursuant to the state water code and the Commission’s administrative rules:

1. The basal (coastal freshwater-lens) groundwater system<sup>2</sup> within the Keauhou Aquifer System Area, and;
2. One or more ahupua‘a<sup>3</sup> (historic land divisions) within the Keauhou Aquifer System Area, and;
3. Some combination of 1 and 2.

Respectfully submitted this 20th day of March, 2015.



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Christine Lehnertz  
Pacific West Regional Director  
National Park Service  
on behalf of Kaloko-Honokohau NHP  
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Kailua-Kona, HI 96740  
808-329-6881

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<sup>2</sup> The basal or coastal freshwater-lens groundwater system is described by the Commission (Preliminary Findings of Fact HA-WMA 2013-1, December 10, 2014) as the groundwater body where water levels are less than 40 feet above mean sea level. The boundaries of this system are identified by the State of Hawaii Department of Health in GIS layers (<http://planning.hawaii.gov/gis/download-gis-data/>) created from maps prepared by John F. Mink and L. Stephen Lau (Water Resources Research Center) for the Department and Technical Report No. 191.

<sup>3</sup> Ahupua‘a boundaries are identified by the State of Hawaii Office of Planning in GIS layers (<http://planning.hawaii.gov/gis/download-gis-data/>). These layers were created by the Office of Hawaiian Affairs and the boundaries correspond to 19th century survey maps.

## **Briefing Statement**

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Bureau: National Park Service (NPS)  
Issue: NPS Water Management Area Petition and efforts to meet with County of Hawai'i  
Park: Kaloko-Honokōhau National Historical Park (Park), Hawai'i Island  
Updated: March 9, 2015

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### **Key Points:**

- Peer-reviewed science indicates that existing and proposed groundwater withdrawals threaten groundwater-dependent cultural and natural resources that are essential to the park's mission, purpose and values.
- The NPS has discussed the need for more careful management of Kona's water resources since 2007 with government agencies and other stakeholders, but not all parties agree that withdrawals threaten native fish and wildlife, and so there is still no explicit plan for protecting non-consumptive public trust uses of water.
- In September, 2013, the NPS filed a petition with the State Commission on Water Resource Management (Commission) to designate the Keauhou Aquifer System a Water Management Area (WMA) to ensure adequate water quantity for park resources.
- The legal standard for the Commission to designate a WMA is that it can be "reasonably determined" from "scientific investigations and research" that water resources "may be threatened." The state Water Code does not require scientific certainty of a threat, nor evidence that harm has already occurred.
- The NPS has conducted individual briefings with County Council members, state Legislators, and other county and state officials and stakeholders, and has participated in numerous government and community functions to provide background on and rationale for the NPS petition.

### **Background:**

- In October, 2013, the Commission voted to defer a decision on the designating the Keauhou aquifer until late 2014 to allow time for further studies.
- In September and October, 2014, the Commission visited the park and the Kona area.
- On December 10, 2014, the Commission held a public meeting in Kona and after hours of public testimony, five of the seven Commissioners voted in favor of continuing the investigation and study period for the petition.
- In a December 29, 2014 preliminary order, the Commission requested that the NPS provide information about a) the quantity of groundwater needed to support natural and cultural resources at the park, b) specific traditional and customary practices that are exercised in the park, and c) how NPS manages traditional and customary practices at the park. Additionally, the Commission requested that the County of Hawai'i and the NPS (with the participation of the Commission staff) "*meet and, in good faith, explore and negotiate alternative paths of action, other than groundwater designation of the Keauhou aquifer...*"
- Between December and February, NPS officials sent three letters to the County expressing desire and eagerness to meet, proposed meeting dates, and reiterated the need for a legally enforceable framework to protect fresh-water dependent cultural and natural resources in the park.
- On March 3, 2015 the NPS had productive discussions with representatives of the County and Commission.
- The Mayor declared his commitment to preserving the island's cultural and natural resources and pledged to help the park accomplish its goals.

### **Current Status:**

- On March 31, 2015 the NPS will meet again with Commission and County representatives to continue discussions and explore alternate paths to designation.
- The NPS will reach out to the Mayor and identify areas where the park can benefit from assistance.
- The NPS is working on identifying the traditional and customary practices that occur in the park.
- The NPS is working to identify the quantity of groundwater needed to support natural and cultural resources

### **Contacts:**

Tammy Duchesne, Superintendent, Tammy\_Duchesne@nps.gov, (808)557-2092  
Bill Hansen, NPS Water Rights Branch Chief, Bill\_Hansen@nps.gov, (970) 225-3537

## **Briefing Statement**

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Bureau: National Park Service (NPS)

Issue: Petition for Declaratory Orders and Negotiated Settlement Concepts

Park: Kaloko-Honokōhau National Historical Park (KAHO)

Updated: March 16, 2015

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### **Key Points:**

- In a December, 2014 Preliminary Order, the State Commission on Water Resource Management (Commission) requested that the NPS, the County of Hawaii, and Commission staff meet and “in good faith, explore and negotiate alternative paths of action, other than groundwater designation of the Keauhou aquifer” as a state water management area.
- The area that contributes fresh groundwater to the park is smaller than the administrative boundaries of the Keauhou aquifer.
- Designating only the park’s “area of concern” is an alternative that alleviates some stakeholder concerns while minimizing risk to the park’s water resources.

### **Background:**

- Existing and proposed groundwater withdrawals threaten cultural and natural resources that are essential to the park’s mission.
- In September, 2013, the NPS filed a petition with the Commission seeking designation of the Keauhou aquifer as a water management area (WMA) to protect park resources.
- There is wide-spread opposition to designation within the development community and among local, county, and state decision-makers and elected officials.
- The State Water Code is not clear as to whether a smaller area within than the Keauhou Aquifer System Area can be designated a WMA.
- Hawaii Administrative Rules allow for declaratory orders regarding the applicability of specific statutes and rules to a factual situation raised by the petitioner.
- On March 3, 2015, the NPS discussed a petition for declaratory orders and other settlement concepts with representatives of the County and the Commission.
- The petition for declaratory orders demonstrates that the NPS is sincerely seeking alternatives and a ruling will clarify whether designation of a subarea is truly feasible.
- Following the ruling, the NPS can consider (1) amending its WMA petition to identify a subarea for designation; and (2) proposing a settlement that caps groundwater withdrawals within the subarea at existing rates and includes an automatic trigger for designation if the cap is exceeded.

### **Current Status:**

- The U.S. Geological Survey is running model simulations to inform the delineation of a subarea within which groundwater withdrawals may adversely affect park resources.
- The NPS is preparing settlement terms and is scheduled to meet with the County and Commission staff in Kona on March 31, 2015.
- The petition for declaratory orders is ready for the Regional Director’s signature.

### **Contacts:**

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