



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
P.O. BOX 621
HONOLULU, HAWAII 96809

June 23, 2015

Honorable William P. Kenoi, Mayor
Office of the Mayor
County of Hawaii
25 Aupuni Street
Hilo, HI 96720

Mr. William R. Hansen, Chief
Water Resources Division - Water Rights Branch
National Park Service
1201 Oakridge Drive, Suite 250
Fort Collins, CO 80525

Dear Mayor Kenoi and Mr. Hansen:

Preliminary Order HA-WMA 2013-1, C.5. - Continuing Negotiations for
Alternatives to the Keauhou Aquifer System Area (KASA) Designation

Thank you for your joint response letter dated April 30, 2015 and the discussions at the Commission's May 20, 2015 meeting in Kona regarding your negotiations towards alternatives to the KASA designation. We understand the negotiations have been productive, healthy, and are heading in a positive direction for the benefit of the Kaloko-Honokōhau National Historical Park (Park).

Continuing along this positive direction, the Commission requested that we provide some additional guidance for your consideration as negotiations continue. Based on your letter response and discussions at the May 20, 2015 meeting, we ask that the negotiations continue to explore mutually agreeable solutions including the following:

- Quantification of the Parks water needs as requested in Preliminary Order WMA 2013-1, item C.3. No change from current conditions is an unsatisfactory response.
- Timely development of a regional Water Use and Development Plan that shows how the County will meet existing and future demands without negatively impacting the Park's water resources (e.g., strategies for conservation, developing high-level water in the southern half of the aquifer system area, developing the deep freshwater aquifer, etc.).
- Formulation of a hydrological and biological monitoring plan that identifies reasonable triggers as an advance warning system to prevent negative impacts to the Park due to increasing pumpage near the park.
- Existing authorities for restricting or directing the locations of private well drilling near the Park.
- Update the draft settlement concepts clarifying mutually agreeable alternative actions.
- The application of Coastal Zone Management (CZM) / Special Management Area (SMA) programs to address or manage National Park Service concerns in the immediate vicinity of the Park.

Honorable William P. Kenoi
Mr. William R. Hansen
Page 2
June 23, 2015

- Opportunities for artificial enhancement (i.e., R1 reuse, desalting/injection wells, importation of irrigation water into the area, development and use of deep freshwater aquifer, etc.) can be used to mitigate future pumpage impacts to the Park.
- Enhancement of the Park's water resources and traditional and customary practices through regular coordinated county and Park clean-up activities such as the removal of invasive plant and animal species based on Park maintenance or restoration plans and community input.

We look forward to your next meeting to address Preliminary Order WMA 2013-1, item C.5. and hope that you both find our suggestions above worthy of discussion. If you have any questions, please feel free to call Roy Hardy, Acting Deputy Director, at 808-587-0274.

Sincerely,



SUZANNE D. CASE
Chairperson

RH:ss



United States Department of the Interior

NATIONAL PARK SERVICE
Natural Resource Stewardship and Science
1201 Oakridge Drive, Suite 250
Fort Collins, CO 80525



July 8, 2015

Ms. Suzanne D. Case, Chairperson
Commission on Water Resource Management
P.O. Box 621
Honolulu, HI 96809

Subject: Preliminary Order HA-WMA-2013-1

Dear Chairperson Case:

Thank you for your letter dated June 23, 2015. Your letter is intended to provide guidance for continuing discussions between the National Park Service (NPS), the County of Hawai'i, and Commission on Water Resource Management staff.

We would first like to seek clarification regarding of the status of the 2013 NPS petition for designation of the Keauhou Aquifer System as a water management area. The Commission has twice extended the review period for this petition beyond the 90-day timeframe provided in the State Water Code. This was first done by a Commission vote on October 16, 2013, and then by the Commission's Preliminary Order HA-WMA-2013-1 dated December 29, 2014. The Preliminary Order extended the review period to May 30, 2015, and requested that the parties explore and negotiate alternatives to designation of the Keauhou Aquifer System.

The parties met twice in March and on March 26, 2015, the NPS proposed draft settlement concepts to the County and the Commission that included triggers for designation. In a letter dated May 14, 2015, Mayor Kenoi rejected the draft settlement conditions, noting that the County was not in agreement with any of the proposed terms, conditions, goals, or background information. Neither the County nor the Commission has proposed alternative settlement concepts.

It is not clear if your letter is suggesting another extension of the deadline for deciding whether to continue the designation process and hold a public hearing on this matter. We encourage and support the Commission making a decision on the 2013 NPS petition for designation at this time.

