

Environment Hawai'i

a monthly newsletter

Donate Renew Subscribe Shop

Index by Year

PDF Archive

Recusal Debate Delays Conclusion Of Contested Case for O'ahu Wind Farm

1
MAR 2018

posted in: March 2018 |



Nearly two months after hearing oral arguments in the contested case hearing over the Habitat Conservation Plan (HCP) and Incidental Take License (ITL) proposed by the Na Pua Makani wind farm, the state Board of Land and Natural Resources had yet to decide whether or not one of its members, Sam Gon, should have recused himself from participating.

Only after the board settles that matter will it issue a final decision on the petition filed in 2016 by the community group Keep the North Shore Country, which opposes the plan and the license to allow the incidental killing of protected species such as the endangered nene (Hawaiian goose) or ope'ape'a (Hawaiian hoary bat).

One board member, Stanley Roehrig, has already recused himself. Before oral arguments began on January 12, Roehrig announced that he had inadvertently had an *ex parte* communication with an "impassioned" legislator — later identified by fellow board member Chris Yuen as Sen. Lorraine Inouye of Hawai'i island — who wanted the wind farm project to succeed. Roehrig explained that she had called him to talk about the wind farm and while discussing it with her he did not realize it was the facility involved in the ongoing contested case hearing.

"When I got my [Land Board] materials, I found out it was this case. It was a contested case. That communication with that legislator was inappropriate. I should have checked," he said.

"I decided I should recuse myself. I apologize to everyone for doing that. ... The next time, I'm not going to talk to any legislator before I open my docket and that's that," he said.

"I was also called by Sen. Lorraine Inouye," board member Yuen added. He said his wife had taken a message from Inouye, who said she wanted to talk about the wind farm, proposed for the Kahuku area on O'ahu. "I called her back telling her I can't talk on the matter," he said.

What's more, Inouye, chair of the state Senate Committee on Transportation and Energy, sent a letter to all of the board members about the project, according to board chair Suzanne Case.

"We did accidentally distribute it. I was out sick and our regular board person was out sick. So it went out. I immediately saw that it went out. I followed up in an email to board members not to read the letter so we did not have any *ex parte* communications. None of the board members read it," she assured the parties in the case.

Maxx Phillips, one of the attorneys representing Keep the North Shore Country, told *Environment Hawai'i* that she requested a copy of the letter, but had not received one.

Current Issue



Bill Would Ensure Land Purchasers Know Of Sea Level Rise Threat
March 1, 2018



Compliance Problems with Small Farms Hamper Use of Former Galbraith Lands
March 1, 2018



New & Noteworthy: Red Hill, GEMS
March 1, 2018



Recusal Debate Delays Conclusion Of Contested Case for O'ahu Wind Farm
March 1, 2018



Alterations to Kekaha Ditch Diversions Hinge on ADC's \$3.6M Funding Ask
March 1, 2018



Board Fines Companies \$2,500 Each For Unpermitted Tours of Mauna Kea
March 1, 2018



Shoreline Encroachment Bills Limit Easement Terms to Encourage Retreat
March 1, 2018



At Kuki'o, Sandbags, Irrigation, And Plantings Encroach on Beach
March 1, 2018



March 2018 PDF
March 1, 2018

With regard to Gon's recusal, the group had approached state deputy attorney general Cindy Young — before the Inouye issue arose — to ask that Gon recuse himself because he was involved in the approval of Na Pua Makani's habitat conservation plan when he was a member of the state's Endangered Species Recovery Committee (ESRC).

Based on Young's advice that his recusal wasn't necessary, Gon participated in the oral arguments. After Phillips reiterated her client's objection to Gon's involvement, Case said the board would be issuing a Minute Order setting forth a schedule under which the parties would submit motions regarding the recusal request.

Oral Arguments

In her proposed findings of fact, conclusions of law, and decision and order, hearing officer Yvonne Izu recommended that the Land Board deny the HCP and ITL, mainly because of what she saw as flaws in the company's approach to estimating predicted bat interactions and determining mitigation measures. She found, among other things, that Na Pua Makani improperly used only one other wind farm — the Kahuku Wind Power facility — as a proxy for expected bat take, despite the fact that the turbines used by that facility are considerably smaller than the ones Na Pua Makani intended to use. Ultimately, she found that the plan failed to meet the statutory requirement that mitigation measures protect the species covered under the plan "to the maximum extent practicable." (For more information on this, see our December 2017 cover story, "Wind Farm Plan to Protect Rare Bats Is Inadequate, Hearing Officer Finds.")

