

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Forestry and Wildlife
Honolulu, HI, 96813

February 24, 2012

Chairperson and Members
Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Land Board Members:

SUBJECT: REQUEST FOR APPROVAL OF THE AMENDMENT TO INCIDENTAL TAKE LICENSE TO DECREASE TAKE OF (1) NEWELL'S SHEARWATER FROM 40 BIRDS TO 25 BIRDS, (2) HAWAIIAN PETREL FROM 40 BIRDS TO FOUR BIRDS, AND (3) REMOVE THE NOTABLY HIGHER TAKE LEVEL, AND APPROVE THE SECOND AMENDMENT TO THE IMPLEMENTING AGREEMENT FOR KAHEAWA WIND POWER, ON THE ISLAND OF MAUI, HAWAI'I

SUMMARY:

Submitted for your approval is the Amendment to Incidental Take License (ITL) as part of the Habitat Conservation Plan (HCP) for Kaheawa Wind Power (KWP), on the island of Maui, Hawai'i. The purpose of the HCP is to provide for avoidance, minimization, mitigation, and monitoring of potential incidental take of four Federally and State-listed threatened and endangered species: the Hawaiian petrel (*Pterodroma sandwichensis*), Newell's shearwater (*Puffinus auricularis newelli*), nēnē or the Hawaiian goose (*Branta sandvicensis*), and Hawaiian hoary bat (*Lasiurus cinereus semotus*). Hereafter, these four species are collectively referred to as the "Covered Species." This Amendment reflects changes in authorized take limits for Hawaiian petrel and Newell's shearwater (the "Seabirds") and is valid for 20 years from the original permit date of January 30, 2006. The original permit approved baseline take limits of 40 birds per species, while the revised baseline take limits for Hawaiian petrel and Newell's shearwaters are 25 birds and four birds, respectively. Higher take limits for Hawaiian petrel and Newell's shearwater are revised to 38 birds and eight birds, respectively. The Notably Higher Take level has been removed for Seabirds.

BACKGROUND:

The operation of the KWP wind farm has the potential to result in the incidental take of four threatened or endangered species: Newell's shearwater or 'a'o (*Puffinus auricularis newelli*), Hawaiian petrel or 'ua'u (*Pterodroma sandwichensis*), Hawaiian goose or nēnē (*Branta sandvicensis*), and Hawaiian hoary bat or 'ope'ape'a (*Lasiurus cinereus semotus*). To address potential take and to comply with Hawai'i endangered species law, Hawai'i Revised Statutes

Chapter 195D, the Applicant developed an HCP that outlines measures to avoid, minimize, mitigate, and monitor take of the aforementioned Covered Species and the HCP was approved. In addition, the HCP outlines measures to ensure a net recovery benefit to the species that are the focus of the plan. Pursuant to Hawai'i Revised Statutes Chapter 343 an Environmental Assessment has also been prepared which includes the HCP actions. An ITL was issued to the Applicant from DOFAW on January 30, 2006. The ITL approved the take of Newell's shearwater and Hawaiian petrels each at two birds per year up to 40 birds over 20 years.

The Applicant has requested to amend the previously approved HCP. The amendment would reduce the take authorized under Condition H of the ITL for the the "Seabirds" and remove the Notably Higher Take scenario for the Seabirds from Condition I of the ITL. Amendments include a reduction in the authorized anticipated take of Newell's shearwater to two birds per year up to four birds over 20 years and of Hawaiian petrel to two birds per year up to 25 birds over 20 years. The Notably Higher Take level was removed for Seabirds. The Notably Higher Take level for the nēnē and Hawaiian hoary bat remains in the document.

