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NA PUA MAKANI POWER PARTNERS
PO Box 540
Santa Barbara, CA 93102

December 8, 2016

BOARD OF LAND AND NATURAL RESOURCES
Kalanimoku Building
1151 Punchbowl Street, Room 130
Honolulu, HI 96813

Re: Applicant Na Pua Makani Power Partners, LLC's Testimony in Opposition to Keep the North Shore Country's Request for Contested Hearing – Item C-1
HCP / ITL - Na Pua Makani Project
December 9, 2016 Board Meeting

Ladies and Gentlemen:

On behalf of Na Pua Makani Power Partners, LLC ("NPM"), I submit this testimony in opposition to Item C-1, Keep the North Shore Country's ("KNSC") Petition for a Contested Case Hearing.

In connection with the above referenced Petition by KNSC, we respectfully request that the Board deny KNSC's Petition at the December 9, 2016 Board Meeting.

As is explained in detail in the attached ***Testimony in Opposition to Petition for a Contested Case Hearing***, submitted by Carlsmith Ball LLP on behalf of NPM,

1. KNSC failed to request a contested case hearing ("CCH") at the October 28, 2016 Board Meeting when the matter was first scheduled for hearing by the BLNR;

2. KNSC is not entitled to a CCH by statute or by rules promulgated by the Department of Land and Natural Resources ("DLNR"); and

3. KNSC does not have standing.

The last-minute request and Petition for a CCH filed by Sen. Gil Riviere on behalf of KNSC, if granted, would improperly delay and impede the Na Pua Makani Project and establish

a dangerous precedent for the State's already arduous, intensive, and time consuming environmental review process.

Simply put, KNSC is not entitled to a CCH under the governing statutes or the Board's rules. KNSC has had ample opportunity to provide comments and evidence concerning NPM's habitat conservation plan ("HCP") and incidental take permit ("ITP"), but failed to do so. Having previously declined its numerous opportunities to participate in the process, KNSC should not be permitted to interject at the last possible moment and stall NPM's Project for months, if not years. Furthermore, KNSC's objections to the methodologies and evidence relied upon in the HCP are without basis. The HCP is based on the best science and evidence available. It has already been thoroughly vetted and unanimously approved by the Endangered Species Recovery Committee ("ESRC") which, by statute, is the consultant to the Board and DLNR on matters relating to, among other things, the protection of endangered species.

By way of background, we started the biological surveys for the NPM Project over four years ago. The HCP is a joint federal and state plan, which means that we had to satisfy the requirements of both the State and Federal Agencies.

We worked with both the DLNR's Division of Forestry and Wildlife ("DOFAW") staff and U.S. Fish and Wildlife Service ("USFW") staff for over two years to develop and finalize an acceptable HCP. The process of negotiating that HCP was arduous and difficult. The State and Federal Agencies have very high standards and requirements. We incorporated the lessons learned from other HCPs approved and ITLs issued by the State for other wind farms over the years into the requirements for our HCP. This translated into much more stringent requirements in our HCP than contained in the other HCPs that were approved in the past. There were also seven public hearings for the HCP over the course of the last two years, including three ESRC meetings. Additionally, there was a site visit that was open to the public.

Sen. Riviere attended a number of those meetings, including the final ESRC meeting on February 25, 2016, when the ESRC unanimously voted to recommend approval of the HCP to the DLNR Board and chose not to comment or express any concern or issue with regards to the HCP. The ESRC Board is composed of experts, biologists and scientists from State and Federal Agencies as well as independent experts. The ESRC Board has a lot of expertise in endangered species conservation and used the best available science to evaluate our HCP. ESRC does an excellent job for the State and has extremely high standards that ensure the requirements of the State are met.

Sen. Riviere was not present at the December 2015 ESRC meeting at which NPM presented the proposed final HCP to the ESRC. At that meeting, ESRC required additional changes before it would accept the HCP, but did not find any significant flaws or deficiencies in the HCP.

We have also attached the ***Response to Petition for a Contested Case Hearing by Keep the North Shore Country on the Request for Approval of the Na Pua Makani Wind Project Habitat Conservation Plan and Issuance of the Associated***, dated December 2, 2016, from Tetra Tech to NPM that discusses the methodology and evidence relied upon in the HCP and addresses some of the claims raised in the Petition.

With regards to Sen. Riviere's request for a CCH, KNSC is not entitled to a CCH. There is no statute or rule requiring a CCH. HRS 195D requires only a public hearing. There are also no DLNR rules that require a CCH in connection with the Board's approval of the HCP and ITL. Additionally, KNSC does not have a property interest sufficient to satisfy the standing requirement of a CCH.

Sen. Riviere and KNSC have been afforded due process with the seven public meetings held in connection with this HCP, but they chose not to take advantage of it. Up until the last meeting on November 10, 2016, Sen. Riviere and KNSC did not submit any comments or complaints about the HCP. Nor have they at any point provided any evidence supporting the allegations in their Petition. They failed to participate in the Board's process of approving a HCP and ITP for the past year and a half and should not be permitted to derail these proceedings at this late stage. To do so would create a dangerous precedent by rewarding KNSC for its lack of diligence and creating a new right to a CCH that does not otherwise exist. It would also undermine the purpose of the prior hearings and statutory comment period.

Furthermore, the Board must also take into account NPM's due process rights. Granting a CCH when neither the rules nor statute expressly contemplate one would unfairly prejudice NPM, which has diligently adhered to the Board's process for approving an HCP and ITP and has a reasonable expectation that the Board will follow its rules and the law.

The proposed Project is important to Hawaii's energy future. Hawaii has the highest cost electricity in the nation. Electricity generated by this Project will be about half the cost of burning oil, which will help stabilize and reduce electricity costs for the customers on Oahu. The Project will help reduce the State's dependence on foreign oil imports, which costs billions of dollars annually. The Project will help Hawaii achieve its 100% renewable energy initiative that was signed into law by the Governor last summer. NPM is proud of the fact that this Project is the lowest cost wind energy Project in the history of Hawaii and will save Oahu ratepayers millions of dollars in electricity costs over the life of the Project.

The proposed Project will provide short term construction and long term energy jobs for the local community. Furthermore, the Project has committed to fund a robust benefit package worth approximately $2M over the life of the Project for the local community. This fund will help the community address needs and initiatives that are currently underfunded. I have met a

lot of the people that live in the community, and I am very pleased that we can give back to this community which has needs that will not otherwise be met by public funding sources.

