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COMMISSION ON WATER RESOURCE MANAGEMENT

Relating to

Agenda Item A1: Approval of Well Construction Permit Ota Well (Well No. 8-3957-006), TMK (3) 7- 5-001:165, Lanihau 1-2, Moeauo Ahupua'a, Keauhou, Hawai'i

&

Agenda Item B1: Briefing by Commission Staff, Ground Water Regulation Branch and Peter Adler, Guild Consulting - Adaptive Management Plan for Ground Water Resources in the Keauhou Aquifer Sector

April 1, 2025

9:00 a.m.

DLNR Boardroom

Aloha e Chair Chang and Commissioners,

Hui Ola Ka Wai **opposes agenda item A1, approval of a modified well construction permit for the Ota Well.** Approving the recommended action means agreeing to assess the impacts of a project after it is completed in violation of the state's duties under the public trust. Meanwhile, the submittal seeks community support of the proposed action, claiming any impacts to the resource will be mitigated based on unknown guidance from a yet to be developed Adaptive Management Plan ("AMP"), compliance with which is not even a condition of the permit.

If the only action up for decisionmaking was item B1, the approval of preparation of an AMP, Hui Ola Ka Wai would likely support the action and offer comments.

Preparation of an AMP to guide consideration of future well construction and pump installation permits would have value, especially if it were meant to address the harm that has already occurred to public trust uses of water as the result of previously approved pumping in the Keauhou Aquifer. An AMP would also help inform badly needed and long overdue County and Commission actions – including revisions to the Keauhou Water Use and Development Plan ("WUDP") and to the Sustainable Yields ("SY") for Keauhou in an update to the Water Resources Protection Plan ("WRPP"). The latter is necessary to address the known occurrence of multiple water bodies, the inadequacy of a SY based on the assumption that there is only a basal aquifer, and the predictions of reduced recharge ranging from 21-53%.

BACKGROUND

How this Commission considers approvals for the Ota well is precedent setting. This is the first major development well since the Commission decided not to designate the Keauhou Aquifer as a Ground Water Management Area and instead imposed conditions requiring review of the impacts of all future wells in the aquifer on traditional and customary practices. This proposed action would pave the way for well proposals currently in the pipeline – including wells that seek to commercialize Kona’s deep confined water source without a clear picture of the related impacts. This would promote non-public trust uses of water and facilitate profit-generating projects at the expense of a community whose substantive comments and concerns have never been properly addressed, despite a clear directive from this Commission to do just that.

Hui Ola Ka Wai and its members – Native Hawaiian practitioners along the Kona coast, including *kia’i loko i’a* and *lawai’a* – have been staunch advocates for pono groundwater management in Kona. Its members participated in the unsuccessful process to designate the Keauhou Aquifer a water management area, and for over four years, it has raised concerns about the Ota well based on, among other things, incorrect assumptions made regarding potential impacts to the shoreline, noncompliance with the requirements of *Ka Pa’akai* to protect Native Hawaiian traditional and customary practices, as well as the absence of an approved WUDP to guide decision-making.

As a result of CWRM’s seeking to avoid designation while acknowledging a need to fulfil its public trust duties (and thereby foregoing the administrative tools available in designated water management areas), the pathway for consideration of this proposed well has been long and confusing. In April 2021, the Commission voted to defer its decision on a proposal to approve the well construction permit for the Ota Well with special conditions. Instead, it directed staff to more carefully analyze impacts on the shoreline, coastal waters, and Native Hawaiian traditional and customary practices. Former Deputy Director Kaleo Manuel took the lead on convening a series of discussions with certain Native Hawaiian stakeholders over the course of a year and a half. Those discussions resulted in additional permit conditions that Hui Ola Ka Wai ultimately (albeit reluctantly) agreed to support. Requiring the conditions acknowledged that there are impacts to public trust uses of water from groundwater pumping, and that the entities that sought to use these waters for non-public trust purposes were required to follow the Hawai’i Supreme Court’s directive in *Kaua’i Springs* – “in light of the cumulative impact of existing and proposed diversions on trust purposes the applicant must implement reasonable measures to mitigate this impact.”

Kaua‘i Springs, Inc. v. Planning Comm’n of Kaua‘i, 133 Hawai‘i 141, 173, 324 P.3d 951, 983 (2014).

However, at the August 2022 Commission meeting, applicant Natural Energy Laboratory of Hawaii Authority (“NELHA”) opposed the amended conditions and requested a contested case hearing on its own application. That hearing never took place. While burdensome on Hui Ola Ka Wai, such a hearing would have allowed its members’ constitutionally-protected rights to be considered appropriately.

The applicants returned to the Commission last April to amend the permit conditions and remove measures that that were important to the Hui and other Native Hawaiian practitioners. As a result, the Hui opposed the amendments and advocated for a better, more transparent process to engage community, seek and incorporate public input, and have meaningful discussions about management of Kona’s wai that would restore trust in the state’s protection of fresh water. At that meeting, Hui Ola Ka Wai also deferred its legal right to a contested case hearing to protect its Native Hawaiian traditional and customary practices and rights under the public trust doctrine. This concession was based on the Commission’s clear agreement to review and synthesize all available hydrological data in the region to establish a baseline of information to better assess impacts on groundwater dependent ecosystems and species and, in turn, cultural practices at the coastline. That synthesis was estimated to take a couple of months. As of this submittal, that synthesis – if it exists – has not been made public. Neither have the letters of support for Ota well that the Commission requested from the applicants at that same meeting.

