

FIRST CIRCUIT COURT  
STATE OF HAWAII  
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CRUISE & YOST  
A Limited Liability Law Company

MICHAEL R. CRUISE        7334-0  
COLIN A. YOST            7739-0  
The Dillingham Transportation Building  
735 Bishop Street, Suite 433  
Honolulu, Hawai'i 96813  
Telephone: (808) 275-1200  
Facsimile: (808) 356-3299  
Email: colin@cruiseyost.com

H. CHING  
CLERK

Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

KAHEA, The Hawaiian-Environmental  
Alliance,

Plaintiff,

vs.

THE DEPARTMENT OF LAND AND  
NATURAL RESOURCES OF THE STATE  
OF HAWAII; LAURA H. THIELEN, in her  
capacities as Director of the DEPARTMENT  
OF LAND AND NATURAL RESOURCES  
OF THE STATE OF HAWAII and as  
Chairperson of the BOARD OF LAND AND  
NATURAL RESOURCES,

Defendants.

CIVIL NO. 09-1-1684-07  
(Declaratory and Injunctive Relief)

COMPLAINT; SUMMONS

COMPLAINT

Plaintiff KAHEA, The Hawaiian-Environmental Alliance ("KAHEA"), comes now by and through its attorneys, CRUISE & YOST, A Limited Liability Law Company, and for its complaint against the above-named defendants, alleges and avers as follows:

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## INTRODUCTION

1. The Northwestern Hawaiian Islands ("NWHI") are revered as sacred by Native Hawaiian cultural and religious practitioners as the path of souls to the next life. The region is also world renowned for its diversity of endangered species, unique deep sea coral reefs, and rare predator-dominated ecosystem. Famed ocean explorer and researcher Jean-Michel Cousteau has said that "[t]his near pristine environment, teeming with indigenous and endangered species and extraordinary habitats, is under siege from marine debris, ravenous commercial fishing interests and the effects of human irresponsibility. It is a fragile ecosystem that is as beautiful as a porcelain figurine and as easily broken."

2. In 2005, the NWHI were established as a state refuge, and the following year, the State of Hawai'i entered an agreement with the federal government to establish the islands as the nation's first national marine monument, the Papahānaumokuākea Marine National Monument (the "Monument"). In setting this region aside for protection, state and federal regulators committed to a "do no harm" policy for all human activities allowed there. The Monument is intended to be one of the most protected places on earth, with access strictly limited by the do-no-harm policy and applicable state and federal laws.

3. Despite these principles, Defendant the Department of Land and Natural Resources of the State of Hawai'i ("DLNR") has approved hundreds of permits to access the Monument without conducting environmental assessments ("EAs") of the proposed activities as required by the Hawai'i Environmental Policy Act ("HEPA"), Chapter 343 of the Hawai'i Revised Statutes, and its implementing regulations. The DLNR has granted permits to, *inter alia*, harvest thousands of marine species, kill sharks, allow extreme-sports canoe racing and disturb sunken vessels -- all without understanding the threat posed to the resources of the

Monument.

4. A whistleblower formerly employed by DLNR recently revealed that the DLNR has established a deliberate policy of ignoring HEPA's mandate to evaluate proposed activities in the Monument for impacts on the environment and Native Hawaiian culture.

5. This lawsuit is filed to require DLNR and Director/Chairperson Laura H. Thielen to faithfully implement the "do no harm" management principle through full compliance with its obligations under HEPA and other applicable laws intended to protect and preserve this irreplaceable and delicate resource.

#### PARTIES

6. Plaintiff KAHEA is a nonprofit corporation incorporated in the State of Hawai'i. Since the year 2000, KAHEA has advocated for the strongest possible protection of the state waters in the NWHI. 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 use and enjoyment of the environment in and around the Hawaiian islands as well as 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.

7. Defendant The DEPARTMENT OF LAND AND NATURAL

RESOURCES is an agency of the State of Hawai‘i which has the responsibility to review and act upon permit applications for access to the NWHI, and, among other matters, to assure that, prior to the approval of any permits, a proper environmental assessment, pursuant to HRS Chapter 343 and the regulations promulgated thereunder, has taken place.

8. Defendant LAURA H. THIELEN, in her capacity as Director of the DLNR and Chairperson of the Board of Land and Natural Resources (BLNR), is responsible for assuring that proper environmental analysis, pursuant to HRS Chapter 343 and the regulations promulgated thereunder, has taken place prior to approving any permit application for access to the NWHI.

