

Maxx E. Phillips 10032
66-250 Kamehameha Hwy, Suite D103
Hale'iwa, Hawai'i 96712
Telephone: (808) 388-3825
MaxxEPhillips@gmail.com

David Kimo Frankel 5791
1638-A Mikahala Way
Honolulu, HI 96816
davidkimofrankel@hawaiiantel.net

Attorneys for Keep the North Shore Country

BOARD OF LAND AND NATURAL RESOURCES
STATE OF HAWAI'I

IN THE MATTER OF

A Contested Case Hearing Re Final Habitat
Conservation Plan and Incidental Take
License for the Na Pua Makani Wind Energy
Project by Applicant Na Pua Makani Power
Partners, LLC; Tax Map Key Nos. (1) 5-6-
008:006 and (1) 5-6-006:018, Koolauloa
District, Island of O'ahu, Hawai'i.

Case No. BLNR-CC-17-001

KEEP THE NORTH SHORE COUNTRY'S
CLOSING BRIEF; CERTIFICATE OF
SERVICE

HEARING OFFICER: YVONNE Y. IZU

KEEP THE NORTH SHORE COUNTRY'S CLOSING BRIEF

Na Pua Makani Power Partners, LLC's (NPM) habitat conservation plan (HCP) fails to meet the requirements of HRS chapter 195D in five ways. The plan should either be rejected, or sent back to the endangered species recovery committee for further review and refinement.¹

I. NPM'S HCP VIOLATES STATUTORY REQUIREMENTS.

There are five compelling reasons to reject NPM's HCP. Both NPM and the endangered species recovery committee failed to: (a) establish measurable goals and time frames for significantly improving habitat; (b) consider curtailing operations to the maximum extent

¹ If it was not clear at the August 7 and 8 hearings, the only species Keep the North Shore County has focused upon is the 'ōpe'ape'a.

FOREST & WILDLIFE
STATE OF HAWAII

17 SEP 11 P1:54

RECEIVED

practicable to minimize 'ōpe'ape'a mortality; (c) use the best available data to properly estimate bat fatalities; (d) point to any credible evidence that the mitigation measures would actually increase the bat population; and (e) thoroughly assess the cumulative impact of the project on 'ōpe'ape'a.

A. The HCP Omits Measurable Goals and Time Frames.

HRS § 195D-21(b)(2)(G) requires that the habitat conservation plan:

[c]ontain 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.

The HCP contains no such measurable goals. There are no time frames within which goals are achieved. The HCP's plan to restore the native habitat at Poamoho lacks any measurable goals and time frame. *See* Exhibit A-1. As the chair of the endangered species recovery committee, Dr. Scott Fretz noted, "the Poamoho plan is very short without details." Exhibit A-35 at 8. *Cf. Mahuiki v. Planning Commission*, 65 Haw. 506, 519, 654 P.2d 874, 882 (1982) ("We have combed the record in vain for findings").² In fact, the HCP proposes that such goals be prepared at a later time:

The preparation of the Poamoho Ridge restoration area management plan will be initiated upon Project construction and completed within 1 year of construction, assuming timely review by USFWS and DOFAW and recommendation for approval by the ESRC. The management plan **will include goals, objectives, and timelines** associated with reduction in targeted invasive species and pig/goat removal.

Exhibit A-1 at 65-66.

² On the same day that this brief is filed, NPM will be filing its proposed findings of fact. The hearing officer should note that NPM will be unable to provide a pinpoint citation (i.e., a page number) within the NPM that contains measurable goals or time frames within which the goals are to be achieved.

