

State of Hawaii
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Forestry and Wildlife
Honolulu, Hawaii 96813

August 12, 2010

Chairperson and Members
Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Land Board Members:

**SUBJECT: DENIAL OF REQUEST FOR CONTESTED CASE HEARING BY
SUMMER K. NEMETH AND HUANG CHI KUO**

This submittal requests the Board to deny the petitions for a contested case hearing filed by Summer K. Nemeth and Huang Chi Kuo for Item C-1 of the January 8, 2010 Board meeting, which issued an immediate right of entry to conduct conservation management for the Kaena Point Ecosystem Restoration Project on Kaena Point Natural Area Reserve and Kaena Point State Park, TMKs 8-1-001-006; 8-1-001-022; 6-9-001-030; 6-9-002-004; 6-9-002-009; 6-9-002-013, Oahu, subject to the standard terms and conditions of the most current right-of-entry permit form, as may be amended from time to time; and such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

BACKGROUND:

The proposed Kaena Point Ecosystem Restoration Project is a joint project of DLNR-DOFAW-Oahu Natural Area Reserves Program, DLNR-State Parks, The Wildlife Society, Hawaii Chapter (TWS), and the U.S. Fish and Wildlife Service (USFWS). The project involves the planning and implementation of a predator-proof fence to exclude small mammals (dogs, cats, mongoose, rats, mice) from the coastal ecosystem at the tip of Kaena Point and to remove any animals remaining within the fenced area. The project is ready for implementation after resolution of contested case petitions. A Draft Environmental Assessment (EA) was prepared in December 2007, and the Final EA was published in June 2009, after briefing the BLNR on the project and EA process in the May 22, 2009 meeting. Neither petitioner commented during the Draft EA comment period, and there were no challenges to the Final Environmental Assessment or Finding of No Significant Impact (FONSI) during the challenge period. A Special Management Area permit and a Shoreline Setback Variance have been approved. The project is primarily funded through a Federal grant from the USFWS to TWS.

Previous Contested Case Petitions

On October 24, 2008, BLNR unanimously authorized the Chair to negotiate and sign a cooperative agreement with the US Fish and Wildlife Service and The Wildlife Society, Hawaii Chapter, for the implementation of the Kaena Point Ecosystem Restoration Project. Following the meeting, on November 3, 2008, four contested case petitions were filed in response to the

approved staff recommendation. Petitioners Michael Nawaiki O'Connell, Summer K. Nemeth, Sandra M. L. Park, and Denis Park's written requests for a contested case were denied in the May 22, 2009 meeting of the BLNR, as agenda item C-2, because a contested case was not required by law.

DISCUSSION:

1. Denial of Contested Case Hearing Regarding BLNR Agenda Item C-1 of the January 8, 2010 Board meeting, which issued an immediate right of entry to conduct conservation management for the Kaena Point Ecosystem Restoration Project on Kaena Point Natural Area Reserve and Kaena Point State Park, TMKs 8-1-001-006; 8-1-001-022; 6-9-001-030; 6-9-002-004; 6-9-002-009; 6-9-002-013, Oahu

This submittal recommends denial of the contested case petitions because petitioners do not have standing and are not entitled to a contested case as a matter of right.

Facts

At its meeting on January 8, 2010, the Board approved the issuance of an immediate right of entry to the US Fish and Wildlife Service and The Wildlife Society for the purpose of constructing a predator proof fence as part of the Kaena Point Ecosystem Restoration Project. At the meeting the DLNR explained that the purpose of the fence is to prevent predators, such as dogs, cats, and rodents. The fence design provides for two access doors to be included in the fence that would facilitate public access into the Kaena Point area beyond the fence from the Mokuleia and Waianae sides and a third access door to allow access to the fishing shrine upslope. Also, a clear path along the outside of the fence will be maintained to allow access for people who may come down the unimproved ridge trail from the military bunkers above Kaena Point. The access doors are designed as a double door system that will be large enough for up to nine people to enter together. It will also accommodate a person with a bicycle or a fishing pole. Access along the shoreline is not expected to be affected as the fencing will stop at or before the high tide line. Once the fence was installed, it would be the property of the State.

At the meeting, requests for a contested case hearing were made by two people, Summer Nemeth and Huang Chi Kuo. Both requestors subsequently submitted written petitions for a contested case hearing. In her written petition, Summer Nemeth claimed that she exercises traditional and customary Hawaiian cultural and religious practices at Kaena. Huang Chi Kuo's petition states that his legal interest is the conservation of biota at Kaena Point.

Discussion

A. Sources of Standing

A contested case is required if the statute or rule governing the activity in question mandates a hearing prior to the administrative agency's decision-making, or if a hearing is mandated by due process. Bush v. Hawaiian Home's Com'n, 76 Haw. 128, 134, 870 P.2d 1272, 1278 (1994). Thus a particular petitioner has standing if so stated in a statute or rule or if the petitioner has a property interest entitled to due process protection.

Petitioners in this matter, therefore, have two potential sources of standing. First, standing may be afforded by statute or rule. Second, petitioners may have a property interest entitled to protection.

First, as to standing pursuant to statute or rule, the statutes and rules do not discuss standing or mention who may be entitled to request a contested case.

Hawaii Administrative Rules Chapter 13-1 describes the procedures governing contested case hearings.

HAR § 13-1-31(b) describes persons or agencies that “shall be admitted as parties” when a contested case is held. Subsection 1 refers to government agencies. Subsection 2 states:

(2) All persons who have some property interest in the land, who lawfully reside on the land, who are adjacent property owners, or who otherwise can demonstrate that they will be so directly and immediately affected by the requested action that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application.

Second, as to property interest entitled to due process protection, “in order to assert a right to procedural due process, [a plaintiff] must possess an interest which qualifies as ‘property’ within the meaning of the constitution.” Sandy Beach Defense Fund v. City Council of City and County of Honolulu, 70 Haw. 361, 377, 773 P.2d 250, 260 (1989).

“To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” In re Roberts Tours & Transportation, Inc., 104 Hawaii 98, 106, 85 P.3d 623, 631 (2004) (quoting Board of Regents).

