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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

KEEP THE NORTH SHORE COUNTRY, Appellant, vs. BOARD OF LAND AND NATURAL RESOURCES, the DEPARTMENT OF LAND AND NATURAL RESOURCES, SUZANNE D. CASE in her official capacity as Chairperson of the Board of Land and Natural Resources and NA PUA MAKANI POWER PARTNERS LLC, Appellees.	Civil No. 18-1-0960-06 JPC (Agency Appeal) APPELLANT KEEP THE NORTH SHORE COUNTRY'S OPENING BRIEF; CERTIFICATE OF SERVICE JUDGE: Honorable Jeffrey P. Crabtree

APPELLANT KEEP THE NORTH SHORE COUNTRY'S OPENING BRIEF

On May 18, 2018, the Board of Land and Natural Resources (BLNR or Board) improperly approved a permit to construct and operate the largest wind turbine generators (WTGs) in Hawai'i that would likely kill endangered species in Kahuku, Island of O'ahu, Hawai'i.

I. QUESTIONS PRESENTED FOR DECISION

1. Should the BLNR's decision be reversed where applicant failed to minimize 'ōpe'ape'a deaths to the maximum extent practicable?

2. Should the BLNR's decision be reversed when applicant failed to produce any

evidence that the plan will increase the likelihood that ʻōpeʻapeʻa will survive and recover?

3. Should the BLNR's decision be reversed when applicant failed to adequately assess the cumulative impacts to Oʻahu ʻōpeʻapeʻa?
4. Was it an error for the BLNR to rely on the endangered species recovery committee's recommendation when that recommendation was not based on a full review of the best available scientific and reliable data?
5. Was the BLNR's contested case hearing corrupted by the BLNR's refusal to recuse Land board member Sam Gon III, improper political pressure, and *ex parte* communications?

II. BRIEF STATEMENT OF FACTS

A more thorough recounting of the facts in this case, with specific references to the record, is provided in the First Amended Statement of the Case and the argument below.

A. The Project

Na Pua Makani Power Partners, LLC (NPM or applicant) proposes to construct and operate eight WTGs with maximum blade tip heights of 173 meters (m) above ground level on approximately 706.7 acres in Kahuku on the North Shore of Oʻahu (project site). ROA Doc #100 FOFs 38 and 41; ROA Doc #100 Special Conditions 12. NPM's project will likely kill or injure endangered ʻōpeʻapeʻa, otherwise known as the Hawaiian hoary bat (*Lasiurus cinereus semotus*), along with seven other species of endangered birds that are listed and protected under Federal and State law, therefore NPM applied for approval of a HCP and ITL. ROA Doc #100 FOF 52.

B. The Endangered ʻŌpeʻapeʻa

The ʻōpeʻapeʻa is an endangered species protected under both federal and state law. ROA Doc #100 FOF 165. ʻŌpeʻapeʻa population estimates have ranged from a few hundred to a few thousand. ROA Doc #39 Exhibit A-44 at 4765. Bats are long-lived species with low reproductive rates, making populations susceptible to localized extinction. ROA Doc #39 Exhibit A-10 at 1361 and 1366; ROA Doc #75 at 8417-8418. In Hawaiʻi, collision with WTGs has resulted in ʻōpeʻapeʻa fatalities at every permitted wind farm. *See* ROA Doc #61 Exhibit B-12. Every HCP approved in this state has underestimated the number of ʻōpeʻapeʻa that would be killed by WTGs. ROA Doc #33 NPM HCP at 1000; ROA Doc #61 Exhibits B-12 at 5707-5723 and B-30 at 7174; ROA Doc #75 at 8374. Between 2006 and June 2016, wind turbines with HCPs are estimated to have killed 146 endangered native bats in Hawaiʻi. ROA Doc #61 Exhibit B-12 at 5708, 5712, 5716, 5719 and 5722. Applicant estimates that over 20 years, its WTGs will take 51 endangered bats. ROA Doc #33 NPM HCP at 988.

