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KEEP THE NORTH SHORE COUNTRY

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

KEEP THE NORTH SHORE COUNTRY,)	Civil No. 18-1-0960-06 JPC
)	
Appellant,)	(Agency Appeal)
)	
vs.)	AMENDED STATEMENT OF THE CASE;
)	CERTIFICATE OF SERVICE
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,)	
)	JUDGE: Honorable Jeffrey P. Crabtree
)	
Appellees.)	
)	

AMENDED STATEMENT OF THE CASE

Pursuant to Rule 72(c) of the Hawai'i Rules of Civil Procedure, Appellant Keep the North Shore Country (KNSC), by and through its undersigned attorney, makes the following amended statement of the case.

INTRODUCTION

1. Keep the North Shore Country brings this administrative appeal to challenge the decision of the Board of Land and Natural Resources (BLNR or board) on May 18, 2018 approving the Final Habitat Conservation Plan (HCP) and Incidental Take License (ITL) for the

Na Pua Makani Wind Energy Project in Kahuku, Island of O‘ahu, Hawai‘i (project). Record on Appeal (ROA) Doc #39 Exhibits A-1 and A-2.

2. Na Pua Makani Power Partners, LLC (NPM or applicant) proposes to construct and operate the largest wind turbine generators (WTGs) in Hawai‘i. ROA Doc #39 Exhibit A-1 and ROA Doc #83 at 8728.

3. These colossal turbines and associated infrastructure will likely kill or injure endangered ‘ōpe‘ape‘a, otherwise known as the Hawaiian hoary bat (*Lasiurus cinereus semotus*), along with seven other species of endangered birds that are listed and protected under Federal and State law. ROA Doc #39 Exhibit A-1.

PARTIES

4. Keep the North Shore Country is a grassroots, volunteer-based North Shore nonprofit, 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. ROA Doc #59 Written Direct Testimony of Gil Riviere.

5. Appellee BLNR heads the Department of Land and Natural Resources (DLNR) pursuant to HRS § 26-15 and is an agency of the State of Hawai‘i.

6. Appellee Suzanne D. Case is the chairperson of the BLNR and is named in her official capacity.

7. Appellee DLNR issues Habitat Conservation Plan and Incidental Take Licenses pursuant to HRS chapter 195D and is an agency of the State of Hawai‘i.

8. DLNR’s mission is to “enhance, protect, conserve and manage Hawaii’s unique and limited natural, cultural and historic resources held in public trust for current and future generations of visitors and the people of Hawaii nei in partnership with others from the public

and private sectors.”

9. Appellee Na Pua Makani Power Partners, LLC is a Delaware limited liability company and the applicant for the Habitat Conservation Plan and Incidental Take License in the above-captioned matter. ROA Doc #39 Exhibit A-1.

STANDING

10. Keep the North Shore Country mission is to preserve, protect, and enhance the heritage and rural character of the North Shore of O‘ahu. ROA Doc #59 Written Direct Testimony of Gil Riviere.

11. Since its creation in 2006, Keep the North Shore Country has advocated for preservation of the natural environment and considers biodiversity to be an integral part of the rural character of the North Shore. *Id.*

12. Keep the North Shore Country has volunteered on wildlife conservation projects throughout the state, including Kahuku Point, Malaekahana, and James Campbell National Wildlife Refuge, near or within the area affected by the project. *Id.*

13. The Hawai‘i Supreme Court has recognized Keep the North Shore Country’s ability to represent environmental interests on the North Shore. Keep the North Shore Country, with co-plaintiff Sierra Club, Hawai‘i Chapter, won the landmark Turtle Bay Resort development case in the Hawai‘i Supreme Court in 2010 that compelled Kuilima Resort Company, located in Kahuku, to Supplement its 1985 Environmental Impact Statement. *Unite Here! Local 5 vs. City and County of Honolulu*, 123 Haw. 150, 231 P.3d 423 (2010).

14. Keep the North Shore Country, and its president, has an interest in protecting endangered species, including the ‘ōpe‘ape‘a. ROA Doc #59 Written Direct Testimony of Gil Riviere.

15. Keep the North Shore Country's interests will be adversely affected because NPM's proposal is likely to kill 'ōpe'ape'a. *Id.*

JURISDICTION

16. The Circuit Court has jurisdiction over this appeal pursuant to HRS § 91-14 which provides in pertinent part:

Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review under this chapter.

17. Jurisdiction is also based upon Article XI § 9 of the Constitution of the State of Hawai'i.

PROCEDURAL BACKGROUND

18. In 2012, NPM decided to pursue development of an industrial wind farm in Kahuku on the North Shore of O'ahu. ROA Doc #39 Exhibit A-31 at 4588.