John Manaut, the attorney for Na Pua Makani, stressed during oral arguments that state Division of Forestry and Wildlife (DOFAW) biologist Scott Fretz felt the HCP adequately met the state's requirements and stood by ESRC recommendations.

Manaut also pointed out that Izu had issues with just a small portion of the HCP, namely, the sections dealing with bats and a "minor point" regarding water birds.

"Overall, the mitigation measures required under the HCP will provide net environmental benefits ... even though benefit to ope 'ape' a may be uncertain," he said.

"There was no analysis by the hearing officer why the agencies were wrong in their recommendation. No finding of fact or conclusion of law how or why DOFAW or ESRC failed to properly analyze the statute or use the best available science," he said.

He noted that the plan's recommendation to curtail the wind turbines until wind speeds reached 5 meters per second to help avoid killing bats during low wind was taken directly from the ESRC's own bat guidance document. (Izu and Keep the North Shore Country argued there were studies that suggested that curtailment up to 6.5 mps would prevent the killing of even more bats.)

"There's really no basis to second-guess the standard in the bat guidance," Manaut said. "It's particularly important to apply that in the area of Kahuku. We have the neighboring Kahuku project that has been very successful in using cut-in speed [the speed at which blades start turning] of 5 mps. For several years now, utilizing 5 mps, they have experienced one observed bat fatality. ... The hearing officer's recommendation, for whatever reason, completely ignored that fact," he said.

Manaut also disputed the arguments that taller turbines would kill more bats. Tetra Tech, the consultant that authored the Na Pua Makani plan, suggests that there are no definitive studies that tie turbine height to bat mortality, he said. The one study that Keep the North Shore Country offered to dispute that was "inconclusive," he said.

"There is no proven science that shows a difference in bat take in differences in turbine height," he claimed. But in his next breath, he conceded that common sense might lead one to think "there could be some issue with take and height."

He then reported that Na Pua Makani would now be including as a condition of the ITL that it would limit the maximum height of its turbines to 570 feet, down from the 656-foot turbines evaluated in the proposed HCP and ITL submitted for approval in 2016.

What's more, Na Pua Makani planned to reduce the number of turbines at its facility from nine to eight.

"Even though the applicant believes the HCP should be compliant as written ... these additional measures should alleviate concerns raised by the hearing officer's findings," Manaut said.

While data from both Kawailoa — another O‘ahu wind farm that has been estimated to have taken many more bats than expected — and Kahuku were considered, an agreement among the state and federal agencies was reached to focus on Kahuku “as the best surrogate based on location, topography, habitat, wind regime, number of turbines,” he said.

He also pointed out that Na Pua Makani would provide \$4.6 million for bat research under the plan, and should those studies indicate that a certain action should be taken, “through adaptive management, the applicant is required to make those adjustments.”

Manaut concluded his arguments with a warning: “Are we going to create a problem where developers are not going to want to invest in this state?” Wind farm developers are not going to want to spend a significant amount of money on the permitting process, only to face a long contested case hearing brought by opponents who do not want wind farms in their back yard, he said. He then argued that the contested case hearing process was being used as a tool to limit renewable projects in Kahuku. “That’s essentially what we have here,” he said.

In her rebuttal arguments, Phillips urged the board to uphold Izu’s recommendations.

“The applicant needs to go back to the ESRC, which would take a fresh look [at the HCP and] ensure compliance with the endangered species law,” she said.

To Manaut’s argument that there was agreement among agencies and the applicant to use the Kahuku wind farm as the surrogate for estimating bat takes, Phillips suggested that the facility wasn’t exactly the most thorough in assessing fatalities. She noted that in 2012, the Kahuku wind farm reduced its bat search radius, as well as the frequency of its searches. She also said, “the applicant continually tries to shift the burden [of meeting the requirements of the state’s endangered species law] from themselves to agencies, the ESRC, the petitioner ...”

She argued that while the Kahuku wind farm has had only one bat take since implementing a cut-in speed of 5 mps, data from mainland wind facilities do, indeed, show that bat deaths decrease with higher cut-in speeds.