#### JURISDICTION AND VENUE

9. The conduct, acts and/or omissions alleged herein occurred in the State of Hawai‘i and/or within its jurisdiction. Pursuant to Hawai‘i Revised Statutes §§ 343-7, 603-21.5, 632-1 *et seq.*, and Article XI, § 9, of the Constitution of the State of Hawaii, this Court has subject matter jurisdiction to decide the issues of Hawai‘i law related to this matter.

10. Venue is proper in this Court pursuant to Haw. Rev. Stat. § 603-36.

#### BACKGROUND FACTS

11. The Hawaiian Islands form an archipelago that extends over a vast area of the North Pacific Ocean. The archipelago is made up of 132 islands, atolls, reefs, shallow banks, shoals, and seamounts stretching 1,523 miles (2,451 km) from the island of Hawai‘i in the southeast to Kure Atoll in the northwest.

12. The inhabited eight Main Hawaiian Islands (MHI) are separated from the southernmost of the mostly uninhabited Northwestern Hawaiian Islands (NWHI) by approximately 155 miles (250 km) of open ocean. This is the distance between Kaua‘i in the

south and Nihoa Island in the north.

13. The NWHI constitute one of the last intact, fully functional marine ecosystems in the world. These ancient reefs, atolls, and shoals contain over three million acres of some of the oldest, most diverse, and pristine coral reefs on the planet. Its age and remote location means this region has become home to over 7,000 marine species, one quarter of which are found only in the Hawaiian Archipelago, as well as one of the last predator-dominated marine ecosystems left on the planet. Highly endangered Hawaiian monk seals, threatened green sea turtles, and rare sea birds, sharks, corals, and algae rely on the NWHI for important habitat. A number of animals, such as the endangered Hawaiian monk seals, rely on both the NWHI and MHI for their survival.

14. Equally invaluable culturally, the NWHI are revered as the Kupuna Islands in Hawaiian epistemology. Ancient Hawaiian *'oli* and *mele* (chants and song) tell of the fire goddess Pele and her family traversing the NWHI on their way to the main islands. Generations of Native Hawaiians lived on the remote islands of Nihoa and Mokumanamana, where cultural features, housing sites, and burials are still found today.

15. Today, Native Hawaiians, including members of KAHEA, continue to build on the traditions of their ancestors and study the ancient ways of life in the islands with cultural, educational, and research voyages to the NWHI.

16. Unfortunately, decades of modern human interference have taken a toll on the region leaving ancient reefs scarred by massive shipwrecks, fish stocks decimated by excessive commercial fishing, and ecosystems ravaged by military contamination and misguided commercial exploitation.

17. For more than five years, the public consistently demanded that this

ecologically significant and culturally sacred region be fully protected from the harms of human activity. More than 100 public meetings and 30 formal public hearings were held by state and federal policymakers to determine the fate of the NWHI. In this process, well over 100,000 public comments were collected, the majority calling for strict limitations on impacts of human activity in the NWHI.

18. In 2005, the State of Hawai'i finally made a commitment to provide this region with the strongest possible protections by establishing the NWHI State Marine Refuge for all state waters (0-3 miles) in the region. This Refuge, managed by the DLNR, established the first "do no harm" standard in the state for all activities in the fragile near-shore waters.

19. These protections were followed a year later by the creation of the first-ever marine national monument. Encompassing 139,797 square miles of the Pacific Ocean, the Monument is the single largest conservation area under the U.S. flag, and one of the largest marine conservation areas in the world.

20. The Monument overlays the existing Coral Reef Ecosystem Reserve managed by the National Oceanic and Atmospheric Administration (NOAA), and the several federal refuges throughout the archipelago, which are managed by the U.S. Fish and Wildlife Service (FWS). Together these three agencies are responsible for implementing and enforcing all of the protections for the Federal Monument and the State Refuge.

21. In 2007, the three co-managing agencies imposed a joint permitting process for all requests to access the Monument and Refuge.

22. Since the agencies began issuing permits under this regime, however, KAHEA has raised serious concerns about the lack of adequate environmental and cultural impact reviews in testimony to the BLNR.

23. In 2007, in a presentation to the BLNR, staff with NOAA and the state Division of Aquatic Resources (a division of DLNR) assured board members and the public that all state and federal environmental requirements were being satisfied.

24. Despite these assurances, concerns persisted that the state was not abiding by the requirements of HEPA and that exemptions to the requirements of the National Environmental Policy Act (NEPA, 42 U.S.C. § 4231) were being improperly issued.

