SCAP-19-0000449

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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| KEEP THE NORTH SHORE COUNTRY,<br><br>Appellant-Appellant<br><br>vs.<br><br>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<br><br>Appellees-Appellees. | Civil No. 18-1-0960-06 JPC<br>(Agency Appeal)<br><br>APPEAL FROM THE FINAL JUDGMENT, filed MAY 23, 2019<br><br>FIRST CIRCUIT COURT<br><br>HONORABLE JEFFREY P. CRABTREE, JUDGE |

**KEEP THE NORTH SHORE COUNTRY'S MOTION FOR STAY UPON APPEAL**

**MEMORANDUM IN SUPPORT OF MOTION**

**DECLARATION OF GILBERT RIVIERE**

**DECLARATION OF TĒVITA O KAʻILI**

**APPENDICES "A"-"C"**

**CERTIFICATE OF SERVICE**

LAW OFFICE OF LANCE D COLLINS
Lance D. Collins 8246
Post Office Box 782
Makawao, Hawai'i 96768
808.243.9292
lawyer@maui.net

LAW OFFICE OF BIANCA ISAKI
BIANCA ISAKI 9977
1720 Huna Street 401B
Honolulu, Hawai'i 96817
tel. 808.927.5606
bianca.isaki@gmail.com

Attorneys for Appellant-Appellant
KEEP THE NORTH SHORE COUNTRY

**KEEP THE NORTH SHORE COUNTRY'S MOTION FOR STAY UPON APPEAL**

Appellant KEEP THE NORTH SHORE COUNTRY, a Hawai'i nonprofit corporation (Appellant) respectfully submits this Motion for Stay Upon Appeal pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rules 8 and 27 and Hawaii Revised Statutes (HRS) § 641-3, and Hawai'i Rules of Civil Procedure (HRCP) Rule 62.

Specifically, Appellant moves this Court to stay the effectiveness of Appellees BOARD OF LAND AND NATURAL RESOURCES, THE DEPARTMENT OF LAND AND NATURAL RESOURCES, and SUZANNE D. CASE IN HER OFFICIAL CAPACITY AS CHAIRPERSON OF THE BOARD OF LAND AND NATURAL RESOURCES' (BLNR) decision and order approving Appellee NA PUA MAKANI POWER PARTNERS, LLC's (NPM's) habitat conservation plan and incidental take license, filed May 16, 2018, without bond, pending a decision on the appeal of this matter. [Docket No.] 70 Record on Appeal (ROA) Volume (V.) 30 at [PDF page no.] 147, 240 (Findings of Fact, Conclusions of Law, Decision and Order, filed May 16, 2018.

The Notice of Appeal was filed on June 20, 2019. Dkt. 1. This Court granted Appellant's application for transfer on February 26, 2020. Dkt. 116. Since that time, NPM completed construction of its wind turbines in Kahuku, O'ahu and has announced plans to initiate operations this "Summer 2020." BLNR's endangered species advisory committee has also proposed revising downward population estimates for species that would be killed under the terms of BLNR's approval. Permitting NPM to initiate operations prior to disposition of this case risks irreparable damage to endangered natural and cultural resources that are vital to Appellant KNSC and the communities that it supports.

This motion is supported by the attached memorandum, declarations, appendices, and the record on appeal.

DATED: Honolulu, Hawai'i June 17, 2020

*/s/ Lance D. Collins*
LAW OFFICE OF LANCE D COLLINS
LANCE D. COLLINS
LAW OFFICE OF BIANCA ISAKI
BIANCA ISAKI
Attorneys for Appellant-Appellant
KEEP THE NORTH SHORE COUNTRY

## MEMORANDUM IN SUPPORT OF MOTION

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### I. FACTS WARRANTING STAY UPON APPEAL

A. Factual background

NPM recently announced it will initiate operations of its 25 megawatt (MW) industrial wind facility on approximately 706.7 acres of rural country area of Kahuku, O‘ahu, Tax Map Key Nos. (1) 5-6-008:006 and (1) 5-6-006:018 (wind project) this "Summer 2020." 38 ROA V. 15 at 332, 336-37; 70 ROA V.30 at 155 (BLNR FOF 38), 38 ROA V.14 at 272; Declaration of Gilbert Riviere (Riviere Decl.) ¶7; Appendix "A."

BLNR's approval of NPM's habitat conservation plan (HCP) and incidental take license (ITL) permits NPM to kill four adult and two chick or eggs of the threatened, migratory ‘a‘o (Newell's shearwater) for the 21 year permit term (70 ROA V. 30 at 162 (FOF No. 63)), 4 koloa maoli, 4 ae‘o, 8 ‘alae ke‘oke‘o and 8 ‘alae‘ula (*id.* at 174 (FOF No. 113)), 6 adults/fledged young nene (*id.* at 178 (FOF No. 132), direct take of 4 pueo and indirect take of another 4 pueo over the 21-year permit term (*id.* at 183 (FOF No. 152)), and 51 ‘ōpe‘ape‘a over a 20-year term based on two tiered levels. 70 ROA V.30 at 191 (FOF No. 196); *see* 22 ROA V.6 at 243.

At the time NPM's permits were approved, BLNR found that ‘ōpe‘ape‘a population estimates range from hundreds to a few thousand, and that those estimates are based on limited and incomplete data due to difficulties with estimation. 70 ROA V.30 at 189 (FOF No. 183). Since that time, the Department of Land and Natural Resources' (DLNR) Endangered Species Recovery Committee (ESRC) updated its "Hawaiian Hoary Bay Guidance Document," which had been

released in December 2015. 40 ROA V.15 at 57 (NPM Exh. A44). The ESRC released its proposed update to this document in January 2020, which proposes that no more than 1,000 ʻōpeʻapeʻa individuals. Appendix "B" at 16.

*Figure 1. Observed bat fatalities by month as of June 30, 2019. Appendix "B" at 10 (2020 ESRC Draft Hawaiian Hoary Bat Guidance Report).*

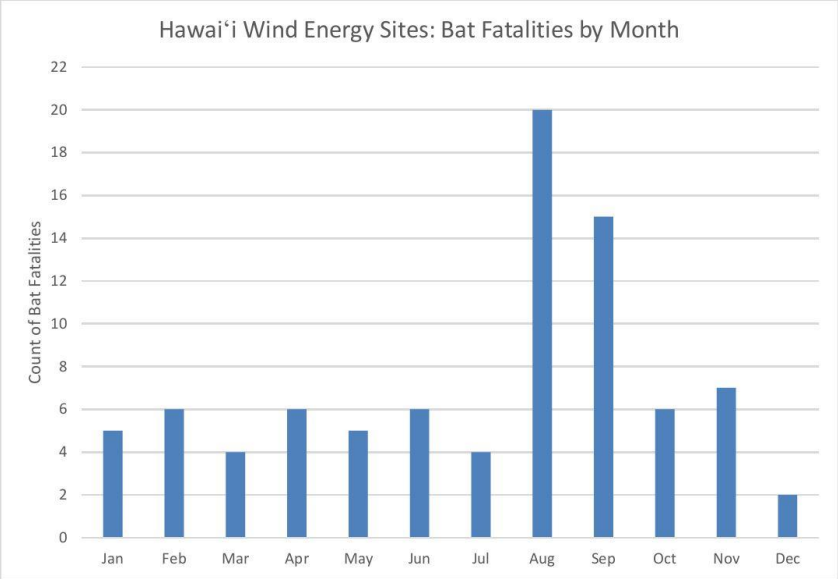


Figure 1. Observed bat fatalities by month across all wind facilities with approved ITLs in Hawaiʻi as of June 30, 2019.

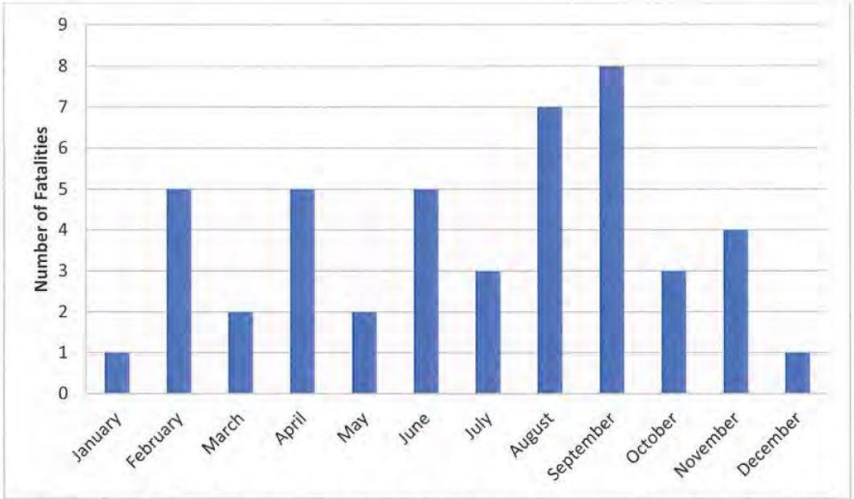


Figure 1. Bat fatalities by month across all wind facilities with approved ITLs in Hawaiʻi as of August 25, 2015.

*Figure 2. 2015 ESRC Hawaiian Hoary Bat Guidance Report. 40 ROA V.15 at 62.*

The "apparent" seasonal patterns in Hawaiian hoary bat collision fatalities is believed to coincide with migrations beginning in August. Appx. B at 10; 40 ROA V.15 at 62. Should NPM begin wind project operations this summer 2020 as it has announced, it will be operating at the height of the time of ʻōpeʻapeʻa take. Riviere Decl. ¶7, Appx. A.

Prior to BLNR's approval of NPM application, 46 ʻōpeʻapeʻa had been killed by wind turbines in Hawaiʻi. 22 ROA V.6 at 46. Also during the pendency of BLNR's approval of NPM's

application in 2016, the Kawailoa Wind facility was already seeking permission to kill an additional 30 bats, increased from its initial 20 bat take. 38 ROA V.14 at 323. According to the ESRC's December 2015 document, on Oʻahu alone, BLNR had approved take of 53 ʻōpeʻapeʻa by Kahuku Wind Farm and another 120 ʻōpeʻapeʻa Kawailoa Wind facility at the time that NPM obtained its approval to kill 51 ʻōpeʻapeʻa. 40 ROA V.15 at 74. This means BLNR has approved killing at least 224 ʻōpeʻapeʻa on Oʻahu. Based on ESRC's updated proposed figure, that is nearly a quarter of the entire population of the potential 1,000 ʻōpeʻapeʻa individuals on Oʻahu. Appendix "B" at 16.

B. Procedural background

On February 25, 2016, ESRC voted to recommend approval of NPM's draft habitat conservation plan application for the wind project. 38 ROA V. 15 at 332, 336-37; 70 ROA V.30 at 155 (BLNR FOF 38), 38 ROA V.14 at 272. BLNR member Sam Gon (Gon) was present as a voting member of ESRC and made the motion to approve NPM's application. *Id.*

At its November 10, 2016 regular meeting, BLNR held a public hearing on NPM's request for approval of an incidental take permit and final habitat conservation plan for the wind project. 14 ROA V.2 at 210. BLNR deferred decisionmaking after Appellant requested a contested case hearing. 16 ROA V.3 at 265; 70 ROA V.30 at 153. Also at the meeting, Member Gon "disclosed that he was briefly on the endangered species advisory committee that advises windfarm projects. . ." 16 ROA V.3 at 264, 265 (meeting minutes).

On November 19, 2016, Appellant filed its written contested case petition with BLNR. 16 ROA V.3 at 293.

At its December 12, 2016 meeting, BLNR determined to grant Appellant's petition for a contested case hearing. 16 ROA V.3 at 314; 18 ROA V.4 at 268. Gon voted against granting Appellant's contested case request. 40 ROA V.15 at 21 (12/12/2016 minutes).