C. Procedural Background

In 2012, NPM decided to pursue development of an industrial wind farm in Kahuku on the North Shore of Oʻahu. ROA Doc #39 Exhibit A-31 at 4588. On June 4, 2015, a public hearing on applicant's draft HCP was held. ROA Doc #100 at 9238. Between the time of the public hearing on the draft HCP and the final HCP, applicant increased the maximum height of the WTGs from 156 m to a maximum of 200 m. Regardless of the change in height and rotor swept area, there was no change in applicant's take estimates. No public hearing was held to address the change in WTG height. ROA Doc #100 at 9238; ROA Doc #39 Exhibit A-1 at Appendix B at 1343-1344 and 1350; ROA Doc #61 Exhibit B-16 at 5946-5947.

On February 25, 2016, the endangered species recovery committee (ESRC) voted to recommend applicant's HCP. ROA Doc #39 Exhibit A-36. Land board member Sam Gon III (board member Gon), who served on the ESRC during this time, made the motion to approve applicant's HCP. *Id.* At the November 10, 2016 board hearing on NPM's application, Keep the North Shore Country testified against applicant's HCP and ITL and orally requested a contested case hearing. ROA Doc #100 at 9240. On November 19, 2016, Keep the North Shore Country filed its written petition for a contested case hearing. *Id.* On December 9, 2016, Keep the North Shore Country's request for a contested case hearing was granted. ROA Doc #39 Exhibit A-41 at 4724-4725.

A contested case hearing was held on August 7 and 8, 2017. ROA Doc #75 and ROA Doc #76. On November 1, 2017, the Hearing Officer issued her recommended findings of fact, conclusions of law, and decision and order finding that applicant's HCP fails to meet all the criteria for acceptance pursuant to HRS Chapter 195D and recommended the board disapprove the HCP. ROA Doc #86.

On January 12, 2018, the board held oral arguments. ROA Doc #92. The BLNR issued its final decision on May 18, 2018, to approve applicant's HCP and ITL. ROA Doc #100.

III. ARGUMENT

The BLNR's approval of the HCP and ITL should be reversed. First, the applicant and the BLNR failed to comply with HRS §§ 195D-21(b)(2)(C) and 195D-4(g)(1), which requires all HCPs minimize ʻōpeʻapeʻa deaths to the maximum extent practicable. *See* HRS § 91-14(g)(1), (3), (4), (5), and (6). Second, the BLNR failed to hold the applicant to their burden of proof when it approved the HCP and ITL without any evidence that the project will increase the likelihood that ʻōpeʻapeʻa will survive and recover. *See* HRS § 91-14(g)(1), (3), (4), (5), and (6);

HRS §§ 195D-4(g)(4) and 195D-21(b)(1)(B). Third, the applicant failed to adequately assess the cumulative impacts to O'ahu 'ōpe'ape'a. *See* HRS § 91-14(g)(1), (3), (4), (5), and (6); HRS §§ 195D-21(b)(2)(C) and 195D-4(g)(5). Fourth, the BLNR's reliance on the endangered species recovery committee recommendation is improper, as it was not based on a full review of the best available scientific and other reliable data. *See* HRS § 91-14(g)(1), (2), (3), (4), (5), and (6); H.R.S. § 195D-25(b)(1). Fifth, the BLNR's contested case hearing was tainted with highly unusual circumstances and procedural irregularities that resulted in a flawed board decision.[1] *See* HRS § 91-14(g)(1), (2), (3), (4), (5), and (6).

For any and all of these reasons, the Board's decision should be reversed.

A. Introduction

It is unlawful to kill, or "take," any endangered or threated species. HRS § 195D-4(e). The BLNR may, however, issue an incidental take license (ITL) to allow for the take of these species, if that take is incidental to, and not the purpose of, an otherwise lawful activity. HRS § 195D-4(g). In order to obtain an incidental take license an applicant must develop, fund, and implement a BLNR-approved HCP. The required components of an HCP are listed in HRS § 195D-21 and HRS § 195D-4(g). The applicant has the burden of demonstrating that a proposed project is consistent with the criteria set forth in HRS § 195D-21 and HRS § 195D-4(g). As demonstrated below, applicant failed to carry its burden of demonstrating that the proposed project is consistent with all criteria set forth in HRS § 195D-21 and HRS § 195D-4(g).

