

November 15, 2010

Aloha,

I am writing this letter, as a concerned member of the public, a native Hawaiian, a descendant of a fishing family from the Ka'ena area, and a representative of the Lawai'a Action Network, to request the following:

- 1) That all ground-breaking activity relating to the construction of the predator fence at Ka'ena be stopped until appropriate measures are put in place to ensure there will be no further harm to any undocumented cultural sites, significant land marks or any desecration of ancestral remains.
- 2) That before any ground-breaking activity is allowed to continue, the partnering departments and organizations responsible for the KPERP recognize that the need to best protect and malama both the natural *and* cultural resources of this wahi kapu of Ka'ena far outweighs the desire to construct the fence at this time. It is when projects are rushed that mistakes happen – mistakes that could lead to significant, unmitigable impacts to what we consider to be a “traditional landscape” or “traditional cultural property.”
- 3) That before any ground-breaking activity is allowed to continue, all signatories of the Memorandum of Agreement (MOA) amend Sections IV and V to include the need for a third-party cultural monitor and a third-party archaeologist to be on-site at all times during the entirety of the construction project.
- 4) That before any ground-breaking activity is allowed to continue, the BLNR reconsider their decision to deny the petitions for contested cases on this project. The contested case process will not only allow for meaningful citizen participation in an agency decision, beneficial to the intent of the project, but it will also ensure that the concerns of native Hawaiians, whose rights will be impacted by the decision-making process, will be properly considered.
- 5) That before any ground breaking activity is allowed to continue, the U.S. Fish & Wildlife Service reconsider their exemption from the NEPA based upon an update of findings related to cultural resource impacts presented in the MOA.

As you may well know, several people from the community, including native Hawaiians, have expressed their concern about the impacts that this project would have on the wahi kapu of Ka'ena. Since we first heard about the Draft Environmental Assessment for the Ka'ena Point Ecosystem Restoration Project (KPERP), I, and other members of the Lawai'a Action Network, have openly stated our concerns for both cultural and

environmental resources of the area through every possible avenue, only to find our concerns ultimately ignored. I, and other members had filed two rounds of petitions for contested cases, that were ultimately denied by the BLNR.

As you may also know, I had filed an appeal on the Board's decision, representing myself and the Lawai'a Action Network, on September 10, 2010 in First Circuit Court of the First Circuit State of Hawaii (Civil Case #10-1-1951-09). The appeal is yet to be heard, although two months ago certified copies of the appeal were delivered to Appellees.

During the second week of November, without any correspondence from any of the parties named as Appellees on the appeal, I was surprised to learn that the construction of the fence was to move forward, despite the fact that they had missed the proposed scheduling window (October to early November) for fence construction based upon stipulations in the Environmental Assessment (EA) that reads:

“Fence construction will be timed for October-early November or July-August. These time periods **will avoid the Laysan albatross nesting season (November through June)** and avoid the initial nesting period (April through June) and the primary fledging periods (September through October) for wedge-tailed shearwaters. Construction is anticipated to take approximately three to four weeks, weather-dependent. Fence crews will work in 2 10-day increments, with a break in between.”

It was our understanding, from the EA, that the main purpose of KPERP was to protect the Moli, the U'au Kani, and the occasional Ka'upu from predators. And now we continue to question the integrity of this project. We wonder if it is really about protecting these birds, especially when the current construction at this time of year coincides with the nesting season of the Moli, which was not part of the original plan (as documented in the above passage from the EA). We wonder why the construction of this fence is so rushed and cannot begin to imagine the reasons for the rushed action outweighs the need to make sure this fence, if it must be built, is done so in the most pono way possible.

On Friday, November 12, 2010 I placed calls to both Randall Kennedy , Native Ecosystem Section Manager, Natural Area Reserve System and Loyal Mehrhoff, Field Supervisor for the U.S. Fish and Wildlife Service, as I was concerned, after two visits to the project area, that requirements outlined paragraph 3 of the MOA were not being followed. The most recent version of the MOA states:

“A site visit will be conducted *prior to the commencement of work* with the fencing contractors, a biologist, archaeologist, and *cultural monitor* where *the precise fence line, the boundaries of areas where machinery is allowed (disturbed roadbed, fenceline and staging area only)*, and *the staging area will be staked out* and will be confirmed *to ensure that no archaeological features or endangered plants are disturbed during construction.*”

I was concerned that the use of the term “cultural monitor” in the paragraph above was misused, as there was no “cultural monitor” identified within the MOA, nor was there a definition of the position or a clear role for that person outlined in the MOA. It seems that there is a problem with Section IV of the document, as it explains clearly explains the role of the Interpretive Ranger, but fails to do the same for a “Cultural Monitor.”

But my immediate concern was that the precise fenceline, boundaries where vehicles are allowed, and the staging area were not marked off before ground-breaking activities began. According to Steve Miller, of US Fish and Wildlife, who took my call as Field Supervisor Loyal Mehrhoff was off island, “these are all pretty standard things, but they’re also very important things . . . flagging a critical site for native and cultural resources are the standard thing that’s typically done that the Fish and Wildlife service insists on before anything happens . . . all that would be clearly specified before anything happens.”