25. Under the joint permitting system, BLNR holds a public hearing to review applications and grant permits to allow access to state waters. The permit application form invokes the authority of the DLNR's Division of Aquatic Resources to issue special use permits under Haw. Rev. Stat. sec. 187A-6, as implemented by Haw. Admin. Rules § 13-60.5. Although these regulations mandate that agencies follow all applicable laws, the permit application ignores HEPA.

26. In an example typical of the approximately 140 permit applications granted so far, Dr. Brian Bowen seeks to extract thousands of fish samples from the state waters of the NWHI. The staff submittal to the BLNR inquires whether his request is subject to any other environmental reviews to which staff replies: "Yes, The proposed activities are in compliance with the National Environmental Policy Act." There is no mention of the equally important state environmental review process required under HEPA.

27. In June 2009, at the most recent public meeting for the Monument, staff discussion of NEPA/HEPA requirements made it apparent that:

(1) The state DLNR has abdicated its responsibilities under HEPA to the federal agencies and has a policy of not following any of the procedures required by the regulations implementing this law.

(2) At the same time, while the federal agencies may or may not be following proper procedure, they are improperly applying the "categorical exclusion" provision of NEPA to the NWHI.

28. Concerns about the state's failure to abide by HEPA were confirmed in July 2009, when a claim for wrongful termination was filed by the compliance officer for the state Refuge. In his complaint, the former employee alleged that he was improperly dismissed from his position because he had reported to his superiors, including the State Refuge Superintendent, Athline Clark, the Director of the Division of Aquatic Resources, Dan Polhemus, and Director of the Department of Land and Natural Resources, Laura Thielen, that the BLNR had been and continued to issue permits for access to the NWHI without conducting any environmental or cultural impact review of any kind, in violation of HRS Chap. 343.

29. On July 9, 2009, KAHEA requested from DLNR copies of all environmental reviews for all permits issued for the NWHI. None were provided.

30. The public has shown enormous interest in participating in the process of establishing and managing the NWHI. Thousands of people have commented on the various state and federal actions establishing the monument over the past decade. Now, however, the state of Hawai'i is reducing opportunities for public participation by failing to follow HEPA. This failure by the state is a violation of both the letter and intent of HEPA, whose purpose is to encourage public participation in decisions affecting state environmental resources.

31. The following table lists permits, approved by the DLNR, which are scheduled to begin (or have commenced) within the last 120 days without any formal determination from the DLNR as to whether an EA is necessary:

	<b>Permitee</b>	<b>Activity</b>	<b>Date Scheduled to begin</b>	<b>Date Permit Approved</b>
1	Abbott, Isabella	Algae research	June 1, 2009	June 12, 2009
2	Antonellis, George	Shark Deterrence	May 1, 2009	March 27, 2009
3	Bowen, Brian	Reef fish genetics	June 1, 2009	April 24, 2009
4	Caskey, John	HI'IALAKAI operations	June 1, 2009	March 27, 2009
5	Craig, Matthew	Reef fish life history	June 1, 2009	April 24, 2009
6	Gates, Ruth	Coral research	June 1, 2009	April 24, 2009
7	Gleason, Kelly	Shipwreck surveys	June 1, 2009	May 8, 2009
8	Karl, Stephen	Reef temperature	June 1, 2009	April 24, 2009
9	Kosaki, Randall	Deep sea reef surveys	August 1, 2009	June 12, 2009
10	Levin, Wayne	Nature photography	June 1, 2009	June 12, 2009
11	Littnan, Charles	Monk Seal Management	June 1, 2009	May 22, 2009
12	Lopez, Anita	OSCAR ELTON SETTE	March 1, 2009 (but did not begin on schedule)	January 23, 2009
13	Meyer, Carl	Shark Monitoring	April 1, 2009	March 27, 2009
14	Meyer, Carl	Predator Monitoring	June 1, 2009	May 8, 2009
15	Nichols, Ryan	Fish Growth	June 1, 2009	May 8, 2009
16	Rossiter, Andrew	Coral Collection	June 1, 2009	May 22, 2009
17	Smith, Derek	Shipwreck biological surveys	June 1, 2009	May 8, 2009
18	Thompson, Charles	Hokule'a Voyaging	April 1, 2009	March 27, 2009
19	Toonen, Robert	Reef genetics	May 15, 2009	April 24, 2009
20	Winn, Christopher	Water Analysis	June 1, 2009	May 8, 2009

32. Each of the above 20 permits ("subject permits") involve actions for which an EA is required under HRS § 343-5(a)(1), (2) and/or (3).