In regard to continued discussions, we would like to reiterate our concern that several issues need to be addressed for future discussions to be productive. At the Commission meeting on May 20, 2015, the NPS requested clarification from the Commission on the following issues:

1. Revision of the December 2014 Preliminary Findings of Fact (FOF) – As requested by the Commission, the NPS and other stakeholders provided comments on the Preliminary FOF by January 30, 2015. The Preliminary FOF contains many factual

2015 JUL 15 AM 9:05

errors and omissions and this has become increasingly problematic. For example, the Preliminary FOF was cited by Mayor Kenoi prior to starting discussions (letter dated January 29, 2015), and was recently cited to support the County's Finding of No Significant Impact on June 15, 2015, for improvements to Well No. 3957-005 in the Keauhou Aquifer System. The Preliminary FOF should be corrected to provide common ground for future discussions and water-resource management decisions.

2. Analysis of legal arguments in the 2013 NPS petition for designation – The Commission's Staff Submittal on this matter, dated December 10, 2014, states "legal arguments will be addressed separately" (page 7). The legal analysis is needed for the NPS to evaluate whether any future settlement proposals satisfy the existing legal requirements for the protection of natural and cultural public trust resources.
3. Decision on the 2015 NPS petition for declaratory orders – The importance of determining whether the Commission can designate an area smaller than the entire Keauhou Aquifer System was discussed during the Commission's May meeting. The NPS will consider amending its 2013 petition for designation in the event of an affirmative decision.
4. Deferral of pump installation permits in the area of the Park – During the Commission's May meeting, the NPS requested that the Commission defer approval of new pump installation permits in the area of Kaloko-Honokōhau National Historical Park until a decision is made on the 2013 NPS petition for designation. Well No. 4258-007 was given as an example of an application for a private well in the Keauhou Aquifer System that is under consideration for approval by Commission staff, but for which potential impacts to natural and cultural public trust resources have not been evaluated by the applicant or the Commission.

Discussion of these issues is reflected in the draft minutes for the Commission's May meeting. The draft meeting minutes also document that the County did not object to these four conditions for continuing discussions.

Based on the foregoing, we respectfully request that the Commission clarify the status of the 2013 NPS petition for designation of the Keauhou Aquifer System as a water management area, and resolve the issues described above, before the NPS agrees to resume discussions with the County and Commission staff. Please contact me at (970) 225-3532 if you have any questions.

Sincerely,



William R. Hansen, Chief
Water Rights Branch

cc: KAHO – Superintendent
William P. Kenoi, Mayor

William P. Kenoi
Mayor



Walter K.M. Lau
Managing Director

Randall M. Kurohara
Deputy Managing Director

County of Hawai'i
Office of the Mayor

25 Aupuni Street, Suite 2603 • Hilo, Hawai'i 96720 • (808) 961-8211 • Fax (808) 961-6553
KONA: 74-5044 Ane Keohokalole Hwy., Bldg. C • Kailua-Kona, Hawai'i 96740
(808) 323-4444 • Fax (808) 323-4440

July 20, 2015

William R. Hansen, Chief
Water Rights Branch
United States Department of Interior
National Park Service
Natural Resource Stewardship and Science
1201 Oakridge Drive, Suite 250
Fort Collins, CO 80525

Dear Mr. Hansen:

Subject: Alternative paths of action, other than ground water designation
of the Keauhou Aquifer as requested by the Commission on Water
Resources Management

Please allow this transmittal to serve as a follow-up to both the June 23, 2015 letter from the Commission on Water Resource Management ("Commission") as well as your letter dated July 8, 2015, addressed to Chairperson Case of the Commission.

In December, 2014, the Commission issued a Preliminary Order requesting both the County of Hawai'i ("County") and the National Park Service ("NPS") meet, with participation of the Commission staff, to "explore and negotiate alternative paths of action, other than ground water designation of the Keauhou aquifer..."

Additionally, in their June 23, 2015 letter, the Commission thanked the parties for their ongoing negotiations towards alternatives to the Keauhou Aquifer designation, as well as requested that the "negotiations continue to explore mutually agreeable solutions..."

Mr. William R. Hansen
July 20, 2015
Page 2

In our continued effort to satisfy the terms of the Preliminary Order and the wishes of the Commission, the County proposes the following attached document entitled County of Hawai'i's and National Park Service's Proposed Alternative Paths of Action, for consideration and implementation.

We look forward to moving ahead with these action steps.

Sincerely,

A handwritten signature in black ink, appearing to read 'William P. Kenoi', with a stylized flourish at the end.