B. Specific Claims of Petitioners

1. Huang Chi Kuo Petition ¹

¹ Huang Chi Kuo’s petition was filed past the 10 day time limit provided for in HAR § 13-1-29(a).

In his petition, Huang Chi Kuo states that his specific legal interest in the matter is the conservation of native biota of Kaena Point Natural Area Reserve. According to the petition, the specific issues to be raised in a contested case hearing would be that (1) the environmental assessment (EA) did not sufficiently explore the alternative options and it did not have sufficient data on potential impacts of terrestrial invertebrates, and (2) the negative impact of rat eradication was not addressed. The specific disagreement stated in the petition is that (1) the project could significantly impact the native biota, (2) EAs were inadequate and insufficient, and (3) the conservation district use application (CDUA) from 1982 should not cover this project. It is believed that the relief that is being sought by the petitioner is for the Board to cease the Kaena Point Ecosystem Restoration Project until a proper EA/environmental impact statement (EIS) is conducted.

The issues raised by Mr. Kuo are all related to whether the EA was adequate or not in assessing the potential environmental impacts of the project. The question of whether the 1982 CDUA covered this project is subsumed in the issues regarding the EA.² Mr. Kuo does not have standing to challenge the EA through a petition for a contested case hearing. Chapter 343 of the Hawaii Revised Statutes (HRS) provides a procedure for challenging the adequacy of an EA or a determination that an EIS is not required. If a specific statutory process is provided, it must be followed.

In addition, Mr. Kuo has not identified a property interest which he is attempting to protect. He has not identified a property interest that will be directly and immediately affected by the requested action nor has he asserted a property interest that rises to the level of an entitlement. Lacking an identifiable property interest, Mr. Kuo does not have standing to challenge the Board's action in this matter.

Lastly, as explained below, the decision of the Board was a matter of internal management and as such is not subject to a contested case.

2. Summer Nemeth Petition

Petitioner Nemeth's claimed interest is based on her family having practiced subsistence fishing in the area and her exercise of traditional and customary Hawaiian cultural and religious practices at Kaena. Although these are interests which have been held in other cases to constitute a sufficient basis for standing, that is not the case here.

The requirement to hold a contested case is found in chapter 91, HRS, also referred to as the Hawaii Administrative Procedures Act (HAPA). An agency must follow HAPA when it is "acting in either a rule making capacity (quasi-legislative) or in the adjudication of a contested case (quasi-judicial)." *Sharma v. State, Dept. of Land and Natural Resources*, 66 Haw. 632, 637, 673 P. 2d 1030 (1983). The Board was acting in neither of those capacities in this case when it made the decision to allow the predator proof fence to be erected.

² The EA stated that based on conversations with staff from the DLNR Office of Conservation and Coastal Lands, a new CDUA would not be required for this project. Instead, the project was permitted under existing CDUA No. SH-2/26/89-1459.

An administrative agency has more duties than just rule making or adjudication. *Id.*, 66 Haw. at 637, 673, P. 2d at 1034. An agency must also deal with matters related to its internal management. Matters related to the internal management of an agency do not fall within the purview of HAPA and as such, no contested case hearings are required. *Id.*

The legislative history behind the enactment of HAPA clarified that “matters relating to...the custodial management of the property of the state or county or of any agency (are) primarily a matter of ‘internal management.’” *Ah Ho v. Cobb*, 62 Haw. 546, 552, 617 P.2d 1208, 1212 (1980) (citing Stand. Com. Rep. No. 8, 1961 Hawaii House Journal 653, 656.) “Internal management of an agency necessarily includes the custodial management of public property entrusted to the agency.” *Holdman v. Olim*, 59 Haw. 346, 335-56, 581 P.2D 1164, 1170 (1978). “The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.” *Adderly v. Florida*, 385 U.S. 39, 47 (1966).

In the current case, the decision by the Board to erect a predator proof fence is neither a quasi-legislative action nor an adjudicatory action. The proposed predator proof fence is part of on-going management efforts aimed at the preservation and recovery of native vegetation and wildlife within the Kaena Point Natural Area Reserve. The purpose of the fence is to provide a predator free area for native plants and wildlife where these species may flourish and to potentially provide a predator free area for the establishment of other native populations. The decision to erect the predator proof fence is part of DLNR’s custodial management of the public property that has been entrusted to DLNR and as such, is not subject to the requirements of HAPA, including the requirement to hold a contested case hearing. The Petitioner, Summer Nemeth, is not entitled to a contested case from the Board’s decision to allow the predator proof fence to be erected in Kaena Point Natural Area Reserve.

RECOMMENDATION: That the Board:

Deny the petitions for a contested case hearing filed by Summer K. Nemeth and Huang Chi Kuo based on lack of standing.

Respectfully submitted,



PAUL J. CONRY, Administrator
Division of Forestry and Wildlife

APPROVED FOR SUBMITTAL:



LAURA H. THIELEN, Chairperson
Board of Land and Natural Resources

Attachments

1. Contested Case Hearing Petition: Summer K. Nemeth
2. Contested Case Hearing Petition: Huang Chi Kuo

PETITION FOR A CONTESTED CASE HEARING

BOARD OF LAND AND NATURAL RESOURCES

10 JAN 21 AIO 43

1. Name: Summer Kaimalia Nemeth

Phone: [REDACTED]

2. Address: [REDACTED]

DEPT. OF LAND
& NATURAL RESOURCES
STATE OF HAWAII

RECEIVED
JAN 19 2010

3. Attorney: Pro se.

DLNR/APO

4. Address: N/A

5. Subject Matter: The Board of Land and Natural Resources (BLNR) January 8, 2010 approval of the "IMMEDIATE RIGHT OF ENTRY TO CONDUCT CONSERVATION MANAGEMENT FOR THE KA'ENA POINT ECOSYSTEM RESTORATION PROJECT ON KA'ENA POINT NATURAL AREA RESERVE AND KA'ENA POINT STATE PARK"

