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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-118307
CED9-119

February 6, 1979

Mr. Elvis J. Stahr
President, National Audubon
Society
950 Third Avenue
New York, New York 10022

— DLG

AGC 33
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DLG 642

Dear Mr. *Stahr,*

Your letter of January 11, 1979, stated that our report of November 1, 1978, to the Secretary of the Interior (CED-79-6) contained numerous inaccuracies that seriously weakened our findings. Following receipt of your letter, we reviewed the information used to support our recommendation that Interior discontinue [acquisition of Kealia Pond on the Island of Maui, Hawaii] and examined the limited new data provided in your letter. Our position remains unchanged.

We agree that Kealia Pond should remain a wildlife refuge. This is reflected in our recommendation that the Secretary monitor State and county actions to assure that they are compatible with a waterbird habitat. We do not agree, however, that actual and planned development in the pond area constitute serious threats to the survival of the coot and the stilt, necessitating Federal acquisition through condemnation.

As pointed out in our report, data in the recovery plan approved by the Director of Interior's Fish and Wildlife Service (FWS) show that the coot has already surpassed its population objective and that the stilt population is well on the way to recovery without the acquisition of Kealia Pond. (See p. 9 of enclosure for discussion of population objectives.) Our report also shows that State-owned Kanaha Pond is the primary nesting and feeding habitat for both the coot and the stilt, that Kealia Pond is within a zoned conservation district, and that both ponds have been designated by the State as wildlife sanctuaries. (See pp. 1 to 5 of enclosure for responses to specific points relating to the current status of the two ponds.)

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Further, the interagency cooperation provisions (section 7) of the Endangered Species Act of 1973, as amended, provide an effective mechanism to protect Kealia Pond. Before the pond can be converted to a boat harbor or marina or other adverse developments occur, a lengthy review process, including consultation with FWS, is required. The high-level Endangered Species Committee, established by the 1978 amendments to the act, would then have to determine whether (1) the project is of regional or national significance and in the public interest, (2) the benefits to be derived clearly outweigh the benefits of conserving the species' habitat, and (3) no reasonable and prudent alternative to Kealia Pond exists. Using this criteria, the Committee blocked completion of the Tellico Dam in Tennessee on January 23, 1979.

As your letter points out, the U.S. Army Corps of Engineers is conducting a study of alternative harbor sites on Maui. Before adverse development could occur, the Corps would have to find that Kealia Pond is not only the best site for a harbor on Maui, but that no reasonable and prudent alternative site exists on the Island. In the unlikely event Kealia Pond is found to be the only site for a harbor on Maui, FWS would have ample opportunity to reinstate condemnation proceedings, if required. (See pp. 6 to 7 of enclosure for complete chronology.)

We are still of the opinion that there is no persuasive reason for Interior to acquire Kealia Pond, and therefore have no plans to withdraw or change our recommendation.

Your letter refers to the points included in a November 20, 1978, letter from the Vice-President of the Hawaii Audubon Society and requests us to review his arguments to correct the inaccuracies in our report. Our review indicated that many of the points he raised were based on speculation and conjecture and that others were inaccurate. Our responses to each of the points raised are enclosed.

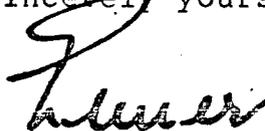
We have been informed that the Secretary of the Interior's response to our report parallels yours. We intend to recommend that the Secretary work with us and the State of Hawaii to resolve this issue. To accomplish this, we will propose a meeting of all the parties involved so that commitments concerning the future of Kealia Pond can be discussed and a working accord arranged. We would welcome your participation.

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Because of continuing congressional interest in the Federal acquisition of Kealia Pond, we are sending copies of this letter and your request to the Chairmen of the Senate Committees on Governmental Affairs, Appropriations, and Environment and Public Works, and to the Chairmen of the House Committees on Government Operations, Appropriations, Merchant Marine and Fisheries, and Public Works and Transportation. Copies are also being sent to Hawaii's Senators and Congressmen, Senator Proxmire, the Governor of Hawaii, the Mayor of Maui, the Secretary of the Interior, the Director of the U.S. Fish and Wildlife Service, and the Director, Office of Management and Budget.