We understand that approving new renewable Projects and the HCP and ITL in this case are complex decisions. The Board must balance competing interests in making its determinations, but the Board must do so in a manner that is fair and equitable to everyone, not just the small minority who oppose a particular Project. That is why the Board has its extensive process for public hearings and comment—to give everyone, including community groups like the KNSC, ample opportunity to voice its concerns and present testimony and other evidence for the Board to consider. KNSC's eleventh hour objections are untimely and undermine the State's and the Board's processes. There would be no point in having public hearings and comment periods if any latecomer, for whatever reason, can simply swoop in just prior to approval and initiate a CCH. In this case, based on the evidence and testimony that were timely and properly presented during the approval process, this Project clearly will help Hawaii achieve its renewable energy goal at half the cost of burning oil while minimizing the impact to endangered species to the extent practicable.

We would respectfully request that the Board deny the request for a CCH and subsequently approve the HCP and issuance of the ITL. Mahalo.

[signature follows on next page]

Sincerely,

NA PUA MAKANI POWER PARTNERS, LLC

Michael D. Cutbirth
Manager

Signature page to Na Pua Makani Power Partners, LLC's Testimony in Opposition to Keep the North Shore Country's Petition for a Contested Case Hearing, Agenda Item C-2

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December 8, 2016

VIA HAND DELIVERY

Suzanne D. Case
Chairperson, Board of Land and Natural Resources
Members of the Board of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl Street, Room 130
Honolulu, Hawaiʻi 96813

Re: **Applicant Nā Pua Makani Power Partners, LLCs Submission of Legal Argument in Opposition to Keep the North Shore Country's Petition for a Contested Case Hearing (Agenda Item C-1)**

Dear Chairperson Case and Members of the Board of Land and Natural Resources:

As part of its proposed development of an approximately 25 megawatt wind generating facility on the North Shore of Oʻahu ("**Project**"), on or about March 30, 2015, Nā Pua Makani Power Partners, LLC ("**Applicant**") initiated the process for Board of Land and Natural Resources ("**Board**") approval of a habitat conservation plan ("**HCP**") and incidental take license ("**ITL**").[1] Since that time, these items have been the subject of, among other things, a statutorily prescribed public review and comment period of no less than sixty (60) days, a public site visit, and at least seven public meetings. Through this process, the HCP and related ITL have undergone revisions based on the comments and recommendations received, including from the Endangered Species Recovery Committee ("**ESRC**"). The ESRC recommended approval of the revised HCP on or about February 25, 2016. At no time during this lengthy public comment

[1] Details regarding the proposed Project, the HCP and the ITL are set forth in the HCP, the Staff Submittal for Agenda Item C-2, as well as in Applicant's Testimony in Opposition to Keep the North Shore Country's Request for a Contested Case Hearing – Item C-1 from i) Mr. Michael Cutbirth, manager of the Applicant, and ii) the Response to Petition for a Contested Case Hearing by Keep the North Shore Country on the Request for Approval of the Na Pua Makani Wind Project Habitat Conservation Plan and Issuance of the Associated Incidental Take License, from Tetra Tech, the consultant who prepared the HCP, to the Applicant, dated December 2, 2016.

process did Keep the North Shore Country ("**KNSC**") provide any comments on these submittals.

Applicant's request for approval of its HCP and ITL was placed on the Boards agenda for October 28, 2016, but was deferred. KNSC did not oppose the HCP or ITL at this meeting. These items were again agendized for the November 10, 2016 meeting. At this meeting, KNSC voiced—*for the very first time*—opposition to the HCP and ITL and orally requested a contested case hearing on these items. KNSC subsequently filed a written petition on November 19, 2016 (together with the oral request, the "**Petition**"). KNSCs Petition and Applicants request for approval of its HCP and ITL have since been placed on the agenda for the December 9, 2016 Board meeting as Items C-1 and C-2, respectively.

Applicant hereby opposes Agenda Item C-1, and respectfully submits that for the reasons set forth herein, the Petition should be denied, and the Board should proceed with its vote on Agenda Item C-2.

I. ARGUMENT

A. A CONTESTED CASE HEARING IS NOT REQUIRED BY LAW

KNSC submitted its Petition citing Hawai'i Administrative Rules ("**HAR**") § 13-1-29, which contains the Boards procedures to initiate a properly authorized contested case hearing. However, KNSCs Petition does not provide or cite to any legal authority that would entitle it to a contested case hearing.

The Board is required to hold a contested case hearing only when required by law to do so for the purpose of determining the legal rights, duties, or privileges of a party. *See* HRS § 91-1(5); HAR § 13-1-2(a); *see also Mauna Kea Anaina Hou v. BLNR,* 136 Hawai'i 376, 390, 363 P.3d 224, 238 (2015) (citations omitted). To be "required by law," a contested case hearing must be mandated by agency rule, statute or constitutional due process. *See id.* at 390, 363 P.3d at 238 (citations omitted). For the reasons set forth below, Applicant respectfully submits that a contested case hearing is *not* required by law here; and, KNSCs Petition should be denied.

1. There is No Statute or Rule Requiring the Board to Hold a Quasi-Judicial Contested Case Hearing on a HCP or ITL Application

a. Contested Case Hearings and Public Hearings Are Different in Nature

At the outset, the Applicant encourages the Board to consider the differences between the terms "contested case," "agency hearing," and "public hearing" as defined in HRS Chapter 91 and the Boards rules of practice and procedure, HAR Title 13, Chapter 1. Under HRS Chapter 91:

> "Contested case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for ***agency hearing***.
>
> "Agency hearing" refers ***only*** to such hearing held by an agency *immediately prior to a judicial review of a contested case* as provided in section 91-14.

HRS § 91-1(5) & (6) (emphasis added). The Boards rules further provide the following relevant definitions:

> "Contested case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for an ***agency hearing***.
>
> "Public hearing" means a hearing required by law in which members of the public ***generally may comment*** upon the subject matter of the hearing.

HAR § 13-1-2 (emphasis added).

These separate and distinct definitions demonstrate that public hearings are intended to be different in nature from contested cases (and agency hearings). *See Medeiros v. Hawai'i Dept of Labor and Indus. Relations*, 108 Hawai'i 258, 265, 118 P.3d 1201, 1208 (2005) ("***Medeiros v. DLIR***") (holding that courts are bound to give effect to all parts of a law, and ensure that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a reasonable, alternate construction will give force to and preserve all words in the statute). Although in some instances both public hearings and contested case hearings may be required by rule or law, these hearings serve very different purposes. Whereas the former simply contemplates a procedure by which the public may provide comments on the matters at issue in the hearing, the latter contemplates an independent quasi-judicial evidentiary proceeding. *See* HAR § 13-1-2; *see also* HAR § 13-1-28(a), (b) (noting that contested case hearings are separate and independent from public hearings, and shall only be held, if required by law, after any public hearing required by law); *see also* HAR § 13-1-28 to HAR § 13-1-39 setting forth in detail the quasi-judicial procedures applicable specifically to contested case proceedings). The Hawai'i Supreme Court recently explained the Boards rules governing contested cases:

> A contested case hearing affords parties extensive procedural protections ***similar to those afforded parties in a civil bench trial*** before a judge. These protections include the opportunity to issue subpoenas for witnesses to testify under oath or produce documents, to cross-examine witnesses under oath, and to present evidence by submitting documents and testimony under oath in support of their positions. Moreover, a contested case hearing

> affords parties the opportunity to obtain and utilize the assistance of counsel, comment on how a site visit by the hearing officer should be conducted, review the written decision of the hearing officer, and challenge the hearing officers decision both in writing and verbally at a hearing before BLNR.