19. On June 4, 2015, a public hearing on applicant's draft HCP was held. ROA Doc #100 at 9238.

20. Between the time of the public hearing on the draft HCP and the final HCP, applicant increased the maximum height of the WTGs from 156 meters (m) to a maximum of 200 m. There was no change in applicant's take estimates regardless of the change in height and rotor swept area. No public hearing was held to address the change in WTG height. ROA Doc #100 at 9238; ROA Doc #39 Exhibit A-1 at Appendix B at 1343-1344 and 1350; ROA Doc #61 Exhibit B-16 at 5946-5947.

21. On February 25, 2016, the Endangered Species Recovery Committee (ESRC) voted to recommend that the BLNR approve applicant's HCP. ROA Doc #39 Exhibit A-36 at 4653. Land board member Sam Gon III (board member Gon), who served on the ESRC during this time, made the motion to approve applicant's HCP. *Id.*

22. At the November 10, 2016 board hearing on NPM's application, Keep the North Shore Country testified against applicant's HCP and ITL and orally requested a contested case hearing. ROA Doc #100 at 9240.

23. On November 19, 2016, Keep the North Shore Country filed its written petition for a contested case hearing. *Id.*

24. On December 9, 2016, Keep the North Shore Country's request for a contested case hearing was granted. ROA Doc #39 Exhibit A-41 at 4724-4725.

25. Elizabeth Rago filed a petition for a contested case proceeding that the board consolidated with this case. ROA Doc #25.

26. On February 14, 2017, the board selected Yvonne Y. Izu as the Hearing Officer in this proceeding. ROA Doc #20.

27. No objection was filed to Elizabeth Rago's participation in this contested case and she was admitted as party because she had shown a substantial interest in the matter and her participation would assist the board in its decision-making. ROA Doc #28.

28. A contested case hearing was held on August 7 and 8, 2017. ROA Doc #75 and ROA Doc #76.

29. Testimony was received from: Mike Cutbirth, Alicia Oller and Thomas Snetsinger on behalf of NPM; Gil Riviere on behalf of Keep the North Shore Country; Elizabeth Rago and Tēvita Ka'ili on behalf of Ms. Rago; and Scott Fretz, who was subpoenaed to testify

by Keep the North Shore Country. *Id.*

30. All exhibits proffered by the parties were accepted into evidence. *Id.*

31. During the two days of oral testimony, the only species that the opposition to NPM's application was focused upon was the 'ōpe'ape'a. *Id.*

32. On November 1, 2017, the Hearing Officer issued her recommended findings of fact, conclusions of law, and decision and order finding that the applicant's HCP fails to meet all the criteria for acceptance pursuant to HRS Chapter 195D and recommended the board disapprove the HCP. ROA Doc #86.

33. On January 12, 2018, the board held oral arguments. ROA Doc #92.

34. At the oral argument, board Chairperson Case (Chair Case) disclosed that Hawai'i State Senator Lorraine Inouye (Senator Inouye) sent a letter that was distributed to the Board regarding this contested case. ROA Doc #92 at 9043. Chair Case stated that this letter "went out, but I immediately saw that it had gone out and I followed up in an immediate email to ask the board members not to read the letter." *Id.*

35. Land board member Stanley Roehrig (board member Roehrig) disclosed that he received a phone call from an unnamed legislator talking to him "rather impassioned on this docket," concerning a wind project that "the legislator was in favor of." ROA Doc #92 at 9043 - 9044. Board member Roehrig recused himself from participation due to this improper ex parte communication. ROA Doc #92 at 9044.

36. Land board member Christopher Yuen (board member Yuen) stated that this same legislator, now named as Senator Inouye, also called him regarding "the Kahuku wind farm," but he did not recuse himself. ROA Doc #92 at 9045.

37. Before oral arguments began, Keep the North Shore Country moved for the

disqualification of board member Gon due to his prior decision making on applicant's HCP as a ESRC member. ROA Doc #92 at 9046. Chair Case asked Keep the North Shore Country to file a motion for recusal and allowed board member Gon to participate in the proceedings. *Id.*

38. On January 24, 2018, Keep the North Shore Country filed a request to access government records under HRS Chapter 92F requesting from the BLNR the "letter sent in 2018 from Senator Lorraine Inouye to Suzanne Case or the BLNR regarding the Na Pua Makani Wind Energy Project."

39. On January 29, 2018, the BLNR responded to Keep the North Shore Country's request to access government records stating that it could not grant the request because the agency did not maintain the records.

