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STATE OF HAWAII

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, Ko'olauloa District, Island of O'ahu, Hawai'i

Case No. BLNR-CC-17-001

APPLICANT NA PUA MAKANI POWER PARTNERS, LLC'S **RESPONSE TO KEEP THE NORTH SHORE COUNTRY'S EXCEPTIONS TO THE HEARING OFFICER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER FILED NOVEMBER 1, 2017; CERTIFICATE OF SERVICE**

APPLICANT NA PUA MAKANI POWER PARTNERS, LLC'S RESPONSE TO KEEP THE NORTH SHORE COUNTRY'S EXCEPTIONS TO THE HEARING OFFICER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER FILED NOVEMBER 1, 2017

I. INTRODUCTION

Pursuant to Hawai'i Administrative Rules ("**HAR**") § 13-1-42 and Minute Order Nos. 11 and 12, Applicant Na Pua Makani Power Partners, LLC ("**Applicant**" or "**NPM**") submits this Response¹ to Keep the North Shore Country's ("**KNSC**") Exceptions ("**KNSC Exceptions**") to

¹ References to specific findings of fact ("**FOF**") or conclusions of law ("**COL**") are denoted by the applicable FOF or COL number (e.g., FOF 1, COL 1). The specific FOF or COL referenced from the Recommendation are denoted by "HO FOF" or "HO COL". The specific FOF or COL

the Hearing Officer's ("**HO**") Recommended Findings of Fact, Conclusions of Law, and Decision and Order dated November 1, 2017 ("**Recommendation**") related to Applicant's Habitat Conservation Plan ("**HCP**" submitted as Ex. A-1) for the proposed 25 megawatt wind energy generating facility in Kahuku on the Island of O'ahu ("**Project**").

Pursuant to HAR § 13-1-45(b), Applicant requests that the Board of Land and Natural Resources ("**Board**") reject KNSC's Exceptions, as detailed below, because the requested exceptions/changes are incorrect, not supported by the record, would lead to a misrepresentation of the evidence in the record, or are otherwise unnecessary.

Further, Applicant requests that the Board render its decision upon the record after oral argument (1) reversing the Recommendation to not approve Applicant's HCP, and (2) accepting the HCP submitted to the Board for approval on October 28, 2016, as recommended by the Endangered Species Recovery Committee ("**ESRC**") on February 25, 2016, and as further clarified by Applicant's Exceptions filed on December 7, 2017.

II. LEGAL STANDARDS

A. EXCEPTIONS

HAR § 13-1-42 provides in pertinent part:

(a) Except as otherwise ordered by the chairperson, within twenty-one calendar days after service of the report and recommendation by the hearing officer, a party may file with the board, exceptions to the report together with a brief in support of such exceptions. . . .

(b) The exceptions shall:

- (1) Set forth specifically the questions of procedure, fact, law, or policy, to which the exceptions are taken;
- (2) Identify that part of the hearing officer's report and

that are referenced from Applicant's Proposed Findings of Facts, Conclusions of Law, and Decision and Order, filed on September 11, 2017 ("**NPM FOF/COL**") are denoted by "NPM FOF" or "NPM COL". A copy of the NPM FOF/COL was attached as Exhibit 1 to Applicant's Exceptions filed on December 7, 2017. References to exhibits refer to the exhibits admitted as part of the record. *See* HO FOF 27.

recommended order to which objections are made; and
(3) State all the grounds for exceptions to a ruling, finding, conclusion, or recommendation. The grounds not cited or specifically urged are waived.

B. BOARD ACTION

Under HAR § 13-1-45, the Board may:

(a) In the event no statement of exceptions is filed, the board may proceed to reverse, modify, or adopt the recommendations of the hearing officer.

(b) Upon the filing of the exceptions and briefs together with the briefs in support, the board may:

- (1) Render its decision upon the record;
- (2) If oral argument has been held, the board may render its decision after oral argument;
- (3) Reopen the docket and take further evidence; or
- (4) ***Make such other disposition of the case that is necessary under the circumstances.***

(Emphasis added.)

