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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

KEEP THE NORTH SHORE COUNTRY, Appellant, vs. 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, Appellees.	)	Civil No. 18-1-0960-06 JPC (Agency Appeal) APPELLANT KEEP THE NORTH SHORE COUNTRY'S **REPLY BRIEF**; CERTIFICATE OF SERVICE JUDGE: HON. JEFFREY P. CRABTREE DATE: DECEMBER 5, 2018 TIME: 9:00AM

APPELLANT KEEP THE NORTH SHORE COUNTRY'S REPLY BRIEF

This Court should reverse the Board of Land and Natural Resources' (BLNR or Board) approval of Na Pua Makani Power Partners, LLC's (NPM or applicant) habitat conservation plan (HCP) and incidental take license (ITL) because the HCP does not meet the requirements of Hawaiʻi Revised Statute (HRS) chapter 195D. The substantial evidence in the record demonstrates BLNR erred by not requiring applicant to: (a) curtail operations to the maximum extent practicable to minimize ʻōpeʻapeʻa mortality; (b) produce any credible evidence that the mitigation measures will offset the take of 51 bats, let alone increase the likelihood that ʻōpeʻapeʻa will survive and recover; and (c) thoroughly assess the cumulative impacts of the project on Oʻahu ʻōpeʻapeʻa. BLNR further erred by: (d) improperly relying on the Endangered Species Recovery

Committee's (ESRC) incomplete recommendation; and (e) depriving Keep the North Shore Country (KNSC) of its right to due process.

Due to the majority of the issues listed above and more, the Hearing Officer appropriately found applicant's HCP fails to meet the criteria for acceptance pursuant to HRS chapter 195D. ROA Doc #86 8760-8827. After extensive briefings, two days of oral testimony, and a thorough review of the actual evidence in the record the Hearing Officer recommended the Board disapprove the HCP. *Id*. BLNR should have given due regard to the Hearing Officer's determinations as they are supported by substantial evidence in the record. *See* HRS § 91-14. Alas, the Hearing Officer's well-reasoned and factually supported determination was ignored in the wake of highly unusual circumstances, procedural irregularities, improper political pressure, and *ex parte* communications prior to final decision-making. Record on Appeal (ROA) Doc #91 at 9043-9046, 9084-9087. The Board erroneously approved applicant's HCP irrespective of its incompliance with the law and procedural infirmities. ROA Doc #100 at 9234-9335.

Unfortunately, the Board's approval of an inadequate HCP is nothing new. Every approved HCP has significantly underestimated the number of ʻōpeʻapeʻa that would be killed by wind turbines. ROA Doc #33 at 1000; ROA Doc #61 at 5707-5723 and 7174; ROA Doc #75 at 8374. As of June 2016, wind turbines with HCPs are estimated to have killed 146 endangered native bats in Hawaiʻi. ROA Doc #61 5708, 5712, 5716, 5719 and 5722. This level of unprecedented take is potentially catastrophic for four major reasons. First, scientific experts don't know how many ʻōpeʻapeʻa there are — estimates range from only a few hundred to a few thousand state-wide. ROA Doc #39 at 4765. Second, "[e]ach of the five industrial-scale wind farms in Hawaii operating with an approved HCP is in the process of amending their HCP in response to higher than anticipated levels of estimated take of the Hawaiian hoary bat." ROA Doc #33 at 1000. Third, there is no credible evidence that any of the mitigation plans employed at existing wind turbine facilities have offset their take, let alone increased the ʻōpeʻapeʻa population by even one bat. ROA Doc #75 at 8414; ROA Doc #76 at 8498 and 8500. Lastly, bats are long-lived species with low reproductive rates, making populations extremely susceptible to localized extinction. ROA Doc #39 at 1361 and 1366; ROA Doc #75 at 8417-8418.

Extinction is forever. This Court must ensure the State protects the endangered ʻōpeʻapeʻa. They deserve no less than what the law requires.