The Hawai'i Supreme Court has rejected efforts by state agencies to defer legal responsibilities until after decisionmaking. For example, in *Ka Pa'akai O Ka'aina v. Land Use Comm'n*, 94 Hawai'i 31, 7 P.3d 1068 (2000), the Hawai'i Supreme Court condemned the land use commission's rendering a decision without first satisfying its statutory and constitutional obligations. The court held that "[t]hese issues must be addressed *before* the land is reclassified." *Id.* at 50, 7 P.3d at 1087 (emphasis in original). While other issues plagued that decision, the court was clear that necessary findings had to precede authorization. Similarly, in *Kaleikini v. Yoshioka*, 124 Hawai'i 53, 76, 283 P.3d 60, 83 (2012), the Hawai'i Supreme Court rejected efforts by the City to delay the historic preservation review process until a later time:

In short, the PA commits to undergoing the historic preservation review process at a later time. The City appears to acknowledge this in its opening brief, where the City states that, '[i]n accordance with the terms of the PA and [c]hapter 6E, SHPD will continue to be consulted, have the opportunity to comment, and retain the right and authority to approve the remaining Phases.' However, the City does not address the rules, which require that these steps be taken *before* the SHPD gives its concurrence in the project.

By failing to include measurable goals within the HCP itself, and in fact, proposing that they be developed at a later time, the HCP fails to comply with HRS § 195D-21(b)(2)(G).

B. The HCP Fails to Minimize Bat Deaths to the Maximum Extent Practicable.

HRS § 195D-4(g)(1) requires that the "applicant, **to the maximum extent practicable, shall minimize** and mitigate the impacts of the take" HRS § 195D-4(g)(1). State and federal agencies consistently recommend implementing low wind speed curtailment (LWSC) to minimize bat deaths. Snetsinger Reply Testimony ¶25; Exhibit A-44 above Figure 2.

Data from mainland wind facilities demonstrates that bat casualty rates are reduced significantly when curtailment begins at 6.5 meters per second (**m/s**) instead of 5 m/s. Exhibit B-15 at 70; Exhibit A-44 at Figure 2. "The FRWF study is the first to demonstrate that bat casualty rates were not only significantly different between control and treatment turbines, but that bat

casualty rates were significantly different between cut-in speeds raised to 5.0 m/s versus turbines with cut-in speeds raised to 6.5 m/s." Exhibit B-15 at 70.

The endangered species recovery committee's recommendation should not be misinterpreted. It stated:

The ESRC recommends that low wind speed curtailment is a part of every wind facility's minimization strategy to the maximum extent practicable, and recommends a **minimum** cut-in speed of 5.0 m/s, increasing to a higher cut-in speed through adaptive management if the rate of bat take is higher than initially expected.

Exhibit A-44 at IV c. Its recommendation does not mean that the initial curtailment speed cannot be greater than 5.0 m/s. The endangered species recovery committee did not discuss employing a higher cut-in speed for this application. Transcript Vol I at 143. And although the committee "recommends the inclusion of specific triggers for increasing curtailment be included in HCPs", Exhibit A-44 above Figure 2, NPM's HCP fails to include specific triggers for increasing curtailment. Exhibit A-1 at 39 and 87; Transcript Vol II at 201-202.

In this case, NPM has admitted that to protect endangered species, operations could be curtailed when wind speeds drop to 6.5 m/s. Transcript Vol I at 23-24 and 139. In other words, it is practical to do so. Because it is practical to do so, it should be required. At the very least, the endangered species recovery committee should discuss the possibility of establishing a 6.5 m/s curtailment to minimize 'ōpe'ape'a mortality, or, in the alternative, establishing a specific trigger requiring 6.5 m/s curtailment.³

C. The HCP Underestimates Bat Fatalities.

HRS §195D-21(c) states in part: "The habitat conservation plan shall contain sufficient

³ Requiring it to do so would allow for DLNR to obtain data to show whether curtailment at 6.5 m/s is more effective than 5 meters per second in Hawai'i. If the endangered species recovery committee and the BLNR never require curtailment at 6.5 m/s, then there will never be any data generated in Hawai'i that demonstrates that curtailment at 6.5 m/s is better for the 'ōpe'ape'a as it is for bats on the mainland.

