

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

January 9, 2015

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

PSF No.: 10HD-183

Hawaii

Issuance of Direct Lease to the Water Board of the County of Hawaii for Windfarm and Related Communication/Energy Facilities Purposes; Consent to Sublease Between the Water Board of the County of Hawaii, as Sublessor, and Lalamilo Wind Company, LLC, as Sublessee; Consent to Subleasehold Mortgage, Security Agreement and Financing Statement, Lalamilo Wind Company, LLC, as Mortgagor, to American Savings Bank, F.S.B., as Mortgagee; Issuance of Right-of-Entry to Water Board of the County of Hawaii for Survey and Maintenance Purposes, Lalamilo, South Kohala, Hawaii, Tax Map Keys: 3rd/ 6-6-01:02 por., 71 & 76.

**APPLICANT:**

Water Board of the County of Hawaii

**LEGAL REFERENCE:**

Sections 171-95, -22 and -36(a)(6), Hawaii Revised Statutes, as amended.

**LOCATION:**

Portion of Government lands of Lalamilo, being an ili of the land of Waimea situated at Lalamilo, South Kohala, Hawaii, identified by Tax Map Keys: 3rd/ 6-6-01:02 por., 71 & 76, as shown on the attached map labeled Exhibit 1.

**LEASE AREA:**

Tax Map Key 3rd/	Area
6-6-01:02 por. (Easement J – access)	1.947 acres
6-6-01:02 por. (Easement K – electrical)	3.795 acres
6-6-01:71 (main windfarm site)	78.081 acres
6-6-01:76 (substation site)	0.174 acre
Total:	83.997 acres

**ZONING:**

State Land Use District:      Agriculture  
County of Hawaii CZO:        A-5a

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: NO

CURRENT USE STATUS:

Previously encumbered by General Lease No. S-5240 to the Water Commission of the County of Hawaii. The lease expired on December 13, 2010.

LEASE CHARACTER OF USE:

Windfarm and Related Communication/Energy Facilities purposes.

LEASE TERM:

Fifty (50) years

LEASE COMMENCEMENT DATE:

The first day of the month to be determined by the Chairperson.

ANNUAL LEASE RENT:

The services of an independent appraiser were procured and the fair market rent for the premises was determined to be \$56,000 per annum for the first ten years of the lease term. However, the Water Board of the County of Hawaii has requested that the rent be reduced to \$7,000 per annum, which is close to the \$6,400 per annum it was paying at the end of the prior lease. The new lease is being issued under HRS Section 171-95, and, therefore, the Board has authority to lease land to the applicant "at such rental and on such other terms and conditions as the board may determine." At the applicant's request, staff is recommending that payments under the new lease be waived for the first year pursuant to HRS Section 171-6(7).

METHOD OF PAYMENT:

Semi-annual payments, in advance.

RENTAL REOPENINGS:

At the 10th, 20th, 30th and 40th years of the lease term, by staff or independent appraisal.

SUBLEASE AREA:

44.5 acres.

TERM OF SUBLEASE:

Twenty (20) years.

ANNUAL SUBLEASE RENT:

\$7,700.

SUBLEASE TERMS AND CONDITIONS:

Sublessee Lalamilo Wind Company, LLC, will construct and operate a windfarm for the purpose of providing energy to the sublessor, the Water Board of the County of Hawaii, to operate the pumping system for the well sites in South Kohala.

RECOMMENDED ADJUSTMENT TO LEASE RENTAL:

None at this time. The Water Board of the County of Hawaii is essentially passing on the lease costs to its sublessee, together with an overhead of 10%.

PERFORMANCE BOND:

Twice the annual rental amount. The performance bond shall be due at the time the sublease between the Water Board of the County of Hawaii and Lalamilo Wind Company, LLC is executed, or within six months of the execution of the lease between the State and the Water Board, whichever occurs first.

MORTGAGE LOAN AMOUNT AND USE OF LOAN PROCEEDS:

The anticipated loan amount is \$10,000,000. The purpose of the loan is to finance the purchase of the major windfarm components. Additional equity will be injected to cover the construction and installations of the equipment.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

The Final Environmental Assessment for the subject project was published in the OEQC's The Environmental Notice on October 23, 2014 with a finding of no significant impact (FONSI). (Exhibit 2)

DCCA VERIFICATION:

LESSEE:

The Water Board of the County of Hawaii, as the governing board of the Department of Water Supply of the County of Hawaii, is not required to register with the Department of Commerce and Consumer Affairs.

**SUBLESSEE:**

Place of business registration confirmed:	YES <u>X</u>	NO <u>  </u>
Registered business name confirmed:	YES <u>X</u>	NO <u>  </u>
Applicant in good standing confirmed:	YES <u>X</u>	NO <u>  </u>

**REMARKS:**

At its meeting of February 11, 2011, under agenda item D-8, the Board of Land and Natural Resources approved, in concept, the issuance of a direct lease to the Water Board of the County of Hawaii (WBCOH), for windfarm and related communication/energy facilities purposes. (Exhibit 3)

As a condition of the approval in concept, WBCOH was required to conduct an Environmental Assessment (EA) and obtain a Finding of No Significant Impact (FONSI) for the project. On October 23, 2014, a FONSI was published in the Office of Environmental and Quality Control's (OEQC) The Environmental Notice. Results from the EA indicate the area is covered primarily with introduced plant species and the land has been heavily disturbed as a result of cattle grazing over a long period of time. Based on the findings from the EA, it was determined that the project will not result in the loss or destruction of any natural or cultural resources. Additionally, access to the area will be limited to Department of Water Supply (DWS) and its sublessee and contractors.

WBCOH was also required to conduct auditory and monitoring surveys of the site to determine whether any animal species listed as endangered or protected under Federal or State law would be affected by the proposed project. A Biological Reconnaissance Survey was conducted in December 2013. No Federal or State listed threatened species were found during the survey. The flora and fauna observed in the area are typical of the region.

Land Division procured the services of an appraiser to determine the fair market rent for the premises, and the appraised value was determined at \$56,000 per annum.<sup>1</sup> However, WBCOH has requested that the rent be reduced to the same amount it was paying when its prior lease for the premises expired, i.e., \$6,400 per annum. The new lease is being issued under HRS Section 171-95, and, therefore, the Board has authority to lease land to the county "at such rental and on such other terms and conditions as the board may determine." Staff supports the below-market rent request in this case because this is a government renewable energy project, and WBCOH has represented that the energy savings will be passed on to the ratepayers. (Exhibit 4)

WBCOH has requested a rent waiver under HRS Section 171-6(7) as discussed in the Board's approval in concept, and staff is including a one-year rent waiver in the recommendations section. Staff is also including recommendations for the lease to include special provisions relating to the potential for unexploded ordnance on the premises and fencing to exclude cattle, for the reasons discussed in the approval in

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<sup>1</sup> The Board action of February 11, 2011, agenda Item D-8, that approved the lease in concept, contemplated the lease rent would be established at fair market rates.

concept (Exhibit 3, pp. 10-11). Staff is further recommending specific language in the lease that the land and any improvements thereon are leased in “as is, where is” condition, with all faults and defects, whether latent or patent.

WBCOH has entered into a sublease agreement with Lalamilo Wind Company, LLC (LWC) to construct and operate the windfarm project, and sell the energy behind the meter to DWS through a negotiated Power Purchase Agreement (PPA). A copy of the sublease is attached Exhibit 5, and portions of the PPA are attached as Exhibit A of Exhibit 5.<sup>2</sup> The proposed project will provide renewable energy to power the eight (8) existing water wells in the Lalamilo water distribution system. The project is located adjacent to the DWS water wells and will generate significant energy savings for DWS, and ultimately, water ratepayers. The project will consist of five (5) Vestas V47-660 kilowatt (kw) wind turbines to provide a total generating capacity of 3.3 MW to the existing water wells.

The PPA dated October 22, 2013 between WBCOH and LWC contemplates the potential sale of excess energy from the windfarm directly to HELCO.<sup>3</sup> However, the Board’s approval in concept of the direct lease to WBCOH precluded WBCOH (and its contractors) from operating as renewable energy producers without first complying with HRS Section 171-95(c) and 171-95.3, and obtaining the prior written consent of the Board. Accordingly, staff is including a recommendation below that the lease include language to this effect. If either WBCOH or LWC is going to make money from selling electricity to HELCO, then staff believes the Board should share in the revenues, especially in light of the substantially below-market rent that is being proposed for the lease to WBCOH.

In addition to the windfarm, the approved lease character of use will allow the installation and maintenance of radio communications equipment for the reasons explained in the prior Board approval (Exhibit 3, p. 8).

As part of the transaction, LWC intends to borrow funds from American Savings Bank, F.S.B. to purchase the main components of the windfarm. WBCOH is therefore requesting the Board’s consent to a subleasehold mortgage in the amount of \$10,000,000.

Staff is also including a recommendation below that a right-of-entry be issued to WBCOH, its consultants, contractors and persons acting on its behalf, to allow WBCOH to conduct the necessary surveys and test borings of the site. Additionally, because some infrastructure remains on the land as noted above, the right-of-entry will allow WBCOH to check on the building and other structures periodically, safeguard them against vandalism, and maintain them in their existing condition. No construction of new improvements will be allowed until the lease is executed.

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<sup>2</sup> Staff has omitted some of the voluminous Exhibits to the sublease agreement and PPA from the documents attached to this submittal.

<sup>3</sup> See Exhibit A of Exhibit 5, at sections 5.2 and 5.3 on pages 15-16 of Exhibit A.

**RECOMMENDATION:** That the Board:

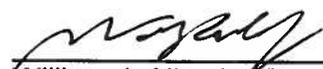
1. Authorize the issuance of a direct lease to the Water Board of the County of Hawaii covering the subject area under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
  - A. The standard terms and conditions of the most current government agency lease document form, as may be amended from time to time;
  - B. Payment of lease rent shall be waived for the first year pursuant to HRS Section 171-6(7);
  - C. WBCOH is aware that the lease premises are located in a formerly used defense site and acknowledges the potential presence of unexploded ordnance on the premises and assumes all risks associated therewith. WBCOH shall cooperate with any undertaking of the United States Army Corps of Engineers to survey the premises for unexploded ordnance and to remove any ordnance found, at no cost to the State;
  - D. WBCOH shall be responsible for fencing off any areas of the lease premises that it does not want livestock to enter, at its own cost;
  - E. The land and any improvements thereon are leased in "as is, where is" condition, with all faults and defects, whether latent or patent;
  - F. WBCOH, its consultants and contractors, are prohibited from operating as a renewable energy producer on the demised premises without the prior written consent of the Board of Land and Natural Resources, which may include a condition of an upward adjustment of rent;
  - G. Review and approval by the Department of the Attorney General; and
  - H. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
  
2. Consent to the sublease between the Water Board of the County of Hawaii, as Sublessor, and Lalamilo Wind Company, LLC, as Sublessee, subject to any applicable conditions cited above which are by this reference incorporated herein and further subject to the following terms and conditions:
  - A. The standard terms and conditions of the most current consent to sublease form, as may be amended from time to time;
  - B. The Lessee shall submit construction plans of the Sublessee's improvements to the Land Division for the Chairperson's approval prior to constructing any improvements on the demised premises;

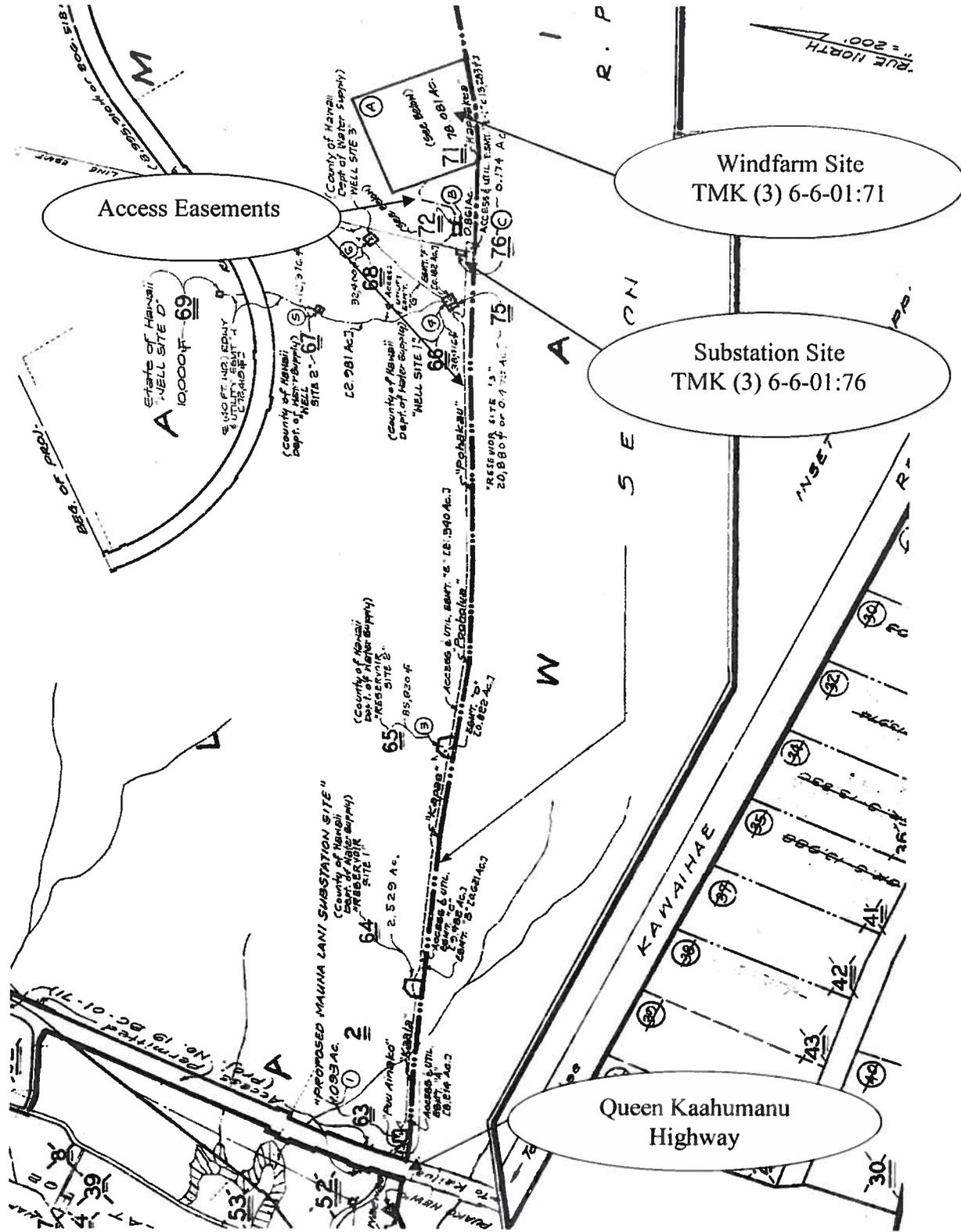
- C. Review and approval by the Department of the Attorney General; and
  - D. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
3. Consent to the mortgage between Lalamilo Wind Company, LLC, Mortgagor, and American Savings Bank, F.S.B., Mortgagee, subject to the following:
- A. The standard terms and conditions of the most current consent to mortgage form, as may be amended from time to time;
  - B. The loan proceeds shall be used for the purposes as stated in "Use Mortgage of Loan Proceeds" above. The Lessee shall ensure that Lalamilo Wind Company, LLC maintains records of loan expenditures which may be inspected by the Department;
  - C. Review and approval by the Department of the Attorney General; and
  - D. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
4. Authorize the issuance of a right-of-entry permit to the Water Board of the County of Hawaii and/or the Lalamilo Wind Company, LLC covering the subject land under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
- A. The standard terms and conditions of the most current right-of-entry permit form, as may be amended from time to time; and
  - B. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interest of the State.

Respectfully Submitted,

  
\_\_\_\_\_  
Gordon C. Heit  
District Land Agent

APPROVED FOR SUBMITTAL:

  
\_\_\_\_\_  
William J. Aila, Jr., Chairperson



**EXHIBIT 1**

October 23, 2014

OFFICE OF ENVIRONMENTAL QUALITY CONTROL

# The Environmental Notice

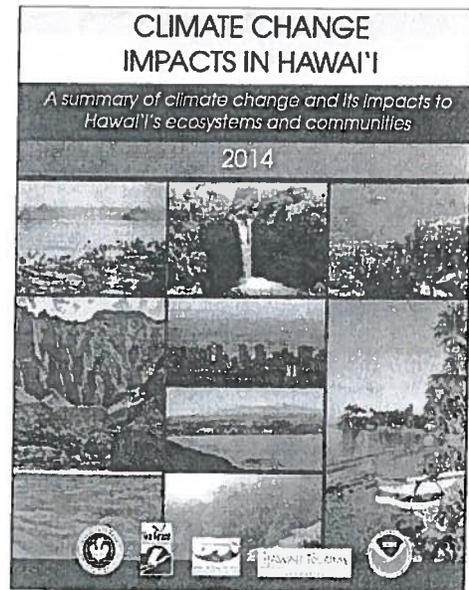
A Semi-Monthly Bulletin pursuant to Section 343-3, Hawai'i Revised

## Climate Change Impacts in Hawai'i

The University of Hawai'i Sea Grant College Program (UH Sea Grant) prepared a report that summarizes the current state of scientific knowledge regarding climate change and how it is anticipated to affect Hawai'i.

*Climate Change Impacts in Hawai'i - A Summary of Climate Change and its Impacts to Hawai'i's Ecosystems and Communities* was written to provide communities and government agencies with a fundamental understanding of the effects of climate change so that Hawai'i can be better prepared for changes to come.

OEQC recently released *The Hawai'i Environmental Policy Act Citizen's Guide* which discussed the need to incorporate sea level rise and other climate change impacts in environmental review documents. As this *Climate Change Impacts in Hawai'i* report is structured to serve a broad audience it may assist both document preparers and reviewers to incorporate climate change impacts into plans for future development.



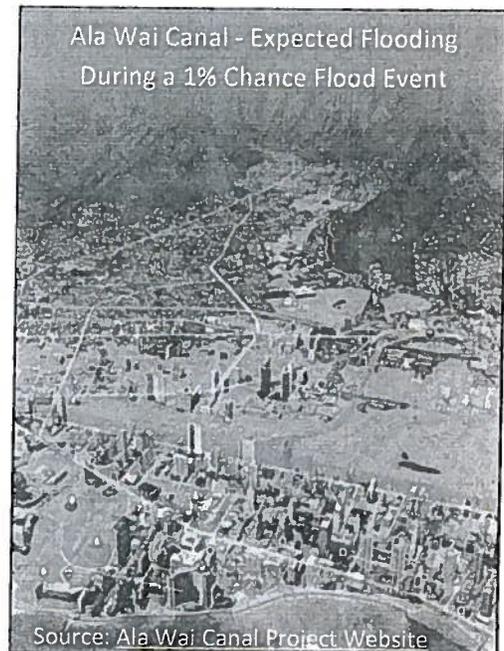
## Ala Wai Canal Project EISPN

The Ala Wai watershed (comprised of the communities of Makiki, Mānoa, Pālolo, McCully, Mōiili'i, Kapahulu, Ala Moana and Waikīkī) is the most densely populated watershed in Hawai'i.

The Ala Wai Canal is susceptible to flooding due to aging and undersized flood conveyance infrastructure.

The State of Hawai'i Department of Land and Natural Resources and the U.S. Army Corps of Engineers are conducting a feasibility study to address flood risk associated with the Ala Wai Canal and its contributing watershed. The objective of the project is to reduce riverine flood hazards to property and life safety in the Ala Wai watershed.

See page 6 for more details.



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**Ala Wai Canal Project EISPN**

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Neil Abercrombie, Governor · Jessica Wooley, Director · Office of Environmental Quality Control · 235 South Beretania Street, Suite 702 · Honolulu, Hawaii 96813 · Tel: 586-4185 · Fax: 586-4186 · Email: [oeqchawaii@doh.hawaii.gov](mailto:oeqchawaii@doh.hawaii.gov)  
 Website: <http://health.hawaii.gov/oeqc/>  
 Toll Free: Kauai 274-3141, ext. 64185 · Maui 984-2400, ext. 64185 · Molokai/Lāna'i 1-800-468-4644, ext. 64185 · Hawaii 974-4000, ext. 64185

## 2. Lālāmilo Wind Farm Repowering Project FEA (FONSI)

**Island:** Hawai'i  
**District:** South Kohala District  
**TMK:** (3) 6-8-001:001 (por.), (3) 6-6-001:002 (por.), 071, 076  
**Permits:** NPDES Permit, if applicable; Construction Permits; Oversize Load Permits

**Proposing/Determination Agency:**

Hawai'i County, Department of Water Supply  
 Contact: Quirino Antonio, Jr., 345 Kekūanaō'a Street, Suite 20, Hilo, Hawai'i 96720, (808) 961-8050

**Consultant:** Tetra Tech Inc., Contact: Leilani Pulmano, 737 Bishop Street, Suite 2340, Honolulu, Hawai'i 96813, (808) 441-6652

**Status:** Findings of No Significant Impact Determination



The previous Lālāmilo Wind Farm constructed in the mid-1980s with 120 wind turbines for a nameplate generating capacity of 2.7 megawatts (MW) was decommissioned in 2010 in anticipation of re-powering the site. The Department of Water Supply awarded Lālāmilo Wind Company, LLC a contract to design, build, and operate the wind farm and associated facilities for the Lālāmilo Wind Farm Repowering Project (Project). The Project would consist of five Vestas V47-660 kilowatt wind turbines, for a nameplate generation capacity of 3.3 MW, to power the eight existing water wells in the Lālāmilo-Parker well system, as well as an updated monitoring and control system to optimize the operations of the pumping system. Associated infrastructure would include on-site access road improvement, electrical collection system, operations and maintenance building, new 13-kilovolt overhead electrical transmission line, and updated switchgear and electrical interconnection equipment.

The Project is consistent with the Department of Water Supply's policy and its mission of reducing energy costs by replacing a large portion of its pumping energy demands with renewable wind energy and saving up to 50 percent of its annual pumping cost for the next 20 years. The Project would also contribute to the State's Clean Energy Initiative goal that at least 40 percent of the State's energy be supplied by renewable resources by the year 2030.

## 3. Pi'ihonua-Kukuau Reservoir and Transmission Improvements DEA (AFNSI)

**Island:** Hawai'i  
**District:** South Hilo  
**TMK:** (3) 2-5-065:037, Various County Road Rights-of-way, (3) 2-5-060 (Hokulani Street), (3) 2-5-035 (Hokulani Street), and (3) 2-5-011 (Kaumana Drive); Easements Over (3) 2-5-006:061, 142 and 149, and (3) 2-4-075:049  
**Permits:** County of Hawai'i, Department of Public Works: Grubbing and Grading Permits, Permit for Work in County ROW, Building Division Approval and Building Permit  
 County of Hawai'i, Planning Department Plan Approval  
 Department of Health, National Pollutant Discharge Elimination System Permit

**Proposing/Determination Agency:**

Hawai'i County, Department of Water Supply, 345 Kekuanaoa Street, Suite 20, Hilo, Hawai'i 96720.  
 Contact: Larry Beck, (808) 961-8070 X260

**Consultant:** Geometrician Associates, PO Box 396, Hilo, Hawai'i 96721. Contact: Ron Terry, (808) 969-7090, rterry@hawaii.rr.com



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

February 11, 2011

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

PSF No.: 10HD-183

Hawaii

Approval in Concept of Issuance of Direct Lease to the Water Board of the County of Hawaii for Windfarm and Related Communication/Energy Facilities Purposes; Issuance of Right-of-Entry for Survey and Maintenance Purposes, Lalamilo, South Kohala, Hawaii, Tax Map Keys: 3rd/ 6-6-01:02 por., 71 & 76.

APPLICANT:

Water Board of the County of Hawaii

LEGAL REFERENCE:

Section 171-95, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands of Lalamilo, being an ili of the land of Waimea situated at Lalamilo, South Kohala, Hawaii, identified by Tax Map Keys: 3rd/ 6-6-01:02 por., 71 & 76, as shown on the attached map labeled Exhibit A.

