

MINUTES
FOR THE MEETING OF THE
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: August 17, 2015
TIME: 9:00 a.m.
PLACE: West Hawaii Civic Center
Community Meeting Hale, Building G
74-5044 Ane Keohokalole Highway
Kailua-Kona, Hawaii 96740

Chairperson Suzanne Case called the meeting of the Commission on Water Resource Management to order at 9:02 am.

The following were in attendance:

MEMBERS: Ms. Suzanne Case, Mr. Jonathan Starr, Mr. Michael Buck,
Dr. Kamana Beamer, Ph.D., Mr. Milton Pavao,
Dr. Virginia Pressler, M.D., Mr. William Balfour, Jr.

STAFF: Roy Hardy, Lenore Ohye, Ryan Imata, Jonas Burgon

COUNSEL: Linda Chow, Esq.

OTHERS: Ken Melrose, Keith Okamoto (HDWS), Kawika Uyehara (HDWS),
Matt Cintos, Kirstin Kahaloa (Kona-Kohala Chamber of Commerce),
Nancy Burns, Mike Shibata (QLT), Mana Purdy (QLT),
LeeAnn Crabbe (QLT), Kaleo Manuel (DHHL),
William Aila, Jr. (DHHL), Thomas Yeh (Yeh & Moore),
Shannon Rudolph, Duane Kanuha (County of Hawaii, Planning
Department), Janice Palma-Glennie (Surfrider Kona Kai),
Bo Kahui (L2020/VOLA), Max Newberg, Alan Murakami,
Kealohapauole Manaku, William Hansen (NPS), Peter Fahmy (NPS),
Paula Cutillo (NPS), Jonathan Scheuer (NPS), Ben Kudo (Esq. HDWS),
Yvonne Izu (Esq. Lanihau Properties, LLC)

Chair Case introduced Jeffrey Pearson and thanked him for attending the Water Commission meeting. She also thanked Roy Hardy for his incredible work as Acting Deputy Director for the Water Commission.

A. ACTION ITEMS

1. Approval of Phase 1 and Request for Extension of Time to Submit Proposed Scope of Work for Phase 2 of the Hawaii County Water Use and Development Plan Update- Preliminary Order HA-WMA 2013-1 C.2, C.4, & C.6 and Feb 18, 2015 Amendments and Request to Separate Keauhou and Waimea Aquifer System Area Reports

STAFF PRESENTATION by Lenore Ohye

Approved by Commission on
Water Resource Management
at the meeting held on

12/16/2015

Item A1 concerns the regional Water Use and Development Plan updating for the Kona area of Hawaii. The 3 approvals before the Commission are 1) approval of Phase 1 of the Keauhou Water Use and Development Plan Update; 2) approval of an extension of time for scope of work for Phase 2; and 3) approval to separate the Keauhou and Waimea Aquifer System Area Reports. In 2011, Hawaii County updated its Water Use and Development Plans for the entire island. It was the first update since 1990. The County employed a uniform approach to the entire island to test sustainability of the land use policies. Demand analyses were based on full buildout of the General Plan's Land Use Pattern Allocation Guideline and zoning. The Hawaii County also did a 20-year demand update. This analysis was able to identify areas where the land use policies, in relation to the ground water supply, might result in unsustainable water withdrawals. Based on this island-wide update, the County identified 2 areas of the island that required further analysis, the Waimea Aquifer System Area and the Keauhou Aquifer System Area. On December 10, 2014 the Commission held a public meeting in Kona to review the Preliminary Findings of Fact and to hear public testimony on the National Park Service's Petition to Designate the Keauhou Aquifer System Area as a Water Management Area. Following the public testimony and deliberation, the Commission issued a Preliminary Order (HA-WMA 2013-1). The order contained 3 submittals that are relevant to water use and development planning. The first order required the County of Hawaii to submit a project description and scope of work for the proposed revision and update to the Water Use and Development Plan by January 15, 2015. The Commission staff would provide comments back to the County by February 1, 2015. The County would then provide a draft of the revised Water Use and Development Plan to the Commission by May 15, 2015. The second order required the County of Hawaii to create a scope, timeline and funding methodology for an infrastructure improvement plan to alleviate the existing source, chloride, transmission, storage and well interaction issues and submit it to the Commission by May 30, 2015. The third order required the County of Hawaii to refine its projected water demands and "authorized planned uses". Table 1 on page 2 summarizes the different items to be submitted and shows the deadlines as well as the compliance dates. Following the transmittal of the County's project description for the Keauhou and Waimea regional updates, staff met with the County and discussed other elements that would be beneficial to include in the long range plan. In February 2015 the Commission acted to amend some of the things that were required under the preliminary order and approved the update to proceed in 2 different phases. The first phase will refine demand projections and calculate authorized planned use. A new project description for Phase 1 was submitted to the Commission on March 4, 2015. A draft of the Phase 1 update was submitted to the Commission by May 15, 2015. The second phase included the source development strategies and was submitted by May 30, 2015.

On March 4, 2015 the County submitted the revised project description for the Phase 1 WUDP update. Staff reviewed it and believed it adequately incorporated the project description clarifications discussed in the February 18, 2015 Commission meeting. On May 14, 2015 the County submitted a draft of the Phase 1 WUDP update. Also

submitted was a draft memo regarding anticipated water demands that addresses authorized planned use.

Based on staff's review and consultation with HDWS and their consultants, various clarifications and revisions were made to the Phase 1 WUDP and the anticipated water demands memo, including: 1) clarification of the accounting and methodology used to calculate anticipated water demand, 2) clarification of projected demands associated with private developments that will be using water from the Keauhou Aquifer System Area and 3) inclusion of agricultural demands in the WUDP zoning demand projection. Page 4 of the submittal discusses the authorized planned use calculations. The total anticipated water demand/authorized planned use is 28.07 mgd, which is 74% of sustainable yield.

The methodology for refining zoning demand projections involved 1) updating the zoning information for zoning that changed since 2010, 2) refining planning unit rates for undeveloped parcels with more realistic unit rates based on actual metered data and 3) replacing planned unit rates for developed parcels with actual water use data. For the 20-year projection period to 2035, a range of forecasts was included for 5-year incremental demand projections. Projected demands were based on full buildout for DHHL lands. The total buildout zoning demands of 28.54 mgd are 75% of the aquifer system sustainable yield.

Five-year incremental water demand projections to 2035 for the medium growth scenario, broken down by category of use, are shown on Table 4. The total projected demand over the 20 years is approximately 23 mgd. The County also looked at different demand projections, high, medium and low, and these ranged from a low of 22.5 mgd to a high of about 24 mgd for the 20 year projection period.

The Phase 1 update of demands is consistent with the project description that the Commission approved in February, as amended by the County in March. Pursuant to the Water Code, in order to make this update an official part of the Hawaii Water Plan, a public hearing and formal adoption by the Commission is required. Staff is recommending that the Commission approve the Phase 1 demand analysis but defer the public hearings and formal adoption pending the completion of Phase 2. This would allow for a complete WUDP – one that analyzes both future demands and identifies supply options and preferred source strategies to meet projected demands.

In response to Commissioner Starr's concerns, Ms. Ohye clarified that staff is recommending that the Commission approve the zoning demand analysis but defer the public hearing and adoption pending the development of the supply side strategies. Secondly, staff is recommending an extension of time to submit the Phase 2 project description. The Department of Water Supply did submit a Phase 2 project description as well as their infrastructure plan; however, the document did not appear to adequately address all of the issues and concerns raised by the Commission. The Board of Water Supply subsequently approved funding to hire a consultant to develop the Phase 2 project description and scope of work and also to do the actual updating work for the Keauhou Aquifer System Area as well as the Waimea Aquifer System Area. The Department of

Water Supply is requesting a 3-month extension of time to go through the procurement process to hire a consultant to work on the revised project description and scope of work for the Phase 2 update. Thirdly, staff is recommending separation of the Water Use and Development Plan updates for the Keauhou and Waimea Aquifer System Areas. The County had planned to update both areas concurrently as both areas were identified as sensitive areas. However, the County is now requesting to sequence the updates, with the Keauhou update preceding Waimea. Staff believes this is a reasonable request. The Commission's immediate concern is Keauhou because of the pending petition to designate.

Commissioner Beamer asked if the Waimea Aquifer System Area update will also be presented to the Commission at a later date as well as a public hearing.

Ms. Ohye replied, "yes". The project descriptions for the Phase 2 Keauhou Aquifer System Area update as well as for the Waimea Aquifer System Area update will be submitted to the Commission for approval, and the respective draft plans will also be presented once the draft plans are completed. Staff will come back to the Commission for formal adoption after the public hearing.

Commissioner Starr was happy to see a much improved process. However, before approving the demand analysis refinements, he would like to see assessments of and source strategies for agricultural, non-potable, and the public trust needs.