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." NPM's HCP fails to do so. That is not unusual. Every single HCP approved in this state has woefully underestimated the number of 'ōpe'ape'a that would be killed. Exhibit A-1 at 56. In fact, NPM's consultant underestimated bat fatalities by more than five times for the Auwahi. Exhibit B-5 at 3-78 and Exhibit B-12 at 19. These underestimates prevent the public and decisionmakers from determining the likely effect of the plan upon the 'ōpe'ape'a. NPM's HCP underestimates bat fatalities by: (1) refusing to use data from Kawailoa; (2) using unreliable data from the existing Kahuku facility; and (3) failing to consider the impacts of significantly taller turbines.⁴

1. Refusal to use data from Kawailoa.

NPM refused to use data on bat mortality from a nearby wind farm at Kawailoa. Exhibit A-1 at 41; Direct Testimony of Thomas Snetsinger at ¶ 14; Transcript Vol II at 194. Wind turbines have killed more than three times as many bats at Kawailoa than at Kahuku. Exhibit B-12 at 13 and 16. NPM offered three reasons for relying exclusively on data from the Kahuku windfarm and excluding data from Kawailoa. Exhibit A-1 at 41; Direct Testimony of Thomas Snetsinger at ¶¶ 13-14. None of the proffered reasons are logical.

One reason offered was that there are more wind turbine generators (**WTGs**) at Kawailoa. Exhibit A-1 at 41; Direct Testimony of Thomas Snetsinger at ¶ 14. Yet, in its calculation of bat mortality, NPM assumes that the number of bat deaths is directly proportional

⁴HRS § 195D-21(b)(1) requires that the HCP be based "on the best available scientific" data. The repeated incantation by NPM's witnesses that they are using the "best available science" does not magically make it so. *See e.g.* Transcript Vol I at 30 (line 21), 31 (line 23), 41 (lines 8-10), 43-44, 62 (lines 23-24), 75 (line 24), 76 (line 7, 20-21), 83 (line 13), 103 (line 21), 133 (lines 3 and 24-25), 134 (lines 20-21). Similarly, NPM's witnesses' repeated mantra that they were merely following the guidance from state and federal agencies is no excuse for the lack of rigorous analysis. *See e.g.* Transcript Vol I at 31 (lines 16 and 24), 133 (lines 4 and 25), 136 (line 8), 142 (line 22), 143 (line 20), 148 (line 17).

to the number of WTGs (i.e. a linear relationship). Transcript Vol I at 97. NPM divides bat mortality per WTG at Kahuku to calculate the fatality rate and then multiplies the fatality rate by NPM's number of WTGs. Exhibit A-1 at 42. NPM's consultant admits that ten WTGs would kill ten times more bats than one WTG. Transcript Vol I at 97. Thus, it is irrelevant that there are more WTGs at Kawailoa since the fatality calculation is based on an average per turbine and then multiplied by the number of turbines proposed by NPM. Dr. Scott Fretz, the chair of the endangered species recovery committee and a scientist who actually has a Ph.D. in zoology and conservation biology, testified that the fact there are more WTGs at Kawailoa is not a reason to ignore data from Kawailoa. Transcript Vol. II at 183, 197.

Another reason, NPM suggested that the landscape features and vegetation at Kahuku were similar to those of NPM's project. Exhibit A-1 at 41 and Direct Testimony of Thomas Snetsinger at ¶ 12. Yet, 'ōpe'ape'a are found in all habitat types. Exhibit A-11 at 38; Exhibit B-19 at 64 and 69; Exhibit A-44 at section VIc1; Transcript Vol II at 197.

The physical structure of the spaces in which Hawaiian hoary bats forage are extremely varied and include forest gaps and clearings, forest edges, along planted windrows of trees, above forest canopies and along roads. . . . The above physiognomies occur in habitats that include undisturbed native forest, mature eucalyptus plantations having mixed understory trees and shrubs, lowland forest dominated by introduced trees, suburban and urban areas richly planted with ornamental trees, grassland/pasture, river gorges, arboretums, macadamia nut orchards, and coastal embayments.

Exhibit B-19 at 69.