In December 2024, a meeting was convened between Hui Ola Ka Wai and NELHA, facilitated by state Representative Kirsten Kahaloha and Senator Dru Kanuha, to discuss concerns regarding Ota well and water development in Kona.

In February 2025, Deputy Director Ciara Kahahane met briefly with Hui Ola Ka Wai’s attorney to introduce the concept of preparing an AMP for the entirety of the Keauhou Aquifer, in part to address a commitment to prepare an AMP focused on Kaloko-Honokōhau National Historic Park that the Commission made in the 2019 WRPP, which it has never fulfilled.

On March 28, 2025 – four calendar days/two business days before this meeting – the final submittal for this action was made public. Under this proposal, the applicants will be allowed to construct their well on the condition that they propose to the Commission

a simple monitoring plan, obtain three months of monitoring data, and complete a brief 96-hour pump test to assess impacts on the aquifer.

In sum, the A1 submittal proposes to eliminate all of the conditions that the community worked on and substitute them with an inadequate pump test that by design cannot reveal the true impact of Ota well on the aquifer and public trust uses of water.

I. The Proposal Violates the Commission's Duties Under the Public Trust

"The purpose of the state water resource public trust is to protect certain uses." *Kaua'i Springs*, 133 Hawai'i at 172, 324 P.3d at 982. These public trust uses include (1) the maintenance of water in their natural state, (2) domestic water use, specifically for drinking water, (3) the exercise of Native Hawaiian traditional and customary rights, and (4) reservations of water to the Department of Hawaiian Home Lands ("DHHL"). *See id.*

As the Hawai'i Supreme Court has made clear:

Private commercial use is not protected by the public trust. "[T]he public trust has never been understood to safeguard rights of exclusive use for private commercial gain." [*In re Water Use Permit Applications*], 94 Hawai'i [97,] 138, 9 P.3d [409,] 450 [(2000) ("*Waiāhole I*")]. **The very meaning of the public trust is to recognize separate and enduring public rights in trust resources superior to any private interest.** *Id.* In accordance with the fundamental principles of the public trust and the fact that private commercial use is not one of the uses the public trust protects, a "**higher level of scrutiny**" is therefore employed when **considering proposals for private commercial use.** *Id.* at 142, 9 P.3d at 454.

Kaua'i Springs, 133 Hawai'i at 173, 324 P.3d at 983 (emphases added). In furtherance of these mandates, the Commission has certain duties:

When an agency is confronted with its duty to perform as a public trustee under the public trust doctrine, it must preserve the rights of present and future generations in the waters of the state. *Wai[ā]hole I*, 97 Hawai'i at 141, 9 P.3d at 453. **An agency must take the initiative in considering, protecting, and advancing** citing *Kukui (Molokai), Inc.*, 116 Hawai'i at 490, 174 P.3d at 329), the submittal ignores applicant's proposed water use, justifying approval merely as a means "to assess the impacts of **public rights in the resource at every stage of the planning and decision-making process.** *Id.* at 143, 9 P.3d at 455. The agency measures the proposed use under a "reasonable and beneficial use" standard, which requires examination of the proposed use in relation to other public and

private uses. *Id.* at 161, 9 P.3d at 473. The agency must apply a presumption in favor of public use, access, enjoyment, and resource protection. *Id.* at 142, 154 n.59, 9 P.3d at 454, 466 n.59.

Id. at 173, 324 P.3d at 983 (emphases added).

A. The Submittal Fails to Scrutinize the Proposed Uses of Ota well

Although the Commission “is duty-bound to place the burden on the applicant to justify the proposed water use in light of the trust purposes,” *id.*, the submittal completely ignores the applicants’ proposed water use, justifying approval merely as a means “to assess the impacts of pumpage on coastal resources[.]” Submittal at 9.

This justification hides the ball. It is undisputed that the proposed uses of the 1mgd withdrawals from Ota well are for a NELHA’s industrial park with commercial uses and the Hawai‘i Housing Finance and Development Corporation’s (“HHFDC’s”) 2,330-unit master planned community (which also includes commercial uses), along with a small percentage of water for DHHL. See [EA](#) at 1-1.

What is being proposed is only the initial phase of the project as discussed in the applicants’ environmental assessment (“EA”). According to the EA, “the project would be implemented in three phases[.]” EA at 2-1.¹ “Phase 1 of the project would involve: (i) site preparation; (ii) well drilling; and (iii) pump testing.” *Id.* at 2-4. In other words, it was always anticipated that there would be an initial phase that included some type of testing prior to putting the well into full production.

The Commission is obligated to assess the proposed uses of the well now, even before specifically considering a pump installation permit. See *Waiāhole I*, 94 Hawai‘i at 141, 9

¹ The EA notes:

Table 2.1 Project Phases

<i>Phase</i>	<i>Summary</i>
Phase 1	Development of an exploratory well, well drilling pad, and improvement of an existing driveway for temporary construction access.
Phase 2	Development of the first production well, a 1.0 million-gallon storage tank, control building, permanent access drive, perimeter fence, and pipeline connecting the new facilities to DWS’ existing North Kona Water System.
Phase 3	Development of a second production well and a second 1.0 million-gallon storage tank.