On January 12, 2018, BLNR held a contested case hearing on the hearing officer's recommendations and the parties' proposed exceptions. 68 ROA V.29 at 216 (Tr. 1/12/2018). The Board chair announced that its staff had distributed a letter from Senator Lorraine Inouye to other Board members and the chair subsequently emailed other the Board members to instruct them not to read it. *Id.* at 219. The BLNR chair acknowledged BLNR "received a letter from Senator Lorraine Inouye to be distributed to the board in this matter" and "actually did distribute it[.]" *Id.* Two other BLNR members disclosed that they received calls from a "legislator" who favored the wind project, although only one recused himself from participation. 68 ROA 29 at 219-20.

Appellant orally requested Gon's recusal at the outset of the hearing, but the Chair directed Appellant to file a motion for that request and Gon participated in the hearing. 68 ROA 29 at 222.

On January 24, 2018, Appellant filed a motion to recuse Gon in accordance with BLNR's Minute Order No. 13. 68 ROA V.29 at 267, 70 ROA V.30 at 7. BLNR subsequently denied the motion. 70 ROA V.30 at 43.

On May 16, 2018, BLNR entered its Findings of Fact, Conclusions of Law, and Order, which was signed by four members, including Gon. 12 ROA V.1 at 34; 70 ROA V.30 at 47, 245.

On June 15, 2018, Appellant appealed to the circuit court pursuant to HRS §91-14 and cited their right to a clean and healthful environment under article XI, §9 of the Hawai'i Constitution. 12 ROA V.1 at 11.

On April 10, 2019, the circuit court entered its Order Affirming BLNR's Decision. 12 ROA V.1 at 275.

On April 26, 2019, Appellant filed a request for further findings and conclusions pursuant to HRCP Rule 72, which NPM opposed. 12 ROA V.1 at 284, 290.

On May 23, 2019, the circuit court entered its Final Order Affirming Order Affirming BLNR's Decision and its final judgment. 12 ROA V.1 at 296-98, 300.

On June 21, 2019, Appellant filed its notice of appeal from the circuit court's final judgment to the Intermediate Court of Appeals (ICA). 12 ROA V.1 at 305.

On September 5, 2019, Appellant filed its opening brief with the ICA.

On November 14, 2019, NPM filed its answering brief with the ICA.

On December 9, 2019, Appellant filed its reply to NPM with the ICA.

On December 30, 2019, BLNR filed its answering brief with the ICA.

On January 21, 2020, Appellant filed it reply brief to BLNR with the ICA.

On January 21, 2020, Appellant also filed its application for transfer to this Court. Dkt. 1.

On January 28, 2020, NPM and BLNR filed their responses to Appellant's application for transfer. Dkt. Nos. 3, 5.

On February 26, 2020, this Court entered its order granting the transfer application. Dkt. 7.

## II. STANDARDS FOR OBTAINING STAY PENDING APPEAL

Stay pending appeal is appropriate under HRAP Rule 8(a), which provides in relevant part:

> **(a) Motions for stay, supersedeas bond or injunction in the appellate courts.** A motion for stay of the judgment or order in a civil appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal shall ordinarily be made in the first instance to the court or agency appealed from.

> A motion for such relief on an appeal may be made to the appellate court before which the appeal is pending or to a judge thereof, but, if the appeal is from a court, the motion shall show that application to the court appealed from for the relief sought is not practicable, or that the court appealed from has denied an application, or has failed to afford the relief the applicant requested, with the reasons given by the court appealed from for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and, if the facts are subject to dispute, the motion shall be supported by affidavits, declarations, or other sworn statements or copies thereof. With the motion shall be filed such copies of parts of the record as are relevant. Notice of the motion shall be given to all parties. The motion shall be filed with the appellate clerk and should ordinarily be considered by the appellate court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge or justice of the court. If the motion for such relief is from an agency, the motion shall comply with statutory requirements, if any.

*Id.* Obtaining a stay pending appeal from BLNR is not practicable for reasons including that its rules and governing statutes do not grant BLNR the power to issue a stay of its approvals. *See* HRS §26-15 (outlining the powers of BLNR); HRS chapter 195D (outlining BLNR's role in administering endangered species protections).

Appellant also has no practicable avenue to obtaining a stay pending appeal from the circuit court for several reasons. First, the circuit court already ruled that it did not agree with Appellant concerning the merits of the case, therefore Appellant's effort to avail itself of that avenue of obtaining a preliminary injunction would be futile. *See Poe v. Hawai'i Labor Relations Bd.,* 97 Hawai'i 528, 536, 40 P.3d 930, 938 (2002) ("[w]henever exhaustion of administrative remedies will be futile[,] it is not required") (internal quotation marks, original brackets, and citations omitted).

Second, the circuit court requires motions filed at least eighteen days before a hearing,[1] any order from which would then have to be reduced to a written order for interlocutory appeal. By the time Appellant completes raising their motion for stay to the circuit court in order to then bring the matter before this Court, the NPM wind project would likely be fully operational because "Summer 2020" has already arrived. Riviere ¶7; Appx. A. Initiating operations during the impending high-activity period for 'ōpe'ape'a in August would likely lead to taking this listed species, and others, that Appellant seeks to protect with appropriate mitigation, including implementing a 6.5 meter per

[1] Rules of the Circuit Courts of Hawai'i (RCCH) Rule 8 provides:

> Motions will be heard upon 18 days written notice in accordance with Rule 7 herein, unless otherwise ordered by the court or unless a different notice is required by the Hawai'i Rules of Civil Procedure, upon having the same placed on the judge's docket by the attorney, and upon filing the moving papers not less than 18 days before the date set for the hearing. The court on its own motion may order any matter submitted on the briefs and/or affidavits, without oral argument.

second (m/s) cut-in speed for wind turbine operations and by ensuring the integrity of BLNR's approval process, which was flawed through inclusion of Gon as a former-ESRC member and failure to disclose and address ex parte communications to BLNR. 12 ROA V.1 at 179, 203; 23 ROA V.1 at 163; 70 ROA V.30 at 7.

## III. DISCUSSION

A. Test for injunctive relief to protect endangered species applicable in this case.

Stay of BLNR's approval pending appeal is appropriate and necessary under both the traditional test for injunctive relief and the attenuated test applied in cases concerning the protection of endangered and listed species. The Ninth Circuit held that when there is a procedural violation of the ESA, there is a presumption of irreparable harm that generally requires an injunction. *See Southwest Center for Biological Diversity v. U.S. Forest Service*, 307 F.3d 964, 972–73 (9th Cir. 2002), *opinion withdrawn on mootness grounds*, 355 F.3d 1203 (2004).

HRS chapter 195D, titled "Conservation of aquatic life, wildlife, and land plants," includes provisions deeming all endangered species under the federal Endangered Species Act to be "endangered species under this chapter[.]" HRS §195D-4 citing Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1982 & Supp. III 1985); *see also* HRS §195D-5(d) ("In carrying out programs authorized by this section, priority shall be given to the conservation and protection of those endangered aquatic life, wildlife, and land plant species and their associated ecosystems, whose extinction within the State would imperil or terminate, respectively, their existence in the world."). HRS chapter 195D implements and supports the purposes of the federal ESA.

In passing the ESA, "Congress intended endangered species to be afforded the highest of priorities." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978) (Court approved an injunction preventing the operation of the Tellico Dam, a $100 million project, which would jeopardize the existence and destroy the habitat of the endangered snail darter). In applying the ESA, the traditional test for preliminary injunctions is augmented because "Congress removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties' competing interests." *Nat'l Wildlife Federation v. Burlington Northern R.R.*, 23 F.3d 1508, 1510-11 (9th Cir. 1994) (citations omitted). Instead, "[t]he 'language, history, and structure' of the ESA demonstrate Congress' determination that the balance of hardships and the public interest tips heavily in favor of protected species." *Id.*, 23 F.3d at 1511 (citing *Tennessee Valley Authority*, 437 U.S. at 174; *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987)).

This case meets both the attenuated test under the ESA and the traditional threefold test for granting injunctive relief, which requires consideration of: "(1) whether the plaintiff is likely to prevail on the merits; (2) whether the balance of irreparable damage favors the issuance of a temporary injunction; and (3) whether the public interest supports granting an injunction." *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Hawai'i*, 117 Hawai'i 174, 211, 177 P.3d 884, 922 (2008) (citations omitted).

B. Appellant is likely to prevail on the merits.

*1. BLNR failed to ensure NPM mitigated impacts of take to the maximum extent practicable.*

HRS chapter 195D specifies factors, assessments, and methods that BLNR was required to employ in its decision-making on NPM's application. BLNR violated its statutory mandate or exceeded its statutory authority by failing to adhere to parameters required by HRS chapter 195D, committed other errors of law, and issued its decision upon an unlawful procedure, each of which errors are reviewed *de novo*. HRS § 91-14(g)(1), (2), and (3). Specifically, Appellant raised BLNR's failure to support its legal conclusions under the mandate of HRS §195D-4, which requires BLNR to ensure that applicants like NPM, "to the maximum extent practicable, . . . minimize and mitigate the impacts of the take" consequent to their projects or actions. HRS §195D-4(g)(1); 70 ROA v. 30 at 137-38 (BLNR COL ¶¶28-31); 12 ROA V.1 at 169 (citing COL Nos. 18.e; 28-31).

In the context of federal regulations concerning oil spill response, "maximum extent practicable" means "within the limitations of available technology, as well as the physical limitations of personnel." *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1223 (9th Cir. 2015) (discussing definition under 30 C.F.R. § 254.6). "[T]he phrase 'maximum extent practicable' . . . has a superlative quality and therefore must refer to the greatest option in a range of possibilities." *Id.*, 788 F.3d at 1229 (Nelson, J., dissenting).

NPM admitted it would be possible to curtail its operations up to 6.5 m/s and therefore implementation of this level of low wind speed curtailment was practicable. 66 ROA V.28 at 32: 5-12 (Tr. 8/7/2017); 66 ROA V. 28 at 465. Second, the "science" did not establish 6.5 m/s was not necessary. NPM's expert biologist clarified that objections to implementing curtailment up to 6.5 m/s because "there is no evidence from Hawaii" that it is a better curtailment than 5 m/s by stating: "We can't study the effect of changing five meters to 6.5 meters per second to your curtailment because the take rates at the . . . facilities are too low to be able to assess that." 66 ROA V.28 at 147-48 (Tr. 8/7/2017). In other words, 'ōpe'ape'a deaths would be so rare at an operation utilizing the 6.5 m/s cut-in speed that study would not be possible. This describes the epitome of a situation

in which ʻōpeʻapeʻa deaths would be mitigated to the "maximum extent practicable" notwithstanding any perceived need for data to establish the effectiveness of the study. The point of HRS §195D-4 is to protect listed species and not to require significant sample sizes of species deaths to support study findings.

BLNR, however, found 6.5 m/s wind speed curtailment was not "necessary" and thereby incorrectly applied the statutory standard, which requires a finding that this mitigation was not "practicable." 70 ROA v. 30 at 110 (FOF ¶289). Appellant properly pointed out to the circuit court BLNR's conclusion that 5.0 m/s curtailment represents minimization and mitigation of impacts "to the maximum practicable is unsupported by substantial evidence in the record" and sought reversal "[p]ursuant to HRS § 91-14(g)(l), (3), (4), (5), and (6)." *Id.*

*2. Member Gon's participation and voting in Board proceedings constituted reversible error.*

At the January 12, 2018 hearing, Appellant requested Gon "to be recused . . . due to prior decision making in his capacity on the ESRC on this exact Habitat Conservation Plan." 68 ROA 29 at 222. The BLNR chair asked Appellant to file a motion on the issue and Gon continued to participate in that hearing, stating in part: "I love to chat with [other who have published on ʻōpeʻapeʻa research] about what they've learned about the biology, what we know and what we don't know about Hawaiian hoary bats." *Id.* at 222, 260. Gon's statement indicated at least that he had formed an opinion on the meaning of "best available scientific" information, which is a legally significant term under HRS § 195D-21(b)(1) prior to the contested case. *Id.*

Gon served on the ESRC during its December 15, 2015 and February 25, 2016 meetings and made the motion to recommend approval of the NPM application. 38 ROA V.14 at 321, 332. As an ESRC member, Gon was provided with specific information about NPM's habitat conservation plan that was not present in the record for the contested case hearing in violation of HRS §91-9(g). *See* 12 ROA V.1 at 176. Gon was sitting as a BLNR member when he voted to approve NPM's application and relied on information he obtained as an ESRC member. 70 ROA V.30 at 246.