Finally, NPM contends that there is more data from Kahuku than Kawailoa because it has been operating longer. Exhibit A-1 at 41; Direct Testimony of Thomas Snetsinger at ¶ 13; Transcript Vol I at 85. A careful look at the data, however, demonstrates that Kahuku has generated 34.25 months of data whereas Kawailoa has generated 33 months of data -- an insignificant difference and no reason to reject data from Kawailoa. The Kahuku facility

commenced operations on March 23, 2011 -- not March 1. Exhibit B-30 at 5. It shut down on August 1, 2012 and was not fully operational until January 30, 2014. Exhibit B-38 at 8. NPM relied on data during a five-month period when all the WTGs were not spinning. *Id.* and Tr. The Kahuku facility was fully operational for 34.25 months. In contrast, the Kawaihoa facility commenced operations on November 2, 2012. Exhibit B-33 at 5 (formerly mislabeled as B-29). November 2012-October 2013 is 12 months. November 2013 -October 2014 is another 12. November 2015 through July 2016 is another 9. That's 33 months of data. The difference in operational times between the two facilities is insignificant. As Dr. Fretz testified, "It does not seem that different." Transcript Vol. II at 197.

The rationale for not using data from the Kawaihoa facility is simple illogical -- although it is understandable from NPM's perspective since so many more bats have been killed at Kawaihoa -- a facility with taller WTGs. Exhibit B-35 at 13; Exhibit B-23 at 8.

Dr. Scott Fretz testified that it would have been a good idea for NPM to have taken into account and considered data from Kawaihoa to estimate 'ōpe'ape'a deaths that would be caused by NPM's WTGs. Transcript Vol II at 199. But NPM has refused to do so.

2. Misuse of data

NPM's "take" estimate is based on its incorrect assumption that the Kahuku WTGs have fully operated for much longer than they have. NPM claims that the Kahuku WTGs operated for approximately 1.17 years without wind speed curtailment and 2.17 years with curtailment. Exhibit A-1 at 41. These numbers are incorrect.

NPM claims that Kahuku's operated without curtailment for 1.17 years. A-1 at 41. *See also id.* at 42, Table 5 line A. There are 12 months in a year. One month is the equivalent of .083 of a year (one divided by twelve). Two months is .17 of a year. In other words, NPM is claiming

that Kahuku operated without curtailment for approximately one year and two months. Operations commenced on March 23, 2011. Exhibit B-30 at 5. March 2011 cannot count as a full month because it only operated for a week. Curtailment began on April 27, 2012. *Id* at 15. March 23, 2011-April 27, 2012 is one year plus one month plus almost one week. NPM's take calculation is based on its incorrect assumption that it can count the entire month of March 2011 even though operations did not commence until March 23, 2011. NPM's estimate should have been based on 1.08 years of operation during non-curtailment -- not 1.17 years

NPM also overestimated the months of operation during curtailment. NPM claims that the Kahuku facility operated with curtailment for 2.17 years. Exhibit A-1 at 41. *See also id.* at 42, Table 5 line B. Yet for five months, not all the turbines were spinning. "From August 29, 2013 through January 29, 2014 the project was limited by HECO to generating a maximum of 5 MW of the possible 30 MW. Typically during this period fewer than 12 WTG's operated in high winds, although in low winds all WTG's may have operated." Exhibit B-38 at 8. Because this five month period is not representative, the data from this time period is problematic, as Dr. Fretz noted, and should not be used. Transcript Vol II at 195. The Kahuku facility was fully operational with curtailment for only 21 months. Curtailment commenced on April 27, 2012. Exhibit B-30 at 15. It shut down on August 1, 2012. Exhibit B-38 at 8. So, in 2012, the facility ran for 3 months. It was fully operational again on January 30, 2014. From January 30, 2014-January 29, 2015 is 12 more months. From January 30, 2015 through July 2015 is 6 more months. That is a total of 21 months -- less than two years. Kahuku was fully operational with curtailment for far less than the 2.17 years claimed by NPM.

By over-estimating the amount of time that the Kahuku WTGs were fully operational, NPM has underestimated the rate at which bats are killed. The same number of bats were killed -

- but in a shorter period of time. Thus, the fatality rate is higher than the rate NPM has estimated.

