

September 4, 2007

Transmittal via Hand Delivery

Chairperson Laura H. Thielen
Hawai'i Board of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl Street
Honolulu, Hawai'i 96813

RE: Application of KAHEA to Participate in Contested Case Hearing
Involving Dr. Greta Aeby/Hawai'i Institute of Marine Biology
Northwestern Hawaiian Islands Permit #DLNR.NWHI06R008

Hearing Date: To Be Announced

Dear Chairperson Thielen and Members of the Board:

This office represents KAHEA: The Hawaiian-Environmental Alliance ("KAHEA"). As permitted by § 13-1-31 of the Hawai'i Administrative Rules ("HAR"), KAHEA seeks to participate in the contested case hearing requested on August 2, 2007 by the General Counsel for the University of Hawai'i on behalf of Dr. Greta Aeby, a researcher with the Hawai'i Institute of Marine Biology (HIMB). This contested case has implications far beyond Dr. Aeby's conduct. It is the first proceeding to enforce the vital rules and regulations protecting the Northwestern Hawaiian Islands ("NWHI") marine refuge ("Refuge"), and it is essential that the resolution of this matter be carried out in the public view and with the participation of stakeholders and genuinely interested parties. While marine research is important to the long term health of the Refuge, such activity also has the potential to bring about the Refuge's destruction if the entire framework of legal protections is not followed and properly enforced.

As discussed below, KAHEA has standing to participate in this contested case as a party, and this written application is timely made, as no date for the contested case hearing has been set. Granting this application allows KAHEA to protect its unique interests and will benefit the public interest as well by ensuring the development of a more complete record in this matter.

I. KAHEA HAS STANDING TO PARTICIPATE IN THIS CONTESTED CASE

KAHEA should be admitted as a party to this contested case hearing because it has a substantial and distinct interest in the protection of the Northwestern Hawaiian Islands (NWHI) and a unique perspective on the issues presented in this case. The Hawai'i Administrative Rules identify three groups that "shall be admitted as a

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Telephone: (808) 275-1200; Facsimile: (808) 275-8808
Website address: www.cruiseyost.com

party": the petitioner, relevant government agencies, and "other persons who can show a substantial interest in the matter...." (HAR §13-1-31(a)(4)).

A. The Nature of KAHEA's Interests

As a founding member of the NWHI *hui*, KAHEA has advocated for the strongest possible protection of the state waters in the NWHI since 2000. KAHEA's Board and constituents include Native Hawaiian cultural practitioners, conservationists, scientists, fishers and a former resident of the NWHI, all of whom are deeply invested in the effort to protect this public trust resource and implement this visionary marine protected area. The health of the NWHI is also essential to the ability of KAHEA's members to engage in traditional cultural and religious practices.

KAHEA asserts the rights of all Native Hawaiians to ensure Hawai'i's natural resources and the cultural beliefs and traditional practices associated with them are fully protected. KAHEA is led by and works on behalf of Native Hawaiians with constitutionally recognized rights to access and protect the NWHI. See, Hawai'i Const. Art. XI §§ 1, 6 and 9; Art. XII § 7; HRS §§ 1-1, 7-1 and 171-11; HAR §13-60.5. In this contested case proceeding, KAHEA will present its genuine concerns related to the protection of these legitimate interests of Native Hawaiians that are not shared by the general public as a whole. As the Supreme Court of Hawai'i has stated:

With regard to native Hawaiian standing, this court has stressed that "the rights of native Hawaiians are a matter of great public concern in Hawaii." Our fundamental policy [is] that Hawaii's state courts should provide a forum for cases raising issues of broad public interest, and that the judicially imposed standing barriers should be lowered when the "needs of justice" would be best served by allowing a plaintiff to bring claims before the court.

See *Ka Pa'akaio Ka'aina et al. v. Land Use Commission et al.*, 94 Haw. 31, 42, 7 P.3d 1068, 1079 (2000) (internal quotations and citations omitted). See also *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission*, 79 Haw. 425, 434 n.15, 903 P.2d 1246, 1255 n. 15 (1995): "issues relating to the subsistence, cultural and religious practices of native Hawaiians amount to **interests that are clearly distinguishable from those of the general public.**" (emphasis added).