The requested incidental take levels are as follows:

Common Name	Scientific Name	No. of Specimens over 20-year term		TMK
		Baseline	Higher	
'Ua'u (Hawaiian petrel)	<i>Pterodroma sandwichensis</i>	25	38	TMK: 4-8-001-001 and 3-6-001-014
'A'o (Newell's shearwater)	<i>Puffinus auricularis newelli</i>	4	8	
Nēnē (Hawaiian goose)	<i>Branta sandvicensis</i>	60		
'Ōpe'ape'a (Hawaiian hoary bat)	<i>Lasiurus cinereus semotus</i>	20		

The HCP also allows for adaptive management. Adaptive management is defined as a formal, structured approach to dealing with uncertainty in natural resources management, using the experience of management and the results of research as an on-going feedback loop for continuous improvement. Adaptive approaches to management recognize that the answers to all management questions are not known and that the information necessary to formulate answers is often unavailable. Adaptive management also includes, by definition, a commitment to change management practices when determined appropriate.

The HCP outlines detailed monitoring and reporting protocols to account for injury or mortality to the covered species, as well as to ensure avoidance, minimization, and mitigation measures are being accomplished and goals and objectives are being met.

The Division released the draft Amendment for 30-day public comment period in the November 23, 2011, Office of Environmental Quality Control (OEQC) Environmental Notice. During the

comment period, the Division did not received comments any comments concerning this draft Amendment.

At the January 31, 2012, Endangered Species Recovery Committee (ESRC) meeting, the ESRC recommended the Board approve Amendment to the ITL and HCP.

HRS CHAPTER 343

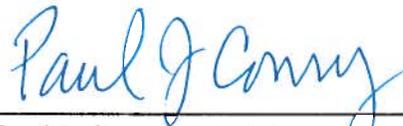
Pursuant to Hawai'i Revised Statutes Chapter 343, a Final Environmental Impact Statement and a Final Environmental Assessment for the HCP were published in the OEQC Environmental Notice on October 8, 1999 and November 23, 2004, respectively.

RECOMMENDATION:

The Department recommends that the Board:

1. Approve the Amendment to the Incidental Take License and the Habitat Conservation Plan for Kaheawa Wind Power, on the island of Maui, Hawai'i by the required two-thirds vote of the authorized membership.
2. Authorize the Chairperson of the Board of Land and Natural Resources to issue the Amendment to the Incidental Take License.
3. Authorize Chair to sign the Second Amendment to the Implementing Agreement.

Respectfully submitted,



Paul J. Conry, Administrator
Division of Forestry and Wildlife

APPROVED FOR SUBMITTAL:



WILLIAM J. AILA, Chairperson
Board of Land and Natural Resources

Attachment: Habitat Conservation Plan

Attachment: Amendment to Incidental Take License

Attachment: Original Incidental Take License

Attachment: Second Amendment to Implementing Agreement

Attachment: Endangered Species Recovery Committee Recommendations

ATTACHMENT III

State of Hawaii
Department of Land and Natural Resources
Division of Forestry and Wildlife
1151 Punchbowl Street, Room 325
Honolulu, Hawaii, 96813

Date of issue:
Valid until: 20 years from the date of issue

INCIDENTAL TAKE LICENSE AMENDMENT 01

To accompany:

Incidental Take License (ITL) 08

and

Habitat Conservation Plan for the Construction and Operation of the Kaheawa Pastures Wind
Energy Generation Facility, Maui, Hawaii

**The Board of Land and Natural Resources hereby grants permission, under the authority of
Hawaii Revised Statutes §§ 195D-4(f) and 195D-4(g), to:**

Kaheawa Wind Power, LLC
100 Wells Avenue, Suite 201
Newton, MA 02459

For the purpose of:

Amending ITL-08 take limits for Hawaiian petrel and Newell's shearwater to be valid from date
of issue of this amendment to 20 years from the date of issue of original permit (January 30,
2006).

Common Name	Scientific Name	No. of Specimens over 20-year term		Location
		Baseline	Higher	
'Ua'u or "Hawaiian Petrel"	<i>Pterodroma sandwichensis</i>	25	38	Lands leased or otherwise controlled by Kaheawa Wind Power, LLC on the Island of Maui (TMK #4-8-001-001 and 3-6-001-014)
'A'o or "Newell's (Townsend's) Shearwater"	<i>Puffinus auricularis newelli</i>	4	8	
Nene or "Hawaiian Goose"	<i>Branta sandvicensis</i>	60*		
'Ope'ape'a or "Hawaiian Hoary Bat"	<i>Lasiurus cinereus semotus</i>	20*		

*These values have not changed from the original take permit. Only baseline take limits are given in the HCP.