AREA:

Tax Map Key 3rd/	Area
6-6-01:02 por. (Easement J – access)	1.947 acres
6-6-01:02 por. (Easement K – electrical)	3.795 acres
6-6-01:71 (main windfarm site)	78.081 acres
6-6-01:76 (substation site)	0.174 acre
Total:	83.997 acres

APPROVED BY THE BOARD OF  
LAND AND NATURAL RESOURCES  
AT ITS MEETING HELD ON

February 11, 2011 *DW*

**EXHIBIT 3**

**ZONING:**

State Land Use District: Agriculture  
County of Hawaii CZO: A-5a

**TRUST LAND STATUS:**

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: NO

**CURRENT USE STATUS:**

Previously encumbered by General Lease No. S-5240 to the Water Commission of the County of Hawaii. The lease expired on December 13, 2010.

**CHARACTER OF USE:**

Windfarm and Related Communication/Energy Facilities purposes.

**LEASE TERM:**

Fifty (50) years

**COMMENCEMENT DATE:**

The first day of the month to be determined by the Chairperson.

**ANNUAL RENT:**

Fair market annual rent to be determined by independent appraiser, subject to review and approval by the Chairperson. Rental payments shall be waived for the first year pursuant to HRS Section 171-6(7).

**METHOD OF PAYMENT:**

Semi-annual payments, in advance.

**RENTAL REOPENINGS:**

At the 10th , 20th, 30th and 40th years of the lease term, by staff or independent appraisal.

**PERFORMANCE BOND:**

Twice the annual rental amount. The performance bond shall become due and payable at the time the Land Board consents to any sublease between the Water Board of the County of Hawaii and a private developer of the windfarm to be selected through the competitive bid process.

**PROPERTY CHARACTERISTICS:**

Utilities – Electricity and water available

Slope – 5.5%

Elevation – approximately 1100-1400'

Rainfall – less than 20" annually

SCS Soil Series – Lithosol

Land Study Bureau – University of Hawaii

Legal access to property – Staff has verified that Applicant has legal access to the property off of Queen Kaahumanu Highway, over easements designated in Executive Order No. 3221 to the County of Hawaii Department of Water Supply, and over an easement designated in Land Office Deed No. S-28,519.

Subdivision – Staff has verified that the subject parcels are legally subdivided lots.

Encumbrances – Staff has verified that the following encumbrances exist on the property:

<b>Tax Map Key 3rd/</b>	<b>Encumbrance</b>
6-6-01:02	Executive Order (EO) No. 2921 to the State Department of Transportation for the Kailua-Kawaihae Road Project; EO No. 3221 to the County of Hawaii, Department of Water Supply for reservoir and well sites and access and utility easements; Land Office Deed (LOD) No. S-28,519 to the Water Board of the County of Hawaii for access and utility easements; LOD No. S-28,237 to Hawaii Electric Light Co., Inc. (HELCO) for utility easement; General Lease (GL) No. S-5373 to Harold F. Rice, Jr. for pasture purposes; GL No. S-5396 to HELCO for electrical substation site and non-exclusive utility easement; LOD No. S-28,310 to Mauna Kea Properties, Inc. for non-exclusive easement for diversion ditches and desilting basin; LOD No. S-28,215 to Hawaiian Telcom for non-exclusive utility easement; LOD No. S-26,929 to the United States of America for road license and easement; GL No. S-5240 to the Water Commission of the County of Hawaii (WCCOH) for windfarm purposes (expired December 13, 2010).

<b>Tax Map Key 3rd/</b>	<b>Encumbrance</b>
6-6-01:71	GL No. S-5240 to WCCOH for windfarm purposes (expired December 13, 2010).
6-6-01:76	GL No. S-5240 to WCCOH for windfarm purposes (expired December 13, 2010).

**CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:**

The Final Environmental Assessment (EA) for the original windfarm project was published in the OEQC Bulletin (now known as Environmental Notice) on July 23, 1985 with a finding of no significant impact (FONSI).

Based on Applicant's consultations with DLNR's Division of Forestry and Wildlife (DOFAW) and the US Fish and Wildlife Service (USFWS), and staff's consultations with the Department of the Attorney General, the 1985 EA and FONSI cannot be relied upon for the proposed project. Both DOFAW and USFWS have recommended auditory and monitoring surveys to determine whether endangered or protected species are present on or traverse the site. The updating of the wind turbine equipment with newer and larger machines, and the installation of radio communications equipment and other infrastructure may have impacts on wildlife and other resources that will need to be evaluated through the EA process.

**DCCA VERIFICATION:**

The Water Board of the County of Hawaii, as the governing board of the Department of Water Supply of the County of Hawaii, is not required to register with the Department of Commerce and Consumer Affairs.

**APPLICANT REQUIREMENTS:**

Applicant shall be required to:

- 1) Conduct auditory and monitoring surveys of the site to determine whether any animal species listed as endangered or protected under Federal or State law will be affected by the proposed project, and provide a copy of the survey reports to DLNR and the US Fish and Wildlife Service; and
- 2) Publish an environmental assessment with the Office of Environmental Quality Control in compliance with the HRS Chapter 343 and HAR Chapter 11-200, and obtain Finding of No Significant Impact (FONSI) for the project, or if there are significant impacts, complete the environmental impact statement process.

REMARKS:

At its meeting of September 14, 1984, Item F-3, the Board of Land and Natural Resources granted the County of Hawaii, Department of Water Supply (DWS) a right-of-entry onto the subject lands for the purpose of conducting a feasibility study for a proposed windfarm project. The windfarm was intended to power the pumps for the DWS Lalamilo Deep Water Wells that supply water to South Kohala. At that time, there were two wells in operation. DWS conducted an environmental assessment for the construction of a windfarm with 120 turbines on towers 117.5 feet tall.

At its meeting of December 14, 1984, Item F-2, as amended, the Board approved the issuance of a direct lease to DWS for a lease of approximately 78 acres for the windfarm project. The approval contemplated DWS hiring a private developer to build and operate the windfarm and charge DWS for the electricity generated at a rate lower than what DWS would have to pay to Hawaii Electric Light Company, Inc. (HELCO) for power.

Final subdivision approval for the windfarm site was issued by the County of Hawaii Planning Department on August 8, 1985.

At its meeting of December 20, 1985, Item F-1-e, the Board consented to a Project Development and Power Purchase Agreement (PD&PPA) between the Water Commission of the County of Hawaii for DWS and Renewable Energy Ventures, Inc. (REV). At the same meeting under agenda Item F-1-f, the Board consented to the Assignment of the PD&PPA from REV to Lalamilo Ventures, Inc. (LVI). The PD&PPA was an integral part of the windfarm project in that it governed the provision of power to DWS to operate the Lalamilo Deep Wells.

General Lease No. S-5240 was issued to the Water Commission of the County of Hawaii (WCCOH) on July 26, 1993, but contained a commencement date of December 14, 1984.

LVI thereafter merged with and into HELCO on September 29, 1995. On the same date, HELCO and WCCOH executed a document entitled Assignment of Lalamilo Windfarm to Hawaii Electric Light Company and Facility Management Agreement (FMA), by which HELCO agreed to fulfill LVI's obligations under the PD&PPA, with certain amendments. One of the amendments was that WCCOH would pay HELCO standard scheduled rates for the power generated from the windfarm. At its meeting of June 28, 1996, Item D-3, the Board approved the FMA between HELCO and WCCOH.

At the end of 1999 and continuing into 2000, WCCOH and HELCO approached DLNR with a proposal to amend and extend the lease of the site. But because WCCOH was by that time paying HELCO standard rates for electricity, the original justification for the lease appeared to have been undermined. There also seemed to be little opportunity for the State to share in revenues generated from the operation. Land Division determined

that the proposal was not consistent with DLNR's obligation to manage public resources, and therefore decided that it could not recommend the proposal to the Board.

In November 2000, the Water Commission of the County of Hawaii became known as the Water Board of the County of Hawaii (WBCOH).

In December 2009, the National Renewable Energy Laboratory (NREL) under the U.S. Department of Energy (USDOE), conducted a preliminary analysis for repowering the windfarm at Lalamilo by replacing the 1980s Jacobs wind turbines with modern technology. The work was funded by USDOE through the Hawaii Clean Energy Initiative, a partnership between the State and USDOE to achieve 70% clean energy for the State by 2030. The Lalamilo site is categorized by DOE as a Class 7 wind source, which is the optimal classification. The sizes of turbines analyzed ranged from 275 kW to 1,500 kW with hub heights of 40 to 80 meters (131 to 262 feet). The study showed that the 120 old turbines could be replaced by 1 to 10 modern turbines, depending in the technology selected.

The current lease expired on December 13, 2010. In preparation for the termination of the lease, WBCOH and HELCO had a Phase I Environmental Site Assessment (ESA) conducted of the premises. The consultant's report dated April 28, 2010 was provided to staff. The report identified several discrete areas of potential soil contamination from storing and/or servicing vehicles and machinery on site, as well as a cesspool servicing the office.

WBCOH/HELCO's contractor began decommissioning the old wind turbine towers and related equipment on August 23, 2010. A Phase II ESA was performed after the contractor completed its decommissioning work in early November 2010. The Phase II ESA report Dated November 17, 2010 was also provided to staff. It shows that one suspect location required remediation, which was performed. Contaminated soil was removed from the site and replaced with clean soil. The contaminated soil was legally disposed of at the West Hawaii Sanitary Landfill.

Some of the facilities and infrastructure from the original windfarm were left in place. These include an office building/workshop, power poles, power lines, meters, conduits, two towers, and a substation, all of which can be re-used in WBCOH's repowered windfarm. The two towers had the turbines removed from them years ago. WBCOH/HELCO then installed an anemometer atop one tower and a transmitting antenna atop the other tower. The instruments delivered wind speed and direction information to an electronic logger in the office, as well as to a remote receiver. The anemometer and antenna remain in place in operable condition. All these improvements became the property of the State at the termination of the lease, and the new lease to WBCOH will include the right to occupy and use the improvements for the term of the lease.

By letter dated August 27, 2010, the WBCOH submitted a request for a new direct lease of the site for 50 years. DWS currently operates eight existing large-capacity wells on parcels adjacent to the subject land. Four of the eight wells are located on State land, and the other four are on private land leases. These wells supply approximately five million gallons of water per day to the area between Puako and Kawaihae. DWS' long-range plans include the construction of two additional wells in the area.

On average, the DWS pump motors use about 10,000 megawatt-hours annually at an energy cost of about three to four million dollars. The cost is passed to County of Hawaii residents and businesses through their water bills.

The Lalamilo site is ideal for renewable energy from wind and other sources, and unlike other windfarms on Hawaii Island, the energy demand from the DWS well pumps is located adjacent to the energy generation. Location of the generation assets at or near the load eliminates or dramatically reduces negative impacts to grid operation typically associated with intermittent energy resources. The proposed project is conceptually designed to provide 50-60% of the electricity required by the existing pumps. Once a detailed final design and construction are completed, actual energy production may be more or less than this range. WBCOH anticipates its annual energy savings to be in the range of \$400,000 to \$1,000,000.<sup>1</sup>

WBCOH estimates that the construction of the new facility would cost approximately \$3,500,000 to \$5,500,000, and generate about 50 jobs, three of them being permanent positions needed to operate and maintain the site once constructed. The repowered windfarm is anticipated to have a 25-year lifespan.

As with the original lease for the site, General Lease No. S-5240, WBCOH intends to enter into a contract through a competitive bid process with a developer who will construct and operate the windfarm, and sell the energy behind the meter to DWS through a power purchase agreement to be negotiated. WBCOH advises that such an arrangement

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<sup>1</sup> WBCOH's overriding purpose in obtaining the lease and developing the windfarm is to provide power to the well pumps. It has no present plans to generate electricity for sale to an electric utility company. WBCOH therefore does not meet the definition of a "renewable energy producer" under HRS Section 171-95(c), and the requirements of that section and Section 171-95.3 are inapplicable to WBCOH's request. If it is later determined that electricity production beyond WBCOH's needs is a viable use of the subject land, WBCOH will comply with Sections 171-95(c) and 171-95.3, as may be amended from time to time, as a renewable energy producer and will apply to the Land Board and any other agencies with oversight for the necessary approvals to operate as such. Staff will include a recommendation in the final lease approval that the lease specifically prohibit WBCOH from operating as a renewable energy producer at the site without the prior written consent of the Board.

is outside the regulatory purview of the Public Utilities Commission. Any sublease to the developer would require further Board approval.

General Lease No. S-5240 provided for gratis rent for the first eleven years of the term, unless power generation exceeded a threshold stated in the lease. In that event, DLNR was to share 1/3 in the proceeds from the sale of such excess energy. The threshold was never reached. After the first eleven years, rent was reopened at market rates.

For the new lease, staff is recommending that rent be established at market rates from the outset, which will avoid the situation where rent is tied to power production. WBCOH has requested a rent waiver for the first five years of the lease, explaining that it will be making substantial improvements to the property. However, after consulting with the Department of the Attorney General, staff understands that rent waivers are limited to one year under HRS Section 171-6(7) where substantial improvements are required for any commercial, industrial or other business use. Accordingly, staff is recommending that rental payments be waived for one year.

In addition to the windfarm, WBCOH requests that the lease allow the installation and maintenance of radio communications equipment. WBCOH explains that it can install such equipment on the two towers that were salvaged from the old windfarm and transmit radio signals to a repeater on Haleakala, Maui that WBCOH owns. Signals from Kona and Waimea can be sent to Hilo via Haleakala. This will facilitate communications around Hawaii Island for DWS operations. Additionally, WBCOH/DWS would allow County Civil Defense, Police Department, Fire Department and State and Federal public safety agencies to use the communications towers at no charge, assuming space availability and co-location requirements are satisfied.

Windfarms are an allowed use in the County agricultural zone. In light of the historical use of the site as a windfarm, and USDOE's classification of the site as optimal for a windfarm, the proposed use appears to be the highest and best use of the land. Staff has not received any other requests to use the land.

WBCOH qualifies for a direct lease under HRS Section 171-95 as government agency.

WBCOH has not had a lease, permit, easement or other disposition of State lands terminated within the last five years due to non-compliance with such terms and conditions.

Staff solicited comments on the proposed disposition from the agencies listed below with the following results.

Agency	Response
DLNR-Historic Preservation	No response

<b>Agency</b>	<b>Response</b>
DLNR-Forestry and Wildlife	Requests monitoring for possible effects of the wind farm on native wildlife, including the Hawaiian Hoary bat and native birds.
DBEDT	No response.
Department of Transportation – Highways Division	DOT initially had comments on connection of windfarm access road to Queen Kaahumanu Highway, but formally withdrew all comments and stated that it has no objections by letter dated 1-20-11.
Department of Hawaiian Home Lands	No response.
Department of Health, Environmental Division	DOH has no comments but recommends reviewing the Standard Comments on its website and applying the principles of the Healthy Community Design Smart Growth Checklist.
Office of Hawaiian Affairs	No response.
Planning Department, County of Hawaii	Wind energy facilities are permitted uses in agriculture district. Wind machines may be exempt from height limitations, provided they are set back from all property lines one foot for each foot of height, measured from the highest vertical extension of the system. Where there is an existing telecommunications tower, co-location of additional antenna or equipment will be permitted provided the Planning Director has issued plan approval for such use.
US Army Corps of Engineers	Requests WCBOH to contact Army Corps to coordinate worker training and education as well as MEC removal due to the high probability of the presence of unexploded ordnance fragments and fuses.
US Fish and Wildlife Service	USFWS recognizes that threatened and endangered species exist on Hawaii Island that may be adversely affected by the proposed wind turbine movements and/or lighting, and recommends monitoring surveys, and coordination with the agency to minimize and mitigate the adverse effects. See Exhibit B attached.

WBCOH/DWS staff consulted with DLNR's Division of Forestry and Wildlife (DOFAW) regarding the replacement of the old windfarm with modern equipment that will likely be on towers 14 to 145 feet (5 to 40 meters) taller than the original towers, using turbines that will have longer and wider blades. DOFAW responded that a primary concern with any windfarm is the potential for incidental take of protected bird and bat species. DOFAW recommended that WBCOH/DWS conduct an auditory survey, and if necessary, prepare a habitat conservation plan for use in obtaining an incidental take permit.

The US Fish and Wildlife Service (USFWS) also recommends auditory and monitoring surveys at the site to determine species diversity and densities. "If it is determined that the proposed project may affect federally listed species, we recommend that our office be contacted early in the planning process so that we may assist with [Endangered Species Act] compliance." See Exhibit B. Auditory surveys use an audio recording device installed on the property to record bat noises. The recording period can extend up to a year. Monitoring surveys usually involve the use of radar to identify bird species during migratory periods.

Based on DOFAW's and USFWS's comments, staff is presenting WBCOH's request for a new lease for approval in concept, with the requirement that WBCOH conduct auditory and monitoring surveys of the site, provide written reports to DLNR and USFWS, and perform a new environmental assessment/environmental impact statement, as appropriate. WBCOH will need to return to the Board at a later date for final lease approval.

WBCOH advises staff that it will comply with the setback, plan approval and any other applicable requirements imposed by the County Planning Department.

The windfarm is located in a formerly used defense site. In 1998, HELCO hired a contractor to perform a visual inspection for unexploded ordnance (UXO) on the surface of the windfarm and related areas. No UXO was found at that time. Nevertheless, staff will include a recommendation in the final lease approval that WBCOH cooperate with any undertaking of the US Army Corps of Engineers to survey the premises for UXO and to remove any UXO found. Additionally, WBCOH will need to acknowledge the potential presence of UXO on the property and assume all risks associated therewith.

WBCOH did not fence the windfarm site under the prior lease. Rather, cattle from the adjoining ranch on State lands under lease to Harold F. Rice, Jr., General Lease No. S-5373, were free to graze on the windfarm. This led to a complaint from HELCO in December 2004 regarding cattle damaging equipment and landscaping on the windfarm site. However, staff understands that grazing livestock in the extremely dry terrain is a desirable and beneficial fire control measure. In the interest of preventing any potential disputes between Mr. Rice and WBCOH or its sublessees in the future as to unrestrained cattle, staff will include a recommendation in the final lease approval that WBCOH be

responsible at its own cost for fencing off any areas of the lease premises that it does not want livestock to enter.

Staff is including a recommendation below that a right-of-entry be issued to WBCOH to allow it to conduct the necessary auditory and monitoring surveys of the site and to conduct its environmental review. Additionally, because some infrastructure remains on the land as noted above, the right-of-entry will allow WBCOH to check on the building and other structures periodically, safeguard them against vandalism, and maintain them in their existing condition. No new construction will be allowed under the right-of-entry.

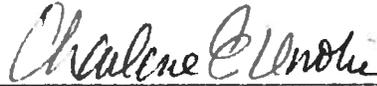
**RECOMMENDATION:**

That the Board, subject to the Applicant fulfilling the Applicant Requirements listed above:

1. Approve in concept the issuance of a direct lease to the Water Board of the County of Hawaii covering the subject area for windfarm and related communication/energy facilities purposes, with the understanding that approval in concept shall not be deemed to be an approval of a lease at this time. Instead, staff shall return to the Board at a later date to report on the results of Applicant's auditory and monitoring surveys and environmental assessment and, if appropriate, recommend the issuance of the lease.
2. Authorize the issuance of a right-of-entry permit to the Water Board of the County of Hawaii covering the subject land under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
  - A. The standard terms and conditions of the most current right-of-entry permit form, as may be amended from time to time; and

- B. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,



Kevin E. Moore  
District Land Agent

APPROVED FOR SUBMITTAL:

  
William J. Aifa, Jr., Interim Chairperson





## United States Department of the Interior



FISH AND WILDLIFE SERVICE  
Pacific Islands Fish and Wildlife Office  
300 Ala Moana Boulevard, Room 3-122, Box 50088  
Honolulu, Hawaii 96850

In Reply Refer To:  
2011-TA-0051

NOV 24 2010

Mr. Kevin Moore  
State of Hawaii  
Department of Land and Natural Resources  
75 Aupuni Street, Room 204  
Hilo, Hawaii 96720

Subject: Technical Assistance for the Issuance of Direct Lease to the Water Board of the County of Hawaii for Windfarm and Related Communication/Energy Facilities Purposes, Hawaii

Dear Mr. Moore:

The U.S. Fish and Wildlife Service (Service) is in receipt of your letter, dated November 3, 2010, requesting our comments regarding the lease of state land to the Water Board of the County of Hawaii (WBCOH) for windfarm and other communications and energy purposes on the island of Hawaii. The proposed lease term would be for 50 years, and the agreement would include a total of 84.9 acres located in Lalamilo, South Kohala. The land is zoned as "Agriculture" and has been the site of an existing windfarm, constructed in 1985, consisting of 120 turbines, all 117.5 feet tall.

The proposed project is to issue a direct lease to WBCOH to replace the expiring windfarm lease [General Lease No. S-5240]. The WBCOH intends to enter into a contract with a developer who will construct and operate an entirely new windfarm facility. The old turbines will likely be replaced with 12 to 120 new units that will be 131 to 262 feet tall and have longer, wider blades. In addition, the developer will install and maintain several radio communication towers to facilitate communications around the island. You state that an existing Environmental Assessment (EA), written in 1985 for the installation of the original windfarm, is sufficient to meet the requirements for the proposed project. Therefore, the State of Hawaii is proposing to exempt the project from having to prepare a new EA, under the authority of Chapter 343, HRS and Chapter 11-200, HAR. The following comments are in accordance with section 7 of the Endangered Species Act of 1973 (ESA), as amended (16 U.S.C. 1531 *et seq.*).

There are ESA protected species on the island of Hawaii that may be adversely affected by the proposed wind turbines and radio towers. The federally endangered Hawaiian hoary bat (*Lasiurus cinereus semotus*) may be harmed or killed by moving turbines. The endangered Hawaiian petrel (*Pterodroma sandwichensis*) and the threatened Newell's shearwater (*Puffinus auricularis newelli*), fly at night and are attracted to artificially-lighted areas which can result in

TAKE PRIDE  
IN AMERICA 

EXHIBIT B

Mr. Kevin Moore

2

disorientation and subsequent fallout due to exhaustion or collision with objects such as utility lines, guy wires, and towers that protrude above the vegetation layer. Lights associated with the radio communication towers may disorient fledgling seabirds, resulting in increased collisions with the turbines and towers. Waterbirds, such as the federally endangered Hawaiian stilt (*Himantopus mexicanus knudseni*), Hawaiian duck (*Anas wyvilliana*), Hawaiian coot (*Fulica alai*), and the endangered Hawaiian goose (*Branta sandvicensis*) may also be impacted by this project if they attempt to traverse the area where turbines are being used. In addition, numerous species protected under the Migratory Bird Treaty Act (16 U.S.C. 703 et seq.) as amended (MBTA) may be harmed or killed by collisions with the turbines, radio towers, guy wires, and other infrastructure. Although this site has been used as a windfarm since 1985, it is more than likely that species impacted from the existing structures may have gone undocumented, since birds or bats that fall to the ground are often removed by introduced mammalian species.

To address these potential impacts to federally listed species, we recommend auditory and monitoring surveys at the site to determine species diversity and densities. If it is determined that the proposed project may affect federally listed species, we recommend that our office be contacted early in the planning process so that we may assist with ESA compliance. If the proposed project is funded, authorized, or permitted by a Federal agency, then that agency should consult with us pursuant to section 7(a)(2) of the ESA. If no Federal agency is involved with the proposed project, the WBCOH should apply for an incidental take permit under section 10(a)(1) of the ESA. A section 10 permit application must include a habitat conservation plan that identifies the effects of the action on listed species and their habitats, and defines measures to minimize and mitigate those adverse effects.

Additionally, although it is stated in your correspondence that the proposed project will likely have minimal or insignificant effect on the environment, we do not agree that the existing EA is adequate to address the potential impacts to listed species. If there is a Federal agency involved, we recommend that the agency draft a new EA to meet the requirements of the National Environmental Policy Act (NEPA). If there is no Federal agency, upon issuance of an incidental take permit, the Service would draft a NEPA document.

If you have questions regarding these comments, please contact Michelle Bogardus, Consultation and Habitat Conservation Planning Program Biologist (phone: 808-792-9400, fax: 808-792-9400).