40. On March 23, 2018, after briefings from the parties and receiving a statement from board member Gon, the board denied Keep the North Shore Country's motion to recuse. ROA Doc #97 and ROA Doc #98.

41. The BLNR issued its final decision on May 18, 2018, to approve applicant's HCP and ITL. ROA Doc #100.

GENERAL FACTUAL ALLEGATIONS

NPM Proposed Project

42. Applicant's project is a 25 megawatt wind generating facility sited on approximately 706.7 acres in Kahuku on the North Shore, Ko'olauloa District, Island of O'ahu, identified by Tax Map Key Nos. (1) 5-6-008:006 and (1) 5-6-006:018 (project site). ROA Doc #33 at 945 and 948.

43. Applicant's final HCP proposed to construct and operate up to nine WTGs with maximum blade tip heights of 200 m above ground level, a permanent meteorological tower,

access roads, operation and maintenance facilities, electrical collection and interconnection infrastructure, including an electrical substation, a temporary laydown area, and associated infrastructure. ROA Doc #33 948-949.

44. Prior to December 2015, earlier versions of NPM's project called for WTGs with a maximum height of 130.5 m and 156 m. ROA Doc #33 at Appendix B at 1107-1108 and 1114

45. Following the Hearing officer's recommendation that the board disapprove the HCP, applicant proposed that conditions of approval should limit the project to eight WTGs with a maximum blade tip height of 173 m. ROA Doc #88 at 8839.

46. The purpose of the proposed project is to generate renewable wind energy on the island of O'ahu. ROA Doc #39 Exhibit A-1.

47. NPM's project will likely result in the incidental take of endangered Species, therefore NPM applied for approval of a HCP and ITL. *Id.*

Existing Wind Energy Facilities With HCPs and ITLs in Hawai'i

48. There are two existing wind energy facilities on O'ahu, Kahuku and Kawaihoa, both of which are on the North Shore. ROA Doc #61 Exhibit B-12 at 5715 and 5718.

49. The existing Kahuku wind power facility commenced operations on March 23, 2011. ROA Doc #61 Exhibit B-30 at 7169.

50. The Kahuku wind power facility consists of twelve WTGs with a maximum height of 128 m. ROA Doc #61 Exhibit B-23 at 6233.

51. The Kahuku wind power facility shut down on August 1, 2012 and was not fully operational until January 30, 2014. ROA Doc #61 Exhibit B-38 at 7966.

52. 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 WTGs operated in high winds, although in low winds all WTGs may have operated. *Id.*

53. The data on bat mortality collected for the five-month period from August 29, 2013 through January 29, 2014 is not representative or comparable to other data from the Kahuku wind power facility because the facility was operating at 1/6 of its capacity and all the WTGs were not spinning as much as they normally do. *Id.*

54. 34.25 months of data while the Kahuku facility was fully operational was available to NPM. ROA Doc #75 at 8376, 8379, 8380-8381, 8384-8385.

55. While fully operational, four dead 'ōpe'ape'a were observed at the Kahuku facility and it is scientifically estimated that 16 were taken prior to June 30, 2016. ROA Doc #61 Exhibit B-12 at 5716.

56. The Kawaihoa wind power facility commenced operations on November 2, 2012. ROA Doc #61 Exhibit B-33 at 7342.

57. The Kawaihoa wind power facility consists of thirty WTGs with a maximum height of 150.5 m. ROA Doc #61 Exhibit B-35 at 7436.

58. 33 months of data while the Kawaihoa facility was fully operational was available to NPM. ROA Doc #75 at 8385; ROA Doc #33 NPM HCP at 963; ROA Doc #61 Exhibit B-33 at 7342.

59. While fully operational, 29 dead 'ōpe'ape'a were observed at the Kawaihoa facility and it is scientifically estimated that 54 were taken prior to June 30, 2016. ROA Doc #61 Exhibit B-12 at 5719.

60. The Auwahi wind energy facility commenced operations at the end of 2012. ROA Doc #75 at 8330.

61. NPM's consultant conservatively estimated that fewer than one bat would be killed annually at the Auwahi wind energy facility. ROA Doc #61 Exhibit B-5 at 5670; ROA Doc #75 at 8326-8328.

62. In the three and half years since operations commenced, seven dead 'ōpe'ape'a were observed at the Auwahi facility and it is scientifically estimated that 23 have been taken prior to June 30, 2016. ROA Doc #61 Exhibit B-12 at 5722.