Mauna Kea Anaina Hou, 136 Hawai'i at 391, 363 P.3d at 239 (internal citations omitted). omitted). Given the foregoing, to read "public hearing" as synonymous with "contested case" or "agency hearing" when considering whether a contested case hearing is required by rule or statute would effectively rewrite the legislated statute and the Boards rules and run afoul of basic rules of statutory construction. *See Medeiros v. DLIR*, 108 Hawai'i 265, 118 P.3d 1208; *Director, DLIR v. Kiewit Pacific Co.*, 104 Hawai'i 22, 84 P.3d 530 (2004) ("The general principles of construction which apply to statutes also apply to administrative rules.").

This distinction between a quasi-judicial "contested case" and a "public hearing" whose purpose is to provide a forum for public input is supported by Hawai'i case law. In *Sandy Beach Def. Fund v. City Council of City and Cnty. of Honolulu*, the Hawai'i Supreme Court considered whether or not the City Councils procedures to approve a Special Management Area ("**SMA**") permit required a contested case hearing. 70 Haw. 361, 773 P.2d 250 (1989). The appellants argued that the City Council was required to afford them a trial-like adjudicatory hearing (*i.e.*, a contested case hearing). The Court disagreed. In doing so, the Court looked at the legislative intent behind the Coastal Zone Management Act ("**CZMA**") and found that in enacting the CZMA, the legislature provided for "public hearings" to afford the public an adequate opportunity to participate in certain agency decision-making processes. *Id.* at 373, 773 P.2d at 258 (citing Senate Committee Report No. 143). Because the legislature expressly provided for a "public hearing" rather than a "contested case," the Court concluded that:

> The pattern and purpose of the CZMA lead to the conclusion that the legislature intended the hearing held by the county authority in conjunction with the application for an SMA use permit be ***informational in nature in order to permit members of the public to present their views and relevant data as an aid to the administrative decision*** on the particular application as well as long-term planning policy for the entire coastal area.
>
> We find, therefore, that neither the language nor the legislative history of the CZMA supports Appellants contention that the City Council is required to conduct contested case hearings in SMA use permit proceedings. Rather, it is apparent that the legislature in HRS § 205A-29 allowed each authority to decide for itself the nature of the hearings it would conduct in reviewing SMA use permit applications.

Id. (emphasis added). The Court held that neither the legislative history of the CZMA nor the language of the CZMA supported the appellants argument that a *contested case hearing* was required. *Id.*; *cf. Public Access Shoreline Hawaii v. Hawaii Cnty. Planning Commn*, 79 Hawaiʻi 425, 903 P.2d 1246 (1995) ("***PASH***") (finding that a contested case hearing was required where the Hawaiʻi County Planning Commissions rules explicitly provide that the agency must hold a contested case hearing in accordance with HRS Chapter 91 on a SMA application).

Although the Courts holding was also based on the determination that the City Council was not subject to the Hawaiʻi Administrative Procedure Act, the Court emphasized that "the legislative history of the original act and its amendments does not indicate any intent by the legislature to require a contested case hearing, as defined in Chapter 91, in SMA use permit procedures." *Sandy Beach*, 70 Haw. at 373, 773 P.2d at 258. Accordingly, the *Sandy Beach* analysis is relevant to the Boards consideration of the instant Petition.

Similarly, in *Medeiros v. Hawaiʻi Cnty. Planning Commn*, the Intermediate Court of Appeals ("**ICA**") examined the Hawaiʻi County Planning Commissions ("**HCPC**") procedures related to geothermal resource permit applications. 8 Haw. App. 183, 797 P.2d 59 (1990) ("***Medeiros v. HCPC***").[2] The applicable statutory provisions explicitly exempted geothermal resource permit applications from contested case hearings and substituted a "public hearings and mediation process" to "provide for a simpler procedure to consider and act on permits for geothermal development before state and county agencies." *Id.* at 194, 797 P.2d at 65 (quoting Sen. Stand. Comm. Rep. No. 1118, in 1987 Senate Journal, at 1387).

b. <u>HRS Chapter 195D and its Implementing Rules Require Only That a "Public Hearing" Be Held, Not a "Contested Case" Hearing</u>

The analyses in *Sandy Beach* and *Medeiros v. HCPC* provide guidance here. HRS Chapter 195D governs HCPs and ITLs. No provision in Chapter 195D refers to, requires or provides any right to a person to request and be given a *contested case hearing* before approval of an ITL or HCP.[3] Rather, this Chapter explicitly requires that the Board consult with the

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[2] Although the specific statutory provisions examined in *Medeiros v. HCPC* were repealed in 2012, the case and its analysis has not been overruled nor have Hawaiʻi Supreme Court cases citing to *Medeiros v. HCPC*. *See, e.g.*, *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 87 Hawaiʻi 217, 953 P.2d 1315 (1998); *Aged Hawaiians v. Hawaiian Homes Comm'n*, 78 Hawaiʻi 192, 891 P.2d 279 (1995).

[3] The authority of an administrative agency is limited by the powers expressly granted to it by the legislature. *See Morgan v. Planning Dep't, Cnty. of Kauai*, 104 Hawaiʻi 173, 184, 86 P.3d 982, 993 (2004) ("An administrative agency can only wield powers expressly or implicitly granted to it by statute. However, it is well established that an administrative agency's authority includes those implied powers that are reasonably necessary to carry out the powers expressly granted.") (citations and quotation marks omitted); *Public Util. Comm'n of Texas v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 315 (Tex. 2001) ("The basic rule is that a state

ESRC publish notice of the proposed HCP and ITL, make the materials available for *public review and comment* for not less than sixty days, and then hold a "*public hearing*" prior to voting on the plan and application. *See* HRS §§ 195D-4(g) & 195D-21(b).[4] There is absolutely nothing in HRS Chapter 195D related to HCPs and ITLs that suggests that the legislature ever contemplated, much less intended, a full blown evidentiary-based *contested case hearing*. Instead, on its face, Chapter 195D contemplates a *public hearing* at which any last public comments can be provided for consideration before final decision-making on a proposed HCP and/or ITL.