William P. Kenoi
Mayor
County of Hawai'i

cc w/ attachment: Suzanne Case, Chairperson DLNR
Commission on Water Resource Management (CWRM)
Attachment

COUNTY OF HAWAII'S AND NATIONAL PARK SERVICE'S PROPOSED ALTERNATIVE PATHS OF ACTION

JULY 20, 2015

The County of Hawai'i ("COH") and the National Park Service ("NPS") offer the following alternative paths of action, other than ground water designation of the Keauhou Aquifer as requested by the Commission on Water Resource Management ("Commission") via its Preliminary Order, Item C.5.:

1. Section C.3. of the Commission's Preliminary Order, dated December 29, 2014, requested NPS to provide to the Commission with information regarding the quantity of ground water needed to support both natural and cultural resources within the Park. NPS was also requested to identifying specific traditional and customary practices that are exercised in the Park, as well as, how the NPS manages those traditional and customary practices. Unfortunately, the Commission's requested information remains outstanding. In order to assist the NPS with obtaining that information, the COH proffers the following:

The COH and the NPS will partner in obtaining the services of independent third parties to assess the current state of the on-shore and off-shore ecosystems with primary emphasis on the anchialine ponds in the Kaloko-Honokohau National Park ("Park") and make recommendations on the restoration and management of these ecosystems (including but not limited to addressing invasive or exotic flora and fauna) and re-establishment of traditional and cultural practices in the Park to provide a baseline to determine whether or not reduction of aquifer resources do in fact adversely impact such practices.

- a. Details: The COH will provide three consultants (at least one of which has a background in hydrology), and the NPS will provide three consultants (which could come from the Na Hoa Pili O Kaloko-Honokohau Advisory Commission) to accomplish the above. Each party will be responsible for the payment, if any, to their chosen consultants.
- b. Rationale: Kohanaiki Shores, LLC, whose project is situated adjacent to the Park, manages an extensive anchialine pond restoration and management program. The Kohanaiki ponds are thriving, and are not affected (nor are they threatened) by the withdrawals of water either above their ponds or around their property. Also, nearby, the Natural Energy Laboratory of Hawaii Authority ("NELHA") has through monitoring, assessment and management maintained healthy on-shore (anchialine ponds) and off-shore ecosystems for over 30 years. This implies that with proper stewardship, the ecosystems within the Park could also thrive which in turn would re-establish the traditional and cultural intent of these resources. The COH is willing to assist the NPS in this assessment. Without NPS committing to assess, restore and manage its on-site resources, it cannot be determined if there is ANY effect due to pumpage of water in and around the Park.

2. DWS will provide NPS all monitoring data on its wells that it currently compiles and sends to the Commission. NPS will provide all monitoring data to DWS that is collected within the Park.
 - a. Details: DWS already provides monitoring data to the Commission on a regular basis. DWS would agree to provide such data directly to NPS so that NPS can get timely and up to date information to analyze. DWS' collection of data from NPS could also be used to monitor and study the aquifer.
 - b. Rationale: The "Precautionary Principle" has been loosely used in these proceedings. Yet in *In re Water Use Permit Applications*, 94 Hawai'i 97, 9 P.3d 409 (Hawai'i 2000) the Commission stated: "where there are present or potential threats of serious damage, lack of full scientific certainty should not be a basis for postponing effective measures to prevent degradation". *Id.* at 154, 9 P.3d at 466. It is unquestionable that there is a lack of full scientific certainty that pumping of water around the park is or has the potential to affect the Park. Yet, there must be some scientific proof of the cause and effect of the pumping of water in and around the Park. The COH understands that the assessment, subsequent findings and recommendations described above will take some time and effort. Therefore, monitoring and sharing of data/information is mutually beneficial, both in the interim as well as in the future.
3. The Planning Department agrees to incorporate the approved County Water Use and Development Plan ("WUDP") within the County General Plan/Community Development Plan ("CDP") policy planning framework. The Planning Department also agrees to incorporate applicable recommendations to the County General Plan/CDP recommended by NPS during the 2015 comprehensive General Plan update.
4. NPS commits to a timeline to implement the recommendations provided in the assessment.
 - a. Details: Details can be discussed after the assessment is complete. The COH could also commit to assist in some fashion, such as they did on April 18, 2015 when members of the cabinet cleaned ekoa and kiawe from a section of the Park.
 - b. Rationale: Without eliminating the on-site factors adversely impacting the Park's resources, it is impossible to determine, or hypothesize with any degree of scientific certainty whether off-site factors, including water withdrawal has any effect. Therefore, some timeline must be committed to implement the recommendations provided in the assessment described in paragraph one.

Summary: Based on the foregoing, COH and NPS hereby agree that the designation of the Keauhou Aquifer System Area as a ground water management area is premature and the petition should be deferred until such time as the above proposed alternative paths are implemented, findings are developed and effects are evaluated.