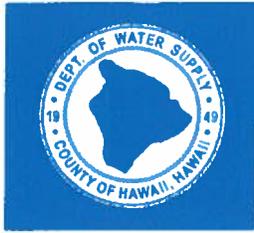
Sincerely,



for

Loyal Mehrhoff  
Field Supervisor

cc: Scott Fretz, DOFAW



**DEPARTMENT OF WATER SUPPLY • COUNTY OF HAWAI'I**

345 KEKŪANAŌ'A STREET, SUITE 20 • HILO, HAWAI'I 96720  
TELEPHONE (808) 961-8050 • FAX (808) 961-8657

December 24, 2014

Mr. Russell Y. Tsuji  
Land Division Administrator  
State of Hawai'i, Department of Land and Natural Resources  
P.O. Box 621  
Honolulu, HI 96809

**LALAMILO WIND FARM REPOWERING PROJECT – LEASE RENTAL (10HD-183)  
TAX MAP KEYS: 3/6-6-001:002 PORTION 71&76  
DISTRICT OF SOUTH KOHALA, ISLAND OF HAWAII**

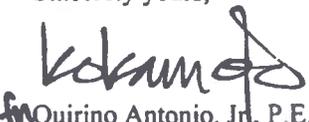
The Department of Water Supply has reviewed the Appraisal Report for the subject Lease, and requests the Department of Land and Natural Resources Land Division reconsider the rental fee of \$56,000.00 for the following reasons:

1. The purpose of utilizing the Lalamilo Wind Farm is to reduce electrical power costs to operate our Lalamilo Water System, thereby passing the actual monetary savings to our customers. The attached Department of Water Supply Water Rates Schedule, Part J, explains how the Department of Water Supply reviews the actual costs of electrical power to adjust its water rates (power cost adjustment).
2. The Department of Water Supply's goal is to minimize water rate costs to its customers, and will purchase the wind energy directly from Lalamilo Wind, LLC. There will not be a Power Purchase Agreement between Lalamilo Wind, LLC and the Hawaii Electric Light Company (HELCO), nor will there be any excess energy provided to HELCO.

Accordingly, the Department of Water Supply proposes a revised rental fee of \$7,000.00 for the Wind Farm site, based on a two percent (2%) average annual increase over the former \$6,400.00 rental fee from the year 2010 to 2015. Please also note that the approved lease in concept, executed February 11, 2011, calls for rental reopenings at the 10<sup>th</sup>, 20<sup>th</sup>, 30<sup>th</sup>, and 40<sup>th</sup> years of the lease term. The Department of Water Supply's goal is to establish an agreed lease rental amount in order to proceed with this project and requests the matter be addressed at the Board of Land and Natural Resources' January 9, 2015 meeting.

Should you have any questions, please contact Mr. Owen Nishioka at (808) 961-8070, extension 259.

Sincerely yours,

  
Quirino Antonio, Jr., P.E.  
Manager-Chief Engineer

ON:jms

Enc.

Copy – Randy Kurohara, Deputy Managing Director, County of Hawaii  
Richard Horn, Lalamilo Wind, LLC

STATE OF HAWAI'I  
DEPARTMENT OF LAND AND NATURAL RESOURCES

SUBLEASE NO. K-\_\_

between

COUNTY OF HAWAI'I

DEPARTMENT OF WATER SUPPLY  
BY AND THROUGH ITS WATER BOARD

and

**LALAMILO WIND COMPANY, LLC**

**A Limited Liability Company**

covering

44.5 acres of land at

Lālāmilo, South Kohala, Hawai'i

**EXHIBIT 5**

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EXHIBIT "A" Renewable Energy Service and Power Purchase Agreement and Reassignment

EXHIBIT "B" Site Map and Description

EXHIBIT "C" Master Lease

EXHIBIT "D" Federal Aviation Notice Criteria Tool

EXHIBIT "E" Subleasehold Mortgage, Security Agreement and Financing Statement

COUNTY OF HAWAI'I  
DEPARTMENT OF WATER SUPPLY  
BY AND THROUGH ITS WATER BOARD

SUBLEASE NO. K-\_\_

THIS INDENTURE OF Sublease, made this \_\_\_\_ day of \_\_\_\_\_ 2014, but effective as of the first day of this Sublease term, (date) \_\_\_\_\_, 2014, and superseding all prior agreements related to the subject property, by and between the semi-autonomous County of Hawai'i Department of Water Supply, by and through its governing Water Board (COUNTY), hereinafter referred to as the "Sublessor", and whose business and post office address is 345 Kekūanaō'a Street, Suite 20, Hilo, Hawai'i 96720, and LALAMILO WIND COMPANY, LLC, a Limited Liability Company, under the laws of the State of Hawai'i, hereinafter referred to as "Sublessee", whose business and mailing address is 55-310 Upolu Airport Road, Hawai'i, HI 96719.

WITNESSETH:

WHEREAS, the Sublessee desires to sublease certain COUNTY leased land near Lālāmilo, South Kohala, Island of Hawai'i, only for the purposes specified in the Sublessee's Renewable Energy Service and Power Purchase Agreement dated October 22, 2013 ("PPA"), and Reassignment dated December 23, 2013, for the construction and operation of a wind farm. The PPA and Reassignment are, attached hereto as Exhibit "A" and incorporated by reference herein by reference as though fully set forth,

WHEREAS, the Sublessor recognizes Sublessee's benefits to the public and Sublessor;

WHEREAS, COUNTY is the Lessee, and the State of Hawai'i, Board of Land and Natural Resources ("BLNR") is the Lessor under that certain Direct Lease No. 10HD-183; and

WHEREAS, at a meeting of the BLNR held on \_\_\_\_\_, 2014, approved the Direct Lease 10HD-183 for the purpose of constructing a wind farm and related communication/energy facilities and requires prior approvals for consents to subleases from the BLNR, its Chairperson, or its authorized representative.

NOW, THEREFORE, in consideration of the mutual promises provided herein, the parties hereto mutually covenant and agree as follows:

**ARTICLE I: DEMISE**

1.1 Premises.

The Sublessor for and in consideration of the rent to be paid and of the terms, covenants, and conditions herein contained, all on the part of the Sublessee to be kept, observed, and performed, does hereby sublease unto the Sublessee, and the Sublessee does hereby sublease from the Sublessor the subleased premises identified as:

*Lease Parcel 001 being approximately 44.5 acres located in the northeast portion of the COUNTY site at Tax Map Keys: 3<sup>rd</sup>/ 6-6-01:71 South Kohala, Island of Hawai'i, County and State of Hawai'i, more particularly described and as shown on the map in Exhibit "B" hereto attached and made a part hereof for the only purposes and uses specified in the Sublessee's PPA (hereinafter "permitted uses"), and includes all buildings and improvements now or hereinafter constructed or installed on the subleased land.*

1.2 Term.

The term of this Sublease, and Sublessee's obligations to pay the rent shall be for the term of twenty (20) years, commencing and continuing as set forth in Section 10.2 and related provisions of the PPA.

1.3 Quiet enjoyment.

Sublessor hereby covenants and agrees with the Sublessee that upon payment of the rent at the times and in the manner provided and the observance and performance of the covenants, terms, and conditions on the part of the Sublessee to be observed and performed, the Sublessee may have, hold, possess and enjoy the subleased premises for the term of this Sublease, without hindrance or interruption by the Sublessor or any other person or persons lawfully claiming by, through or under it.

**ARTICLE II: RENT AND OTHER CHARGES**

2.1 Fixed Rental Fees.

In consideration of the property and services provided by the Sublessor, Sublessee agrees to pay Sublessor fixed rental fees. Rental payments shall be waived for the first year pursuant to HRS Section 171-6(7). The annual amount paid by the Sublessee shall be \$6,000, or ten (10) percent more than the amount the Sublessor is charged by the BLNR under Direct Lease No. \_\_\_\_\_ to account for general and administrative efforts in managing the fees, whatever is greater. If other improvements are made on the premises by another sublessee, the lease amount may be prorated according to the relative value of the land. Payment will be made to the Sublessor in legal tender of the United States of America

## 2.2 Reopening of Fixed Annual Rental Fees.

Rental reopenings of the minimum fixed annual rental fee, will occur at the 10<sup>th</sup> and 20<sup>th</sup> years of this Sublease and if this Sublease term is extended. This Sublease rental fee may be reopened at the time any new sublease is negotiated with another sublessee under Direct Lease No. \_\_\_\_\_.

## 2.3 Dispute of fixed Annual Rental Fees.

If the Sublessee and Sublessor are unable to agree on this Sublease rental fee, the fee amount will be determined by fair market value as follows. The fair market rental shall be determined by an appraiser appointed by Sublessor who is:

- (a) an employee of the Department of Land and Natural Resources who is qualified to appraise lands; or
- (b) a disinterested appraiser whose services shall be contracted for by Sublessor. In determining the fair market rental for the subleased premises, the appraiser or appraisers shall consider:
  - 1) the infrastructure and amenities (both tangible and intangible) available to Sublessee and other tenants within the COUNTY leased lands (as described in Direct Lease 10HD-183, Exhibit "C," attached hereto) that enhance or add to the value or desirability of the subleased premises, including, but not limited to the investment costs incurred by Sublessor for the infrastructure, land improvements, water lines, and other improvements on the premises of neighboring tenants;
  - 2) the buildings and other improvements existing on the subleased premises at the time of reopening that were neither constructed nor placed on the subleased premises by Sublessee; and
  - 3) local commercial rates and rents, and any other applicable and appropriate market evidence. The Sublessee shall be promptly notified by certified mail, return receipt requested of the fair market rental as determined by Sublessor's appraiser; provided, that should the Sublessee fail to notify Sublessor in writing within thirty (30) days after receipt thereof that Sublessee disagrees with the fair market rental as determined by Sublessor's appraiser and that Sublessee has appointed its own appraiser to prepare an independent appraisal report, then the fair market rental as determined by Sublessor's appraiser shall be deemed to have been accepted by Sublessee and shall be the fair market rental as of the date of the reopening. If Sublessee has notified Sublessor and appointed its appraiser as stated hereinabove, Sublessee's appraiser shall complete its appraisal and the two appraisers shall then exchange their reports within forty-five (45) days from the date of the Sublessee's appointment of the appraiser.

The two appraisers shall review each other's reports and make every effort to resolve whatever differences they may have. However, should differences still exist fourteen (14) days after the exchange, the two appraisers shall within seven (7) days thereafter appoint a third appraiser who shall also prepare an independent appraisal report based on the review of the two appraisal reports prepared and any other data. Copies thereof shall be furnished to the first two appraisers within forty-five (45) days of the appointment. Within twenty (20) days after receiving the third appraisal report, all three shall meet and determine the fair market rental in issue. The fair market rental as determined by a majority of the appraisers shall be final and binding upon both Sublessor and Sublessee, unless otherwise modified or corrected for good cause by a majority of the appraisers within TWENTY (20) days thereafter. Each party shall pay for its own appraiser and the cost of the services of the third appraiser shall be borne equally by the Sublessor and the Sublessee. All appraisal reports shall become part of the public record of the Sublessor.

In the event the appraisers are unable to determine the fair market rental before the reopening date, or by the foregoing prescribed time, whichever is later, the Sublessee shall pay the fair market rental as determined by the Sublessor's appraiser and the rental paid by Sublessee shall then be subject to retroactive adjustments as appropriate to reflect the fair market rental determined as set forth hereinabove. However, Sublessee or Sublessee's appraiser's failure to comply with the procedures set forth above shall constitute a waiver of Sublessee's right to contest the new rent, and the Sublessee shall pay the rent as determined by Sublessor's appraiser without any retroactive adjustments. Alternatively, Sublessor may treat this failure as a breach of this Sublease and terminate this Sublease accordingly.

### **ARTICLE III: RESERVATIONS**

#### **3.1 The State of Hawai'i and Sublessor reserve the following:**

(a) *Minerals and waters*

All minerals as hereinafter defined, in, on or under the subleased premises and the right, on the State of Hawai'i's or Sublessor's own behalf or through persons authorized by it, to prospect for, mine and remove such minerals and to occupy and use so much of the surface of the ground as may be required for all purposes reasonably extending to the mining and removal of such minerals by means whatsoever, including strip mining. "Minerals", as used herein, shall mean any or all oil, gas, coal, phosphate, sodium, sulfur, iron, titanium, gold, bauxite, silver, bauxite clay, diaspore, boehmite, laterite, gibbsite, alumina, all ores of aluminum and, without limitation thereon, all other mineral substances and ore deposits, whether solid, gaseous or liquid, including all geothermal resources in, on, or under the land, fast or submerged; provided, that "minerals" shall not include sand, gravel, rock or other material suitable for use and used in general construction in

furtherance of the Sublessee's permitted activities on the subleased premises and not for sale to others.

All surface and ground waters appurtenant to the subleased premises and the right on the State of Hawai'i's or Sublessor's own behalf or through persons authorized by it, to capture, divert or impound the same and to occupy and use so much of this right reserved; provided, however, that as a condition precedent to the exercise by the State of Hawai'i or Sublessor of the rights reserved in this paragraph, just compensation shall be paid to the Sublessee for any of Sublessee's improvements taken.

- (b) *Prehistoric and historic remains*  
All prehistoric and historic remains found on said subleased premises.
- (c) *Ownership of fixed improvements*  
The ownership of all improvements of whatever kind or nature, including but not limited to fences, pipelines, power lines, and energy system(s) located on the land prior to or on the date when this Sublease was executed, except as otherwise stated in the PPA.

#### **ARTICLE IV: UTILITIES AND CONNECTIONS**

##### **4.1 Utilities.**

Sublessee shall pay when due all charges, duties, and rates of every description, including water hauling, electricity, wastewater, gas, refuse collection, and any other charges, as to which the subleased premises or any part, or any improvements the Sublessor or Sublessee may become liable for during the term, whether assessed to or payable by the Sublessor or Sublessee.

Sublessee shall be responsible for all requirements for utilities at the site. Sublessor shall not be responsible for any inability to provide utilities to Sublessee. In the event that the utilities furnished to Sublessee must be interrupted or diminished by Sublessor on a scheduled basis, Sublessor will attempt to provide Sublessee with adequate notice thereof. Sublessor shall not be liable for any and all claims, loss, costs, damages, or expenses arising out of any interruption of utility service to the Sublessee.

Sublessee recognizes that site does not have a source of potable water and Sublessee agrees to provide its own potable water through catchment or hauling water whenever necessary. A cesspool exists at the main office/shop building; however any improvements would need additional permits and approvals.

Subject to Sublessor's prior approval, Sublessee may install its own telephone equipment.

#### 4.2 Equipment and apparatus.

Sublessee shall be responsible for any equipment and apparatus provided and operated by the Sublessee in accordance with Sections 3 and 4 of the PPA. All of Sublessee's equipment and apparatus that will be connected to the Sublessor water and electrical systems at the facility shall be subject to inspection by the Sublessor or its designated representative prior to any connection. All of Sublessee's equipment and apparatus shall be installed and operated in accordance with applicable standards, regulations, codes and sound engineering practice. Sublessee shall, at its own expense, keep, repair and maintain its equipment and apparatus in good order, condition and repair, reasonable wear and tear excepted. Sublessor or its designated representative may request additional inspection and certification by outside experts and/or professional engineers at Sublessor's expense; however, the expense for the additional inspection and certification shall be paid by the Sublessee if all of Sublessee's equipment and apparatus have not been installed and operated according to the foregoing requirements stated herein.

#### 4.3 Utility connections.

It shall be the responsibility of the Sublessee to make the necessary connections to the existing electrical utility systems in accordance with Sections 3 and 4 of the PPA. All connections and service lines shall be installed in accordance with the applicable rules, regulations, laws, and codes and shall be subject to Sublessor's prior approval. Sublessee shall discuss with and obtain the concurrence of the Sublessor or its designated representative as to the method proposed for each connection and line, and at no time shall there be disruption to the Sublessor's operations, utilities, or services. Sublessor shall be permitted to inspect the installation of all connections and service lines.

#### 4.4 Operations.

Sublessee shall conduct its activities on the subleased premises in accordance with all applicable HELCO rules and interconnection requirements, any permit conditions, Federal, State, and County statutes, ordinances and regulations in addition to Sublessor's rules and regulations. Sublessor will provide the Sublessee with a copy of its Facilities Use Manual (FUM) which outlines the day to day operating rules, regulations, and expected conduct on the subleased premises.

Sublessee's material breach of any of the aforesaid rules or regulations shall be deemed in material default under this Sublease. Sublessor, after the giving of thirty (30) days' notice, specifying the nature of Sublessee's default and the required correction, elect to terminate this Sublease. Where such a correction of a specified default may not be reasonably corrected within said timeframe, then reasonable additional time shall be given pursuant to said notice.

### **ARTICLE V: AGENTS and EMPLOYEES of SUBLESSEE**

#### 5.1 Sublessee responsibility.

All persons hired or used by Sublessee shall be considered Sublessee's agents and employees and Sublessee shall be responsible for all services performed by its agents and

employees. Further, Sublessee intentionally, voluntarily, and knowingly assumes the sole and entire liability for any of its agents and employees, and to third persons for all loss, cost, damage, or injury caused, either directly or indirectly, by Sublessee's agents and employees in the course of their employment.

5.2 Covenant against discrimination.

The use and enjoyment of the subleased premises shall be consistent with the County of Hawai'i Anti-Discrimination and Harassment Policy that prohibits all forms of unlawful discrimination and/or harassment of any manager, supervisor, co-employee, customer, vendor, supplier, or agent on the basis of a protected class. Examples of protected classes include but are not limited to sex, pregnancy, race, ancestry, national origin, religion, color, disability, genetic information, age, marital status, assignment of income for child support obligations, military service, veteran's status, sexual orientation, gender identity, gender expression, lactation, arrest and court record, citizenship, or any other classification protected by state or federal law.

## **ARTICLE VI: IMPROVEMENTS, MAINTENANCE AND REPAIRS**

6.1 Sanitation, etc.

Sublessee shall keep the subleased premises and improvements in a strictly clean, sanitary, and orderly condition.

6.2 Waste and unlawful, improper or offensive use of subleased premises.

Sublessee shall not commit, suffer, or permit to be committed any waste, nuisance, clearing or unlawful, improper or offensive use of the subleased premises, or any part, nor, without the prior written consent of the Sublessor, cut down, remove or destroy, or suffer to be cut down, removed or destroyed, any trees now growing on the subleased premises.

6.3 Compliance with laws.

Sublessee shall comply with all of the requirements of all county, state, and federal authorities and observe all county, state, and federal laws (including, but not limited to the observance of and compliance with the Americans With Disabilities Act) applicable to the subleased premises, now in force or which may be in force.

6.4 Environmental Compliance.

Sublessee shall comply with all applicable federal, state and county environmental assessment conditions, as determined by the Chapter 343, Hawai'i Revised Statutes, as amended, and historic preservation review process completed for the project..

6.5 Archaeological sites.

In the event any unanticipated discoveries or remains such as shell, bone, charcoal deposits, human remains, rock or coral alignments, pavings or walls are found on the subleased premises, the Sublessee and the Sublessee's agents, employees and representatives and shall immediately stop all land utilization and/or work in the area of

the find and contact the Historic Preservation Office at (808) 692-8015 in compliance with Chapter 6E, Hawai'i Revised Statutes.

6.6 Inspection of subleased premises.

Sublessee shall permit the Sublessor and its agents, at all reasonable times during this Sublease term, to enter the subleased premises and examine the state of repair and condition of the subleased premises.

6.7 Unexploded Ordnance Inspections.

The parcel is located in a formerly used defense site. In 1998 an inspection was completed for unexploded ordnance and none were found at that time. Further inspections were ongoing in 2013 and 2014. Sublessee shall acknowledge the potential presence of unexploded ordnance on the property. Sublessee shall cooperate with any undertaking of the United States Army Corps of Engineers to further survey the parcel for unexploded ordnances and shall be removed at the cost of Sublessor along with other hazardous materials discovered in the course of the construction, but unrelated to construction as set forth in the Section 14.1.9 of the PPA. In the event that any unanticipated discoveries of unexploded ordnances occur, the Sublessee and the Sublessee's agents, employees and representatives shall immediately stop all land utilization and/or work in the area of the find and contact the U.S. Army Corps of Engineers at (808) 294-3583 or (808) 315-6449.

6.8 Improvements.

Sublessee shall construct structures and improvements in accordance with Section 3 of the PPA, and maintain such improvements on the premises in accordance with Sections 3 and 4 of the PPA. Sublessee shall not install any building, structure or improvement of any kind and description whatsoever except with the prior written approval of the Sublessor, and upon those conditions as the Chairperson of the Board of Land and Natural Resources and the Sublessor may impose, including any adjustment of rent, unless otherwise provided in this Sublease. At the end of the lease term, improvements installed by Sublessee shall be treated in accordance with the PPA, specifically Section 10 contained therein.

6.9 Repairs to improvements.

Repairs to improvements shall be completed in accordance with Section 3 and 4 of the PPA.

6.10 Non-adverse effects.

Any building, structure, or improvement erected on the premises shall be completed in accordance with Section 3 of the PPA or constructed by the Sublessee on the subleased premises, shall not in any way adversely affect the safe and efficient operations of the Sublessor operations and prior to construction or erection shall be approved in writing by the Sublessor.

#### 6.11 Non-obstruction reservations.

The Sublessee has conducted an analysis in accordance with the Federal Aviation Administration requirements in CFR Title 14 Part 77.9. It was determined that the wind farm does not exceed the limits requiring Notice although the Sublessee recognizes the filing of Notice of construction requirements shall remain in effect.

The Sublessee shall recognize its activities shall be subject to the following reservations:

- a) There is hereby reserved to the Department of Transportation, Airports Division, its successors, and assigns, for the use and benefit of the public, a right of flight for the passage of aircraft in the airspace above the surface of the subleased premises herein conveyed.
- b) The erection of structures or growth of natural objects that would constitute an obstruction to air navigation is prohibited.
- c) The height limitations above which no structure or growth shall be permitted shall be in accordance with the Airport Zoning Regulations all as shown in the Notice Criteria Tool in Exhibit "D".

#### 6.12 Suspension of operations.

In the event of any disaster or pollution, or likelihood of either, having or capable of having a detrimental effect on public health, safety, welfare, or the environment caused in any manner or resulting from operations under this Sublease, the Sublessee shall immediately take corrective action, seek to mitigate any damage and promptly notify Sublessor and the State of Hawai'i Board of Land and Natural Resources.

### **ARTICLE VII: GENERAL**

#### 7.1 Liens.

Sublessee shall not commit or suffer any act or neglect which results in the subleased premises, any improvement, or the leasehold estate of the Sublessor becoming subject to any attachment, lien, charge, or encumbrance, except as provided in this Sublease, and the PPA. Rights with regard to the indemnity of the parties are specified in Section 7.1.4 and 13 of the PPA.

#### 7.2 Assignments.

Assignments of this agreement shall be in compliance with the terms and conditions of the PPA and be subject to BLNR approval.

#### 7.3 Subletting.

The Sublessee shall not rent or sublet the whole or any portion of the subleased premises, without the prior written approvals of the Sublessor and BLNR, except as may be provided in the PPA.

#### 7.4 Indemnity.

The provisions regarding indemnification and responsibility of the parties are as set forth in Section 13 of the PPA. The Sublessee shall indemnify, defend, and hold the State and Sublessor harmless from and against any claim or demand for loss, liability, or damage including claims for bodily injury, wrongful death, or property damage, arising out of or resulting from: (1) any act or omission on the part of Sublessee relating to Sublessee's or its employee's or agent's use, occupancy, maintenance, or enjoyment of the subleased premises; (2) any failure on the part of the Sublessee to maintain the subleased premises and sidewalks, roadways and parking areas adjacent thereto in Sublessee's use and control, and including any accident, fire, or nuisance, growing out of or caused by any failure on the part of the Sublessee to maintain the subleased premises in a safe condition; and (3) from and against all actions, suits, damages, and claims by whomsoever brought or made by reason of the Sublessee's non-observance or non-performance of any of the terms, covenants, and conditions of this Sublease or the rules, regulations, ordinances, and laws of the federal, state, municipal or county governments.

#### 7.5 Costs of litigation.

The provisions regarding costs of litigation and responsibility of the parties are as set forth in Sections 8, 12 and 13 of the PPA. In case the Sublessor or the State of Hawai'i shall, without any fault on its part, be made a party to any litigation commenced by or against the Sublessee (other than condemnation proceedings), the Sublessee shall pay all costs, including reasonable attorney's fees, and expenses incurred by or imposed on the Sublessor and the State of Hawai'i; furthermore, the Sublessee shall pay all costs, including reasonable attorney's fees and expenses which may be incurred by or paid by the Sublessor and the State of Hawai'i in enforcing the covenants and agreements of this Sublease, in recovering possession of the subleased premises or in the collection of delinquent rental, taxes, and any and all other charges.