I. THE BOARD'S FLAWED DECISION SHOULD BE REVERSED

The Board's approval of applicant's HCP should be reversed because the agency made numerous errors of law and errors of fact resulting in a flawed decision. "Questions of fact are reviewed under the clearly erroneous standard. In contrast, an agency's legal conclusions are freely reviewable." *Diamond v. Dobbin*, 132 Hawaiʻi 9, 22, 319 P.3d 1017, 1030 (2014). A finding of fact or mixed determination of law and fact "is clearly erroneous when (1) the record lacks substantial evidence to support the finding or determination, or (2) despite substantial evidence to support the finding or determination, the appellate court is left with the definite and firm conviction that a mistake has been made." *Id.* at 34, 319 P.3d at 1042 (internal quotations and citations omitted). Substantial evidence is "credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." *Id*.

The Hawaiʻi Supreme Court has established that "agency determinations, even if made within the agency's sphere of expertise, are not presumptively valid."[1] *Diamond v. Dobbin*, 132 Hawaiʻi 9, 24, 319 P.3d 1017, 1032 (2014)(brackets, internal quotation marks, and citation omitted). "Presuming the validity of the agency's decision as to credibility and weight, or because of its 'expertise,' undermines the clearly erroneous rule imposed by HRS § 91-14(g)(5)." *Id*. This Court should not defer to BLNR's interpretation of the requirements of HRS chapter 195D as it is both erroneous and inconsistent with the underlying legislative purpose. *See In re Waiʻola O Molokaʻi, Inc*., 103 Hawaiʻi 401, 425, 83 P.3d 664, 688 (2004).

As discussed below, BLNR's decision should be reversed as it is made up of FOF and COL that are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." HRS § 91-14(g)(5).

[1] Both Department of Land and Natural Resources (DLNR) and NPM incorrectly assert in their answering briefs that the Board's decision carries a presumption of validity and KNSC has a heavy burden of making a convincing showing.

A. THE BOARD'S DECISION FAILS TO MINIMIZES 'ŌPE'APE'A DEATHS TO THE MAXIMUM EXTENT PRACTICABLE

BLNR's conclusion that NPM's HCP minimizes the impacts of killing 51 'ōpe'ape'a to the maximum extent practicable is not supported by substantial evidence in the record. HRS § 195D-4(g)(1) requires that the "applicant, to the maximum extent practicable, shall minimize and mitigate the impacts of the take." Data from wind facilities on the continent clearly demonstrate that bat mortality is reduced significantly when low wind speed curtailment (LWSC) begins at 6.5 meters per second (m/s) instead of 5 m/s. ROA Doc #61 at 5786-5928 and ROA Doc #39 at 4768 (Figure 2). For example, mortality rates were reduced by 50% when curtailment was increased from 3.5 m/s to 5 m/s, and 78% when raised from 3.5 m/s to 6.5 m/s. ROA Doc #61 at 5789 and 5837. The Bat Guidance Document includes a graph summarizing multiple studies showing irrefutably that bat mortality is significantly reduced when curtailment begins at 6.5 m/s:

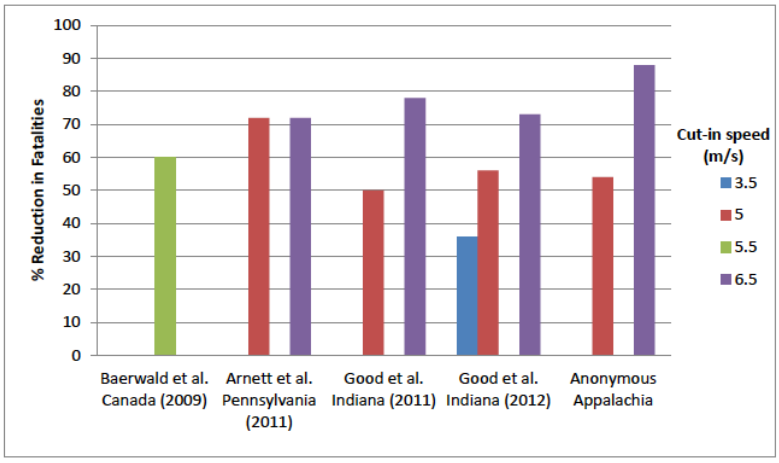

Figure 2. Reduction in fatalities under different curtailment regimes at five wind farms in the continental U.S.