United States Department of the Interior



NATIONAL PARK SERVICE
Natural Resource Stewardship and Science
1201 Oakridge Drive, Suite 250
Fort Collins, CO 80525

August 13, 2015

Ms. Suzanne D. Case, Chairperson
Commission on Water Resource Management
P.O. Box 621
Honolulu, HI 96809

Subject: Preliminary Order HA-WMA-2013-1

Dear Chairperson Case:

This letter is in response to the proposal we received from Mayor Keno'i regarding alternatives to designation of the Keauhou Aquifer System (dated July 20, 2015). We have a number of concerns with the alternative paths of action that have been proposed by the County of Hawai'i. None of the elements contained therein have ever been raised with the National Park Service (NPS) during our discussions with Commission on Water Resource Management staff, and they do not provide sufficient protection for the cultural and natural public trust resources located in Kaloko-Honokōhau National Historical Park. Deficiencies associated with each of the proposed actions are addressed below:

1. Item 1 of the proposal incorrectly suggests that the NPS has not provided the information requested by the Commission under Item C.3. of the above referenced Preliminary Order. The NPS provided this information to the Commission on May 29, 2015. Additional information was submitted on August 12, 2015. We believe the actions proposed under Item 1 of the proposal are unnecessary.
2. Item 2 of the proposal requests that the NPS provide all monitoring data that is collected in the Park to the Department of Water Supply. Groundwater monitoring data collected by the NPS and the U.S. Geological Survey in the Park are available in online databases (e.g., <https://irma.nps.gov/aqwebportal/>) and published reports (e.g., <http://pubs.usgs.gov/sir/2014/5158/>). A table with direct links and references to data collected in the Park by other entities was sent from my staff to Commission staff and the Department of Water Supply by email on February 26, 2014. The actions requested of the NPS under Item 2 of the proposal have been accomplished.
3. Item 3 of the proposal involves incorporating the County Water Use and Development Plan within the County General Plan/Community Development Plan planning framework. We support this proposed action. We believe that such incorporation should have taken place immediately following the adoption of the County Water Use and Development Plan and note that such consistency is required under the State Water Code

(§174C-31(b)(2)). Therefore, an agreement with the NPS for an action required by law is unnecessary.

4. Item 4 of the proposal alleges that “Without eliminating the on-site factors adversely impacting the Park’s resources, it is impossible to determine, or hypothesize with any degree of scientific certainty whether off-site factors, including water withdrawal has any effect.” We disagree with the County’s assertion in this regard, and note that no evidentiary basis is provided to support it.

More importantly, the premises underlying this item (that scientific certainty is needed to take actions to protect non-consumptive public trust resources; and that the burden of proof with regard to proving harm to these resources falls on the agencies that have an enduring responsibility to protect these resources, as opposed to applicants for water use) have no foundation in law and are in direct contradiction with repeated rulings of the appellate courts of Hawai‘i.

The State of Hawai‘i and its political subdivisions are responsible for protecting public trust resources in Hawai‘i. The Commission’s landmark 1997 decision in the Waiāhole Ditch Combined Contested Case Hearing was upheld for its recognition that as trustee of the state’s water resources, its duty to protect those resources required it, when faced with “scientific evidence [that] is preliminary and not yet conclusive regarding the management of fresh water resources which are part of the public trust,” to adopt “precautionary principles” to protect those resources. Conclusions of Law at 7.

The Hawai‘i Supreme Court endorsed the Commission’s adoption of the precautionary principle as a guidepost in the exercise of its statutorily-defined duties, noting that “at minimum, the absence of firm scientific proof should not tie the Commission’s hands in adopting reasonable measures designed to further the public interest.” In re Waiāhole Ditch Combined Contested Case Hearing, 9 P.3d at 467 (2000) (“Waiāhole”); reaffirmed In re Kukui (Molokai), Inc., 174 P.3d at 320, at 338 (2007).

The Court also ruled that “under the public trust [doctrine] and the Code, permit applicants have the burden of justifying their proposed uses in light of protected public rights in the resource.” Waiāhole, 94 Hawai‘i at 160, 9 P.3d at 472. The Court further clarified that the Commission is “duty-bound” to place the burden on the applicant. Waiāhole at 142, 9 P.3d at 454.

We note that the issuance of well construction and pump installation permits does not explicitly require the applicant to analyze the effect of a proposed withdrawal on public trust resources. In contrast, the water-use permit required in designated water management areas does contain such a requirement.

The foundation of this proposed action is in conflict with the public trust doctrine and the State Water Code and infringes on the responsibilities of the Commission.

For the reasons described above, the NPS does not agree to Items 1 and 4 of the County’s proposed alternative paths of action. Please refer to my previous letter to you dated July 8, 2015 regarding the issues that the NPS believes need to be resolved before future discussions on

alternative paths of action can proceed. We trust that the Commission will take up those issues at your August 17, 2015 meeting. Please contact me at (970) 225-3532 if you have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "W. R. Hansen".

William R. Hansen, Chief
Water Rights Branch

cc: KAHO – Superintendent
William P. Kenoi, Mayor