“We’re not making a mockery of the state approval process,” she said. But, she added, the ESRC needs to consider all the reliable data and science in front of them. “It can’t be just cherry-picked by the applicants. The experts the applicants relied on, neither have a Ph.D. or are experts on ope‘ape‘a. The reality is there are a lot of things we don’t know about the ope‘ape‘a. We know a lot more now than we used to,” she said.

As to Manaut’s assurances that more conservative measures can and will be implemented through adaptive management, Phillips argued that altering approved HCPs and ITLs isn’t simple. The majority of wind farms throughout the state are in the process of making major amendments to their HCPs and ITLs, since regulations allow new conditions to be added only in “a limited number of extraordinary circumstances,” she said.

“The agencies’ hands are tied,” she said.

Board Questions

Before delving into the arguments presented about surrogates, cut-in speeds, and other areas, board member Yuen raised the “big picture” issue of climate change.

“One of the findings the board is supposed to make is [whether the project is] not detrimental to the environment. We can consider the environmental benefits of the project. In the environmental impact statement, it says the project will eliminate 58,000 tons of carbon dioxide going into the air. In every documentary on climate change ... one of the things you see is a wind farm as a solution,” he told Phillips.

“At issue right now isn’t whether I personally believe in renewable energy. It’s whether this HCP is in compliance with the law,” she replied.

With regard to the dispute whether or not the Kawailoa wind farm’s bat takes should have been factored into the projected takes by the Na Pua Makani facility, Yuen asked Phillips what she proposed. Would she have the board weigh the data for those facilities “50-50? 25-75?” he asked.

She said she believed it was the ESRC’s task to determine that.

To this, Yuen said, “They saw the plan. They saw the proposal. They approved the idea of just using Kahuku. Why do we tell them now to include Kawailoa?”

“Suppose the situation were this: You were representing the opponents of a wind farm at Kahuku and the adjacent wind farm at Kahuku was already operating and had a much higher take than a wind farm four miles away and the applicant said ‘Let’s average.’ Wouldn’t you be arguing that’s completely wrong?” he continued.

Phillips said she would argue that an assessment be made that considers both facilities.

“This question of why are more bats killed at Kawailoa, in the minutes of the ESRC, they say Kawailoa is an outlier, an exception,” Yuen said.

Phillips, however, argued that without pre-construction monitoring, “we don’t have the data to know whether or not this area is going to have [bat] take closer to Kahuku or Kawailoa.”

Yuen then asked whether economics should be considered when determining whether an HCP minimizes take “to the maximum extent practicable,” suggesting that Na Pua Makani might not meet its electricity production contract under stricter conservation measures.

Phillips said economic elements should absolutely be considered. “This is why it needs to be sent back to ESRC so it can be properly weighed,” she said.

Yuen noted, however, that the types of mitigation Na Pua Makani is proposing are exactly what’s called for in the ESRC’s bat guidance document.

Phillips agreed, but added a caveat: “The guidance document is supposed to be a working document and, as information comes in, should be expanded and tweaked. A fresh look needs to be given by the ESRC to what constitutes appropriate mitigation for projects such as this.”

Gon, however, was skeptical.

“I have published on Hawaiian bats. I understand them more than [most people]. The consensus is it remains a fairly poorly understood creature,” said Gon, senior scientist for The Nature Conservancy of Hawai‘i.

Despite his previous decisions on the Na Pua Makani case, “the idea of my ability to take in fresh information ... is not in question,” he continued. “I’m actually in a really good position to determine whether or not what I hear today does represent relatively new information. So the decision was made in consultation with the AG [attorney general] to remain in this deliberation,” he said.

“The idea the ESRC didn’t consider other turbine projects ... and the ramifications of that is probably erroneous,” he said, adding that the committee had visited many of the wind farm projects proposed to assess what was most appropriate to apply to the Na Pua Makani HCP.

The committee’s decision to follow the guidance from state and federal agencies to use the existing Kahuku facility as a surrogate was not lightly made or made in an effort to try to fudge data, he said.

“In fact, they considered, with a great deal of concern, the fact that the takes of ope‘ape‘a were higher than expected,” he said.

At this point, Phillips noted for the record that her client objected to Gon’s participation.

“There’s nobody on our side saying ESRC didn’t do their job. We’re saying the applicant didn’t do their job,” Phillips added.