6. Date of public hearing / Board meeting: Friday, January 8, 2010

7. Legal authority under which hearing, proceeding or action is being made: HRS § 91-2, 91-9, HRS § 171-6, HRS §§ 183C-3, 183C-6, HRS § 195D-21, HRS § 205-A, HRS § 343-5, HAR § 13-1-28, HAR § 13-1-29, HAR § 13-1-31, HAR § 13-5-22, HAR § 13-5-30, HAR § 13-209-5, NEPA

8. Nature of your specific legal interest in the above matter, including tax map key of property affected:

a. Tax Map Key Numbers: (1)6-9-02:4,9,13,14 &8-1-01:6 and surrounding areas.

b. Background

On Friday, January 8, 2010, the State's BLNR was asked to make a decision on Item C-1: "ISSUANCE OF IMMEDIATE RIGHT OF ENTRY TO CONDUCT CONSERVATION MANAGEMENT FOR THE KA'ENA POINT ECOSYSTEM RESTORATION PROJECT ON KA'ENA POINT NATURAL AREA RESERVE AND KA'ENA POINT STATE PARK." The action described as "conservation management" is the construction of a predator fence within Ka'ena, a conservation district.

At the board meeting, Mrs. Summer Kaimalia Nemeth, a descendant of kanaka lawai'a who resided in both the Makua and Mokule'ia sides of Ka'ena, a cultural practitioner, educator, and member of the Lawai'a Action Network (LAN) presented verbal testimony against the Ka'ena Point Ecosystem Restoration Project (KPERP) on behalf of herself and as a member of LAN. Her testimony questioned the necessity of this extreme and potentially destructive form of conservation management, and the failure to identify other less permanent conservation alternatives. In the limited time given to her, she presented her concerns for the lack of

discussion and complete scientific study on existing species (specifically invertebrates, but also the failure to recognize the inter-relationships between the species of flora and fauna that currently reside in the NAR), as well as the impacts that the proposed project would have on the Ka'ena area (including but not limited to run-off, erosion, and the desecration of a significant cultural landscape) and the failure to complete a current CDUA for the project. The petitioner concluded with a verbal request for a Contested Case Hearing (HRS chapter 91) after the board voted in favor of the proposal.

d. Standing.

Summer Kaimalia Nemeth is the daughter of kanaka lawai'a Fred Mullins, who has traditionally practiced subsistence fishing with his ohana in the Ka'ena area from the 1950's to the present. He is the son of kanaka lawai'a Louise Aukai Helenihi Walters, who had traditionally practiced subsistence fishing with her ohana in the Ka'ena area from the 1920s to 2006 when she passed away. She was the daughter of kanaka lawai'a Quincy Pila Helenihi who lived in Makua-Ka'ena with his ohana and traditionally practiced subsistence fishing from the 1890s to 1960 when he passed away. He was the son of kanaka lawai'a Kalike (w) and James Kaiama Helenihi (k) who both resided in Ka'ena and practiced subsistence fishing in their lifetimes . . .

From the time of her birth in 1976, Summer Kaimalia Nemeth, had been steeped in the kanaka lawai'a traditions of her family at Ka'ena, and was taught at an early age that it was part of her kuleana (responsibility) to continue these traditions so that they can be shared with future generations. She continues in the present to exercise her traditional and customary Hawaiian cultural and religious practices at Ka'ena.

Between 1997 & 1998, the Ka'ena Point Community Advisory Committee (KPCAC) held public meetings in which Mrs. Nemeth and her father Fred Mullins participated. When the KPCAC became inactive, and no longer held meetings with the general public, she and her father became involved in the group Na Maka o Ka'ena which was a partnership between the DLNR and other interested parties (i.e. Ahupua'a Action Alliance), formed to address concerns for the lack of management at Ka'ena and to look toward community-based solutions that would alleviate some of the problems in the area.

When the same problems continued, in 2006, Summer and her father met on several occasions with former Chief of Staff George Lindsey who suggested they consider entering into a Kokua Agreement with the state. In the same year, they also took State Park Director Dan Quinn on a site visit to show him the devastating impacts that off-road activities were having on areas of cultural significance in Ka'ena. In 2007, Summer and her father formed the group Kokua Ka'ena with the intent of entering into a Kokua Agreement with the state. Unfortunately, when all of the paperwork was complete, George Lindsey no longer held the position of Chief of Staff, and the proposal for the kokua partnership with the state became obsolete.

In 2008, Summer Kaimalia Nemeth helped to form the LAN, a network of cultural practitioners/lawai'a dedicated to preserving, protecting, and perpetuating ancestral fishing traditions through cultural practice. The network is a hui of lawai'a who work together on issues that negatively impact their ability to continue teaching and practicing cultural traditions of resource management (and protection), fishing and gathering which have been passed down from

time immemorial. Mrs. Nemeth and other members of the LAN have family and genealogical ties to Ka'ena.

LAN members have been actively involved in protecting the natural and cultural resources in Ka'ena for generations, and continue to partner with other organizations who have a similar vision for Ka'ena. In 2009, members of the LAN were nominated to participate as fishing representatives in the Ka'ena Advisory Group. Sandra Park and Michael Nawaiki O'Connell, both founding members of the LAN, are also descendants of kanaka lawai'a in the area who continue to practice fishing traditions within Ka'ena. Both had filed contested cases (along with Summer Nemeth) against the formation of a cooperative agreement between DLNR, DOFAW and the Wildlife Society, Hawaii Chapter in November 2009, and have both demonstrated continued concern over the KPERP.

Summer, her ohana, and the other members of the LAN continue to exercise their traditional and customary native Hawaiian rights within Ka'ena.

Summer Kaimalia Nemeth has a genuine interest in the Ka'ena area, including the area in which the Ka'ena Point Ecosystem Restoration Project (KPERP) will take effect, which is separate from that of the general public.