63. NPM's consultant underestimated bat fatalities by more than five times for the Auwahi facility. ROA Doc #61 Exhibits B-5 at 5670 and B-12 at 5722; ROA Doc #75 at 8330-8331.

64. The Kaheawa Pastures wind energy generation facility (KWP I) commenced operations in 2006. ROA Doc #61 Exhibit B-12 at 5708.

65. KWP I consists of twenty WTGs. *Id.*

66. While operational, eight dead 'ōpe'ape'a were observed at the KWP I facility and it is scientifically estimated that 34 were taken prior to June 30, 2016. *Id.* at 5708.

67. The Kaheawa wind power II wind energy generation facility (KWP II) commenced operations in 2012. ROA Doc #61 Exhibit B-12 at 5710.

68. KWP II consists of fourteen WTGs. *Id.*

69. KWP II is adjacent to and downslope of KWP I. *Id.*

70. While operational, three dead 'ōpe'ape'a were observed at the KWP II facility and it is scientifically estimated that 19 were taken prior to June 30, 2016. *Id.* at 5712.

71. Every HCP approved in this state has underestimated the number of 'ōpe'ape'a that would be killed by WTGs. ROA Doc #33 NPM HCP at 1000; ROA Doc #61 Exhibits B-12 at 5707-5723 and B-30 at 7174; ROA Doc #75 at 8374.

72. Between 2006 and 2016, wind turbines with HCPs are estimated to have killed 146 endangered native bats in Hawai'i. ROA Doc #61 Exhibit B-12 at 5708, 5712, 5716, 5719 and 5722.

73. There is no evidence that the mitigation measures employed in the HCPs for any of the existing WTG facilities has increased the bat population in Hawai'i. ROA Doc #75 at 8414; ROA Doc #76 at 8498 and 8500.

The Endangered 'Ōpe'ape'a

74. The 'ōpe'ape'a is the only fully terrestrial native mammal in the Hawaiian Islands and is designated as the official land mammal of the State. HRS § 5-12.2.

75. The 'ōpe'ape'a is a subspecies of the North American hoary bat. Recent genetic research indicates that there could be two distinct species present in Hawai'i. 'Ōpe'ape'a are about 45% smaller than their mainland relatives, weighing less than an ounce, with typical wingspans of 10.5-13.5 inches. ROA Doc #100 at 9273.

76. 'Ōpe'ape'a population estimates have ranged from a few hundred to a few thousand. These estimates are based on incomplete data. While observation and specimen records demonstrate that 'ōpe'ape'a are now absent from historically occupied areas the extent of the species population decline is unknown. ROA Doc #39 Exhibit A-44 at 4765; ROA Doc #33 NPM HCP at 962.

77. 'Ōpe'ape'a are nocturnal solitary tree-roosting bats whose prey include a variety of native and non-native night-flying insects. 'Ōpe'ape'a roost in both native and non-native trees and have been observed in a variety of habitats that include wetlands, open pastures, roadways, and forested areas in both native and non-native habitats. 'Ōpe'ape'a forage at forest edges, orchards, lowland forests dominated by introduced trees, along the coast, and over stream

and bays. *Id.* at 961-962; ROA Doc #61 Exhibit B-19 at 6159.

78. 'Ōpe'ape'a can be found in both wet and dry areas and at all elevations up to 13,000 feet. ROA Doc #33 NPM HCP at 962.

79. 'Ōpe'ape'a are known to travel as far as 6 – 8 miles one-way in a night to forage in numerous distinct habitats and at widely fluctuating elevations. ROA Doc #39 Exhibit A-44 at 4765.

80. Based on the observed incidental take at both nearby existing wind energy facilities on O'ahu, Kahuku and Kawaihoa, and the detection of bats through acoustic monitors at the project site, it is clear that 'ōpe'ape'a use the project area. ROA Doc #61 Exhibit B-12 at 5716 and 5719; ROA Doc #33 NPM HCP at 963.

81. Tree-roosting bats, like the hoary bat, rarely collide with man-made sedentary structures. However, the hoary bat is one of the bat species most frequently killed by WTGs in the continental United States. Hundreds of thousands of bats are killed each year nationwide due to collision with WTGs, thus wind power has become a significant threat to the continued survival of these species. ROA Doc #39 Exhibit A-44 at 4763.

82. Bats are long-lived species with low reproductive rates, making populations susceptible to localized extinction. ROA Doc #39 Exhibit A-10 at 1361 and 1366; ROA Doc #75 at 8417-8418.

83. In Hawai'i, collision with WTGs has resulted in 'ōpe'ape'a fatalities at every wind farm with an ITL and HCP. ROA Doc #61 Exhibit B-12.