Ms. Ohye stated that the Commission required the County to start a preliminary cultural assessment. The County has reviewed environmental assessments and impact statements filed since 1990. Of the 200 reports reviewed, 47 of which underwent detailed review, only one report addressed potential impacts of well pumping on traditional and customary practices and habitat concerns. The County will continue to seek input on cultural practices and potential impacts from community members and organizations. This information will be used to inform and vet source strategies in Phase 2.

Commissioner Starr commented that he did not see the benefit of approving the demand analysis when further assessments are on-going regarding system demands and public trust needs. He didn't see an integrated approach.

Ms. Ohye said that is another reason staff is recommending to defer the formal adoption of Phase 1. The County and their consultants recognize that as it goes through Phase 2, some adjustment of the Phase 1 demands may be warranted. The objective of Phase 1 is to determine the amount of water that would be needed to support land use plans, and the water infrastructure needed to support the urban developments, recognizing there are other demands within the aquifer that need to be protected but they are not necessarily going to be served by infrastructure.

Commissioner Starr recommended a conditional approval with the understanding that the off system and any other public trust needs and uses will be addressed at a later date.

Ms. Ohye suggested that Recommendation 1 could be amended to read conditional approval of Phase 1.

Commissioner Buck questioned why a conditional approval is needed at this time as the staff's recommendation is to defer formal adoption.

Commissioner Pavao added that the approach is working well.

Ms. Ohye stated that staff's goal was to give some assurance to the County that it had met the expectations of the Commission in terms of the Phase 1 demand analyses.

Commissioner Beamer referenced Tables 2 and 3 and asked staff to explain the different methodologies: buildout zoning and anticipated water demands.

Ms. Ohye stated that it was coincidental that the results were really close as the methodologies are 2 completely different demand analyses. For Table 2, anticipated water demands, or authorized planned use, the legal definition is the projected use of water by a development that has received the proper state land use designation and County development plans and community plan approvals. In keeping with this definition, the County identified the different projects and subdivisions contained in the approved Kona Community Development Plan. The February 18 staff submittal explained the background and how at one point when the Water Code was passed, the development plans approved specific densities attached to each development and therefore it was very easy to calculate water demands. However, because the Kona CDP is more of a conceptual and visionary plan it does not include specific densities and acreages that can be used to translate to water demands. But, a companion document, the financing plan for the CDP, was developed to ascertain how much development would be needed to fund the public facilities and infrastructure. The demand projection was based on the unit and acreages given in the financing plan. This is the best available information on planned densities. In addition, in accordance with the definition of authorized planned use, only proposed developments having State Land Use District consistency were included. In order to avoid double counting, existing developments already using water, DHHL lands, and developments with existing water entitlements, were also subtracted out. The total remaining balance is 1.85 mgd.

Table 3, the buildout zoning demand analysis, is based on a much bigger footprint. This analysis looked at each parcel within the entire Keauhou Aquifer System Area and assigned a demand based on actual metered data for developed parcels, and projected demands for undeveloped parcels based on zoning designation.

Chair Case thanked the County and staff for a great analysis. Demand estimates are good and can be tied to sources though changes will occur with time. With the understanding that potential impacts on traditional and customary rights will be addressed in Phase 2, she would approve staff's recommendation as presented.

Ms. Ohye said environmental and cultural impacts are more appropriately associated with source strategies and will be incorporated in Phase 2. The County acknowledges that refinements to Phase 1 may be required as Phase 2 is developed.

Commissioner Beamer preferred not to approve Phase 1 if the results of Phase 2 will require refinements to Phase 1.

Ms. Ohye stated that perhaps a compromise is needed as Commissioner Starr suggested a conditional approval. She also said that an approval of Phase 1 would indicate to the County that it has taken the Commission's concerns into consideration regarding issues the Commission felt should have been included in the initial demand analysis and that no further analysis is needed at this time.

Commissioner Starr commented that non-consumptive, traditional and customary as well as public trust uses should be incorporated into the plan before the Commission approves it. Additionally, he had concerns with approving a demand model based on anticipated water demand versus the statutory authorized planned use term.

Ms. Ohye said the staff believes the 2 terms are interchangeable. Staff is considering anticipated water demand as the equivalent of authorized planned use for purposes of applying it to the Water Code criterion for water management area designation. She deferred to the County if it wanted to elaborate.

Commissioner Starr asked the County for a statement saying anticipated water demand is synonymous with authorized planned use and would like a legal analysis on authorized planned use.

Commissioner Beamer asked if staff is defining anticipated water demands as synonymous with authorized planned use in its documents.

Ms. Ohye replied, "yes" we feel it's a matter of semantics; however, this is the first time this term is being used.

Commissioner Starr asked if the County was willing to include a statement saying that anticipated water demand is synonymous with authorized planned use.

Commissioner Beamer asked why the County substituted anticipated water demand for authorized planned use.

Ms. Ohye referred to the anticipated water demand memo, Exhibit 5.

Keith Okamoto, Manager Chief Engineer, Department of Water Supply, stated that County doesn't want to define authorized planned use but that anticipated water demand uses zoning, general plan, community plan and population projections to determine future water needs.

Chair Case asked if staff agreed with that approach.

Ms. Ohye commented that the legal definition of authorized planned use requires consistency with community development plans and state land use designation. The Commission has applied that term based on the best available information that can be used to attach water demands to community development plans for parcels having the appropriate state land use designation. The Deputy Attorney General advised the Commission that the authorized planned use is a legal definition that the Commission has applied using best available information.

Commissioner Beamer asked if the County objected to using authorized planned use.

Mr. Okamoto stated that the County's concern was that there is no County development plan that provides the approvals that define developments for which water demands can be calculated. The County's intent was to provide the Commission with all the available information. The County put in all the projected water demands that were based on any development that had some approval and at some point in the future if designation occurs, authorized planned use is used to evaluate areas for designation. The only reference to authorized planned use in the Water Code appears in Part IV Regulation of Water Use and is one criterion for designating a ground water management area.

Commissioner Starr asked the County why it chose to create new terminology as the Water Code uses the term authorized planned use. He questioned whether the County's intent was to evade the Water Code.

Commissioner Buck said the Commission determines what term is going to be used and staff has recommended that anticipated water demand and authorized planned use are interchangeable. The County provided all the information and authorized planned use is based on the best available information. He didn't believe the County was trying to skirt the issue.

Commissioner Starr stated that the County is not providing authorized planned use information and is skating around the issue and making it unclear

Commissioner Buck said staff believed anticipated water demand and authorized planned use are synonymous and that authorized planned use will be used regarding designation proceedings.

Commissioner Starr said that may be debatable in the future.

Chair Case agreed with Commissioner Buck that the County may use the terminology it wants and is providing the best available information, which ultimately results with staff's determination.

Mr. Okamoto addressed the Commission and said the County's intention was to work with staff, the County has a good relationship with Commission staff, it is a collaborative one, it is not a divisive one and the County believes that its history working with staff, which goes back decades, has proven that. The County does not ever intend to hide

anything from the Commission staff. It tries to give staff the best available information so that it can present that to the Commission to make the best decision possible.

Commissioner Pavao agreed with Mr. Okamoto. It is really not good when the Commissioners question the integrity of the Department of Water Supply and the staff. The working relationship appears to be very good and working well. The County has done what the Commission asked. Whether the term is authorized planned use or anticipated water demand, it is the same thing. Anticipated water demand seems to be more encompassing than authorized planned use because it takes into account everything.

Commissioner Beamer asked the Deputy Attorney General if there are any issues having these 2 separate terms and the Commission defining anticipated water demand as authorized planned use.

Deputy Attorney General Linda Chow replied that the Commission is the body to interpret what is authorized planned use. It is the Commission's interpretation, regardless of how it is presented. Ultimately, the Commission is the deciding body.

Commissioner Beamer said there should be no further issues if the County defines authorized planned use as anticipated water demand.

Commissioner Starr reiterated that interchanging the terms will not have the best ramifications and will result in confusion.

Commissioner Buck noted the importance of Phase 2, source development, and asked what is the County's timeline?

Mr. Okamoto anticipated 9-10 months to develop a draft depending upon what the County needs to address. Phase 2 intends to include going out into the community to get traditional and cultural information.

Commissioner Buck noted that in the National Park's submission, there is very little quantification. The Phase 2 data is really critical for the Commission.

Ms. Ohye said that staff is recommending a 3-month extension of time for the County to submit a project description.

Commissioner Buck said the Phase 2 data, location of wells and financing source of wells is really critical as it will provide T&C requirements and public trust requirements that will aid in the Commission's decision to designate or not.

Commissioner Starr wanted clarification that Recommendation 1 will be a conditional approval.

Ms. Ohye asked the Commission if it would like to amend the recommendation to conditional approval of Phase 1 of the Keauhou Aquifer System Area, pending completion of Phase 2.