When Appellant argued BLNR should require the ESRC to examine new information concerning ʻōpeʻapeʻa behaviors, the impacts of taller turbines on these creatures, and the mitigative effects of a higher 6.5 m/s cut in speed, Gon opined that returning NPM's application to ESRC to consider this information would not "result in any . . . significant change in the information that has already been considered by ESRC" and he was "in a really good position to determine whether or not what" was "in the contested case information does represent relatively new information[.]" 69 ROA V. 29 at 249, 258, 261-62 (January 12, 2018 hearing). The circuit court also acknowledged

Gon's participation on the ESRC and BLNR is "clearly a potential problem" and "a legitimate question whether best practices standards include opining as an ESRC member and then voting on the same issue as a BLNR member." 12 ROA V.1 at 280.

Gon specifically pointed to discrepancies between the contested case record and ESRC's consultations on the NPM habitat conservation plan, which demonstrated his reliance on information outside of the record in violation of HRS §91-9:

> And then continuing on now, the idea that the ESRC did not consider other turbine projects and other bats and the ramifications of that on this particular case is probably erroneous. 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.

68 ROA V.29 at 262. Here, Gon specifically described consultations and surveys that he engaged as part of the ESRC and which were not part of the contested case record in violation of HRS §§91-9(g) and -13. HRS §91-9(g) provides: "(g) No matters outside the record shall be considered by the agency in making its decision except as provided herein." Relatedly, HRS §91-13 provides:

> No official of an agency who renders a decision in a contested case shall 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.

*Id.* "Where an agency consults outside sources, the right of a party to cross-examine those sources and present rebuttal evidence is violated." *Mauna Kea Power Co., Inc. v. BLNR,* 76 Hawai'i 259, 262, 874 P.2d 1084, l087 (1994) (internal citations omitted).

Gon's participation in deliberations and as a voting member of BLNR violated Appellant's constitutional due process rights, constituted a procedural error, and was affected by other error of law. HRS §91-14(g). "[A]n impartial tribunal is an essential component of due process in a quasi-judicial proceeding" and therefore, "'an appearance of impropriety' is the proper standard and any commissioner whose impartiality might reasonably be questioned should be disqualified from hearing the appeal." *Sussel v. City and County of Honolulu Civil Srvc. Comm'n*, 71 Haw. 101, 103, 784 P.2d 867, 869 (1989) *quoting Offutt v. United States*, 348 U.S. 11, 14 (1954). "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). Gon's

participation as both an ESRC member and deliberating and voting BLNR member violated the high level of procedural fairness and protections afforded by contested case hearings.

*3. Ex parte communications with the State senator were improperly addressed.*

Appellant will likely prevail against the circuit court's conclusion that Appellant waived objections to ex parte communications between Senator Inouye and BLNR. 12 ROA V.1 at 282. Waiver does not apply because: (1) Appellant sought contested ex parte communications through a HRS chapter 92F public records request; and (2) BLNR had an independent duty to maintain those communications and disclose them, which it failed to do. 12 ROA V.1 at 18. BLNR's failure to maintain and disclose the communication shifted the burden of proof to BLNR such that Appellant did not waive this issue.

> Substantive ex parte communications and procedural ex parte communications that may subtly affect the decisionmaking of an agency adjudicator are, by their nature, "outside the record," such that the quasi-judicial decisionmaker of an agency may not consider them in the decisional process without giving notice and the opportunity for all parties to participate; otherwise, HRS §§ 91–9(g) and 91–13 are necessarily offended.

*Kilakila*, 138 Hawai'i at 383, 416, 382 P.3d at 228. The Senator Inouye communications involved NPM's "wind project" application, favored the application, and were directed to the substantive matter of BLNR's action thereon. 68 ROA V.29 at 220. Because the communications came from a State Senator, they were further substantive. *See Abrahamson v. Wendell*, 249 N.W.2d 302 (1976), *on reh'g* 256 N.W.2d 613 (1977) (pressure of public officer whose influence might be great has been subject to disapproval).

Where "ex parte communications are not timely disclosed to allow the parties to respond, the right of parties to present evidence and argument on all issues involved is contravened." *Kilakila*, 138 Hawai'i at 417, 382 P.3d at 229 (citations omitted). The BLNR chair's mere description of the event of the ex parte communication did not constitute "disclosure." *See Kilakila*, 138 Hawai'i at 417, 382 P.3d at 229 ("for disclosure to effectively serve the values protected by due process and HAPA, the contents of the disclosure should be sufficiently detailed to allow the parties to adequately respond to the ex parte communications and to permit the courts to independently review the nature and substance of the communications.") (citation omitted). BLNR members did not deny that they read the ex parte communication. 69 ROA V.28 at 219-220. The record does not include the offending ex parte communications, which were neither maintained nor disclosed to the parties. As a quasi-judicial body, BLNR was obligated to maintain ex parte communications as part of its record and disclose them to the parties for review, rebuttal, and rehearing. *Mauna Kea*

*Power,* 76 Hawai‘i at 263, 874 P.2d at 1088 (1994) (a reopened hearing to allow rebuttal of the *ex parte* communications cured due process concerns) *followed by Moran v. Guerreiro*, 97 Hawai‘i 35, 55, 37 P.3d 603, 623 (App. 2001). BLNR's failure to disclose Inouye's ex parte communications requires the invalidation of BLNR's decision. *See Kilakila*, 138 Hawai‘i at 419, 382 P.3d at 231 (ex parte communications have potential to render agency decision voidable).

C. The balance of irreparable damage favors issuing the stay.

Allowing the NPM project to initiate under an approval from BLNR for the NPM habitat conservation plan and incidental take license without first addressing the many procedural flaws in BLNR's vote and the legal sufficiency of the mitigation measures KNSC has challenged will cause irreparable harm to endangered species, including the ‘ōpe‘ape‘a - the Hawaiian hoary bat (*Lasiurus cinereus semotus*), along with seven other endangered birds that are listed and protected under Federal and State law. Riviere Decl. ¶9.

As set forth *supra* Part I, allowing BLNR's approval for the wind project take license to remain effective pending appeal means that NPM will initiate operations at the peak season of ‘ōpe‘ape‘a (bat) mortality consequent to wind turbines, during ‘ōpe‘ape‘a breeding, and without the benefit of low wind speed curtailment result in kill-rates so low that they could not be "assess[ed]." 66 ROA V.28 at 147-48 (Tr. 8/7/2017). NPM announced it will initiate operations this "Summer 2020" and KNSC members observed NPM wind turbines spinning for brief periods in May 2020 and watched as power cables were brought near the grid, but not yet connected, in June 2020. Riviere Decl. ¶¶7-8; Appx. A.

KNSC's members include those who live, recreate, conduct cultural practices, study, and work in Kahuku, including those who would be under the shadow of NPM's Project. Riviere Decl. ¶5. KNSC's members have specific and personal recreational, aesthetic, cultural, scientific, and spiritual interests, including members whose traditional and cultural, recreational, and aesthetic practices include and rely on native birds and ‘ōpe‘ape‘a that will be adversely impacted by the installation and operation of the wind turbines proposed as part of the project. They have interests in protecting endangered and threatened species, native species, and wildlife. KNSC's members volunteered on wildlife conservation projects throughout the state, including Kahuku Point, Malaekahana, and James Campbell National Wildlife Refuge. *Id.* ¶6.

Dr. Tēvita O. Ka‘ili, professor of cultural anthropology, specializing in Pacific cultures, Dean at Brigham Young University-Hawai‘i, and the cultural advisor and President of the Kahuku Community Association, a nonprofit corporation (KCA), based in Kahuku, O‘ahu, declared that he

and KCA oppose the wind project for reasons including that killing native and listed species in Kahuku is deeply troubling. Declaration of Tēvita O. Kaʻili, Ph.D. (Dr. Kaʻili Decl.) ¶¶4-5, 8. The Kahuku community has relied on, and continues to rely upon, our partnerships with Appellant to vindicate our concerns in these beings as a community. *Id.* ¶18.

The name of the wind of Kahuku, Ahamanu (or ʻAhamanu), means the gathering of manu, which may refer to birds and other winged creatures, such as bats. This is likely a reference the role of the makani (wind) in creating an ʻaha or gathering of manu in Kahuku. Dr. Kaʻili Decl. ¶7. Native birds and bats are "manu" - winged creatures; and are all vital to our ecology and highly significant to Hawaiian and other Polynesian cultures. Many of these beautiful winged creatures are acknowledged in the Hawaiian creation chant, the Kumulipo, and other Polynesian creation stories, as indigenous, as ancestors, as protectors, as creators, and as our elders. Dr. Kaʻili Decl. ¶9.

NPM's habitat conservation plan insufficiently addresses impacts of killing manu; which are guardians, parents, caretakers, and deities' vessels in Hawaiian and Polynesian cultures. Dr. Kaʻili Decl. ¶15. Some are ʻaumākua (ancestral guardians), makua (parental birds), keiki (children of parent birds), kiaʻi (guardian/caretaker birds), and others are kinolau (body forms) of principal ancestors in Oceania. Dr. Kaʻili Decl. ¶10.

Manu considered to be ʻaumākau (ancestral guardians) include: (a) ʻAlae ʻula or Hawaiian moorhen (*Gallinula chloropus sandvicensis*), ʻAlae ʻula also taught Maui the secret of firemaking; (b) Pueo or Hawaiian short-eared owl (*Asio flammeus sandwichensis*); (3) Nēnē or Hawaiian goose (*Branta sandvicensis*). Dr. Kaʻili Decl. ¶11. Manu considered to be mākua or parental/ caretakers include: (a) ʻAʻo or Newell's shearwater (*Puffinus auricularis newelli*), the mākua or "parent" of the Aʻu bird (Kumulipo line #299); (b) ʻAlae ʻula, the mākua of the Apapane bird (Kumulipo line #303); (c) ʻAlae keʻokeʻo or Hawaiian coot *(Fulica alai*), is the mākua of the Apapane bird (Kumulipo line #303). *Id.* ¶12. Manu considered to be kiaʻi, or guardian and protectors, include: (a) Pueo or Hawaiian short-eared owl (*Asio flammeus sandwichensis*), the kiaʻi or guardian of the Noio bird (Kumulipo line #361); (b) Nēnē or Hawaiian goose (*Branta sandvicensis*), the kiaʻi or guardian of the Hehe bird (Kumulipo line #349); (c) Koloa maoli or Hawaiian duck (*Anas wyvilliana*) are kiaʻi for Imaikalani) ("Koloa birds protected a legendary blind giant, Ima-i-ka-lani, and quacked to warn him from which side he might expect an attack"). *Id.* ¶13. The ʻŌpeʻapeʻa or Hawaiian hoary bat (*Lasiurus cinereus semotus*) is the kinolau (bodily form or vessel) of the Hawaiian god, Kanaloa (Kumulipo lines #589 – 592). *Id.* ¶14.

Native manu, particularly the listed species subject to take by NPM, are already rarely observed in our community. Their sightings are notable and cherished. Taking further manu would deprive current and future generations of a necessary part of their natural environment and, for native Hawaiians, a vital resource for traditional and customary practices. Dr. Kaʻili Decl. ¶16. Failure to protect these manu would be a failure to protect traditional and customary Hawaiian cultural resources and the practices that depend on them. *Id.* ¶17.