The petitioner can and will provide information to assist decision-making on the KPERP. To manage and expedite the Contested Case Hearing, she will address:

Rights protected under Hawaii Const. Art. XI, secs.1 & 9, Art. XII, § 7, HRS § 1-1, HRS § 171-55, HRS § 174C-2c, HRS chapter 195D, HRS § 205A-2: 3A, HRS chapter 343; 40 C.F.R. § 1508.27(b); HAR § 13-5-1, HAR § 13-209-4.

Public Trust. Article XI, Section 1 of the Hawaii Constitution recognizes the application of the public trust to all natural resources, and requires that the state conserve and protect these resources (including marine resources), and promote development of these resources in a manner consistent with their conservation.

Environmental Justice. Article XI, Section 9 of the Hawaii Constitution holds the rights of the general public to a clean and healthful environment, including conservation, protection and enhancement of natural resources.

Traditional and Customary Practices. Article XII, section 7 of the Hawaii Constitution recognizes the importance of such rights by placing an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights. Accordingly, the State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible. Public Access Shoreline Hawaii v. Hawai'i County Planning Commission (hereinafter "PASH"), 79 Haw. 425, 450 n.43, 903 P.2d 1246, 1271 n.43 (1995), certiorari denied, 517 U.S. 1163, 116 S. Ct. 1559, 134 L. Ed. 2d 660 (1996). More precisely, all State agencies have a duty to identify them, assess the potential impacts of development on them, and protect these rights by preventing any interference with the reasonable exercise of these rights. Kapa'akai v Land Use Commission, 94 Haw. 31; 7 P.3d 1068 (2000). These rights, established during the period of the Kingdom of Hawaii, have been carried forth in the laws of Hawai'i unaffected by the changes in government. The exercise of such rights is a public trust purpose.

The proposed predator fence will impact land uses in the Ka'ena area. The project is also insensitive to traditional belief systems and practice specifically related to the area of Ka'ena. The project threatens the ability of native Hawaiians to exercise their traditional and customary rights in Ka'ena derived from custom which is recognized statutorily in HRS § 1-1. These rights include, but are not limited to:

- Subsistence fishing and gathering practices
- Burial practices;
- Exercise of other rights for religious, cultural, and subsistence purposes.
- Protection of mauka-makai and makai-mauka view planes.
- Protection of the Leinaka'uhane and the 'uhane of the area
- Native Hawaiian traditional and customary, cultural and religious uses.
- Access to and through the area

HRS § 174C-2c holds that “adequate provision be made for the protection of traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty . . .”

The Pu'eo (Hawaiian Short-eared Owl). Under the Endangered Species Act, the state is required to protect species that are subject to potential extinction and is supposed to coordinate its activities with the federal government to promote the conservation of endangered and threatened species. 16 USC § 1531, et seq. The purpose of this act is not only to allow such species to survive but to recover from their endangered or threatened status. Sierra Club v United States Fish & Wildlife Serv. 245 F3d 434 (5th Cir. 2001). This board also has the power under state law to protect any other species it determines needs protection because of “[t]he present or threatened destruction, modification, or curtailment of its habitat or range.” HRS § 195D-4(b).

Although the *Pu'eo* has been designated as a candidate for listing, it has never been listed as endangered or threatened species under the Endangered Species Act. The BLNR has specific duties to protect and conserve it if its survival is threatened by KPERP.

Preservation of Culturally Significant Viewplanes. HRS § 205A-2: 3A recognizes that an objective of Coastal zone management is to protect, preserve, and where desirable, restore or improve the quality of coastal scenic and open space resources. The petitioner feels that it is the BLNR's responsibility to preserve the mauka-makai and makai-mauka viewplanes of Ka'ena which are an important part of its cultural landscape.

Protecting Coastal Ecosystems. Also recognized in HRS § 205A-2:4A is the need to protect valuable coastal ecosystems, including reefs, from disruption and minimize adverse impacts on all coastal ecosystems. The petitioner feels that the construction of a predator fence in the Ka'ena NAR will have a irreversible impact on the reef systems of the surrounding area.

Hawaii Environmental Policy Act. Under HRS chapter 343, an EIS is required for all projects which will significantly impact a conservation district. However, the DOFAW and the DLNR failed to produce an EIS for the Ka'ena Ecosystem Restoration Project, instead they opted for an Environmental Assessment which is inappropriate for the project and which the petitioner believes will significantly impact both natural and cultural resources of Ka'ena.

According to Section 5-e of the same chapter: When a conflict of interest may exist because the proposing agency and the agency making the determination are the same, the office may review the agency's determination, consult the agency, and advise the agency of potential conflicts, to comply with this section. The petitioner recognizes the BLNR's decision-making in this situation as a conflict of interest, as the DLNR is an active, cooperative partner in the KPERP.

National Environmental Policy Act. Funding for the predator fence project at Ka'ena was granted to the Wilderness Society, Hawaii Chapter by US Fish and Wildlife, which would be classified as federal funding. Under NEPA regulations, "an agency must prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." The regulations promulgated by the Council on Environmental Quality established the following nonexclusive criteria for determining when a full EIS is required:

- "Impacts that may be both beneficial and adverse. A significant impact may exist even if the Federal agency believes that on balance the effect will be beneficial," 40 C.F.R. § 1508.27(b)(1);
- "Unique characteristics of the geographic area such as the *proximity to historic or cultural resources... or ecologically critical areas*," *id.* § 1508.27(b)(3);
- "The degree to which the effects on the quality of the human environment are likely to be *highly controversial*," *id.* § 1508.27(b)(4);
- "The degree to which the possible effects on the human environment are *highly uncertain* or involve unique and unknown risks," *id.* § 1508.27(b)(5);
- "The degree to which *the action may establish a precedent for future actions with significant effects* or represents a decision in principle about a future consideration," *id.* § 1508.27(b)(6);
- "Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a *cumulatively significant impact* on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts," *id.* § 1508.27(b)(7);

- "The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or *eligible for listing in the National Register of Historic Places* or may cause loss or destruction of significant scientific, cultural or historical resources," *id.* § 1508.27(b)(8);
- Whether the action threatens a violation of...requirements imposed for the protection of the environment, *id.* § 1508.27(b) (10).