33. For each of subject permits, DLNR did not perform an EA.

34. For each of the subject permits, DLNR did not make categorical exemption determination, or any other formal, written determination that an EA was not required.

35. Hawai'i Administrative Rule ("HAR") § 11-200-8(E) provides: "[e]ach agency shall maintain records of actions which it has found to be exempt from the requirements for preparation of an environmental assessment in chapter 343, HRS and each agency shall

produce the records for review upon request."

36. Upon information and belief, for each of the subject permits, DLNR has not maintained any records relating to any determination to exempt the permits from an EA.

**COUNT I**

(Violation of HEPA, Chapter 343, HRS)

37. Plaintiff realleges and incorporates herein by reference the allegations set forth above.

38. HEPA, HRS § 343-1, *et seq.*, is the cornerstone of this State's laws for protection of the environment. HEPA requires agencies of the State and its counties to prepare an EA for certain categories of state and county agency and applicant actions. HRS § 343-5. If the EA determines that the proposed action "may have a significant effect on the environment," the state or county agency must order the preparation of an EIS. HRS § 343-5(b) and (c).

39. The permits described herein proposed "actions" governed by HEPA.

40. DLNR's approval of the subject permits was discretionary.

41. HRS § 343-5(a)(1), (2) and/or (3) required the completion of an EA for the subject permits.

42. No exemption applied to prevent the completion of EAs for the subject permits.

43. Defendants failed to perform EAs for any of the subject permits, in violation of HEPA.

44. Defendants failed to maintain proper records relating to their failure to perform EAs for the subject permits, in violation of HEPA's implementing regulations.

45. An actual controversy exists as to Defendants' acts and omissions. For the above reasons, Plaintiff is entitled to a judgment declaring Defendants' actions to be in violation

of HEPA. Plaintiff is also entitled to an award of its attorneys' fees and costs as provided by law.

**COUNT II**  
(Injunctive Relief)

46. Plaintiff realleges and incorporates herein by reference the allegations set forth above.

47. Completion of the environmental review process was a condition precedent to approval and commencement of the subject permits. *See* HRS § 343-5.

48. Because an EA was required for each of the subject permits but was not performed, injunctive relief must be issued to invalidate the subject permits, prohibit the implementation of the subject permits and prohibit the use of state funds, lands and waters for the activities described in the subject permits until full compliance with HEPA is achieved.

49. Defendants should also be enjoined from approving any future permit applications without full compliance with HEPA and other applicable law.

50. Plaintiff has been forced to seek relief from this Court at this time because the substantial rights of its members have been prejudiced by the Defendants.

51. Plaintiff is likely to prevail on the merits and is likely to suffer irreparable injury if injunctive relief is not granted to compel Defendants' compliance with HEPA. The public interest also strongly favors an injunction.

52. Plaintiff is thus entitled to permanent, preliminary and temporary injunctive relief prohibiting Defendants violating HEPA.

WHEREFORE, Plaintiff prays that judgment be entered in favor of Plaintiff and against Defendants herein, granting Plaintiff relief as follows:

A. For a determination that Defendants' failure to perform EAs for the subject permits violated HEPA and its implementing regulations;

B. For a determination that Defendants' failure to maintain records of their reasons for not performing EAs violated HAR § 11-200-8(E);

C. For an order invalidating the subject permits for noncompliance with HEPA and enjoining the permits' implementation pending full compliance with HEPA.

D. For a mandatory injunction or stay that orders the Defendants to fully comply with HEPA and its implementing regulations for all future permit applications;

E. For the Court to grant Plaintiff's expenses and costs of suit, including reasonable expert witness and attorneys' fees;

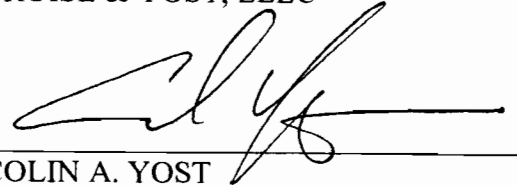
F. For the Court to retain continuing jurisdiction to review Defendants' compliance with any judgment and orders issued herein;

G. For such additional judicial determinations as are necessary to effectuate the foregoing; and

H. For such other and further relief as the Court shall deem just and proper.

DATED: Honolulu, Hawai'i, July 21, 2009.

CRUISE & YOST, LLLC



COLIN A. YOST  
Attorney for Plaintiff