Killing these endangered and threatened native creatures from and in the North Shore environs will cause great emotional distress to many in the community, cannot truly be fixed or replaced by civil fines or other consideration, and ultimately the killing of a single individual pursuant to an invalid license would entirely deprive KNSC and its members of its rights in a clean and healthful environment and protection of the public trust that could ultimately never be remedied. Riviere Decl. ¶11.

NPM would suffer minimal or no harm consequent to a stay pending appeal. Even if the Court does not rule in favor of Appellants, NPM would have foregone killing the limited number of listed species in its permit. On the contrary, on March 27, 2020, NPM invoked force majeure clauses in its purchase power agreement with the Hawaiian Electric Company, Incorporated (HECO) consequent to COVID-19 restrictions that are "impacting [NPM's] resource availability" to delay the onset of commercial operations. Riviere ¶12; Appendix "C" at 2. Further delay pending appeal would not likely harm NPM in light of ongoing COVID-19 restrictions.[2]

D. Public interests support granting the stay.

Appellant and the public have constitutional rights to a "clean and healthful environment" and protection of public trust natural resources. Haw. Const. art. XI, §§ 1 & 9. These rights to a clean and healthful environment are defined by laws including HRS chapter 195D, which itself announces a public interest in protecting indigenous species. "All indigenous species of aquatic life, wildlife, and land plants are integral parts of Hawaii's native ecosystems and comprise the living heritage of Hawaii, for they represent a natural resource of scientific, cultural, educational, environmental, and economic value to future generations of Hawaii's people." HRS §195D-1. The

[2] On June 10, 2020, Governor Ige issued a supplementary proclamation that required implementing certain precautions and extended restrictions on movement that include a interstate travel quarantine. David Ige, Governor, Ninth Supplementary Proclamation Related to the COVID-19 Emergency, State of Hawaiʻi (Jun. 10, 2020) *available at*: https://governor.hawaii.gov/wp-content/uploads/2020/06/2006097A-ATG_Ninth-Supplementary-Proclamation-COVID-19-distribution-signed.pdf.

State must "take positive actions to enhance their prospects for survival." *Id.* The loss of constitutional freedoms "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 350 (1976) (affirming grant of preliminary injunction where first amendment rights would be infringed) *cited by Legal Aid Soc. of Hawaii v. Legal Services Corp.,* 961 F. Supp. 1402, 1417-19 (1997) (("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary") (quoting 11A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.1, at 161 (1995)). In the absence of a stay pending appeal, BLNR's approval would allow NPM to initiate operations even where its approval was obtained under improper procedure and in violation of HRS chapter 195D. Such procedural and substantive violations would harm the right of the public and KNSC members and supporters in a clean and healthy environment defined by laws relating to environmental quality. Hawai'i Const., art. XI, §9. Permitting public trust resources to be depleted by private actors' temporary reliance on subsequently invalidated government approvals would pose a legal paradox that undermines the purpose of the public trust. Granting the requested stay is consistent with the public interest.

E. No supersedeas bond should be required from Appellant.

In this Court's discretion, Appellant may be excused from posting a supersedeas bond due to the merits of his appeal, the lack of harm to Appellees, and the irrevocable harm that may result from operating the wind project this "Summer 2020." *See Shanghai Inv., Co. v. Alteka Co.*, 92 Hawai'i 482, 503, 993 P.2d 516, 537 (2000) (court may grant a stay pending appeal and allow an alternative to a supersedeas bond) overruled on other grounds by *Blair v. Ing*, 96 Hawai'i 327, 31 P. 3d 184 (2001); *Midkiff v. de Bisschop*, 58 Haw. 546, 550, 574 P.2d 128, 131 (1978) (per curiam) (citation omitted). HRAP Rule 8(b) renders a supersedeas bond as a discretionary condition.

> **(b) Stay may be conditioned upon giving of bond; proceedings against sureties.** Relief available in the appellate courts under this rule may be conditioned upon the filing of a bond or other appropriate security in the court or agency appealed from. If security is given in the form of a bond or stipulation or other undertaking with one or more sureties, the bond, stipulation, or undertaking shall comply with applicable statutes, and each surety submits to the jurisdiction of the court or agency appealed from and irrevocably appoints the clerk of the court as the surety's agent upon whom any documents affecting liability on the bond or undertaking may be served. Liability may be enforced on motion in the court or agency appealed from without the necessity of an independent action. The motion and such notice of the motion as the court or agency prescribes may be served on the clerk of the court appealed from, who shall forthwith mail copies to the sureties if their addresses are known.

HRAP Rule 8(b). Here, NPM has not initiated operations and it would retain its permit privileges to take listed species even if Appellant were not to prevail upon appeal. *See Cal. ex rel. Van De Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325 (9th Cir.1985) (finding proper the district court's exercise of discretion in allowing environmental group to proceed without posting a bond "where requiring security would effectively deny access to judicial review."), *amended on other grounds,* 775 F.2d 998 (9th Cir. 1985).

Alternatively, this Court may properly exercise its discretion in fixing the amount of the supersedeas bond by "determin[ing] what damages for delay the Appellees might reasonably be expected to be able to establish with adequate certainty in the event the appeal were to be resolved in their favor." *Midkiff*, 58 Haw. at 550, 574 P.2d at 132. In so determining, a court properly looked to "a showing of the nature and extent of the possessory rights which it holds with respect to the property occupied by [the appellants]." *Id.*, 58 Haw. at 551, 574 P.2d at 133 (concluding the record did not so "furnish an adequate basis for the order of the circuit court fixing the amount of the supersedeas bond" and therefore disregarding the lower court's determination as to the security to be furnished by the appellants.

## IV. CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court grant this motion for stay pending appeal and without requiring a supersedeas bond from Appellant.

DATED: Honolulu, Hawai'i June 17, 2020

*/s/ Lance D. Collins*
LAW OFFICE OF LANCE D COLLINS
LANCE D. COLLINS
LAW OFFICE OF BIANCA ISAKI
BIANCA ISAKI
Attorneys for Appellant-Appellant
KEEP THE NORTH SHORE COUNTRY

## DECLARATION OF GILBERT RIVIERE

I, GILBERT RIVIERE, do declare under penalty of law that the following is true and correct.

1. I make this declaration based upon my personal knowledge, information and belief.

2. I am a resident of the island of O'ahu and the City and County of Honolulu.

3. I am the President of Appellant KEEP THE NORTH SHORE COUNTRY, a nonprofit corporation (KNSC), in the above captioned proceedings concerning Appellee NA PUA MAKANI POWER PARTNERS, LLC's (NPM) wind turbine project in Kahuku, O'ahu.

4. KNSC is a grassroots, volunteer-based North Shore non-profit, formed in 2006, to preserve, protect and enhance the heritage and rural character of the North Shore of O'ahu Hawai'i, in partnership with communities from Ka'ena Point to Kahalu'u.

5. KNSC's members include those who live, recreate, conduct cultural practices, study, and work in Kahuku, including those who would be under the shadow of NPM's Project located at Tax Map Keys (1)5-6-005:018 (portion); (1)5-6-006:018, 47, 51, 55; and (1)5-6-008:006 (portion), Koolauloa District, island of O'ahu (project).

6. KNSC's members have specific and personal recreational, aesthetic, cultural, scientific, and spiritual interests, including members whose traditional and cultural, recreational, and aesthetic practices include and rely on native birds and 'ōpe'ape'a that will be adversely impacted by the installation and operation of the wind turbines proposed as part of the project. They have interests in protecting endangered and threatened species, native species, and wildlife. KNSC's members volunteered on wildlife conservation projects throughout the state, including Kahuku Point, Malaekahana, and James Campbell National Wildlife Refuge.

7. NPM announced on May 12, 2020 that construction of all eight turbines was completed in late February 2020, testing would commence in June, and the project is slated to be operational in Summer 2020. Attached as Appendix "A" is a true and correct copy of AES Nā Pua Makani, "Nā Pua Makani Project Progress Update" (May 12, 2020) *available at*: https://www.napuamakanihawaii.org/na-pua-makani-project-progress-update-may-12-2020/.

8. KNSC members observed NPM wind turbines spinning for brief periods in May 2020 and watched as power cables were brought near the grid, but not yet connected, in June 2020.

9. Allowing the NPM project to initiate under an approval from the Appellee BOARD OF LAND AND NATURAL RESOURCES (BLNR) for the NPM habitat conservation plan and incidental take license without first addressing the many procedural flaws in BLNR's vote and the

legal sufficiency of mitigation measures KNSC has challenged will cause irreparable harm to endangered species, including the ʻōpeʻapeʻa - the Hawaiian hoary bat (*Lasiurus cinereus semotus*), along with seven other endangered birds that are listed and protected under Federal and State law.

10. Under the current permit, NPM would be able to kill the following native, listed species: 4 adult and 2 chick or eggs of the migratory ʻaʻo (Newell's shearwater); 4 koloa maoli (native Hawaiian duck), 4 aeʻo (Hawaiian black-necked stilt), 8 ʻalae keʻokeʻo (Hawaiian coot), 8 ʻalaeʻula (Hawaiian moorhen), 6 nēnē (Hawaiian goose), eight pueo (Hawaiian owl) through direct and indirect means, and 51 ʻopeʻapeʻa (Hawaiian hoary bat).

11. Killing these endangered and threatened native creatures from and in the North Shore environs will cause great emotional distress to many in the community, cannot truly be fixed or replaced by civil fines or other consideration, and ultimately the killing of a single individual pursuant to an invalid license would entirely deprive KNSC and its members of its rights in a clean and healthful environment and protection of the public trust that could ultimately never be remedied.

12. Attached as Appendix "B" is a true and correct copy of excerpts from the Endangered Species Recovery Committee, Department of Land and Natural Resources, Division of Forestry and Wildlife, [Draft] Hawaiian Hoary Bat Guidance for Renewable Wind Energy Proponents, (updated Jan. 2020) *available at*: https://dlnr.hawaii.gov/wildlife/files/2020/01/Draft-Hawaiian-Hoary-Bat-Guidance-Document-2020.pdf.

13. Attached as Appendix "C" is a true and correct copy of the letter from Kevin M. Katsura, Director, Hawaiian Electric Company, Inc. (HECO) to the Hawaiʻi Public Utilities Commission, "Power Purchase Agreement with Na Pua Makani Power Partners, LLC. Response to Commission's Information Request," (April 30, 2020), e-file confirmation no. MARI20085657558.

DECLARANT FURTHER SAYETH NAUGHT

DATED: Haleiwa, Hawaiʻi June 17, 2020

GILBERT RIVIERE
Declarant

**DECLARATION OF TĒVITA O. KAʻILI, PH.D.**

I, TĒVITA O. KAʻILI, PH.D., do declare under penalty of law that the following is true and correct.

1. I make this declaration based upon my personal knowledge, information and belief.

2. I am a resident of the ahupuaʻa of Kahuku, Oʻahu and the City and County of Honolulu.

3. I received my doctoral degree in anthropology from the University of Washington, in Seattle, Washington in 2008.

4. I am a professor of cultural anthropology, specializing in Pacific cultures, and a Dean, at Brigham Young University - Hawaiʻi.

5. I am also the cultural advisor and President of the Kahuku Community Association, a nonprofit corporation (KCA), based in Kahuku, Oʻahu.

6. I, the Kahuku Community Association, and many others on the North Shore of Oʻahu are alarmed and oppose the NA PUA MAKANI POWER PARTNERS, LLC (NPM)'s wind turbine project in Kahuku, Oʻahu for reasons including that the project may kill rare, endangered, and native species.