GENERAL CONDITIONS:

1. All General and Special conditions of ITL-08 remain applicable.
2. This Amendment shall be attached to and made part of ITL-08.

By: _____
 William J. Aila, Chairperson and Member
 Board of Land and Natural Resources

Date _____

The undersigned has read, understands, and hereby agrees to abide by the General Conditions stipulated in this license.

Kaheawa Wind Power, LLC

By: _____

Date _____

Its: _____

Kaheawa Wind Power, LLC notarized signature is attached and made a part of this document.

Cc: DOFAW
 DOCARE
 USFWS Pacific Islands Office, Honolulu

State of Hawaii
 Department of Land & Natural Resources
 Division of Forestry and Wildlife
 1151 Punchbowl Street, Room 325
 Honolulu, Hawaii 96813

Incidental Take License No. ITL-08
 Date of Issue: JAN 30 2006
 Valid Until: 20 years from date of issue

INCIDENTAL TAKE LICENSE

to accompany:

Kaheawa Pastures Wind Energy Generation Facility Habitat Conservation Plan

The Board of Land and Natural Resources hereby grants permission under the authority of §195D-4(g) Hawaii Revised Statutes and all other applicable laws, to:

Kaheawa Wind Power, LLC
 100 Wells Avenue, Suite 201
 Newton, MA 02459

To: take of (if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity);

The following species:

<u>Common Name</u>	<u>Scientific Name</u>	<u>No. of Specimens over 20-year Term*</u>	<u>Location</u>
'Ua'u, or "Hawaiian Petrel"	<i>Pterodroma sandwichensis</i>	40	Lands leased or otherwise controlled by Kaheawa Wind Power, LLC on the Island of Maui (TMK# 4-8-001-001 and 3-6-001-014)
'A'o or "Newell's (Townsend's) Shearwater"	<i>Puffinus auricularis newelli</i>	40	
Nene or "Hawaiian Goose"	<i>Branta sandvicensis</i>	60	
'Ope'ape'a or "Hawaiian Hoary Bat"	<i>Lasiurus cinereus semotus</i>	20	

* - See Special Conditions #1-7.

Subject to the following conditions:

I. GENERAL CONDITIONS

- This license only authorizes the permittee to conduct incidental take of *Pterodroma sandwichensis*, *Puffinus auricularis newelli*, *Branta sandvicensis* and *Lasiurus cinereus semotus* on the lands leased or otherwise controlled by Kaheawa Wind Power (TMK# 4-8-001-001 and 3-6-001-014) at the time this license is issued pursuant to the "Kaheawa Pastures Wind Energy Generation Facility Habitat Conservation Plan" dated 1/12/06 (hereafter "HCP") and the "Implementing Agreement for the Kaheawa Pastures Wind Energy Generation Facility for Kaheawa Wind Power, LLC" (hereafter "IA").
- This license is valid only if Kaheawa Wind Power abides by the terms and conditions of the HCP and IA for the duration of the HCP.

3. This license is valid for species protected by federal law only if accompanied by proper federal permits. Permit number for the required permit must be provided:

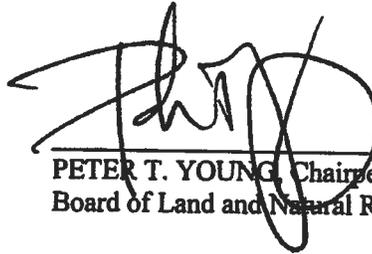
USFWS 10(a)(1)(B) permit no. TE 118901-0

4. This license shall become valid upon completion of the following:
 - i. A legal representative of Kaheewa Wind Power has acknowledged understanding and agreement to abide by its conditions by signing two copies of Attachment 1, which is attached hereto and made a part of this license.
 - ii. Both copies of the signed license must be returned to the Division of Forestry and Wildlife. Upon approval by the Chairperson of the Board of Land and Natural Resources, a copy of the license will be returned to the applicant.
5. The Board may suspend or revoke this license if the HCP is suspended or revoked. The Board may also suspend or revoke this license in accordance with applicable laws and regulations in force during the term of the license.