That same morning, Randy Kennedy of the NARS responded to me by saying, “I’m not exactly sure what has been flagged or hadn’t been flagged . . . but as of now there hasn’t been any earth moving activity. They’re supposed to do a little bit of work, if any, today(Friday 11/12), and then they’re off for the weekend and coming back on Monday(11/15).”

After the call with Randy, I was shocked on Saturday evening to find the following culvert partially completed (see photos below). I confirmed with the operator who was there that evening, and who had done the work , that earth-moving activities had taken place the morning of the 13th, and that he would be finishing the culvert on the morning of the 14th, despite the previous assurance from Randy Kennedy that there would be no such activities occurring until Monday, November 15, 2010.





I returned again on the afternoon of Sunday, November 14, 2010 and it was clear that even more earth-moving had taken place.







What bothers me most about what happened over the weekend is that those who were partially responsible for the project & its creation had assured me that standard procedures, put forth in the MOA, would be followed, and that earth-moving activity would not be happening over the weekend. I was disappointed that earth-moving activity did, in fact, take place, and it took place without an archaeologist present (a stipulation from Section V of the MOA). SECTION V. ARCHAEOLOGICAL MONITORING, reads:

“An archaeologist will be present while ground-disturbing activities are taking place (grading and Post hole digging) to ensure that archaeological resources are not adversely impacted. If previously unknown archaeological resources are encountered by fence construction personnel, the archaeologist will require a stoppage of work to inspect the site and determine the appropriate course of action. The archaeologist will also conduct a final inspection of the work area following completion of the project.”

Even archaeologists do not always have a thorough understanding of the cultural landscape, especially since there was no TCP study done for the wahi kapu. An

archaeologist who is an employee of the state, and moreover, an employee of one of the Departments that has championed the KPERP, could be considered as having a conflict of interest in that position of power. It is because of this that we also recommend the above section be amended to include, that aside from the current archaeologist from the state, there should also be a third-party archaeologist on site at any time that work is being done, be it earth-moving , or a less impacting activity.

Because of the recent activities that have demonstrated cultural insensitivity on the part of the DLNR and other partnering organizations for the KPERP, we ask all signatories, and the organizations and departments responsible for the KPERP, redraft Sections IV & V of the MOA to ensure such culturally insensitive behavior does not occur again, on this or any other project within a wahi kapu.

We ask all signatories of the current MOA to reconsider the necessity of having a third party cultural monitor (different from an ‘interpreter‘ who is employed by the state), and third-party archaeologist during *any* ground-breaking activity in the wahi kapu of Ka‘ena *for this project and any future projects* in the region. In fact, both a third party cultural monitor and a third-party archaeologist should be on site for the length of the project, especially since opposition to the project, in its current state, has been clear. Not only must they be included, but they must be given as much power as an archaeologist (see Section V of the MOA) to stop all activity if a cultural concern arises.

As the MOA stands right now, there has been no description of the responsibility of a "cultural monitor," nor any powers given to someone designated as such for this project. Section IV. ‘Cultural Monitoring and Interpretation‘ states:

“An interpretive ranger who is aware of culturally sensitive and legally protected information that should not be shared with the public has been hired to provide construction personnel and visitors with appropriate information on natural history and Native Hawaiian, military, and railroad history of Ka'ena Point. The information will be delivered onsite, in person, as well as with interpretive media such as a pamphlet. The FWS will fund this position in 2010 for one year. The FWS and project partners, along with the Hawai'i SHPO will work to evaluate, and if necessary, modify the duties of the ranger position in future years. The IOWS will consider additional funding for this position along with other funding requests, but is under no obligation to provide future funding for this effort.”

The amended language in ‘Section IV. CULTURAL MONITORING AND INTERPRETATION‘ must be made clear and should explain the difference between a ‘third-party cultural monitor‘ and an ‘Interpretive ranger‘ who is a state employee.

Last night, at 7:30pm, I was invited by the Interpretive Ranger to come out for the last day of earth-moving activity as a ‘cultural monitor.’ This invitation should have occurred prior to the project commencing, and the position should have been clearly documented within the MOA, explaining both the requirements one would need to be considered a ‘cultural monitor’ and the role the ‘cultural monitor’ would play in construction activities. A last minute invitation does not excuse or dismiss the hewa that has been committed over the weekend. As the MOA stands, it is highly inconsiderate, and not feasible for any native Hawaiian to act as a ‘cultural monitor’ with no clear role to play, and no authority to put a stop to activity that they consider culturally inappropriate.

Finally, I would like to shed some light on an issue that I take quite seriously. I find it highly irresponsible for a federal organization like U.S. Fish and Wildlife Service, who would be responsible to operate under the strict regulations and guidelines of NHPA, NAGPRA and NEPA which were created to ensure the best protection for both natural and cultural resources, to apply for an exemption from NEPA. Especially when the information provided in the most current version of the MOA conflicts with that found on the NEPA Exemption Application.