Sufficiency of an environmental impact statement is a question of law. 81 H. 171, 914 P.2d 1364.

The proper inquiry for determining the necessity of an environmental impact statement (EIS) based on the language of §343-5(c) is whether the proposed action will "likely" have a significant effect on the environment; as defined in this section, "significant effect" includes irrevocable commitment of natural resources; where the burning of thousands of gallons of fuel and the withdrawal of millions of gallons of groundwater on a daily basis would "likely" cause such irrevocable commitment, an EIS was required pursuant to both the common meaning of "may" and the statutory definition of "significant effect". 106 H. 270, 103 P.3d 939.

Appropriate Management of Natural Resources. According to HAR § 13-5-1 the State must regulate land-use in conservation districts for the purpose of conserving, protecting and preserving not just a single species, but all natural resources.

Construction within a Natural Area Reserve. HAR § 13-209-4 states that any construction or improvement within a Natural Area Reserve is prohibited.

9. The specific disagreement, denial or grievance with the above matter:

Public Trust, Environmental Justice, & Protection of Coastal Ecosystems. The BLNR has a statutory and constitutional obligation to protect the natural resources of Ka'ena, and yet they have supported The KPERP which will threaten the current and future quality of the coastal waters of Ka'ena (construction of the predator fence will require trenching in an area that naturally slopes to the shoreline on both the Keawaula and Mokule'ia sides of the point). As construction is projected to take place during the rainy season at Ka'ena, the potential for siltation of reef systems in the surrounding area by way of natural run off is high; a threat to off-shore reef systems that are home to many marine species.

Any threat to the reef systems and ocean resources of Ka'ena, so deeply connected to the life of the lawai'a, is a threat to the resources which the petitioner and other kanaka lawai'a have an interest in protecting. Summer Nemeth has spent years advocating the State for greater protections of the natural and cultural resources of the area, and has a continued interest in protecting this ecosystem and sacred landscape as a part of her traditional and customary cultural and religious practice.

The continued protection the reefs of Ka'ena from erosion and siltation is necessary to protect the inter-dependent relationship between the lawai'a and the ocean for future generations of Hawaiians and the people of Hawaii. She is informed and believes that there is a substantial threat of both erosion and siltation on the ocean resources of Ka'ena that will be magnified in the construction of the predator fence in the NAR, despite the arguments presented by project managers. The DLNR must protect these reefs from disruption of projects like KPERP as defined in HRS § 205A-2:4A

Traditional and Customary Rights of Hawaiians. The BLNR approval of the KPERP will lead to abridgement and/or denial of constitutionally protected rights held by Petitioners as native Hawaiians. By allowing a project that can potentially devastate the off-shore reef ecosystem of Ka'ena, the State fails to protect the resources necessary for kanaka lawai'a to continue subsistence fishing and gathering practices for future generations who are descendents of the kanaka lawai'a of Ka'ena.

According to the final EA for the KPERP, the petitioners concern for existing burials in the area of construction was dismissed because of the rocky quality of the surface soil that covers the majority of the construction path. However, the petitioners are concerned that burials adversely affected may not be located in the previously disturbed roadbed, but above or below the proposed site for the fence.

The EA does not identify the NAR as a cultural landscape, nor does it make connections between the Leinaka'uhane and other cultural sites that will be mauka of the fence project. The proposed fence project will sever the mauka-makai and makai-mauka visual plane which is significant to cultural practice in the area. The petitioner feels it is her kuleana to protect these viewplanes for future generations, and that it is the DLNR's responsibility to appropriately manage this coastal zone by preserving these viewplaces under HRS § 205A-2: 3A.

Summer Nemeth does not believe that enclosing the Leinaka'uhane with a predator fence is culturally appropriate, and feels that the KPERP is also insensitive to traditional belief systems specifically related to the Leinaka'uhane. The Leinaka'uhane is so kapu to many practitioners. Having a fence that encloses it is blatantly disrespectful to the 'uhane (spirits), to the ancestors, and to the cosmogony of the kanaka maoli (the first people of Hawai'i). The petitioner also feels that the suggestion to add a "third gate" for the 'uhane to enter through is culturally insensitive and again disrespectful to the 'uhane who are seeking entrance into Po.

The Pueo. The use of rodenticides in the Ka'ena Point NAR, which will continue to be used for the Ka'ena Point Ecosystem Restoration Project may have had a significant impact on this culturally significant native species. When Summer Nemeth and other members of the LAN (whose families have been in the area for generations) raised concerns about the noticeable decline in the Pueo population at Ka'ena since the establishment of the NAR, a project manager, who has been studying the area for seven years (not long enough to see the changes in population between pre and post NAR Ka'ena) noted in her testimony that she had only documented a few Pueo in the area). Her findings documented in the EA do not take into consideration the knowledge of cultural practitioners and ohana who have frequented the area for generations, and who have testified that there was a large population of Pueo at Ka'ena in the past.

Under HRS § 195D-4(b), the board has an imperative to take steps to protect the range and habitat of the Pueo irrespective of its formal status. The petitioners, and native Hawaiians as a whole, have an interest in its protection, based on cultural and religious beliefs associated with this 'aumakua (familial guardian), and which requires them to seek the preservation and conservation of all the resources of Ka'ena.

Hawaii Environmental Policy Act. The petitioner believes that the construction of a predator fence will significantly impact both natural and cultural resources which kanaka maoli and kanaka lawai'a depend upon in Ka'ena, and that the final EA for the KPERP did not thoroughly or adequately report the potential harms and significant impacts of the planned construction in the conservation district of Ka'ena as required by HRS 343-5.

The BLNR should require an EIS be completed before any construction, that may be detrimental to Ka'ena and its stakeholders, takes place. But also an EIS is required because the project is funded by a federal grant from US Fish and Wildlife Service, under regulations of NEPA.