Source: Planning Solutions, Inc. (2018)

EA at 2-1.

P.3d at 453 (noting the Commission’s “affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.”). Hui Ola Ka Wai testified on this point back in 2021, noting that the practical effect of approving a well construction permit in the absence of an affirmative review of impacts of pumping necessarily means that key information is not being considered by the Commission.² After millions of dollars are spent developing a well, it becomes much more difficult for decisionmakers to render a decision separate from politics. “After major investment of both time and money, it is likely that more environmental harm will be tolerated.” *Citizens for the Prot. of the N. Kohala Coastline v. Cty. of Haw.*, 91 Hawai‘i 94, 105, 979 P.2d 1120, 1131 (1999); see also *Pyramid Lake Paiute Tribe of Indians v. BLM of the United States DOI*, 2007 U.S. Dist. LEXIS 31766, 4-5 (D. Nev. Apr. 29, 2007) (“[T]he difficulty of stopping a bureaucratic steam roller, once started, is a perfectly proper factor to take into account in assessing that risk [of irreparable harm.]”); see also *id.* (“[A] significant difference exists between a decision whether to grant a right-of-way to permit the construction of a water pipeline and a decision whether to allow water to flow through a pipeline that crosses public lands when a decision to not allow the water to flow means that the pipeline (and all efforts and sums expended to construct it, and the incurred disturbance to public lands) will be wasted. . . . [I]n such a situation, “[i]f a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the . . . substantive provisions will not result.”).

The opportunity and need to address potential impacts is now – before the well is constructed and before more funds are committed and other opportunities and alternatives are foreclosed. Allowing after-the-fact determinations may leave practitioners of customary and traditional uses unprotected from possible arbitrary and self-serving actions on the applicants’ part. See *Ka Pa‘akai O Ka ‘Āina v. Land Use Comm’n*, 94 Hawai‘i 31, 52 7 P.3d. 1068, 1089 (2000).

Because the applicants have already gone on record opposing conditions placed on their well (to the extent of requesting a contested case hearing on their approved

² This is not unlike the Hawaii Environmental Policy Act, which recognizes that, for the purpose of environmental review, “[a] group of actions shall be treated as a single action when: (1) The component actions are phases or increments of a larger total program; (2) An individual action is a necessary precedent to a larger action; (3) An individual action represents a commitment to a larger action.” Hawai‘i Administrative Rules §11-200.1-10.

permit), the Hui has no reason to believe that they will not balk when the Commission seeks to place unknown conditions on their pumping in the future.

The only clear public trust use proposed for Ota well is for DHHL's water needs. The remainder is intended for market rate housing and commercial/industrial use, which requires a higher level of scrutiny. *See Kaua'i Springs*, 133 Hawai'i at 173, 324 P.3d at 982.

The submittal also inappropriately defers to the applicant to submit a pre-pump test monitoring plan for baseline data within 30 days after the issuance of a permit. This monitoring plan would include important details, including the location of monitor wells and anchialine pools to be monitored, the design of monitor wells, parameters and frequency of monitoring, and the schedule of submission of data to the Commission. The Commission has an affirmative duty to review this pre-pump test monitoring plan before approving any permit. *See Waiāhole I*, 94 Hawai'i at 143, 9 P.3d at 455 (holding that the State "must not relegate itself to the role of a mere umpire passively calling balls and strikes for adversaries appearing before it, but instead must take the initiative in considering, protecting, and advancing public rights in the resource at **every stage** of the planning and decisionmaking process[.]")(emphasis added).

B. The Proposal Will Cause Harm to the Public Trust

For years, the community has said that harm will be caused by additional withdrawals. Despite the science that backs up those claims, these concerns have always fallen on deaf ears. The submittal does not necessarily disagree with those claims³ but instead recommends that the Commission simply study the harm after the well is construction. This shifts the burden away from the applicants and to the community, which is contrary to what the law requires.

According to the Hawai'i Supreme Court:

If there is a reasonable allegation of harm to one of the uses protected by the public trust, then the **applicant** must demonstrate that there is no harm in fact or that any potential harm does not preclude a finding that the requested use is

³ However, given the data previously submitted to CWRM, its statement that "[t]he interconnection between the high-level water that the Ota Well will draw from, and the basal and/or deep confined lens is not well established" is incorrect.

nevertheless reasonable and beneficial. *Kukui (Molokai), Inc.*, 116 Hawai‘i at 499, 174 P.3d at 338.

The applicant is “obligated to demonstrate affirmatively that the proposed use will not affect a protected use], in other words, the absence of evidence that the proposed use would affect a protected use is insufficient.” *Wai‘ola O Moloka‘i*, 103 Hawai‘i at 442, 83 P.3d at 705 (emphases in original). *See also Kukui (Molokai), Inc.*, 116 Hawai‘i at 509, 174 P.3d at 348 (“The Water Commission’s conclusion that ‘no evidence was presented’ . . . that the protected use would be adversely affected erroneously shifted the burden of proof.”)