For a federally funded project, like the KPERP, there is no question that an EIS based upon non-exclusive criteria established by the Council on Environmental Quality would be required as it falls under the following criteria:

1. “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. § 150S.27(b)(1). In the case of the KPERP EA, the State and it’s partnering organizations found that protection of the migratory species far outweighs any impact that construction may have on the area.
2. “Unique characteristics of the geographic area such as the proximity to historic or cultural resources or ecologically critical areas,” id. § 150S.27(b)(3). This criteria applies 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).
3. “The degree to which the possible effects on the human environment are likely to be highly controversial,” id §150S.27(b)(4).
4. “The degree to which the possible effects on the human environment are highly uncertain or involve unique and unknown risks,” id.§ 150S.27(b)(5).
5. “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).

As noted in the exemption application (attached at bottom of document), U.S. Fish & Wildlife Service claimed to anticipate “no significant cultural resource impacts to occur based on ongoing coordination with local and regional archaeologist and based on implementation methods.” Based on the incidents that occurred over the weekend, the U.S. Fish and Wildlife should rescind its exemption from NEPA based on the following statements from paragraph 4 of the MOA:

WHEREAS, the FWS has determined that the undertaking may have an adverse effect on several historic properties at Ka'ena Point listed in, or eligible for listing in, the National Register of Historic Places including the “Ka'ena archaeological site complex” (Site No. 50-80-03-1183), rock formations Leina ka 'Uhane and Pōhaku o Kaua'i, which are of known traditional cultural significance, and structures and landscape modifications associated with the island's railway and military histories which are described in Attachment A, listed in Tables 2, 3, and 4 of Attachment A, and mapped on Attachment C.

I truly hope that all signatories, departments and organizations responsible for this project, and the cultural insensitive actions that occurred over the weekend, decide to do what is pono for the wahi kapu of Ka'ena. Again, I ask that all earth-moving activities be stopped until the kuleana outlined above is taken care of.

Malama Pono.

Aloha Aina.

Malama Ka'ena, a malama Ka'ena ia 'oe.

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Lawai'a Action Network

Attachment: Application for Exemption from NEPA

UNITED STATES FISH AND WILDLIFE SERVICE
Pacific Islands Office

ENVIRONMENTAL ACTION STATEMENT
Categorical Exclusion

Within the spirit and intent of the Council on Environmental Quality's regulations for implementing the National Environmental Policy Act (NEPA), and other statutes, orders, and policies that protect fish and wildlife resources, we have established the following administrative record and determined that the action described below is a categorical exclusion as provided by 516 DM 2, Appendix 1 and 516 DM 6, Appendix 1.

The Ka'ena Point Ecosystem Restoration Project is an integrated management and education effort to protect, preserve and restore the native environment of Ka'ena Point Natural Area Reserve for the benefit of future generations. The cooperating partners are the Hawai'i DLNR, U.S. Fish and Wildlife Service, the Wildlife Society, Hawai'i Chapter with the support of local conservation and education groups. A key component of the restoration project is the construction of a predator proof fence to keep out invasive mammals that threaten the native and endangered species at the Reserve.

We anticipate no significant cultural resource impacts to occur based on ongoing coordination with local and regional archeologists and based on implementation methods.

Check One:

- X The construction of new, or the addition of small structures or improvements, including structures and improvements for the restoration of wetland, riparian, instream, or native habitats, which result in no or only minor changes in the use of the affected local area. The following are examples of activities that may be included (installation of fences, construction of small water control structures, planting of seeds or seedlings and other minor revegetation actions, construction of small berms or dikes, development of limited access for routine maintenance and management purposes).
- The reintroduction or supplementation of native, formerly native, or established species into suitable habitat within their historic or established range, where no or negligible environmental disturbances are anticipated.
- The issuance, denial, suspension or revocation of permits for activities involving fish, wildlife, or plants regulated under 50 CFR Chapter 1, Subsection B, when such permits cause no or negligible environmental disturbance.
- The issuance of ESA section 10(a)(1)(B) "low-effect" incidental take permits that individually or cumulatively, have a minor or negligible effect on the species covered in the habitat conservation plan.
- Issuance of recovery plans under section 4(f) of the ESA.
- State, local, or private financial assistance (grants and/or cooperative agreements) including State planning grants and private land restoration, where the environmental effects are minor or negligible.
- Hazardous fuels reduction activities using prescribed fire, not to exceed 4,500 acres, and mechanical methods for crushing, piling, thinning, pruning, cutting, chipping, mulching, and mowing, not to exceed 1,000 acres.
- Post-fire rehabilitation activities, not to exceed 4,200 acres (such as tree planting, fence replacement, habitat restoration, heritage site restoration, repair of roads and trails, and repair of damage to minor facilities such as campgrounds) to repair or improve lands unlikely to recover to a management approved condition from wildland fire damage, or repair or replace minor facilities damaged by fire.
- Other. (see categorical exclusions as provided by 516 DM 2, Appendix 1 and 516 DM 6, Appendix 1.) Describe:

Other supporting documents (list):