Recusal Filings

On January 24, Phillips and attorney David Kimo Frankel followed up with a motion and memorandum arguing for Gon’s recusal. They cited two reasons: 1) Gon’s participation violated the state’s laws on contested case hearings and 2) Gon’s prior participation on the ESRC prejudiced his views.

Hawai‘i Revised Statutes sections 91-9 and 91-13 forbid the board from considering matters that are not specifically in the record, they wrote.

Because Gon served on the ESRC when it was considering Na Pua Makani’s HCP, “It seems obvious that his participation would have provided him very specific information about this [HCP] that is not in the record. In any case, at the January 12, 2018, meeting, Gon specifically made reference to knowledge that is not in the record,” they

wrote, citing his statement about the ESRC visiting many wind farm projects and considering records for them to assess which was the most appropriate to apply to the Na Pua Makani project.

Not only did their clients dispute Gon's recollection, they argued it wasn't supported by evidence in the record, "[a]nd it taints this entire board's deliberative process," they wrote.

Once Gon is recused, their client must be allowed to question Department of Land and Natural Resources staff and the ESRC as to the accuracy of Gon's statements and to present any corrected information to the Land Board, they wrote.

With regard to Gon's alleged prejudice, Phillips and Frankel cited a relatively recent court ruling regarding telescope construction on Mauna Kea that due process prohibits decision-makers from being biased and from "prejudging matters and the appearance of having prejudged matters."

Gon was a member of the ESRC that made the motion to approve Na Pua Makani's HCP, which Izu later found to be lacking, they noted. "Clearly, Gon views these positions as a criticism of him. ... Most importantly, before Keep the North Shore Country had any opportunity to present any evidence or cross examine the applicant's 'experts,' he proclaimed that '[t]he suggestion that the habitat conservation plan is fatally flawed or inadequately researched is problematic in his mind.' Gon's statement reveals prejudice," they wrote.

Addressing the case that the deputy attorney general relied on in her decision to allow Gon to continue participating — *Liberty Dialysis-Hawaii, LLC v. Rainbow Dialysis, LLC, et al.* — Phillips and Frankel argued that her reliance was misplaced. In that case, the state Supreme Court had found that members of the State Health Planning and Development Agency's committees did not need to recuse themselves from a reconsideration proceeding.

Phillips and Frankel pointed out that the court's decision did not involve any interpretation of HRS Chapter 91. "It boggles the mind why anyone would think that this case has any relevance to the case at hand," they wrote.

In their rebuttal, Na Pua Makani attorneys Manaut and Puananionaona Thoene argued that a different statute — HRS 84-14 — should apply. That law states that no state employee can take an official action directly affecting an undertaking in which they have a substantial financial interest, or an undertaking in which they are "engaged as legal counsel, an advisor, a consultant, representative, or other agency capacity." Neither instance applies to Gon, they argued.

They also claimed that Gon's statements at the January 12 meeting "contain no new information that is not already in the record or information that was not otherwise available to the public."

Gon's involvement with the ESRC also does not require his recusal, they argued. "Expertise and knowledge in a particular area has been a long-standing consideration for persons serving on state agencies and boards," they wrote, later citing another Hawai'i Supreme Court decision that found that a good conflict-of-interest statute should "not prohibit so much that competent people will be discouraged from serving. For example, a state would be hurt more than helped by a statute which in effect barred experts from serving on advisory boards."

Although not a party to the contested case, Gon, on February 21, chose to file a disclosure in which he basically argued for his continued participation. He recounted his "considerable knowledge and understanding" of the bat's biology, including the fact that he had authored a journal article on it. He added that although he was on the ESRC when it considered Na Pua Makani's HCP, he understood that as a Land Board member, his deliberations must be based on the evidence in the record "and the various presentations to the Board considered in the light of my experience, training, and background."

"I am fully capable of considering issues before the board ... without prejudice or bias toward any result or party. I respectfully submit that my experience, training and background will be of service to the [Land Board] in reaching a fair and appropriate decision on this matter," he wrote.

The board had not decided on the matter as of press time.

—*Teresa Dawson*

Leave a Reply

Logged in as Gilbert Riviere. [Log out »](#)

Comment

[Submit Comment](#)

Contact Us

📄 Environment Hawai`i

📍 190 Keawe St., Suite 29
Hilo HI 96720

☎ 877-934-0130

✉ mail@environment-hawaii.org

Follow Us



[About](#)