#### 7.6 Liability insurance.

Liability insurance shall be in accordance with the insurance requirements in Section 8 of the PPA. The Sublessee shall procure and maintain, at its cost and expense and acceptable to the Sublessor, in full force and effect throughout the term of this Sublease, commercial general liability insurance in an amount of at least \$500,000.00 for each occurrence and \$1,000,000.00 aggregate, and commercial general property damage insurance in an amount of at least \$50,000.00 for each occurrence and \$100,000.00 aggregate, with an insurance company or companies rated A or higher licensed to do business in the State of Hawai'i or any other state. The policy or policies of insurance shall name the State of Hawai'i and the Sublessor as additional insured. The insurance shall cover the entire subleased premises, including buildings, improvements, and grounds and all roadways or sidewalks on or adjacent to the subleased premises in the use or control of the Sublessee.

The Sublessee, prior to entry and use of the subleased premises or within fifteen (15) days from the effective date of this Sublease, whichever is sooner, shall furnish the Sublessor with a certificate(s) showing the policy(s) to be initially in force, keep the certificate(s) on deposit during the entire sublease term, and furnish a like certificate(s)

upon each renewal of the policy(s). This insurance shall not be canceled, limited in scope of coverage, or not renewed until after thirty (30) days written notice has been given to the Sublessor.

The Sublessee agrees that, with respect to any contractors or subcontractors performing services on the Sublessee's behalf on the subleased premises, the aforementioned liability insurance requirements shall also apply. The Sublessee shall provide the required certificate(s) of insurance to Sublessor prior to commencement of those services.

The Sublessor shall retain the right at any time to review the coverage, form, and amount of the insurance required by this Sublease. If, in the opinion of the Sublessor, the insurance provisions in this Sublease do not provide adequate protection for the Sublessor, the Sublessor may require Sublessee to obtain insurance sufficient in coverage, form, and amount to provide adequate protection. The Sublessor's requirements shall be reasonable but shall be designed to assure protection for and against the kind and extent of the risks which exist at the time a change in insurance is required. The Sublessor shall notify Sublessee in writing of changes in the insurance requirements and Sublessee shall deposit copies of acceptable insurance policy(s) or certificate(s) thereof, with the Sublessor incorporating the changes within thirty (30) days of receipt of the notice.

The procuring of the required policy(s) of insurance shall not be construed to limit the Sublessee's liability under this Sublease nor to release or relieve the Sublessee of the indemnification provisions and requirements of this Sublease. Notwithstanding the policy(s) of insurance, Sublessee shall be obligated for the full and total amount of any damage, injury, or loss caused by Sublessee's negligence or neglect connected with this Sublease.

It is agreed that any insurance maintained by the Sublessor with respect to the subleased premises will apply in excess of, and not contribute with, insurance provided by Sublessee's policy.

Sublessor's lien rights are referenced in Section 24, which reference the lien rights of the PPA.

**7.7 Fire and Extended Coverage Insurance.**

Sublessee's insurance requirement shall be as specified in Section 8 of the PPA.

**7.8 Mortgage.**

Except as provided in this Sublease, Sublessee shall not mortgage, hypothecate or pledge the subleased premises or any portion, or any interest in this Sublease, without the prior written approval of Sublessor and the BLNR and mortgage, hypothecation or pledge without the approval shall be null and void.

That upon due application and with the written consent of the Sublessor and the BLNR, the Sublessee may mortgage this Sublease or any interest, or create a security interest in the subleasehold of the subleased premises. If the mortgage or security interest is to a recognized lending institution in either the State of Hawai'i or elsewhere in the United States, consent may extend to foreclosure and sale of Sublessee's interest at the foreclosure to any purchaser, including the mortgagee, without regard to whether or not the purchaser is qualified to sublease, own or otherwise acquire and hold the land or any interest. The interest of the mortgagee or holder at the foreclosure shall be freely assignable. However the use of the premises shall be limited to that as set forth in Subleasehold Mortgage, Security Agreement and Financing Statement as marked Exhibit "E". The term "holder" shall include an insurer or guarantor of the obligation or condition of such mortgage, including the Department of Housing and Urban Development through the Federal Housing Administration, the Federal National Mortgage Association, the Veterans Administration, the Small Business Administration, Farmers Home Administration, or any other federal agency and their respective successors and assigns or any lending institution authorized to do business in the State of Hawai'i or elsewhere in the United States; provided, that the consent to mortgage to a non-governmental holder shall not confer any greater rights or powers in the holder than those which would be required by any of the aforementioned Federal agencies. Sublessor and the State of Hawai'i Board of Land and Natural Resource hereby consent to the Subleasehold Mortgage, Security Agreement and Financing Statement in Exhibit "E" attached hereto and incorporated herein by reference as though fully set forth.

#### **ARTICLE VIII: BREACH AND TERMINATION**

##### **8.1 Breach and termination.**

Time is of the essence of this agreement.

- (a) The Sublessor may give the Sublessee thirty business days' notice of intention to terminate this Sublease if a material breach or default shall occur. The occurrence of any of the following shall constitute a material breach or default of this Sublease by Sublessee:
- 1) Sublessee shall fail to pay the rent, additional rent or other monetary obligation, or any part thereof at the times and in the manner provided in this Sublease within ten (10) calendar days after delivery by the Sublessor of a written notice of the breach or default, by personal service, registered mail, or certified mail to the Sublessee at its last known address and to each mortgagee or holder of record having a security interest in the subleased premises.
  - 2) Sublessee shall become bankrupt, or if any assignment be made of the Sublessee's property for the benefit of creditors, or if this Sublease and the subleased premises shall be attached or taken

by operation of law. This provision is subject to the rights of mortgagee.

- 3) Sublessee uses the subleased premises for purposes other than as specified in the PPA.
  - 4) Sublessee fails to comply with or otherwise obey all rules and regulations pertaining to the use and enjoyment as specified in the PPA.
  - 5) Sublessee wholly ceases all activities on the subleased premises as specified in the PPA.
  - 6) Sublessee fails to comply with any statutes, ordinances, laws, rules or regulations as specified in the PPA.
  - 7) Sublessee shall fail to observe and perform any material covenant, term or condition contained in this Sublease and on its part to be observed and performed, and this failure shall continue for a period of more than sixty (60) days after delivery by the Sublessor of a written notice of the breach or default, by personal service, registered mail, or certified mail to the Sublessee at its last known address and to each mortgagee or holder of record having a security interest in the subleased premises; provided, that if Sublessor deems in its sole discretion that such default shall be of such nature that it cannot with due diligence be cured completely within such sixty (60) day period, Sublessee may be deemed not to be in default on the condition that the Sublessee shall within such period commence and thereafter diligently prosecute the cure to completion upon such terms and conditions as required by Sublessor at Sublessor's discretion.
- (b) Termination. In the event of any such material breach or default by Sublessee and with thirty business days' notice of termination given to Sublessee, the Sublessor may, subject to the provisions of Section 171-21, Hawai'i Revised Statutes, as amended, at once re-enter the subleased premises or any part thereof, administratively and without the need for a court order, and upon or without this entry, at its option, terminate this Sublease and all rights of Sublessee hereunder, and shall have the right to terminate, at its election, any sublease then in effect without the consent of the Sublessee concerned and without prejudice to any other remedy or right of action for arrears of rent or for any preceding or other breach of contract; and in the event of termination at the option of the Sublessor, all buildings and improvements shall remain and

become the property of the Sublessor or shall be removed by Sublessee at the Sublessee's cost; furthermore, Sublessor shall retain all rent paid in advance to be applied to any damages. This does not prohibit the Sublessor from seeking further damages. Sublessor shall not be deemed guilty of trespass or become liable for loss or damage which may be occasioned thereby.

### 8.2 Right of holder of record of a security interest.

In the event the Sublessor seeks to forfeit the privilege, interest, or estate created by this Sublease, each recorded holder of a security interest may, at its option, cure or remedy the default or breach of rent payment within ten (10) days or any other default or breach within sixty (60) days, from the date of receipt of the Sublessor's notice, or within such additional period as the Sublessor may allow for good cause, and add the cost thereof to the mortgage debt and the lien of the mortgage. Upon failure of the holder to exercise its option, the Sublessor may: (a) pay to the holder from any moneys at its disposal, the amount of the mortgage debt, together with interest and penalties, and secure an assignment of the debt, including interest and penalties, and all reasonable expenses incurred by the holder in connection with the foreclosure and preservation of its security interest, less appropriate credits, including income received from the privilege, interest, or estate subsequent to the foreclosure; or (b) if the property cannot be reasonably reassigned without loss to the Sublessor or State, then terminate the outstanding privilege, interest, or estate without prejudice to any other right or remedy for arrears of rent or for any preceding or other breach or default and use its best efforts to redispense of the affected land to a qualified and responsible person free and clear of the mortgage and the debt secured; provided that a reasonable delay by the Sublessor in instituting or prosecuting its rights or remedies shall not operate as a waiver of these rights or to deprive it of a remedy when it may still otherwise hope to resolve the problems created by the breach or default. The proceeds of any redispense shall be applied, first, to reimburse the Sublessor for costs and expenses in connection with the redispense; second to discharge in full any unpaid purchase price or other indebtedness owing the Sublessor in connection with the privilege, interest, or estate terminated; third, to the mortgagee to the extent of the value received by the State upon redispense which exceeds the fair market sublease value of the land as previously determined by the Sublessor's or State's appraiser; and fourth, to the owner of the privilege, interest, or estate.

### 8.3 Acceptance of rent not a waiver.

The acceptance of rent by the Sublessor shall not be deemed a waiver of any breach by the Sublessee of any term, covenant, or condition of this Sublease, nor the Sublessor's right of re-entry for breach of term, condition, or covenant, nor of the Sublessor's right to declare and enforce a forfeiture for any breach of any term, covenant, or condition, or to exercise any option conferred, in any one or more instances, shall not be construed as a waiver or relinquishment of any term, covenant, condition, or option.

#### 8.4 Extension of time.

Notwithstanding any provision to the contrary contained in this Sublease, when applicable, Sublessor may for good cause shown, allow additional time beyond the time or times specified in this Sublease for the Sublessee to comply, observe, and perform any of this Sublease terms, conditions, and covenants.

### **ARTICLE IX: CONDEMNATION**

#### 9.1 Condemnation.

If at any time, during the term of this Sublease, any portion of the premises should be condemned or required for public purposes by the State, any county, or city and county, the rental shall be reduced in proportion to the value of the portion of the premises condemned. Sublessor shall be entitled to collect and receive all compensation and damages payable for or on account of all buildings, fixtures and other improvements existing and located on the premises at the commencement of the term of this Sublease. Sublessee shall be entitled to receive from the condemning authority, all compensation and damages payable for or on account of all buildings, fixtures and other improvements existing and located on the premises by Sublessee during the term of this Sublease. Sublessee shall be further entitled to collect, receive from the condemning authority such other loss or damages as may be available pursuant to the laws of condemnation as they may exist in the State of Hawai'i. Provided however, to the extent that the improvements hereafter constructed or placed on the premises by Sublessee during the term of this Sublease are not part of the aforesaid condemnation or required for public purpose, then Sublessee may, in the alternative, remove and relocate the aforesaid improvements to the remainder of the lands occupied by Sublessee under this Sublease. Sublessee shall not by reason of such condemnation be entitled to any claim against the condemning authority or Sublessor for condemnation or indemnity for the subleasehold interest or the land and all compensation payable or to be paid for or on account of the aforesaid subleasehold interest and the land shall be payable to and be the sole property of Sublessor. Where the portion so taken renders the remainder unsuitable for the use or uses for which the land was subleased, Sublessee shall have the option to surrender this Sublease and be discharged and relieved from any further liability provided further, Sublessor may, in its sole discretion, allow Sublessee to remove within a reasonable period of time the permanent improvements constructed, erected and placed on the premises by Sublessee during the term of this Sublease.

### **ARTICLE X: RIGHT TO ENTER**

#### 10.1 Right to enter.

The BLNR or Sublessor, or their respective agents or representatives, upon reasonable notice, shall have the right to enter and cross any portion of the subleased premises for the purpose of performing any public or official duties, provided, however, in the exercise of such rights, the Sublessor or the BLNR shall not interfere unreasonably with the Sublessee or Sublessee's use and enjoyment of the subleased premises. The Sublessor or its designated representative specifically reserves the right to enter the subleased premises or any part thereof for purposes related to the Department of Water

Supply's operation and maintenance of the Lālāmilo-Parker Well Field, provided that such entry, operation, or maintenance does not unreasonably interfere with or hinder the use, occupancy, operation, and enjoyment of the subleased premises by the Sublessee. In the event Sublessor's executive director or such other designated representative determines that an emergency situation or potential emergency situation threatens the health, safety, or welfare of persons, property, or the environment, the Sublessor or its designated representative may enter the subleased premises or any part thereof without any notice whatsoever.

#### 10.2 Inspection.

The Sublessor shall have the right to authorize any person or persons to enter upon and inspect the subleased premises at all reasonable times; provided, however, that any entry and inspection shall be conducted during reasonable hours after notice to enter is first given to the Sublessee, and shall, if the Sublessee so requires, be made in the company of the Sublessee or designated agents of the Sublessee;

#### 10.3 Ingress and egress.

Sublessor shall possess the right, by the most convenient route(s) of ingress and egress from the subleased premises for utilities, roadway purposes and pipelines, power lines, and related facilities necessary for Sublessor's operations and maintenance, subject to any reasonable safety requirements of the Sublessee. This right of ingress and egress shall inure to the benefit of the Sublessor and its duly authorized agents, representatives, contractors, employees, and invitees.

### **ARTICLE XI: BONDS AND INSURANCE REQUIREMENTS**

#### 11.1 Justification of sureties.

Any bonds required by this Sublease shall be supported by the obligation of a corporate surety organized for the purpose of being a surety and qualified to do business in the State of Hawai'i, or not less than two personal sureties, corporate or individual, for which justifications shall be filed as provided in Section 78-20, Hawai'i Revised Statutes; provided, however, the Sublessee may furnish a bond in like amount, conditioned as aforesaid, executed by it alone as obligor, if, in lieu of any surety or sureties, it shall also furnish and at all times thereafter keep and maintain on deposit with the Sublessor security in certified checks, certificates of deposit (payable on demand or after such period as the Sublessor may stipulate), bonds, stocks or other negotiable securities pro endorsed, or execute and deliver to the Sublessor a deed or deeds of trust of real property, all of such character which is satisfactory to the Sublessor and valued in the aggregate at not less than the principal amount of said bond. It is agreed that the value of any securities which may be accepted and at any time thereafter held by the Sublessor shall be determined by the Sublessor, and that the Sublessee may, with the approval of the Sublessor, exchange other securities or money for any of the deposited securities if in the judgment of the Sublessor the substitute securities or money shall be at least equal in value to those withdrawn. It is further agreed that substitution of securities or the substitution of a deposit of security for the obligation of a surety or sureties may be made by the Sublessee, but only upon the written consent of the Sublessor and that until this

consent is granted, which shall be discretionary with the Sublessor, no surety shall be released or relieved from any obligation.

11.2 Waiver, modification, reimposition of bond and liability insurance provisions.

Upon substantial compliance by the Sublessee of the terms, covenants, and conditions contained in this Sublease on its part to be observed or performed, the Sublessor at its discretion may in writing, waive or suspend the performance bond and/or improvement bond requirements or may in writing, modify the particular bond(s) or liability insurance requirements by reducing its amount; provided, however, that the Sublessor reserves the right to reactivate the bonds or reimpose the bond(s) and/or liability insurance in and to their original tenor and form at any time throughout the term of this Sublease.

11.3 Bond, improvement.

Prior to the start of any construction and upon receipt of the appropriate building permit, the Sublessee shall procure and deposit with the Sublessor a surety bond in an amount reasonably determined by the Sublessor, and in any case not to exceed the cost of construction, acceptable to the Sublessor, which bond shall name the State and Sublessor as obligees, conditioned upon the faithful observance, performance, and completion of any building requirement agreed to now or in the future, the completion of the building and improvements on or before the specified date of completion free from all liens and claims, and that the Sublessee shall hold the State and Sublessor harmless from all liens, suits, actions or damages arising out of, caused from or attributable to the work performed pursuant to any building requirement.

## **ARTICLE XII: HAZARDOUS MATERIALS**

12.1 Hazardous materials.

Sublessee shall not cause or permit the escape, disposal, or release of any hazardous materials, except as provided by law. Sublessee shall not allow the storage or use of such materials, nor allow to be brought onto the subleased premises any such materials except to use in the ordinary course of Sublessee's business, and then only after written notice is given to Sublessor of the identity of such materials and upon Sublessor's consent, which consent may be withheld at Sublessor's sole and absolute discretion. Sublessor shall have the sole and absolute discretion to permit such materials to be brought onto and remain on the subleased premises. Sublessee's failure to comply with Sublessor's directions under this section shall constitute a breach of this Sublease. In addition, upon reasonable request and reasonable time allotted, Sublessee shall execute affidavits, representations and the like from time to time at Sublessor's request concerning Sublessee's best knowledge and belief regarding the presence of hazardous materials on the subleased premises placed or released by Sublessee.

Sublessee agrees to indemnify, defend and hold Sublessor harmless, from any damages and claims resulting from the release of hazardous materials on the subleased premises occurring while Sublessee is in possession or elsewhere if caused by Sublessee

or persons acting under Sublessee. These covenants shall survive the expiration or earlier termination of this Sublease.

For the purpose of this Sublease "hazardous material" shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil as defined in or pursuant to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation, and Liability Act as amended, the Federal Clean Water Act, or any other federal, state, or local environmental law, regulation, ordinance, rule, or by-law, whether existing as of the date hereof, previously enforced, or subsequently enacted.

12.2 Level one (1) hazardous waste evaluation.

Prior to the termination of this Sublease or the assignment of the subleasehold, Sublessee shall conduct a Level One (1) Hazardous Waste Evaluation and conduct a complete abatement and disposal, if necessary, satisfactory to the standards required by the Federal Environmental Protection Agency and the Department of Land and Natural Resources. The termination will not be approved by the Board of Land and Natural Resources unless this evaluation and abatement provision has been executed.

**ARTICLE XIII: GENERAL**

13.1 Withdrawal.

Any right of Sublessor to withdraw any portion of the premises during the term of this Sublease shall be as otherwise specified herein or contained within the PPA.

13.2 Governmental permits.

Sublessee shall comply with all applicable federal, state and county permitting requirements including those relating to shoreline management area, shoreline setback requirements, state conservation district requirements, subdivision permits and building standards. The Sublessor does not warrant or guarantee that the applicable federal, state or county authority will permit the construction or installation of improvements that may be required by Sublessee. All costs associated with obtaining the building and other permits or approvals will be borne by the Sublessee.

13.3 Notices.

Sublessor may give any notice or deliver any document hereunder to Sublessee by mailing the same by registered or certified mail addressed to Sublessee's address above or by delivering the same in person to any officer of Sublessee. Sublessee may give any notice or deliver any document hereunder to Sublessor by mailing the same by registered or certified mail addressed to Sublessor's address above or by delivering the same to Sublessor's agent for service or process in person. For the purposes of this paragraph, either party may change its address by written notice to the other. In case of any notice or document delivered by certified or registered mail, the same shall be deemed delivered when deposited in any United States post office, properly addressed as herein provided, with postage fully prepaid.

13.4 Surrender.

Upon the termination of this lease, any early termination or extension thereof, the rights of the party shall be as set forth in Section 10 of the PPA.

13.5 Non-warranty.

Except as contained herein or as contained in the PPA, Sublessor does not warrant the conditions of the subleased premises, as the same is being subleased as is.

13.6 No party deemed drafter: Headings.

This Sublease has been submitted to the scrutiny of all parties hereto and their counsel if desired, and shall be given a fair and reasonable interpretation in accordance with the words hereof, without consideration or weight being given to its having been drafted by any party hereto or its counsel. The article and paragraph headings are inserted only for the convenience of the Sublessor and the Sublessee and are not intended to construe the intent or meaning of any of the provisions thereof.

13.7 Superseding agreement.

This Sublease supersedes and terminates all prior leases, subleases, facilities rental agreements, facilities use agreements and option agreements previously made between the Sublessor and Sublessee, provided that Sublessee shall continue to remain liable to the Sublessor and the State for all monetary and insurance obligations incurred prior to the date of this Sublease. In the event of any conflict between the provisions of this agreement and the provisions of the PPA, the provisions of the PPA shall prevail.

13.8 Modification of Sublease.

Any modification, alteration, or change in this Sublease shall be made only by written agreement executed by the parties.

13.9 Net Agreement.

Notwithstanding any provision herein to the contrary, it is the intention of the parties that the rent shall be net to Sublessor. Excepting as to costs, expenses and obligations relating to Sublessor's continued use of the premises shall be paid by Sublessee.

13.10 "As-Is" Condition.

Sublessee represents and warrants to Sublessor that Sublessee has fully inspected the premises and does hereby agree to accept the premises in its "as is" and "where is" condition, excepting as otherwise represented herein or as represented in the PPA.

13.11 Accord and Satisfaction.

No payment by Sublessee or receipt by Sublessor of a lesser amount than the monthly rent herein stipulated shall be deemed to be other than on account of the earliest stipulated rent, nor shall any endorsement or statement on any check or any letter accompanying any check or payment as rent be deemed an accord and satisfaction, and Sublessor may accept such check or payment without prejudice to Sublessor's right to recover the balance of such rent or pursue any other remedy provided in this Agreement.

13.12 Entire Agreement.

This Agreement and the Exhibits attached hereto and forming a part hereof set forth all the covenants, promises, agreements, conditions and understandings between Sublessor and Sublessee concerning the premises, and there are no covenants, promises, agreements, conditions or understandings between them other than what is set forth herein. Unless otherwise provided for herein, no subsequent alteration, amendment, change or addition to this Agreement shall be binding upon Sublessor or Sublessee unless reduced to writing and signed by all parties.

13.13 Governing law.

This Sublease shall be construed, interpreted, and governed by the laws of the State of Hawai'i.

13.14 Exhibits – incorporated in Sublease.

All exhibits referred to are attached to this Sublease and hereby are deemed incorporated by reference.

13.15 Partial invalidity.

If any term, provision, covenant, or condition of this Sublease should be held to be invalid, void, or unenforceable, the remainder of this Sublease shall continue in full force and effect and shall in no way be affected, impaired, or invalidated thereby.

13.16 Time is of the essence.

Time is of the essence in the performance of each and every provision of this Sublease.

13.17 No partnership.

The Sublessor is not a partner nor joint venturer with Sublessee in connection with the business carried on under this Sublease and shall have no obligation with respect to Sublessee's debts or other liabilities, and likewise shall not be entitled to share in the profits of any sale of Sublessee's business.

13.18 Authority.

The persons who have executed this Sublease represent and warrant that they are duly authorized to execute this Sublease in their individual or representative capacity as indicated.

13.19 No waiver.

Waiver by either party of strict performance or any provisions of this Sublease shall not be a waiver nor prejudice of the party's right to require strict performance of the same provision in the future or of any other provision.

13.20 Survey monuments.

Any legal land subdivision survey corners, reference points or monuments are to be preserved. If such are destroyed or disturbed by Sublessee, Sublessee shall reestablish

them by a licensed land surveyor in accordance with U.S. General Land Office standards at Sublessee's own expense. Corners and/or reference points or monuments that must necessarily be disturbed or destroyed in the process of carrying out the operations allowed by this Sublease must be properly and adequately referenced and/or replaced. Such references must be approved by the Sublessor prior to removal of said corners, reference points or monuments.

13.21 No third party beneficiary enforcement.

It is agreed that enforcement of the terms and conditions of this agreement, and all rights of action relating to such enforcement, shall be strictly reserved to the Sublessor, the Board of Land and Natural Resources, the State of Hawai'i, and the Sublessee, and Mortgagee of any leasehold Mortgage security interest and nothing contained in this agreement shall give or allow any claim or right of action whatsoever by any other person on this agreement. The Sublessor and Sublessee intend that any entity, other than the Sublessor, the Board of Natural Resources, the State of Hawai'i, or the Sublessee receiving services or benefits under this agreement, shall be deemed and incidental beneficiary only.