Commissioner Buck asked to amend Recommendation 1 to read “conditional approval”. He requested approval of Recommendations 2, 3, and 4.

Commissioner Pavao did not understand the term conditional approval.

Commissioner Beamer believes some of the Commissioners are concerned that Phase 1 may need to be updated subject to the information that will be provided in Phase 2.

Chair Case asked what if it is called preliminary approval without the formal adoption.

Commissioner Starr preferred conditional approval.

Chair Case asked what is the condition?

Commissioner Starr said the condition is there will be more information added to Phase 1.

Ms. Ohye suggested preliminary approval subject to Phase 2.

Chair Case asked depending upon what information is presented in Phase 2, Phase 1 may or may not require an update?

Ms. Ohye said, “yes”.

Chair Case requested preliminary approval of Phase 1 subject to any potential changes based on the Phase 2 information.

Commissioner Starr believed Phase 1 did not meet the mandate because Phase 1 is use definition for the consumptive use for the municipal system. It is not the use definition in terms of T&C and other public trust uses, which have to be part of the Plan. By approving Phase 1 the Commission is saying that the water use and development plan does not need to take into account traditional and customary uses, the needs for the environment and any other public trust or off system uses.

Chair Case stated staff confirmed Phase 1 is the consumptive use analysis.

Commissioner Starr asked for DWS’s commitment that public trust, T&C and consumptive uses will be included in Phase 2.

Mr. Okamoto said, “yes” and clarified that the anticipated water demands include off system uses in addition to DWS’s system, it includes water demand projections outside of the DWS system.

Jonathan Scheuer, Consultant to the National Park Service, politely disagreed with staff that anticipated water demand and authorized planned use are synonymous. One of the distinctions between any calculation that might be made in the water use and development plan and the calculation of authorized planned use is that the water use and development plan is directed by the framework for developing the Hawaii Water Plan and a 20-year time process, but authorized planned use is very specific and has no

timeframe improvised into it. He also noted that the County's anticipated water demand calculation for the Kona Community Development Plan is 1.85 mgd. The Kona Community Development Plan proposes 10 or more transit oriented developments within the Keauhou Aquifer System Area. The Environmental Impact Statement for Kaloko Makai proposes a water demand 2.5 mgd. This implies that the water demand for the entire Kona Community Development Plan is smaller than one development.

Mr. Okamoto explained that the County's projections do not have a timeline and are based on full buildout. That is why the Commission staff equated it to authorized planned use because authorized planned use has no timeframe. The reason why the Kona CDP number was rather small is because a lot of that is overlapping with other components in the table, things that received zoning, things that have entitlements and things that have laterals.

Commissioner Beamer asked if the Kona CDP was a small subset of another component in the Kona CDP.

Mr. Okamoto replied yes, if it was not already included in another element in the table.

Commissioner Beamer asked if that could be noted in the plan because the line item Kona CDP implies the entire Kona CDP.

Mr. Okamoto said the intent was to capture all of DHHL as a separate line item.

Commissioner Starr asked if the County was capping all of the developments in the Kona area so there will be no additional development using water in the Kona area.

Mr. Okamoto said it was not capping the developments but it was capturing projected water use in the area.

Ms. Ohye noted a map in the Phase 1 document shows the Kona CDP, with all the subdivisions that are included in that plan. Existing entitlements, DHHL lands, vacant laterals, existing pumpage are color coded. It signifies what is not included in all the other categories as far as authorized planned use as well as how the authorize planned use categories intersect with the Kona Community Development Plan.

Duane Kanuha, County of Hawaii Planning Department Director added that regarding the Kona CDP and the TODs there is a very strong component in the plan which calls for concurrence requirements before any anticipated zoning. The concurrence requirements are related to available water and transportation. The Kona CDP is related to a series of TOD constants, higher density and connectivity between the rest of the Kona area. The difficulty to effectuate the TODs, is the transportation component as it will require extensive roadway improvements. Therefore, based on projections for the Kona CDP currently, the County does not see any implementation of these TODs for a long period of time. The County's General Plan is undergoing a comprehensive review regarding the Kona CDP as it relates to the density and concurrence requirements.

Commissioner Starr appreciated Mr. Kanuha's comments but was puzzled because it appeared that there were 10 urbanized areas without transit corridors included in the water demands. He asked are the water demands for the 10 TODs included in the water demand numbers being presented today?

Mr. Kanuha said currently most of the TODs do not have authorized planned use. They are not in the urban district and are not ready for zoning. He believes this is what the Department of Water Supply was referring to as a slight differentiation from the statutory definition of authorized planned use.

Commissioner Starr thanked Mr. Kanuha for the clarification and suggested that the term was changed from authorized planned use to anticipated water demand because the County did not want to acknowledge the 10 TOD centers as part of the authorized planned use and by changing the term, it was able to avoid adding the water demand use to the calculation.

Mr. Kanuha believed that the Water Supply provided the projection under a different definition, which gives the Commission more leeway to determine the water demands.

Commissioner Starr opined that the water plan demand side was a farce.

Mr. Okamoto clarified that if the water demand was included in the TOD but it did not have state land use classification and did not have authority to proceed, the County did not include it as part of the anticipated water demand. The County believed it was consistent with the definition of authorized planned use.

Commissioner Starr asked if there is any intention of amending the Water Use and Development Plan if any of the TODs are approved.

Mr. Okamoto stated that the Water Use and Development Plan is anticipated to be a dynamic document and a snapshot of what information is available at the time.

Commissioner Pressler requested that Commissioner Starr be excused from the hearing if he chooses to insult anyone in the room again today.

Commissioner Pavao seconded Commissioner Pressler's request.

Bo Kahui, Executive Director, La'i'opua 2020 supports the County's and Commission staff's proposal. He took offense to Commissioner Starr's comments that the County wants to sneak out of its fiduciary duties. He opposes designation because the impacts are still unknown. He supported the 3-month time extension for the County to provide a project description. This additional information will allow the Commission to make the pono decision. The Villages of La'i'opua need water to build its modern day puuhonua and it needs the Commission to exercise its authority.

Commissioner Starr asked if Mr. Kahui's water needs for the community was included in the DHHL reservation that is before the Commission today.

Mr. Kahui answered, “yes, it is”.

Janice Palma-Glennie, Surfrider Foundation, said information presented continues to support designation. The NPS is petitioning the State to do its job since state waters are under state jurisdiction. The NPS has worked with the County of Hawaii to find alternatives to designation. There is ample evidence that designation will not stop development. Regulation of water resources within and beyond the Kaloko-Honokohau National Park fits perfectly with the Kona Community Development Plan to protect Kona’s natural resources and culture. Petitioning for designation is not premature. The County’s water use projections do not reflect future water needs. The County suggests that anticipated water demand for the Kona Community Development Plan will only require 1.85 mgd; however, one single proposed TOD, the Kaloko Makai Development, in its EIS noted that it would need 2.5 mgd. She appreciated the NPS’s ongoing efforts to work with the County and State to mitigate damage to the park’s resources for the common good as well as supporting public input. She asked that the fact finding phase for this process be closed and that a public hearing be held in Kona so the Commissioners can vote on designation as soon as possible. She asked that the Commissioners support designation of the Keauhou Aquifer System Ground Water Area. She had concerns that Mr. Kanuha may have implied that the Kona Community Development Plan may not have included financial considerations for implementation; however, the Kona CDP must be implemented by ordinance. She agrees with Commissioner Starr’s comments that the language in the motion previously discussed, seems ambiguous and open to further interpretation.

Nancy Burns found the NPS’s claims that it needs all the water in the watershed very disturbing.

Chair Case reminded everyone that the issues currently before the Commission are approving the Phase 1 Water Use and Development Plan, deferring formal adoption and public hearing on the Water Use and Development Plan Phase 1, approving a 3 month extension of time for Phase 2 project description and approving the separation of Water Use and Development Plan for Keauhou and Waimea. Aquifer System Areas.

Matthew Cintos requested the Commission to appoint an independent water monitoring agent to investigate and monitor water quality within the Keauhou Aquifer System Area.

Shannon Rudolph requested Commissioner Balfour recuse himself from voting regarding NPS’s petition because he previously voted to dismiss the petition without all the facts.

Commissioner Beamer asked for clarification regarding the Kona CDP 1.85 mgd water demand analysis.

Ms. Ohye said that what the County did for authorized planned use, (the County refers to as anticipated water demand), is it took the footprint of the Kona Community Development Plan, and subtracted out areas that did not have state land use designation consistency. The legal definition of authorized planned use is the use or projected use of

water by a development that has received the proper state land use designation and county development plan/community plan approvals. The County is trying to stay true to the legal definition and using the best available information to project the water demands. The County excluded areas that did not have state land use designation consistency per the legal definition of authorized planned use and excluded all areas that would have been double counted under all the other categories of authorized planned use on Table 2. The remaining balance of unmet demands within the community development plan that have state land use designation consistency equals 1.85 mgd.