Like the legislative history of the statutory schemes examined in *Sandy Beach* and *Medeiros v. HCPC*, the legislative history of HRS Chapter 195D supports the conclusion that only a public hearing —not a contested case hearing—is required when the Board considers a HCP and ITL. When HRS § 195D-4 was originally enacted in 1975, there was no requirement for the Board to hold a public hearing when it approved an ITL. The 1997 amendments to HRS Chapter 195D, enacting HRS § 195D-21 (for HCPs), included the requirement of a public hearing when the Board approves an HCP, and the 1998 amendments added the "public hearing" requirement to HRS § 195D-4(g) when the Board issues an ITL. *See* Act 380 (July 9, 1997); Act 237 (July 20, 1998). The purpose of the 1997 and 1998 amendments were to provide additional

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administrative agency has only those powers that the Legislature expressly confers upon it."); *D.A.B.E., Inc. v. Toledo-Lucas Cnty. Bd. of Health*, 96 Ohio St.3d 250, 773 N.E.2d 536, 545-46 (2002) (providing that a while an agency's grant of power may be express or implied, "the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective").

[4] HRS § 195D-4(g) (emphasis added) provides that:

> **After consultation with the endangered species recovery committee**, the board may issue a temporary license as a part of a habitat conservation plan to allow a take otherwise prohibited by subsection (e) if the take is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity;
>
> *   *   *
>
> Board approval shall require an affirmative vote of not less than two-thirds of the authorized membership of the board **after holding a public hearing on the matter** on the affected island. The department shall notify the public of a proposed license under this section through publication in the periodic bulletin of the office of environmental quality control and make the application and proposed license available **for public review and comment for not less than sixty days prior to approval**.

HRS § 195D-21(b) provides that the Board "after a public hearing on the island affected, and upon an affirmative vote of no less than two-thirds of its authorized membership, may enter into a habitat conservation plan[.]"

incentives to private landowners to recover and protect threatened and endangered species on their lands and to minimize procedural burdens on applicants by consolidating the HCP and ITL processes, while also providing for *public review and comments* (like the CZMA in Sandy Beach). *See* Conf. Comm. Rep. No. 131, in 1998 House Journal, at 829 & H. Stand. Comm. Rep. No. 1291, in 1997 House Journal, at 1613-15. Had the legislature intended to create a right to a contested case hearing, it would have said so. It did not. Instead, the legislature specifically provided for a public comment process and a mandatory public hearing as the mechanism for public participation in the process for HCPs and ITLs under HRS Chapter 195D.

Furthermore, despite being authorized to promulgate rules in connection with HRS Chapter 195D, the Department of Land and Natural Resources ("**DLNR**") has not promulgated any rules related to the process for applying for, and obtaining Board approval for, HCPs or ITLs. No rule authorizes a contested case proceeding in connection with a HCP or ITL.

Accordingly, based on the plain text and legislative history of Chapter 195D, and the lack of any implementing rule providing for a contested case hearing for an HCP or ITL, KNSC has no statutory or rule basis to request one. And no existing case law on point provides for a direct right to request one here under Chapter 195D.

The Hawai'i Supreme Court recently analyzed the right to a hearing in the context of a conservation district use application ("**CDUA**"). *See Kilakila 'O Haleakala v. Bd. of Land and Natural Res.*, 131 Hawai'i 193, 200, 317 P.3d 27, 34 (2013) ("***Kilakila***"). *Kilakila* is clearly distinguishable here. That case dealt solely with the issue of whether the Board was required to hold a public hearing in connection with a CDUA under HRS Chapter 183C and HAR Title 13, Chapter 5 (the "**Conservation District Rules**"). In the context of CDUAs, Chapter 183C expressly contemplates that a "contested case hearing" can be requested under HRS § 183C-6(b). The Court there looked at the plain language of HRS Chapter 183C and concluded that while the statute referenced an ability to hold a hearing before approval, there was no mandatory requirement for a hearing before final approval of the CDUA. *Id.* at 200-01, 317 P.3d at 34-35. The Court found that because the Conservation District Rules required some form of hearing before final approval, appellant was entitled to the previously requested contested case hearing in order to satisfy the requirement that some hearing occur before final approval. *Id.* at 202, 317 P.3d at 36. That is not the case here under Chapter 195D, which expressly requires the Board to hold a public hearing after 60 day notice, and before final approval of the license. Since a public hearing before final Board approval is in fact mandated in HRS § 195D-4(g), any concern about the lack of a public hearing before final approval, as in *Kilakila*, is not involved here.

Furthermore, neither HRS Chapter 183C nor the Conservation District Rules are applicable to the present case. The land proposed for the Project here does not lie within the Conservation District and is therefore not subject to the Conservation District Rules. No applicable statute or rule or policy consideration expressly entitles KNSC to a *contested case* (evidentiary) hearing before the Board can consider and approve an ITL or HCP. Unlike HRS Chapter 183C at section 6(b), the right to a contested case hearing does not appear anywhere in Chapter 195D, which governs aquatic life, wildlife and land and plants, including HCPs and

ITLs. Instead, any hearing requirement is satisfied by the 60-day notice and public hearing requirement that the statute mandates occur before final Board approval as set forth in HRS § 195D-4(g). There is no additional right to a contested case hearing anywhere in Chapter 195D.

No existing case law or constitutional due process mandates that a *contested case* hearing be held before the Board's approval of an ITL or HCP. Here, the public had multiple opportunities to comment on and contest the HCP and ITL. The public—including KNSC—could have presented testimony at the November 10, 2016 public hearing or the other six public meetings. The public also had the opportunity to provide comments and evidence during the statutory comment period. Those due process mechanisms provided for in the statute would be superfluous if anybody could just lie in wait and request a contested case hearing just before the Board is about to take the final vote.

Kilakila was decided in the context of the public interest and due process policy implications that are specific to the CDUA and Chapter 183C, not Chapter 195D. To expand the ruling in *Kilakila* beyond the context of a CDUA to mandate a full blown contested case hearing here, where no right to one exists under Chapter 195D, would have broad policy implications for almost all Board decisionmaking. The result would create a right to a contested case hearing any time the Board (or any administrative agency subject to HRS § 91-14) takes any action that would affect an applicant's rights, duties, or privileges. Such an expansive or overbroad application of *Kilakila* would open the floodgate to an endless series of contested cases for all permits and licenses within the Board's authority.