We trust that this letter satisfactorily responds to your request.

Sincerely yours,



Comptroller General
of the United States

Enclosure

GAO RESPONSES TO POINTS RAISED IN THE
NOVEMBER 20, 1978, LETTER FROM THE VICE-PRESIDENT
OF THE HAWAII AUDUBON SOCIETY

Point: "One is immediately struck by the fact that the Kealia Pond acquisition issue has been singled out for action by GAO although the report of the nationwide GAO review of Endangered Species Act implementation will not be complete for several months. We suspect this is a response to strong pressure from State and/or county officials and feel that it is improper for an action of such significance to be taken before the details of the entire GAO study are available for review."

"The reference to a 6.4 million appropriation is accurate, but we have reason to believe that this figure far exceeds the actual appraised value of the site and is therefore an inaccurate picture of what the Department of the Interior intends to pay. Presumably consultation with your own staff in the U.S. Fish and Wildlife Service would confirm this."

Response: GAO is responsible for promptly bringing our findings to the attention of the Congress and agency officials so that corrective actions can be taken. We give particular emphasis to communicating findings which present opportunities for achieving greater economy, improving efficiency, and obtaining better program results. Initiation of condemnation proceedings, not your suspicion of strong State and/or county pressure, was the primary reason why the Kealia Pond acquisition was singled out for action.

The approximate \$6.4 million appropriated by the Congress for the acquisition of Kealia Pond was based on justification provided by Interior. If this figure far exceeds the amount Interior intends to pay, the error lies with the Department, not with our report, and should be fully explained to the congressional appropriation committees.

Point: "The brief description of the status of Kanaha Pond is very misleading. A review of the detailed discussion of the site in inclosure 4 would confirm this. The site is a sanctuary in name only. The State Department of Transportation has jurisdiction over the pond and has refused to transfer ownership to the

Department of Land and Natural Resources, the State agency responsible for wildlife management. The DLNR has implemented limited habitat improvement efforts at the pond, but the site is clearly not assured permanent protection and should not be thought of as an acceptable alternative to Kealia Pond."

Response: Our descriptions of Kanaha Pond and Kealia Pond were taken from the 1970 pamphlet, "Hawaii's Endangered Waterbirds", prepared by the State of Hawaii's Division of Fish and Game and Interior's Bureau of Sport Fisheries and Wildlife (now FWS). This pamphlet was used by Interior to justify acquisition of Kealia Pond in the draft environmental impact statement dated March 15, 1978.

We agree that the State Department of Transportation has jurisdiction over Kanaha Pond. However, the pond is administered by the State Department of Land and Natural Resources, and its designation as an endangered wildlife sanctuary and the protection provided it by the endangered species act, limit State and private actions to those compatible with a waterbird habitat.

Point: "A quick review of the long list of wetland areas in the State that have been adversely modified in recent years will make it readily apparent that conservation zoning is, in itself, no assurance of permanent protection. As for the sanctuary status, it is correct that Kealia was also a state sancturay in name only for several years. However, this designation was only by agreement with the landowner (Alexander and Baldwin) and was subject to cancellation at any time. As a matter of fact, the agreement has expired anyway, so it is no longer even a 'paper' sanctuary. As far as the waterbirds are concerned, it never made any difference because the State efforts to 'manage' the pond for waterbirds were token at best."

Response: We agree that the location of Kealia Pond within a zoned conservation district does not assure permanent protection. State Department of Land and Natural Resources officials informed us that the current agreement with the principal landowner can be revoked in 30 days. However, if the pond is

rezoned, any subsequent development would require approval from the Corps of Engineers and, as such, would fall under the authority of the Endangered Species Act (discussed in detail later). State officials advised us that they had not improved Kelia Pond to increase its potential as waterbird habitat primarily because of the continuing threat of Federal acquisition.

Point: "Mr. Eschwege's letter attempts to build a case that the FWS acquisition plan for Kealia is inconsistent with FWS policies. As explained earlier, 'sanctuary' status and conservation zoning clearly do not preclude uses that are not compatible with a wildlife refuge. If this were so one wonders why there is a sewage treatment plant injecting sewage under Kanaha Pond, a private residence in the middle of the Paiko Lagoon State Wildlife Refuge on Oahu, and a golf course where Salt Lake used to be. One also wonders about the value of conservation zoning for the largest fresh water marsh in the State (Kawainui) when the Land Use Commission has concluded that sloping lands abutting the marsh are unrelated ecologically to the integrity of the marsh and are more appropriately zoned for urban use. Other equally illustrative examples abound."