Commissioner Beamer asked if an area is slated for urban zoning and although zoning is not in place, it was not included as part the authorized planned use?

Ms. Ohye said, “yes”, and clarified that the zoning is part of the Water Use and Development Plan calculation. Zoning is what the Water Code says the Water Use and Development Plan should be consistent with in making a 20-year projection for the purposes of guiding infrastructure development. Authorized planned use is a legal definition and consistent with community development plans and state land use plans district designation.

Commissioner Beamer asked if state land use designation was not authorized yet in this instance.

Ms. Ohye stated there are a lot of agricultural lands that have not been converted to urban designation yet.

Commissioner Beamer asked what plan does it appear in?

Ms. Ohye stated that the zoning demand calculations include every parcel within the Keauhou Aquifer System Area. It looks at the current zoning and attaches a projected demand associated with that zoning based on observed usage at other similarly zoned parcels, so the Water Use and Development Plan projections on page 5 includes every parcel and consistent with its zoning derives a number. It is really close to the other calculation of authorized planned use, which is a completely different methodology.

Commissioner Starr asked if any or all of the 10 TODs do start moving through the entitlement process, what would trigger a revision of the Water Use and Development Plan?

Ms. Ohye said the Water Code does not specify triggers for Water Use and Development Plan revisions. It just says periodic updates to remain consistent with zoning; however, the framework recommends 5 year updates because that is when land use plans are generally updated. Staff needs to be vigilant in tracking state land use designation approvals and as more subdivisions obtain its approvals, staff should be updating the calculations of authorized planned use.

Commissioner Starr asked what happens if the Water Use and Development Plan is approved and the TODs get LUC approval. Will the Water Use and Development Plan be amended?

Ms. Ohye said the Water Use and Development Plan does not require an analysis of authorized planned use. It requires an analysis of zoning to 20 years to guide infrastructure development. Authorized planned use should take place earlier in the planning process so that before zoning is approved and as state land use designation consistency is approved, if that project is in the community development plan it would change the calculation of authorized planned use. It is a snapshot in time based on today's approvals and today's LUC consistency but as LUC approves new conversions from agriculture or conservation to urban, and as it affects the footprint of the Kona Community Development Plan, that calculation needs to be updated.

Commissioner Starr asked how a preliminary approval of Phase 1 will affect the adoption process of the Water Use and Development Plan.

Ms. Ohye stated that the formal adoption process requires City Council adoption by ordinance including all the required public hearings. Upon Council adoption, the Commission will then do a formal adoption as well as the required public hearings. As this is an approval for the methodology and the application of that methodology, staff is not recommending approval for adoption yet.

Commissioner Starr stipulated for preliminary approval to update Phase 1 upon approval of any TODs.

Ms. Ohye said the Commission is attempting to make the Hawaii Water Plan and all its components a living document so that it can be flexible and responsive to changes in land use.

AMENDED RECOMMENDATION:

Staff recommends that the Commission:

1. Approve on a preliminary basis the Phase 1 Water Use and Development Plan update for the Keauhou Aquifer System Area.
2. Defer the public hearing and formal adoption of the Phase 1 Water Use and Development Plan update for the Keauhou Aquifer System Area pending completion and acceptance of the Phase 2 component.
3. Approve a 3-month extension of time to develop and submit a project description and scope of work for the Phase 2 Water Use and Development Plan update for the Keauhou Aquifer System Area.
4. Approve the separation of the Water Use and Development Plan updates for the Keauhou and Waimea Aquifer System Areas.

**MOTION: (Case / Buck)
To approve staff's amended recommendation.
UNANIMOUSLY APPROVED.**

2. Department of Hawaiian Home Lands Request for Reservation of 3.398 Million Gallons per Day of Water from the Keauhou Aquifer System Area, Kona, Hawaii

STAFF PRESENTATION by Lenore Ohye

Item C2 is a request from the Department of Hawaiian Home Lands to reserve 3.398 million gallons a day of ground water from the Keauhou Aquifer System Area. DHHL currently holds 1,510 acres of land in the Keauhou Aquifer System Area. An additional 359 acres are in the process of being transferred to DHHL. Staff has reviewed the analysis provided to justify the numbers and is recommending approval. Under the Code there are 2 legal authorities for approving reservations. One is specific to water management areas and pursuant to §174C-49(d), Hawaii Revised Statutes (HRS), the Commission, by rule, may reserve water in such locations and quantities and for such seasons of the year as in its judgment may be necessary. To date the Commission has only established 3 water reservations by rule in water management areas. All 3 have been for DHHL. Table 1 on page 3 summarizes the reservations that have already been approved for DHHL in designated water management areas. HRS §174C-101(a) authorizes reservations for only the Department of Hawaiian Home Lands for its foreseeable future needs, whether or not the area has been designated a water management area. While administrative rules have not yet been promulgated for this statutory provision, staff has been advised by legal counsel that, pursuant to this provision, the Commission may reserve water for DHHL statewide, whether or not the area has been designated as a water management area. Should the Commission approve this request, the reservation will be documented in the Water Resources Protection Plan, along with the prior approved water reservations. Should the Keauhou Aquifer System Area be designated as a water management area, staff will initiate review and rule-making. Staff also believes it is important that water reservations be consistent with the Hawaii Water Plan. The appropriate parts of the Hawaii Water Plan that justify reservations are the County Water Use and Development Plans and the State Water Projects Plan. The subject reservation will be included in these two draft plans that are in the process of being updated. Therefore, staff is recommending that the Commission find the reservation request for 3.398 mgd from the Keauhou Aquifer System Area for DHHL is consistent with the Hawaii Water Plan. Secondly, staff is recommending the Commission approve a water reservation for 3.398 mgd from the Keauhou Aquifer System Area for DHHL. Lastly, staff recommends the Commission direct that this water reservation and all future reservations made pursuant to HRS §174C101(a), be incorporated in the calculation of authorized planned use.

Commissioner Pavao asked if the Department of Hawaiian Home Lands and the Department of Water Supply have discussed how the water is going to be delivered and how it is going to be managed? Is it going to be a private system?

Ms. Ohye deferred to the County and DHHL. The Commission has authority and jurisdiction to reserve from the resource and has not been privy to any discussion regarding the infrastructure.

Commissioner Beamer asked how would the 3.398 mgd reservation affect allocation?

Ms. Ohye stated that pursuant to the Water Code and the Hawaii Water Plan, when Engineering Division updates the Water Projects Plan, it aggregates all the State demands that are proximal to an area and comes up with how much water the State needs. DLNR then asks the Legislature for funding for capital improvement projects to develop a well. When that well is developed, the County will allocate water to the different State agencies to meet its demands.

Commissioner Buck commented that one of the recommendations for DHHL is that the Commission develop a mechanism to protect its water reservations by ensuring that its rights are considered when new well construction or pump installation permits are issued. Is this a criterion staff would be willing to consider in approving new permits?

Mr. Hardy said one of the standard conditions of a well construction or pump installation permit is that the particular source is always subject to DHHL's rights.

Commissioner Buck asked if the County and DHHL wells come into disagreement would staff consider DHHL's reservation as part of its recommendation for approval or denial of any well construction permit application.

Mr. Hardy stated that well construction permits are ministerial and do not consider distribution of end uses.

Commissioner Buck asked if the reservation request is approved would DHHL's reservation be a mechanism for approval of any permits?

Mr. Hardy said it is the Commission's discretion.

Commissioner Buck commented that it is within the Commission's jurisdiction for approval of any well.

Mr. Hardy noted that the Commission does not have the authority to say where water from a particular water source has to be delivered. The Commission's responsibility is to protect the resource first.

Chair Case stated that the issue is what mechanism is available to the Commission to ensure DHHL's reservations are valid when new permits are issued in undesignated areas.

Mr. Hardy said that staff is recommending that this reservation be incorporated in the calculation of authorized planned use that increases the threshold for designation and when the threshold limit is reached that mechanism will manifest itself.

Chair Case noted that there is no problem as long as the reservation request does not increase the threshold beyond 90% limit. When it gets close to the limit that is when the designation process will begin to create that mechanism.

Commissioner Pavao stated that as long as the reservation does not go beyond the threshold limits for designation everything is okay.

William Aila, Jr., Deputy Director, Department of Hawaiian Home Lands, thanked staff for the excellent submittal. DHHL has 1,500 acres in north Kona and has invested \$40 million in trust assets for improvements to these lands. The approval of a water reservation of 3.398 mgd for DHHL's lands in north Kona is a critical first step in upholding DHHL's mission. DHHL asks for the Commission's consideration and assurance that DHHL's water reservations will be protected in a non-designated area as well as in a designated area. The Commission and the County Department of Water Supply should develop a mechanism to protect DHHL's water reservations by ensuring that DHHL's rights are considered before new well construction and pump installation permits are issued.