7. The name of the wind of Kahuku, Ahamanu (or ʻAhamanu), means the gathering of manu, which may refer to birds and other winged creatures, such as bats. This is likely a reference the role of the makani (wind) in creating an ʻaha or gathering of manu in Kahuku.

8. As a Polynesian anthropologist, I am a strong advocate for clean, green, and renewable energy for this ʻāina. However, I am deeply troubled by the injuring and killing of manu (birds and bats) by industrial wind turbines.

9. Native birds and bats are "manu" - winged creatures; and are all vital to our ecology and highly significant to Hawaiian and other Polynesian cultures. Many of these beautiful winged creatures are acknowledged in the Hawaiian creation chant, the Kumulipo, and other Polynesian creation stories, as indigenous, as ancestors, as protectors, as creators, and as our elders.

10. Some are ʻaumākua (ancestral guardians), makua (parental birds), keiki (children of parent birds), kiaʻi (guardian/caretaker birds), and others are kinolau (body forms) of principal ancestors in Oceania.

11. Manu considered to be ʻaumākau (ancestral guardians) include: (a) ʻAlae ʻula or Hawaiian moorhen (*Gallinula chloropus sandvicensis*), ʻAlae ʻula also taught Maui the secret of firemaking; (b) Pueo or Hawaiian short-eared owl (*Asio flammeus sandwichensis*); (3) Nēnē or Hawaiian

goose (*Branta sandvicensis*).

12. Manu considered to be mākua or parental/ caretakers include: (a) ʻAʻo or Newell's shearwater (*Puffinus auricularis newelli*), the mākua or "parent" of the Aʻu bird (Kumulipo line #299); (b) ʻAlae ʻula, the mākua of the Apapane bird (Kumulipo line #303); (c) ʻAlae keʻokeʻo or Hawaiian coot *(Fulica alai*), is the mākua of the Apapane bird (Kumulipo line #303).

13. Manu considered to be kiaʻi, or guardian and protectors, include: (a) Pueo or Hawaiian short-eared owl (*Asio flammeus sandwichensis*), the kiaʻi or guardian of the Noio bird (Kumulipo line #361); (b) Nēnē or Hawaiian goose (*Branta sandvicensis*), the kiaʻi or guardian of the Hehe bird (Kumulipo line #349); (c) Koloa maoli or Hawaiian duck (*Anas wyvilliana*) are kiaʻi for Imaikalani) ("Koloa birds protected a legendary blind giant, Ima-i-ka-lani, and quacked to warn him from which side he might expect an attack").

14. The ʻŌpeʻapeʻa or Hawaiian hoary bat (*Lasiurus cinereus semotus*) is the kinolau (bodily form or vessel) of the Hawaiian god, Kanaloa (Kumulipo lines #589 – 592).

15. NPM's habitat conservation plan insufficiently addresses impacts of killing manu; which are guardians, parents, caretakers, and deities' vessels in Hawaiian and Polynesian cultures.

16. Native manu, particularly the listed species subject to take by NPM, are already rarely observed in our community. Their sightings are notable and cherished. Taking further manu would deprive current and future generations of a necessary part of their natural environment and, for native Hawaiians, a vital resource for traditional and customary practices.

17. Failure to protect these manu would be a failure to protect traditional and customary Hawaiian cultural resources and the practices that depend on them.

18. Our community has relied on, and continues to rely upon, our partnerships with Appellant KEEP THE NORTH SHORE COUNTRY, to vindicate our concerns in these beings as a community.

DECLARANT FURTHER SAYETH NAUGHT

DATED: Kahuku, Hawaiʻi June 15, 2020

Tēvita O. Kaʻili

TĒVITA O. KAʻILI, PH.D.
Declarant

# Nā Pua Makani Project Progress Update – May 12, 2020

by AES Nā Pua Makani | May 12, 2020 | in Updates | 192

Construction of all eight turbines was completed in late February 2020.

The project remains on track and will commence testing activities in June.

Nā Pua Makani is slated to be operational in Summer 2020.

# APPENDIX "A"

**Hawaiian Hoary Bat Guidance for Renewable Wind Energy Proponents**

Endangered Species Recovery Committee
and
State of Hawaii Department of Land and Natural Resources
Division of Forestry and Wildlife

Updated January 2020
(First edition September 2015)

Cover Photo by Corinna Pinzari

# APPENDIX "B"

## Table of Contents

# Introduction

## *A. Purpose*

The Hawaiian Hoary Bat (*Lasiurus cinereus semotus*) is an endemic subspecies that is listed as an endangered species under state and federal laws. The operation of wind turbines in Hawai'i may result in take of the Hawaiian Hoary Bat. Under state law, take of endangered species is prohibited, but may be permitted by the Board of Land and Natural Resources (BLNR; the board) under certain conditions if the take is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity, and when accompanied by an approved Habitat Conservation Plan (HCP). The Department of Land and Natural Resources, Division of Forestry and Wildlife (DOFAW) provides technical assistance to landowners in developing, reviewing, and monitoring Habitat Conservation Plans.

The Endangered Species Recovery Committee (ESRC) is established under Hawaii Revised Statutes, Chapter 195D (HRS 195D) in section 195D-25 (§195D-25) to serve as a consultant to the board and the Department of Land and Natural Resources (the department) on matters relating to endangered, threatened, proposed, and candidate species. Among the ESRC's required duties are to review all applications and proposals for Habitat Conservation Plans and Incidental Take Licenses (ITLs) and make recommendations, 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, to the department and the board as to whether or not they should be approved, amended, or rejected. The ESRC is also required to consult with persons possessing expertise in such areas as the Committee may deem appropriate and necessary in the course of exercising its duties.

The purpose of this guidance document is to provide advice and assistance to the board, department, and applicants for the development, review, and monitoring of Habitat Conservation Plans that accompany ITLs that are proposed or approved for the incidental take of Hawaiian Hoary Bats resulting from the operation of wind turbines. This document provides guidance on selected issues related to the development of HCPs for the Hawaiian Hoary Bat, including, but not limited to the assessment of impacts to Hawaiian Hoary Bats and the avoidance, minimization, and mitigation of those impacts. It does not supersede a detailed analysis of take, avoidance or minimization measures, or mitigation under state (or federal) criteria, nor does it constitute state (or federal) rule-making. Information is provided for clarity and to assist in informing recommendations but may change based on in-progress or future research on the species.

A complete account of requirements for the issuance of an Incidental Take License under state law is provided in HRS 195D. This guidance does not serve as a comprehensive guide to all of the requirements contained in HRS 195D. The purpose of this document is to provide detailed guidance on selected statutory requirements identified in HRS 195D that warrant particular consideration for the issuance of ITLs for the Hawaiian Hoary Bat.

HRS Chapter 195D requires generally that all HCPs describe the activities contemplated to be undertaken within the plan area with sufficient detail to allow the department to evaluate the impact of the activities on the particular ecosystems, natural communities, or habitat types

within the plan area that are the focus of the plan (§195D-21(b)(2)(B)). The statute provides further that HCPs contain: objective, measurable goals, the achievement of which will contribute significantly to the protection, maintenance, restoration, or enhancement of the ecosystems, natural communities, or habitat types; time frames within which the goals are to be achieved; provisions for monitoring (such as field sampling techniques), including periodic monitoring by representatives of the department or the Endangered Species Recovery Committee, or both; and provisions for evaluating progress in achieving the goals quantitatively and qualitatively (§195D-21(b)(2)(G)). The HCP shall provide for an adaptive management strategy that specifies the actions to be taken periodically if the plan is not achieving its goals (§195D-21(b)(2)(H)).

Specific requirements for approval include further that the HCP shall:

1) Minimize and mitigate impacts of take, such that:
   a) The applicant, to the maximum extent practicable, shall minimize and mitigate the impacts of the take (§195D-4(g)(1)); and
   b) The HCP shall 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 (§195D-21(b)(2)(C)).

2) Ascertain impacts, so that the plan will:
   a) Contain sufficient information for the board to ascertain with reasonable certainty the likely effect of the plan upon any endangered, threatened, proposed, or candidate species in the plan area and throughout its habitat range (§195D-21(c));
   b) Identify 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 (§195D-21(b)(2)(C)); and
   c) Take into consideration the full range of the species on the island so that the cumulative impacts associated with the take can be adequately assessed (§195D-4(g)(5)).

3) Provide benefits, such that:
   a) The plan will increase the likelihood that the covered species will survive and recover (§195D-4(g)(4));
   b) The cumulative impact of the activity, which is permitted and facilitated by the license, provides net environmental benefits (§195D-4(g)(8)); and
   c) The HCP is designed to result in an overall net gain in the recovery of Hawai‘i's threatened and endangered species (§195D-30).

4) Avoid specific impacts so that:
   a) Take is not likely to cause the loss of genetic representation of an affected population of any endangered, threatened, proposed, or candidate plant species (§195D-4(g)(9)); or
   b) The cumulative activities within the areas covered by the plan do not reach the level that they cannot be environmentally beneficial (§195D-21(c)(1)); or
   c) Implementation of the plan is not likely to jeopardize the continued existence of any endangered, threatened, proposed, or candidate species identified in the plan area (§195D-21(c)(1)).

A checklist of HCP requirements pursuant to HRS 195D is provided in Appendix 3.

### *B. Need*

The state of Hawai'i has established ambitious renewable energy goals with the adoption of Act 97 in 2015 requiring "each electric utility company that sells electricity for consumption in the State" to establish a renewable energy portfolio standard of 100 percent of its net electricity sales by 2045. Wind energy generation is expected to be one of the largest sources of renewable energy to meet this goal. From 2006 to 2012, eight wind energy production facilities were constructed and became operational to provide approximately 200 megawatts (MW) of renewable energy potential in Hawai'i, with a ninth wind farm due for completion in 2020. On August 22, 2019, Hawaiian Electric Company, Inc. issued a request for proposals for the generation of up to 250 MW of additional renewable energy on Hawai'i Island, Maui, and O'ahu, much of which is expected to be proposed through the construction and operation of additional wind energy facilities (Hawaiian Electric 2019). A request for proposals for Moloka'i on August 6, 2019 specified wind turbines of 100 kW or less as a potential option for renewable energy development (Maui Electric 2019).

Monitoring of wind energy facilities in Hawai'i to date has shown that their operation during nighttime hours results in take of Hawaiian Hoary Bats, and that the numbers killed by those facilities are higher than was expected during the initial review of the applications for incidental take of the species. Between 2014 and 2017 several of the authorized wind projects exceeded approved take levels. Based on fatality monitoring and the application of the Evidence of Absence (EoA) model at the 80% credibility level for the assessment of unobserved and indirect take, the calculated take as of June 30, 2019 is 190 bats and the current permitted take for all HCPs in Hawai'i is 334.

In order to lawfully operate a commercial wind farm in Hawai'i, state and federal incidental take authorizations are required, among other environmental compliance measures. All projects which may result in incidental take under HRS 195D are required to develop and implement an approved HCP and obtain an associated Incidental Take License that specifies their permitted level of incidental take. HCPs integrate development activities with conservation and must be designed to ensure that licensed activities do not appreciably reduce the likelihood of the survival and recovery of at-risk species through establishment of impact avoidance and minimization measures, as well as mitigation efforts to offset take. Mitigation required under HRS 195D must be consistent with established recovery goals, must provide a net environmental benefit, and must increase the likelihood that the affected species will survive and recover from its reduced state.

Development of HCPs for the Hawaiian Hoary Bat is problematic because much of the basic information on ecology and life history of the species that is essential for designing an HCP to meet the requirements under HRS 195D is limited or lacking. Among the six HCPs that have been approved for take of Hawaiian Hoary Bats by wind energy projects, guidance provided, and terms and conditions approved for essential components of the HCPs have varied considerably. Recommended and approved mitigation, minimization, and monitoring requirements, for example, have changed among HCPs as new ecological information has become available. As a result, scale and cost of mitigation has been inconsistent, adding to the challenges faced by applicants seeking to develop HCPs that will meet the requirements for

approval by the state. Those challenges are unparalleled among the numerous endangered species for which incidental take is currently authorized or requested in Hawai'i, and are a clear indication of the need for consistent guidance developed for Hawaiian Hoary Bats through a scientifically rigorous and publicly transparent process.