2. Constitutional Due Process Does Not Mandate a Contested Case Hearing

a. KNSC Does Not Have a "Property" Interest Within the Meaning of the Due Process Clause

When determining whether a contested case hearing is required by constitutional due process, the first question is whether the interest the petitioner seeks to protect is a "property" interest within the meaning of the state and federal due process clauses. *See Sandy Beach*, 70 Haw. at 376, 773 P.2d at 260; *see also Pele Defense Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 68, 881 P.2d 1210, 1214 (1994). A "property interest" is a benefit to which the petitioner is legitimately entitled, one that is more than an abstract need or desire. *See Sandy Beach*, 70 Haw. at 376, 773 P.2d at 260; *Pele Defense Fund*, 77 Hawai'i at 68, 881 P.2d at 1214; *Bush v. Hawaiian Homes Commn*, 76 Hawai'i 128, 136, 870 P.2d 1272, 1280 (1994).

KNSC is not an adjacent landowner. KNSCs Petition for a contested case hearing instead appears to be based on general environmental concerns. As the Hawai'i Supreme Court has expressly stated, "[w]hile we have recognized the importance of aesthetic and environmental interests in determining an individual's standing to contest an issue, we have not found that such interests rise to the level of "property" within the meaning of the due process clause." *Sandy Beach*, 70 Haw. at 377, 773 P.2d at 261 (concluding that constitutional due process did not give rise to a right to a contested case for a community group because its "aesthetic and

environmental" interests were not legitimate claims of entitlement or property interest).

b. Even If KNSC Did Have a Recognized Due Process "Property" Interest, It Has Been Afforded Sufficient Notice and Opportunity to Be Heard

Even if KNSC could demonstrate a legitimate property interest, which Applicant asserts KNSC cannot, constitutional due process is flexible and only "calls for such procedural protections as the particular situation demands." *Sandy Beach*, 70 Haw. at 378, 773 P.2d at 261. Moreover, due process mandates a hearing only "where the issuance of a permit implicating the applicants property rights adversely affect the constitutionally protected rights of other interested person ***who have followed the agency's rules governing participation in contested cases***." *Pele Defense Fund*, 77 Hawai'i at 68, 881 P.2d at 1214 (emphasis added). KNSC has failed to show or even claim that the procedures set forth in HRS Chapter 195D are insufficient to protect its interests from erroneous deprivation. And, KNSC cannot in good faith claim wrongful deprivation given that it has failed to participate in the process provided for under Chapter 195D.

In *Sandy Beach*, in addition to analyzing whether or not the City Council was required to hold a contested case hearing rather than a public hearing, the Hawai'i Supreme Court also considered whether constitutional due process provided an independent basis for the requested contested case hearing. In connection with this analysis, the Court articulated the following test:

> Determination of the specific procedures required to satisfy due process requires a balancing of several factors: (1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.

Sandy Beach, 70 Haw. at 378, 773 P.2d at 261. Applying this test, the Court concluded that the appellants "rights to procedural due process were satisfied by the notice and opportunity to be heard" provided for through the public hearing process, and that "the due process clause does not require the additional procedures sought by Appellants." *Id.* In particular, the Court found that the City Council provided ample notice of public hearings and complied with its own notice procedures. *Id.* at 378-379, 773 P.2d at 261. The Court also found that, through the public hearings that were held, appellants were afforded numerous opportunities to be heard. *Id.* at 378-379, 773 P.2d at 261-262.

Similarly, in this case, the Board has provided the public—which includes KNSC—with ample notice and opportunities to be heard; and, thus satisfied any conceivable due process requirements. Consistent with Chapter 195D, notice of the HCP and ITL was published and the public was provided a minimum of 60 days to provide feedback on the initial proposed HCP and

ITL. In addition, seven public meetings and a site visit that was open to the public were held on the HCP, at which KNSC could provide additional comments, as follows:

July 2, 2014 (informal project introduction to the ESRC)

March 30-31, 2015 (site visit and ESRC meeting)

June 4, 2015 (DLNR public meeting)

December 17, 2015 (ESRC request for approval of Final HCP, revisions recommended)

February 25, 2016 (ESRC recommended HCP for approval)

October 28, 2016 (Board public meeting on the HCP)

November 10, 2016 (Board public meeting on the HCP).

In other words, to date, KNSC has had at minimum ***eight*** different opportunities—plus the statutory comment period—to present arguments and evidence in support of its position on the HCP and ITL. Despite these opportunities, KNSC failed to provide any evidence to support its allegations that the HCP and ITL fail to comply with the requirements of Chapter 195D. That KNSC did not avail itself of these opportunities does not give rise to a constitutional basis for additional proceedings.[5] The Petitions contention that a contested case hearing is the only mechanism by which KNSC can establish facts and present expert testimony for the Board's consideration ignores the procedural history and lacks merit. What broad concerns KNSCs Petition does allege have been fully considered and addressed in the Project's approved environmental impact statement (**"EIS"**)[6] and in the HCP. Therefore, even if KNSC had a

[5] As the Staff Submittal notes, it is unclear whether any member of KNSC was present at the October 28, 2016 Board meeting on the HCP, however, no oral or written request for a contested case haring was made at that meeting. Submittal (Agenda Item C-1) at 1. KNSC also failed to provide testimony at the Board's public meeting on the HCP on November 10, 2016. Instead, KNSC simply stated that the reasoning for its objection to the HCP would be provided at a later date and orally requested a separate contested case hearing. KNSC should not be allowed to submit a last minute petition when it was afforded multiple opportunities to participate and express its position for consideration, but failed to do so.

[6] In addition to the HCP process described above, the Applicant's Project also required compliance with HRS Chapter 343. An EIS preparation notice ("EISPN") was issued for the project in 2014. The public was allowed to comment on the EISPN. On June 8, 2015, the draft EIS for the Project was published, at which point the public was again afforded the opportunity to comment on the draft EIS. On April 23, 2016, a supplemental draft EIS for the Project was published, giving the public yet another chance to comment on the Project. On May 25, 2016, a public comment meeting was held on the supplemental draft EIS. The final EIS for the Project was published on July 23, 2016, and was accepted by the Board at its meeting on July 22, 2016.

legitimate property interest (which it does not), due process does not require a separate contested case hearing.[7] *See Sandy Beach*, 70 Haw. at 372, 773 P.2d at 258 (holding that the City and County of Honolulu City Council can act upon permit applications by way of public hearings rather than contested case hearings); *see also Medeiros v. HCPC*, 8 Haw.App. at 194-98, 797 P.2d at 67-68 (finding that public hearings on a geothermal resource permit application were sufficient to satisfy due process considerations even though opponents were not afforded the right of cross-examination at the public hearings).