Summer Nemeth believes that there should be no question of a need for an EIS based on non-exclusive criteria established by the Council on Environmental Quality, the KPERP should require a complete EIS as:

- "Impacts that may be both beneficial and adverse. A significant impact may exist even if the Federal agency believes that on balance the effect will be beneficial," 40 C.F.R. § 1508.27(b)(1). In this case, the EA finds that the protection of the non-native, migratory species far outweighs any impact that construction may have on the area.
- "Unique characteristics of the geographic area such as the *proximity to historic or cultural resources... or ecologically critical areas*," *id.* § 1508.27(b)(3). Because the construction of the KPERP will take place in a Natural Area Reserve, in a Conservation District, and an area of unique cultural importance to all native Hawaiians (including lawai'a), the petitioner believes that an EIS must be completed.
- "The degree to which the effects on the quality of the human environment are likely to be *highly controversial*," *id.* § 1508.27(b)(4). As demonstrated in the testimonies from the hearings related to the KPERP, the petitioner believes that these effects have been considerably downplayed in the final EA.
- "The degree to which the possible effects on the human environment are *highly uncertain* or involve unique and unknown risks," *id.* § 1508.27(b)(5); In response to testimony by the petitioner on whether scientific studies on the ecosystem were thorough, and whether impacts of erecting a fence, and completely removing a predatory species from a sensitive ecosystem might negatively impact other flora and fauna that are part of that system, the project manager and other supporters of the project (including biologists) stated that this is "a test" and they will not know the real impacts until the project is underway.

- "The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or *eligible for listing in the National Register of Historic Places* or may cause loss or destruction of significant scientific, cultural or historical resources," *id.* § 1508.27(b)(8). The fence project has the potential to cause both loss and destruction of the reef ecosystem, which the petitioners consider to be a cultural resource, as it plays a key role in the practice of the *kanaka lawai'a*.
- Whether the action threatens a violation of...requirements imposed for the protection of the environment, *id.* § 1508.27(b) (10). The KPERP is in clear violation of requirements imposed for the protection of the environment including, but not limited to: HAR § 13-5-1 and HAR § 13-209-4 which the petitioner recognizes as applicable to the project.

Appropriate Management of Natural Resources. The KPERP is not an example of appropriate management of natural resources as it does not look at the entire ecosystem as a living system of interdependent species of flora and fauna. The project does not consider the impacts construction may have on reef systems, nor has it evaluated its use of rodenticides on other species in the area, or studied the plummeting population of Pueo at Ka'ena. The KPERP does not include a complete invertebrate study, which is very important when competition between predatory species comes into play. Summer Nemeth believes that the KPERP could cause irreparable harm to the natural resources of Ka'ena. As stated in HAR § 13-5-1, the State must regulate land-use in conservation districts for the purpose of conserving, protecting and preserving not just a single species, but all natural resources.

Failure to prepare a "Current" CDUP. The DLNR and DOFAW did not complete the CDUA/CDUP process for the KPERP. They state that the project falls under the existing CDUP which was created in 1982 for the formation of several NAR throughout the islands of Hawai'i. Nowhere in this outdated CDUP is there a mention of any type of construction within a NAR. Summer Nemeth believes that the BLNR should not dismiss KPERP from such a process as it is their responsibility to make the decisions that best protect our conservation districts.

10. Outline of specific issues to be raised:

- Whether the DLNR is required to prepare, and BLNR to adopt and implement a Habitat Conservation Plan for the Ka'ena NAR before any construction take place in the area;
- Whether BLNR's approval of the KPERP violated both DLNR's own rules and due process?

- c. Whether the BLNR violated its own rules and regulations regarding its decision to support KPERP, a construction project within a NAR;
 - d. Whether the DLNR/BLNR was required to complete an EIS for the KPERP;
 - e. Whether the BLNR should have agreed to the right of entry for the KPERP without a current CDUP, and when the CDUP from 1982 does not include any language relating to construction within the NAR;
 - f. Whether the BLNR must comply with the requirements of HRS § 343-5(b) and prepare and circulate for public review and comment an Environmental Impact Statement for protecting the natural resources of Ka'ena;
 - g. Whether the BLNR is violating state and federal laws protecting species facing possible extinction (even if not designated endangered or threatened) by failing to follow the proper procedures and apply proper standards for the protection of those species.
 - h. Whether the DLNR and DOFAW must consider environmental impacts, or take mitigation measures to avoid these impacts that relate to the delivery of materials into the construction area. And whether the public will be able to provide testimony about the impacts of selected method of equipment transport to the construction site within the NAR;
 - i. Whether the BLNR will require a complete invertebrate study (along with studying the relationship between competitive predator species within the NAR) before construction of the predator fence and increased use of rodenticides are to occur;
11. **Outline of basic facts:**

Summer Kaimalia Nemeth is an educator and cultural practitioner with cultural and genealogical ties to the wahi pana of Ka'ena. She and other members of the LAN have learned cultural practices specific to Ka'ena that have been passed down through generations of kanaka lawai'a of the area. She and other members of the LAN continue to practice subsistence fishing, gathering and other religious practices in the area of Ka'ena. They continue to pass on these traditions to the younger generations in order to continue to protect the resources for generations to come.

The petitioners believe that the Board has made a decision that is in direct violation of many laws and rules that were established to protect the cultural and natural resources of these islands, and that this decision will negatively impact the future relationships between the kanaka lawai'a of Ka'ena and the land and sea.

The petitioners feel that the decision made by BLNR was done so in a conflict of interest, and believe that because of this conflict of interest, the BLNR did not strictly

uphold the laws and rules which it requires for other land users (outside its own department). The BLNR was wrong to excuse the need for a current CDUP, failed to question the slippery science used in the EA, or to look more closely at potential impacts of this project.

The failure to genuinely prepare a Habitat Conservation Plan and to restrict and manage activities in Ka'ena has led to, and will in the future lead to overuse and loss of the unique natural and cultural resources at Ka'ena.