### *C. Process*

The ESRC, advisory to the BLNR and the department regarding HCP approval and management, has acknowledged the challenges and inconsistencies regarding HCPs and the Hawaiian Hoary Bat. At the request of the ESRC, a Hawaiian Hoary Bat workshop was held April 14 and 15, 2015 in Honolulu, Hawai'i to discuss issues related to Hawaiian Hoary Bat conservation with particular reference to guidance for agencies and applicants seeking to develop and secure approval of HCPs. Participants included Hawaiian Hoary Bat researchers from DOFAW, U.S. Geological Survey (USGS), U.S. Forest Service, University of Hawai'i, Pacific Cooperative Studies Unit, and U.S. Fish and Wildlife Service (USFWS), as well as government regulators, consultants, stakeholders, and the public.

This guidance document was developed from the outcome of that workshop and is meant to serve as a "living document" to be revisited and updated by DOFAW staff, with ESRC review and input, at least every five years, or as significant advancements are made in the understanding of Hawaiian Hoary Bat ecology and management. The 2020 version of the Hawaiian Hoary Bat guidance document includes the following additions and modifications from the original guidance document of 2015, in addition to numerous lesser changes:

- Revises Section III, Assessment of Take and Impacts for HCPs;
- Adds additional discussion to Section IV, Hawaiian Hoary Bat Take Avoidance and Minimization Measures, and Section V, Mitigation;
- Updates research on Low Wind Speed Curtailment;
- Adds new Section VI, Adaptive Management;
- Summarizes the research initiatives currently underway in Appendix 1; and
- Provides a checklist of HCP requirements pursuant to HRS 195D in Appendix 3.

This document provides assistance to wind energy project proponents to develop HCPs in compliance with HRS 195D, with discussions on topics related to assessment of take and measures to avoid, minimize, and mitigate effects to Hawaiian Hoary Bats during the development of new HCPs and HCP amendments. It should be supplemented with other guidance, in particular the U.S. Fish and Wildlife Service HCP Handbook (https://www.fws.gov/endangered/what-we-do/hcp_handbook-chapters.html).

A key element for the ongoing evaluation of Hawaiian Hoary Bat issues and updates to this guidance document are annual reports provided by ITL license-holders. Given the importance of these documents, uniformity of reporting is essential. Therefore, a template has been provided for annual reports in Appendix 2.

# II. Background

## *A. Ecology and Status of the Hawaiian Hoary Bat*

The Hawaiian Hoary Bat, also known as the ʻōpeʻapeʻa, is an endemic subspecies of the North American Hoary Bat (*L. c. cinereus*) and is listed as endangered under both the federal and state endangered species laws. The Hawaiian Hoary Bat has not been evaluated as a distinct subspecies by the International Union for Conservation of Nature (IUCN), but the subspecies is listed as imperiled by NatureServe. Recent genetic research indicates that hoary bats in Hawaiʻi likely colonized the Hawaiian Islands in multiple events and that there may be two distinct subspecies of Hawaiian Hoary Bats present (Baird et al. 2015, Russel et al. 2015, and Baird et al. 2017). Baird et al. (2015) proposed, and Baird et al. (2017) further argued, that red, yellow, and hoary bats should be placed in separate genera (*Lasiurus*, *Dasypterus*, and *Aeorestes*, respectively) and proposed full species status for the Hawaiian Hoary Bat as *Aeorestes semotus*. Federal and state regulatory agencies may make a listing determination in the future in light of new information but at the present time only one bat species is considered present in Hawaiʻi. In April 2015 the Hawaiian Hoary Bat was officially designated as the state land mammal, and it is in fact the only extant native terrestrial mammal in the Hawaiian Islands.

Due largely to the cryptic and solitary nature of the Hawaiian Hoary Bat, knowledge of its ecology, life history, and population constraints is limited. It is known that the Hawaiian Hoary Bat occurs on all of the main Hawaiian Islands, and breeding populations have been documented on all of the main Hawaiian Islands except for Niʻihau and Kahoʻolawe. Recent studies suggest Hawaiian Hoary Bats roost primarily in woody vegetation exceeding 15 feet in height (Bonaccorso et al. 2015), their diet consists principally of nocturnal aerial beetles and moths (Jacobs 1999 and Todd 2012), and they may use several distinct core use areas, each with a mean size of about 63 acres (25.5 hectares) with little to no overlap (Bonaccorso et al. 2015). Hawaiian Hoary Bats may travel as far as six to eight miles (11 to 13 kilometers) one-way in a night to forage (Jacobs 1994 and Bonaccorso et al. 2015). Additional discussion on core use area is provided in Section IV B.

Hawaiian Hoary Bat population sizes are unknown, and it is generally accepted that it is not feasible at this point in time to ascertain an actual population estimate for a single island or the entire state. Understanding population status and specific habitat requirements of the species has been identified as a primary data need for species recovery (USFWS 1998 and Gorresen et al. 2013). Occupancy models and genetic studies have been and continue to be conducted to attempt to come up with population indices and effective population sizes, although effective population does not necessarily equate to actual population size (Gorresen 2008 and Gorresen et al. 2013). Although population estimates are not currently available, studies suggest that the Hawaiian Hoary Bat population on Hawaiʻi Island may be stable and potentially increasing (Gorresen et al. 2013).

## *B. Bats and Wind Energy*

With the increasing development of wind energy facilities, the number of bat fatalities due to collisions with wind turbines has continued to grow to the point that hundreds of thousands of bats are killed each year nationwide, making wind power a significant threat to the continued survival of these species (Cryan 2011).

Bat collisions and mortality at wind facilities are well-documented throughout the U.S., mostly involving migratory tree-roosting bat species such as silver-haired, hoary, and eastern red bats (Johnson and Strickland 2003, Kunz et al. 2007, Arnett et al. 2008, and Cryan 2011). Arnett and Baerwald (2013) estimated that from 2000 to 2011, between 650,000 and 1,300,000 bats were killed at wind facilities in the U.S. and Canada. Hoary bats have been documented to have the highest proportion of fatalities at most continental U.S. wind energy facilities, ranging from nine to 88 percent of all bat fatalities (Arnett et al. 2008). The national average is about 50 percent, with the majority of collisions occurring between July and September during fall migration, with another smaller peak of fatalities documented during spring migration (Cryan 2011).

Fatality rates vary by facility and the national average has been estimated at approximately 12.5 bats per MW per year (Arnett et al. 2008). It is unclear exactly what is driving these fatalities but factors that may influence bat mortality at wind facilities include bat distribution, behavior (e.g. attraction to turbines), weather, turbine height, habitat degradation or loss, and/or siting near certain topographic or landscape features (e.g. proximity to forest or wetlands). Studies have indicated that tree-roosting bats may be attracted to turbines, potentially due to the resemblance of these structures to tall trees and/or the expectation of resources, such as insect prey or potential mates (Kunz et al. 2007, Cryan et al. 2014, and Gorresen et al. 2015c). Other research has shown bats at wind turbines engaging in flight patterns that resemble those of bats swooping down to drink water, indicating that perhaps bats perceive the smooth surface of the turbine as resembling water (McAlexander 2013).

### *C. Hawaiian Hoary Bats and Wind Energy in Hawai'i*

Take records suggest there may be a seasonal pattern for Hawaiian Hoary Bat collision fatalities, although it is not as pronounced as on the continental U.S. (Figure 1). While it is thought that the Hawaiian Hoary Bat completes a seasonal altitudinal migration on a similar time frame, there are still many questions surrounding timing, and whether bats migrate on all islands regardless of maximum elevation, or perhaps migrate to a lesser extent or not at all on lower elevation islands.

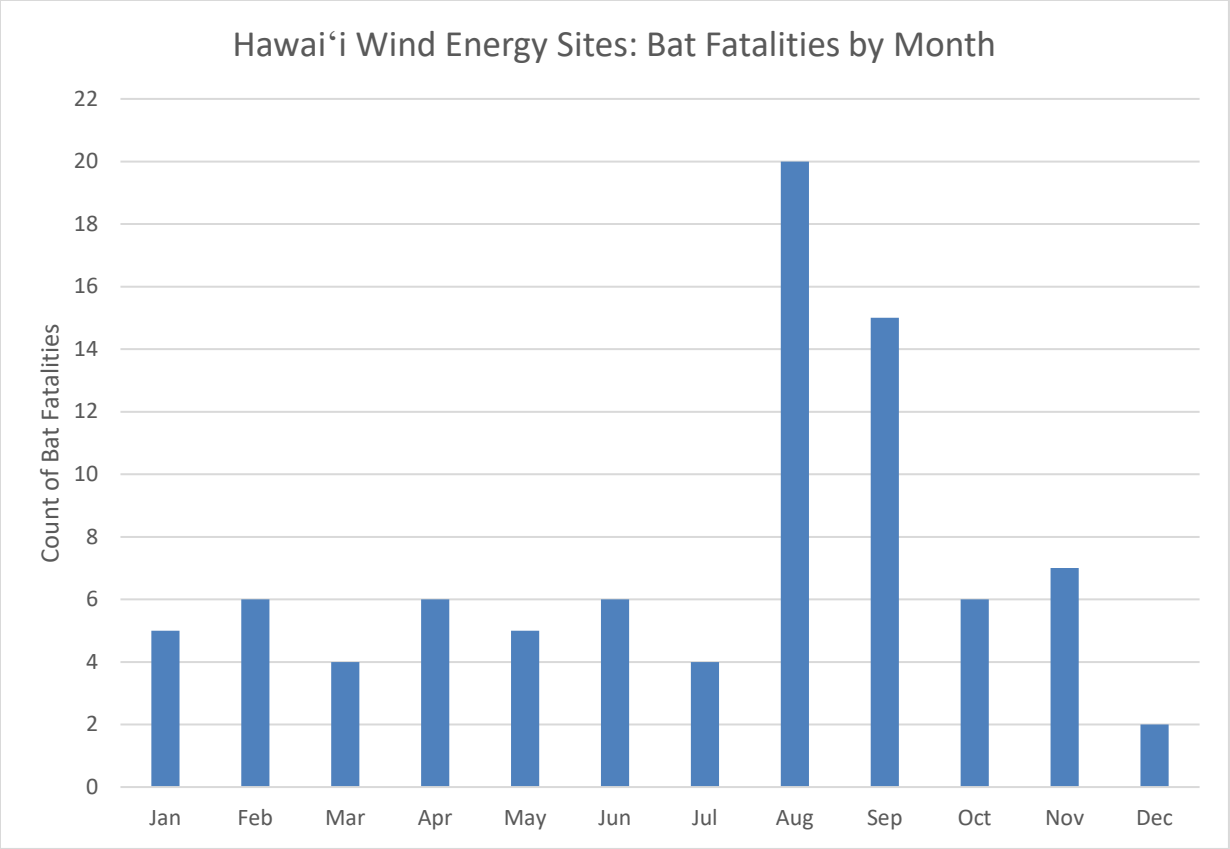


Figure 1. Observed bat fatalities by month across all wind facilities with approved ITLs in Hawai'i as of June 30, 2019.