Commissioner Beamer noted that the Commission is responsible for securing the public trust in perpetuity. He appreciated DHHL's request for reservation in a non-designated area as it created an opportunity to ensure that the Commission is maintaining its duties to the public trust.

Mr. Aila, Jr. stated that the Commission also has fiduciary duties for allocation of water for its beneficiaries.

Chair Case said best practices should be considered in processing water use permits to keep DHHL apprised of potential development near DHHL lands.

Mr. Manuel said DHHL examines water use permit applications for potential impacts outside of the water management areas. DHHL's objective is to ensure that DHHL's lands are not affected by developments near and around DHHL's lands.

Commissioner Starr questioned pump installation permits being subject to DHHL needs as pump installation permits are not approved based on the use of the water. Permits are approved based on whether the plan to drill and install the pump is consistent with the physical requirements for protecting the aquifer and DOH and EPA standards.

Alan Murakami, Native Hawaiian Legal Corporation, noted that under the section 221 of the Hawaiian Homes Commission Act, DHHL water rights are primary. This should be a given and should be respected and publically acknowledged and reinforced in the minds of the public as well as before the Commission and Land Use Commission and other members of the public that have as what they see as potentially competing uses, which really are not competing uses because DHHL's water rights come first. Section 221 is a powerful foundation on which all of these decisions should be made. Commissioner Beamer made a point that it should not matter whether it is a designated or non-designated area because DHHL's rights are rights that supersede the Water Code.

Commissioner Starr talked about the history of the Water Code as there was an attempt to have a statewide system rather than a hybrid designated water management area system. The Legislature passed several amendments to the Water Code and other statutes that try to respect the rights of the DHHL. One example is in DLNR's statutes that require consultation with the DHHL prior to the issuance of a water lease or water license. The Legislature also required the Commission to incorporate in all of its decisions the rights of the DHHL. It required the Water Use and Development Plan to incorporate the current and foreseeable needs of the DHHL. HRS Section 174C-101(a) is a restatement of Hawaiian rights the Commission has to respect. This should apply to all decisions of the Commission and it should be incorporated into the Water Use and Development Plan. This incorporation of rights has an immediate impact in reference to the statement that well construction and pump installation permit applications are ministerial and do not address where the water is allocated to water users. As indicated in the Kukui Molokai case, if there is an application in the future for pump installation, the issue becomes an ministerial criterion to know whether or not those wells could compromise other wells that the DHHL may have operating or could operate in the future. The Commission needs to ensure adequate resources are made available for the DHHL.

Commissioner Starr asked Mr. Murakami if he had any specific suggestions regarding mechanisms that would ensure the DHHL's reservations and if he would be willing to share it with the Commission and staff at a later date.

Mr. Murakami said he would be happy to do that. He believed a lot of it can be done through rule-making.

Shannon Rudolph stated her concerns regarding water contamination and health effects continuing from the well construction including geothermal well contamination.

Bo Kahui supported DHHL's reservation request of 3.398 mgd from the Keauhou Aquifer System Area. Mr. Kahui believed it is a Constitutional right to exercise the need for water for the community outside of designation. The Villages of La`i`opua are concerned with the process that triggers native Hawaiian reservation rights. It is looking to exercise its rights pursuant to HRS Section 174C-101(a). It wants to understand and participate in the process to protect its reservation rights as native Hawaiians. The Commission needs to make a decision and look at the interests of the broader state, state agencies and community developers. He appreciated Commissioner Starr's positive thoughts regarding native Hawaiian water rights issues. He also thanked Mr. Manuel for reserving a part of the 3.398 mgd for community development.

Riley Smith, Lanihau Propertes, supported DHHL's rights to develop wells and withdraw water from the Keauhou Aquifer System Area for current and future development, however he opposed DHHL's request. He believed that the water reservation pursuant to HRS 174C-49(d) is unnecessary at this time because according to the updated County Water Use and Development Plan there is more than sufficient quantities of water in the Keauhou Aquifer System Area to support all planned development including DHHL's lands.

RECOMMENDATION:

Staff recommends that the Commission:

1. Find the reservation request for 3.398 mgd from the Keauhou Aquifer System Area for the Department of Hawaiian Home Lands is consistent with the HWP,
2. Approve a water reservation for 3.398 mgd from the Keauhou Aquifer System Area for the Department of Hawaiian Home Lands, and
3. Direct that this water reservation, and all future reservations made pursuant to HRS §174C-101(a), be incorporated in the calculation of authorized planned use.

MOTION: (Beamer / Starr)

To approve staff's recommendation.

UNANIMOUSLY APPROVED.

[break]

3. Public Testimony and Argument on the Petition for Declaratory Relief filed by the Kaloko-Honokōhau National Historical Park (NPS) Regarding the Petition for Declaratory Orders on the Applicability of Hawaii Revised Statutes §174C-3 & §174C-41 to the Basal, One or more Ahupua‘a, or Some Combination of these Smaller Areas within the Hydrologic Unit of the Keauhou Aquifer System Area, Kona, Hawaii

Staff Presentation by Roy Hardy

Item A3 is the petition for declaratory relief filed by the Kaloko-Honokohau National Historical Park. The National Park Service is asking for a declaratory order on the applicability of Hawaii Revised Statutes §174C-3 and §174C-41 and whether or not a smaller area than the Keauhou Aquifer System Area can be designated as a management area. Staff requests that the Commission process the subject petition pursuant to HRS Chapter 92[Sunshine Law], instead of conducting a HRS Chapter 91 proceeding for declaratory rulings as provided for under the State Water Code. This would provide for public notice and further public testimony for the presentation of evidence, but still allow for Commission deliberation under HRS Chapter 91.

The NPS submitted its petition in March 2015. In May 2015, the U.S. Geological Survey sent a letter to the NPS regarding estimated ground water recharges to the various ahupua‘a in the Keauhou Aquifer System Area. The Petitioners are seeking clarification regarding HRS §174C-31(2) and HRS §174C-3. A major component of the Water Resource Protection Plan is the hydrologic unit system approach for inventorying wells, diversions, its use, and the nature, occurrence and availability of surface and ground water statewide. HRS §174C-31(2) states “hydrologic units and their characteristics, including the quantity and quality of available resource, requirements for beneficial instream uses and environmental protection, desirable uses worthy of preservation by permit, and undesirable uses for which permits may be denied”. HRS §174C-3 further

defines hydrologic units as surface drainage area or a ground water basin or a combination of the two.

Mr. Hardy explained the complexities of the hydrologic unit framework. Exhibits 5a and 5b show an overlay of the surface and ground water hydrologic units, as defined in the Water Resources Protection Plan and ahupua`a as defined by the Office of Hawaiian Affairs within the Keauhou Aquifer System Area. Exhibits 6 and 7 show the difference between a high level and basal aquifer. Blue wells are mauka of the high-level divide and red wells, makai of the high-level divide, are basal. The high-level contributes some portion of its ground water to the basal area. While the petition seeks designating the basal area of the Keauhou Aquifer System Area only, it does not make geologic or hydrologic sense to designate only the basal portion because it loses the known connections and flow from the high-level portions resource. Using the ahupua`a for an area makes more sense than the basal only area option as the ahupua`a's general mauka-makai includes mauka high-level portions that have some impact on the basal portions of the Keauhou Aquifer System Area. However, the width of the ahupua`a does not correspond with the ground water behavior in the Keauhou Aquifer System Area. Ahupua`a are more closely related to watershed and surface water based area than a ground water based area. No surface or ground water hydrologic units have ever been combined into one management area. The closest case resembling a combination of ground and surface water management area is the Waiahole Ditch System, although the boundaries and impacts on the ground water management areas and non-designated surface water system areas are not clear. Some implications of designating an area smaller than a hydrologic unit is that years of effort have gone into using a consistent method and the best method available for updating both ground and surface water hydrologic units in the Water Resource Protection Plan. There are legal issues with using areas smaller than hydrologic units that are designated as management areas as hydrologic units are used to define standing but objections or requests for contested cases are made as specified in the designation part of the code. A smaller designated area than the current Keauhou Aquifer System Area boundaries would raise confusion as to who has standing within a hydrologic unit but is outside the smaller area within the hydrologic unit. Also, through declaratory ruling, the Commission has set policy for administrative modifications of water use permits within single aquifer system areas. Carving up the hydrologic unit of the Keauhou Aquifer System Area into a smaller area sets a precedent for carving up hydrologic units into smaller and smaller pieces, for the purpose of resolving more localized individual disputes, which is not the intent under the Water Code. It also sets a precedent of managing the ground water ahupua`a, which is more relevant to surface water hydrologic units. Mr. Hardy used exhibits 8 & 9 to show the complexity of using several different drainage basin for surface water areas used by various agencies, which is somewhat understandable given the relative geologic youth of Kona and lack of clear erosional drainage areas like the other older islands.