84. On April 14-15, 2015, the ESRC held a workshop with state and federal regulators, ecological researchers, bat experts, consultants, industry personnel, and the public "to develop cohesive, consistent guidelines for project proponents attempting to avoid, minimize,

and mitigate for incidental bat take, and for the regulators tasked with overseeing those projects.” ROA Doc #39 Exhibit A-44 at 4764-4765.

85. The two-day workshop resulted in the “Hawaiian Hoary Bat Guidance Document,” otherwise known as the “white paper,” which the ESRC unanimously adopted in 2015. The white paper “is meant to serve as a ‘living document’ that will be revisited and updated . . . at least every five years, or as significant advancements are made in the understanding of Hawaiian hoary bat ecology and management.” *Id.*

86. The BLNR has previously concluded that “[t]he Bat Guidance Document constitutes the best science currently available on how the potential impacts of wind farms on the ‘ōpe‘ape‘a should be handled in an HCP.” ROA Doc #100 FOF 16.

87. The “Hawaiian Hoary Bat Guidance Document,” however, is clear that “[t]his document does not constitute agency approval of any particular measure or project.” ROA Doc #39 Exhibit A-44 at 4765.

NPM’s Estimates of Bat Fatalities

88. Applicant estimates that over 20 years, its WTGs will take 51 endangered bats. ROA Doc #33 NPM HCP at 988.

89. The ESRC relied on applicant’s take estimates. ROA Doc #76 at 8476.

90. Applicant’s estimates are based exclusively on data from the existing WTGs at Kahuku. ROA Doc #33 NPM HCP at 985; ROA Doc #41 Direct Testimony of Thomas Snetsinger ¶¶ 12-14 at 4521; ROA Doc #76 at 8484.

91. Applicant gave three reasons for not using bat mortality data from Kawaihoa to make its estimates. ROA Doc #33 NPM HCP at 985; ROA Doc #41 Direct Testimony of Thomas Snetsinger ¶¶ 13-14 at 4521.

92. One reason given for not using data from Kawaihoa was that Kahuku has a longer operational history. ROA Doc #33 NPM HCP at 985; ROA Doc #41 Direct Testimony of Thomas Snetsinger ¶ 13 at 4521; ROA Doc #75 at 8375.

93. Data from Kahuku while fully operational was available for 34.25 months, while data from Kawaihoa while fully operational was available for 33 months. ROA Doc #75 at 8385; ROA Doc #33 NPM HCP at 985; ROA Doc #61 Exhibit B-33 at 7342.

94. The BLNR agreed that the difference in operational time between Kahuku and Kawaihoa is insignificant and not a reason to ignore data from Kawaihoa. ROA Doc #100 FOF 228.

95. Another reason NPM gave for not using data from Kawaihoa was that there are more WTGs at Kawaihoa. ROA Doc #33 NPM HCP at 985; ROA Doc #41 Direct Testimony of Thomas Snetsinger ¶ 14 at 4521.

96. In its calculation of bat mortality, NPM assumes that the number of bat deaths is directly proportional to the number of WTGs (i.e. a linear relationship). ROA Doc #75 at 8387; ROA Doc #33 NPM HCP at 985.

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. *Id.*

98. The BLNR agreed that because the fatality calculation is based on an average per turbine and then multiplied by the number of turbines proposed by NPM, it is irrelevant that there are more WTGs at Kawaihoa. ROA Doc #100 FOF 231.

99. The third reason that NPM gave for ignoring data from Kawaihoa was that Kahuku and NPM's project are immediately adjacent so the sites have similarities in "landscape features" such as elevation. ROA Doc #33 NPM HCP at 985; ROA Doc #41 Direct Testimony

of Thomas Snetsinger ¶ 14 at 4521.

100. Yet, ‘ōpe‘ape‘a are known to fly over 6 miles one-way in a single night to forage and are found in a variety of habitats and “landscape features” at widely fluctuating elevations. ROA Doc #39 Exhibits A-44 at 4765 and A-11 at 2050; ROA Doc #61 Exhibit B-19 at 6154 and 6159; ROA Doc #76 at 197. Nearby Kawaiiloa is only 4.5 miles away. ROA Doc #100 FOF 210.

101. The preponderance of the evidence demonstrates that when WTGs are taller and/or rotor swept area increases, the number of bats killed increases. ROA Doc #39 Exhibits A-9 at 1936 and A-44 at 4766; ROA Doc #61 Exhibits B-7 at 5676, 5679-5678; B-15 at 5867.