# III. Assessment of Take and Impacts for HCPs

## *A. Overview*

Pursuant to statutory requirements in HRS 195D, HCPs should include measures to employ the best available data and methods to determine the number of individuals of the covered species that are expected to be taken during the term of the ITL in order to establish a credible estimated maximum take limit for that license. During the implementation of the HCP, the applicant should conduct appropriate, quantitative field methods to monitor the project for any observed take and employ appropriate analytical techniques and models to assess the calculated actual number taken annually and during the full term of the ITL. To assess potential impacts on endangered species resulting from the take, the HCP should provide for field surveys and monitoring of those species and employ the best available science to assess the full extent of impacts of the take on Hawaiian Hoary Bats in the plan area, on the island, and throughout its range. Resolving those impacts, including cumulative impacts, should result in net recovery benefits for the species, and should not cause the loss of genetic representation or jeopardize the continued existence of any endangered species. Guidance on the development of these measures for HCPs is provided in this section.

## *B. Take Calculations*

For wind energy sites to obtain an ITL, a maximum take limit must be identified. For proposed new sites or sites with minimal or no existing Hawaiian Hoary Bat monitoring data, the recommended process for determining the appropriate requested bat take is as follows:

1. Use information from the most comparable wind energy site(s) currently permitted with take data available as a baseline.
2. Adjust the take level based on specific conditions at the proposed new site, including but not limited to: size of turbines and rotors (including tower height and maximum height of blade), wind speeds, results of local or regional Hawaiian Hoary Bat studies, site-specific monitoring (with a minimum of one year of acoustic monitoring in all months, supplemented by thermal imagery monitoring, to gauge the effectiveness of the acoustic monitoring), and ecologic and landscape considerations.
3. Adjust the estimated maximum take, with justification, based on the implementation of any avoidance/minimization proposed.

For existing wind energy facilities with at least several years of monitoring data, a requested take limit should be determined using results of take calculated using Evidence of Absence (EoA) indirect take guidance that has been provided by the USFWS in a separate guidance document (Appendix 4), and bullet 3 above, also adjusting for any factors in bullet 2 that may have changed and that could affect take. For all sites, regardless of prior history, requested take levels should be thoroughly justified with detailed documentation.

Currently, the EoA model developed by statisticians at USGS (Dalthorp et al. 2014, or as updated) for determining incidental take is the model recommended by the agencies and in use by all wind energy projects with permits in Hawai'i. This model is designed to estimate take in situations when very few actual observed take events are recorded, as is the case in Hawai'i, and is used to project future take and to calculate take at any point in time. The model accounts for both observed and unobserved takes. It incorporates the spatial distribution of the location of carcasses found during monitoring to estimate the fraction of carcasses landing outside the searched area, and includes correction factors for searcher efficiency and carcass removal estimates based on field trials (see Section II C for detailed information on fatality monitoring). With this information the model is then used to calculate a maximum credible number of fatalities. Both DOFAW and USFWS specify the use of 80% credibility levels for a conservative estimate of take. If, for example, 25 bats is the direct take value calculated by the model at the 80% credibility level it can be stated with 80% certainty that the actual amount of take is 25 bats or less.

When using the EoA model to calculate the ongoing take, a *rho* value (when used as a factor by which an adaptive management action may change the fatality rate) should not be applied unless a baseline from site-specific monitoring is first established at a site. To justify the use of a *rho* factor in the EoA calculation, information should be provided on how site-specific or other data were used to determine requested take; specific topics include: average wind speed at site, pre-operational monitoring of bat activity, rotor diameter, nacelle height, and minimization methods (i.e., low wind speed curtailment and/or deterrents).

Annual reports should provide outputs from the EoA model and include a graphical representation of estimated and projected take over the authorized life of the ITL (Figure 2).

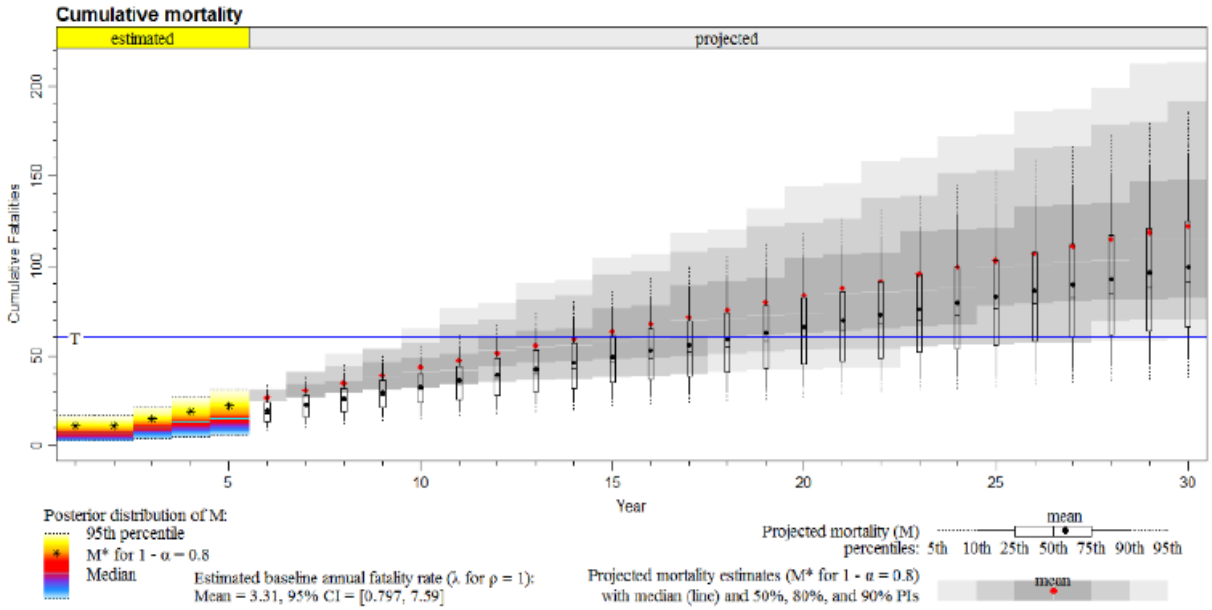


Figure 2. Example of graphic representation of estimated take that should be provided in annual reports. From Evidence of Absence modeling.

Demographic data to calculate indirect take for Hawaiian Hoary Bats are currently limited. Hawaiian Hoary Bat data should foremost be used for analytical purposes; where Hawaiian Hoary Bat data are not available, demographic data from the mainland hoary bat can be used as an appropriate surrogate. Calculations are recommended as described below. Indirect take assessed should follow USFWS guidance (Appendix 4).

### *C. Fatality Monitoring*

Determination of the numbers of Hawaiian Hoary Bats taken under an ITL is essential for compliance with legal requirements under HRS 195D .

Obligations under an HCP include monitoring impacts caused by project activities to ensure compliance with authorized take limitations. For wind farms, a post-construction monitoring plan is designed by the licensee/permittee and must be approved by the wildlife agencies. The method, frequency, size of search plots, number of turbines, and monitoring period are project-specific and dependent on carcass persistence at the site, as well as effectiveness of the searcher.

Fatality monitoring may not represent all individuals killed as some carcasses may 1) fall outside the searched area, 2) be removed by scavengers, 3) deteriorate beyond recognition prior to detection, or 4) remain undiscovered by searchers even when present. Current protocols involve routine searches within a specified distance from the turbine. Hull and Muir (2010) and current findings should be used to determine the fall-out pattern for the fatalities. The maximum height of blade tip and wind direction should be considered when determining the

maximum area in which fatalities may fall. A 20% buffer should be added to the outer area during the first few monitoring years to assure coverage is adequate. This is especially important at sites with high wind. There is new data showing that impacted bats fall farther from wind turbines at higher wind speeds (Hein 2017) which has implications for Hawai'i wind energy facilities that should be evaluated.

Independent searcher efficiency (SEEF) and carcass removal trials (CARE) are conducted parallel to the search process to estimate probability that a carcass persists until the next search and to estimate the probability that it is then discovered by a searcher. Details of these trials should be provided in HCPs, describing how and when they are to be conducted at a specific site during the year. Treatment of carcasses found during fatality monitoring, or incidental to the regular monitoring, should follow the most current standardized protocol provided by the agencies (Appendix 5). Canine-assisted searches have been demonstrated to provide cost effective and highly efficient searching (e.g. 80-90% of bat trials found, and 97-100% of bird trials found, SunEdison 2014 and 2015) and should be used for all Hawaiian Hoary Bat fatality monitoring and SEEF trials.

Downed wildlife reports for bats should follow the recommended format and content in the most recent Downed Wildlife Protocol (Appendix 5). For bat fatalities the information recorded should include wind speeds, wind directions, temperature, precipitation, moon phase, acoustic detector results (including temporal aspects and call types), and turbine activity for the period between the date the fatality was found and the date of the previous fatality search and, separately, for the fatality search period before that (total of two search periods analyzed). Location of any open water in the area, including watering troughs, should be provided due to the potential to attract bats. Ungulate grazing activity or other relevant land uses in the project area and distances involved should also be provided as there is potential for a relationship with bat activity (Todd et al. 2016). If deterrent devices are installed their operational status during the search period should be reported.

§195D-4(g)(3) provides that the applicant shall cover all costs to monitor the species. To ensure transparency and avoid conflicts of interests, perceived or real, the ESRC recommends that fatality monitoring, SEEF, and CARE trials be carried out by an independent, qualified, third party entity approved by the agencies. Alternatively, for consistency and efficiency of statewide monitoring of Hawaiian Hoary Bat HCPs, DOFAW may wish to procure the appropriate services through a request for proposals process consistent with state procurement rules to carry out those monitoring functions, with the costs to be borne by the applicants.

### *D. Bat Activity Monitoring*

Bat acoustic monitoring at and in the vicinity of wind facilities is necessary to document bat occurrence, habitat preferences at the project site, and seasonal and temporal activity changes that may be associated with take. Monitoring results are expected to help with the development of avoidance and minimization strategies at wind facilities by helping to design smart curtailment regimes or assess the effectiveness of installed deterrent devices.

HCPs should include a description of the experimental design to be employed to monitor Hawaiian Hoary Bat activity in the project area. The description should specify the number and types of devices to be used, the spatial configuration, and the analytical techniques to be used.

The design should be informed by a statistical analysis of the sample size required to detect a given level of change with known level of confidence. The recommended objective is to detect a 20% change in activity in the project area with >80% confidence. The design and methods used should be adaptive, with the results analyzed annually and any modifications employed to achieve the desired level of power to detect the target change.

Acoustic monitoring of bat activity at the site should occur throughout the permit period. Intensive monitoring after the early years of a project may be scaled back if reduced monitoring levels can be demonstrated to maintain acceptable power to establish temporal trends in bat activity through the permit period as well the ability to evaluate bat interactions with wind turbines, to develop methods to more accurately document downed wildlife incidents, and to evaluate adjustment of curtailment protocols. Effective monitoring may also provide information on correlations to other factors that will better inform management decisions. Activity monitoring is recommended at both nacelle and ground levels.

Project proponents should enhance techniques to monitor bat activity at their facilities as new methods become available in order to better understand the impacts of the project on the Hawaiian Hoary Bat, and to potentially reduce impacts by adjusting curtailment protocols based on monitoring results. Research on new monitoring technology could be very beneficial, both to analyze bat interactions with wind turbines as well as to develop methods to more accurately capture downed wildlife incidents.

Newer technologies such as thermal infrared and near-infrared cameras have been used in three studies at wind facilities on the continental U.S. and in Hawai'i to observe interactions between bats and wind turbines at night (Horn et al. 2008, Gorresen et al. 2015c, and Cryan et al. 2014). Thermal imaging provides more detailed information about bat behaviors as compared to other monitoring techniques. In Hawai'i, during a USGS six-month video surveillance study at the Kawailoa Wind Farm, over 3,000 bat events were observed in almost four thousand hours of video, which was nearly 75% more than detections obtained only with concurrent acoustic monitoring. Bat interactions including chasing blades, investigating nacelles, blade bouncing, foraging near turbines, and some additional unexplained behaviors were documented.