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[1] Keep the North Shore Country does not waive it's right to argue that the following findings of fact are erroneous in part or entirely: 37A, 44, 167, 185, 186, 188, 191, 193, 202, 210, 219, 223, 225, 226, 230, 232, 238, 242, 243, 246, 247, 248, 249, 250, 251, 252, 259, 260, 262, 263, 265, 273, 274, 275, 277, 278, 281, 282, 283, 284, 285, 286, 288, 289, 290, 291, 292, 293, 294, 295, 304, 306, 307, 309, 311, 315, 318, 329, 330, 338, 343. Additionally, Keep the North Shore Country does not waive it's ability to challenge in part, or entirely, conclusions of law: 6, 9, 12, 13, 14.e, 15.e, 18.e, 21, 22.e, 24, 29, 30, 31, 38(1)-(3), 39(1), 39(3)-(4). These findings and conclusions are irrelevant, inaccurate, and/or incorrect in part or entirely.

B. Applicant Fails to Minimizes ʻŌpeʻapeʻa Deaths to the Maximum Extent Practicable.

HRS § 195D-4(g)(1) requires that the "applicant, to the maximum extent practicable, shall minimize and mitigate the impacts of the take." Every habitat conservation plan must identify "the steps that will be taken to minimize and mitigate all negative impacts, including without limitation the impact of any authorized incidental take, with consideration of the full range of the species on the island so that cumulative impacts associated with the take can be adequately assessed." HRS § 195D-21(b)(2)(C). The applicant failed to demonstrate, and the BLNR failed to require, that the habitat conservation plan minimizes the impacts of taking 51 ʻōpeʻapeʻa to the maximum extent practicable.

Low wind speed curtailment (LWSC) "is currently the primary minimization measure implemented by wind farms in the U.S., including those here in Hawai'i," for reducing incidental take risks to bats. ROA Doc #39 Exhibit A-44 at 4767; ROA Doc #100 FOF 271. The BLNR has concluded that the "Bat Guidance Document constitutes the best science currently available on how the potential impacts of wind farms on the ʻōpeʻapeʻa should be handled in an HCP." ROA Doc #100 FOF 16. The Bat Guidance Document recommends that LWSC be "a part of every wind facility's minimization strategy to the maximum extent practicable," with a "minimum cut-in speed of 5.0 m/s." ROA Doc #39 Exhibit A-44 at 4767 (emphasis added). It further recommends that applicants "collect, analyze, and report data on the effectiveness of curtailment practices." ROA Doc #39 Exhibit A-44 at 4768.

The Bat Guidance Document compiled data from mainland wind facilities that demonstrates bat casualty rates are reduced significantly when curtailment begins at 6.5 meters per second (m/s) instead of 5.0 m/s. ROA Doc #39 Exhibit A-44 at 4768 (Figure 2). Dr. Fretz concurred that curtailing wind production at higher speeds could reduce bat take. ROA Doc #76

at 8490. Regardless of this, neither the applicant nor the endangered species recovery committee ever discussed or analyzed employing a higher cut-in speed to minimize ʻōpeʻapeʻa mortality to the maximum extent practicable. ROA Doc #75 at 8433. Applicant admitted that operations could be curtailed when wind speeds drop to 6.5 m/s, ROA Doc #75 at 8313-8314 and 8429, and provided no evidence that increasing cut-in speed from 5.0 m/s to 6.5 m/s is not practicable. ROA Doc #86 FOF 210. Nevertheless, the BLNR concluded that to "require LWSC at 6.5 m/s at the outset of operations, rather than as a part of adaptive management, is not necessary to minimize and mitigate the impacts of the take of ʻōpeʻapeʻa to the greatest extent practicable." ROA Doc #100 FOF 289.

The record must provide some evidence for concluding, not just that the chosen curtailment is practicable, but that a higher cut-in would be impracticable. The BLNR does not seem to disagree with this assertion, but instead contends that the record does adequately demonstrate that the HCP provides for minimization to the maximum extent practicable. ROA Doc #100 COLs 18.e; 28-31. However, the record is practically non-existent on this matter. The BLNR relies on conclusory statements in the record to the effect that "curtailing production could potentially put [applicant] in a situation where [it is] not meeting [it's] production requirements," ROA Doc #75 at 8313-8314 and 8429, but the record is devoid of credible evidence in support of this claim. In fact, there is no economic analysis, discussion of higher cut-in speeds, or any examination of data on the effectiveness of increased curtailment practices in the record. The BLNR insists that "it is clear that although it would be possible from an operational standpoint to institute LWSC at 6.5 m/s, it would jeopardize NPM's ability to meet its requirements under its power contract." ROA Doc #100 FOF 281. The record lacks any evidence or analysis whatsoever of whether a higher cut-in speed than that initially proposed by

the applicant would be economically impracticable. ROA Doc #86 FOF 210.