ROA Doc #39 at 4768 (Figure 2). Regardless of this probative evidence, neither the applicant nor the ESRC ever discussed a higher cut-in speed for the project. ROA Doc #75 at 8433.

NPM incorrectly claims, on page 13 of its answering brief, that only one study demonstrates the value of curtailing at 6.5 m/s. Figure 2 above plainly shows multiple studies validating higher curtailment at 6.5 m/s. Furthermore, NPM claim that multiple studies show no difference between 5 m/s and 6.5 m/s is misleading. NPM answering brief at 13. The two studies that NPM cites to, and that BLNR erroneously relies on in its findings of fact (FOF) 273-275, are both from the same wind energy facility in

Pennsylvania. *Id*. The BLNR did not articulate in its decision why these studies from a singular wind facility in Pennsylvania were more persuasive than the other evidence demonstrating a need for higher cut-in speeds.

In fact the best available science, a 2015 study conducted in the Koʻolau Mountains of Oʻahu, demonstrates irrefutably that a significant number of endangered ʻōpeʻapeʻa continue to fly when wind speeds reach 6.5 m/s. ROA Doc #39 at 2037. The fact that ʻōpeʻapeʻa are present at higher wind speeds than 5m/s is also supported by data from the Kahuku wind facility. For example, in 2012 all three observed bat fatalities in Kahuku occurred with mean wind speeds of 6.2 m/s or higher. ROA Doc #61 at 7173 (table 2).

NPM and BLNR's reliance exclusively on data from Kahuku, one of only two wind facilities on Oʻahu, to assert that LWSC at 5 m/s minimizes bat deaths to the maximum extent practicable is clearly erroneous. NPM answering brief at 13; ROA Doc #100 FOF 292 and COL 18.e. Reliable data from the nearby Kawailoa wind facility, which has implemented LWSC at 5 m/s since it began operations, demonstrates without a doubt that a significant amount of endangered ʻōpeʻapeʻa continue to be killed at a 5 m/s cut-in speed. ROA Doc #61 at 7511, 7206, 7261, 7342, and 7403. According to Kawailoa's annual reports, the majority of observed bat takes occurred when that wind facility was actively curtailing at 5 m/s. ROA Doc #61 at 7206, 7261, 7342, and 7403. This substantial evidence from the only other wind facility on Oʻahu demonstrates that curtailing at 5 m/s does not minimize bat takes to the maximum extent practicable. The Board's refusal to require NPM to consider data from Kawailoa is clearly erroneous.

Furthermore, BLNR and applicant's reliance on adaptive management is misplaced. NPM claims, albeit without any credible evidence in the record, that it is impractical to curtail at a higher wind speed prior to the project being built. ROA Doc #104 at 9679-80. Logically then wouldn't it still be impracticable once the project is operational. Additionally, the Board failed to consider that every wind turbine project with a HCP has proposed amendments to increase the number of bats taken rather than effectively employing adaptive management. ROA Doc #33 at 1000.