In *Feliciano v. Board of Trustees of Employees' Retirement System*, the Hawai'i Intermediate Court of Appeals ("ICA") described the "function and effect of the hearing officer's recommendations." 4 Haw.App. 26, 659 P.2d 77 (1983). Recommendations are "to provide guidance" and an agency is "not bound by those findings or recommendations." *Id.* at 34, 659 P.2d at 82. Indeed, an agency, after review of the reliable, probative and substantial evidence in the proceeding, may reject a hearing officer's recommendations and "ma[ke] its own findings and conclusions based on the same evidence." *Id.*

Therefore, the Board must determine whether the reliable, probative, and substantial evidence within the record as a whole supports approval or rejection of the HCP and ITL.

III. POINTS OF ERROR

A. FOF 194 and COL 5.e

Applicant objects to KNSC's Exceptions to HO FOF 194² and HO COL 5.e³ because KNSC's requested exceptions are incorrect and not supported by the evidence in the record.

KNSC's exception to HO FOF 194 and HO COL 5.e states that:

FOF 194 and COL 5.e: This FOF and COL use the word "may" when *all* the evidence demonstrates that *all* the wind farms with HCPs have *actually* taken more 'ōpe'ape'a, our endangered native Hawaiian hoary bats, than predicted. *See e.g.* FOF 192. Every HCP approved in this state *has underestimated* the number of 'ōpe'ape'a *that would be killed* by wind turbine generators. Exhibit A-1 at 56; Exhibit B-12 at 4-20; B-30 at 10; Vol. 1, Tr. 08/07/17 at 40-41 and 84; Exhibit B-5 at 3-78; Exhibit B-12 at 19. FOF 194 and COL 5.e should delete the word "may."

KNSC Exceptions at 2 (emphases added).

This exception misinterprets HO FOF 192 and the testimony at the hearing. None of the evidence in the record demonstrates that "all the wind farms with HCPs have *actually* taken"

² HO FOF 194 provides:

194. Because very little is known about the population status of 'ōpe'ape'a (estimates range from a few hundred to a few thousand), and given the fact that take of 'ōpe'ape'a by wind energy facilities may have been underestimated in the past, a robust analysis of potential take is critical. By relying solely on the Kahuku Wind Project as a surrogate and electing not to consider data from other wind facilities on Oahu or the other islands, and by failing to consider the impact of turbine height on bat mortality, the estimated take set forth in the HCP is not reliable enough for the Board to determine that the HCP will not jeopardize the continued existence of 'ōpe'ape'a. HRS 195D-21(c), HRS 195D-21(c)(1).

³ HO COL 5.e provides:

5.e. 'Ōpe'ape'a. See COL 1.e and 2.e., above. Because very little is known about the population status of 'ōpe'ape'a (estimates range from a few hundred to a few thousand), and given the fact that take of 'ōpe'ape'a by wind energy facilities may have been underestimated in the past, a robust analysis of potential take is critical. By relying solely on the Kahuku Wind Project as a surrogate and electing not to consider data from other wind facilities on Oahu or the other islands, and by failing to consider the impact of turbine height on bat mortality, the estimated take set forth in the HCP is not reliable enough for the Board to determine the cumulative impacts on 'ōpe'ape'a. FOF 194.

more Hawaiian hoary bats than estimated or that "[e]very HCP approved in this state *has underestimated* the number of 'ōpe'ape'a *that would be killed* by wind turbine generators." The evidence in the record supports the Recommendation's finding that "existing data reveals that 'ōpe'ape'a have been taken at a *faster rate* than predicted." HO FOF 192 (emphasis added); *see also* Vol. 1, Tr. 08/07/17 at 84:9-11 (T.Snetsinger testifying that the take *rate* at existing wind farms is faster than predicted); *see also* Vol. 1, Tr. 08/07/17 at 81:11-20; 109:2-18.

KNSC's requested edit to HO FOF 194 and HO COL 5.e would result in a misinterpretation of the record that the existing wind farms have exceeded their allowable take. KNSC's exception is not accurate because there is no evidence in the record that *all* of the existing wind farms have *actually exceeded* their allowed take and KNSC cites to none. KNSC's position is inaccurate and directly contrary to the evidence in the record. In addition to the evidence cited in the paragraph above, the evidence in the record related to the Kahuku Wind Farm, the facility that is the best surrogate for the proposed Project as recognized by the State and Federal agencies charged with reviewing and approving HCPs, is that the Kahuku Wind Farm has *not* exceeded its allowed take. *See* Ex. A-55 (Kahuku Wind Farm HCP 2015 Annual Report) at 8-9 (providing that the Baseline 5-year permitted take for the Kahuku Wind Farm has *not* been exceeded); *see also* Ex. B-12 at 12-13. No other evidence was introduced to counter these facts. Therefore, KNSC's requested edits to HO FOF 194 and HO COL 5.e would result in HO FOF 194 and HO COL 5.e being further inaccurate and are not supported by the evidence in the record.

