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

Attorney for Petitioner
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 RESPONSIVE BRIEF; CERTIFICATE OF SERVICE CONTESTED CASE HEARING DATE: AUGUST 7, 2017 TIME: 9:00 A.M. HEARING OFFICER: YVONNE Y. IZU

KEEP THE NORTH SHORE COUNTRY'S RESPONSIVE BRIEF

I. INTRODUCTION

Keep The North Shore Country (**KNSC**) files this responsive brief pursuant to Minute Order No. 5 to urge the denial of proposed final habitat conservation plan (**HCP**) and incidental take license (**ITL**) for the Na Pua Makani Power Partners, LLC Wind Energy Project in Kahuku on the North Shore of O'ahu, Hawai'i (**Project**) because it does not meet statutory requirements of Hawai'i Revised Statutes (**HRS**) Chapter 195D. Na Pua Makani (**Applicant** or **NPM**) proposes to construct and operate up to nine wind turbine generators (**WTG**s) and associated infrastructure on 706.7 acres in Kahuku, on O'ahu, Hawai'i. The Project will have the largest WTGs in Hawai'i, with a maximum blade tip height of 656 feet (200 m) above ground level.

Hawai'i's statutory protection for threatened and endangered species is codified in HRS Chapter 195D. The state law, in many ways, mirrors the federal Endangered Species Act (**ESA**).

While both the federal incidental take permits (**ITP**) and state ITLs require HCPs, the federal law only requires that there be no net loss in the species, 16 USC § 1539(a)(2)(B)(iv), whereas state law requires a net gain in the recovery of the endangered species. *See e.g.* HRS §§ 195D-4(g)(4) and 195D-30.

The HCP neglects to use the best available science in its understanding of potential impacts, presents false information, relies on inadequate analysis of potential impacts to endangered and threatened species, neglects to employ measures that would better protect ʻōpeʻapeʻa, fails to consider cumulative impacts to species on Oʻahu, and proposes mitigation measures that are neither measurable nor likely to provide a net benefit to affected species as required by HRS chapter 195D. The Applicant's lack of compliance with HRS §§ 195D-4(g) and 195D-21 has improperly attempted to shift the burden of proof from NPM to the public to assess and mitigate the environmental impacts of this project. This improper placement of the burden on the community violates the spirit and letter of the laws protecting Hawaiʻi's precious endangered and threatened species, the public trust doctrine, and the precautionary principle.

II. FACTUAL BACKGROUND

The proposed Project is an industrial wind farm sited on approximately 706.7 acres in Kahuku on the North Shore, Koʻolauloa District, Island of Oʻahu, identified by Tax Map Key Nos. (I) 5-6-008:006 and (1) 5-6-006:018 (**Project Area**). *See* Ex. A-1 at 1, 4; *see also* Ex A-12 at 1-3. About 254.7 acres of the Project site are state lands managed by DLNR. Ex. A-1 at 4. The remaining lands that will be used for the Project (451.9 acres) are privately owned. *Id.*

Between the Fall of 2012 and Summer of 2013, a seabird and bat study was conducted at the then proposed Project Area, for Tetra Tech, Inc., a mainland consulting firm based in Portland, Oregon (**Consultant**). *See* Ex. A-1 at Appendix B. This study included radar and

visual identification of endangered avian wildlife and calculations of possible interactions with fourteen wind turbines with a maximum height of 130.5 meters, a rotor radius of 50.5 m, and minimal (side view) and maximal (frontal view) areas of 783 m^2 and 8,189 m^2." *Id* at 11. Initially, the applicant proposed to have fourteen wind turbines capable of generating 45 MW of electricity. *See* B-24 and Ex. A-14 at Appendix A.

Sometime after June 2015, the applicant changed its mind. Instead of wind turbines with a maximum height of 130.5 meters (or 428 feet), it proposed turbines that were up to 200 meters (or 656 feet). This change came after the public was told of the smaller height and smaller wind swept areas in a November 2013 Federal Register Notice, a December 2013 environmental impact statement preparation notice, a second November 2014 environmental impact statement preparation notice, a March 2015 draft habitat conservation plan, and a draft environmental impact statement. *See* Ex. A-12 at 1.7.1 and Ex. A-29 at 20. There was no public hearing held on the current HCP. The June 4, 2015, DLNR public hearing at the Kahuku Community Center was for the draft HCP, was substantially different than the current HCP. Ex. A-29 (Oller WDT) at ¶8.

While the turbine height and rotor swept area continued to increase, the applicant's analysis of the potential impacts to threated and endangered birds and bats continued to rely on a now inadequate study based on wind turbines with a maximal height of 130.5 m and a rotor radius of 50.5 m. *See* Ex. A-1 at Appendix.