3. No State or Federal Case law Has Held that a Contested Case Hearing is Required for a HCP or ITL

Applicant has been unable to locate any Hawai'i or federal precedent that provides for holding a contested case hearing in connection with the approval of a HCP and ITL. This is likely because the state and federal processes for approval of a HCP and ITL already include multiple opportunities for public participation through the public comment period and public hearings. Thus, as discussed above, the appropriate mechanism to support or challenge a HCP or ITL is through the public comment process set forth in HRS Chapter 195D.

B. EVEN IF A CONTESTED CASE HEARING MAY BE REQUIRED BY LAW, KNSC DOES NOT MEET THE CRITERIA FOR STANDING

Even if a contested case hearing was found to be generally required by law, KNSC should not be afforded one here because it does not meet the Boards criteria for standing. Under HAR § 13-1-31, a person or organization may be admitted as a party in a contested case hearing if it: (1) has some "property interest" *in the land* at issue, resides on the land, or is an adjacent property owner, (2) can otherwise demonstrate that it as an entity will be so directly and immediately affected by the HCP and ITL that its interest in a contested case is clearly distinguishable from that of the general public, or (3) demonstrate that it has a substantial interest in the matter and that its participation in the contested case will substantially assist the Board in its decision-making. HAR § 13-1-31(b)(2), (c). KNSC cannot demonstrate it meets any of these requirements under existing Board rules governing standing.

First, KNSCs Petition does not make any showing that it has a property interest in the land upon which the Project will be developed and the HCP and ITL will apply. Nor does it make a showing that it resides on this land or that it is an adjacent landowner.

The notice of acceptance was published on August 8, 2016. The statutory 60-day appeal period expired on October 7, 2016. *See* HRS § 343-7(c). No challenges to the final EIS were made.

[7] To allow KNSC an entirely new proceeding with unknown delays in time where no such right exists by law or rule at the eleventh hour of the Project's timeline would render the public hearing and comment periods meaningless and unfairly burden the due process rights of the Applicant and other participants who have diligently and in good faith adhered to the existing Board process.

Second, KNSCs Petition offers no facts or evidence that its members will be so immediately affected by the HCP that its interest are clearly distinguishable from that of the general public. The HCP is a voluntary plan between a private landowner and the state and assists the state in achieving its goals of conservation and resource protection. *See Habitat Conservation Plans*, DEPT OF LAND AND NATURAL RES., http://dlnr.hawaii.gov/wildlife/hcp/ (last visited Nov. 30, 2016). Aside from vague allegations, KNSC has not provided any valid information supporting its claims that the HCP is inadequate, that the ESRCs recommendation is based on false information, or that the HCP fails to meet the States goals. *See* Conf. Comm. Rep. No. 131, in 1998 House Journal, at 829 & H. Stand. Comm. Rep. No. 1291, in 1997 House Journal, at 1613-15; *see also Sandy Beach*, 70 Haw. at 373, 773 P.2d at 258 (recognizing that the SMA procedures assist the agency in its long-term planning goals).

Third, KNSCs Petition offers no facts or evidence that its participation in any contested case hearing would substantially assist the Board in its decision-making. Nor does KNSC offer any explanation as to why the Boards existing process under HRS Chapter 195D is insufficient to address its concerns or to protect any rights KNSC may have and offers no justification for needing an evidentiary hearing in addition to the multiple public comment periods and meetings already held on the HCP and ITL.

KNSC also fails to offer any explanation for its failure to participate or offer comments during those public comment periods and hearings, or why the information that KNSC seeks to offer could not have been presented during the required comment period.

Accordingly, even if KNSC was entitled to a contested case hearing, KNSC does not have standing to be a party in any such contested case.

II. CONCLUSION

For the foregoing reasons, Applicant respectfully submits that a contested case hearing is not required by law in this matter, and that the Petition should therefore be denied. Moreover, KNSC has been afforded ample notice and opportunity to be heard in a meaningful way, but failed to avail itself of the procedures and numerous opportunities for it to present its arguments and evidence in support of its position. Thus, even if there is a right to a contested case hearing, KNSC waived that right by failing to participate in the process. KNSC also fails to meet the standing requirements for a contested case under HAR § 13-1-31(b).

The Board should be cautious of setting a precedent it does not intend to. For the Board to grant a contested case hearing in connection with the HCP and ITL where there is no clear entitlement to a contested case hearing would contradict the legislative intent to make this process easier and to encourage private landowners to enter into HCPs with the State. Such action potentially opens up every Board action to a contested case hearing, regardless of whether it is actually required by law.

Respectfully submitted,

John P. Manaut

cc: Michael D. Cutbirth

4829-2507-5261.2

TETRA TECH

TTCES-PTLD-2016-142

To:	Na Pua Makani Power Partners
From:	Tetra Tech, Inc.
Subject:	Response to Petition for a Contested Case Hearing by Keep the North Shore Country on the Request for Approval of the Na Pua Makani Wind Project Habitat Conservation Plan and Issuance of the Associated Incidental Take License
Date:	December 7, 2016

INTRODUCTION

On November 19, 2016, Keep the North Shore Country (the petitioners) filed a written petition with the Board of Land and Natural Resources (Board) for a contested case hearing pursuant to Hawaii Administrative Rules (HAR) § 13-1-29 on Na Pua Makani Power Partners, LLC's (NPMPP) request for approval of the Final Habitat Conservation Plan and issuance of an Incidental Take License (ITL) for the Na Pua Makani Wind Project (Project). NPMPP's request for approval was submitted before the Board on November 10, 2016, under agenda item C-10. At the request of NPMPP, Tetra Tech, Inc. (Tetra Tech) has prepared this response to the petition which is limited to claims related to the Final HCP; responses to the petitioner's assertions about their legal standing to make the petition are not addressed.

Since 2013, NPMPP has worked closely with the Department of Land and Natural Resources, Division of Forestry and Wildlife (DOFAW) and the U.S. Fish and Wildlife Service (USFWS) to develop an HCP that meets both federal and state requirements set forth under Section 10 of the federal Endangered Species Act (ESA) and Hawaii Revised Statutes (HRS) §195D, respectively. Agency input and recommendations were incorporated throughout the HCP development process including 1) baseline survey protocols for birds and bats, 2) approaches to estimating take of the covered species, and 3) the mitigation strategy. The mitigation for each covered species was designed to provide a net benefit and is supported by both DOFAW and USFWS.

The Draft HCP was published in the March 8, 2015 Office of Environmental Quality Control *Environmental Notice* and made available for public review and comments. A public hearing on the HCP was held on June 4, 2015, at the Kahuku Community Center. During the public review period, NPMPP also sought guidance from the Endangered Species Recovery Committee (ESRC), which ultimately must make a recommendation for approval of the Final HCP before it may be considered by the Board. The proposed Final HCP is the result of multiple rounds of revision, incorporates the best available science on wind energy impacts and the covered species; incorporates agency and ESRC recommendations; and considers input received during the public review period. On February 23, 2016, the ESRC made a recommendation for approval of the Final HCP and that it go to the Board for consideration and approval.