The Supreme Court of Hawai'i has also ruled: "where the interests at stake are in the realm of environmental concerns[,] we have not been inclined to foreclose challenges to administrative determinations through restrictive applications of standing requirements." *Ka Pa'akaio Ka'aina*, 94 Haw. at 42 (internal quotations omitted).

The environmental concerns at issue may be summarized as follows:

1. Public Trust Doctrine: The NWHI are a public trust resource managed by the Department of Land and Natural Resources on behalf of and for the benefit of all people in Hawai'i (Hawai'i Const. Art. XI §§ 1, 6 and 9; HRS §171-11; HAR §13-60.5). The Hawai'i Constitution specifically provides that "any person may enforce this right against any party, public or private, through appropriate legal proceedings..." (Hawai'i Const. Art. XI § 9).

2. State Marine Refuge: The Board established the Marine Refuge in the NWHI "for the long-term conservation and protection of the unique coral reef ecosystems... to ensure their conservation and natural character for present and future generations" (HAR § 13-60.5-1(1)) and "to implement an entry permit program for the area that will cause no harm to the refuge resources" (Id. At (3)). As a beneficiary of this protection effort, KAHEA has a right to ensure that the natural character of the NWHI ecosystem is, in fact, protected. This contested case involves violations of the strict permitting requirements for access to the NWHI, the taking of marine resources, the release of effluent in state waters, the threat of coral disease dissemination, and the introduction of potentially invasive species.

As a representative of the Native Hawaiian community, including a former NWHI resident and Native Hawaiian cultural practitioners, KAHEA's interests are unique from the general public. And because of KAHEA's on-going advocacy since 2000 for the creation and preservation of the Refuge (further discussed below) KAHEA is also an exceptional representative of the public's interest in protecting the Refuge from environmental harm.

B. The Effect Of A Decision In The Contested Case On KAHEA's Interests

The contested case hearing is based on the first-ever enforcement action against the first-reported violations of a permit issued under the Refuge rules. The outcome of this case is historic and may affect all future interpretations of the applicable rules. The questions of law and fact presented in this case speak to the core purpose and proper implementation of the Refuge rules, which KAHEA helped to draft and enact. As such, this contested case directly affects KAHEA's interests as a longstanding advocate for the protection of this public trust resource and as a Native Hawaiian-led organization committed to protecting traditional and cultural rights.

C. KAHEA'S Participation Will Serve The Public Interest And Ensure The Development Of A More Complete Record

In the Spring of 2000, KAHEA convened the first meeting of right-and stake-holders interested in pursuing the further protections for its Kupuna Islands. From

this foundation, KAHEA, as an organization, successfully advocated at the state and federal levels for the strongest possible protections in the NWHI. And that winter, KAHEA staff and Board members, including Louis "Buzzy" Agard and Isaac Harp, met with President William J. Clinton for the signing of the Executive Order to create the federal NWHI Reserve.

Five years later, after more than 30 state and federal public hearings and 100 official meetings, the regulations creating the state's first Marine Refuge were adopted by the DLNR Board on May 13, 2005, and signed into law by the Governor on September 30, 2005. KAHEA participated in every step of the process to develop these regulations. See Exhibit "A," hereto, a brief summary of KAHEA's involvement in the establishment of the NWHI Refuge. Due in large part to KAHEA's public education and outreach efforts, the state received over 24,000 public comments on the proposed state refuge rules. Upon signing the regulations into law, the Governor acknowledged in a public speech KAHEA's significant contribution to the development of the Refuge rules.

The depth of KAHEA's involvement and influence in developing the administrative rules for the state refuge is evident in KAHEA's literature. A comparison of the final rules and KAHEA's proposed amendments published in a brochure in the summer of 2004 reveals that the majority of KAHEA's suggestions for improvement were included in the final regulations. (See Exhibit "B" hereto, KAHEA NWHI brochure Summer 2004; and Exhibit "B-1" hereto, Comparison of HAR §13-60.5 et seq. (2005) and KAHEA literature). In the two years since the Refuge was established, KAHEA has attended nearly every meeting of the Board regarding the NWHI, providing the Board with detailed information, expert insight, and suggestions for improvements in the implementation of the permit entry program for the NWHI. Many of KAHEA's suggestions have been used by the Board to implement the Refuge.