102. NPM admitted twice that taller WTGs would have greater impacts than smaller ones. ROA Doc #61 Exhibit B-16 at 41 5982; ROA Doc #33 NPM HCP at 985; ROA Doc #75 at 8336-8337.

103. The Bat Guidance Document, which the BLNR has previously concluded “constitutes the best science currently available on how the potential impacts of wind farms on the ‘ōpe‘ape‘a should be handled in an HCP” acknowledged that turbine height may affect bat mortality. ROA Doc #39 Exhibit A-44 at 4766.

104. NPM failed to consider or provide any analysis on the impact to endangered ‘ōpe‘ape‘a when increasing the size of the turbines or the rotor swept area between the draft HCP and the final HCP. ROA Doc #75 at 8337, 8394, 8398 and 8401.

105. Increased WTG height and/or rotor swept area will likely result in increased take of ‘ōpe‘ape‘a yet neither the applicant nor the ESRC analyzed any change in take estimates. ROA Doc #39 Exhibits A-9 at 1936 and A-44 at 4766; ROA Doc #61 Exhibits B-7 at 5676, 5679-5678; B-15 at 5867; ROA Doc #75 at 8394 and 8401.

106. The ESRC never discussed the issue. ROA Doc #39 Exhibits A-35 and A-36.

107. NPM proposes to build the largest wind turbines in the Hawai'i, yet the impact of increasing the turbine size and rotor swept area was never discussed let alone analyzed by the applicant or ESRC.

NPM's Mitigation

108. Applicant failed to provide any credible evidence that the HCP will increase the likelihood that 'ōpe'ape'a will recover. ROA Doc #39 Exhibit A-34 at 4623-4625.

109. Applicant failed to provide any credible evidence that the HCP is likely to increase the population of 'ōpe'ape'a.

110. Applicant failed to provide any credible evidence that the O'ahu 'ōpe'ape'a population would be better off with this project than without it.

111. Applicant failed to provide any credible evidence that the HCP will replace the 51 bats that NPM estimates its WTGs are likely to take.

112. Any results from the research component of the mitigation are speculative and cannot be relied upon to increase the survivability of the 'ōpe'ape'a. ROA Doc #75 at 8403-8404; ROA Doc #76 at 8492-8493.

113. Applicant provided no evidence that the fence maintenance component of the mitigation will increase the bat population. ROA Doc #76 at 8494

114. There is evidence that demonstrates that the fence component of the mitigation will not increase the bat population. *Id.*

115. Applicant provided no evidence that management of native forest through the removal of alien species will increase the bat population.

116. There is, however, evidence that demonstrates that management of native forest

through the removal of alien species has not increased the bat population. ROA Doc #39 Exhibits A-34 at 4634 and A-35 at 4644; ROA Doc #61 Exhibit B-20 at 6179; ROA Doc #76 at 8493-8495; ROA Doc #75 at 8406, 8407-8409, 8411.

NPM's Cumulative Impact Analysis

117. Applicant provided no credible evidence that the O'ahu 'ōpe'ape'a population is stable or increasing. ROA Doc #75 at 8422 and 8404.

118. The most recent study in this area concluded that its findings do not demonstrate high bat abundance in the region. ROA Doc #39 Exhibit A-11 at 2050.

119. Between 2006 and 2016, wind turbines with HCPs are estimated to have killed 146 bats. ROA Doc #61 Exhibit B-12 at 5708, 5712, 5716, 5719 and 5722.

120. There is no evidence that the mitigation measures employed in the HCPs for any of the existing WTG facilities has increased the bat population. ROA Doc. #75 at 8414; ROA Doc #76 at 8498 and 8500.

121. Applicant did not provide any credible evidence that the existing O'ahu 'ōpe'ape'a population can tolerate any more "take."

NPM's Curtailment

122. The HCP calls for the WTGs to stop spinning and feather at wind speeds less than 5 meters per second (m/s) (curtailment). ROA Doc #33 NPM HCP at 983.

123. The Bat Guidance Document recommends including specific triggers for increasing curtailment, yet the HCP did not include specific triggers. ROA Doc. #33 NPM HCP at 983 and 1031; ROA Doc #76 at 8491 and 8492.

124. The Bat Guidance Document compiled data from mainland wind facilities that demonstrate bat casualty rates are reduced significantly when curtailment begins at 6.5 m/s

instead of 5 m/s. ROA Doc #39 Exhibit A-44 at 4767-4768 (Figure 2).