Additionally, the applicant must demonstrate the absence of a practicable alternative water source. *Wai[ā]hole I*, 94 Hawai‘i at 161, 9 P.3d at 473. The applicant's proposed use must be denied if the applicant does not show that there is no practicable alternative water source. *Id.* at 161 n.65, 9 P.3d at 473 n.65. “Such a requirement is intrinsic to the public trust.” *Id.*; *see also Kukui (Molokai), Inc.*, 116 Hawai‘i at 496, 174 P.3d at 335 (“The agency cannot fairly balance competing interests in a scarce public trust resource if it renders its decision prior to evaluating the availability of alternative sources of water.”).

Lastly, if the impact is found to be reasonable and beneficial, then in light of the cumulative impact of existing and proposed [uses] on trust purposes, the applicant must implement reasonable measures to mitigate this impact. *Wai[ā]hole I*, 94 Hawai‘i at 143, 161, 9 P.3d at 455, 473.

Id. (original brackets omitted)(emphases added); *see also Waiāhole I*, 94 Hawai‘i at 155, 9 P.3d at 467 (“[T]he precautionary principle simply restates the Commission's duties under the constitution and Code. Indeed, the lack of full scientific certainty does not extinguish the presumption in favor of public trust purposes or vitiate the Commission's affirmative duty to protect such purposes wherever feasible.”).

The applicants have not met their burden and not offered any additional information since the original submission of their permit other than testimony arguing for its issuance. The submittal ignores critical data, including information from the recent studies presented to the Commission by University of Hawai‘i researchers,⁴ current monitoring data, and other earlier studies. These include, for example, reports prepared by the Kaloko-Honokōhau National Historical Park on order of the Commission, which were discussed at the April 2024 CWRM meeting and establish that additional wells

⁴ [See Nov. 19, 2024 Briefing on recent research with relevance to public trust priorities and groundwater for Keauhou, Kona, Agenda Item C-1.](#)

present a reasonable likelihood of harm to Kaloko.⁵ It also does not include the letters of support for the project which were requested by the Commission in April 2024.⁶

Such documents describe irreparable impacts already reported by the community; for example:

Herbert A. Kai, a Native Hawaiian familiar with cultural practices in the area, recounted the changes to water that he has observed over his lifetime at the southern end of the coastal portion of the Keauhou Aquifer System. He testified that he and his 'ohana have practiced fishing, gathering, drinking and bathing practices proximate to “where the flowing fresh water, fresh water springs, brackish water pools, and opae ula were...not to mention the wana, lobsters, and octopi.” He specifically noted, “[t]hese flowing fresh water, fresh water springs, brackish water pools, and opae ula ARE GONE... or, at least not easy to find; they’ve been slowly diminishing since the Kahalu‘u well was drilled in 1975” (emphasis in the original).

Scheuer & Isaki, Response to the Commission on Water Resource Management Request for Information on Traditional and Customary Practices (May 29, 2015) at 3 (recounting testimony from CWRM’s December 10, 2014 meeting).

Additional wells clearly contribute to the cumulative impact of pumping in the Keauhou Aquifer on coastal resources and constitutionally protected Native Hawaiian traditional and customary practices.

⁵ See, e.g., Scheuer & Isaki, Response to the Commission on Water Resource Management Request for Information on Traditional and Customary Practices (May 29, 2015); National Park Service, Response to the Commission on Water Resource Management Request for Specific Information on the Quantity of Water Needed to Support Natural and Cultural Resources in Kaloko-Honokōhau National Historical Park (August 2015); [April 16, 2024 meeting minutes](#) at 52-53 (proposing to draft a “more rigorous summary of the published information” including “[t]he current state of knowledge regarding the hydrogeology of Kona[,] the information on the features of interest: the high-level water, the basal, the deep confined, and specifically the connectivity of those and base it on the geochemical and geophysical studies[, and] the current state of knowledge regarding Kona groundwater dependent ecosystems.”

⁶ See [April 16, 2024 meeting minutes](#) at 56.

C. No Findings Have Been Rendered

The submittal contains none of the findings that the law requires.

Findings are necessary “to demonstrate that [an agency] has properly exercised the discretion vested in it by the constitution and the statute.” *Kaua‘i Springs*, 133 Hawai‘i at 174, 324 P.3d at 984; *see also Carmichael v. Bd. of Land Nat. Res.*, 150 Hawai‘i 547, 562, 506 P.3d 211, 226 (2022) (“As a trustee of the public trust, the BLNR failed to demonstrate that it properly exercised the discretion vested in it by the constitution and the statute.”); *see also id.* at 564, 506 P.3d at 228 (“Because the BLNR did not make factual findings or enter conclusions of law positing that the permits served the State’s best interests, the BLNR failed to demonstrate that it properly exercised the discretion vested in it by the constitution and the statute.”). No impacts have been assessed, and no findings have been made.