Based on the July 27, 2007 presentations to the Board, the current parties to this contested case proceeding have not addressed certain issues related to the adequate protection of public trust resources in the NWHI. The petitioner in this contested case, an HIMB researcher, contends that her effort to keep coral alive onboard the Hi'ialakai and utilize a flow-thru water system that dumped wastewater overboard as it sailed from French Frigate Shoals to Gardner Pinnacles was not a violation of her permit. This challenge requires the Division of Aquatic Resources (DAR) to defend the July 27 staff recommendation, which advocated that only one fine be issued for one violation.

Limiting the proceedings to only these two positions leaves serious questions, which are material to the enforcement action before the Board, unanswered. A comparison of the staff recommendation presented to the Board on January 12 and that presented on July 27, raises significant doubts about the adequacy of the penalty imposed, the necessity to address outstanding violations, and the culpability of other individuals mentioned in the record currently before the Board. The Board should address these questions at this time to ensure a complete record, consistent decision-making, and

solid precedent for future decision-making. As a longstanding and independent advocate for the proper protection of Hawai'i's public trust resources in the NWHI, KAHEA is the proper party to raise these distinct issues.

KAHEA has consistently provided critical information to the Board to assist Board members in making the best possible decisions about the management of the NWHI. Unlike the other parties to this case, KAHEA has access to independent, expert analysis of the research activities in the NWHI. Because KAHEA's panel of respected research scientists is not challenged by the conflicting loyalties inherent to small research communities like Hawai'i's, KAHEA is free to express its objective assessment of the obligations and responsibilities of researchers, the threats and impacts of dangerous research activities, as well as the legitimacy and necessity of conducting such research in the delicate and unique NWHI. Such impartial information is essential to an effective and efficient decision-making process.

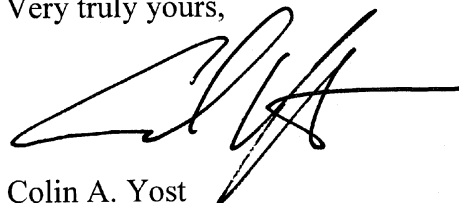
II. CONCLUSION

KAHEA has an independent and substantial right to participate in this contested case proceeding as a party. KAHEA's participation will also give the public greater confidence in the legitimacy of the final ruling. While KAHEA's participation may slightly broaden the issues addressed in this case, doing so will not delay the proceeding and, in fact, will help to ensure the disposition is based on a complete record. KAHEA's participation will also serve the public interest by ensuring that violations are properly adjudicated, the NWHI Marine Refuge rules are fully enforced, and that decisions about public trust resources are made with transparency and full accountability.

For the reasons stated above, KAHEA respectfully requests that its application to participate as a party in this contested case be granted.

Thank you for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Colin A. Yost', with a long horizontal line extending to the right.

Colin A. Yost
Attorney for KAHEA

Enclosures

Cc: Client
David W. Lonborg, Esq.

A Brief Summary of KAHEA's Involvement in the Establishment of the NWHI Refuge

July 2000: KAHEA helps to draft "Malama I ka Moana," a consensus-based plan for protecting the Northwestern Hawaiian Islands that was developed after a two-day community meeting. The community meeting involved Kūpuna, cultural practitioners, commercial and recreational fishers, and other ocean users from all five islands. This plan was later used to create the 84 million acre NWHI Coral Reef Ecosystem Reserve.

August 2000: KAHEA participates in the White House "public visioning" meetings, where 1,100 written comments and 430 in-person comments were received, the overwhelming majority advocating protection for the NWHI and the "Malama I ka Moana" plan.

October 2000: KAHEA alerts the public to contact the Clinton Administration and Hawai'i's Congressional Delegation urging protection of the NWHI as a monument. More than 5,500 comments were received from the public.

November 2000: KAHEA alerts the public to contact the Cayetano Administration and Hawai'i's Congressional Delegation urging protection of the NWHI. More than 5,700 people responded.

December 2000: President Clinton signs the Executive Order establishing the NWHI Reserve. KAHEA's Board members and staff attended the ceremony and reception at the President's request.

February 2001: KAHEA attends the first meeting of the federal Reserve Advisory Council (RAC).

February 2002: The State of Hawai'i withdraws its plan to allow fishing in the delicate lagoons of the NWHI after KAHEA's analysis of the plan generates overwhelming public opposition.

May 2003: KAHEA participates with over 100 scientists in the NOAA-sponsored conference on conservation-management measures in the NWHI.