A curtailment speed that is higher than 5 m/s is justified by the preponderance of the evidence. First, the reliable studies cited above demonstrating that higher wind speed curtailment reduces bat mortality. Second, the compelling evidence that ʻōpeʻapeʻa

continue to fly when wind speeds reach 6.5 m/s. Third, the death of far more ʻōpeʻapeʻa than predicted by every wind facility with a HCP. Fourth, the lack of credible evidence that any of the mitigation plans at existing wind turbine facilities in Hawaiʻi have offset their take. Fifth, the lack of any credible evidence in the record that a higher cut-in speed than that proposed by the applicant would be impracticable. Sixth, the fallacies in NPM's adaptive management scheme. Accordingly, BLNR's FOF and COL related to LWSC are clearly erroneous as demonstrated by "the reliable, probative, and substantial evidence on the whole record."

B. THE RECORD LACKS ANY EVIDENCE THAT APPLICANT'S HCP WILL INCREASE THE LIKELIHOOD THAT ʻŌPEʻAPEʻA WILL SURVIVE AND RECOVER

The Board failed to provide any evidence whatsoever that applicant's HCP will increase the likelihood that ʻōpeʻapeʻa will survive and recover as required by HRS §§ 195D-4(g)(4), 195D-21(b)(1)(B). HRS § 195D-30 requires that all HCPs "result in an overall net gain in the recovery of Hawaii's threatened and endangered species." "'Recovery' or "recover" means that the number of individuals of the protected species has increased. HRS § 195D-2 (emphasis added).

Neither the applicant nor BLNR effectively demonstrated that ʻōpeʻapeʻa will be better off with NPM's project than without. There is no evidence that any of the HCP's mitigation will increase the ʻōpeʻapeʻa population. *See* ROA Doc #75 at 8403-8404, 8406-8409, 8411; ROA Doc #76 at 8492-8495; ROA Doc #61 at 6179; and ROA Doc #39 at 4644 and 4634. There is, however, "reliable, probative, and substantial evidence" that: (1) none of the mitigation plans employed at existing wind turbine facilities in Hawaiʻi have increased the bat population by even one bat. ROA Doc #75 at 8414; ROA Doc #76 at 8498 and 8500; and (2) all permitted wind turbine facilities in Hawaiʻi have killed endangered ʻōpeʻapeʻa. *See* ROA Doc #61 Exhibit B-12.

The BLNR's determination "that the HCP will increase the likelihood of recovery of the ʻōpeʻapeʻa,"is not supported by the evidence in the record and is therefore clearly erroneous. *See* ROA 104 at 9700.

C. THE BOARD'S CUMULATIVE IMPACT ANALYSIS ON O'AHU 'ŌPE'APE'A IS INADEQUATE

The Board's cumulative impact analysis is flawed as it fails to consider relevant data and adequately assess impacts on the O'ahu 'ōpe'ape'a population. In an obvious effort to reach a preordained result, the BLNR attempts to minimize the very real impacts to endangered O'ahu 'ōpe'ape'a by cherry-picking and misquoting the record in its FOF 259-263, 266-293. HRS §§ 195D-4(g)(5) and 195D-21(b)(2)(C) require that an HCP consider the full range of 'ōpe'ape'a on O'ahu so that cumulative impacts associated with the take can be adequately assessed. In its decision the Board improperly limits consideration of substantial evidence. Thus, the Board is unable to reach a legally sound conclusion regarding the project's impacts on the O'ahu 'ōpe'ape'a population because it improperly ignores scientific evidence and necessary local data. Consequently, the Board's decision regarding cumulative impacts is clearly erroneous.

D. THE BOARD'S RELIANCE ON THE ENDANGERED SPECIES RECOVERY COMMITTEE'S RECOMMENDATION IS CLEARLY ERRONEOUS

The ESRC did not complete a full review of the best available science and other reliable data when making their recommendation as required by HRS § 195D-25(b)(1). The ESRC did not go through all the criteria in HRS §§ 195D-4(g) and 195D-21. ROA Doc #76 at 8475; *See* ROA Doc #39 Exhibits A-33, A-34, A-35 and A-36. NPM incorrectly claims KNSC's never raised this argument before, however the record is clear that KNSC did in its closing brief. ROA DOC #83 at 8733.