The submittal also fails to mention or attempt comply with the requirements of *Ka Pa‘akai*, 94 Hawai‘i 31, 7 P.3d 1068, to address Native Hawaiian rights protected by Haw. Const. Art XI, §§ 1 & 7, Art. XII, § 7, and Hawai‘i Revised Statutes (“HRS”) §§ 174C-101, 1-1, and 7-1. As Hui Ola Ka Wai has been asserting for years, government agencies, including the Commission, are “required under the Hawai‘i Constitution to preserve and protect customary and traditional practices of native Hawaiians.” *Ka Pa‘akai*, 94 Hawai‘i at 45, 7 P.3d. at 1082; Haw. Const. Article XII § 7. They have “an affirmative duty” to “protect these rights and to prevent any interference with the exercise of these rights.” *Id.* *Ka Pa‘akai* requires the Commission to conduct detailed investigations and **make specific findings** as to: (1) the identity and scope of valued cultural historical, or natural resources in the area, including the extent to which traditional customary native Hawaiian rights are exercised in the area; (2) the extent to which those resources – including any traditional and customary Native Hawaiian practices – will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the agency to reasonably protect such practices if they are found to exist. *See id.* at 47, 7 P.3d at 1084; Haw. Const. Article XII § 7. Although the focus of this proposal is the well construction permit – and not the pump installation permit – *Ka Pa‘akai* requires agencies to engage in this analysis whenever it acts – especially where, as here, well construction is a substantial step toward a functioning *development* well that would indeed impact the nearshore area.

D. The Proposal Violates the Water Code

Decisionmaking without an approved WUDP to guide the Commission runs afoul of the public trust doctrine and dilutes the authority of the Hawai'i Water Plan. A WUDP is required by law. *See* HRS § 174C-31(a)(2); Hawai'i Administrative Rules ("HAR") § 13-170-30. The Water Code mandates that the Commission

[s]hall plan and coordinate programs for the development, conservation, protection, control, and regulation of water resources, based upon the best available information, and in cooperation with federal agencies, other state agencies, county or other local governmental organizations, and other public and private agencies created for the utilization and conservation of water[.]

HRS § 174C-5(13) (emphases added). It is also necessary to ensure that the Commission complies with its duties as trustee of the public trust. *See Kaua'i Springs*, 133 Hawai'i at 172, 324 P.3d at 982 ("The public trust creates an 'affirmative duty' of the State and its political subdivisions 'to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.'"); *Waiāhole I*, 94 Hawai'i at 143, 9 P.3d at 455 ("An agency must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process.).

In accepting the County of Hawai'i's project description for updating the WUDPs for the Keauhou and Waimea Aquifer System Areas, Commission staff recognized:

The Water Code sets forth the requirement for initial development and updating of the Hawaii Water Plan (HWP) to guide the Commission in executing its general powers, duties, and responsibilities assuring economic development, good municipal services, agricultural stability, and environmental protection.

....

An updated HWP is considered essential to effective coordination and integration of State and County actions related to sustainable water resource development and enables the Commission to more effectively implement the statutory objectives of the Water Code. Absence of updated information can lead to preparation and implementation of inadequate or unrealistic plans for development of existing and alternative water resources and may result in conflicting objectives or uses that threaten our State's limited water resources. The lack of up-to-date demand projections

and proposed strategies to meet such demands limit the State's and Counties' ability to address future water development and resource protection issues.

[Feb. 18, 2015 Staff Submittal Agenda Item C1](#) at 1-2 (emphasis added). However, over 10 years later, no update has been completed.⁷

Additionally, the Commission is due to update the WRPP and set the sustainable yield for Keauhou Aquifer. The last update was in 2019. Since that time, the US Geological Survey has prepared a report on end of century expected changes to recharge and has presented that report to this Commission. The best case scenario is a 21% decrease, and the worst case scenario is a decrease of 53%, which would put current pumping in the aquifer at likely near 80% of SY without any additional pumping from this proposed well or any other existing or proposed wells.

The Hawai'i Water Plan is an important tool to protect our limited water resources, particularly in undesignated areas. Moving forward without the proper plans in place reinforces the piecemeal decisionmaking that contradicts the Commission's public trust duties and that has spurred ongoing criticism from the community. To continue to approve future withdrawals without a WUDP in place ultimately renders the plan meaningless and conflicts with HRS § 174C-31.

II. The AMP Cannot Substitute for Duties Under the Public Trust

The submittal provides roughly a page of discussion on the AMP, conditioning the approval of the Ota well construction permit on the drilling of a well for "monitoring" as well as anchialine pool monitoring. It suggests that the AMP "will facilitate the best data collection, provides a precautionary approach that protects public trust resources, and can cautiously provide forward movement on the development of potable water sources." However, **there is no recommendation to approve the plan or project description for the AMP.** Although the public may be allowed to review and comment on the AMP in concept if the process proposed in item B1 is followed, the Commission is taking no action to approve this plan for AMP development. The public is left with no assurances as to process, form, or substance of the plan, let alone whether the AMP will be completed all. ⁸

⁷ Apparently, the County is waiting on an updated Hawai'i Water Plan framework, which is slated to go to the Commission for approval in late 2025.

⁸ As noted above, this proposed AMP is in partial fulfillment of a commitment made by CWRM in 2019 that it has never acted on.

The Commission must weigh in and take action. As Hui Ola Ka Wai expressed in March 2024, because Keauhou is not a designated water management area and is, therefore, subject to ad hoc decisionmaking, there is a critical need to establish a process that engages community and allows for broader public input, transparency, and accountability. Commencing an AMP process without transparency at the outset is troublesome and inconsistent with the State's duties under the public trust.