July-August 2004: KAHEA helps to generate overwhelming public support for the state's new proposal to establish a refuge in the state waters of the NWHI, providing substantive and technical amendments to regulations. The proposed refuge would protect Native Hawaiian cultural access rights, permit appropriate management-based research, and prohibit all commercial extraction.

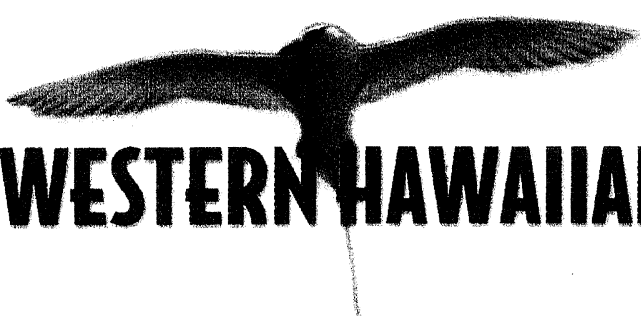
May 2005: The Board of Land and Natural Resources votes in favor of establishing a NWHI Marine Refuge in the state waters of the NWHI. They send the regulations that KAHEA helped to draft to the Governor for her signature.

August – October 2005: At KAHEA's request, Maui, Kaua'i, Hawai'i County Councils unanimously support resolutions urging state and federal policymakers to completely and permanently protect the NWHI.

September 2005: Governor Lingle signs the regulations creating the state's visionary NWHI Marine Refuge. In her presentation to the media, the Governor specifically commended KAHEA and the NWHI *hui* for their unique commitment to protecting the NWHI by educating lawmakers, helping to develop the regulations, and advocating for the passage of the regulations.

June 2006: By presidential proclamation, the first-ever marine monument is created in the NWHI. It is the largest marine protected area in the world. KAHEA is invited to the signing ceremony. The overwhelming public support for the strongest possible protections in the NWHI is cited as grounds for the decision.

EXHIBIT A



NORTHWESTERN HAWAIIAN ISLANDS

YOUR TESTIMONY IS NEEDED AT HEARINGS JULY 21-29

DLNR Proposes a Refuge for Public Trust/Hawaiian waters in NWHI

We have a rare opportunity to save one of the last wild places on earth

In response to an outpouring of public support, Hawai'i Department of Land and Natural Resources (DLNR) has released a long-awaited proposal to establish a Refuge in state-controlled waters of the Northwestern Hawaiian Islands. The existing NWHI Coral Reef Ecosystem Reserve boundaries surround—but do not include—public trust/Hawaiian (state) waters.

**THESE WATERS CONSTITUTE
THE VERY HEART OF THE
CORAL REEF ECOSYSTEM.**

**FIND OUT WHAT YOU CAN DO
TO SUPPORT THIS PROPOSED
REFUGE AND SUPPORT
IMPORTANT TECHNICAL
AMENDMENTS.**

**HELP PROTECT THIS VITAL
AND REMOTE ECOSYSTEM.**

Local and national organizations that have been working for lasting protection of the NWHI, commend DLNR for proposing strong and protective regulations for state-controlled waters. Two years ago, the public soundly rejected

DLNR's attempt to establish a Fishery Management Area in state waters in the NWHI, which are surrounded by the federally protected Coral Reef Ecosystem Reserve. The concerned public sent a loud and unified message that the remote NWHI are fragile and deserve to be protected in their natural state and for the benefit of future generations.

DLNR has proposed proactive and protective Refuge status that would safeguard the survival of the highly endangered Hawaiian monk seal, threatened and endangered sea turtles and millions of seabirds. The intent and purpose of the proposed Refuge clearly reflect the area's vulnerability and its ecological and cultural importance.

However, we need your help to encourage DLNR to adopt important technical amendments needed to address language inconsistencies and enforceability.

With adequate public input, this fragile resource can be saved. The Refuge in state waters can serve as a model of protection for federal waters, as the NWHI Reserve is being considered for Sanctuary designation.

Talking Points for Proposed Marine Refuge in the Northwestern Hawaiian Islands

In response to tremendous public support for stronger protections in state waters, the Department of Land and Natural Resources (DLNR) is now proposing a "Marine Refuge" in the NWHI. DLNR is calling for public input on the proposed refuge as per Hawaii Administrative Rules Chapter 13-60.5. A link to the proposed regulation and maps can be found at www.kahala.org.