13.22 Design standards.

The Sublessee shall comply with any applicable design standards of the Sublessor or the Board of Land and Natural Resources in the preparing, design and construction of structures and other site improvements. The Exhibit "A" describing the system specifications and maintenance of the PPA are hereby deemed preapproved.

13.23 Administrative Rules.

The Sublessee shall comply with all administrative rules adopted by Sublessor pursuant to Chapter 91 and Chapter 227D Hawai'i Revised Statutes, as amended, relating to Hawai'i County Department of Water Supply.

13.24 Restoration of subleased land.

The requirements of Sublessee to restore the subleased lands shall be as set forth in the PPA.

13.25 Sublease approved by Master Lessor.

The BLNR has ratified and approved the terms and conditions of this Sublease. However, Sublessee agrees to comply with any and all provisions of the Master Lease. In the event of the cancellation of the Master Lease with BLNR, this Sublease shall be cancelled and Sublessor shall have no liability to Sublessee.

13.26 Gender neutral.

The use of any gender shall include all genders, and if there is more than one Sublessee, then all words used in the singular shall extend to and include the plural.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed this \_\_\_\_\_ day of \_\_\_\_\_, 2014.

RECOMMEND APPROVAL:

“SUBLESSOR”:  
WATER BOARD OF THE  
COUNTY OF HAWAI‘I  
(SEAL)

\_\_\_\_\_  
Quirino Antonio, Jr., P.E.  
Manager-Chief Engineer  
Department of Water Supply

\_\_\_\_\_  
Kenneth Kaneshiro  
Chairperson

“SUBLESSEE”:  
LALAMILO WIND COMPANY, LLC

By \_\_\_\_\_  
Richard Horn  
Its \_\_\_\_\_

APPROVED AS TO FORM AND  
LEGALITY:

\_\_\_\_\_  
Assistant Corporation Counsel  
County of Hawai‘i  
Date: \_\_\_\_\_

THE ABOVE SUBLEASE IS HEREBY CONSENTED TO:

\_\_\_\_\_  
BOARD OF LAND AND NATURAL  
RESOURCES, STATE OF HAWAI‘I  
BY: \_\_\_\_\_

STATE OF HAWAI'I )  
 ) SS:  
COUNTY OF HAWAI'I )

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me appeared \_\_\_\_\_ to me personally known, who, being by me duly sworn, did say that the person is the \_\_\_\_\_ of the Water Board of the County of Hawai'i and that the seal affixed to the foregoing instrument is the seal of the Department of Water Supply of the County of Hawai'i, and that the instrument was signed and sealed in behalf of the Water Board by authority of the Water Board and said \_\_\_\_\_ acknowledged the instrument to be the free act and deed of the Water Board.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print or Type Name

Notary Public, State of Hawai'i

My Commission Expires: \_\_\_\_\_

<b>NOTARY CERTIFICATION</b>	
Doc. Date: _____	No. of Pages: _____
Notary name: _____	Third Circuit
Doc. Description: _____	
_____	
_____	
Notary Signature	Date



RENEWABLE ENERGY SERVICE AND POWER PURCHASE AGREEMENT

Dated as of October, 22, 2013

by and between

SITE CONSTRUCTORS INC.

AS PROVIDER

and

COUNTY OF HAWAI'I

DEPARTMENT OF WATER SUPPLY

BY AND THROUGH ITS WATER BOARD

**EXHIBIT A  
(redacted)**

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## **RENEWABLE ENERGY SERVICE AND POWER PURCHASE AGREEMENT**

This RENEWABLE ENERGY SERVICE AND POWER PURCHASE AGREEMENT, dated as of \_\_\_\_\_, 2013 (the "Agreement"), is by and between Site Constructors Inc., a California Corporation, whose address is Post Office Box 6254, Chico, California, 95927, ("Provider") and the Water Board of the County of Hawai'i a municipal corporation, the governing body and part of the semi-autonomous County of Hawai'i Department of Water Supply ("DWS"), whose address is 345 Kekūanaō'a Street, Suite 20, Hilo, Hawai'i 96720 (Provider and DWS are collectively referred to as the "Parties").

### **RECITALS:**

WHEREAS, DWS had previously issued a Request for Proposal (RFP) for the development of a wind energy project which would provide wind-generated electricity to the deep well pumps at its Lālāmilo-Parker Well Field (Lālāmilo wells) operated by the DWS as more fully described in Exhibit "A" hereto (the "Site");

WHEREAS, DWS has received an approval in concept of a lease from the State of Hawai'i of approximately 83 acres of State of Hawai'i land in the vicinity of the Lālāmilo wells, a portion of which shall be used for the project (TMK 3rd Division 6-6-01:Portion 2)(See Exhibit "F" attached hereto);

WHEREAS, Provider is engaged in the business of developing, designing, constructing, and operating wind energy projects, has responded to the RFP, and DWS had selected Provider to develop such wind energy project;

WHEREAS, DWS desires that Provider install, maintain and operate, and Provider desires to install, maintain and operate the System (as hereinafter defined) to be located on the Site; and

WHEREAS, Provider desires to sell, and DWS desires to purchase, the Wind Services (as hereinafter defined), consisting of the delivery of electrical energy generated by the System to the Lālāmilo Wells and other services pursuant to the terms and conditions set forth herein.

NOW THEREFORE, in consideration of the mutual promises set forth below and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

### **AGREEMENT:**

#### **1. Definitions.**

Unless otherwise required by the context in which any term appears:

(a) capitalized terms used in this Agreement shall have the respective meanings set forth in this

Section 1; (b) the singular shall include the plural and vice versa; (c) the word “including” shall mean “including, without limitation”, (d) references to “Sections” and “Exhibits” shall be to sections and exhibits hereof; (e) the words “herein,” “hereof” and “hereunder” shall refer to this Agreement as a whole and not to any particular section or subsection hereof; and (f) references to this Agreement shall include a reference to all exhibits hereto, as the same may be amended, modified, supplemented or replaced from time to time.

“Agreement” shall have the meaning set forth in the preamble.

“Applicable Law” shall mean, with respect to any Governmental Authority, any constitutional provision, law, statute, rule, regulation, ordinance, treaty, order, decree, judgment, decision, certificate, holding, injunction, registration, license, franchise, permit, authorization, guideline, governmental approval, consent or requirement of such Governmental Authority, enforceable at law or in equity, along with the interpretation and administration thereof by any Governmental Authority.

“Claim Notice” shall have the meaning set forth in Section 13.1.2.

“Commercial Operation Date” shall have the meaning set forth in Section 3.6.1.

“Completion Notice” shall have the meaning set forth in Section 3.5.5.

“Contract Energy” shall be 7,620 megawatt-hours/year (MWh/yr).

“DWS Default” shall have the meaning set forth in Section 11.1.

“DWS” shall mean the County of Hawai‘i Department of Water Supply, and includes the Water Board.

“Energy” shall be electrical power from the System.

“Environmental Attributes” means the characteristics of electric power generation of the System that have intrinsic value, separate and apart from the Energy, arising from the perceived environmental benefits of the System of the Energy, including but not limited to all environmental and other attributes that differentiate the System or the Energy from energy generated by fossil-fuel based generation units, fuels or resources, characteristics of the System that may result in the avoidance of environmental impacts on air, soil or water, such as the absence of emission of any oxides of nitrogen, sulfur or carbon or of mercury, or other gas or chemical, soot, particulate matter or other substances attributable to the System or the compliance of the System or the Energy with the law, rules and standards of the United Nations Framework Convention on Climate Change (the “UNFCCC”) or the Kyoto Protocol to the UNFCCC or crediting “early action” with a view thereto, or laws or regulations involving or administered by the Clean Air Markets Division of the Environmental Protection Agency or successor administrator or any state or federal entity given jurisdiction over a program involving transferability of rights arising from Environmental Attributes and Reporting Rights.

**“Environmental Incentives”** shall mean all existing and future rights, credits (including tax credits), tax depreciation, rebates, benefits, reductions, offsets, and allowances and entitlements of any kind, howsoever entitled or named (including carbon credits and allowances), whether arising under federal, state or local law, international treaty, trade association membership or the like, arising from the Environmental Attributes of the System or the Energy generated thereby or otherwise from the development or installation of the System or the production, sale, purchase, consumption or use of the Energy generated thereby. Without limiting the forgoing, “Environmental Incentives” includes green tags, renewable energy credits, tradable renewable certificates, portfolio energy credits, the right to apply for (and entitlement to receive) incentives under incentive programs offered by the State of Hawai‘i and the right to claim federal income tax credits under Sections 45 and/or 48 of the Internal Revenue Code.

**“Expiration Date”** shall mean the date twenty-years after the Commercial Operation Date (the “Term”), unless and until terminated earlier.

**“Fair Market Value”** means the price that would be established in an arm’s-length transaction between an informed and willing buyer and an informed and willing seller, neither being under any compulsion to act.

**“Force Majeure Event”** shall have the meaning set forth in Section 9.1

**“Governmental Authority”** shall mean any federal, state, regional, county, town, city, or municipal government, whether domestic or foreign, or any department, agency, bureau, or other administrative, regulatory or judicial body of any such government.

**“Hazardous Materials”** shall have the meaning set forth in Section 14.19.

**“HELCO”** shall mean Hawaii Electric Light Company, Inc., which is the regulated electric utility serving the County of Hawai‘i or any successor in interest.

**“Installation Work”** shall mean all work performed by Provider in connection with the furnishing, installation, testing and commissioning of the System.

**“Interconnection Agreement”** shall mean a written agreement between Provider and HELCO specifying the business and technical arrangements pursuant to Rule 14H necessary to allow the System to operate in parallel with HELCO’s power system, and if applicable, to allow the System to deliver electric energy to HELCO’s power system.

**“kWh”** shall mean kilowatt-hours, the unit of measure to be used with respect to Energy under this Agreement.

**“kWh Rates”** shall have the meaning set forth in Section 5.1.

**“Lease”** shall mean that certain State Lease entered into with the State of Hawai‘i, as Lessor and DWS as Lessee concerning that Lālāmilo lands of Waimea situated at Lālāmilo,

South Kohala, Hawai‘i more fully described in Exhibit “A” hereto, a portion of which will be sub-leased to the Provider for the Wind Services, entered into by Provider and DWS.

“Liens” shall have the meaning set forth in Section 7.1.4.

“Meter” shall have the meaning set forth in Section 4.3.1.

“Monthly Period” shall mean the period commencing on the Commercial Operation Date and ending on the last day of the calendar month in which the Commercial Operation Date occurs, and, thereafter, all subsequent one (1)-month periods during the Term.

“Monthly Production” shall mean, for each Monthly Period, the amount of Energy delivered during such Monthly Period.

“O&M Work” shall have the meaning set forth in Section 4.1.1.

“Party” shall mean either DWS or Provider. “Parties” shall mean both DWS and Provider.

“Permits” shall mean any and all approvals, waivers, exceptions, variances, permissions, filings, permits, orders, licenses, registrations, judgments, written interpretations, decrees, exemptions, and declarations of or with or issued by any Governmental Authority or pursuant to any Applicable Law applicable to the ownership, construction, use, operation and maintenance of the System and the performance of the Wind Services.

“Person” shall mean any individual, corporation, partnership, company, joint venture, association, trust, unincorporated organization or Governmental Authority.

“Provider” shall have the meaning set forth in the preamble. For purposes of access rights and other rights necessary for Provider to perform its obligations hereunder, the term “Provider” shall include Provider’s authorized agents, contractors and subcontractors.

“Provider Default” shall have the meaning set forth in Section 11.2.

“Provider Termination Event” shall have the meaning set forth in Section 10.4.

“PUC” shall mean the Hawai‘i Public Utilities Commission.

“Rejection Notice” shall have the meaning set forth in Section 3.5.5.

“Reporting Rights” means the right of Provider to report to any governmental Authority or other authority, including without limitation under Section 1605(b) of the Energy Policy Act of 1992 and provisions of the Energy Policy Act of 2005, or under any present or future domestic, international or foreign emissions trading program, that Provider owns the Environmental Attributes and the Environmental Incentives associated with the Energy.

“Rule 14H” shall mean the Hawaiian Electric Company’s tariff Rule No. 14, Section H entitled “Interconnection of Distributed Generating Facilities Operating in Parallel with the Company’s Electric System”.

“SCADA” means Supervisory Control and Data Acquisition system including but not limited to power monitoring equipment, Remote Terminal Unit Hardware, Radios, Antennas, Computer Processing Unit workstations, enclosures, wires, connectors, and associated appurtenances for use in controlling the well motor operations.

“Scheduled Outage” shall have the meaning set forth in Section 4.5.1.

“Site” shall have the meaning set forth in the first recital.

“System Acceptance Testing” shall have the meaning set forth in Section 3.5.4.

“System” shall mean the wind energy generating system including, but not limited to wind power turbines, batteries, switch gears, SCADA system, and over head transmission power lines designed and installed pursuant to this Agreement at the Site and more fully described in Exhibits “B” and “E” hereto.

“Term” shall have the meaning set forth in Section 10.2.

“Termination Date” shall have the meaning set forth in Section 10.2.

“Wind Services” shall mean all services provided to DWS by Provider hereunder, including the furnishing and installation of the System, O&M Work and the provision of Energy.

## 2. Purchase and Sale of Wind Services.

DWS engages Provider to provide the Wind Services to DWS at the Site, and Provider agrees to provide the Wind Services to DWS at the Site, all in accordance with the terms and conditions set forth herein. DWS shall provide Provider with access to the Site in accordance with the terms of the State sublease. Provider may retain one or more contractors or subcontractors to fulfill its obligations hereunder with the prior written consent of DWS; provided that Provider shall remain liable for performance hereunder.

## 3. Design, Construction, Installation and Testing of System.

With respect to the Site on which the System is to be installed:

### 3.1 Detailed Design.

The System shall comply with the applicable Institute of Electrical and Electronic Engineers rules for interconnected distributed generation systems and shall be compliant with the 2002 National Electrical Code and relevant state and local building codes. All equipment shall be labeled as required by the 2002 National Electrical Code with special “High Voltage” warning labels where applicable.

Provider shall submit to HELCO, for HELCO review and written approval, written equipment specifications, and detailed plans of the interconnections facilities, control and protective devices and settings, any required breaker control schematics, and facilities as specified in the HELCO Interconnection Requirements manual, as may be revised from time to time, for the design, installation and operations of its System prior to its actual installation.

Following HELCO written approval of Provider's proposed System and associated facilities, neither Provider nor its successors or assigns shall remove, alter or otherwise modify or change the equipment specifications, including, without limitation, the plans, control and protective devices or settings, and in general the System specifications configuration or any facilities appurtenant thereto. If Providers desire to make such changes or modifications, Provider shall resubmit to HELCO plans describing said changes or modifications for approval by HELCO. No such change or modification may be made without the prior written approval of HELCO.

The System shall be in accordance with the requirements of all applicable construction and safety codes, laws and governmental agencies having jurisdiction, and in accordance with the requirements set forth by DWS, HELCO, and the terms and conditions of this Agreement.

Control and protective devices shall be installed, in addition to the Minimum Protective Devices and Relays as required by DWS and HELCO, in order to protect the DWS water system and to protect the System from abnormal operating conditions such as, but not limited to, electrical overloading, abnormal voltages, and fault currents. Such protective devices shall promptly disconnect the System from the HELCO System in the event of a power outage on the HELCO System.

The System shall be operated with all of the protective relaying, and any Provider operating procedures and switching apparatus in service whenever the facility is connected to, or is operated in parallel with, the HELCO System.

An acceptable visibly "open" isolation point will be provided by Provider on the Provider's side of the service entrance meter section, to electrically isolate the Provider-owned facilities from all HELCO electric service equipment in order to establish a safe work area for HELCO personnel.

The isolation point will comprise a gang-operated load break Disconnect Switch identified as the Generation Utility Disconnect Switch (also sometimes referred to as the "Utility Isolation Switch") as shown on the Single-Line Diagram Drawing No. E-1 attached in Exhibit "B" of this Agreement. The Disconnect Switch shall be capable of being locked in a visibly "open" position by a standard HELCO padlock, and shall be installed in a place so as to provide easy and unrestricted accessibility to HELCO personnel on a 24-hour basis. HELCO shall have the right to lock open without notice to Provider, or require Provider to lock open, the Disconnect Switch when interconnected operation of the System with the HELCO System could adversely affect the HELCO System, or endanger life or property, or upon termination of this Agreement.

Provider will be required to electrically isolate the System from the HELCO System and install grounds acceptable to HELCO at the time of install and in the event that HELCO needs to

perform subsequent maintenance on its equipment in the metering compartment, or electric service equipment.

When an electrical clearance is required by HELCO and the HELCO electric service to Provider is at a phase to phase voltage of greater than 500 V, Provider shall provide personnel and equipment on site to open the Disconnect Switch so as to provide a visible open, groundable (on the utility side) and lockable isolation point acceptable to HELCO personnel.

The electrical output of Provider's System shall not contain harmonic content, which may cause disturbances on or damage to the HELCO System or equipment, or other parties' systems, such as but not limited to computer, telephone, communication and other sensitive electronic or control systems.

Provider shall exercise reasonable care to assure that the electrical characteristics of its System, such as deviation from sine wave form or unusual short interval fluctuations in power production, shall not be such as to result in impairment of service to DWS or in interference with operation of computer, telephone or other communication systems or facilities. The current imbalance for a three phase system, as measured at the DWS service entrance section shall not be greater than four percent (4%) at any time. The power factor of the Provider's facility shall not be less than ninety percent (90%) lagging, but shall not be leading, unless agreed to in writing or otherwise required by DWS.

Provider shall protect, operate and maintain the System in accordance with those practices and methods, as they are amended or changed from time-to-time that are commonly used in prudent engineering and electric utility operations and shall operate and maintain the System lawfully in a safe manner and non-hazardous condition.

Provider shall prepare and submit for approval to DWS two (2) hard copies and one (1) digital copy of detailed engineering drawings showing the plan and configuration for the Site, detailed plans of all structures, electrical systems, interfaces with the HELCO grid electricity supply and any necessary facility or utility infrastructure improvements and/or modifications in accordance with a schedule to be agreed upon with DWS. The Parties recognize that some improvements remain on the Site from the previous wind farm constructed in mid-1980's including the shop/office, access road, transmission line, and switchgear, all of which Provider may re-use if deemed viable. All other major components that Provider installs on the Site must be new and not previously used in any other applications.

### 3.2 Installation.

Subject to Section 3.3, Provider will cause the System to be designed, engineered, installed and constructed substantially in accordance with the terms of this Agreement and the Lease/Sublease. DWS shall have the right to review and approve, such approval not to be unreasonably withheld or delayed, all construction plans, including engineering evaluations of the impact of the System on the HELCO system.

- (i) Provider shall procure all materials and equipment for the Installation Work. Subject to the terms of the Sublease, Provider

shall perform Installation Work at the Site on a schedule approved by DWS.

- (ii) Provider will be responsible for having current licenses and all Permits to do the work indicated and must provide these licenses and Permits in accordance with Section 3.3.6 before a notice to proceed is issued by DWS. Provider shall be responsible for any taxes or fees involved in constructing this project.
- (iii) Provider' permission to access to any DWS well, reservoir, or other water facility must be made with DWS Operations personnel in advance, because trespassing onto a public drinking water facility is a federal offense. Access is not to be unreasonably withheld or to cause unreasonable delay in Provider's ability to construct and maintain the facility.
- (iv) DWS shall have access to any facility constructed in association with this project.

**3.3 Conditions Precedent to Commencement of Construction and Installation.**

Provider shall have the sole responsibility for preparing applications and obtaining all Permits and licenses required for the performance of work under this Agreement. Commencement by the Provider of construction and installation activities with respect to the Site shall be subject to the satisfaction of the following conditions precedent (in addition to the condition set forth in Section 3.4):

3.3.1 Provider shall have submitted a complete Environmental Assessment by September 15, 2014, to the State of Hawai'i Office of Environmental Quality Control per requirements of HRS 343 and HAR 11-200. This includes complete content, applicable forms, the proper amount of copies, etc.

3.3.2 DWS and Provider shall have executed the Sublease with the State's approval;

3.3.3 Provider shall have obtained full financing for the Wind Services performed at the Site;

3.3.4 DWS shall have approved Provider' detailed engineering drawings pursuant to Section 3.1;

3.3.5 Provider shall have complied with HELCO requirements, applied for and obtained an Interconnection Agreement pursuant to Section 3.4 by September 15, 2014. This shall include all subcontracts for construction and installation of the System subject to the terms of HELCO'S requirement;

3.3.6 If required under tariff or Applicable Law in order for DWS to combine electrical service at the Site, Provider shall have applied for a Standby Agreement with HELCO;

3.3.7 Provider shall have obtained prior to such commencement the Permits and licenses required by all safety codes and Applicable Law; provided, however, if the foregoing conditions precedent are not completed by September 15, 2014, DWS shall have the option to terminate the Agreement without triggering the default provisions of this Agreement or incurring any liability under this Agreement, and all funds deposited by Provider in good faith deposit, shall be returned to Provider. Alternatively, if such conditions precedent are not satisfied or waived by such date, the Parties may mutually agree to amend this Agreement in writing to revise the Commercial Operation Date and Term.

#### 3.4 Utility Interconnection.

Interconnection facilities on Provider's premises as may be required to deliver power from Provider's System to the HELCO System at the point of interconnection, and all equipment downstream (Provider's side) of the Provider's service entrance section.

In the event that HELCO provides more than one point of electrical service delivery to the Site, then Provider shall (a) have controls and/or operating procedures in place that are acceptable to HELCO to ensure that HELCO's points of delivery are never connected together or electrically paralleled in anyway; and (b) ensure that the System is never connected to an electrical service other than the one specified in this Agreement.

Provider shall have the sole responsibility for obtaining and executing an Interconnection Agreement with HELCO. Provider agrees to furnish, install, operate and maintain its interconnection as required in the HELCO tariff Rule No. 14 Section H entitled "Interconnection of Distributed Generating Facilities Operating in Parallel with the Company's Electric System" ("Rule 14H"), attached hereto as Exhibit "D" and agrees to meet the requirements of Appendix 1 of Rule 14H or receive a waiver thereof. If after exercise of Provider's best efforts to secure an Interconnection Agreement with HELCO, the Provider is unable to secure an Interconnection Agreement with HELCO, not later than September 15, 2014 Provider shall notify DWS in writing specifying the specific deficiencies and/or additional costs associated with any additional equipment or design changes set forth in Exhibit "B", which if remedied, would result in an acceptable Interconnection Agreement. Such notice shall include proposed amendments, if any, to this Agreement, which if executed would allow the execution of an Interconnection Agreement. Within thirty (30) days of receipt of such notification by DWS, DWS may, at DWS' option, either (i) terminate this Agreement immediately and the Parties shall not be obligated to go forward with installation of the System, or (ii) the Parties shall negotiate and execute an amendment to this Agreement.

#### 3.5 System Acceptance Testing.

3.5.1 Provider shall not commence interconnected operation of the System until it has been inspected by an authorized DWS and HELCO representative and written notification is received from DWS and HELCO allowing the System to commence parallel operation with the DWS water system. Provider shall give at least 5 business day's written notice to DWS and HELCO when initial startup is to begin.

3.5.2 Provider shall, prior to commencing parallel operation with the DWS water system, provide documentation acceptable to DWS (including, without limitation, FERC Form 556), that confirms the System has achieved Qualifying Facility (QF) status under 18 CFR, Chapter I, Part 292, Subpart B, including, without limitation, §292.207 of the FERC's regulations, as amended.

3.5.3 If Provider utilize the HELCO System to facilitate start-up of its System, the voltage flicker level shall not exceed HELCO standards.

3.5.4 Provider shall conduct testing of the System ("System Acceptance Testing") prior to the Commercial Operation Date. Provider shall notify DWS not less than three (3) days prior to the anticipated date of System Acceptance Testing. DWS shall have the right, but not the obligation, to be present at and observe the System Acceptance Testing.