The proposal asks the community to accept less than it should and already has. Despite all of Hui Ola Ka Wai's concerns about the project, in 2022, it reluctantly agreed to the revamped conditions that resulted from the Commission's community outreach. In 2024, it opted to defer its request for contested case because the Commission promised to pull together existing data to give a better picture of the state of Keauhou Aquifer in light of current pumping, climate change, and the most recent hydrological data. That data has never been formally reviewed by the Commission in conjunction with Ota well. **Today's proposal asks the community to accept the construction of Ota well simply because it has agreed to study it. That is not acceptable.**

Additionally, although the concept of an AMP is promising, too few details have been presented to know whether the Commission and the public could and should rely on it in ensuring North Kona's water resources are properly managed. Hui Ola Ka Wai raises the following:

- The WUDP is a statutory requirement and planning tool and should be in place prior to the approval of new wells. At minimum, an update to WUDP – required by this body over a decade ago – should be commenced along with the AMP.
- Compliance with the AMP must be a condition of all wells and construction and pump installation permits in the area, existing and proposed.
- The timeline for the AMP process is too rushed. Allowing only one month to do focus meetings (May) is unrealistic. Similarly, allowing only one month between drafts is not enough time to do a thorough job and allow time for the Commission and public to review, digest, and provide comment. The timeline must also include public briefing(s) to the impacted communities at the outset as well as between each draft.
- Three months of monitoring is not enough. Changes to critical biota used in practices change seasonally, annually, and on decadal cycles.
- CWRM must set an updated sustainable yield in a 2025 WRPP update, differentiating among the different water bodies, which should play a big role in the AMP.

- Who is drafting the AMP?
- How is the AMP enforced? Who oversees enforcement?
- How does the AMP apply to existing wells?
- The plan would benefit from more community input.

Since at least 2021, Hui Ola Ka Wai has made its case that the impacts on its practices and public trust uses of water are reasonably foreseeable as a result of construction of Ota well. The Commission should defer decisionmaking on item A1 and bring back only item B1 for approval after further discussion and input.

Unless the Commission demonstrates that it is going to take the issues raised by Hui Ola Ka Wai seriously, the Hui will be asking for a contested case hearing and seeking all other legal avenues to protect its rights to water in this area, including petitioning for designation of Keauhou Aquifer as a water management area.

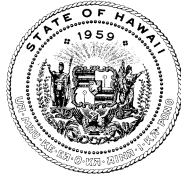
Mahalo,

A handwritten signature in black ink, appearing to be 'S' with a long, sweeping tail that curves back to the left.

Ashley K. Obrey
Attorney for Hui Ola Ka Wai

JOSH GREEN, M.D.
GOVERNOR
STATE OF HAWAII
*Ke Kia'āina o ka Moku'āina 'o
Hawaii'i*

SYLVIA J. LUKE
LT. GOVERNOR
STATE OF HAWAII
*Ka Hope Kia'āina o ka Moku'āina
'o Hawaii'i*



KALI WATSON
CHAIRPERSON, HHC
Ka Luna Ho'okele

KATIE L. LAMBERT
DEPUTY TO THE CHAIR
Ka Hope Luna Ho'okele

STATE OF HAWAII
DEPARTMENT OF HAWAIIAN HOME LANDS
Ka 'Oihana 'Āina Ho'opulapula Hawaii'i

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March 31, 2025

TESTIMONY

TO: Dawn Chang, Chairperson
Commission on Water Resource Management

FROM: Kali Watson, Chairperson
Hawaiian Homes Commission

RE: **CWRM Agenda Items A-1 and B-1, meeting of April 1, 2025ⁱ**

Dear Chair Chang and Commissioners,

The Department of Hawaiian Home Lands (DHHL) respectfully requests a deferral of agenda item A-1, as we believe approval would be in violation of the duties of the Commission to affirmatively protect native Hawaiian rights, including the rights of the Hawaiian Homes Commission (HHC), DHHL and our beneficiaries. We believe if item A-1 is approved it is likely to lead to litigation that would determine the proposed action is contrary to the duties held by CWRM, unfortunately stalling the development of needed water for the Department.

We believe the proposal outlined in the presentation posted for item B-1 has merit and could be part of a pathway to successfully address the cumulative impacts of existing and proposed uses of water in this area. We offer some specific recommendations regarding item B-1, based on the proposed mitigations we have offered in a recently published Final Environmental Assessment (FEA) for a well we are seeking to develop in the Keauhou Aquifer.

In our testimony we address four key matters to assist this Commission in their analysis and decision making:

- 1. DHHL's Interests Related to the Ota Well and the Keauhou Aquifer**
- 2. DHHL's concerns with statements in the submittal for Item A-1**
- 3. DHHL's concerns with what is absent from the submittal for Item A-1**
- 4. DHHL's request for items to be considered in relationship to item B-1**

We begin with the review of our particular interests.