The stated intention of this Refuge is to provide for the long-term conservation and protection of the unique coral reef ecosystems and the related marine resources and species of the NWHI, and to implement an entry permit program designed to "cause no harm" to the Refuge resources.

While DLNR has demonstrated commendable intentions, the specific language of the proposed regulation falls short of providing for a true "Refuge" in the NWHI, and must be strengthened to do so. The proposed regulation contains problematic inconsistencies and loopholes that undermine the stated intentions for the Refuge.

State management measures must meet the needs of this fragile ecosystem, especially the need to retain the ecosystem in its natural character. In addition, state regulations should be consistent with federal efforts to protect adjacent areas. Recent developments in the ongoing process for a proposed NWHI National Marine Sanctuary suggest a uniform policy of not allowing commercial extraction within either State or Federal waters of the NWHI.

As part of the federal government's Sanctuary designation process for waters bordering State waters and extending seaward, the National Marine Sanctuary Program hired a consulting firm of independent scientists to review existing scientific and economic data as required under the National Environmental Policy Act. Sustainable Resources Group International (SRGI), concluded that

due to the fragile nature of the marine ecosystems of the NWHI, no commercial extraction of marine resources is appropriate within the proposed Sanctuary. SRGI also conducted meetings with various affected parties to discuss fishing alternatives in the NWHI. Those consulted included a group of Native Hawaiians, including numerous Kāpuna (elders) fishermen who fished in the NWHI. The group recommended prohibiting all commercial extraction around the NWHI, and providing

continuance of Native Hawaiian cultural, religious, and subsistence access. A summary and the full SRGI report are available at: www.kahala.org and www.dlnr.org/hawaii. Thus scientists and kāpuna reached the same conclusion, that commercial extraction of marine resources in the NWHI is not appropriate.

GOOD FEATURES OF PROPOSED REFUGE

The Intent and Purpose of the proposed Refuge reflect the ecological and cultural importance of this unique area:

- 1) Establishes a marine refuge for the long-term conservation and protection of the unique coral reef ecosystems and related marine resources and species;
- 2) Ensures access for Native Hawaiians' cultural, subsistence, and religious practices;
- 3) Utilizes the precautionary approach in decision-making to minimize risk when impacts of an activity are unknown;
- 4) Requires Entry Permits with conditions designed to "Cause No Harm";
- 5) Prohibits access to vital habitat for the Hawaiian monk seal and sea turtles (except at Nihoa);
- 6) Prohibits damage to corals from anchoring vessels and other activities;
- 7) Prohibits lobster fishing, which helps protect prey species important to the Hawaiian monk seals' survival.

SPECIFIC TECHNICAL AMENDMENTS

NEEDED TO PROTECT FRAGILE STATE WATERS

- 1) *The Intent and Purpose should be revised to state that the principal purpose of the Refuge is to ensure the long-term conservation and protection of the unique coral reef ecosystems and related marine resources of the NWHI in their natural character for future generations.*
- 2) *Permitted Activities language under §13-60.5-5 should be revised to remove a major loophole and to prevent delegation of permitting authorities to a "representative" of the Board of Land and Natural Resources. The provision allowing the Board to delegate permit authorization to a "representative" must be deleted.*

Continued on p. 7

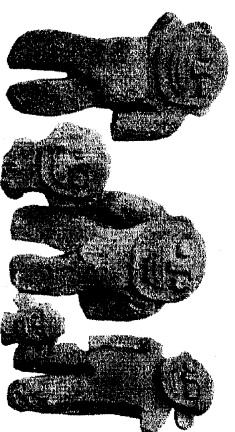
The Unique Cultural and Ecological Wonders in the NWHI Must be Cherished and Protected Forever

The Northwestern Hawaiian Islands are a global legacy that requires immediate and stringent protection. Stretching over 1,200 miles to the northwest of Kaua'i, these prehistoric islands, atolls and shoals contain 3.5 million acres of some of the most diverse and pristine reefs in the world. One of the planet's last remaining large-scale relatively intact coral reef ecosystems, it is remarkable for fish communities dominated by large predators and include the world's northernmost atolls.



With some of the healthiest and most extensive coral reefs left on earth, this remote and biologically diverse ecosystem is truly a world treasure.