3. Failure to Consider Impacts of Taller Turbines

Finally, NPM failed to analyze the effect on bat mortality when the WTG height was increased by more than 28%. The February 2015 draft HCP called for WTGs of a maximum height of up to 512 feet. Exhibit B-16 at 5; Transcript Vol I at 109-110. The final HCP plan calls for WTGs up to 656 feet tall. Exhibit A-1 at 5; Transcript Vol I at 110. The preponderance of the evidence demonstrates that when WTGs are taller and rotor swept area increases, the number of bats killed increases. Exhibit B-1 at 24; Exhibit A-9 at 69; Exhibit B-7 at 381, 384-85; Exhibit A-50 at 5. For example, one carefully conducted study⁵ noted:

Observed bat casualty rates were not equal between turbine types, with higher bat casualty rates observed at turbines with greater rotor diameters. This pattern was potentially a function of increasing rotor swept area, and bats may have had an increased probability of colliding with turbines that had greater rotor swept areas.

Exhibit A-9 at 69. "The endangered species recovery committee has acknowledged that WTG height may affect bat mortality. Exhibit A-44 at section IIIa.

In fact, NPM admitted twice that taller WTGs would have greater impacts than smaller WTGs. In its February 2015 draft HCP, NPM wrote: "However, the WTG array ultimately selected will include at least some smaller WTGs and could potentially not include the largest WTG currently being considered so that impacts are anticipated to be less than assessed for the purposes of this HCP." Exhibit B-16 at 41. The final HCP states, "It is assumed that risk to the Covered Species would be less than assessed in this HCP if a smaller WTG model were selected." Exhibit A-1 at 41. *See also* Transcript Vol I at 46-47. If smaller WTGs have fewer impacts, larger ones have greater impacts.

Nevertheless, neither NPM nor the endangered species recovery committee analyzed any

⁵ NPM's consultant relied on this same study. Exhibit A-1 at 16; Direct Testimony of Thomas Snetsinger at n.3.

change in impact with the more than 28% increase in height, or the increase in the rotor swept area. Transcript Vol I at 104 and 111. The endangered species recovery committee never discussed the issue. Exhibits A-35 and A-36. NPM proposes to build the largest structure on O`ahu. Yet, the impact of increasing the turbine size and rotor swept area was never discussed.

NPM points to a 2016 Canadian study to justify its conduct. Exhibit A-10. That study, completed after the HCP was approved, can only be viewed as a post hoc rationalization for its conduct. There is nothing in the record showing that NPM actually ever considered the impact of increasing the height of the WTGs. In any case, the Canadian study is not persuasive given that: (1) the purpose of the study was not to study the relationship between WTG height and mortality; (2) the article's abstract does not mention the issue; (3) the height of the turbines in that study ranged from 117 to 135 meters, which is a difference of about 15%, Exhibit A-10 at 1364; (4) the study called that "relatively little variation in the height", *id.* at 1364; and (5) the study observed: "Variation in mortality estimates is expected because of site-specific characteristics that may concentrate migratory bats in some areas and not in others." *Id.* at 1365.

NPM's fatality estimate is based on data from WTGs at Kahuku, which are significantly smaller than the ones NPM is proposing: 128 m rather than 200 m. Exhibit B-23 at 8 and Exhibit A-1 at 5. The WTGs at Kawailoa are closer in size to NPM's than the ones at Kahuku: 150.5 m. Exhibit B-35 at 13. And far more 'ōpe'ape'a have been killed by the WTGs at the taller Kawailoa WTGs than at the Kahuku WTGs. Exhibit B-12 at 13 and 16. The reason for NPM's decision not to use data from Kawailoa is fairly obvious.

3. Conclusion

NPM's refusal to use data from Kawailoa is unjustified -- particularly since those turbines are taller than the ones that spin at Kahuku. Its incorrect assumption as to how long the Kahuku

turbines have been fully operational (whether intentional or not) underestimated the bat fatality rate. Its failure to consider or discuss the impact of increasing the size of the turbines or the rotor swept area between the draft HCP and the final is troubling. Given the failure of all prior HCPs to properly estimate bat mortality, the endangered species recovery committee should more carefully consider these deficiencies in NPM's HCP.