RESPONSE TO THE PETITION

This memo responds to some of the points made in the petition. Points identified in the petition that are similar are summarized as issue statements presented below followed by the corresponding numbered entries from the petition. Note that petition points associated with the Final HCP not addressed below

are either general statements or summaries of information in the HCP that did not warrant responses, and, as noted above, points about legal standing are being addressed separately.

Issue 1 Bat Acoustic Monitoring – The petitioners assert that NPMPP did not adequately study the presence of Hawaiian hoary bats on site, pointing to the use of two acoustic bat detectors which they felt was inadequate to assess presence of the species. The petitioners further assert that acoustic monitoring data were improperly used to justify the assumption that bat use is expected to be low in this area. **(Petition points #16, p. 6-7)**

Response: NPMPP met with DOFAW and USFWS field staff on January 22, 2013, to discuss the collection of baseline data. In accordance with agency recommendations, bat acoustic monitoring was conducted to confirm bat presence and understand seasonal patterns of bat activity in the proposed wind farm site. Project-specific acoustic monitoring data (quantified as bat passes per detector night) in combination with other available data from the adjacent Kahuku Wind Farm, indicated similar, low levels of bat use. **(Final HCP p. 19)**

Pre-construction bat acoustic monitoring data are poor predictors of post-construction bat mortality risk (Hein et al. 2013). Therefore, these data were not used to quantify mortality risk or estimate Hawaiian hoary bat take associated with Project operation. **(Final HCP p. 41)**. Given that DOFAW and USFWS acknowledged the limited utility of this baseline acoustic data for estimating take, a more extensive acoustic monitoring effort was not warranted by the agencies.

Issue 2 Hawaiian Hoary Bat Take Estimation – The petitioners assert that NPMPP used inaccurate and misleading information, "cherry picking" data sources, to develop a more favorable incidental take estimate for Hawaiian hoary bats than would have resulted from using the best available science or reliable data to derive take estimates. They disagree with the use of post-construction mortality monitoring data at the Kahuku Wind Farm to estimate anticipated Project-specific take of Hawaiian hoary bats, stating that more extensive data from the Kawailoa Wind Farm are available. They also assert that the Kahuku Wind Farm's similarity to the Project in elevation, slope, and aspect is not adequate justification for using its data because they presume that these characteristics have no bearing on bat biology.

The petitioners also disagree with the incorporation of the potential benefits of low wind speed curtailment (LWSC)[1] into the Hawaiian hoary bat take estimate, stating that the assumed reduction in fatality rate is improperly based on mainland research rather than LWSC effectiveness observed on Oahu. They further state that Hawaiian hoary bat take is likely to be higher than estimated in the Final HCP because the turbine models proposed for the Project are taller than those operating at the Kahuku Wind Farm, and because Hawaiian hoary bat take at the Kawailoa Wind Farm, which implements LWSC, is higher than anticipated in their HCP. **(Petition points # 17- #22, p. 7-9)**

Response: When preparing an HCP, it is in the applicant's and the agencies' best interest to develop conservative estimates of take (i.e., greater than anticipated take levels) to account for uncertainty related to species biology, potential impacts, and the effectiveness of avoidance and minimization measures. This ensures that take levels authorized under the ITL are adequate to sufficiently cover the

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[1] Low wind speed curtailment (LWSC) is an operational measure in which the wind turbine blades stop generating power and are feathered into the wind at low wind speeds, under 5 meters per second based on DOFAW and USFWS guidance, when bats are most active, in an effort to reduce collision risk.

applicant's proposed actions and provides a higher level of confidence so that a major amendment to the HCP would not be needed during the permit term. For these reasons, NPMPP relied on the best available information to derive Hawaiian hoary bat take estimates and incorporated several layers of conservatism to develop the requested take limit. NPMPP used higher than expected estimates of unobserved take in the derivation of the estimate of take value and based the requested take limit on 150 percent of the estimated take value.

The Kahuku Wind Farm provides the best available data for estimating Project-related take of Hawaiian hoary bats because it is located on the same coastline and is adjacent to the proposed Project and similar in size. Therefore, the Kahuku Wind Farm possesses topographical and vegetative characteristics that make it most similar in habitat to the proposed Project. Moreover, Tetra Tech is not aware of any peer-reviewed studies supporting the petitioner's statement that slope, aspect, and elevation have no bearing on bat biology on Oahu. In contrast, the Kawailoa Wind Farm is approximately 6 miles from the Project and is situated at a higher elevation with more extensive forest in the immediate vicinity. Kawailoa Wind Farm is a larger facility with approximately 3 times as many turbines as the Project. Thus, the Kahuku Wind Farm is more appropriate for the Project to base its take estimate **(Final HCP p. 41)**

The Kahuku Wind Farm also has the longest operational history of the existing wind farms on Oahu, and therefore provides the most comprehensive dataset for these estimates. The Kahuku Wind Farm became commercially operational in March 2011, and although the project was idle for 1 year, it has been operational for a longer period of time than the Kawailoa Wind Farm which began commercial operation in November 2012. **(Final HCP p. 41)**

The Hawaiian hoary bat take estimate in the HCP was calculated using the per turbine fatality rate observed at the Kahuku Wind Farm and a conservatively high assumed value of unobserved take (based on Kahuku Wind Farm data), adjusted for the potential effectiveness of LWSC in reducing collision risk. The level of effectiveness used was based on the lower end of the range of the estimated effectiveness of LWSC from mainland studies to account for the uncertainty associated with the effectiveness of this measure in Hawaii. The petitioners are incorrect in suggesting that the analysis should have incorporated observed LWSC effectiveness at the Kawailoa Wind Farm. There are no data available from the Kawailoa Wind Farm, nor any other operational wind farm in Hawaii, to accurately estimate the effect of LWSC on Hawaiian hoary bat fatality rates. The relatively few bat fatalities that occur in Hawaii, along with the fact that the agencies are now making a consistent recommendation that all wind farms implement LWSC, make it impossible to conduct a controlled experiment to evaluate LWSC effectiveness in Hawaii based on current data. Moreover, the Kawailoa Wind Farm has implemented LWSC since it began commercial operation; therefore, there is no way to compare fatality rates before and after LWSC implementation. **(Final HCP p. 43-44)**