Despite the false claims by NPM, the record is replete with evidence that the ESRC never considered or discussed: (a) curtailing operations at 6.5 m/s. ROA Doc #75 at 8433; (b) impacts of taller turbines and increased rotor swept areas on bat mortality. ROA Doc #75 at 8394 and 8401; ROA Doc #39 at 4766; ROA Doc #61 at 5676, 5679-5678, 5867; (c) the exclusion of reliable data from Kawailoa. ROA Doc #76 at 6489. It was improper for the Board to rely on the ESRC's incomplete recommendation.

E. KNSC WAS DEPRIVED OF PROCEDURAL DUE PROCESS

1. The Board's Abused its Discretion by Allowing Board Member Gon to Participate

BLNR abused its discretion by refusing to recuse BLNR member Gon regardless of his appearance of bias, prejudice, and violation of HRS §§ 91-9(g) and 91-13.

NPM incorrectly asserts that KNSC waived its arguments with respect to member Gon's participation in decision making because KNSC did not appeal the Boards decision not to disqualify him. NPM Answering Brief at 24. NPM's argument is not supported by a plain reading of this statute. HRS § 91-14(b) provides that a party wanting to appeal shall appeal "within thirty days after the preliminary ruling or within thirty days after service of the certified copy of the final decision and order of the agency[.]" (Emphasis added). KNSC's appeal shortly after the "final decision and order of the agency" was legally sufficient. KNSC did not waive a due process challenge by not immediately appealing after BLNR issued MO No. 14. *See Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.*, 136 Hawai'i 376, 395, 363 P.3d 224, 243, (2015).

Similarly, NPM's argument that KNSC's motion to recuse member Gon was untimely is absurd. NPM's "position would effectively require a party to a contested case hearing to appeal whenever a decisionmaker appears to engage in prejudgment of the matter at issue . . . . Requiring a party to appeal (or lose the right to do so) based on such indefinite circumstances would encourage piecemeal appeals, inconsistent with well established law." *Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.*, 136 Hawai'i 376, 395, 363 P.3d 224, 243, (2015) (*Citing Mitchell v. State Dep't of Educ.*, 77 Hawai'i 305, 308, 884 P.2d 368, 371 (1994) (stating that an end served by the requirement of a requisite degree of finality of agency decisions before appellate review is the avoidance of piecemeal litigation). KNSC's motion to recuse was timely as it was not until after the contested case hearing did not lead to adequate relief that judicial review was appropriate.

2. The Board's Decision was Improperly Influenced by Political Pressure and Ex Parte Communications

The improper external political pressure and *ex parte* communications by Senator Inouye violated KNSC's right to procedural due process, thereby invalidating the BLNR's decision. NPM incorrectly asserts that because KNSC did not object to the

"participation of any of the Board members on the basis of ex parte communications or undue political pressure by Senator Inouye" that these arguments are untimely and should be deemed waived. NPM answering Brief at 32. KNSC arguments are timely and appropriate:

> [T]he remedy for improper ex parte communications is distinct from that demanded in cases involving a biased or impartial decisionmaker. The mere existence of improper ex parte communications does not automatically result in disqualification of an adjudicating agency decisionmaker; due process requires disqualification where circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on the adjudicator's impartiality.

Kilakila 'O Haleakalā v. Bd. of Land & Natural Res., 138 Hawai'i 383, 425, 382 P.3d 195 (2016)(brackets, internal quotation marks, and citation omitted). It was not until the Board's final decision that KNSC understood the level of interference and improper pressure.

II. CONCLUSION

In order to approve an HCP pursuant to HRS chapter 195D, the BLNR must consider the best available scientific and reliable data. The BLNR's decision to approve applicant's HCP effectively failed to do so and contained errors of law and clearly erroneous findings of fact. Accordingly, the BLNR's Decision should be reversed.

DATED: Honolulu, Hawai'i, October 15, 2018.

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