Immortalized in oil and mele (chant and song), the Northwestern Hawaiian Islands were always part of the Hawaiian nation and hold deep historical and cultural significance for the Hawaiian people, who occupied the lower Islands for over 700 years. Evidence of heiau, burials, and cultural sites are abundant in the lower Islands. These Kī'i (stone carvings), found on Mokumanamana, are reminiscent of carvings from the Marques Islands.



A "rainforest of the sea," the Northwestern Hawaiian Islands ecosystem contains some of the world's oldest living coral colonies and encompasses tremendous biodiversity. These pristine coral reefs are the foundation of an expansive ecosystem that host interdependent associations of vertebrates (monk seals, reef and bottom fish, turtles, birds, and sharks), invertebrates (corals, anemones, jellyfishes, mollusks, shrimps, crabs, lobsters, sea urchins, sea stars, sea cucumbers), sea grasses, and algae.

The Northwestern Hawaiian Islands provide essential habitat for millions of seabirds, including the world's population of Laysan and black-footed albatross, the highly endangered Hawaiian monk seal and threatened and endangered sea turtles. Because the waters there are colder this ecosystem is very slow to recover from disturbance and are extremely vulnerable to human impacts.

NW/Hi Hearing Schedule for Four Main Islands

O'AHU

Weds., July 21, 2004
McCoy Pavilion
Ala Moana Beach Park, Honolulu

MAUI

Thurs., July 22, 2004
Maui Community College,
Laulima Bldg. 107, Kahului

KAUAI

Tues., July 27, 2004
Lihue Public Library
4344 Hardy St., Lihue

KONA/HAWAII

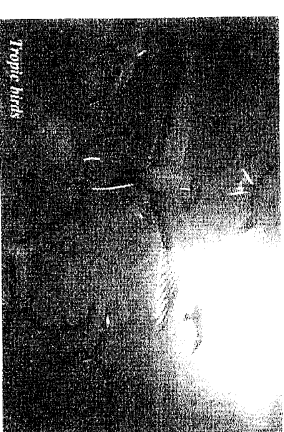
Weds., July 28, 2004
King Kamehameha's Kona Beach Hotel,
Honu Room, Kalua-Kona

HILO/HAWAII

Thurs., July 29, 2004
Waialea High School Cafeteria
155 W. Kawili St., Hilo, HI 96720

The public comment period ends August 13, 2004

For more information on the Northwestern Hawaiian Islands and to find a link to proposed Refuge regulations and maps, visit: WWW.KAHEA.ORG



For people who cannot attend the hearings or who have additional comments, KAHEA and Environmental Defense will email Action Alerts mid-July, 04

Comments can be also be mailed before Aug. 13, to:
DLNR
Division of Aquatic Resources
1151 Punchbowl Street, Room 330
Honolulu, Hawai'i 96813

The Process to Protect the Northwestern Hawaiian Islands

Currently there are two public processes that will determine the long-term protection measures for the Northwestern Hawaiian Islands. DLNR has proposed draft regulations for a Refuge that would protect biologically rich state waters. And in a parallel process, as stipulated in the Executive Order that created the NW/Hi Reserve, NOAA has initiated a process to determine if the NW/Hi Reserve should become part of the sanctuary program. The ongoing EIS process will identify future protection options for the federal waters in the NW/Hi.

Our challenge is to insist that NOAA recognize that we will only accept a Sanctuary that would provide the strongest possible protections for these fragile waters. This ecosystem is unique on the planet and any future protections must reflect the importance and fragility of this world treasure.

NOAA recently released a Draft Reserve Operations Plan to guide management of the Reserve waters in the Northwestern Hawaiian Islands for public comment. The proposed plan lacked a mechanism to implement the existing protections.

In response to a *Call to Action* by KAHEA, Environmental Defense, and The Ocean Conservancy, NOAA received 25,000 comments calling for the strongest possible protections for the NW/Hi. The public called for regulations and enforcement, an ecosystem-based management plan, protection of cultural rights and recognition of the unique and fragile nature of this phenomenal archipelago.

A Native Hawaiian advisory group on subsistence fishing, including numerous kūpuna who fish commercially, was convened by the Sanctuary program to develop Fishing Alternatives in the NW/Hi. The advisory group stated that protection of the NW/Hi is a part of Native Hawaiian cultural identity and *kuleana* (responsibility). They supported continued cultural access and advised that no commercial extraction should be allowed the Northwestern Hawaiian Islands.