Peter Fahmy, National Park Service, clarified that NPS's intention of filing its petition was to get a sense of the authorities and flexibilities that the Commission has in regards to the management of the water resources. The NPS appreciated the Commission's

devotion in trying to establish a framework for the Hawaii Water Plan through the inception of hydrologic units and it was not challenging the aquifer system area approach. The NPS was not attempting to delay the process by filing the Petition for Declaratory Order, it was trying to find out whether it could shrink the footprint of management. Section 174C-41 says designation of an area is for the purpose of establishing administrative control for the withdrawals and diversions of ground and surface waters in the area to ensure reasonable-beneficial use of the resources. The NPS was seeking information regarding what area can the Commission essentially determine is needed to manage an issue with regards to public trust resources. The Water Resource Protection Plan says, aquifer system area boundary lines should be recognized as management lines and not as hydrologic boundaries. They were established to aid in the management of these resources and the Commission has the authority to create smaller management areas.

Paula Cutillo, National Park Service, reminded the Commission that Bob Whittier (State of Hawaii, Department of Health) in May 2015 presented modeling results that showed the recharge area for the Keauhou Aquifer System Area may extend beyond the aquifer system amounts, which was an example of ground water flowing across aquifer system boundaries.

Mr. Fahmy added that the NPS's petition seeks clarification of whether a smaller area within the hydrologic unit can be designated as a water management area.

Commissioner Buck asked if NPS could appreciate the kind of challenges the Commission will face if it designated areas smaller than a hydrologic unit.

Mr. Fahmy appreciated the Commission's efforts. He cited the precedent setting Supreme Court case in the State of Nevada whereby a buffer zone was established around Devil's Hole (home of the endangered pupfish) to protect the water levels. It was the first time state administrative officials took administrative action to protect federal waters.

Commissioner Beamer asked if NPS was confident of the connectivity between mauka and makai regions that a smaller area designation would preserve the integrity of the park.

Dr. Cutillo said NPS has not identified the area yet. It would use a combination of models and available information to identify those areas. It would probably be a bigger area than the 4 ahupua`a because it would need to identify the area that contributes fresh water to the park and it is not the entire aquifer. Maintaining existing conditions in the area that contributes water to the park does not mean more pumping in the entire aquifer. The NPS would identify an area that contributes fresh water under natural conditions and then take into consideration a larger area that pumping a well might divert water out of that area. Between the 2 areas it could find the area that would roughly correspond to combinations of ahupua`a and basal aquifer boundaries. That would be the area NPS would like to maintain existing conditions.

Chair Case understood the benefit of examining the smaller portion of the aquifer that is directly relevant to the issue of protecting the resource of the park, but asked NPS does the smaller area have to be designated?

Dr. Cuttillo said if the NPS identifies an area it thinks needs to be protected, then it could set up a trigger for designation. If an area is identified and the trigger is that if pumping increases in that area from the 2014 average, that will automatically trigger designation. Designation could be avoided by just identifying this area and having a commitment to keep existing fishes in that area.

Chair Case asked if NPS is looking at all of the impacts of pumping on its resource.

Dr. Cuttillo stated the trigger NPS proposed was just an increase in ground water withdrawals above 2014 average conditions.

Chair Case inquired about the connection between the increases in pumping ground water and the actual impact on the park.

Dr. Cuttillo explained that what NPS tried to do was to provide thresholds and optimal conditions for the resource. It compared it to all of the monitoring data that was available and it believed that these resources were near or at the threshold and in some areas outside of the optimal ranges. That is how the NPS determined that protecting and preserving existing conditions would also prevent impairment or damage to these resources. It was not arbitrary.

Commissioner Buck asked if NPS is examining strictly pumpage of water versus impact on cultural resources. Is it factoring in other types of resource management activities that could enhance the condition of the resource?

Dr. Cuttillo said the NPS did address those concerns.

Commissioner Buck commented that there is usually more than one limiting factor in the survival and enhancement of some of the species and resources NPS is trying to protect.

Mr. Fahmy stated that the NPS is attempting to maintain habitat and species and because it does not know the effects of climate change, water resource management actions are vital. It is not concerned with just the water level and that is the reason thresholds were to address pumping and ensuring that that is maintained at certain levels is important to the NPS. In the event ground water withdrawals increased and thresholds were exceeded, the NPS wants assurance that actions would be taken to protect the public trust resources.

Chair Case appreciated the threshold document on page 27. She asked if there is an alternative path of action in a more geographical area that has direct impact to the NPS in lieu of designating a smaller area.

Dr. Cuttillo said NPS could come to an agreement with the County about pumping in the basal or high levels in a smaller geographic area; however, it does not own private wells and NPS could not predict what would happen on private wells.

Commissioner Buck asked if there were other limiting factors.

Commissioner Pavao asked if the NPS had a list of issues it was concerned with.

Dr. Cutillo said the report contains information on salinity thresholds.

Commissioner Pavao asked if the NPS was concerned with more than salinity.

Dr. Cutillo stated that the health of the ponds are also a concern. Salinity is just one parameter that contributes to its habitat and whether it can produce and survive.

Commissioner Pavao recalled experts saying that the ponds area healthy.

Dr. Cutillo said the ponds are relatively healthy and NPS would like to preserve those conditions as any degradation would result in habitat loss so it is trying to proactively prevent degradation of the pond.

Commissioner Pavao asked if there was a problem or is NPS anticipating a problem.

Mr. Fahmy said NPS is operating with the hypothesis that it has an obligation to prevent damage to any fresh resources.

Commissioner Pavao stated that the Commission previously asked NPS to provide a number that it felt comfortable with water flowing through the park.

Dr. Cutillo responded it would like to maintain existing conditions, whatever the discharge is currently. NPS could calculate a number; however, it probably would be a range. When sustainable yield is calculated, the result is sometimes a range because it is dependent on recharge and recharge fluctuates over time. If NPS identified an area that it thinks needs to be productive that contributes water to the park, it could base it on recharge at any given point and time and come up with a range of numbers.

Commissioner Pavao asked if the NPS believes that nobody should pump water from the aquifer to maintain the status quo.

Dr. Cutillo said because there is existing pumping in the park and if sustainable yield is divided into the small area, pumping is not evenly distributed. NPS is saying that sustainable yield has been reached in the smaller area.

Ben Kudo concurred with the staff recommendation. He respectfully asked the Commission to dismiss the Declaratory Order request filed by the National Park Service on March 25, 2015. To grant NPS's request would be a significant departure from the way in which the Commission and how the various water agencies and departments throughout the State have managed water resources for many years. Many key water plans and methodologies used by the Commission use hydrologic units as a base. The calculation of sustainable yield used in management of ground water resources is based upon the interconnection of ground water sources within a defined hydrologic unit. Many scientific hydrogeological studies have been conducted to gather a base of data and

scientific information that is resulted in the establishment of hydrologic units throughout the State as a unit of management in order to fulfill the public trust obligations of the Commission. The State Water Code Chapter 174C adopted a regulatory mechanism that has as its basis the hydrologic unit. This provided a rational, scientific basis for effective management of water resources by this Commission. As someone once said, “if you can’t measure it, it’s very difficult to manage it”. The NPS’s declaratory order requests that the Commission depart from the regulatory practice and bifurcate the Keauhou Aquifer System Area into either an arbitrary geographical area or a ground water basal system that does not include other ground water resources and interconnectivity factors. The NPS’s request lacks a rational and scientific basis and would not be effective in terms of the Commission fulfilling its management capabilities and duties. The NPS’s request presents 2 questions before the Commission. First, does the Commission have the authority to designate an area that is smaller than a hydrologic unit? The second question is does the Commission have the ability to use a ground water basal area, ahupua`a or a combination of the 2 for purposes of defining an area of designation? The Commission has 4 options: 1) The Commission can take no action and dismiss the request, 2) rule that it has authority to make a determination of a smaller area for designation, but decide not to act on it, 3) rule that it has authority to make a determination of a smaller area for designation and agree in whole or in part with NPS to use either the ground water basal area or ahupua`a or both as a water management area, or 4) decide that it does not have authority to bifurcate the Keauhou Aquifer System Area into a smaller area. He believes the Commission should choose the first option and dismiss NPS’s request as it is not necessary for the Commission to decide today and leave the question of its legal authority to bifurcate the Keauhou Aquifer System Area into a smaller water management area for another day. NPS’s request for designation of the entire Keauhou Aquifer System Area made in 2013 was using a “shotgun to kill a fly on the wall.” NPS now realizes that it was seeking the wrong remedy. During the Commission hearing last year on NPS’s petition, Mr. Kudo stated that many, if not all, of the criteria for designation listed in 174C, HRS were not satisfied and it would be premature to designate the Keauhou Aquifer System Area as a water management area. The remedy sought by NPS to designate pursuant to §174C-31, HRS was the wrong remedy. Now NPS seeks to modify that remedy to fit a smaller issue or controversy. The real question posed is what is the proper remedy that NPS should be pursuing? The remedy is provided under HRS Chapter 174C-10. The Commission shall have the jurisdiction statewide to hear any dispute regarding water resource protection, water permits, or constitutionally protected water interests, or where there is insufficient water to meet competing needs for water, whether or not the area involved has been designated as a water management area. He suggested Commission staff in consultation with NPS and other parties designate an area of impact, all landowners within that area would be invited to participate in the proceedings, the Commission would designate an arbitrator or hearings officer to sit in these proceedings and would conduct the proceeding and recommend a decision to the Commission. Arbitration proceedings are a final decision of the Commission, whatever the hearings officer or arbitrator decides will be a recommendation made to the Commission and the Commission will either adopt it, deny

it, or adopt it conditionally. Included in that would be reservations for DHHL or any other kinds of topics that are obligations for the public trust duties as well. Under Section 10 the Commission has the ability to make a dispute resolution template for other future uses by setting a precedent for other matters involving conflict of water use.