125. Applicant did not demonstrate that it is impracticable to curtail its operations at wind speeds of 6.5 m/s.

126. Curtailment at 6.5 m/s would likely reduce the take of 'ōpe'ape'a more than curtailment at 5 m/s. ROA Doc #61 Exhibit B-15 at 5868; ROA Doc #39 Exhibit A-44 at 4767-4768 (Figure 2).

127. Neither NPM nor the ESRC considered or analyzed the possibility of curtailing at 6.5 m/s. ROA Doc #75 at 8433; ROA Doc #76 at 8489-8491.

CLAIMS FOR RELIEF

COUNT 1

(Violation of HRS Chapter 195D)

128. Keep the North Shore Country hereby realleges and incorporates by reference the above allegations.

129. HRS § 195D-4(g)(1) requires that the “applicant, to the maximum extent practicable, shall minimize and mitigate the impacts of the take.”

130. HRS § 195D-4(g)(4) requires that the “plan shall increase the likelihood that the species will survive and recover.”

131. 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.”

132. 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.”

133. 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.”

134. HRS § 195D-21(b)(1) requires that the plan “be based on the best available scientific and other reliable data available.”

135. Applicant has failed to meet its burden by failing to provide any credible evidence that:

- a. it will minimize the impacts of the take of ‘ōpe‘ape‘a to the maximum extent practicable as required by HRS § 195D-4(g)(1);
- b. the ‘ōpe‘ape‘a population would be better off with this plan than without it as required by HRS §§ 195D-4(g)(4), 195D-21(b)(1)(B) and 195D-30;
- c. the plan is likely to increase the ‘ōpe‘ape‘a population as required by HRS §§ 195D-4(g)(4) and 195D-21(b)(1)(B); and
- d. the plan has adequately assessed the cumulative impact on the ‘ōpe‘ape‘a as required by HRS § 195D-4(g)(5).

136. HRS § 195D-25(b)(1) requires the ESRC to “[r]eview all applications and proposals for habitat conservation plans, safe harbor agreements, and incidental take licenses and make recommendations, based on a full review of the best available scientific and other reliable data and at least one site visit to each property that is the subject of the proposed action, 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.”

137. Because the ESRC’s recommendation was not based on a full review of the best available scientific and other reliable data in consideration of the cumulative impacts of the applicant’s proposed project, it fails to comply with HRS § 195D-25(b)(1).

138. HRS § 195D-21(c) states in part: “The habitat conservation plan shall 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.”

139. Because NPM’s HCP fails to include sufficient accurate information for the board to ascertain with reasonable certainty the likely effect of the plan upon the ‘ōpe‘ape‘a population (including its estimate of bat fatalities), it fails to comply with HRS § 195D-21(c).

140. The BLNR’s approval of applicant’s HCP and ITL violates HRS Chapter 195D.

141. Pursuant to HRS § 91-14(g)(1),(5), and (6), this Court should reverse the BLNR’s May 2018 decision to grant the HCP and ITL.

COUNT 2
(Violation of HRS §§ 91-9(g) and 91-13)

142. Keep the North Shore Country hereby realleges and incorporates by reference the above allegations.

143. HRS § 91-9(g) forbids board members from considering matters that are not specifically in the record: “No matters outside the record shall be considered by the agency in making its decision except as provided herein.”

144. HRS § 91-13 forbids board members from consulting “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.”

145. The Hawai‘i Supreme Court has held:

Hawai‘i Revised Statutes (HRS) § 91-9(g) (1985) provides that “[n]o matters outside the record shall be considered by the agency in making its decision except as provided herein.” Accordingly, administrative agencies may not consult sources outside the record when acting in an adjudicatory capacity. Where an agency consults outside sources, the right of a party to cross-examine those sources and present rebuttal evidence is violated.

However, where an agency conducts further proceedings such as a rehearing, and affords the parties the opportunity to cross-examine the outside source and to present rebuttal evidence, the improper effect of the agency consulting sources outside the record may be cured.

Mauna Kea Power Company Inc. v. BLNR, 76 Hawai'i 259, 262, 874 P.2d 1084, 1087 (1994)

(internal citations omitted).

146. Board member Gon served on the ESRC during its December 15, 2015 and February 25, 2016 meetings. ROA Doc #39 Exhibits A-35 and A-36.

147. His participation provided him with very specific information about this HCP that is not in the record.

148. At the January 12, 2018 hearing, after Keep the North Shore Country requested board member Gon recuse himself, board member Gon specifically made reference to information that is not in the record. He said:

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.

ROA Doc #92 Tr. 01/21/2018 at 9086.