Although video imaging can uncover many interactions between bats and wind turbines, it is not an effective substitute for conducting regular carcass searches at wind energy facilities. The field of view from thermal and infrared cameras is limited; therefore, multiple cameras would be required to adequately monitor each turbine. Furthermore, finding rare events such as bat strikes at wind turbines in Hawai'i requires sifting through many hours of data causing a lag time from the time the event occurred to the identification of the event. Due to this lag time, it is unlikely that carcasses would be found to confirm sex, or gather other information, if the monitoring only relied on this search method.

In addition to acoustic or thermal bat activity monitoring, monitoring other weather-related variables such as temperature, wind speed, wind direction, or changing barometric pressure may also be important in determining patterns of observed mortality (Baerwald and Barclay 2011). Moon phase may be important as there is some indication that moon phase may affect how much Hawaiian Hoary Bats use echolocation (Gorresen et al. 2017).

## *E. Impacts of Take*

HRS 195D requires that HCPs include mitigation that will compensate for individuals of a species impacted by the project actions, increase the likelihood that the covered species will recover, contain sufficient information to ascertain with reasonable certainty the likely effect of the plan on the covered species in the plan area and throughout its habitat range, and adequately assess the cumulative impacts associated with the take on the island. The preferred strategy to meet these requirements is to implement mitigation actions designed to offset take of the affected population through enhancement of survival or reproductive success, or both, and to monitor the results of that mitigation to quantitatively confirm its success. Where the impacts of mitigation can be quantitatively assessed with confidence, the impacts of take on the population may be ascertained with reasonable certainty. For the Hawaiian Hoary Bat however, this approach poses significant challenges because of practical and technical limitations associated with quantitative assessment of demographic and population level benefits of mitigation.

Where the impacts of mitigation on take cannot be assessed with reasonable certainty, it is appropriate to explore other approaches to improve understanding of how take may affect the covered species. For example, population models may be used to predict the impact of a given level of take on a population, providing an additional tool to aid planning. Population models may be used to identify levels of take that are likely to cause a population decline, and can be useful to guide HCP planning by allowing the applicant or agency to establish a take limit that is not likely to cause a decline in the population in the event that the effectiveness of mitigation is not known. Population models have been used recently to examine the potential population impacts of take of several mainland species (Frick et al. 2017). Those models were used to predict population responses to mortality resulting from take by wind turbines and to assess the sensitivity of model inputs on the outcomes of the simulations.

Population models for the Hawaiian Hoary Bat are expected to be considerably less robust than those reported by Frick et al. (2017) for mainland species because the demographic information needed to inform those models is poorly known and imprecise for Hawaiian Hoary Bats. While this currently limits the predictive ability of the models, useful results and insights may nevertheless be gained from their development. The ESRC conducted preliminary population viability assessments using Vortex to identify (1) specific population dynamics parameters that are needed to conduct an acceptable population viability analysis (PVA), (2) particularly impactful parameters that should be prioritized for research, and (3) general trends or outcomes that could inform discussions on the impacts of wind projects on the Hawaiian Hoary Bat. Those models used plausible values for demographic inputs based on best available data to explore potential impacts on Hawaiian Hoary Bat populations, examining how impacts would differ for Hawaiian Hoary Bat populations depending on the starting size of a population, whether suitable habitat is limited, and whether that population was stable, increasing, or decreasing at the onset of take. While the models are not meant to predict the outcome of take for any given application, they do suggest what scenarios may be expected under certain circumstances. A detailed account of those exploratory efforts is provided in Appendix 6.

Based on the preliminary models explored by the ESRC, the following recommendations are provided:

1. That additional research is supported to improve estimation of life history and demographic variables that inform the population models.
2. That additional efforts are supported to explore population models for the Hawaiian Hoary Bat that employ alternative assumptions and approaches.
3. That applicants and agencies, in assessing cumulative impacts to Hawaiian Hoary Bat populations resulting from take, should, until such time as the best available science informs otherwise, adopt prudent and relatively conservative assumptions regarding Hawaiian Hoary Bat populations. Until data to the contrary are obtained, analyses should, as a minimum, include the following conservative assumptions:
    a. that Hawaiian Hoary Bat populations on each island are stable or slightly increasing (i.e., a 0 to 1 percent annual population increase as found by Gorresen et al. (2013)),
    b. that compensatory reproduction is not occurring (because no studies have shown that compensatory reproduction is occurring), and
    c. that an annual rate of take that exceeds the annual rate of increase of a population is likely to cause a decline in the population. For example, if the pre-project population is thought to increase by one percent annually then the take of more than one percent of the population annually would be expected to cause a declining population; similarly, if a population is stable, then any take would be expected to result in a comparable population decline.
4. That applicants and agencies should assume, until such time as the best available science informs otherwise, that the Hawaiian Hoary Bat populations on O'ahu, Maui, and Hawai'i are not more than 1,000, 1,500, and 5,000 bats, respectively.
5. That cumulative levels of take exceeding the annual rate of growth of the assumed population sizes for each island should not be authorized unless the expected net benefits to Hawaiian Hoary Bat recovery outweigh the potential losses from take.

Additional details of the exploratory models employed are provided in Appendix 6.

### *F. Use of Tiers*

From 2006 to 2018, the BLNR and the USFWS approved six HCPs for wind energy projects that included authorization for incidental take of Hawaiian Hoary Bats. Due to high levels of uncertainty regarding the levels of take projected, unknown effectiveness of projects approved as compensatory mitigation, and the expectation that the results from ongoing research would provide improved guidance for HCP development and implementation, the approved HCPs structured take levels into sequential tiers, each with associated plans and conservation measures. The tiered approach was meant to provide the HCPs with flexibility to implement the appropriate suites of conservation measures in the face of unknown take probabilities and uncertainties in the effectiveness of the minimization measures to be employed.

The ESRC acknowledges the rationale and utility of this approach for early HCPs. In and of itself, the use of tiers to define an incremental approach to the implementation of conservation measures, as part of an otherwise effective and compliant HCP that authorizes an appropriate level of take, may serve a functional purpose. However, the ESRC cautions that the use of tiers may not be consistent with state law and that the use of tiers may have negative outcomes. Inappropriate uses of tiers may include:

April 30, 2020

The Honorable Chair and Members of the
Hawai‘i Public Utilities Commission
Kekuanao‘a Building, First Floor
465 South King Street
Honolulu, Hawai‘i 96813

Dear Commissioners:

Subject: Hawaiian Electric Company, Inc. Power Purchase Agreement with Na Pua Makani Power Partners, LLC.
Response to Commission's Information Request

Hawaiian Electric Company, Inc. respectfully submits its response to the Commission's information request (PUC-HECO-IR-1), filed on April 20, 2020.[1]

Sincerely,

/s/ Kevin M. Katsura

Kevin M. Katsura
Director
Regulatory Non-Rate Proceedings

Attachment

c: Division of Consumer Advocacy, dnishina@dcca.hawaii.gov
Henry Curtis, Life of the Land, henry.lifeoftheland@gmail.com

# APPENDIX "C"

[1] In accordance with Order No. 37043 *Setting Forth Public Utilities Commission Emergency Filing and Service Procedures related to COVID-19* (non-docketed), issued by the Commission on March 13, 2020, the Company is serving this filing on the Consumer Advocate and Life of the Land via email.

PUC-HECO-IR-1

Reference: *Reference: Amended and Restated Power Purchase Agreement between Hawaiian Electric Company, Inc. and Na Pua Makani Power Partners, LLC, dated August 12, 2016.*

Please provide an update as to whether either HECO or Na Pua Makani have invoked any PPA provisions at this time or are planning to invoke any PPA provisions related to missed contract deadlines or milestones.

Hawaiian Electric's Response:
At this time, Hawaiian Electric and Na Pua Makani have invoked the following PPA[1] provisions related to missing the Guaranteed Commercial Operations Date ("GCOD"):

- On October 9, 2019, Hawaiian Electric and Na Pua Makani invoked Section 13.3(C), which granted Na Pua Makani a 90-day grace period following the GCOD. This was due to Hawaiian Electric identifying the need for neutral conductors to be added to interconnection poles. Hawaiian Electric and Na Pua Makani agreed to the 90-day grace period per Section 13.3(C) to accommodate the redesign and manufacturing work impacted by this change.

- On October 17, 2019, Na Pua Makani invoked Section 21.4 declaring Force Majeure due to work delays resulting from public protests that blocked the transport of equipment to the Project site. Under the PPA's Force Majeure provisions, the party declaring Force Majeure must notify the other party in writing and indicate what effect the Force Majeure event has on the declaring party's performance. The Force Majeure event then defers the declaring party's obligation only for the duration of the Force Majeure event. This Force Majeure event resulted in a 4-day delay and, per Section 13.3(B), Na Pua Makani was provided a 4-day grace period.

- On March 23, 2020, Hawaiian Electric invoked Section 21.4 declaring Force Majeure due to the COVID-19 pandemic and required quarantine/safety procedures impacting Hawaiian Electric's resource availability. On March 27, 2020, Na Pua Makani acknowledged the foregoing Force Majeure events, and also invoked Section 21.4 declaring Force Majeure due to the COVID-19 pandemic and required quarantine/safety procedures impacting Na Pua Makani's resource availability. Hawaiian Electric and Na Pua Makani continue to monitor and work toward mitigating the potential impacts of these Force Majeure events. As the pandemic situation is ongoing and constantly changing, the Force Majeure event is ongoing, and the ultimate duration of the Force Majeure event and extent of any delays is currently unknown.

[1] Unless otherwise defined herein, capitalized terms have the meaning given to the in the Amended and Restated Power Purchase Agreement between Hawaiian Electric Company, Inc. ("Hawaiian Electric") and Na Pua Makani Power Partners, LLC ("Na Pua Makani"), dated August 12, 2016 ("PPA").

- On April 1, 2020, Hawaiian Electric gave notice to Na Pua Makani that Hawaiian Electric would invoke Sections 13.4 and 13.5 and Daily Delay Damages from Na Pua Makani would begin to accrue in March 2020 for its delay in meeting the GCOD, following the expiration of the 90-day grace period per Section 13.3(A).

## Chun, Marisa

**From:** puc@hawaii.gov
**Sent:** Thursday, April 30, 2020 9:00 AM
**To:** Chun, Marisa
**Subject:** Hawaii PUC eFiling Confirmation of Filing



Your eFile document has been filed with the Hawaii Public Utilities commision on 2020 Apr 30 AM 08:56. The mere fact of filing shall not waive any failure to comply with Hawaii Administrative Rules Chapter 6-61, Rules of Practice and Procedure Before the Public Utilities Commission, or any other application requirements. Your confirmation number is MARI20085657558. If you have received this email in error please notify the Hawaii Public Utilities Commission by phone at 808 586-2020 or email at hawaii.puc@hawaii.gov.

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was duly served on the following parties via electronic filing (JEFS):

CLARE E. CONNORS
Attorney General of Hawai'i
WILLIAM J. WYNHOFF
LINDA L.W. CHOW
CINDY Y. YOUNG
Deputy Attorneys General
Department of the Attorney General
465 S. King Street, Room 300
Honolulu, Hawai'i 96813
Telephone: (808) 587-2937

Attorneys for Appellees-Appellees
BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, AND SUZANNE D. CASE

JOHN P. MANAUT
PUANANIONAONA P. THOENE
CARLSMITH BALL LLP

ASB Tower, Suite 2100
1001 Bishop Street
Honolulu, Hawai'i 96813
Telephone: (808) 523-2500

Attorneys for Appellee-Appellee
NA PUA MAKANI POWER PARTNERS, LLC

DATED: Honolulu, Hawai'i June 17, 2020

*/s/ Lance D. Collins*
LAW OFFICE OF LANCE D COLLINS
LANCE D. COLLINS
LAW OFFICE OF BIANCA ISAKI
BIANCA ISAKI
Attorneys for Appellant-Appellant
KEEP THE NORTH SHORE COUNTRY