The plain language of HRS §§ 195D-4(g)(1) and 195D-21(b)(2)(C) requiring that the applicant minimize impacts of the take "to the maximum extent practicable" is not satisfied by the minimum cut-in speed necessary to meet the endangered species recovery committee's recommendation. The record lacks adequate evidence and analysis of whether a higher cut-in speed would be economically impracticable. Applicant provided no evidence that increasing cut-in speed from 5.0 m/s to 6.5 m/s is not practicable. The BLNR has not adequately explained its decision and has not based its conclusion on facts in the record. "A conclusion requires evidence to support it." *In re Kaua'i Elec. Div.*, 60 Hawai'i 166, 184, 590 P2d 524, 537 (1978). The BLNR's conclusion that 5.0 m/s curtailment minimizes impacts to the maximum practicable is unsupported by substantial evidence in the record, and therefore is arbitrary and capricious. Pursuant to HRS § 91-14(g)(1),(3),(4),(5), and (6), this Court should reverse the BLNR's May 2018 decision to approve the HCP and ITL.

C. Failure of Applicant to Demonstrate That the HCP Will Increase the Likelihood That 'Ōpe'ape'a Will Survive and Recover.

HRS §195D-4(g)(4) requires that the "plan shall increase the likelihood that the species will survive and recover." Similarly, HRS § 195D-21(b)(1)(B) requires that all habitat conservation plans "increase the likelihood of recovery of the endangered or threatened species that are the focus of the plan." Applicant failed to provide any evidence whatsoever that the 'ōpe'ape'a population would be better off with this plan than without it as required by HRS §§ 195D-4(g)(4), 195D-21(b)(1)(B) and 195D-30. Furthermore, applicant failed to demonstrate that any of the mitigation proposed will actually increase the number of 'ōpe'ape'a.

Applicant failed to produce any credible evidence that: (a) any of the mitigation plans employed at existing wind turbine facilities in Hawai'i have offset their take, let alone increased

the bat population. ROA Doc #75 at 8414; ROA Doc #76 at 8498 and 8500; (b) research will produce results that increase the bat population. ROA Doc #75 at 8403 and 8404; ROA Doc #76 at 8492-8493; (c) maintaining an ungulate fence will increase the bat population. ROA Doc #76 at 8494; and (d) removal of alien species from native forests will increase the bat population. ROA Doc #61 Exhibit B-20 at 6179; ROA Doc #39 Exhibits A-35 at 4644; A-34 at 4634; ROA Doc #76 at 8493-8495; ROA Doc #75 at 8406-8409, 8411. There is evidence, however, that all permitted existing wind turbine facilities in Hawai'i have killed endangered 'ōpe'ape'a at unprecedented rates, effectively decreasing the bat population. *See* ROA Doc #61 Exhibit B-12.

It is black letter law that the BLNR may only approve an HCP that "will increase the likelihood of recovery," HRS § 195D-21(b)(1)(B)(emphasis added), or "shall increase the likelihood that the species will survive and recover." HRS §195D-4(g)(4)(emphasis added). The BLNR's unsupported claims that: (a) "research may provide improved methods to conserve 'ōpe'ape'a;" (b) "proposed mitigation should" offset take; and (c) "the HCP should contribute to and increase the likelihood of the survival and recovery of the 'ōpe'ape'a" do not meet the requirements of HRS §§ 195D-21(b)(1)(B) and 195D-4(g)(4). ROA Doc #100 COL 15.e. "It is well-established that, where a statute contains the word 'shall,' the provision generally will be construed as mandatory . . . . The word 'will' is 'an auxiliary verb commonly having the mandatory sense of 'shall' or 'must.' It is a word of certainty, while the word 'may' is one of speculation and uncertainty." *Malahoff v. Saito*, 111 Hawai'i 168, 191, 140 P.3d 401, 424 (2006), as corrected (Sept. 19, 2006) (citation and internal quotation marks omitted).