Independent scientists hired by NOAA to review the existing scientific and economic data reconfirmed that the NW/Hi are a fragile but relatively intact ecosystem. Sustainable Resources Group, International reminds us that the NW/Hi are a component of the Hawaiian Islands ecosystem, which is substantially degraded in the Main Hawaiian Islands.

The consultants recommend an ecosystem-based conservation approach that is consistent with existing Reserve protections, the U.S. Fish and Wildlife Refuges and the proposed Sanctuary. This approach will ensure ecosystem integrity as required by law. They reject the Western Pacific Regional Fishery Management Council's fishery management plan, designed to extract the maximum yield of a given target species without insuring the protection of the entire ecosystem.

The SRG report concluded that due to poor economic performance, the lack of sustainability of the small commercial fishery and the fragile nature of the ecosystem, no commercial extraction is appropriate in the proposed Northwestern Hawaiian Islands Reserve waters. A Summary of SRG Report and the full report can be found at www.kahea.org.

Current Threats to the Northwestern Hawaiian Islands

WEAKENING OF EXISTING PROTECTIONS

- Intensive campaigns by Wespac to weaken protections, open new fisheries and reestablish the lobster fishery
- Refusal of NOAA to issue regulations required by the U.S. Coast Guard for enforcement

MARINE DEBRIS

OPENING UP NEW COMMERCIAL ACTIVITIES

- Commercial fishing or expansion of bottomfish fishery



Red-tailed booby

- Tropical aquarium fish trade
- Mining of corals, sands and deep-sea minerals
- Reestablishment of the closed NWHI lobster fishery
- Establishment of coral reef harvesting
- Bio-prospecting

INCREASED HUMAN IMPACT RESULTING FROM THE "REDISCOVERY" OF THE NWHI

- Eco-tourism, "educational" tourism and related activities in new and fragile areas
- Cruise ships. These floating cities carry thousands of people, produce immense amounts of toxic effluent, and threaten the introduction of alien species
- Pollution and contamination from increased air, vessel and human access

RESEARCH ACTIVITIES

- Large increase in NWHI "research" activities Over 1,800 research dives, summer 2002
- Research not related to the protection of the NWHI Reserve
- Lack of monitoring and oversight of research
- Increase in potential for research that damages the NWHI ecosystem and its inhabitants
- Research that disturbs monk seal colonies and leads to their mortality

MILITARY USE

- Storage, use and disposal of hazardous materials
- Military research
- Military exercises, war games and bombings
- Deteriorating WW II structures

OTHER THREATS

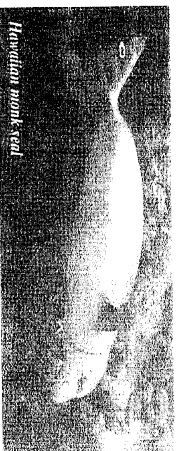
- Lack of adequate enforcement
- Poaching
- Deep sea dumping, CO₂, and vessel effluent
- Leaching of existing contaminants that have not been cleaned up or adequately stored
- Shipwrecks and vessel groundings, anchor damage
- Anchor damage to coral reefs
- Marine testing of sonic devices
- Construction and dredging
- Sophisticated new technologies allowing access to pristine parts of the ecosystem such as re-breathing devices and robotic submersibles

Talking Points

from page 2

- 3) The phrase "such as but not limited to" must be deleted, otherwise the DLNR would retain broad discretion to allow any type of commercial extractive activities anywhere in the proposed Refuge.
- 4) Additional language changes are required under §13-60.5-5 to ensure that:
 - a) Scientific and other access is non-commercial in nature;
 - b) Non-extractive uses are non-commercial and determined through the permit review process to be compatible with the purposes of the Refuge;
 - c) Permitted access is determined through a permit review process mandated to "do no harm."
- 5) Permit Requirements should be strengthened as follows:
 - a) A vessel monitoring system (VMS) should be mandatory for all vessels entering the Refuge;
 - b) Permit applications should be reviewed exclusively by the Board of Land and Natural Resources, and based on recommendations of a "Permit Advisory Group" with representation from Native Hawaiian communities and experts in coral reef ecology, marine mammals, invasive and endangered species;
 - c) Permits should be valid for a single access limited to specified time(s), area(s), and specified purpose(s) only;
 - d) Permit violators should not be eligible to apply for future permits.
- 6) Maps and text in the regulations should be made consistent, small areas within otherwise closed State waters should be eliminated, and State waters at Nihoa should be closed to commercial extractive activities.