"Mr. Eschwege's letter also states that continued State protection of the pond was never considered a viable alternative by FWS. That it was considered an alternative is evidenced by the discussion of alternatives within the FWS Draft EIS for acquisition and management of Kealia Pond as a National Wildlife Refuge. In this document it was concluded that the State was not a logical alternative for management and it was pointed out that the State agency that would be responsible for this job had joined in recommending that the pond become a national wildlife refuge. As to the viability of State or County management, that is another question which you can be sure the FWS has considered. However, in review of the state's track record in waterbird conservation it is no surprise that the alternative was ruled out. The State's endangered waterbird 'program' has been largely lip service. What constructive research has been conducted has been funded largely by private organizations or the Federal Government. Tens of thousands of Federal dollars that could have been used for active wildlife programs have been returned annually for lack of

matching by the State government. Additional funding opportunities through the Endangered Species Program have been lost because the State has not shown the initiative to qualify. There is no question that there are competent people within State resource agencies that could effectively manage Kealia Pond as a refuge, but unless there is a major change in administration policy and a demonstration of initiative in that direction, there is little hope that such a State program could ever achieve its objectives."

Response: As evidenced by the 1978 amendments to the Endangered Species Act, it is not the Congress' intent to prohibit all economic growth and development in existing wetland areas. Compatible dual-use and even the elimination of some existing wetlands are permitted under the act, as amended. Because each project must be considered separately under the act, the examples you use to support Federal acquisition of Kealia Pond have no bearing on the legislative policies and procedures that would be required if the pond were rezoned and if economic development were proposed.

Both the Chairman of the State Department of Land and Natural Resources and the Director of the Department's Fish and Game Division strongly oppose Federal acquisition of the pond. Only the Chief of the Fish and Game Division's Wildlife Branch, who is also the leader of the FWS Hawaiian Waterbirds Recovery Team, has "joined in recommending that the pond become a national wildlife refuge." A reason given us by this official was that the Federal Government has the funds for acquisition, so why not buy the pond.

We agree that Federal matching funds for wildlife programs have been lost and that Hawaii has not qualified for endangered species cooperative agreement grants-in-aid. As of October 1, 1978, only 22 States had entered into cooperative agreements, and regulations to implement December 1977 amendments to the act to make it easier for States to qualify had not been promulgated. Our review showed that the State was actively working towards qualification and should do so once Interior has promulgated the implementing regulations.

Point: "This paragraph implies that the interest of the FWS in establishing a national wildlife refuge at Kealia is based solely on fears that a proposed harbor development would lead to rezoning and consequent habitat loss. This is only a half-truth that misses the main point. The Hawaii Waterbird Recovery Team has written that the pond 'has great potential and, if fully developed, would well be the best area in the State for stilt and possibly coot.' Refuge status would insure the opportunity to implement the proposed management plan to achieve this objective. On the average, the two ponds on Maui account for a quarter of the State's coot population and more than a third of the States stilt population, but they can not be thought of as independent units that can compensate for loss or radical alteration of the other site."

Response: As our report states, Kealia Pond complements Kanaha Pond by providing a feeding area for both the coot and the stilt and a nesting habitat for the coot. Improvements to the pond area could also expand the nesting habitat of the stilt. Our point is that Federal acquisition is not necessary to maintain the pond as suitable wildlife habitat.

Point: "We find it hard to believe that the GAO personnel working on the study in Hawaii were convinced that 'the only development currently planned, for the area is expansion of the aquaculture farming'. Mayor Cravalho was a staunch supporter of a deep draft harbor at Kealia Pond during the period in the late 1960's when the U.S. Army Corps of Engineers was studying alternative harbor sites on Maui. There was, in fact, considerable opposition to Kealia as a harbor site during the Corps study. The State Department of Transportation recommended in 1972 that the Corps defer site selection until conditions changed sufficiently to justify the need for a second port. The study was re-initiated in October 1978 at the request of the State DOT and county officials. For Mayor Cravalho to convince the GAO that harbor development was not a plan under consideration for the site, or to simply hide the fact altogether, was deceptive. Fortunately, in this instance, we are confident that the Corps is fully aware of the controversial nature of the project and the environmental considerations involved."