Pursuant to HRS § 91-14(g)(1),(3),(4),(5), and (6), this Court should reverse the BLNR's May 2018 decision to approve the HCP and ITL.

D. Failure of Applicant to Adequately Assess the Cumulative Impacts on O‘ahu ‘Ōpe‘ape‘a.

HRS § 195D-4(g)(5) requires that an HCP consider the "full range of the species on the island so that cumulative impacts associated with the take can be adequately assessed." HCPs must "identify the steps that will be taken to minimize and mitigate all negative impacts, including without limitation, the impact of any authorized incidental take, with consideration of the full range of the species on the island so that cumulative impacts associated with the take can be adequately assessed; and the funding that will be available to implement those steps." HRS § 195D-21(b)(2)(C).

The BLNR failed to require that the applicant produce essential evidence regarding the project's impact on the O‘ahu ‘ōpe‘ape‘a population. This is particularly disheartening considering that every HCP approved in this state has underestimated the number of ‘ōpe‘ape‘a that would be killed by WTGs. ROA Doc #33 NPM HCP at 1000; ROA Doc #61 Exhibits B-12 at 5707-5723 and B-30 at 7174; ROA Doc #75 at 8374. Applicant provided no credible evidence that the O‘ahu ‘ōpe‘ape‘a population is stable or increasing. ROA Doc #75 at 8422 and 8404. To the contrary, the most recent study in this area concluded that its findings do not demonstrate high bat abundance in the region. ROA Doc #39 Exhibit A-11 at 2050. Between 2006 and 2016, wind turbines with HCPs are estimated to have killed 146 bats, 70 of which were from the O‘ahu ‘ōpe‘ape‘a population. ROA Doc #61 Exhibit B-12 at 5708, 5712, 5716, 5719 and 5722. Additionally, there is no evidence that the mitigation measures employed in the HCPs for any of the existing WTG facilities has increased the bat population. ROA Doc. #75 at 8414; ROA Doc #76 at 8498 and 8500.

In a distressing attempt to demonstrate that the existing O‘ahu ‘ōpe‘ape‘a population can tolerate more "take," the BLNR distorts the evidence in the record by claiming that acoustic

monitoring at Kawailoa shows that despite the estimated take of 54 ʻōpeʻapeʻa between 2012 and 2015 there is no apparent significant decrease in bat activity at Kawailoa after these years of take. ROA Doc #100 FOF 259. BLNR fails to understand that neither acoustic bat "activity nor fatality rates for a region provide any indication of local abundance or population levels for bats." ROA Doc #39 Exhibit A-52 at 5379.

The record is clear that the applicant, and BLNR, failed to adequately assess cumulative impacts. Given the lack of necessary data and evidence from the applicant and the absence of any meaningful endangered species recovery committee analysis, the BLNR is unable to reach a conclusion regarding the project's impacts on the Oʻahu ʻōpeʻapeʻa population.

E. The Endangered Species Recovery Committee's Recommendation was not Based on a Full Review of the Best Available Scientific and Other Reliable Data.

The endangered species recovery committee must review and make recommendations to the BLNR on all habitat conservation plans and incidental take licenses "based on a full review of the best available scientific and other reliable data . . . and in consideration of the cumulative impacts of the proposed action on the recovery potential of the endangered, threatened, proposed, or candidate species." HRS § 195D-25(b)(1)(emphasis added). In this case, the endangered species recovery committee's recommendation was based on an incomplete record. The committee did not examine all relevant data and articulate a satisfactory explanation for its determination. The record clearly demonstrates that applicant failed to consider or include relevant studies, information, and reliable data in its habitat conservation plan. It is also clear from the record that the endangered species recovery committee failed entirely to consider important aspects regarding take estimates, minimization, mitigation, and the cumulative impacts of the proposed project on Oʻahu ʻōpeʻapeʻa.