II. SPECIAL CONDITIONS

1. The allowable incidental take authorized by this license for *Pterodroma sandwichensis*, *Puffinus auricularis newelli* and *Branta sandvicensis* includes both direct and indirect take as defined in the HCP.
2. The estimation of incidental take will be conducted according to adjustments made to the observed direct take according to estimates of unobserved direct take, indirect take and loss of productivity, as detailed in the HCP.
3. The incidental take authorized by this license can be increased provided that mitigation has been implemented such that benefits to the species outweigh the losses as detailed in the HCP as determined by Department of Land and Natural Resources (DLNR) and U.S. Fish and Wildlife Service (USFWS) and reviewed by the Endangered Species Recovery Committee (ESRC).
4. Incidental take of *Pterodroma sandwichensis* authorized under this license exceeding a running average of two per fiscal year, or greater than five at any time during one fiscal year, requires the development and implementation of adaptive management strategies approved by the DLNR and the USFWS and reviewed by the ESRC in accordance with the HCP.
5. Incidental take of *Puffinus auricularis* authorized under this license exceeding a running average of two per fiscal year, or greater than five at any time during one fiscal year, requires the development and implementation of adaptive management strategies approved by DLNR and USFWS and reviewed by the ESRC in accordance with the HCP.
6. Incidental take of *Branta sandvicensis* authorized under this license exceeding a running average of three per fiscal year, or greater than eight at any time during one fiscal year, requires the development and implementation of adaptive management strategies approved by DLNR and USFWS and reviewed by the ESRC in accordance with the HCP.
7. Incidental take of *Lasiurus cinereus semotus* authorized under this license exceeding a running average of one per fiscal year, or greater than two at any time during one fiscal year, requires the development and implementation of adaptive management strategies approved by DLNR and USFWS and reviewed by the ESRC in accordance with the HCP.

8. DLNR will be notified within 30 days in advance of any planned land management activity (e.g., construction or maintenance), which Kaheawa Wind Power reasonably anticipates will result in the incidental take of covered species on the enrolled property. Kaheawa Wind Power will also provide DLNR, possibly with the assistance of the USFWS, the opportunity to capture and/or relocate any potentially affected individuals of the covered species before the activity takes place.
9. DLNR will be notified within 3 days of any mortalities, injuries, or disease observed on the property. Injured individuals or carcasses will be handled according to guidelines in Appendix 9 of the HCP.

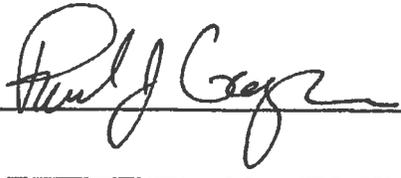


PETER T. YOUNG, Chairperson and Member
Board of Land and Natural Resources

cc: / / DOFAW Maui Branch
/ / DOCARE
/ / USFWS Pacific Islands Office, Honolulu
/ / Senior Resident Agent, USFWS-Law Enforcement, Honolulu

Attachment No. 1 to INCIDENTAL TAKE LICENSE No. ITL-08

The undersigned has read, understands and hereby agrees to abide by General Conditions 1 - 5 and Special Conditions 1 - 9 stipulated on pages 1 through 3 in INCIDENTAL TAKE LICENSE No. ITL-08.

By: 

Date: _____

DRAFT

SECOND AMENDMENT TO IMPLEMENTING AGREEMENT

THIS SECOND AMENDMENT TO IMPLEMENTING AGREEMENT (this "Amendment") is made to be effective as of the ___ day of ___, 2011, by and between KAHEAWA WIND POWER, LLC, ("KWP"), the U.S. FISH AND WILDLIFE SERVICE (the "Service") and the HAWAII DEPARTMENT OF LAND AND NATURAL RESOURCES ("DLNR"). KWP, the Service, and DLNR are sometimes collectively referred to herein as the "Parties."