3.5.5 If the results of the System Acceptance Testing indicate that the System is capable of generating electricity for commercial use by DWS as designed and the System has been approved for interconnected operation by HELCO, then Provider shall send a written notice to that effect to DWS (a "Completion Notice") accompanied by a copy of the results of the System Acceptance Testing. If the System Acceptance Testing indicates that the System fails to meet the System Test Requirements and DWS provides Provider with a detailed notice of such failure (a "Rejection Notice") within fifteen (15) business days of DWS' receipt of the Completion Notice and System Acceptance Testing data, then Provider shall promptly remedy at Provider's cost the relevant specified failure and conduct new System Acceptance Testing until the System Acceptance Testing indicates that the System meets the System Test Requirements. In each such case, Provider shall send a new Completion Notice to DWS with a copy of the results of the new System Acceptance Testing as provided above and the foregoing procedures shall be repeated until the System functions as designed. At such time, DWS shall issue to Provider a written letter of acceptance within five (5) business days of receipt of the Completion Notice.

### 3.6 Energy Delivery.

#### 3.6.1 Commencement of Energy Delivery.

The date on which the delivery of Energy to the Site commences (the "Commercial Operation Date") shall be the date on which all of the following shall have occurred: (a) Provider shall have provided to DWS a Completion Notice pursuant to Section 3.5.5, (absent Provider's receipt of a timely Rejection Notice or a written letter of acceptance from DWS pursuant to Section 3.5.5), (b) Provider shall have submitted a certificate of an officer of Provider familiar with the Site after due inquiry stating that all permits and licenses required to be obtained under Applicable Law in connection with the operation of the System have been obtained and are in full force and effect, (c) certificates of insurance evidencing coverage required by Section 8.1 and the accompanying Sublease shall have been obtained and submitted to DWS, (d) Provider shall have submitted to DWS copies of the as-built construction drawings, O&M Work manuals and equipment and System warranties, and (e) Provider shall have provided any notices and satisfied any conditions precedent as set forth in the Interconnection Agreement and Standby Agreement. Time is of the essence on this Agreement.

If the Commercial Operation Date does not occur within eighteen (18) months of receipt of Provider's Notice to DWS that all approvals have been obtained for reasons attributable to Provider other than any Provider Termination Event pursuant to Section 10.4, Provider shall pay to DWS, per day, as liquidated damages an amount equal to the product of (i) the positive difference, if any, of the price per kWh for commercially available, HELCO-provided energy in the applicable market minus the kWh Rate of Energy, multiplied by (ii) the number of days remaining in the Term of the Agreement times the expected daily number of kWh of Energy, calculated by dividing the Contract Energy by 365.

$$\begin{aligned} \text{For example: LD} &= \$0.14/\text{kWh} (\$.038 - \$.024 = \$0.14/\text{kWh}) \\ &\times 20,876.71 \text{ kWh/day (7,620 MWh per year/365} = 20.877 \\ &\quad \underline{\text{MWh/day or 20,877 kWh/day}} \\ &= \$2,922.78/\text{day} \end{aligned}$$

### 3.6.2 Continuity of Energy Delivery.

Provider shall deliver from the System to DWS at least 95 percent of the Contract Energy during any rolling 12-month period (Availability Guarantee) unless the failure is caused by the inability of the wind resources to produce the energy or the inability of DWS to accept the energy. To the extent that the energy purchased from Provider falls below the Availability Guarantee Provider shall have sixty (60) calendar days to meet the Availability Guarantee. If on the 61<sup>st</sup> day the Availability Guarantee is not met, then Provider shall be assessed an amount equal to \$400 per day until the Availability Guarantee is met. The payment shall be made at the end of each month during which the Availability Guarantee is not met.

## 4. Operation and Maintenance of System.

### 4.1 O&M Work; Training, SCADA

4.1.1 O&M Work. Provider shall perform the O&M Work to ensure that the System is capable of delivering Energy in accordance with the specifications set forth in Exhibit "B". Provider, at its sole cost and expense, shall provide all spare parts, System operation, repair, monitoring, and maintenance services for the Term, including the monitoring and maintenance of equipment determining the quantity of electricity produced by the System (collectively, the "O&M Work"). Provider shall supply a manual specifically describing scheduled maintenance requirements, troubleshooting, and safety precautions specific to the supplied equipment, operations in emergency conditions and any other pertinent information for DWS personnel. Provider shall document the scheduled maintenance actions and work done on a quarterly basis to DWS. Provider shall also provide one set of as-built digital drawings. DWS recognizes the propriety ownership of Provider and shall not disclose the drawings and related information to unrelated parties, subject however to the limitation set forth in Section 14.18 of this Agreement.

**4.1.2 Training.** Although the System will be owned, operated, and maintained by or for Provider at its own cost and expense, Provider shall supply two (2) sets of Site-specific operation, maintenance, and parts manuals for the System (one set hard copy one set digital copy). DWS acknowledges that Provider's provision of the documents and information detailed in this Section 4.1.2 in no way authorizes DWS or any of its agents to operate, maintain, or in any way interfere with the System in the absence of Providers' prior consent or an emergency which threatens property damage and/or bodily injury. Provider shall conduct initial training to DWS for Provider-installed equipment, so DWS personnel can understand the nuances of the System that may be missed in the operations manuals.

**4.1.3 SCADA.** DWS intends to manage its system to maximize the use of the wind energy production to power the Lālāmilo-Parker pumps. Provider shall own, install and maintain Supervisory Control and Data Acquisition ("SCADA") equipment. Provider shall install the equipment at eighteen (18) sites and enable all wind energy production data be viewed by DWS via 4-20 mA analog signal to the SCADA concentrator unit. Detailed SCADA requirements are provided in Exhibit "E".

The control equipment must be fully compatible with existing DWS Siemens PLCs used throughout the water supply system. As the SCADA equipment becomes fully operational, the Provider will work closely with DWS in managing DWS well operations with the objective of maximizing use of wind-generated energy and minimizing HELCO time-of-use and demand charges.

The SCADA system must include preventative maintenance alerts for the wind generators and overhead power lines. As additional storage or voltage regulation equipment is planned for the generation and distribution System, this equipment must also be included in any control System preventative maintenance plan. Provider shall allow DWS Engineering, Finance, and Management access to the recorded, historic and real-time performance data of the wind farm System supplying power to the Lālāmilo-Parker well system. Provider shall ensure that the connection of the recording and monitoring system does not interfere with or impair DWS's computer and communication networks.

## **4.2 Malfunctions and Emergencies.**

**4.2.1 Notice.** Both DWS and Provider shall notify the other within twenty-four (24) hours following the discovery by it of (a) any material malfunction in the operation of the System or (b) an interruption in the supply of Wind Services. Provider and DWS shall each designate personnel and establish procedures such that each Party may provide notice of such conditions requiring Provider's repair or alteration at all times, twenty-four (24) hours per day, including weekends and holidays. Provider and DWS each shall notify the other Party immediately upon the discovery of an emergency condition in the System.

**4.2.2 Repairs.** On an annual basis, Provider shall provide to the DWS Manager-Chief Engineer a statement or other documentation of a reserve account intended to be used for repair and maintenance of the wind farm equipment. Provider shall commence repairs to any malfunction in the System that reduces the supply of Energy within ten (10) days of such

malfunction and shall proceed with due diligence to restore energy within sixty (60) calendar days (grace period), and must take immediate steps to mobilize personnel to commence repairs after notice or discovery of a condition requiring repair or other corrective action. If an emergency condition exists that affects the health and welfare of people or DWS water service customers, Provider shall promptly dispatch the appropriate personnel immediately upon becoming aware thereof to perform the necessary repairs or corrective action in an expeditious and safe manner. Emergency maintenance personnel representing Provider shall be on-site within twelve (12) hours of the notification to assess the condition and commence corrective actions. Delays due to delivery of factory-produced parts do not constitute an emergency. Provider shall provide an on-island service representative prior to the Commercial Operation Date. For routine and emergency repairs, the Parties shall contact the Persons set forth below:

For Provider:

Richard Horn, Authorized Representative  
Site Constructor's Inc.

Chico, CA 95927

For DWS:

Manager-Chief Engineer  
County of Hawai'i, Department of Water Supply (DWS)  
345 Kekūanaō'a Street, Suite 20  
Hilo, Hawai'i 96720

Fax: 808.961.8657

4.2.3 Battery Back-up. The SCADA system must have a battery back-up or similar system, so that the wind farm and Water SCADA systems are operational for a minimum of 24 hours in the event of a HELCO grid power outage.

#### 4.3 Metering.

4.3.1 Maintenance and Testing. Provider shall install and maintain a utility-grade kWh meter ("Meter") for each pump at the switch gear and at well pump motor for the measurement of Energy provided to DWS at the Site, which shall measure the kWh output of the System to each individual motor on a continuous basis with Meter reading output in 15 minute increments. The monthly meter reading dates shall coincide with the HELCO, monthly reading dates. Provider shall furnish a copy of the Meter's make and model number and all technical specifications and manufacturer's recommendations for accuracy calibrations. Provider shall have the Meter tested as specified in the manufacturer specifications during the System Acceptance Testing period and annually thereafter. DWS shall be allowed to observe the Meter test, and Provider shall provide notice of the testing to DWS at least ten (10) business days prior to the test date. Provider shall provide signed copies of the results of the Meter test to DWS. In addition to the initial, first anniversary and triennial tests, Provider shall test the Meter

as specified by the manufacturer if more frequent intervals are required, and at any reasonable time upon the request of DWS. DWS shall reimburse Provider for the cost of the additional tests requested by DWS, unless such testing demonstrates that the Meter was operating outside of industry standards.

Where the applicable rate schedule or other HELCO requirement and/or agreement requires meter(s) to be installed to record the output of the System generator(s), Provider will provide, at its expense, a dedicated phone line to each such meter and also to the System service entrance section utility meter(s) and/or sub meters if necessary. Each dedicated phone line is to be landed on the HELCO-provided telephone interface module, normally located within two feet of the meter.

4.3.2 DWS Audits and Inspections. DWS shall have the right to audit all such Meter data upon seven (7) calendar-day's notice, and any such audit shall be at DWS' sole cost. DWS shall have the right of access to all meters at reasonable times for the purpose of verifying readings and calibrations.

#### 4.4 Title to System.

Provider, or Provider's permitted assigns, shall at all times retain title to and be the legal and beneficial owner of the System except for those improvements that were on the Site prior to this Agreement and the radio building, constructed for this project including the right to any tax credits available under federal or state law, and the System shall remain the property of Provider or Provider's assigns, unless and until DWS exercises its purchase option pursuant to Section 10.3. Provider shall not transfer title to another Person without prior written notification to DWS and without written DWS approval.

#### 4.5 Outages.

Any battery back-up or similar system, must supply enough power so that the SCADA system is operational for a minimum of 24 hours in the event of a HELCO grid power outage.

4.5.1 Scheduled Outages by DWS. DWS shall be permitted two (2) twenty-four (24) consecutive hour days offline (each a "Scheduled Outage") per calendar year during the Term, during which hours DWS shall not be obligated to accept or pay for Energy. DWS shall notify Provider in writing at least forty-eight (48) hours in advance of the commencement of such Scheduled Outage. For any Schedule Outages or unscheduled outages initiated by DWS, DWS shall be responsible for utility standby energy charges levied by HELCO and Provider shall include such standby energy charges on its invoice to DWS in the next billing period after said outage occurs. Further, during Scheduled Outages exceeding the two (2) day per calendar year limit (for any reason other than a Force Majeure Event) and for all unscheduled outages initiated by DWS (for any reason other than a Force Majeure Event), Provider shall calculate the amount of Energy that would have been delivered to DWS during each hour of such excess Scheduled Outage or unscheduled outages and shall invoice DWS for such amount, which shall be payable in accordance with Section 6.

4.5.2 Outages by the Provider. Provider shall be responsible for all standby energy charges levied by the utility as a result of planned or forced outages not initiated

or caused by DWS. DWS shall not be responsible for any Energy charges from the Provider during any outages not initiated by or caused by DWS.

#### 4.6 Compliance with Utility Specifications.

Notwithstanding any other provision of this Agreement, Provider shall ensure that all Energy generated by the System conforms to applicable utility specifications for energy being generated and delivered to the Site's electric distribution system, which shall include the installation of proper power conditioning and safety equipment, submittal of necessary specifications, coordination of utility testing and verification, and all related costs.

### 5. Purchase of Wind Services.

With respect to the System installed on the Site pursuant to this Agreement:

#### 5.1 Purchase Requirement.

Subject to the provisions of Section 4.5.1 and Section 5.3, for every hour DWS shall be responsible for purchasing the lesser of

- (i) 100% of the Energy generated by the System or
- (ii) DWS's electrical requirements at the Site as close as possible to real-time electrical demand.

The System shall be designed so that the Site will use System-produced power first and utility power second. If the System is unable to function or does not produce enough power to meet the demand, the System shall also be designed to allow utility power to make up the difference. It is critical that the System be designed so that there is no interruption in electrical service to DWS. Power quality shall be better than or equal to utility-provided power.

While the Wind Services are calculated and billed on a per kWh basis (the "kWh Rates") as set forth in Exhibit "C", they represent a package of services as described in the definition herein. The payment for Wind Services is calculated to include all of the defined services in the kWh Rates. Neither DWS nor Provider may claim that by this Agreement, Provider is an electric utility subject to regulation as an electric utility or subject to regulated electricity rates. Provider shall not claim to be providing electric utility services to DWS.

#### 5.2 Purchase Rate.

During the Term, DWS agrees to pay Provider for all Energy delivered to the Delivery Point at the Wind Farm substation and purchased for use as measured by the Meters at the per kilowatt-hour (kWh) rate shown in Exhibit "C". In any hour in which the Energy generated by the System is in excess of the electrical demands at the Site ("Excess Energy" described in 5.3 below), and the Provider has entered into separate arrangements with HELCO whereby Provider is compensated by HELCO for Excess Energy, any resulting revenues to the Provider from the sale of Excess Energy shall be used to offset the monthly Energy charges billed by Provider to DWS pursuant to this Agreement. In the event that the Provider enters into a separate Power Purchase

Agreement to sell excess energy to HELCO, the Provider will immediately initiate an amendment to this agreement such that the offset amount to DWS shall be equal to a negotiated amount of such revenues received by Provider. Provider shall be responsible for all metering necessary to sell Excess Energy to HELCO.

#### 5.3 Direct Sale of Excess Energy to HELCO.

Provider may elect to design the System within the boundaries of the DWS leased property to take advantage a direct negotiated sale of electricity to HELCO by increasing the System size such that its capacity exceeds the average Energy demand of the Site. It shall be Provider's sole responsibility to comply with the Lease and Sublease and rules and regulations pertaining to environmental compliance and power sale arrangements and to enter into separate purchased power agreement(s) with HELCO. DWS agrees that it shall reasonably cooperate with Provider and HELCO in connection with such direct negotiated sale of electricity, including executing interconnection agreements, furnishing such information, giving such consents or certificates and such other matters as Provider or HELCO may reasonably request if in the best interest of DWS, and subject to DWS approval. The election to oversize the System to take advantage of a direct sale contract shall apply only to the initial configuration of the System. After the Commercial Operation Date, any proposed modifications to the System and the applicable percentage revenue offset in favor of DWS, must be mutually agreed to in writing by the Parties. It is understood and agreed that DWS shall have the first priority in purchasing Renewable Energy generated by the System at the Site.

#### 5.4 Demand Savings.

DWS retains 100% of any peak demand savings that are the result of the System.

#### 5.5 Environmental Incentives.

DWS' purchase of Wind Services does not include Environmental Incentives such as Renewable Energy Credits or Greenhouse Gas Credits. The incentives shall be retained and owned by Provider. At Provider' request and expense, DWS shall execute all such documents and instruments reasonably necessary or desirable to effect or evidence Provider' right, title and interest in and to the Environmental Incentives. If the standards used to qualify the Environmental Incentives to which Provider is entitled under this Agreement are changed or modified, DWS shall, at Provider's request and expense, execute all such documents and instruments reasonably necessary to cause the Provider's Environmental Incentives to comply with new standards as changed or modified.

#### 5.6 Tax Benefits.

Provider will at all times retain all tax credits or grants and depreciation associated with the System.

### 6. Billing and Payment.

Billing and payment for the Wind Services sold and purchased under this Agreement and any other amounts due and payable hereunder shall be as follows:

#### 6.1 Payments.

DWS shall pay to Provider for each Monthly Period during the Term within thirty (30) days after receipt of any invoice a payment for the Energy delivered by the System during each such Monthly Period equal to the product of (a) Monthly Production for the System for the relevant month multiplied by (b) the relevant kWh Rate for Energy relating to the System, which payment shall be made by check or by wire transfer of immediately available funds to Provider or its designated payee, as set forth in Section 14. Notwithstanding the above, billing cycle should conform to HELCO's electrical billing cycle.

#### 6.2 Invoice Errors.

Within thirty (30) days after receipt of any invoice, DWS may provide written notice to Provider of any alleged error therein. DWS shall pay all undisputed amounts, including the undisputed portion of any invoice, in accordance with Section 6.1 by check or by wire transfer of immediately available funds to Provider or its designated payee, as set forth in Section 14. If Provider notifies DWS in writing within thirty (30) days of receipt of such notice that Provider disagrees with the allegation of error in the invoice, the Parties shall meet, by telephone conference call or otherwise, within ten (10) days of DWS' response for the purpose of attempting to resolve the dispute. If Provider and DWS are unable to resolve the dispute within thirty (30) days after such initial meeting, such dispute shall be submitted for an alternative dispute resolution process. The arbitration shall take place within the State of Hawai'i, using an administrator with an established reputation, its arbitrators located within the State and having technical expertise in the matter, and selected by mutual agreement in accordance with the Commercial Arbitration Rules. The decision of the arbitrator in the matter shall be final and binding upon Provider and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction. Provider agrees that the arbitrator shall have the power to award damages, injunctive relief and reasonable attorneys' fees and expenses to either Provider or DWS in such arbitration; provided that this arbitration provision does not prevent either Provider or DWS from seeking interim injunctive relief from a court in order to preserve the status quo.

#### 6.3 Late Payments.

All payments hereunder shall be made without set-off or deduction except as provided herein. Any payment not made within the time limits specified in Section 6.1 shall bear interest from the date on which such payment was required to have been made through and including the date such payment is actually received by the Provider. Such interest shall accrue at the maximum interest rate permitted by Applicable Law. All payments made under this Section 6 shall be non-refundable, be made free and clear of any tax, levy, assessment, duties or other charges.

### 7. General Covenants.

#### 7.1 Covenants of Provider.

As a material inducement to DWS' execution and delivery of this Agreement, Provider covenants and agrees to the following:

7.1.1 System Condition. Provider shall take all actions reasonably necessary to ensure that the System is capable of providing Wind Services at a continuous rate at the designed capacity.

**7.1.2 Permits and Approvals.** While providing Wind Services, Provider shall obtain and maintain all permits, licenses, and inspections from relevant Governmental Authorities, utility personnel, and other agreements and consents required to be obtained and maintained by Provider and to enable Provider to perform such work. Provider shall deliver copies of all Permits obtained pursuant to this Section 7.1.2 to DWS.

**7.1.3 Health and Safety.** Provider shall take all reasonably necessary safety precautions in providing the Wind Services and shall comply in all material respects with all Applicable Laws pertaining to the safety of persons and real and personal property. Provider shall immediately report to DWS any deaths, lost time injury (exceeding 90 days), or property damage to DWS' property which occur on the Site.

**7.1.4 Removal of Liens.** Provider shall not directly or indirectly cause, create, incur, assume or suffer to exist any mortgage, pledge, lien (including mechanics', labor or materialman's lien), charge, security interest, encumbrance or claim of any nature ("Liens") on or with respect to the Site or any interest therein; provided that this Section 7.1.4 shall not limit Liens on the System in connection with any financing of the System. Provider shall also pay promptly before a fine or penalty may attach to the areas of the Site any taxes, charges or fees of whatever type of any relevant Governmental Authority relating to any work performed hereunder by Provider or its agents and subcontractors on the Site. If Provider breaches its obligations under this Section 7.1.4, it shall (i) immediately notify DWS in writing, (ii) promptly cause such Lien to be discharged and released of record without cost to DWS, and (iii) defend and indemnify DWS against all costs and expenses (including reasonable attorneys' fees and court costs at trial and on appeal) incurred in discharging and releasing such Lien.

**7.1.5 Provider Records.** Provider shall keep complete and accurate records of its operations hereunder and shall maintain such data as may be necessary to determine with reasonable accuracy any item relevant to this Agreement. DWS shall have the right to examine all such records insofar as may be necessary for the purpose of ascertaining the reasonableness and accuracy of any statements of costs relating to transactions hereunder.

**7.1.6 Contract/Insurance Certificates.**

- (i) **Compliance with Law.** As a prerequisite to execute this Agreement, throughout this contract and as a requirement for payment, Provider must furnish proof of compliance with the following:
- a. Chapter 237, tax clearance;
  - b. Chapter 383, unemployment insurance;
  - c. Chapter 386, workers' compensation;
  - d. Chapter 392, temporary disability insurance;
  - e. Chapter 393, prepaid health care; and
  - f. One of the following:

- o Be incorporated or organized under the laws of the State (hereinafter referred to as a "Hawai'i business"); or
- o Be registered to do business in the State (hereinafter referred to as a "compliant non-Hawai'i business").

Acceptable verification is through Hawai'i Compliance Express (HCE). Vendors wishing to do business with DWS must register in HCE and be in compliance. HCE is a one-stop online program where vendors verify and manage their compliance. Once a vendor is registered, HCE provides proof of compliance/compliance documentation.

- (ii) Insurance Certificates. Provider shall provide all insurance certificates described in Section 8 before a notice to proceed is issued by DWS.

**7.1.7 No Infringement.** The System and Provider's services hereunder, including the Installation Work, Wind Services, and O&M Work, shall not infringe any third party's intellectual property or other proprietary rights.

**7.1.8 Property Damage.** Subject to Sections 3.2, 7.1.3, 7.2.3, 9.3 and 10.4, if property damage to the existing water system, overhead power lines, buildings or other above- or below-ground infrastructure at the Site has occurred during Installation Work or O&M Work, and a dispute as to the responsibility of the cost of any damage related repairs arises among Provider and any subcontractor at the Site, Provider shall notify any contractor and DWS in writing within thirty (30) days of the occurrence of such damage that Provider disagrees with the allocation of responsibility of the cost of such repairs and Provider shall attempt to meet any contractor, by telephone conference call or otherwise, within ten (10) days of any contractor's response for the purpose of attempting to resolve the dispute. If Provider and any contractor are unable to resolve the dispute within thirty (30) days after such initial meeting, such dispute shall be submitted for an alternative dispute resolution process. The arbitration shall take place within the State of Hawai'i, using an administrator with an established reputation, its arbitrators located within the State and having technical expertise in the matter, and selected by mutual agreement in accordance with the Commercial Arbitration Rules. The decision of the arbitrator in the matter shall be final and binding upon Provider and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction. Provider agrees that the arbitrator shall have the power to award damages, injunctive relief and reasonable attorneys' fees and expenses to either Provider or any contractor in such arbitration; provided that this arbitration provision does not prevent either Provider or any contractor from seeking interim injunctive relief from a court in order to preserve the status quo.

**7.1.9 Security.** <sup>Provider</sup> DWS shall provide and take reasonable measures for security of the System, as installed by the Provider.

*AK*  
11/21/2013

## **7.2 Covenants of DWS.**

As a material inducement to Provider's execution of this Agreement, DWS covenants and agrees as follows:

7.2.1 **Notice of Damage.** DWS shall promptly notify Provider of any matters it is aware of pertaining to any damage to or loss of the use of the System or that could reasonably be expected to adversely affect the System.

7.2.2 **Access to Premises.** DWS shall provide Provider with access to the Premises as reasonably necessary to allow Provider to perform the Installation Work, O&M Work, and System removal, including ingress and egress rights to the area of the Site for Provider and its employees, contractors and subcontractors and access to electrical panels and conduits to interconnect or disconnect the System with the electrical wiring in the area of the Site. All employees, contractors and subcontractors and all work on the area of the Site must be cleared by DWS before any work proceeds. DWS and its authorized representatives shall at all times have access to and the right to observe the Installation Work, O&M Work or System removal but shall not interfere with or handle any Provider equipment or the System without written authorization from Provider.