There is no evidence in the record that the applicant or endangered species recovery committee ever considered curtailing operations at 6.5 m/s. ROA Doc #75 at 8433. Similarly, neither the applicant nor the endangered species recovery committee analyzed the potential impacts of taller turbines and increased rotor swept areas on bat mortality. ROA Doc #75 at 8394 and 8401. Applicant failed to consider or provide any analysis on the impact to endangered ʻōpeʻapeʻa when increasing the size of the turbines or the rotor swept area between the draft HCP and the final HCP. ROA Doc #75 at 8337, 8394, 8398 and 8401. Increased WTG height and/or rotor swept area will likely result in increased take of ʻōpeʻapeʻa yet neither the applicant nor the ESRC analyzed any change in take estimates. ROA Doc #39 Exhibit A-44 at 4766; ROA Doc #61 Exhibits B-7 at 5676, 5679-5678; B-15 at 5867; ROA Doc #75 at 8394 and 8401. In fact, The endangered species recovery committee never discussed the issue. ROA Doc #39 Exhibits A-35 and A-36. NPM proposes to build the largest wind turbines in the Hawaiʻi, yet the impact of increasing the turbine size and rotor swept area was never discussed let alone analyzed by the applicant or ESRC.

While Dr. Scott Fretz testified that it would have been a good idea for applicant to have taken into account and analyzed data from Kawailoa to estimate ʻōpeʻapeʻa deaths, this exclusion of reliable data was never considered by the endangered species recovery committee. ROA Doc #76 at 6489. Regardless both the applicant and ESRC improperly ignored reliable and relevant data from Kawailoa wind facility. There are two existing wind facility on Oʻahu, Kahuku and Kawailoa. ROA Doc #61 Exhibit B-12 at 5715 and 5718.

Finally, the endangered species recovery committee did not, as a group, specifically go through all the criteria in HRS §§ 195D-4(g) and 195D-21. ROA Doc #76 at 8475; ROA Doc #39 Exhibits A-33, A-34, A-35 and A-36. Thus, the endangered species recovery committee did

not complete a full review of the best available science and other reliable data when making their recommendation.

As BLNR stated in its COL, "[t]he specific standards for an HCP in HRS Chap. 195D obviously require the application of a high degree of scientific expertise and judgment to specific facts." ROA Doc #100 COL 11. The Board relies on the scientific expertise of the endangered species recovery committee when considering whether an HCP and ITL conform to the various criteria required for approval. ROA Doc #100 COL 5. When the committee does not complete a full review of the best available scientific and other reliable data, the BLNR is forced to render its decision without the benefit of analysis from the scientific experts it relies so diligently on. The BLNR must not act as a panel of scientists that instructs the endangered species recovery committee how to choose among scientific studies that they never considered.

F. The Contested Case was Procedurally Flawed.

The BLNR's contested case hearing was tainted with highly unusual circumstances, improper political pressures and ex parte communications, and procedural irregularities that resulted in a flawed board decision.

1. Violation of HRS §§ 91-9(g) and 91-13

"A contested case hearing . . . provides a high level of procedural fairness and protections to ensure that decisions are made based on a factual record that is developed through a rigorous adversarial process." *Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.*, 136 Hawai'i 376, 380, 363 P.3d 224, 228 (2015). HRS § 91-9(g) prohibits board members from considering matters that are not specifically in the record: "No matters outside the record shall be considered by the agency in making its decision except as provided herein." Additionally, HRS § 91-13 does not allow board members to consult "any person on any issue of fact except upon

notice and opportunity for all parties to participate, save to the extent required for the disposition of ex parte matters authorized by law." The Hawai'i Supreme Court has held that "[w]here an agency consults outside sources, the right of a party to cross-examine those sources and present rebuttal evidence is violated." *Mauna Kea Power Company Inc. v. BLNR*, 76 Hawai'i 259, 262, 874 P.2d 1084, 1087 (1994) (internal citations omitted).

In this case, board member Gon served on the Endangered Species Recovery Committee during its December 15, 2015 and February 25, 2016 meetings. ROA Doc #39 Exhibits A-35 and A-36. His participation provided him with specific information about applicant's habitat conservation plan that is not reflected in the record. At the January 12, 2018 hearing, before the commencement of the proceedings, Keep the North Shore Country requested the recusal of board member Gon. ROA Doc #92 at 9046. Nonetheless, board member Gon participated in the hearing where he made specific reference to knowledge that is not in the record. In confirming that he was relying on information that is not in the record board member Gon said:

> I mean, the fact that it doesn't show up in the HCP record kind of flies in the face of the fact that the ESRC went to visit as many of these projects in person to look at the areas that were being surveyed, to consider the records for each of those places, the different conditions and habitat, the -- everything from the vegetation, to the wind, typical wind, behavior and the like in order to assess what was most appropriate to apply to this particular HCP.