1. DHHL's Interests Related to the Ota Well and the Keauhou Aquifer

DHHL and its beneficiaries have three primary interests related to the Ota Well and the Keauhou Aquifer in general:

1. **DHHL has a need for and rights to groundwater from the Keauhou Aquifer for existing homesteads and the development of new homestead uses and other DHHL projects.** DHHL has rights to water under the Hawaiian Homes Commission Act, the State Constitution, the State Water Code, as well as other statutory and case law. DHHL's reservations and uses of water are one of four recognized public trust uses of water that are supposed to have a higher degree of priority and protection than non-public trust uses of water. We specifically hold a reservation for 3.398 million gallons per day (mgd) in the Keauhou Aquifer, granted by CWRM in 2015.
2. **DHHL has a right to water credits for the equivalent of 18,000 gallons per day (gpd) from the Ota well if it is successfully developed.** The Ota well permit applicants have agreed to provide some water to DHHL from their proposed water development, a first of its kind action. This is memorialized in a 2020 Memorandum of Understanding executed among the Natural Energy Laboratory of Hawai'i Authority (NELHA), Hawai'i Housing Finance and Development Corporation (HHFDC), and DHHL. We acknowledge and thank NELHA and HHFDC for their consideration of DHHL water needs in this area and our legal rights to water. We believe that the agreement should set a precedent for all other non-public trust uses of water in Keauhou, and note we have previously asked and again request the Commission to make that agreement a condition of this permit by reference.
3. **Our beneficiaries have a right to water used in the exercise of traditional and customary native Hawaiian practices.** Our beneficiaries may conduct traditional and customary practices in the area, another recognized public trust use of water. Hawai'i Courts have not established priorities among the recognized public trust uses of water. Because of that, DHHL has an obligation to seek that other public trust uses of water are not harmed when DHHL public trust uses of water are being supported, as well as when non-public trust uses of water are being pursued.

In light of these interests, DHHL has carefully reviewed the proposed action.

2. DHHL's concerns with statements in the submittal for Item A-1

DHHL appreciates the effort of CWRM staff and acknowledges that CWRM deserves resources far beyond its current allocation in order to fulfill its myriad duties. With that said, we must respectfully note the following concerns with certain statements in the submittal. We quote the following statements, and below each note our concerns / responses:

- "The proposed Ota well will be drilled along an area known to have high-level (dike confined) water" (p.1.)

- The exact geologic mechanism that is impeding some flow of water to the coast is not known. See Oki, D.S., 2021, Numerical simulation of the effects of groundwater withdrawal and injection of high-salinity water on salinity and groundwater discharge, Kaloko-Honokōhau National Historical Park, Hawai‘i: U.S. Geological Survey Scientific Investigations Report 2021–5004, 59 p., <https://doi.org/10.3133/sir20215004>.
- “The interconnection between the high-level water that the Ota Well will draw from, and the basal and/or deep confined lens is not well established.” (p.2)
 - It is well established that there is an interconnection between the three known water bodies in the area; the hydrologic connection is not well understood. This is an important point because it contributes to assessing the reasonableness of an accusation of harm.
- “Impacts to these resources could potentially impact Native Hawaiian traditional and customary practices.” (p.2)
 - We believe the administrative record assembled by CWRM during the consideration of designation of the Keauhou Aquifer contradicts this statement. We are unaware of anybody reasonably challenging whether there are significant traditional customary practices which are exercised in this area. We are similarly unaware of any challenges stating the resources which are used to not exist in this area. Therefore, if these resources are impacted by water withdrawals, there will be an impact to traditional and customary practices.
- “The Commission subsequently denied the petition, but a groundwater dependent ecosystem symposium led the Commission to direct staff to develop a pilot adaptive management approach to protect groundwater resources.” (p.2)
 - Development of a pilot adaptive management was committed to in the 2019 update to the Water Resources Protection Plan.
- “Impacts to coastal discharge of freshwater result from not just one well, but the cumulative impact of all wells pumping in the aquifer.” (p.7)
 - The impacts to coastal discharge of freshwater can result from a single well, as well as from the cumulative impact of all pumping. The relative impacts on a particular groundwater dependent ecosystem and associated practices one seeks to protect will be a product of the proximity of the proposed well to the ecosystem, the depth and rate of pumping, the transmissivity of the area, as well as the associated impacts from other factors including other pumping wells.
- “Collecting data from wells in both the basal and high level areas during the pump test can also help to inform the Commission about potential impacts, so special condition 2 of the previous permit is carried over to this permit.” (p. 8.)
 - It is unreasonable to suggest that the 96 hour pump test will result in any measurable change in any of the areas proposed for measurement. The distances are simply too far. To suggest that an absence of observation would indicate a lack of potential impacts is misinformed.

- “It’s important to note that the Commission’s approval of the well construction permit is purely to assess the impacts of pumpage on coastal resources, and that the applicant cannot rely on the construction of the well to be able to pump the well for consumptive purposes until a pump installation permit is approved, which will be subject to the Adaptive Management Plan. Staff anticipates that the completion of the well will be after the commissions adoption of the Adaptive Management Plan.” (p. 9)
 - We believe the submittal lacks sufficient information for any interested party, including DHHL, to determine what the requirements might be in the proposed Plan. Proposing to willfully impact a resource, study what is happening, and then propose mitigation appears to reverse the order of duties that the applicant and the state has.

3. DHHL’s concerns with what is absent from the submittal for Item A-1

Respectfully, DHHL has greater concerns with what is lacking in the submittal, information that is necessary for CWRM to effectively discharge their duties. The Hawai‘i Supreme Court has provided useful and binding guidance in the Kaua‘i Springs case (*Kaua‘i Springs, Inc. v. Planning Commission of the County of Kaua‘i*, 133 Hawai‘i 141 (2014)) for both *applicants* seeking approvals to either use water or take actions that will result in the use of water, and *any agency* considering such an application. In Kaua‘i Springs, the duties of an applicant include:

- Demonstrating their actual needs;
- Demonstrating the absence of a practicable alternative;
- If there is a reasonable allegation of harm to public trust purposes, then the applicant must demonstrate that there is no harm in fact or that...the requested use is nevertheless reasonable and beneficial; and
- If the impact is found to be reasonable and beneficial, then in light of the cumulative impact of existing and proposed diversions on trust purposes the applicant must implement reasonable measures to mitigate this impact.