7.2.3 **Actions to Prevent Injury.** In the event of a malfunction or emergency, that creates an imminent risk of damage or injury to person or property, the parties hereto shall comply with HELCO rule 14H and all applicable laws, rules and regulations. Nothing in this section detracts from the Provider's obligation to repair and take all action necessary to prevent injury or repair the System.

## **8. Insurance Requirements.**

Provider shall procure and maintain at all times during the Term, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work by Provider or Provider's agents, representatives, employees or subcontractors.

With the exception of Workers' Compensation and Employer's Liability insurance, DWS, its officers, officials, employees, and volunteers shall be added as additional insured with respect to the work contracted for herein, and Provider shall submit proof of the insurance coverage(s) by providing to DWS a certificate of insurance prior to the commencement of the work.

The insurance policies required herein shall not be cancelled, limited in scope of coverage, or not renewed by Provider on the applicable policies during the Term, provided however, should any policy required herein be canceled and not immediately replaced, DWS, in addition to other remedies, reserves the right to procure the canceled insurance and deduct the cost thereof from any money due to Provider.

### **8.1 Minimum Insurance Coverage Requirements.**

Unless otherwise approved by DWS, the policy or policies of insurance maintained by Provider shall provide the following minimum limit(s) and coverage(s) as specified herein, be placed with

an insurance carrier authorized to do business in the State of Hawai'i and rated A- VII by A.M. Best, and shall name DWS as an additional insured. The minimum liability limits of liability may be provided by a combination of primary and Umbrella or Excess Liability policies.

8.1.1 Commercial General Liability. Commercial General Liability by a carrier authorized to do business in the State of Hawai'i on an "occurrence" form, naming DWS as an additional insured, to include coverage for:

- (i) Premises Operations,
- (ii) Independent Contractors,
- (iii) Products and Completed Operations,
- (iv) Broad Form Property Damage including completed operations,
- (v) Blanket Contractual Liability,
- (vi) Personal Injury,
- (vii) Employees named as Additional Insured,
- (viii) Explosion, Collapse and Underground Property Damage, and
- (ix) Severability of Interest.

The minimum acceptable limits of liability for such coverage shall be:

- (i) Bodily Injury and Property Damage Combined Single Limit:  
\$2,000,000 per occurrence;  
\$2,000,000 general aggregate applying per project.
- (ii) Personal & Advertisers Injury:  
\$2,000,000 limit per person or organization;  
\$2,000,000 aggregate.
- (iii) Products/Completed Operations:  
\$2,000,000 per occurrence;  
\$2,000,000 aggregate.

Products and Completed Operations coverage protecting Provider and subcontractors must be carried for one (1) year after substantial completion of the System. Evidence of this insurance will continue to be provided on an annual basis to DWS.

8.1.2 Automobile Liability. Provider shall provide Automobile Liability coverage from a carrier admitted to do business in the State of Hawai'i for all owned, non-owned, and hired autos, naming DWS as an additional insured. The coverage maintained will be in compliance with Hawai'i law. The minimum acceptable limits are:

(i) Bodily Injury Combined Single Limit:

\$1,000,000 per person;

\$1,000,000 per occurrence.

(ii) Property Damage Combined Single Limit:

\$1,000,000 per accident.

8.1.3 Workers' Compensation and Employer's Liability. Provider shall, at no cost to DWS, procure and maintain, in full force and effect, at all times during the Term: Worker's Compensation, Temporary Disability, and other similar insurance that is required by state or federal laws. Coverage will be secured from a carrier admitted to do business in the State of Hawai'i:

(i) Self-insurance is permitted subject to submission of a copy of the appropriate governmental authorization and qualification by Provider and any subcontractors.

(ii) The minimum limits of liability to be maintained are as follows and Provider shall request a waiver of subrogation in favor of DWS:

a. Coverage A: State of Hawai'i Workers' Compensation Law: Statutory

b. Coverage B: Employers Liability:

(i) Bodily Injury from each accident:

\$1,000,000

(ii) Bodily Injury from disease per employee:

\$1,000,000

(iii) Bodily Injury from disease aggregate:

\$ 1,000,000

8.1.4 **Builder's Risk Insurance.** Provider shall procure Builder's Risk coverage on an "all risk" basis on a completed value basis for the System as follows:

- (i) **New Buildings.** Provider shall procure Builder's Risk coverage, for the full replacement value of the insurable improvements on the Site from a carrier admitted to do business in the State of Hawai'i. The policy shall insure all work, labor and materials furnished by Provider and Provider' subcontractors against loss occasioned by fire, lightning, windstorm, including hurricane, flood, collapse, explosion and other perils covered by the standard Extended Coverage Endorsement, theft, vandalism and malicious mischief. The amount of insurance for the peril of flood may be less than the full replacement cost and subject to a sub-limit. The policy shall also include coverage for debris removal and reasonable compensation for architects' and engineers' services and expenses required as a result of an insured loss.
- (ii) **Building Renovation Contract.** Provider shall procure Builder's Risk insurance in the amount equivalent to fair market value of any building renovated by Provider with DWS named as an additional insured and loss payee. . The policy shall insure all work, labor and materials furnished by Provider and Provider' subcontractors against loss occasioned by fire, lightning, windstorm, including hurricane, flood, collapse, explosion and other perils covered by the standard Extended Coverage Endorsement, theft, vandalism and malicious mischief. The amount of insurance for the peril of flood may be less than the full replacement cost and subject to a sub-limit. The policy shall also include coverage for debris removal and reasonable compensation for architects' and engineers' services and expenses required as a result of an insured loss.
- (iii) **Site Development.** Provider are generally not required to obtain Builder's Risk Insurance for Site development contracts. However, if any building or structure is constructed or renovated on Site development contracts, either Sections 8.1.4(i) or (ii) shall apply.

## 8.2 **Other Insurance Provisions.**

8.2.1 For any claims related to this Agreement, where Provider is solely responsible for the claim, Provider's insurance coverage shall be primary insurance with respect to DWS, its officers, officials, employees, and volunteers. Any insurance or self-insurance

maintained by DWS, its officers, officials, employees, and volunteers shall be excess of Provider's insurance. In the event there are any deductibles associated with the above coverage, the Provider will be solely responsible therefore.

8.2.2 The submission of insurance documentation to and acceptance by DWS which does not meet the requirements herein shall not be considered a waiver of Provider's obligations or DWS's rights under the terms of this Agreement.

## 9. Force Majeure Events.

### 9.1 Definition of Force Majeure Event.

For this Agreement, an act or event is a "Force Majeure Event" if such act or event is beyond the reasonable control, and not the result of the fault or negligence, of the affected Party and such Party had been unable to overcome such act or event with the exercise of due diligence (including the expenditure of reasonable sums). Subject to the foregoing conditions, "Force Majeure Event" shall include the following acts or events:

- (i) natural phenomena, such as storms, hurricanes, floods, lightning and earthquakes;
- (ii) explosions or fires arising from lightning or other causes unrelated to the acts or omissions of the Party seeking to be excused from performance;
- (iii) acts of war or public disorders, civil disturbances, riots, insurrection, sabotage, epidemic, terrorist acts, or rebellion;
- (iv) strikes or labor disputes;
- (v) action by a Governmental Authority, including a moratorium on any activities related to this Agreement; and
- (vi) the impossibility for one of the Parties, despite its reasonable efforts, to obtain, in a timely manner, any approval by a Governmental Authority necessary to enable the affected Party to fulfill its obligations in accordance with this Agreement, provided that the delay or non-obtaining of such approval by a Governmental Authority is not attributable to the Party in question and that such Party has exercised its reasonable efforts to obtain such Permit.

### 9.2 Procedure for Claiming Force Majeure.

Any Party claiming Force Majeure shall advise the other Party as soon as possible of the occurrence of the Force Majeure Event and shall provide the other Party with the basis of the claim, in writing, within ten (10) days of the occurrence of the Force Majeure Event. The Parties

shall make reasonable efforts to avoid the adverse impacts of a Force Majeure Event and to resolve the event or occurrence once it has occurred in order to resume performance.

### 9.3 Termination in Consequence of Force Majeure Event.

If a Force Majeure Event shall have occurred that has affected Provider's performance of its obligations hereunder and that has continued for a period of one hundred twenty (120) consecutive days in a twelve-month (12) period or one hundred eighty (180) days in the aggregate in a twelve-month (12) period, then DWS shall be entitled to terminate this Agreement upon thirty (30) days' prior written notice to Provider. If at the end of such thirty (30) day period such Force Majeure Event shall still continue, this Agreement shall automatically terminate. Upon such termination for a Force Majeure Event, neither Party shall have any liability to the other except for the payment of any outstanding invoice, due to the performance of any actions incurred prior to the date of termination. By mutual agreement of the Parties, the System damaged or destroyed by a Force Majeure Event may be replaced by Provider within the time frames set forth above and subsequent to replacement and upon commencement of operation of the replacement System all terms and conditions of this Agreement will remain in effect, including the remaining Term. If DWS does not exercise such option to purchase the System as described in section 10.3, Provider shall remove all of its tangible property comprising the System from the Site by a mutually convenient date but in no case later than one hundred eighty (180) days after the "Termination Date."

## 10. Term; DWS Options; Termination.

### 10.1 Multi-term Contract.

Pursuant to state law, HRS §103D-315 and Hawai'i Administrative Rule ("HAR") §3-122-149, and unless otherwise provided for by law, payment and performance obligations for fiscal periods succeeding the first fiscal period shall be subject to availability and appropriation of funds therefore.

### 10.2 Term.

The term of this Agreement shall commence on the Commercial Operation Date and shall expire on the date (the "Expiration Date") that is twenty (20) years after the Commercial Operation Date (the "Term"), unless and until terminated earlier with respect to the Site pursuant to Sections 9, 10.3, 10.4, 10.5 or 12 (the date of any such termination, the "Termination Date"). Upon prior written notice to Provider at least one-hundred eighty (180) days prior to the Expiration Date, DWS shall have the option to renew the term of this Agreement for one (1) additional five (5)-year period.

### 10.3 DWS Purchase Options.

DWS shall have the option to purchase the System as of the Expiration Date. DWS may exercise this option by providing written notice of intent, not less than one hundred eighty (180) days before the expiration date. DWS shall pay the Provider "Fair Market Value", which shall be due and payable as of the expiration date.

The Parties shall first attempt to agree on Fair Market Value within thirty (30) days after Provider receives DWS notice of exercise of the option, failing which, the Fair Market Value of the System shall be the value determined by a nationally recognized independent appraiser with experience and expertise in the wind energy generation industry to value such equipment and business. Such appraiser shall act reasonably and in good faith to determine the Fair Market Value and shall set forth such determination in a written opinion delivered to the Parties. The valuation shall be the fair market value as a going concern or a liquidation value, whichever valuation shall command a higher price. In the event it is valued as a going concern, the appraiser shall select the highest valuation reached in utilizing the asset based approach, the income approach or the market approach. In conducting the valuation as a going concern, the appraiser shall assume the continuation of the renewable energy service agreement to and until its natural termination date, i.e. full term of twenty (20) years. The valuation made by the appraiser shall be binding on the Parties in the absence of fraud or manifest error. The costs of the appraisal shall be borne by the Parties equally. If the Parties are unable to agree on the selection of an appraiser, such appraiser shall be jointly selected by the appraiser firm proposed by DWS and the appraiser firm proposed by Provider.

Upon receipt by Provider of payment of the Fair Market Value, prior to the expiration date, title to the System as well as Environmental Incentives shall transfer to DWS as-is, where-is as of the expiration date. To the extent transferable, the remaining period on System warranties, if any, will be transferred from Provider to DWS at DWS's sole expense.

If DWS does not exercise such option to purchase the System, Provider shall remove all of its tangible property comprising the System from the Site by a mutually convenient date but in no case later than one hundred eighty (180) days after the Expiration Date, and DWS's Site shall be returned as much as possible to its original condition, except for items negotiated in advance with DWS. Provider shall be required to conduct a Phase I Evaluation and Phase II Remediation (if needed) Environmental Site Assessment to determine the extent of environmental damage and clean up, thereby providing documentation of leaving the Site in neat and clean order. Provide shall complete all Remediation work at its expense within said one hundred eighty (180) days after the Expiration Date.

#### **10.4 Provider Termination.**

Provider shall have the right to terminate the Agreement at any time on thirty (30) days written notice to DWS, without further liability, if any of the following occur:

- (i) upon occurrence of a Force Majeure, pursuant to Section 9;
- (ii) Provider' inability, after diligent efforts, to obtain or maintain required Permits from any Governmental Authority or HELCO necessary for the installation or operation of the System; or
- (iii) If, through no fault of Provider and for other than a Force Majeure Event, the System is permanently shut down due to renovation, damage, destruction, or closure of the Site, and DWS and Provider cannot agree upon an alternate location for the System; or

- (iv) Upon an Event of Default by DWS (each, a “Provider Termination Event”). In the event of termination by Provider, Provider shall be responsible for repairing any damage to the Site arising from activities conducted by Provider pursuant to the Agreement.

Provider shall remove all of its tangible property comprising the System from the Site by a mutually convenient date but in no case later than one hundred eighty (180) days after the “Termination Date.”

#### 10.5 DWS Termination.

10.5.1 DWS Termination for Cause. DWS shall have the right to terminate this Agreement, in whole or in part, at any time on thirty (30) days written notice to Provider, without further liability, if any of the following events occur:

- (i) If a Force Majeure Event, has occurred and continues to occur for one hundred twenty (120) days during a twelve-month period or more consecutive days or one hundred eighty days (180) in the aggregate during a twelve-month period;
- (ii) If Provider files or is adjudged bankrupt or fails to demonstrate the ability to perform under the Agreement following the filing or adjudication of a bankruptcy proceeding;
- (iii) Upon an Event of Default by Provider (as defined in Section 11.2);
- (iv) Provider’ inability or failure to successfully complete construction and commence commercial operation of the System at the Site as contemplated by this Agreement.

Such notice of termination shall inform Provider that upon the expiration of the notice period, Provider is to stop or terminate all or a specified portion of the work or performance under this Agreement. After receipt of a notice of termination, and except as otherwise directed by DWS, Provider shall stop work under this Agreement on the date and to the extent specified in the notice of termination. If DWS elects to terminate this Agreement pursuant to this Section 10.5.1, DWS shall have the option to purchase the System for fair market value as defined in Section 10.3. If DWS does not exercise that option Provider shall remove all of its tangible property comprising the System from the Site by a mutually convenient date but in no case later than one hundred eighty (180) days after the “Termination Date.”

## 11. Defaults.

### 11.1 DWS Default.

The occurrence at any time of any of the following events shall constitute a “DWS Default”:

11.1.1 Failure to Pay. Unless due to a Force Majeure Event excused by Section 9, the failure of DWS to pay on any three separate occasions during the Term any amounts owing to Provider on or before the day following the date on which such amounts are due and payable under the terms of this Agreement and DWS' failure to cure each such failure within fifteen (15) days after DWS receives written notice of each such failure from Provider;

11.1.2 Failure to Perform Other Obligations. Unless due to a Force Majeure Event excused by Section 9, the failure of DWS to perform or cause to be performed any other obligation required to be performed by DWS under this Agreement, or the failure of any representation and warranty set forth herein to be true and correct as and when made; provided, however, that if such failure by its nature can be cured, then DWS shall have a period of thirty (30) business days after receipt of written notice from Provider of such failure to DWS to cure the same and a DWS Default shall not be deemed to exist during such period; provided, further, that if DWS commences to cure such failure during such period and is diligently and in good faith attempting to effect such cure, said period shall be extended for one-hundred twenty (120) additional days; provided, finally, that in any event if such failure shall continue for at least five (5) days and shall result in lost revenue to Provider, Provider shall be entitled to reasonably estimate the amount of revenue that would have been obtained and shall invoice DWS therefore;

11.1.3 Lease Default. A material default by DWS under the Lease or Sublease occurs and is not cured as provided for therein.

#### 11.2 Provider' Default.

The occurrence at any time of the following event shall constitute a "Provider Default":

11.2.1 Failure to Perform Obligations. Unless due to a Force Majeure Event excused by Section 9, the failure of Provider to perform or cause to be performed any obligation required to be performed by Provider under this Agreement or the failure of any representation and warranty set forth herein to be true and correct as and when made; provided, however, that if such failure by its nature can be cured, then Provider shall have a period of thirty (30) business days after receipt of written notice from DWS of such failure to Provider to cure the same and a Provider Default shall not be deemed to exist during such period; provided, further, that if Provider commences to cure such failure during such period and is diligently and in good faith attempting to effect such cure, said period shall be extended for one-hundred twenty (120) additional days;

#### 11.2.2 Bankruptcy, Etc.

- (i) Provider admits in writing its inability to pay its debts generally as they become due;
- (ii) Provider files a petition or answer seeking reorganization or arrangement under the federal bankruptcy laws or any other applicable law or statute of the United States of America or any state, district or territory thereof;
- (iii) Provider makes an assignment for the benefit of creditors;

- (iv) Provider consents to the appointment of a receiver of the whole or any substantial part of its assets;
- (v) Provider has a petition in bankruptcy filed against it, and such petition is not dismissed within ninety (90) days after the filing thereof;
- (vi) a court of competent jurisdiction enters an order, judgment, or decree appointing a receiver of the whole or any substantial part of Provider' assets, and such order, judgment or decree is not vacated or set aside or stayed within ninety (90) days from the date of entry thereof; or
- (vii) under the provisions of any other law for the relief or aid of debtors, any court of competent jurisdiction shall assume custody or control of the whole or any substantial part of Provider' assets and such custody or control is not terminated or stayed within ninety (90) days from the date of assumption of such custody or control.

11.2.3 Lease Default. A material default by Provider under the Sublease occurs; and is not cured as provided for therein.

12. Remedies Following Default.

12.1 General.

Any dispute arising under or out of this Agreement is subject to HRS, 103D, Part IV Legal and Contractual Remedies and/or Chapter 3-126, Hawai'i Administrative Rules, as amended.

12.2 Disputes.

12.2.1 All controversies between DWS and Provider which arise under the Agreement, or are related to the obligations of either party under this Agreement and which are not resolved by mutual agreement or as otherwise provided in this agreement shall be decided by the Procurement Officer in writing, within ninety (90) calendar days after a written request by the Provider for a final decision concerning the controversy; provided that if the Procurement Officer does not issue a written decision within ninety (90) calendar days after written request for a final decision, or within such longer period as may be agreed upon by the Parties, then the Provider may proceed as if an adverse decision had been reached.

12.2.2 The Procurement Officer shall immediately furnish a copy of the decision to the Provider by certified mail, return receipt requested, or by any other method that provides evidence of receipt.

12.2.3 Any such decision shall be final and conclusive, unless fraudulent, or unless the Provider brings an action seeking judicial review of the decision in the Circuit Court of the Third Circuit, State of Hawai'i, County of Hawai'i, within the six months from the date of the receipt of the decision.

12.2.4 The Provider shall comply with the decision of the Procurement Officer and proceed diligently with the performance of this Agreement pending final resolution by the Circuit Court of the Third Circuit, State of Hawai'i, County of Hawai'i, of any controversy arising under, or by virtue of this Agreement, except where there has been a material breach of contract by DWS; provided that in any event the Provider shall proceed diligently with the performance of this Agreement where the Chief Procurement Officer has made a written determination that work under this Contract is essential to the public health and safety.

**12.3 DWS' Remedies Upon Occurrence of a Provider Default.**

DWS may terminate this agreement and purchase the System for fair market value as described in Section 10.3, in which case, title to the System shall transfer to DWS or DWS may require Provider to remove the System, in which case, title shall not transfer to DWS and Provider shall have the obligation to enter on the site and remove the System.

**12.4 Provider's Remedies Upon Occurrence of a DWS Default.**

If a DWS Default as described in Section 11.1 has occurred and is continuing, and if DWS fails to correct or cure the conditions causing such DWS Default within ten (10) days after the date on which Provider gives DWS written notice of Provider' intent to terminate this Agreement as a result of such DWS Default, then this Agreement shall terminate and be of no further force or effect as of the last day of such ten (10) day period and Provider shall have the right to (a) cause DWS to pay the applicable Fair Market Value of the System, in which case title to the System shall transfer to DWS upon such payment or (b) remove the System. If DWS does not pay the Fair Market Value in full as required hereunder, title to the System shall not transfer to DWS, and Provider, without limitation of the other rights and remedies available to it hereunder, shall have the right, but not the obligation, to enter onto the Site and repossess the System. If a DWS Default as described in Section 11.1 has occurred and if such DWS Default is not waived by Provider in writing within ten (10) days after the date on which Provider gives DWS written notice of Provider' intent to terminate this Agreement as a result of such DWS Default, then this Agreement shall terminate and be of no further force or effect as of the last day of such ten (10) day period and DWS shall pay the reasonable expenses of Provider incurred in connection with removing the System.

**12.5 No Special, Indirect or Consequential Damages.**

Nothing in this Agreement is intended to cause either Party to be, and neither Party shall be, liable to the other Party for any lost business, lost profits or revenues from others or other special, indirect or consequential damages, all claims for which are hereby irrevocably waived by DWS and Provider. Notwithstanding the foregoing, none of the payments for Energy or any other amount specified as payable by the Parties under the terms of this Agreement upon the termination of this Agreement shall be deemed consequential damages.

**12.6 Effect of Termination of Agreement.**

Upon the Termination Date or the Expiration Date, as applicable, any amounts then owing by a Party to the other Party shall become immediately due and payable and the future obligations of DWS and Provider under this Agreement shall be terminated (other than the indemnity and responsibility obligations set forth in Section 13). Such termination shall not relieve either Party from obligations accrued prior to the Termination Date or Expiration Date.

**12.7 Limitation on Remedies.**

Except as represented herein and as represented in the Lease and Sublease of the properties described in Exhibit "A" and the appurtenances thereto, Provider are not relying upon any statement or representation or warranty of DWS regarding the site as to the fitness of the site for any particular use by Provider or any other matter. Except as stated herein and as stated in the subject lease and sublease referenced above, DWS hereby expressly disclaims and Provider hereby waives all implied warranties, including, without limitation, any warranty of merchantability or warranty of fitness for a particular use or purpose. For breach of any provision for which an express remedy or measure of damages is provided, such express remedy or measure of damages shall be the sole and exclusive remedy, the obligor's liability shall be limited as set forth in such provision and all other remedies or damages at law or in equity are waived. If no remedy or measure of damages is expressly provided in the Agreement or in a transaction, the obligor's liability shall be limited to direct actual damages only; such direct actual damages shall be the sole and exclusive remedy; and all other remedies or damages at law or in equity are waived. Unless expressly provided in the Agreement, neither Party shall be liable for consequential, incidental, punitive, exemplary or indirect damages, lost profits, or lost energy savings or other business interruption damages, by statute, in tort or in contract or otherwise.

**13. Indemnification and Responsibility as Permitted by Law.**

**13.1 Indemnification by Parties.**

**13.1.1 Indemnification by Provider.** Provider shall indemnify, defend and hold harmless DWS, its permitted successors and assigns and its officers, employees, agents, and representatives from all suits, actions, claims, damages, and judgments of any character arising solely from Provider's performance of the Agreement that are brought against DWS by any Person, on account of any injury or death to any Person or any loss or damage to property, due to the negligent acts or omissions by the Provider or any of its officers, employees, subcontractors, assignees, or representatives. If DWS and Provider are found to be joint tortfeasors with respect to any such injuries or damages, Provider's obligations to indemnify DWS shall extend only to Provider's pro rata share of negligence as determined in accordance with Applicable Law.

**13.1.2 Notice of Claims to Provider.**

DWS shall deliver to Provider a notice describing the facts underlying its indemnification claim and the amount of such claim (each such notice a "Claim Notice"). Such Claim Notice shall be delivered promptly to Provider after DWS receives notice that an action at law or a suit in equity has commenced; provided, however, that failure to deliver the Claim Notice as aforesaid shall not relieve Provider of its obligations under this Section 13.1, except to the extent that Provider has been prejudiced by such failure.