Commissioner Buck stated that the Commission has the discretion to deny the petition. He asked Mr. Kudo if the Commission should not address the issue of designating a smaller area within the aquifer.

Mr. Kudo said the Commission does not need to address the question of whether it can make a water management area a smaller portion of the hydrologic unit at this time. Section 10 allows the Commission to make that determination with or without a water management area designation.

Commissioner Buck asked if a formal mediation process was needed.

Mr. Okamoto believed that although settlement efforts were delayed, he remained hopeful for continued discussions.

Commissioner Buck asked if specific timetables would be helpful.

Mr. Kudo said that a firm timetable needs to be established. As Mr. Murakami mentioned, under the Supreme Court decision, three years was too long for an application for a Water Management Area to be pending.

Commissioner Pavao hoped the Commission would adopt Mr. Kudo's proposal to deny the petition and consider dispute resolution pursuant to HRS Chapter 174C-10.

Mr. Kudo stated many fear the word designation because of its uncertainties.

Commissioner Beamer did not believe fear should be associated with the term designation because according to the Maui and Oahu Departments of Water Supply it did not suspend water meters and water permits.

Commissioner Pavao respectfully disagreed with Commissioner Beamer as designation does create problems. The Keauhou Aquifer System Area is not currently designated but the public does have a fear of it being designated.

Commissioner Beamer appreciated Commissioner Pavao's opinion and thanked everyone present as this process helps the Commission understand how the aquifer is utilized.

Commissioner Starr noted that there are other issues at stake other than the narrow area around the park. The four largest production wells in the aquifer that feed most of Kailua-Kona town are over the salinity that should be pumped are much further south.

Ken Melrose asked the Commission to deny the NPS's Petition because the science does not support it, it is premature and unwarranted. A more appropriate action is to set up a

structure for a comprehensive monitor plan and facilitate funding resources for the use of ground water and waste water reuse resources.

Thomas Yeh representing RCFC Kaloko Heights, LLC, the owner of lands above Kaloko-Honokohau National Park, opposed the petition filed by the NPS. The petition for declaratory ruling is deficient and should not be allowed under the Commission's rules. The NPS asks a hypothetical question of whether a smaller area than the current hydrologic unit can be designated as a water management area. The NPS has not presented any concrete information or facts to support the petition. No scientific information has been presented for allowing the ahupua`a to be managed. The Commission staff has already determined proper water management areas based on the system of hydrologic units. The NPS has not established good cause for the Commission to entertain the petition and there is a lack of evidence showing that the park's resources require designation of a water management area in the Keauhou Aquifer System Area.

Mr. Kanuha noted that the County and Department of Water Supply have been engaged in discussions with the NPS to find alternative paths of resolution without designation. On March 31, 2015, the NPS clarified its settlement concepts but no formal agreement was reached. On July 20, 2015 the County offered to participate in a joint partnership with independent 3rd parties to assess and recommend restoration and management of on-shore and off-shore ecosystems to re-establish traditional and cultural practices. It also proposed the exchange of monitoring data between DWS and the NPS. The Planning Department agreed to incorporate the approved Water Use and Development Plan within the General Plan/Community Development Plan policy planning network.

Chair Case supports the County's collaborative monitoring program; however, the Commission is interested in alternative paths of action that address ground water and water quantity issues.

Mr. Kanuha understands the issue is the sustainable yield within the aquifer.

Commissioner Buck thanked Mr. Kanuha for his testimony and asked for an update on the County's authority to restrict or direct private wells on private lands in and near the park.

Mr. Kanuha said private wells require County review.

Commissioner Buck asked what is the best solution for the Commission to assist the County regarding regulation of private water on private lands for new wells?

Mr. Kanuha suggested a joint agreement between the Department of Water Supply and the landowner.

Kristen Kahaloo, Kona-Kohala Chamber of Commerce. The Kona-Kohala Chamber of Commerce represents over 540 businesses in the community and is the leading business advocacy organization in west Hawaii. It does not support the NPS's request to designate the Keauhou Aquifer System Area. It supports existing management and continuing

oversight by the County of the water resources. It also supports the Mayor and County's request to explore negotiations of alternative paths of action other than ground water designation of the aquifer.

Nancy Burns, Civil Engineer, believes that the NPS does not have knowledge of the hydrology of the Keauhou Aquifer. It takes a simplistic view of ground water resources and jumps to the conclusion that any additional pumping of the aquifer in and around the Kaloko-Honokohau National Park will endanger the environment. She cited the NPS's document, Protocol for Long-Term Groundwater-Hydrology Monitoring in American Memorial Park, page 15 paragraph 2, long-term monitoring provides data that can be used to identify changes in ground water underlying parks and determine possible causes of the changes, and assess how the changes may affect other resources that rely on or are connected to the ground water. For example, water-level and salinity data from ground water monitoring may show a trend of increasing salinity and decreasing water levels. Comparison of the ground water data with data from other monitoring might show that lowering of ground water levels and increasing salinity has resulted in the degradation of anchialine ponds and wetlands. Further comparison may show that the trend is linked to a natural phenomenon such as drought cycles, or global phenomenon such as climate change, which cannot be altered but for which plans can be made to mitigate adverse affects. Some of the salinity change might have nothing to do with sea level rise and other factors that affect it. Alternatively, the comparison may show that change in land use or an increase in well withdrawals in areas adjacent to the park, caused the increasing salinity and decreasing water levels and that steps could be taken to remediate the conditions. The NPS has not conducted enough reliable monitoring studies to determine whether the withdrawal of water from the aquifer is having any effect at all, positive or negative. Page 11 of the referenced document states that withdrawal of water from wells and using it for irrigation can actually have a positive impact. In a most recent letter to the Commission dated August 12, 2015, the NPS talks about a trend in decreasing rainfall but this may just be a cyclical weather pattern and not a long term trend. It also points to increases in salinity but does not address whether this is a result of sea level rise or other factors. Its monitoring documents talk about documenting sea level rises. It does state however, that withdrawal of water from the aquifer adjacent to their property and use of such water for irrigation and other purposes is scientifically proven to cause a decrease in salinity in monitoring wells in and around the park. It did have a decrease in salinity when irrigation was used adjacent to the park. This should not be a surprise since its long term protocol document predicts this to be likely. So why is it trying to stop the pumping of ground water when it could actually help decrease the salinity? An August 12, 2015 letter refers to pollutants being detected in monitoring wells. Is its real concern pollutants and not ground water withdrawals? If so, shouldn't it be working with the Department of Health to determine the source of such pollutants that could actually benefit the flora and fauna. Ms. Burns respectfully requests the Commission to deny the NPS's Petition to designate any portion of the Keauhou Aquifer System Area as a Water Management Area until such time sufficient scientific data is available to more accurately support its request. There are extensive ground water monitoring programs in place that mandate

mitigation should impacts be detected. The NPS agreed to these monitoring plans. It has demonstrated no reason to doubt the effectiveness of such monitoring plans for the protection of the Park's ecosystems. Creation of a Water Management District can still be considered in the future should scientific data and evidence become available.

Commissioner Beamer asked Ms. Burns to clarify her statement regarding the NPS's attempts to stop development projects within the Keauhou Aquifer System Area.

Ms. Burns commented that NPS's attorney's mission is to stop any water development within a water management area. She noted that according to NPS's attorney, it is the National Park's responsibility and duty to stop any water withdrawal from an aquifer within a designated water management area. She then asked, if the water management area is designated, will the NPS have the right to stop allocations to DHHL?

Deputy Attorney General Chow said once a water management area is designated, all uses will require a permit. Objections to a permit application may result in a contested case hearing and delay the application process.