12. The relief or remedy to which you seek or deem yourself entitled:

That the BLNR:

a) REJECT AND NOT APPROVE OR ADOPT the Immediate Right of Entry for the Ka'ena Point Ecosystem Restoration Project;

b) DIRECT the DLNR staff to undertake, supervise, and prepare a current CDUA, Complete Invertebrate Study, and a comprehensive Habitat Conservation Plan as required under HRS chapter 155D-21 for the Conservation District that meets the full scope, terms, and conditions for a Habitat Conservation Plan as required by law, and to seek other alternatives to the predator fence conservation method that are culturally and environmentally appropriate for this unique wahi pana, as required by HRS 343-5; and to order the complete cessation of all project-related activities until these requirements created to protect the cultural and natural resources of Hawai'i have been met.

OR IN THE ALTERNATIVE,

c) GRANT Petitioner Summer Kaimalia Nemeth standing in this proceeding and CONDUCT a full contested case hearing on the proposed Ka'ena Point Ecosystem Restoration Project; and completely stop all project related activities until such case is resolved.

I thank you for your time and consideration,

Malama Pono,


Summer Kaimalia Nemeth, individually


**Summer Kaimalia Nemeth,
member of the Lawai'a Action Network**

DATED: Mililani, Hawaii, January 15, 2010

BOARD OF LAND AND NATURAL RESOURCES

1151 Punchbowl St., Kalanimoku Bldg. Rm. 130

Attn: Land Board Secretary

Honolulu, HI 96813

70 JUN 20 12:47

PETITION FOR A CONTESTED CASE HEARING

Name Huang Chi Kuo Phone [redacted] Fax [redacted]

Address [redacted]

Email Address [redacted]

Attorney (if any) NA. Phone [redacted] Fax [redacted]

Address NA

Email Address NA.

Subject Matter: Approval of item C1 of BLNR's Jan. 8, 2010 meeting

Date of Public Hearing/Board Meeting Jan. 8th, 2010

Legal authority under which hearing, proceeding or action is being made: BLNR, HRS 343, HRS 91

Nature of your specific legal interest in the above matter, including tax map key of property affected: Conservation of native biota of Kaena Point Nature Area Reserve. map key # (1)-6-9-02: 4, 9, 13, 1K2 8-1-01.

The specific disagreement, denial or grievance with the above matter: (1) Project could significantly impact native biota (2) Environmental assessment is inadequate and insufficient (3) CDUA in 1982 should not cover this project

Outline of specific issues to be raised: (1) Environmental Assessment didn't sufficiently explore alternative options, didn't have sufficient data on impacts of terrestrial invertebrates (2) negative impact of rat eradication potential

Outline of basic facts: (1) rat eradication impacts ecosystem (2) only 2 insect species listed in EA and erroneously listed as non-native (3) project involve permanent change of environment, should have EIS. CDUA more details in attached testimony.

The relief or remedy to which you seek or demand, your self entitled: Cessment of go through Kaena Point Ecosystem Restoration Project until proper EA, EIS was conducted

The above-named person hereby requests and petitions the Board of Land and Natural Resources to a Contested Case hearing in the matter described above Dated: Jan. 18, 2010

To Board of Land and Natural Resources,
Testimony for Jan 8th 2010 Land Board Meeting agenda item C1

Against Item C1

My name is Huang-Chi Kuo. I am a biologist and I am writing to testify against item C1 and the Ka'ena Point Predator Proof Fence Project in general. The reason for my objection is simple; this project is flawed and not going to work as it proposed. How do I know? It is because there are already examples of DOFAW using the same management approach that proved to be total disasters.

The predator fence is basically trying to make Ka'ena Point like an offshore islet that is isolated from the surrounding area. Yet, the end results of some predator eradication projects on the offshore islets have been proved not only detrimental to the seabird populations but also to the whole ecosystem. Because the ecosystems of Ka'ena Points and offshore islets are almost identical, I expect to see similar outcomes from the proposed restoration project.

Ant invasion is expected after predator eradication

Let me fill you what had happened on two of the offshore islets of Oahu that had received predator eradication. The first example is Mokolii or Chinaman's Hat. In 2001 DOFAW got the Tesoro Oil Spill compensation money and began the Oahu Offshore Islets Restoration Project. They successfully eradicated the rats on the islet, and the seabird population increased for two years. But after 2003, due to the eradication of the rats on the islet, the invasive ant (yellow crazy ant) population exploded to the extent that this specie of invasive ant became the most dominant animal on the island. As described by a DOFAW biologist, "the whole island is basically a giant ant mound."

Because of the ant population explosion, not only the seabird population drop back to zero, other native invertebrates/insects must had been heavily impacted and some probably had gone extinct. To date there is no seabird on the island, and the scientists are still struggling to control the ant population without success.

The second story occurred on Moku'auia or Goat Island. The same restoration project attempted to eradicate both rat and ant populations on the Goat Island. By spreading tons of poisonous rat and ant baits all over the island, they successfully eradicate rats and one species of invasive ant (big head ant). But two years later, the end result is that another species of ant (tropical fire ant) become dominant on the island. This ant

is worse than the previous one, and almost impossible to eradicate. The seabird chicks suffered mortality from ant bites and the seabird population plummeted by more than half from about 3,500 nesting pairs prior to the project to 1,500 in 2007 (DOFAW data).

The stories taught us that ecosystem restoration is not as simple as removal of invasive species. The outcome of removing one "bad" species often brings in even worse ones. It is not to say that we do nothing about it, but we should at least learn from the mistakes and more conservative before making any attempt on disturbing the ecosystem.

Environmental assessment did not address impacts on invertebrate fauna

I was quite amazed by how the environmental assessment (EA) got accepted with a find of no significant impact, so environmental impact statement is waived. Just use your common sense, to build a two-mile long fence in such a sensitive area and no environmental impact statement is necessary. Does it make sense to any of you?

The environmental assessment prepared by DOFAW is extremely inadequate in terms of neutrality and was written more like a promotion booklet full of empty promises. The environmental assessment is also lacking in good scientific information. There is almost no information about the invertebrate fauna and no mention of the potential impacts to the invertebrates. The only two insect species listed in the final EA. These two are highly endangered species of *Hylaeus* bees, which are important pollinators of native plants. Yet it was erroneously indicated as non-native in the final EA. In other words, the public will never know how much the project impacted the native invertebrates because no baseline data ever exist.