149. Board member Gon's alternate version of the facts is not supported by any of the evidence in the record. His recitation of the facts demonstrates that he violated HRS §§ 91-9(g) and 91-13. He relied on information that is not part of the record and it tainted the entire board's deliberative process and final decision.

150. Board member Gon's participation in the ESRC decisionmaking on this HCP effectively rendered him unable to participate in the same matter brought before the board because he relied upon information that was not in the record and was not been made available to

Keep the North Shore Country. *See* HRS §§ 91-9(g) and 91-13; *Mauna Kea Power Company Inc. v. BLNR*, 76 Hawai‘i 259, 262, 874 P.2d 1084, 1087 (1994).

COUNT 3
(Bias and Prejudice)

151. Keep the North Shore Country hereby realleges and incorporates by reference the above allegations.

152. Additionally, board member Gon’s prior participation on the ESRC prejudiced his viewpoint.

153. “In an adjudicatory proceeding before an administrative agency, due process of law generally prohibits decisionmakers from being biased, and more specifically, prohibits decisionmakers from prejudging matters and the appearance of having prejudged matters.” *Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.*, 136 Hawai‘i 376, 389, 363 P.3d 224, 237 (2015).

154. The standard for recusal in Hawai‘i is an appearance of bias – not demonstrated actual bias. *Sussel v. Honolulu Civil Serv. Comm’n*, 71 Hawai‘i 101, 107, 784 P.2d 867, 870 (1989).

155. Board member Gon demonstrated bias that should have preclude his participation in the contested case hearing.

156. Board member Gon was the member of the Endangered Species Recovery Committee that made the motion to approve applicant’s habitat conservation plan. ROA Doc #39 Exhibit A-36 at 4653.

157. Board member Gon voted against Keep the North Shore Country’s participation in this contested case hearing. ROA Doc #39 Exhibit A-41 at 4725.

158. Before Keep the North Shore County had any opportunity to present any evidence or cross examine the applicant's "experts," board member Gon proclaimed that "[t]he suggestion that the habitat conservation plan is fatally flawed or inadequate researched its problematic in his mind." *Id.* at 4724.

159. Board member Gon's statement reveals prejudice as to the adjudicative facts.

160. It also improperly shifted the burden on to Keep the North Shore Country to prove flaws in the HCP when it is the applicant that has the burden of proof. *See* ROA Doc #30 and ROA Doc #35; HAR § 13-1-35(k); and HRS § 195D-4(g).

161. Board member Gon's prejudice violated Keep the North Shore Country's due process.

162. Pursuant to HRS § 91-14(g)(1),(2),(3),(4),(5) and (6), this Court should reverse the BLNR's May 2018 decision to grant the HCP and ITL.

COUNT 4

(Improper Political Pressure and Ex Parte Communications)

163. Keep the North Shore Country hereby realleges and incorporates by reference the above allegations.

164. "Where an agency performs its judicial function, external political pressure can violate the parties' right to procedural due process, thereby invalidating the agency's decision." *In re Water Use Permit Applications*, 94 Hawai'i 97, 123, 9 P.3d 409, 435 (2000) ("*Waiāhole*").

165. Senator Inouye wielded improper political pressure in order to get this project approved. ROA Doc #92 at 9043-9045.

166. The Hawai'i State Senate occupies an obvious position of influence over the BLNR. *Cf. Waiāhole*, 94 Hawai'i at 124, 9 P.3d at 436.

167. Senator Inouye's multiple *ex parte* communications with the board exerted influence on the BLNR during the period of deliberation between the proposed and final decisions.

168. The *ex parte* communication and pressure put on the BLNR undermined the integrity of this contested case hearing.

169. Pursuant to HRS § 91-14(g)(1),(2),(3),(4),(5) and (6), this Court should reverse the BLNR's May 2018 decision to grant the HCP and ITL.

PRAYER FOR RELIEF

Wherefore, Appellant respectfully prays that this Court:

- A. Stay the decision granting the HCP and ITL.
- B. Reverse the decision granting the HCP and ITL.
- C. Grant Appellant attorneys' fees and costs, including attorneys' fees pursuant to the private attorney general doctrine.
- D. Provide for such other and further relief as the Court shall deem just and proper.

DATED: Honolulu, Hawai'i, August 20, 2018.



Maxx E. Phillips
Attorney for Appellant Keep the North Shore Country

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI'I

KEEP THE NORTH SHORE COUNTRY,) Civil No. 18-1-0960-06 JPC
)
Appellant,) (Agency Appeal)
)
vs.)
) CERTIFICATE OF SERVICE
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.)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the forgoing document was served by depositing a copy of the same in the U.S. mail, postage prepaid to the addresses below:

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