"Again, it should be pointed out that the 'lengthy review process' required by State law leaves little room for comfort in view of the track record. It seems likely that in this case the regulatory authority with the greatest clout will be the Corps' own Section 404. It is also important to note that the same regulatory authority would apply for habitat development proposals should the site become a FWS refuge."

"The statement that the county and State 'will consider improving the pond' is about as noncommittal as one can be, and leaves even less room for satisfaction. If the FWS could be certain that the State and/or county could and would implement an effective management plan at the site and guarantee future wildlife protection, then the acquisition funds would be better spent elsewhere or not at all."

"The final statement in the paragraph regarding the principal landowners lack of plans for commercial development also seem hard to believe in light of the reinitiation of Corps study for harbor development. Are we to believe that the Corps and State DOT restarted the project, and neither the County or the landowner knew anything about it?"

Response: Your chronology correctly sets forth the events that have transpired to the present, and, except for the reinitiation of the Corps' study that occurred after our field work was completed, were identified and evaluated by our staff. However, even the ongoing study of alternative harbor sites does not necessitate Federal acquisition of Kealia Pond. A clear understanding of the protective provisions of the Endangered Species Act, as amended, is the basis for our conclusion. All the following speculative and conjective events would have to occur before construction of a harbor at Kealia Pond could begin or other economic development initiated.

1. The Corps would have to find that Kealia Pond is not only the best site for a harbor on Maui, but that no reasonable and prudent alternative site exists on the Island.
2. The conservation district would have to be rezoned and the lengthy review process,

including preparation of a State environmental impact statement and public hearings, would have to result in an application for a Corps' permit.

3. A biological assessment (review) would have to be conducted by the Corps, as required by law before any construction contract could be entered into, and the resulting consultation with FWS would have to show that the project would adversely affect the species.
4. The Corps would have to deny the permit, and the State or the landowner would have to apply for an exemption from the Endangered Species Committee 1/ established by the 1978 amendments.
5. Five of the Committee's seven members would have to determine that (1) the project is of regional or national significance and in the public interest, (2) the benefits to be derived clearly outweigh the benefits of conserving the habitat, and (3) no reasonable and prudent alternative to Kealia Pond exists.

Only after all the above have occurred could construction of a harbor at Kealia Pond begin. In the unlikely event all of these actions occurred, FWS would have ample opportunity to reinstitute condemnation proceedings, if required.

Point: "Acquisition of Kealia as a refuge is consistent with FWS policy and criteria. The reference to priority categories is misleading because half the story is left untold. We are unaware of any 'priority system' other than that recently applied by your department to

1/The seven members are the Secretaries of the Interior, the Army, and Agriculture; the Chairman of the Council of Economic Advisors; the Administrators of the Environmental Protection Agency and the National Oceanic and Atmospheric Administration; and a representative from the affected State(s).

implement a presidential directive to Federal agencies to identify candidate critical habitat on Federal lands. In this ranking, it is correct that stilt and coots were placed in category 3; species facing low threats. This ranking affects only the timetable of report submission by Federal agencies. The ranking was also based upon the FWS knowledge of the status of endangered species on Federal lands under review. Most of the stilt and coot habitat on non DOI Federal lands in the State is already protected in one way or another, generally by cooperative agreement with the FWS."

"For this reason, the low priority ranking for candidate critical habitat identification is justified but it should not be interpreted as evidence that FWS biologists are not seriously worried about the survival of these species. It should be noted that the FWS and the State, in numerous joint and independent publications, have repeatedly stressed the rapid loss of habitat and consequent imminent threats to survival of the wetland birds."

Response: A criterion that must be met before a habitat can be acquired for an endangered or threatened species is that the species must be in a high priority category based on FWS's endangered species recovery priority system. This system is not the same as the one used to establish the critical habitat identification timetable referred to in your letter.