D. There is No Credible Evidence that the HCP Will Increase the Bat Population.

HRS §195D-4(g)(4) requires that the "plan shall increase the likelihood that the species will survive and recover." Similarly, HRS § 195D-21(b)(1)(B) requires that the "plan will increase the likelihood of recovery of the endangered or threatened species that are the focus of the plan." HRS § 195D-30 requires that all habitat conservation plans "be designed to result in an overall net gain in the recovery of Hawaii's threatened and endangered species." In short, NPM must show that the 'ōpe'ape'a would be better off with the project than without it. There is no credible evidence that the 'ōpe'ape'a will be better off with this plan than without it. Nor is there any reason to believe that any of the mitigation proposed will actually increase the number of 'ōpe'ape'a.

First, there is no evidence whatsoever that any of the mitigation plans implemented for any existing wind turbine facilities has increased the bat population. One facility has been operating for more than 11 years -- and there is no evidence that its mitigation measures have increased the bat population by even one bat. Transcript Vol I at 124; Vol II at 208 and 210.

Second, we have no idea whether the funded research will actually lead to an increase in the bat population. There is hope that it will. But there is no evidence that the research will produce results that increases the bat population. Transcript Vol I at 113, 114 and Vol II at 202-

3.

Third, maintaining a fence will not increase the bat population. Transcript Vol II at 204.

Fourth, there is no evidence that management of native forest through the removal of alien species -- as laudable as that activity is -- increases the bat population. Exhibit B-20 at 14; Exhibit A-44 at section VIc1; Exhibit A-35 at 8 ("On mitigation Jacobi said he would like to see more management at Poamoho, but it's difficult to make a case for the benefit to bats, but said we have acknowledged earlier today that we don't know how to manage bats yet, and that's why we are promoting research."); Exhibit A-34 at 34 ("Fretz asked for clarity on the ideas at Poamoho (bat mitigation site), since it wasn't clear what the habitat looked like or what the management would accomplish, and how that could translate into more bats. . . . Fretz reiterated the concern that preserving habitat is hard to measure in terms of actual benefit for bats."); Transcript Vol II at 203, 204-5 ("we don't have good statistical data on what kind of habitat management will support bats"); Transcript Vol I at 116, 117-119, 121.

Finally, the HCP has no effect on predation of bats. Transcript Vol I at 112.

The plain and simple fact is that we really don't know how to mitigate the death of 'ōpe'ape'a. Exhibit A-34 at 23 (Jacobi: "The ongoing challenge though is that we really don't know how to mitigate for bats."), at 24 (Jacobi: "We don't know a good way to measure benefit for bats." Young: "even doing twice the mitigation we don't know what we will get out of it."), and at 25 (Fretz: "We still aren't even sure . . . what the species benefit would be.").

Given this lack of knowledge, it makes no sense to authorize the killing of more 'ōpe'ape'a until we do. We can keep our fingers crossed and hope that the plan helps the 'ōpe'ape'a somehow, but HRS chapter 195D requires more -- much more.

E. The HCP's Cumulative Impact Analysis is Flawed.

HRS § 195D-4(g)(5) requires that the "plan takes into consideration the full range of the

species on the island so that cumulative impacts associated with the take can be adequately assessed."

NPM states:

Four factors suggest the Project will not contribute significantly to cumulative impacts for the Hawaiian hoary bat: 1) Hawaiian hoary bats breed on Oahu, have a larger population, and are more widespread than previously assumed 2) the Project provides mitigation commitments in this HCP that are designed to provide a net benefit including contributions to improving the understanding of how to effectively mitigate for impacts to the Hawaiian hoary bat; 3) it is highly probable that future industrial-scale wind farms in Hawaii will similarly provide compensatory mitigation for the anticipated take of Hawaiian hoary bats; and 4) there are no reasonably foreseeable additional onshore wind projects planned for Oahu.

Exhibit A-1 at 56. None of these factors hold any weight.

First, it is irrelevant what level someone at some point assumed the bat population was.