The best available science regarding the potential benefits of LWSC exists in the experimental studies conducted on the mainland at wind farms that are estimated to experience hundreds of bat fatalities per year. These studies, as cited in the Final HCP, have found LWSC to be effective at reducing the take of hoary bats. The LWSC analysis presented in the Final HCP was based on the best available science and the conclusions and rationale were supported by the ESRC, DOFAW and the USFWS. **(Final HCP p.43-44)**

As noted in the petition, the 12 Kahuku Wind Farm turbines are shorter than the 8 to 10 turbines proposed for the Project. Although some studies have suggested that collision risk for bats may increase

with wind turbine tower height (Baerwald and Barclay 2009, Barclay et al. 2007, Arnett and Baerwald 2013) there is no evidence to suggest that the operation of fewer, larger turbines as contemplated in the Project would increase bat collision risk. A more recent study that was unavailable at the time of the publication of the Final HCP found no relationship between turbine height and bat fatalities (Zimmerling and Francis 2016). Moreover, collision risk may decrease through the use of larger turbines because fewer are required to produce the same amount of energy (AWWI 2016). To account for the uncertainty associated with risk to the Hawaiian hoary bat, the requested take authorization for this species under the proposed Final HCP is 150 percent of the estimated level of take **(Final HCP p. 44).**

As noted in the petition, the Kawailoa Wind Farm is experiencing higher bat take than predicted in their HCP. Most approved wind project HCPs that include the Hawaiian hoary bat are currently amending their HCPs to address this same issue. This is, at least in part, due to a lack of appropriate data to accurately predict take when these original HCPs were prepared. More recent HCPs, including the Na Pua Makani HCP have the advantage of more data, including post-construction mortality monitoring data, to develop predicted take and therefore can provide conservative estimates of take with less uncertainty.

Issue 3 Demonstration of a Net Environmental Benefit for the Hawaiian Hoary Bat – The petitioners state that the HCP does not provide evidence supporting the provision of a net benefit to the Hawaiian hoary bat resulting from the proposed mitigation. They note that the HCP does not describe an anticipated increase in the bat population in the restoration areas resulting from mitigation, and that increases in bat detections are not included as a measure of success. **(Petition points #23-27)**

Response: NPMPP has worked closely with DOFAW and USFWS field staff to develop a mitigation plan that meets the HRS §195D and USFWS standards, including the provision to provide a net benefit to the covered species. An inherent limitation to all HCPs in Hawaii that include the Hawaiian hoary bat is that there are many gaps in information on the biology of the Hawaiian hoary bat, its limiting factors, and the effectiveness of certain mitigation measures. Project applicants, the agencies, and the ESRC necessarily rely on assumptions based on the best scientific information available. However, in recognition of these uncertainties and in an effort to increase the effectiveness of HCP mitigation strategies, DOFAW recently prepared a guidance document for developing Hawaiian hoary bat mitigation strategies (DOFAW 2015) that was also approved by USFWS. This guidance directs project applicants to incorporate elements of habitat restoration (including habitat protection and/or enhancement) and research designed to increase the knowledge of the species, at an amount of approximately $50,000 per bat. As described in the DOFAW guidance (referenced in the HCP), this funding amount is based in part on costs of conducting restoration at a mitigation ratio of approximately 40 acres per pair of bats. However, in recognizing the importance of a balanced mitigation strategy, DOFAW and the ESRC have recommended and agreed to a mitigation strategy that includes funding for research and restoration based on this recommended financial commitment of approximately $50,000 per bat. Nevertheless, the restoration actions identified in the Project HCP are expected to persist longer than the wind farm operation. Overall the restoration will benefit the entire watershed as well as support the life history requirements of the Hawaiian hoary bat. This expected benefit beyond the completion of the restoration actions supports the conclusion that the mitigation actions provide a net benefit to the species. **(Final HCP p. 65)**

Regarding the success criteria for the restoration component of the mitigation, techniques are not available to measure the increase in a bat population in the Poamoho Ridge mitigation area with any degree of certainty. Therefore, as supported by DOFAW, USFWS, and the ESRC, measures of habitat quality were identified to act as appropriate surrogate measures to track and demonstrate improvements to habitat expected to benefit the Hawaiian hoary bat. For the research component of mitigation, success criteria include design and implementation of an approved study and various reporting requirements. Over the course of the HCP term, DOFAW, USFWS, and the ESRC will have regular input through annual review and will also have approval authority over implementation of all key elements of the HCP. **(Final HCP p. 65-66)**

Issue 4 HCP Does Not Meet Legal Standards of HRS §195D-4(g) – The petitioners claim that the HCP does not minimize the impacts of the take to the maximum extent practicable, increase the likelihood that the species will survive and recover, or provide a net environmental benefit, and therefore does not meet the legal requirements of HRS §195D-4(g). They also claim that there have been no opportunities for the public to provide input on the HCP or conduct a review of its contents. **(Petition points #28-30)**

Response: In the above responses and in the Final HCP, NPMPP has provided evidence demonstrating adherence with the standards presented in HRS §195D-4(g). NPMPP has worked closely with DOFAW and USFWS staff to determine the appropriate species to cover under the HCP; identify standard and Project-specific avoidance and minimization measures that will reduce the potential for take to the maximum extent; appropriately evaluate remaining risk to the covered species and conservatively estimate take; and develop appropriate mitigation strategies. The resulting Final HCP is one that meets both federal and state requirements and has been vetted by the ESRC and recommended it go to the Board for approval in February 2016.

Key components of the Project HCP include monitoring to document Project-related impacts to the covered species and the effectiveness of mitigation actions, and adaptive management. This combination of measures allows NPMPP, the USFWS, and DOFAW to track compliance with the ITL and federal Incidental Take Permit and react to conditions that suggest take or mitigation are not consistent with expectations based on assumptions in the HCP. For example, the Project HCP identifies potential changes in the application of LWSC, should assumptions not be met. **(Final HCP p. 85-86)**

It should be noted that the Final HCP was not developed in isolation and included input from multiple levels of USFWS and DOFAW, species experts, and other important stake holders as well the public. There have been many opportunities for public input on the HCP both during the formal state HCP development process and during the federal National Environmental Policy Act (NEPA) review process. Public testimony was accepted at the DLNR hearing on the Draft HCP in June 2015, and at 3 ESRC meetings at which the Draft or Final HCP was on the agenda. During the NEPA process, the USFWS prepared an Environmental Impact Statement (EIS), soliciting input on and evaluating the impacts of the proposed HCP. Public input was sought during public scoping, the public review period on the Draft EIS, and the public review period for a Supplemental Final EIS. Public meetings on the EIS and HCP were held at the Kahuku Community Center specifically for the NEPA process on November 13, 2013, and June 24, 2015. The purpose of these meetings was to gather input from agencies and the public on the scope and content of the HCP.

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