Yvonne Izu stated that through the Water Resource Protection Plan the policy the Commission adopted is to rely on science based information. The NPS has not come up with science based information for designation of a smaller portion of the Keauhou Aquifer System Area. NPS appears to indicate that it is willing to get more information but until it does it is premature for the Commission to consider a smaller area for designation. She stated that the request for designation of a smaller area is not an alternative path to designation of the entire Keauhou Aquifer System Area. In the Waiahole Ditch case, the Water Commission held that a water use permit was not required for use of water from Kahana Stream because the stream was not a designated surface water management area. On appeal, the Hawaii Supreme Court noted the direct interrelationship between Kahana Stream and the ground water, which had been designated a water management area. Therefore, diversions from Kahana Stream have to be permitted also. As Mr. Hardy pointed out, the Keauhou Aquifer System Area is all interrelated, high-level, basal, different ahupua`a, there is no hydrological disconnect based on ahupua`a. Based on the Hawaii Supreme Court's ruling in the Waiahole Ditch case, designation of a portion of the Keauhou Aquifer System Area will subject withdrawals from the entire aquifer to permitting because of the interrelationship between the designated portion and the rest of the aquifer.

Riley Smith, President, Lanihau Properties, has a lot of concerns with the Petition for Declaratory relief. The NPS has not successfully proven that there is harm to the aquifer; therefore, it does not believe it is correct to assume that there will be harm to a portion of the aquifer. The NPS's own hydro-geologist states that there is no impact to the aquifer. The water resources in the Park include the coral reefs, two fish ponds and a fish trap, over 185 anchialine pools and wetlands. These resources are relatively healthy and the NPS has no evidence that existing pumping has adversely affected these resources. The NPS's Superintendent, Tammy Duchesne, stated that it does not have any evidence that pumping wells has adversely affected water resources in the Park. These public

statements contradict its petition and declaratory motion. At the Kona meeting in May 2015, the NPS's legal counsel, Peter Fahmy, testified that the NPS does not intervene on every matter that comes before the NPS. However, an article from the Pahrump Valley Times contradict his statements saying, "I've had people say NPS stands for National Protest Service, and granted that's sometimes how it appears to some people; the Park Service is just filing protest after protest" Fahmy told the numerous scientists. He also said, "that's all water rights owners do is file protests, because that's what's necessary if you have water rights. That's a valuable asset. You have a fiduciary duty to protect that asset and if that means filing five, ten, fifteen, twenty protests, you do it." The County has embarked on the Kona Community Development Plan in 2007. The NPS was asked to participate. Its Superintendent at that time, Geri Bell participated in the process. Now it is asking the Commission to put its planning process on hold and not permit the urban core to be implemented, as adopted by the County Council and Mayor's office. To complain at this time is unfair. Mr. Smith asked the Commission to do the right thing and deny the petition and deny the declaratory motion.

Bo Kahui requested that the Commission deny NPS's Petition for Declaratory Order regarding designation of an area smaller than the Keauhou Aquifer System Area.

Mr. Hardy said staff also received emails from Brooke Wilson, Don Goo and James Stubenberg.

Commissioner Buck made a motion to accept the staff recommendation and deny the NPS petition for declaratory order regarding the Keuahou Aquifer System Area.

Commissioner Pressler seconded the motion.

Commissioner Starr said he preferred to simply deny the petition for declaratory order versus accept the petition and deny the designation of a smaller area.

Commissioner Buck asked for the Deputy Attorney General's opinion.

Deputy Attorney General Chow stated if the Commission is accepting staff's recommendation, staff recommends that the Commission accept the petition for decision making but the Commission's decision would be to deny the petition. She believed Mr. Kudo suggested that one option would be to just dismiss the petition.

Commissioner Buck asked what the disadvantages would be if the petition was dismissed.

Deputy Attorney General Chow stated that the only basis for not accepting a petition, which would be the same as a dismissal, is if there is a procedural flaw with the petition.

Commissioner Pressler reiterated that by denying the petition, the Commission is accepting the petition and it approves the processing of it but the Commission is denying the petition. The Commission does not need to do this and it can simply dismiss the petition.

Chair Case commented that accepting the staff recommendation would mean that the petition was properly submitted but the Commission is choosing to deny it.

Commissioner Starr disagreed. He believed if the Commission accepts staff's recommendation, the Commission will accept the declaratory order and then deny the request for designation of the smaller area.

Chair Case believed the staff recommendation is to approve the processing of the petition under Chapter 92 while preserving the option for deliberation under Chapter 91.

Commissioner Starr's understanding is if the Commission were to do that, it was not doing step 1.

Commissioner Buck stated that the Commission is currently doing step 1. The Commission is discussing the staff submittal as part of HRS Chapter 92 with an option for deliberation under HRS Chapter 91. Step 2 recommends denying the petition. He went on to say that he did not believe there was good-faith negotiation between the NPS and the County. He also said he did not believe the science warranted designation of a smaller area and, therefore, did not believe the Commission should approve the petition.

Commissioner Balfour made a motion to go into Executive Session.

Commissioner Starr seconded Commissioner Balfour's motion.

Mr. Hardy cited Section 92-5(a)(4), Hawaii Revised Statutes, to consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities and liabilities.

Chair Case said that the Commission will go into Executive Session

[Executive Session]

Chair Case stated that the Commission's decision stands. She commented that she was persuaded by the evidence that staff provided regarding the complexities of the hydrology and the precedent to carve up a water management areas will result in more confusing issues and the best precedent is to keep the structure that the law is based on.

Commissioner Starr did not see any geological or hydrological or regulatory basis for designating a smaller area of the Keauhou Aquifer System Area. It creates a situation where the Commission would be treating a water management area as spot zoning.

Commissioner Beamer had reservations about breaking up a water management area because there is a unique cultural and natural assets that are only a part of that aquifer. There is no compelling case to designate an area smaller than the hydrologic unit. If there is more data collected that shows impacts in the pond that are scientifically viable, at that point the Commission could revisit the issue.

Commissioner Pavao encouraged the Commission to consider Mr. Kudo's recommendation regarding §174C-10 to create an interest group and arbitrate.

Commissioner Beamer as well supported Mr. Kudo's argument and recommendation.

RECOMMENDATION

Staff recommends that the Commission:

1. Approve the processing of this declaratory order request under HRS §92, while preserving the option for deliberations under HRS Chapter 91 following public testimony.
2. Deny the NPS petition for declaratory order regarding the KASA.

MOTION: (Buck / Pressler)

To approve staff's recommendation.

UNANIMOUSLY APPROVED.

B. ANNOUNCEMENTS & UPDATES

1. Status and Update of Deadlines and Items Required in the December 29, 2014 Preliminary Order HA-WMA 2013-1 (PO) regarding the U.S National Park Service's Kaloko-Honokōhau National Historical Park (NPS) Petition to Designate the Keauhou Aquifer System Area, Kailua-Kona, Hawaii (State Aquifer Code 80901) as a Ground Water Management Area:
 - a. NPS Information on Quantity of Water Needed for Natural & Cultural Resources, Specific Traditional and Customary Practices, and Management of Such Practices Within Kaloko-Honokōhau National Historical Park - PO C.3
 - b. Update on Discussions between County of Hawaii and the U.S. Department of Interior National Park Service's Kaloko-Honokōhau National Historical Park (NPS) Regarding Alternative Paths of Action other than Designation-PO C.5

Mr. Hardy said Item B1 is NPS's a) correspondence regarding information on the quantity of ground water needed to support natural and cultural resources and b) update on discussions regarding alternative paths of action other than designation.

Dr. Cutillo spoke about the report in response to the Commission's request for information on traditional and customary practices. The report reviews available monitoring data for aquatic resources and information on estuarine conditions that are needed for it to reproduce, survive and thrive. The report also reviews ground water withdrawal, wastewater injection and climate and rainfall data.

Jonathan Scheuer and Bianca Isaki authored the report referenced by Dr. Cutillo. Mr. Scheuer spoke about the relationship between the Commission's December 19, 2014 Preliminary Order and its legal responsibilities. He believed it was the Commission's responsibility to analyze the withdrawal of water, identify the scope of traditional and

customary practices in the Keauhou area, the impacts that may occur on those practices and what mitigation can be done if any to protect those practices. He noted that there was uncontroverted testimony from practitioners that pumping in the Kahaluu well field has adversely affected its traditional and customary practices.

Bill Hansen, Chief Water Rights Branch, NPS, said it is the Commission's responsibility to manage the water resources. The NPS is trying to figure out how and what authorities exist to manage the private uses. He believes there is disconnect and disagreement with the NPS's science and regarding the designation process, it will continue to work with the Commission and County to figure out the next steps.

Meeting was adjourned at 4:02 p.m.

Respectfully submitted,

KATHY YODA

APPROVED AS SUBMITTED:

JEFFREY T. PEARSON, P.E.
Deputy Director