If the applicant has met these burdens, then the agency (CWRM in this instance) must:

- Determine whether the proposed uses are consistent with the trust purposes;
- Apply a presumption in favor of public use, access, enjoyment, and resource protection;
- Evaluate each proposal for use on a case-by-case basis, recognizing that there can be no vested rights in the use of public water;
- If the requested use is private or commercial, the agency should apply a high level of scrutiny; and
- Evaluate the proposed use under a ‘reasonable and beneficial use’ standard, which requires examination of the proposed use in relation to other public and private uses.

Additionally, in order to determine “reasonable measures to mitigate this impact” on public trust uses of water, the applicant must provide information necessary for the Agency to fulfill its duties under the three part test of *Ka Pa‘a Kai (Ka Pa‘akai O Ka ‘Āina v. Land Use Commission, State of Hawai‘i, 94 Hawai‘i 31 (2000))*.

We note that the submittal does not reference either of these seminal court cases, nor does it present information from the applicant in support of its required duties, nor does it contain an analysis from the Commission that is required of it. It lacks any written argument suggesting why these well-known cases do not apply in this instance.

DHHL acknowledges the public comments made by the Native Hawaiian Legal Corporation (NHLC) and its clients at the March and April 2024 Commission on Water Resource Management (CWRM) meetings. Specifically, NHLC brought forward concerns that the well development may impact traditional and customary practices in the makai area of the ahupua‘a because the well may significantly diminish freshwater flow to the nearshore areas. NHLC also asserted they were not meaningfully engaged with in NELHA’s consultation process. The decision that day was deferred with the requirement that HHFDC and NELHA will return to CWRM in sixty days to present on record the information they collected during their Ka Pa‘akai Analysis. DHHL has not seen a written report on NELHA and HHFDC’s consultation process and so cannot offer comments as to its adequacy to meet its duties.

The proposed significant deviation from established community conditions in the submittal will likely encounter opposition from various stakeholders.

4. DHHL’s request for items to be considered in relationship to item B-1

In its own pursuit of groundwater development in North Kona, DHHL has proactively undertaken environmental studies, including a Ka Pa‘akai Analysis and development of a Draft and Final Environmental Assessment¹ for one potential water source for our DHHL lands.

The FEA outlines a list of recommended mitigation actions that the Department suggests be adopted, beginning on p.52. We offer these here and suggest they be considered for incorporation into the proposed plan. We highlight the following specific proposed mitigations:

- Research, studies and monitoring should be planned for and funded that will be used to inform mitigation. Research and studies should be culturally informed. Appropriate thresholds should be identified and upheld.
 - The design of monitoring plans and the identification of benchmarks and actions should be culturally and community informed
- Frequent, meaningful, and accessible updates regarding research, studies and monitoring practices should be available to stakeholders.

¹ https://files.hawaii.gov/dbedt/erp/Doc_Library/2025-03-23-HA-FEA-DHHL-Kona-Wells-Gianulias-Well-Site.pdf

- DHHL will advocate for and participate in the update of the Water Use and Development Plan for Hawai‘i County.
- DHHL will support and advocate for CWRM analysis of water availability and revised sustainable yields, including a process that has substantial opportunity for public input.
- DHHL will advocate for and participate in the update of the Statewide Framework for Updating the Hawai‘i Water Plan (Framework). The Framework was developed to provide guidance in the integration of the various components of the Hawaii Water Plan and to give additional direction to the various agencies responsible for the preparation of its constituent parts. This Framework was created in 2000 and is in need of update and revision.

While we acknowledge that the design of a scope of work is typically the purview of staff, rather than commissioners, it is hard to underestimate or understate the potential impact of an adaptive management plan. We believe that it would be better if item B-1 comes forward for Commission approval after this briefing.

Conclusion

For the reasons outlined above, DHHL respectfully requests that CWRM defer the proposed action in Item A-1. DHHL believes that the concerns over transparency and inclusivity that were raised by NHLC and its clients need to be adequately addressed so to avoid potential conflicts on this matter. An approved Adaptive Management Plan should be in place to inform conditions for the approval of this permit, not retroactively.

We ask you to consider the items we review in section 4 above for consideration during development of an adaptive management plan as outlined in item B-1.

If a Contested Case Hearing is requested and is granted on item A-1, we request to be a party in the Contested Case Hearing.

ⁱ The full title of agenda item A-1 is **Natural Energy Laboratory of Hawai‘i Authority and Hawai‘i Housing Finance and Development Corporation Approval of Well Construction Permit Ota Well (Well No. 8-3957-006), TMK (3) 7-5-001:165 Lanihau 1-2, Moeauo Ahupua‘a, Keauhou, Hawai‘i**. The full title of item B-1 is **Briefing by Commission Staff, Ground Water Regulation Branch and Peter Adler, Guild Consulting – Adaptive Management Plan for Ground Water Resources in the Keauhou Aquifer Sector**.