The predator proof fence is not capable of excluding invasive insects. By eradicating the rodents inside the fence, the area will become vulnerable to ant population explosion. To date there is not an effective method available to control some of the worst invasive ant species. Without oceanic barrier, the ant control effort is a losing battle because re-invasion is not only inevitable but also immediate.

Unchecked ant population explosion would very likely lead to local extinction of some native insects including pollinators that are essential for the survival of the endangered plants. The outcome of this project can be irreversible loss of biodiversity and collapse of the ecosystem, however none of these was addressed in the environmental assessment.

Why take risk when current management method is effective?

As the CI submittal said, the seabird and marine wildlife populations within Ka'ena Point MAR have been increasing over the years. The current predator control effort is already effective enough to see thriving seabird population in the area. Why disturbing the established balance when there is a very large risk that the money and efforts spent on the fence project will end up damaging the wildlife and ecosystem?

My suggestion is that before practical methods are developed to effectively manage the whole ecosystem, it is better be conservative and not to disturb the delicate balance that has been reached through time. Any disturbance could potentially cause irreversible loss of biodiversity. The priority instead should be focus on establishing baseline data (currently we don't even have a complete picture of the invertebrate fauna), continuing monitor the area and conduct smaller scale trials to evaluate the effectiveness of various restoration methods.

I understand the funding opportunity to get the fence erected will not always there, but we should not rush to it if we are not sure what we committed to. If someday in the future we can be sure the fencing technology is the most effective way of restoring the area I think there will be other funding opportunities. After all, if we agree on the values of Ka'ena Point, shouldn't we handle it more cautiously?/?

Please be responsible and listen to the public

I understand the department have invested a lot in developing Ka'ena Point into an eco-tourism attraction and is not likely to back off. But my question is, if some native species eventually gone extinct because of the project, who can be responsible for the mismanagement? By the time the negative impacts revealed, Ms Thielen and the Land Board members probably are long gone. Mistakes were made but nobody will be held accountable. Are you going to just tell the public that "Oops! We should have listened" like before?

The role of the Land Board is to voice for the public by providing advice and double-checks on DLNR's decisions. I am hoping Land Board would asked DLNR to address public concerns before giving your approval to this project, rather than compromising public interests by giving the approval first and advice DLNR to work on the issues later. Because once the approval was given, DLNR is not held accountable and will just keep neglect public inputs as it have been doing all these years.

EXHIBIT B

PHONE (808) 594-1888

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STATE OF HAWAII
OFFICE OF HAWAIIAN AFFAIRS
711 KAPI'OLANI BOULEVARD, SUITE 500
HONOLULU, HAWAII 96813

HRD08/3231E

October 9, 2008

Christen Mitchell, Planner
Division of Forestry and Wildlife
Department of Land and Natural Resources
1151 Punchbowl St. Rm. 325
Honolulu, HI 96813

RE: Cooperative agreement between the state, the U.S. Fish and Wildlife Service and the Wildlife Society, Hawai'i Chapter, for the implementation of the Ka'ena Point Ecosystem Restoration Project, O'ahu, TMKs: 6-9-001: 030; 6-9-02: 4, 9, 13; and 8-1-001:006 & 022.

Aloha e Christen Mitchell,

The Office of Hawaiian Affairs (OHA) is in receipt of the above-mentioned letter dated September 24, 2008. The Land Board is considering authorizing its chair to negotiate and enter into a cooperative agreement with the U.S. Fish and Wildlife Service and the Wildlife Society, Hawai'i Chapter, for the implementation of the Ka'ena Point Ecosystem Restoration Project. OHA has reviewed the project and offers the following comments.

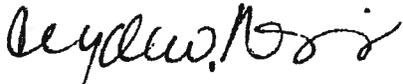
OHA supports the intent of the project, which aims to protect the fragile natural resources found within the Ka'ena Point Natural Area Reserve. The agency has provided comments on the project's Draft Environmental Assessment and continues to consult with the USFWS, in accordance with the National Historic Preservation Act. We appreciate the applicants' sincere attempts at engaging the Native Hawaiian community to ensure that the project's impacts on Native Hawaiian cultural resources and Native Hawaiian traditional and customary practices will be mitigated. We ask that the comments and information provided to the applicants in their consultations with Native Hawaiians, community members and lineal descendents be compiled into a Cultural Impact Assessment that will be included in the Final Environmental Assessment for the project. Chapter 343 of the Hawaii Revised Statutes requires CIAs to be included in the Environmental Assessments. The CIA should include an assessment of the project's potential impact on traditional and customary Native Hawaiian practices, particularly fishing, gathering and use of the Leina-a-ka-'uhane.

What's more, after making a site visit to Ka'ena Point and consulting with our beneficiaries, OHA has decided to support William Ailā's proposed amended-version of the fence alignment described as "Option 1" in the Draft Environmental Assessment for the Ka'ena Point Ecosystem Restoration Project. The newly-proposed alignment would be the same as "Option 1," except it would include an additional gate located directly mauka of the Leina-a-ka-'uhane. This new gate would serve as a symbol of respect and recognition for the entire cultural landscape of Ka'ena, its critical cultural function and the 'uhane (spirits) traversing the area. We believe that this alignment represents the best way to balance the need to protect the area's important natural resources with the need to preserve, protect and honor the region's cultural significance. However, our support of this alignment relies on assurances from the applicants that this newly-proposed fence option will not alter human access - particularly access for Native Hawaiian traditional and customary rights - to the project area from its current state.

OHA would like to extend a warm mahalo to the U.S. Fish and Wildlife Service, the State Forestry and Wildlife Division and The Nature Conservancy for providing the community and OHA an opportunity to visit the project site and for their commitment to ongoing consultation with the Hawaiian community on this matter.

Thank you for the opportunity to comment. If you have further questions, please contact Sterling Wong (808) 594-0248 or e-mail him at sterlingw@oha.org.

'O wau iho nō me ka 'oia'i'o,



Clyde W. Nāmu'o
Administrator

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