Recitals

WHEREAS, the Parties executed that certain Implementing Agreement (the "Agreement") on January 26, 2006, as amended February 26, 2006, in conjunction with the issuance of Incidental Take Permit TE-118901-0 and Incidental Take License ITL-08 (collectively "Permits") to KWP.

WHEREAS, on _____, 2011, the Service and DLNR approved an amendment to the Permits, reducing the amount of authorized take for the Hawaiian petrel and Newell's shearwater (the "Seabirds") and removing the "Notably Higher Take" scenario from the Permits for the Seabirds ("Permit Amendment"). To conform to the Permit Amendment, the HCP has been amended to remove references to a Notably Higher Take scenario for the Seabirds ("HCP Amendment").

WHEREAS, the HCP Amendment also reduces take for the Seabirds under the Higher Take Scenario and removes references to a Lower Take Scenario for the Seabirds.

WHEREAS, the purpose of the Agreement is to ensure the implementation of each of the terms of the HCP.

WHEREAS, certain Agreement provisions require revision to conform to the Permit Amendment and HCP Amendment.

WHEREAS, the Parties also wish to replace the existing "Modification and Amendment" section with updated language.

WHEREAS, the Parties wish to amend the Agreement to reflect the Permit Amendment, the HCP Amendment, and the updated language as set forth below.

Amendment

The Agreement will be revised as set forth below.

1. Subsection 4.1.1(d) of the Agreement will be amended to read as follows:

(d) FWS, DLNR and Permittee shall review the amounts of the two LOCs during the annual meetings held pursuant to Chapter VI, Implementation, of the HCP. If circumstances warrant, in accordance with the HCP, the amounts of the LOCs may be decreased, increased or eliminated during the annual meetings. If unmitigated Notably Higher Take is occurring for the Nene or Hawaiian hoary bat, either during any given year or cumulatively, then Permittee shall increase the amount of the \$500,000 Mitigation LOC to \$1 million. If unmitigated Notably Higher Take for the Nene or Hawaiian hoary bat continues to occur during Year 11 or thereafter, the Parties agree during the annual meeting to evaluate the adequacy of the Mitigation LOC based on the amount of mitigation funds already spent in relation to the total mitigation obligation of \$3.76 million for the project. If FWS/DLNR believe an increase in the Mitigation LOC is warranted after the amount of the Mitigation LOC has been increased to \$1 million pursuant to this paragraph, FWS/DLNR may require an increase in the Mitigation LOC amount. FWS/DLNR will consider the following factors in deciding whether such an increase is warranted: length of time the project has operated under the Notably Higher Take scenario; difference between the unspent portion of the total project mitigation obligation of \$3.76 million and \$1 million; financial condition of Permittee; and Permittee's history of performance of mitigation obligations.

2. Section 12.0 will be replaced in its entirety with the following language:

12.1 Minor modifications.

(a) Minor modifications to the HCP shall not require amendment of the Agreement, the Permits or the ITL.

(b) Minor modifications are modifications to the HCP of a minor or technical nature where the effects on Covered Species and levels of incidental take are not more adverse or higher than those described in the HCP as originally adopted. Minor modifications to the HCP which would not require amendment of the Permits may include modifications that are minor in relation to the HCP and to which the Service and DLNR agree. They include, but are not limited to, corrections of typographic, grammatical, and similar editing errors that do not change the intended meaning; correction of any maps or exhibits to correct errors in mapping or to reflect previously approved changes in the Permits or HCP; minor changes to survey, monitoring or reporting protocols; implementation of adaptive management measures; and implementation of any measures that would result in a reduction in adverse effects on or take levels of Covered Species. Any other modifications to the HCP will be processed as amendments in accordance with Section 12.2.

(c) Any Party may propose minor modification of the HCP or this Agreement by providing notice to all other Parties. Such notice shall include a statement of the reason for the proposed modification and an analysis of its environmental effect, including its effects on operations under the HCP and on Covered Species.