In April 1978, FWS biologists at the Office of Endangered Species ranked listed endangered and threatened species based on a recovery priority system that considers three criteria--degree of threat, recovery potential, and taxonomic status--in a matrix of 12 priorities for recovery planning and resource allocations. Both the coot and the stilt are in the priority ten category because experienced FWS biologists determined that the degree of threat to their survival is low and their recovery potential is high. Therefore, the acquisition of Kealia Pond is not consistent with FWS's criteria relating to the endangered species program.

Point: "The discussion of population data that appears in Mr. Eschwege's letter attests to his lack of understanding of what the numbers mean. Before I became a member of the Hawaiian Waterbirds Recovery Team, I recommended strongly against establishment of a 'population objective' figure as a primary criterion for management programs. Now the numbers have come back to haunt the Team because they were unrealistic and based upon inaccurate and inconsistent data. Interpretation of data derived from waterbird counts in the State is complicated by the combined effect of several problems. These include, among others: (1) variation in the list of sites surveyed, (2) variations in individual site coverage and methods of survey, (3) variations in competency of observers, (4) scheduling of surveys with little or no respect to weather, tidal patterns, time of day, etc., and (5) inconsistencies in methods of recording data. Count records show some radical fluctuations, sometimes exceeding 200%, so description of 'trends' is particularly dangerous. The reference to apparent upswing in stilt population in Mr. Eschwege's letter does not take into account the major increase in the number of sites surveyed in recent years. We can hope for the day that the endangered waterbirds are reproducing successfully in sufficient number to insure their continued productivity with the few habitats that can be assured future protection. In recommending Kealia Pond as 'essential' habitat for stilt and coots, the Recovery Team recognized its prime current value to these species, and its even greater potential."

Response: FWS requires that recovery plans include "* * * as prime objectives the restoration of the species to specific population levels and distribution judged to be adequate for reclassifying or delisting of the species." The population objectives of 2,000 for each of the two species were established by the species recovery team comprised of responsible individuals having expertise or current personal involvement with the species. They represent specific population levels judged by the recovery team to be adequate for reclassifying or delisting the species. The results of the more recent surveys should not be used to discredit the original population objectives, but to justify the delisting or reclassification of the species to the threatened category and to modify the recovery plan accordingly.

Point: "There is no question that acquisition of other refuges on Kauai, Oahu and Molokai has improved the picture for stilt and coots since the original recommendations for acquisition of Kealia were made. However, both the Recovery Plan and the Draft EIS for Kealia Pond attest to the fact that acquisition and habitat management at Kealia is still high priority. One wonders from whom the GAO representatives learned that 'changes in the species status have not been monitored' when in fact the FWS has greatly accelerated its population monitoring program in recent years, particularly within designated and potential refuges. Data for Kealia and other important stilt and coot habitat in the State are more exhaustive than ever before, and they substantiate the great importance of Kealia to the survival of these species."

Response: In our responses to the points above, we have identified statements in both the recovery plan and draft environmental impact statement that should be clarified or revised to reflect the current status of Kealia Pond. Justification for the continued high priority given the acquisition of Kealia Pond cannot be substantiated by available information and data. Interior officials who stated that changes in the species' status had not been monitored, and that the initial decision had never been reevaluated, include the FWS representative to Interior's Land Planning Group, responsible for approving all land acquisitions, and the chief of the Office of Endangered Species' branch responsible for recovery plans and teams.

Point: "Hopefully, the discussion provided here clearly indicates that the conclusions in Mr. Eschwege's letter are largely unwarranted. The statement with respect to compatibility of the aquaculture facility and waterbird use should not be used as an argument against the refuge concept. The Kealia Draft EIS clearly attributes summer waterbird use in recent years to the presence of the catfish farm and further proposes to retain the facility once the area is in refuge status. The plan also calls for creation of large impoundments to allow better management of water levels and to provide a means to periodically remove silt that now accumulates in the absence of a summer drying period. Although it is certain that unlimited expansion of aquaculture facilities would conflict with refuge goals, there is every reason to believe that the two can continue to coexist."

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Response: We conducted a thorough review of available documentation relating to the planned acquisition of Kealia Pond and interviewed pertinent Interior, FWS, State, and other officials. Consequently, our position is well supported. The justification to acquire Kealia Pond appears to be based largely on suspicions, feelings, and opinions.