The Project will likely kill or injure eight federally and state-listed threatened and endangered species: ʻaʻo or Newell's shearwater (*Puffinus newelli*); the aeʻo or Hawaiian black-necked stilt (Hawaiian stilt, *Himantopus mexicanus knudseni*); the ʻalae keʻokeʻo or Hawaiian coot (*Fulica alai*); the ʻalae ʻula or Hawaiian common moorhen (Hawaiian moorhen, *Gallinula*

chloropus sandvicensis); the koloa maoli or Hawaiian duck (*Anas wyvilliana*); the nēnē or Hawaiian goose (*Branta sandvicensis*); the pueo or Hawaiian short-eared owl (*Asio flammeus sandwichensis*); and the ʻōpeʻapeʻa or Hawaiian hoary bat (*Lasiurus cinereus semotus*). *See* Ex. A-1 at 1 and 16. Therefore, under HRS Chapter 195D, the Applicant must prepare a HCP and acquire a ITL from the Board of Land and Natural Resources (**BLNR** or **Board**) for the State-listed species.

III. THE APPLICANT HAS NOT DEMONSTRATED THAT THE STATUTORY REQUIREMENTS OF HRS § 195D HAVE BEEN MET THEREFORE THE HCP AND ITL MUST BE DENIED

Over 40 years ago, in response to the extinction of many species found only in Hawaiʻi and the threatened extinction of countless more, Hawaiʻi wisely codified HRS chapter 195D into law. The State understood it was necessary to enhance our indigenous, threatened, and endangered species' prospects for survival, thus insuring the continued perpetuation of these rare and special species and the habitats, natural communities, and ecosystems they depend on. Like the ESA, in order to protect species in danger of becoming extinct, HRS §195D-4(e) prohibits actions that would result in a "taking" of any listed species. ""Take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect endangered or threatened species of aquatic life or wildlife, or to cut, collect, uproot, destroy, injure, or possess endangered or threatened species of aquatic life or land plants, or to attempt to engage in any such conduct." HRS §195D-2.

It wasn't until 1997, almost a decade after the ESA allowed for "take" under an approved ITP and HCP, that Hawaiʻi permitted "take" under our own ITL and HCP process. HRS §195D-21. The BLNR may issue an ITL to permit take otherwise prohibited if that take is incidental to, and not the purpose of, an otherwise lawful activity. HRS § 195D-4(g). As part of the ITL

application process, an applicant must develop, fund, and implement a BLNR-approved HCP that, to the **maximum extent practicable, minimizes and mitigates** the impacts of the take and **increases the likelihood that the species will survive and recover**. HRS § 195D-4(g)(1)-(4)(emphasis added). Further, the HCP must take into consideration the **full range of the species on the island so that cumulative impacts** associated with the take **can be adequately assessed** and demonstrate that the **cumulative impact of the activity** will result in a **net environmental benefit**. HRS § 195D-4(g)(5),(8)(emphasis added). The required components of the HCP are listed in Section 195D-21.

The evidence in this contested case hearing will show that the Applicant has failed to meet the statutory requirements of 195D, therefore the HCP and ITL must be denied. The HCP neglects to use the best available science in its understanding of potential impacts, presents false information, relies on inadequate analysis of potential impacts to endangered and threatened species, neglects to employ measures that would better protect ʻōpeʻapeʻa, fails to consider cumulative impacts to species on Oʻahu, and proposes mitigation measures that are neither measurable nor likely to provide a net benefit to affected species as required by HRS chapter 195D.

First and most importantly, the HCP proposes to kill or harm eight endangered and threatened species without adequately demonstrating the increased likelihood of survival and recovery.[1] In order for the statutory requirements of HRS §§ 195D-21(b)(1)(B) and 195D-4(g)(4) to be met, the HCP would have to ensure a true net benefit to all eight listed species. That is, the applicant would need to prove that each species is better off with the project, and

[1] "'Recovery" means that the number of individuals of the protected species has increased to the point that the measures provided under this chapter or the federal Endangered Species Act are no longer needed." HRS § 195D-2.2.

corresponding take, than without. Not only can the Applicant not meet this burden, but issuance of the HCP will likely leave these already vulnerable populations worse off. The evidence will show that the applicant has not met its burden to demonstrate that its mitigation commitments will increase the likelihood that affected species will recover. Specifically, there is no evidence that the HCP's mitigation measures would reduce the effect of the take resulting from project to ʻōpeʻapeʻa, ʻaʻo, or pueo. In sum, (a) there is no evidence in the record that the mitigation measures would actually reduce the impact of the project to our bats; (b) there is a plethora of evidence that the impacts of the project are unmitigable; (c) there is no nexus between some mitigation measures and the harm they are supposed to address; (d) implementation of some mitigation measures is purely discretionary by the applicant; and (e) one mitigation measure already exists and therefore cannot be considered to be mitigation.