(d) The Parties will use best efforts to respond to proposed modifications within 60 days of receipt of such notice. Proposed modifications will become effective upon all other Parties' written approval. If, for any reason, a receiving Party objects to a proposed modification, it must be processed as an amendment of the Permits in accordance with subsection 12.2 of this section. The Service and DLNR will not propose or approve minor modifications to the HCP or this Agreement if the Service or DLNR determine that such modifications would result in (i) operations under the HCP that are significantly different from those analyzed in connection with the original HCP, (ii) adverse effects on the environment that are new or significantly different from those analyzed in connection with the original HCP, or (iii) additional take not analyzed in connection with the original HCP.

12.2 Standard Amendment

(a) Standard amendments to the HCP shall mean any amendments not treated as minor modifications. Standard amendments to the HCP shall require an amendment to this Agreement and the Permits.

(b) Standard Amendments may include, but are not limited to, the following:

- (1) Adding a new species to the list of Covered Species contained in the HCP and/or the Permits;
- (2) Changes to the Covered Activities which were not addressed in the HCP as originally adopted, and which otherwise do not meet the criteria for a Minor Amendment as discussed above; and
- (3) Extending the term of the Permits.

(c) A Standard Amendment requires submittal to the USFWS and DLNR of a written application and implementation of all permit processing procedures applicable to an original Permit. The specific documentation required to comply with the ESA, HRS Chapter 195D, and the National

DRAFT

Environmental Policy Act may vary based on the nature of the Amendment.

Miscellaneous

1. In the event of any inconsistency between this Amendment and the terms of the Agreement, the terms set forth in this Amendment shall govern and control. Except as expressly amended hereby, the Agreement shall remain in full force and effect as of the date thereof. Unless specifically defined herein or the context requires otherwise, all capitalized terms used herein shall have the meaning ascribed to them in the Agreement.

2. This Amendment may be executed in one or more counterparts, which shall be construed together as one document. For purposes of the execution hereof, telecopied signatures may be treated as originals.

3. This Amendment (i) shall be binding upon and shall inure to the benefit of each of the Parties and their respective successors, assigns, heirs, receivers and trustees; (ii) may be modified or amended only by a written agreement executed by each of the Parties; and (iii) shall be governed by and construed in accordance with the laws of the State of Hawaii.

4. Descriptive headings used in this Amendment are for convenience only, and are not intended to control or affect the meaning or construction of any provision of this Amendment.

5. The Parties and their respective counsel have participated in the review and negotiation of this Amendment; therefore, this Amendment shall be construed without presumption of any rule requiring construction to be made against the party causing same to be drafted.

<Signatures on following pages>

DRAFT

EXECUTED to be effective as of the date first written above, which shall be the date of the last execution below.

Kaheawa Wind Power, LLC

By: _____
Name: _____
Title: _____

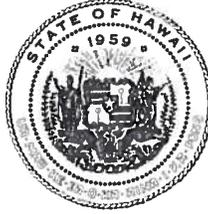
U.S. Fish and Wildlife Service,

By: _____
Name: _____
Title: _____

Department of Land and Natural Resources,
State of Hawai`i

By: _____
Name: _____
Title: _____

NEIL ABERCROMBIE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

WILLIAM J. AILA, JR.
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

GUY H. KAULUKUKUI
FIRST DEPUTY

WILLIAM M. TAM
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAIKOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

February 24, 2012

TO: Honorable Chairperson and Members, Board of Land and Natural Resources

FROM: Endangered Species Recovery Committee

SUBJECT: Recommendation of Approval of Amendment to Incidental Take License and Habitat Conservation Plan for Kaheawa Wind Power, Maui, Hawai'i

On January 31, 2012, the Endangered Species Recovery Committee recommended approval of the Amendment to the Incidental Take License and the Habitat Conservation Plan for Kaheawa Wind Power on the island of Maui, Hawai'i. This Amendment authorizes changes in take limits for Hawaiian petrel (*Pterodroma sandwichensis*) and Newell's shearwater (*Puffinus auricularis newelli*) reducing take limits to 25 birds and four birds, respectively. Higher take limits for Hawaiian petrel are 38 birds and for Newell's shearwater are eight birds. The Notably Higher Take level has been removed for these species.

Prepared and Submitted by:

A handwritten signature in blue ink, appearing to read "Scott Fretz".

Scott Fretz, DLNR ESRC Designee