The relevant factor is the size of the population -- and whether it is increasing or decreasing.

There is no evidence that the population of 'ōpe'ape'a on O`ahu is increasing or is stable.

Transcript Vol I at 132, 134. Moreover, the primary reason that more bats have been detected than were previously thought is that WTGs have killed so many of them. Transcript Vol I at 129-

130. It is illogical to assume that because WTGs have been killing so many bats, there must be lots of bats in the area. Actually, it may be that WTGs are particularly effective in killing bats.

As one study⁶ noted, fatality rates for a region do not "provide any indication of local abundance or population levels for bats." Exhibit A-52 at 15. In fact, a 2015 study conducted in this area of

the Ko`olau Mountains⁷ concluded: "Although more bats may occur at these sites than were

detected acoustically, our findings do not demonstrate high bat abundance in the region." Exhibit

A-11 at 38.

⁶ NPM's consultant relied on this same study. Direct Testimony of Thomas Snetsinger at ¶ 24; Transcript Vol I at 131.

⁷ NPM's consultant relied on this same study. Transcript Vol I at 130. In fact, the study was prepared by Marcos Gorresen, who NPM's consultant identified as one of the two leading 'ōpe'ape'a biologists. Transcript Vol I at 80.

Second, even though the mitigation commitments are "designed" to provide a net benefit, there is no evidence that they are likely to increase the bat population. *See* discussion at section D, pages 11-12 above.

Third, NPM's third and fourth factors contradict each other. Either there are future industrial-scale wind farms that theoretically help bats, or none are reasonably foreseeable. In any case, there is no evidence that future wind farms will increase the bat population -- in fact, there is no evidence that any of the existing wind farms have increased the bat population. Transcript Vol I at 124 and Vol II at 208, 210. But there is evidence, despite what NPM argues in its HCP, that NPM is contemplating a second phase for this project. Exhibit A-33 at 6.

Bats are long-lived species with low reproductive rates, making populations susceptible to localized extinction. Exhibit A-50 at 8, EX. A-10 at 1361 and 1366, Ex. A-5 at PDF 2, Ex. A-7 at 27; Transcript Vol I at 127-128. The best scientific estimates are that wind facilities have killed more than 146 'ōpe'ape'a. Exhibit B-12 at 5, 9, 13, 16 and 19 (adding total estimated take in tables 3, 7, 10, 14 and 18). And there is no evidence that any of the mitigation measures used by any of the wind facilities has increased the bat population. Transcript Vol I at 124 and Vol. II at 208-210.

Extinction is forever. And yet the cumulative impacts of all these WTGs have not been thoroughly assessed.

F. Summary

NPM omitted measurable goals for habitat restoration, failed to consider curtailing operations at 6.5 m/s (which would minimize deaths to the maximum extent practical), underestimated bat fatality, provided no evidence that its mitigation measures would actually increase the bat population, and failed to thoroughly review the project's cumulative impact on

‘ōpe‘ape‘a. The endangered species recovery committee focused on other issues (such as the facility's monitoring plan) rather than devoting attention to these issues. In fact, the endangered species recovery committee did not, as a group, specifically go through all the criteria in HRS §§ 195D-4(g) and 195D-21. Transcript Vol II at 185; Exhibits A-33, A-34, A-35 and A-36. Because of the shortcomings in NPM's HCP, the BLNR cannot approve the HCP at this time.

II. THE BLNR CANNOT APPROVE THE HCP.

Given the failure of NPM and the endangered species recovery committee to thoroughly consider these five issues, the BLNR cannot approve the HCP at this time. The hearing officer has three choices. First, she can recommend that the board of land and natural resources reject the HCP. Second, she can recommend that the BLNR send the HCP back to the endangered species recovery committee for further consideration and revision.⁸ Third, she can re-open the evidentiary portion of this contested case hearing, and ask the endangered species recovery committee to address the issues discussed above as well as any other relevant issues. The procedural implications of each of these options is addressed below.