Maps depicting the closed areas in State waters surrounding islands and atolls must be consistently labeled. The proposed language must accurately reflect



Hawaiian monk seal

the intended closures on the maps. We encourage the following important changes:

- a) Maps for 7 islands depict state waters as closed to extractive activities, however the accompanying text does not consistently indicate this, except at Kure, Pearl and Hermes, and French Frigate Shoals. The proposed language must clearly reflect the intended closures indicated on the maps for Gardner Pinnacles, Maro Reef, Laysan Island, and Lisianski Islands, i.e. that the State waters there are closed to commercial extractive activities;
- b) The map of Mokuamana (Necker) indicates two small areas at the edge of State waters that would remain open to commercial extraction. It would be virtually impossible for a person to comply with the proposed fishing zones. In addition, the State lacks the ability to monitor for compliance in NWHI. The map and the language for Mokuamana should be revised to show closure of the State waters there.

- c) For Nihoa, DLNR proposes to allow commercial extraction in State waters at 10 fathoms or deeper—allowing vessels to operate extremely close to the island. Nihoa provides vital habitat for numerous endangered species, including the highly endangered Hawaiian monk seal and it is very significant to the Native Hawaiian people, due to the extraordinary cultural sites. The State lacks the capability to enforce a depth-based boundary. Nihoa warrants the same protection as the rest of the NWHI ecosystem and should be closed to commercial extraction.

Note: In 2003, only two permitted vessels reported fishing at Nihoa. Even with closure of State waters, fishing is currently allowed in federal waters in five extensive banks surrounding and adjacent to state controlled waters at Nihoa.

In summary, the State waters of the Northwestern Hawaiian Islands deserve the security of a true Refuge, with the principal purpose of protecting this unique and fragile ecosystem in its natural character, and providing protections that are equal to or stronger than those in adjacent federal waters.

We strongly encourage that technical amendments be made to the proposed regulation language to ensure that access and activities within State waters are carefully controlled and limited to non-commercial scientific, educational, and cultural purposes.

*We have a rare opportunity to save one of the last wild places on earth
and hopefully save the Hawaiian monk seal from extinction*

**YOUR COMMENTS ARE NEEDED TO PROTECT
THIS WORLD TREASURE AS A TRUE PU'UHONUA!**

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Summary Comparison of KAHEA's Proposed Amendments and the Final State Regulations Creating the NWHI Marine Refuge

KAHEA "Talking Points for DLNR's Proposed NWHI Refuge," July 2004

- 1) Revise the Intent and Purpose section to identify the principal purpose of the Refuge to be the long-term conservation and protection of the unique coral reef ecosystems and related marine resources of the NWHI in their natural character for future generations.
- 2) Remove section empowering the Board to delegate their duties under these rules to another representative.
- 3) Remove "such as but not limited to..." because it allows the Board to approve any type of commercial extractions.
- 4) Permit access is determined through a permit review process mandated to do no harm.
- 5) Permit violators should be valid for a single access limited to specific times.
- 6) Permit violators should not be eligible to apply for future permits.

Final Regulatory Language Establishing the NWHI State Marine Refuge, September 2005

- 1) HAR §13-60.5-1(1): "Intent and purpose. The Department intends: To establish a marine refuge in the Northwestern Hawaiian Islands for the long-term conservation and protection of the unique coral reef ecosystems..."
- 2) delegation provision removed.
- 3) "such as but not limited to..." removed.
- 4) HAR §13-60.5-1(3): "To implement an entry permit program for the area that will cause no harm to the refuge..."

HAR §13-60.5-5(b): "A person shall only enter the refuge to engage in activities that do no harm and do not degrade the coral reef ecosystem, related marine resources and species..."
- 5) HAR §13-60.5-6(b): "...an approved permit shall not be valid for longer than one year from date of issuance."
- 6) HAR §13-60.5-6(a)(3): "The board shall deny an application based on a past violation or non-compliance with any term or condition of a permit issued under this chapter."