Second, the applicant has not considered, or has rejected, measures that would reduce the number of bats killed.

Third, the applicant failed to consider the impacts of a project that is significantly taller in scope than it first proposed. The applicant increased the height of the turbines and maximum blade tip height from 156 meters (512 feet) to 200 meters (656 feet). The proposed Na Pua Makani wind turbines are 56% taller than any existing wind turbine in Hawaiʻi. The applicant erroneously disregards the increased risk of a turbine blade striking flying wildlife due to the larger size of the turbine's rotor swept area. The wind turbines at the proposed Na Pua Makani Wind Farm would have a rotor swept area 1.8 times larger (almost twice the size) than the Kahuku Wind Farm's turbine rotor swept area. Regardless, the Kahuku Wind Farm was the only wind farm in Hawaiʻi applicant considered when estimating ʻōpeʻapeʻa take. Risk of interaction is dependent on a project's hazardous footprint which is directly related to the square footage

rotor swept area. *See* B-37. Kahuku Wind Farm turbine blades have a diameter of 314 feet with a 77,437 square foot rotor swept area; the proposed Na Pua Makani turbine blades have a diameter of 427 feet (130 meters) with a corresponding rotor swept area of 143,201 square feet. The HCP fails to consider the increased flight hazard posed to flying bats and birds due to the much larger size of the airspace swept by the turbine blades.

Third, the HCP fails to take into account the cumulative effects of the unprecedented take being experienced by the ʻōpeʻapeʻa. The impact of an authorized incidental take cannot be determined or analyzed in a vacuum, but instead must be considered in the context of all other incidental takes already authorized by both the state and the federal government. All five of Hawaiʻi's major wind farms are currently exceeding their allowable bat take. See B-12. Regardless, the Project requests authorized take of 51 endangered Hawaiian hoary bats.

Fourth, the applicant has ignored studies that show that more bats are killed when turbines are taller and when the rotor diameter is larger.

Fifth, the information supporting the HCP is inadequate. The Project did not adequately study the presence of the Hawaiian hoary bat on site. The Project improperly used only two Anabat detectors, which were replaced due to malfunction with only two Wildlife Acoustic detectors, for a project site that is over 700 acres. Each detector has a limited range (around 50 meters), and thus using only two on such a large area could not possibly and accurately conclude the true presence of Hawaiian hoary bats on site. The Project then improperly uses the incomplete data from this inadequate study to justify the assumption that bat use is expected to be low in the area. The HCP also fails to provide maps detailing the vegetation and riparian zones within the Project Area and proposed mitigation sites. Ex. A-1. Maps such as the LANDFIRE "existing vegetation layer" and USGS Gap Analysis Program should have be

included so that the ecosystems, natural communities, and habitat types within the plan areas could be properly identified. While the HCP acknowledges that the James Campbell National Wildlife Refuge is only 0.75 miles to the north of the Project it fails to include a list, or analysis, of the endangered, threatened, proposed, and candidate species known or reasonably expected to be present at the Refuge.

Sixth, the HCP incorrectly claims that the Newell's Shearwater (*Puffinus newelli*) will avoid objects associated with the project: "The likelihood for Newell's shearwaters to collide with Project components such as construction cranes, the permanent met tower, transmission lines, and vehicles, if driven at night, is negligible as shearwaters are known to demonstrate a high level of avoidance behavior." Ex. A-1 Section 5.2. In reality Newell's Shearwaters are well known to be particularly susceptible to collisions with sedentary objects, including powerlines associated with electrical infrastructure. Ex. B-22 at 406.

IV. THE APPLICANT HAS THE BURDEN OF PROOF

The applicant incorrectly asserts that DOFAW, ESRC, and USFWS each approved the subject HCP. On pages 48-49 of its opening brief Applicant urges the hearing officer to defer to "determinations" made by DOFAW, ESRC, and USFWS. Applicant's argument is flawed.

First, the cases cited by the applicant are inapplicable. The cases cited by the applicant stand for the proposition – and explicitly state – that courts generally defer to agency decisions. These cases do not say that agencies defer to the recommendations of other agencies or officials. [2] This contested case hearing is not an appeal. It is a decision for the BLNR to make "after

[2] Thus, for example, in *Neighborhood Board v. State Land Use Commission*, 64 Haw. 265, 639 P.2d 1097 (1982), the Honolulu Planning Commission approved a special permit even though Department of Land Utilization and the Office of Environmental Quality Control recommended that the permit be denied. The Hawai'i Supreme Court reversed that approval — but the commission's rejection of its sister agencies recommendation was irrelevant to the Supreme Court's analysis.

consultation with" – not deference to – "the endangered species recovery committee." HRS § 195D-4(g). As noted in Minute Orders 6 and 7, "Na Pua Makani Power Partners, LLC, the applicant in this case, has the burden of proof." The Applicant, of course, can cite to any "determinations" made by anyone. The hearings officer, however, in her findings can give such "determinations" the weight she feels is due.