If the hearing officer recommends that the HCP be denied and the BLNR agrees, this proceeding would end. NPM could subsequently submit a new HCP. Doing so would be procedurally clean and simple, but would cost NPM additional time and money if it wanted to continue to build WTGs in Kahuku.

In the alternative, the BLNR could simply send the HCP back to the endangered species committee for further deliberation. HAR § 13-1-45(b)(3) and (4) authorizes the BLNR to do so.

⁸ Although not exactly analogous, the courts are known to remand matters back to agencies with expertise for the agency to make clearer findings and for applicants to refine and revise their proposals. *See e.g. Ka Pa'akai*, 94 Hawai'i at 53, 7 P.3d at 1090; *In Re Water Use Permit Applications*, 94 Hawai'i 97, 189, 9 P.3d 409, 501 (2000); *In re 'Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications & Petition*, 128 Hawai'i 228, 249, 251, 256, 258, 262, 287 P.3d 129, 150, 152, 157, 159, 163 (2012).

This alternative would take some time, however, because the parties would need to wait for the scheduling of oral argument and for the BLNR to issue its decision and send the HCP back to the endangered species recovery committee.

This case could be resolved more quickly if the hearing officer issued a minute order, pursuant to HAR §13-1-35(j) -- rather than a final recommendation to the BLNR -- asking the endangered species recovery committee to consider these issues (and any others that it deems relevant) and prepare findings that document the committee's deliberations. Shortly thereafter, the hearing could be reconvened and the parties would have the opportunity to argue and present any necessary further evidence.

Sending the HCP back to the endangered species recovery committee raises two procedural issues: *ex parte* communication and findings.

Ex parte communication. Litigants have raised the issue of *ex parte* communication in BLNR proceedings. *See e.g. Kilakila 'O Haleakalā v. BLNR*, 138 Hawai'i 383, 382 P.3d 195 (2016). Because the endangered species recovery committee is a scientific body and is not acting in a quasi-judicial capacity (*see* HRS § 91-1(6)), if the endangered species recovery committee were to reconvene on this HCP, that meeting would **not** be a contested case hearing, or be part of this proceeding (although its minutes and findings would inevitably become part of the record). The bar on *ex parte* communication would continue to apply to communications with the hearing officer and members of the BLNR.

Findings. Although HRS chapter 195D does not explicitly require that the endangered species recovery committee render findings, given that committee's scientific expertise, having the committee systematically deliberate and make specific findings as to each criterion in the law can aid the BLNR in its decisionmaking. *Cf. Gray v. Administrative Dir. of the Court*, 84

Hawai`i 138, 145, 931 P.2d 580, 587 (1997); *Topanga Association For A Scenic Community v. County of Los Angeles*, 522 P.2d 12, 16 (Cal. 1974); *Fields v. Kodiak City Council*, 628 P.2d 927,933 (Alaska 1981).

In any case, without further review and refinement by the endangered species recovery committee, NPM's HCP cannot be approved.

DATED: Honolulu, Hawai'i, September 11, 2017.



David Kimo Frankel
Maxx E. Phillips
Attorney for Keep the North Shore Country

BOARD OF LAND AND NATURAL RESOURCES
STATE OF HAWAI'I

IN THE MATTER OF

Case No. BLNR-CC-17-001

A Contested Case Hearing Re Final Habitat
Conservation Plan and Incidental Take
License for the Na Pua Makani Wind Energy
Project by Applicant Na Pua Makani Power
Partners, LLC; Tax Map Key Nos. (1) 5-6-
008:006 and (1) 5-6-006:018, Koolauloa
District, Island of O'ahu, Hawai'i.

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I certify that a file stamped copy of the foregoing will be served upon the following via
email today:

Yvonne Izu
Hearing Officer
yizu@moriharagroup.com

Elizabeth Rago
elizabethrago@gmail.com

Cindy Young
Deputy Attorney General
cindy.y.young@hawaii.gov

John Manaut and Puananionaona
Attorneys for NPM
jpm@carlsmith.com and pthoene@carlsmith.com

Dated: Honolulu, Hawai'i, September 11, 2017.



David Kimo Frankel
Attorney for Keep the North Shore Country