ROA Doc #92 at 9086. Nothing in the record supports board member Gon's statement. Contrary to board member Gon's statement, there is no evidence that the Endangered Species Recovery Committee visited any other wind turbine projects, "in order to assess what was most appropriate to apply to this particular HCP." *Id.* Similarly, there is no evidence that the Endangered Species Recovery Committee "consider[ed] the records for each of those places [other turbine projects] . . . to assess what was most appropriate to apply to this particular HCP." *Id.* Instead the record is clear that: (1) the Endangered Species Recovery Committee relied on

the applicant's take estimates that are based exclusively on data from the existing WTGs at Kahuku. ROA Doc #76 at 8476 and 8484; ROA Doc #33 NPM HCP at 985; ROA Doc #41 Direct Testimony of Thomas Snetsinger ¶¶ 12-14 at 4521; and (2) that Dr. Scott Fretz concurred that it would have been a good idea for applicant to have taken into account and considered in its take estimates the number of bat deaths at Kawailoa as well as Kahuku. ROA Doc #76 at 8489.

Board member Gon's alternate version of the facts is not supported by any of the evidence in the record. His statement clearly demonstrates that he violated HRS §§ 91-9(g) and 91-13. He relied on information that is not part of the record and it tainted the entire board's deliberative process and final decision.

The BLNR wrongfully failed to disqualify Board member Gon from participating in the contested case, thereby undermining the integrity of the contested case hearing. "A party asserting grounds for disqualification must timely present the objection, either before the commencement of the proceeding or as soon as the disqualifying facts become known." *In re Water Use Permit Applications*, 94 Hawai'i 97, 122–23, 9 P.3d 409, 434–35 (2000). Keep the North Shore Country voiced objection to board member Gon's participation before he made reference to knowledge that is not in the record and after. ROA Doc #92 at 9046 and 9087. Regardless of Keep the North Shore Country's timely objection, and board member Gon's reference to knowledge that is not in the record, the BLNR denied Keep the North Shore Country's motion for recusal. ROA Doc #98. Board member Gon's disclosure does not reference his statement confirming he relied on information that is not in the record. ROA Doc #97. Similarly, the BLNR's order denying Keep the North Shore Country's motion to recuse makes no mention of board member Gon's recitation of alternative facts not supported by the record. ROA Doc #98.

When an "agency consult[s] an outside source after the hearing was closed without giving the opposing party an 'opportunity to rebut,' the agency decision should be vacated." *Mauna Kea Power Co.,* 76 Hawai'i at 262, 874 P.3d at 1087. In this case, although board member Gon's recitation of the facts unmistakably demonstrated that he violated HRS §§ 91-9(g) and 91-13, Keep the North Shore Country was not given the opportunity to cross-examine those sources and present rebuttal evidence and was therefore denied due process of law.

Pursuant to HRS § 91-14(g)(1),(2),(3),(4),(5) and (6), this Court should reverse the BLNR's May 2018 decision to grant the HCP and ITL and remand to BLNR for further proceedings in which Keep the North Shore Country must be given the opportunity to question the Department of Land and Natural Resources staff and Endangered Species Recovery Committee members as to the accuracy of land board member Gon's comments and present this corrected information to the BLNR.

2. Appearance of Bias and Prejudice

In addition to violating HRS §§ 91-9(g) and 91-13, board member Gon also demonstrated bias and prejudice that should have precluded his participation in this contested case hearing. "In an adjudicatory proceeding before an administrative agency, due process of law generally prohibits decisionmakers from being biased, and more specifically, prohibits decisionmakers from prejudging matters and the appearance of having prejudged matters." *Mauna Kea Anaina Hou,* 136 Hawai'i at 389, 363 P.3d at 237. The purpose of a contested case hearing is frustrated when a "decisionmaker rules on the merits before the factual record is even developed. Such a process does not satisfy the appearance of justice, since it suggests that the taking of evidence is an afterthought and that proceedings were merely "mov[ing] in predestined grooves." *Id.* at 391, 363 P.3d at 239.