Second, there have been no "determinations" by USFWS. There is no evidence in the record that USFWS has endorsed the applicant's habitat conservation plan. There is no evidence that USFWS has accepted the federal environmental impact statement prepared for this project. There is no evidence that USFWS has issued a permit for this project. In any case, the standard for getting approval of a habitat conservation plan is higher under state law than under federal law. For example, state law requires that the plan "increase the likelihood that the species will survive and recover." HRS § 195D-4(g)(4). There is no equivalent language in the federal Endangered Species Act that governs USFWS.

Nor has the ESRC or DOFAW issued any kind of determination – other than making a recommendation. That recommendation was made without the benefit of any of the evidence that Keep the North Shore County will introduce and made without the benefit of cross examination.

The hearing officer is free to consider all the evidence and determine what weight to give each piece.

V. CONCLUSION

The Applicant has failed to demonstrate how the HCP satisfies all the applicable requirements of HRS§§ 195D-21 and 195D- 4(g) and, as such, the HCP must not be approved by the BLNR. The burden is on the applicant to demonstrate not only that this project will not have

negative cumulative impact to endangered and threated species, but that it will result in a net benefit as required by 195D.

The most recent data and best available science indicates one of the greatest threats to the recovery of the Hawaiian hoary bat is mortality caused by Hawai'i wind farms that are reducing the bat population without implementing compensatory mitigation to prevent the bat's population from declining. The benefits of Hawai'i wind farm mitigation are unproven and benefits to the bat individuals or to the population of bats on any island are unlikely to result from approved and proposed compensatory mitigation. The greatest conservation need of the Hawaiian hoary bat is take avoidance. Implementation of the proposed HCP will likely kill bats which will result in a reduction in the O'ahu bat population that will not be compensated for by the proposed mitigation. The most critical conservation need for endangered bats is to prevent mortality of adult breeding bats. All efforts to avoid killing our endangered bats, including the use of noise deterrents on wind turbines and curtailment of turbine blade spinning at night when bats are active, should be taken to avoid any take of adult bats that can't be offset with compensatory mitigation. Implementation of the HCP would cause a deterioration in the Hawaiian hoary bat's condition because it would kill adult breeding bats and reduce the O'ahu bat population. The HCP fails to substantiate how the proposed habitat management and research are expected to benefit any individual bat or the O'ahu bat population.

For the above stated reasons and more to be show by Keep The North Shore Country in the contested case proceeding, the ITL and HCP do not meet the required legal standards of HRS chapter 195D. BLNR must not issue an incidental take license for Project's take of the endangered Hawaiian hoary bat or approve the Project's HCP because the Project does not

mitigate all impacts of the take to the maximum extent practicable, increase the likelihood that the species will survive and recover, or provide a net environmental benefit as required by law.

Keep The North Shore Country reserves the right to amend this responsive brief to set out in more detail the reasons why the Incidental Take License and Final Habitat Conservation Plan for the Na Pua Makani Wind Energy Project must be denied.

DATED: Honolulu, Hawai'i, July 17, 2017.

MAXX E. PHILLIPS
Attorney 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 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Keep The North Shore Country's responsive brief was duly served upon the following parties, by Hand Delivery, U.S. Mail, postage prepaid, or electronically, on July 17, 2017, at the addresses below:

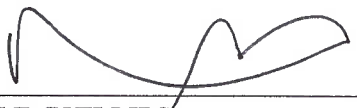
YVONNE Y. IZU, ESQ.
Hearing Officer
yizu@moriharagroup.com

MS. ELIZABETH J. RAGO
56-331 Kekauoha Street
Kahuku, Hawai'i 96731
elizabethrago@gmail.com

CINDY Y. YOUNG, ESQ.
Deputy Attorney General
Department of the Attorney General
465 South King Street, Room 300
Honolulu, Hawai'i 96813
Counsel for the Board of Land
and Natural Resources
cindy.y.young@hawaii.gov

NA PUA MAKANI POWER PARTNERS LLC
John P. Manaut, Esq.
Puananionaona P. Thoene, Esq.
jpm@carlsmith.com and pthoene@carlsmith.com

DATED: Honolulu, Hawai'i, July 17, 2017.



MAXX E. PHILLIPS
Attorney for Keep the North Shore Country