As discussed in Parts IV.A, IV.B, and IV.H of Applicant's Exceptions, Applicant takes exception to HO FOF 194 and HO COL 5.e on other grounds, which arguments are incorporated herein, and urges the Board to adopt Applicant's Exceptions for the reasons stated therein.

B. FOF 239 and COL 20

Applicant objects to KNSC's Exceptions to HO FOF 239⁴ and HO COL 20⁵ because KNSC's requested exception is unnecessary and Applicant disagrees with KNSC's interpretation of HO FOF 239 and HO COLs 20 and 23. KNSC's exception to HO FOF 239 and COL 20 states that:

FOF 239 and COL 20: One phrase in FOF 239 could be misinterpreted to suggest that NPM's HCP will actually minimize and completely mitigate the take of 'ōpe'ape'a – despite the clear findings in FOFs 194, 205, 207, 208, 216, 227. The emphasis in this FOF is the funding, not the effectiveness of the measures. FOF 239 should read:

The funds will be adequate to ensure monitoring of the Covered Species by the State and to ensure that the Applicant takes all actions ~~necessary~~ **that it has proposed** to minimize and mitigate the impacts of the take.

Similar changes should be made to COLs 20 and 23.

KNSC Exceptions at 2 (strikethrough and emphasis in original).

⁴ HO FOF 239 provides:

Funding Commitments

239. As required by HRS § 195D-4(g)(2), Applicant has adequate funding for the HCP and will provide any required financial guarantee tool requested and approved by the Board (e.g., an irrevocable letter of credit). Ex. A-1 at § 9.4; Ex. A-29 (Oller WDT) at ¶ 121. The Project's operational mitigation funds will be deposited in the endangered species trust fund created by HRS § 195D-31. Ex. A-1 at § 9.4. The funds will be adequate to ensure monitoring of the Covered Species by the State and to ensure that Applicant takes all actions necessary to minimize and mitigate the impacts of the take. Ex. A-29 (Oller WDT) at ¶ 122. Funding assurances include a budget for DOFAW to conduct compliance monitoring, if needed. *Id.* These funds will be used by DOFAW to verify Applicant's compliance with the terms of an approved HCP and corresponding ITL. *Id.*

⁵ HO COL provides:

20. In accordance with HRS § 195D-4(g)(3), the Project's operational funds will be deposited in the endangered species trust fund created by HRS § 195D-3 to ensure adequate monitoring and to ensure that Applicant takes all actions necessary to minimize and mitigate the impacts of the take. FOF 239.


As KNSC points out, HO FOF 239 and HO COL 20 and the applicable statutory section HRS § 195D-4(g) they deal with, emphasize that Applicant has provided adequate funding for the proposed HCP. *See* HRS § 195D-4(g)(2). A reasonable reading of HO FOF 239 and HO COL 20 does not lead to an interpretation that HO FOF 239 and HO COL 20 refer to adequacy of the proposed minimization and mitigation measures.

Additionally, Applicant objects to KNSC's exception to HO FOF 239 and HO COL 20 and the changes proposed by KNSC because they are unnecessary. Applicant considers the minimization and mitigation measures that it has proposed in the HCP to be what is necessary to minimize and mitigate the anticipated impacts of the Project. The ESRC agreed and recommended approval of the HCP. The requested changes are further unnecessary as the minimization and mitigation measures that Applicant will be required to fund, if the Board approves the HCP, will be those required by the Board through any conditions of approval. Accordingly, KNSC's exception to HO FOF 239 and HO COL 20 should be rejected.

IV. CONCLUSION

For the reasons stated above and in Applicant's Exceptions, Applicant respectfully requests that the Board reject KNSC's requested exceptions.

DATED: Honolulu, Hawai'i, December 29, 2017.



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CERTIFICATE OF SERVICE

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The undersigned certifies that the above-referenced document was served upon the following parties by email unless indicated otherwise:

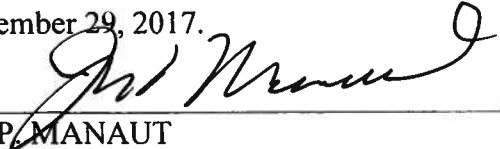
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