Board member Gon was the member of the Endangered Species Recovery Committee that made the motion to approve applicant's habitat conservation plan. ROA Doc #39 Exhibit A-36 at 4653. He voted against Keep the North Shore Country's participation in this contested case hearing. ROA Doc #39 Exhibit A-41 at 4725. Most importantly, before Keep the North Shore County 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 inadequate researched its problematic in his mind." *Id.* at 4724. Gon's statement reveals prejudice as to the adjudicative facts.

The standard for recusal in this state is an appearance of bias – not demonstrated actual bias. *Sussel v. Honolulu Civil Serv. Comm'n*, 71 Hawai'i 101, 107, 784 P.2d 867, 870 (1989). The BLNR's refusal to disqualify board member Gon casts suspicion on the integrity of the hearing conducted by the Board and must be deemed a procedural error. "The appropriate remedy for any bias, conflict of interest, or appearance of impropriety is the recusal or disqualification of the tainted adjudicator." *In re Water Use Permit Applications*, 94 Hawai'i 97, 122, 9 P.3d 409, 434 (2000).

3. Political pressure and ex parte communications

In *In re Water Use Permit Applications*, 94 Hawai'i 97, 123, 9 P.3d 409, 435 (2000)("*Waiāhole*"), the Hawai'i Supreme Court considered whether the governor exerted improper political pressure on an agency when he publicly criticized the agency's preliminary decision. The Court noted that:

> Where an agency performs its judicial function, external political pressure can violate the parties' right to procedural due process, thereby invalidating the agency's decision. Such improper influence may issue from the legislature, as well as from sources within the executive branch.

> External political inference in the administrative process is of heightened concern in a quasi-judicial proceeding, which is guided by two principles. First, the appearance of bias or pressure may be no less objectionable than the reality. Second, judicial evaluation of the pressure must focus on the nexus between the pressure and the actual decision maker. As we have previously observed, the proper focus is not on the content of communication in the abstract, but rather upon the relation between the communications and the adjudicator's decisionmaking process.

Id. (internal quotation marks, brackets, and citations omitted). The court held that the governor's public comments did not amount to improper political pressure because "at minimum, [there must be] some sort of direct contact with the decisionmaker regarding the merits of the dispute." *Id.*

In this case, Hawai'i State Senator Lorraine Inouye's (Senator Inouye) letter to the BLNR and phone calls to land board members are undoubtedly *ex parte* communications in violation of Hawai'i Administrative Rules (HAR) § 13-1-37. ROA Doc #92 at 9043-9045. Senator Inouye exerted improper political pressure on the BLNR during the period of deliberation between the Hearings Officer's Recommendation and the final decisions in order to get applicant's HCP approved. This level of interference violated Keep the North Shore Country's right to procedural due process.

The *ex parte* communications and pressure put on decisionmakers undermined the integrity of the contested case hearing. Yet, despite Appellant's request for complete disclosure, the BLNR refused to disclose the entire extent and content of *ex parte* communications regarding the project.

4. BLNR's Flawed Decision

The BLNR's decision has multiple errors in addition to highly unusual circumstances and irregularities that add up to a flawed board decision. The BLNR should have remanded this HCP and ITL back to the appropriate experts, the ESRC. In this highly unusual instance, the BLNR

went beyond the boundaries of the Board's role, playing scientist and substituting it's judgment for that of the experts, instead of carefully maintaining its responsibility as a fair adjudicator of the process. Unlike the Hearing Officer's well-reasoned recommendations, the BLNR single-mindedly put the blinders on and in this pursuit the BLNR left a trail of procedural errors.

IV. CONCLUSION

Appellant respectfully requests that this Court reverse the BLNR's approval of the HCP and ITL for any and all the reasons discussed above; stay any construction; and provide for such other relief as the Court shall deem just.

DATED: Honolulu, Hawai'i, August 20, 2018.

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

KEEP THE NORTH SHORE COUNTRY, Appellant, vs. BOARD OF LAND AND NATURAL RESOURCES, the DEPARTMENT OF LAND AND NATURAL RESOURCES, SUZANNE D. CASE in her official capacity as Chairperson of the Board of Land and Natural Resources and NA PUA MAKANI POWER PARTNERS LLC, Appellees.	Civil No. 18-1-0960-06 JPC (Agency Appeal) CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the forgoing document was served by depositing a copy of the same in the U.S. mail, postage prepaid to the addresses below:

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