**13.1.3 Defense of Action by Provider.**

If requested by DWS, Provider shall assume on behalf of DWS, and conduct with due diligence and in good faith, the defense of DWS with counsel reasonably satisfactory to DWS; provided, however, that if Provider is a defendant in any such action and DWS believes that there may be

legal defenses available to it that are inconsistent with those available to Provider, DWS shall have the right to select separate counsel to participate in its defense of such action at Provider's expense. If any claim, action, proceeding or investigation arises as to which the indemnity provided for in this Section 13.1 applies, and Provider fails to assume the defense of such claim, action, proceeding or investigation after having been requested to do so by DWS, then DWS may, at Provider's expense, contest or, with the prior written consent of Provider, which consent shall not be unreasonably withheld, settle such claim, action, proceeding or investigation. All costs and expenses incurred by DWS in connection with any such contest or settlement shall be paid upon demand by Provider.

**13.2 DWS' Responsibility as Permitted by Applicable Law.**

DWS shall be responsible, to the extent permitted by Applicable Law, for damage or injury caused by DWS' officers and employees in the scope of their employment provided that DWS' liability for such damage or injury has been determined by a court or agreed to by DWS. DWS shall pay for such damage and injury provided that funds are appropriated and allotted for that purpose.

**13.3 Survival of Provisions.**

The provisions of this Section 13 shall survive the expiration or termination of this Agreement.

**14. Miscellaneous Provisions.**

**14.1 Notices.**

All notices, communications and waivers under this Agreement shall be in writing and shall be (a) delivered in person or (b) mailed, postage prepaid, either by registered or certified mail, return receipt requested or (c) sent by reputable overnight express courier, addressed in each case to the addresses set forth below, or to any other address either of the parties to this Agreement shall designate in a written notice to the other Party:

If to Provider:

**Richard Horn, Authorized Representative  
Site Constructor's Inc.**

**Chico, CA 95927**

If to DWS:

**Manager-Chief Engineer  
Department of Water Supply**

**Fax: 808-961-8657**

All notices, communications and waivers under this Agreement, if applicable, to any Person who has or will make a loan to Provider to help finance the System shall be to the name and address

specified in a notice from Provider to DWS. All notices sent pursuant to the terms of this Section 14.1 shall be deemed received:

- (i) if personally delivered, then on the date of delivery,
- (ii) if sent by reputable overnight, express courier, then on the next business day immediately following the day sent, or
- (iii) if sent by registered or certified mail, then on the earlier of the third (3rd) business day following the day sent or when actually received.

14.2 Authority.

14.2.1 Provider Representations. Provider hereby represent and warrant that:

- (i) They are corporations duly organized, validly existing and in good standing under the laws of the state of its formation and has all requisite corporate power and authority to enter into this Agreement, to perform its obligations hereunder and to consummate the transactions contemplated hereby;
- (ii) The execution and delivery of this Agreement and the performance of its obligations hereunder have been duly authorized by all necessary corporate action;
- (iii) This Agreement is a legal, valid and binding obligation of Provider enforceable against Provider in accordance with its terms, subject to the qualification, however, that the enforcement of the rights and remedies herein is subject to
  - a. bankruptcy and other similar laws of general application affecting rights and remedies of creditors and
  - b. the application of general principles of equity (regardless of whether considered in a proceeding in equity or at law);
- (iv) To the best knowledge of Provider, as of the date of execution hereof, no approval of a Governmental Authority (other than any approvals that have been previously obtained or disclosed in writing to DWS) is required in connection with the due authorization, execution and delivery of this Agreement by Provider or the performance by Provider of its obligations hereunder which Provider has reason to believe that it will be unable to obtain in due course on or before the date required for Provider to perform such obligations;
- (v) As of the date of execution hereof, Provider

- a. has taken all required actions, if any, necessary to comply with the Public Utility Holding Company Act of 2005, as amended,
  - b. is not intending to dedicate its property to public use,
  - c. is not “public utility” (as defined in Chapter 269-1 HRS, as amended) and
  - d. is not electric utility subject to rate regulation by any Governmental Authority.
- (vi) Neither the execution and delivery of this Agreement by Provider nor compliance by Provider with any of the terms and provisions hereof
- a. conflicts with, breaches or contravenes the provisions of the articles of incorporation of Provider or any contractual obligation of Provider or
  - b. results in a condition or event that constitutes (or that, upon notice or lapse of time or both, would constitute) an event of default under any material contractual obligation of Provider.

14.2.2 DWS Representations. DWS hereby represents and warrants that:

- (i) It is a legally and regularly created, established, organized and existing governmental department of the State of Hawai‘i the laws of State of Hawai‘i, duly existing under the laws of State of Hawai‘i and has all requisite power and authority to enter into this Agreement, to perform its obligations hereunder and to consummate the transactions contemplated hereby;
- (ii) The execution and delivery of this Agreement and the performance of its obligations hereunder have been duly authorized by all necessary action;
- (iii) This Agreement is a legal, valid and binding obligation of DWS enforceable against DWS in accordance with its terms, subject to the qualification, however, that the enforcement of the rights and remedies herein is subject to bankruptcy, reorganization, insolvency, moratorium or other laws of equitable principles affecting the enforcement of creditors’ rights;
- (iv) No approval by a Governmental Authority (other than any approvals which have been previously obtained or disclosed in writing to Provider) is required in connection with the due authorization, execution and delivery of this Agreement by DWS or the performance by DWS of its obligations hereunder which DWS has reason to believe that it will be unable to obtain in due course;

- (v) Neither the execution and delivery of this Agreement by DWS nor compliance by DWS with any of the terms and provisions of this Agreement
  - a. conflicts with, breaches or contravenes any contractual obligation of DWS, or
  - b. results in a condition or event that constitutes (or that, upon notice or lapse of time or both, would constitute) an event of default under any contractual obligation of DWS; and
- (vi) DWS has not entered into any contracts or agreements with any other person regarding the provision of the services contemplated to be provided by Provider under this Agreement.

#### 14.3 Successors and Assigns.

The rights, powers and remedies of each Party shall inure to the benefit of such party and its successors and permitted assigns.

14.3.1 Assignment to Special Purpose Entity. DWS hereby acknowledges that Provider may desire to assign all of Provider's interest and obligations to a "Special Purpose Entity" composed of Provider's Chief Executive Officer and sole Shareholder, Richard Horn and business associate entities of Mr. Horn's choosing. Richard Horn to be an owner thereof and serve in a management capacity thereof. As part of this Assignment Site Constructors, Inc. is to be retained by this "Special Purpose Entity" as the general contractor for the development of the Wind Energy Project. Prior to any assignment, Provider agree that they shall obtain the prior written consent of DWS, such consent not to be unreasonably withheld conditioned or delayed.

Provider and DWS shall not assign this Agreement without the prior written consent of the other Party, such consent not to be unreasonably withheld, conditioned or delayed, and any such attempted assignment shall be void *ab initio*.

#### 14.4 Entire Agreement.

This Agreement (including all exhibits attached hereto) and the Sublease represent the entire agreement between the parties to this Agreement with respect to the subject matter hereof and thereof and supersede all prior and contemporaneous oral and prior written agreements. In the event of any conflict between the provisions of this Agreement and the provisions of the Lease, the provisions of this Agreement shall govern and control.

#### 14.5 Amendments to Agreement.

This Agreement shall not be amended, modified or supplemented without the written agreement of Provider and DWS at the time of such amendment, modification or supplement. However, this Agreement shall, at all times, be subject to such changes or modifications by the PUC as it may, from time to time, direct in the exercise of its jurisdiction.

#### 14.6 Waivers; Approvals.

No waiver of any provision of this Agreement shall be effective unless set forth in writing signed by the party making such waiver, and any such waiver shall be effective only to the extent it is set forth in such writing. Failure by a Party to insist upon full and prompt performance of any provision of this Agreement, or to take action in the event of any breach of any such provisions or upon the occurrence of any Provider Default or DWS Default, as applicable, shall not constitute a waiver of any rights of such Party, and, subject to the notice requirements of this Agreement, such Party may at any time after such failure exercise all rights and remedies available under this Agreement with respect to such Provider Default or DWS Default. Receipt by a Party of any instrument or document shall not constitute or be deemed to be an approval of such instrument or document. Any approvals required under this Agreement must be in writing, signed by the Party whose approval is being sought.

#### 14.7 Partial Invalidity.

If any provision of this Agreement is deemed to be invalid by reason of the operation of Applicable Law, Provider and DWS shall negotiate an equitable adjustment in the provisions of the same in order to effect, to the maximum extent permitted by law, the purpose of this Agreement (and in the event that Provider and DWS cannot agree then such provisions shall be severed from this Agreement) and the validity and enforceability of the remaining provisions, or portions or applications thereof, shall not be affected by such adjustment and shall remain in full force and effect.

#### 14.8 Execution in Counterparts.

This Agreement may be executed in counterparts, and all said counterparts when taken together shall constitute one and the same Agreement.

#### 14.9 Governing Law; Jurisdiction; Forum.

This Agreement shall be governed by and construed in accordance with the laws of the State of Hawai'i. DWS and Provider irrevocably agree that any action, suit or proceeding by or between Provider and DWS may be brought in the Third Circuit Court of the State of Hawai'i, has subject matter jurisdiction over the dispute and waives any objection that DWS and Provider may now or hereafter have regarding the choice of forum whether on personal jurisdiction, venue, *forum non conveniens* or on any other ground. Nothing in this Agreement shall affect the right to service of process in any other manner permitted by law. DWS and Provider further agree that final judgment against it in any action or proceeding shall be conclusive and may be enforced in any other jurisdiction within or outside the State of Hawai'i by suit on the judgment, a certified or exemplified copy of which shall be conclusive evidence of the fact and the amount of such judgment.

#### 14.10 No Third Party Rights.

This Agreement is only for the benefit of the Parties to this Agreement, their successors and permitted assigns and Persons expressly benefited by the indemnity provisions of this Agreement. No other Person (including, without limitation, tenants of the Site) shall be entitled to rely on any matter set forth in, or shall have any rights on account of the performance or non-performance by any Party of its obligations under, this Agreement.

#### 14.11 Treatment of Additional Amounts.

The Parties acknowledge and agree that any amounts payable by one Party to the other as a result of the payer's default shall constitute liquidated damages and not penalties. The Parties further acknowledge that in each case (a) the amount of loss or damages likely to be incurred is incapable or is difficult to precisely estimate, (b) the amounts specified hereunder bear a reasonable proportion and are not plainly or grossly disproportionate to the probable loss likely to be incurred by DWS or Provider as the case may be and (c) the Parties are sophisticated business Parties and have been represented by sophisticated and able legal and financial counsel and negotiated this Agreement at arm's length.

**14.12 No Agency.**

This Agreement is not intended, and shall not be construed, to create any association, joint venture, agency relationship or partnership between the Parties or to impose any such obligation or liability upon either Party. Neither Party shall have any right, power or authority to enter into any agreement or undertaking for, or act as or be an agent or representative of, or otherwise bind, the other Party.

**14.13 No Public Utility.**

Nothing contained in this Agreement shall be construed as an intent by Provider to dedicate its property to public use or subject itself to regulation as a "public utility" (as defined in Chapter 269-1 HRS, as amended) or any other Applicable Law.

**14.14 Cooperation with Financing.**

DWS acknowledges that Provider may be financing the Wind Services and the System and DWS agrees that it shall cooperate with Provider and its financing parties in connection with such financing by:

- (i) the furnishing of such information,
- (ii) the giving of such certificates, and
- (iii) providing such opinions of counsel and other matters as Provider and its financing parties may reasonably request; provided, that the foregoing undertaking shall not obligate DWS to materially change any rights or benefits, or materially increase any burdens, liabilities or obligations of DWS, under this Agreement (except for providing notices and additional cure periods to the financing parties with respect to Events of Defaults with respect to Provider as a financing party may reasonably request).

**14.15 Setoff.**

Except as otherwise set forth herein, each Party reserves to itself all rights, set-offs, counterclaims and other remedies and/or defenses to which it is or may be entitled, arising from or out of this Agreement or arising out of any other contractual arrangements between the Parties. All outstanding obligations to make, and rights to receive, payment under this Agreement may be offset against each other.

**14.16 Precedence.**

In the event of any conflict or contradiction between the requirements of the General Terms and Conditions and these provisions, these provisions shall have precedence over the General Terms and Conditions.

**14.17 Timely Submission of all Certificates.**

All required certificates shall be applied for and submitted to DWS as soon as possible. If a valid certificate is not submitted on a timely basis for award of a contract, an offer otherwise responsive and responsible may not receive the award.

**14.18 Proprietary Information.**

Any information deemed proprietary in nature should be clearly marked "proprietary" by Provider. Failure to designate proprietary information will subject Provider's proposal to full disclosure and public inspection. Provider understand that DWS is a government entity and cannot guarantee the public non-disclosure of any information provided to it if such information is otherwise required by law to be disclosed.

**14.19 Hazardous Materials.**

Hazardous Materials shall include, without limitation, substances defined or classified as "hazardous substances", "hazardous waste", or "toxic substances" under federal, state, or local law, statute, regulation, or ordinance (collectively "Hazardous Materials"). Provider shall fully comply with all Applicable Laws in effect or which shall come into effect during the Term regarding the generation, use, storage, handling, transportation, and disposal of Hazardous Materials. Asbestos and lead may be present in the project's buildings. Provider is responsible for determining what actions, if any, will be required with respect to asbestos or any other hazardous materials to complete the work under this agreement; provided however that Provider's responsibilities and liabilities under this Section 14.19 shall be limited to only those areas of the premises where the System is installed. Provider shall not be responsible for hazardous materials discovered in the course of the System construction, but unrelated to such construction, DWS shall be responsible to abate such hazardous material, which shall be conducted in a prompt and efficient matter to reduce impact on the construction schedule. Claims for additional work and compensation will not be allowed on account of hazardous materials so long as DWS complies with this provision.

Provider shall exercise due diligence in identifying any unsafe working conditions and/or the presence of hazardous materials and shall set forth its findings with respect to Hazardous Materials and procedures for abating or containing such conditions and materials.

**14.20 Laws and Regulations.**

Provider shall keep itself fully informed of all Applicable Laws, governmental general and development plans, setback limitations, rights of way, and all changes thereto, which in any manner affect the Agreement and all performance thereof, including but not limited to:

- (i) All Sections of the local County Charter and Code, including provisions relating to Building Energy Efficiency Standards.

- (ii) Chapter 103, HRS, as amended, relating to expenditure of public money.
- (iii) Chapter 103D, HRS, as amended, relating to the public procurement code.
- (iv) Chapter 104, HRS, as amended, relating to wages and hours of employees on public works.
- (v) Chapter 321, HRS, as amended, relating to Health Department.
- (vi) Chapter 378, HRS, as amended, relating to fair employment practices.
- (vii) Chapter 376, HRS, as amended, relating to industrial safety.
- (viii) Chapter 386, HRS, as amended, relating to workers' compensation.
- (ix) Chapter 444, HRS, as amended, relating to contractors for construction work. Provider shall use properly licensed contractors for all construction work as required by law.

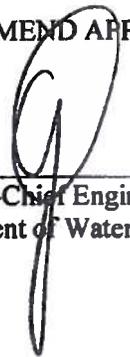
Provider shall comply with all such present Applicable Laws, design standards and criteria, governmental general and development plans, setback limitations, rights-of-way, including the giving of all notices necessary and incident to proper and lawful prosecution of the work, and all changes thereto. If any discrepancy or inconsistency is discovered between the contract and any such Applicable Law, design standard, design criterion, governmental general and development plans, setback limitation, or rights-of-way, Provider shall forthwith report the same in writing to DWS.

**14.21 Requisite Standards.**

The System shall be installed with due care by qualified employees, representatives, agents or contractors of Provider and shall conform to applicable industry standards and practices, Applicable Law, and the Lease and Sublease. If Provider fails to meet any of the foregoing standards, Provider shall perform at its own cost, and without additional charge to DWS, the professional services necessary to correct errors and omissions, including any necessary replacement of the System, that are caused by Provider' failure to comply with the above standard so that the System is capable of providing Wind Services at a reasonably continuous rate.

IN WITNESS WHEREOF, the party of the first part has caused this contract to be executed in its behalf by its Chairman, at Hilo, Hawai'i, County and State of Hawai'i, and the party of the second part has caused this contract to be executed at 345 Kekuanaoa St., Ste. 20, Hilo, Hawaii on the day and year first above written.

RECOMMEND APPROVAL:

  
 \_\_\_\_\_  
 Manager-Chief Engineer  
 Department of Water Supply

WATER BOARD OF THE  
 COUNTY OF HAWAI'I

(SEAL)

By   
 \_\_\_\_\_  
 Print Name: Arthur K. Taniguchi  
 Its Chairperson

APPROVED AS TO FORM AND  
LEGALITY:

  
Assistant Corporation Counsel  
County of Hawai'i  
Date 11/7/2013

SITE CONSTRUCTORS INC  
(SEAL)

By   
Print Name: Richard Horn  
Its President

**ASSIGNMENT OF INTEREST IN RENEWABLE ENERGY SERVICE AND POWER PURCHASE AGREEMENT AND RELATED CONTRACT RIGHTS**

Comes now SITE CONSTRUCTORS INC., a California corporation, and assigns its interest as "Provider" in the Renewable Energy Service and Power Purchase Agreement with the County of Hawai'i, Department of Water Supply by and through its Water Board.

This assignment is to LALAMILO WIND COMPANY, LLC, a Hawaii limited liability company. Pursuant to this assignment, SITE CONSTRUCTORS, INC., transfers all of its rights, title and interest as Provider in the aforesaid Renewable Energy Service and Power Purchase Agreement save and except the fact that SITE CONSTRUCTORS INC., shall remain as general contractor for the construction of all improvements and installation of all equipment as specified in said Renewable Energy Service and Power Purchase Agreement and its Exhibits.

This assignment is being made in pursuant to Section 14.3.1 of said described Renewable Energy Service and Power Purchase Agreement.

This document may be executed by the respective parties to this agreement in counterparts, each of which shall be deemed an original. All of such counterparts together shall constitute one and the same document, binding all the parties hereto notwithstanding that all parties are not signatory to the same original or counterparts.

The submission of a signature page transmitted by facsimile or PDF sent via e-mail shall be considered to be an "original" signature page for purposes of this agreement so long as the original signature page is subsequently transmitted by mail or by other delivery service and the original signature page is substituted for the facsimile or electronically transmitted signature page in the original and duplicate originals of this agreement.

Dated: 12/19/13

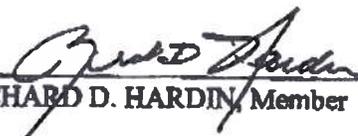
  
SITE CONSTRUCTORS, INC., a  
California Corporation by RICHARD  
HORN, President

This assignment is hereby accepted in all respects.

Dated: 12/19/13

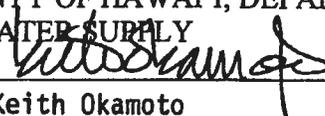
  
LALAMILO WIND COMPANY, LLC, by  
Richard A. Horn, Trustee of the Richard A.  
Horn Trust, Member

Dated: 12/19/13

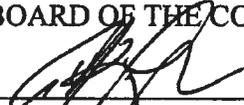
  
RICHARD D. HARDIN, Member

The above assignment of SITE CONSTRUCTORS, INC. to LALAMILO WIND COMPANY, LLC the "Special Purpose Entity" as described in Section 14.3.1 of the Renewable Energy Service and Power Purchase Agreement is hereby consented to.

Dated: 12/23/2013

COUNTY OF HAWAI'I, DEPARTMENT  
OF WATER SUPPLY  
By:   
Keith Okamoto  
Deputy

Dated: 12/23/2013

WATER BOARD OF THE COUNTY OF  
HAWAI'I  
By:   
Arthur K. Taniguchi  
Chairperson

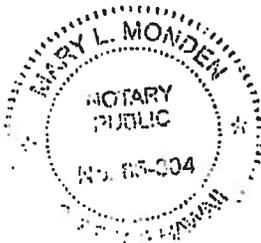
**APPROVED AS TO  
FORM AND LEGALITY:**

**ASST**   
DEPUTY CORPORATION COUNSEL  
COUNTY OF HAWAI'I

Date: 12/19/2013

STATE OF HAWAII )  
 ) SS.  
 CITY AND COUNTY OF HONOLULU )

On this 19th day of December, 2013, before me personally appeared  
Richard Horn, to me known to be the person described in and who executed  
 the foregoing instrument and acknowledged that he executed the same  
 as his's free act and deed.



*[Handwritten Signature]*

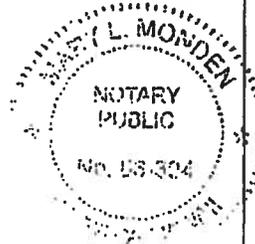
Notary Public, State of Hawai'i

Mary L. Monden

Print name

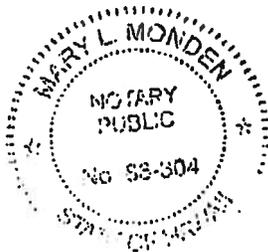
My commission expires: June 29, 2014

NOTARY CERTIFICATION	
Doc. Date: <u>Undated at time of notarization</u>	No. of Pages: <u>7</u>
Notary Name: <u>Mary L. Monden</u>	<u>First</u> Circuit
Doc. Description: <u>Assignment of Interest in Renewable Energy Service and Power Purchase Agreement and Related Contract Rights</u>	
	
Notary Signature	Date <u>12.19.2013</u>



STATE OF HAWAII )  
 ) SS.  
 CITY AND COUNTY OF HONOLULU )

On this 19th day of December, 20 13, before me personally appeared  
Richard A. Horn, to me known to be the person described in and who executed  
 the foregoing instrument and acknowledged that he executed the same  
 as his's free act and deed.



*[Handwritten Signature]*

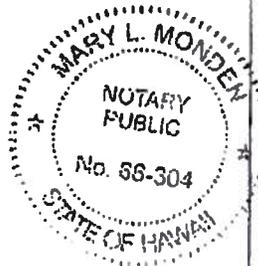
Notary Public, State of Hawai'i

Mary L. Monden

Print name

My commission expires: June 29, 2014

NOTARY CERTIFICATION	
Doc. Date: <u>Undated at time of notarization</u>	No. of Pages: <u>7</u>
Notary Name: <u>Mary L. Monden</u>	<u>First</u> Circuit
Doc. Description: <u>Assignment of Interest in Renewable Energy Service and Power Purchase Agreement and Related Contract Rights</u>	
<i>[Handwritten Signature]</i>	<u>12.19.2013</u>
Notary Signature	Date



STATE OF HAWAI'I )  
 ) SS.  
CITY AND COUNTY OF HONOLULU )

On this 19th day of December, 20 13, before me personally appeared Richard D. Hardin, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his's free act and deed.



*[Handwritten Signature]*

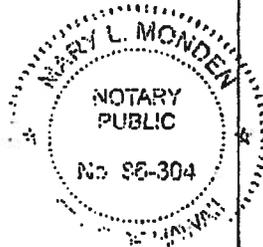
Notary Public, State of Hawai'i

Mary L. Monden

Print name

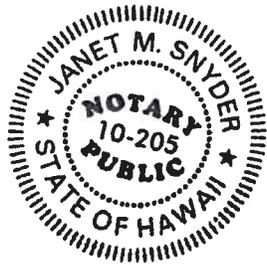
My commission expires: June 29, 2014

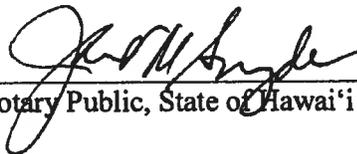
NOTARY CERTIFICATION	
Doc. Date: <u>Undated at time of notarization</u>	No. of Pages: <u>7</u>
Notary Name: <u>Mary L. Monden</u>	<u>First</u> Circuit
Doc. Description: <u>Assignment of Interest in Renewable Energy Service and Power Purchase Agreement and Related Contract Rights</u>	
<i>[Handwritten Signature]</i>	<u>12.19.2013</u>
Notary Signature	Date



STATE OF HAWAI'I )  
 )  
COUNTY OF HAWAI'I ) SS:

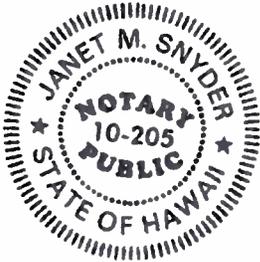
On this 23rd day of December, 2013, before me appeared Arthur K. Taniguchi, to me personally known, who, being by me duly sworn, did say that he is the Chairperson of the **Water Board of the County of Hawai'i** and that the seal affixed to the foregoing instrument is the seal of the Department of Water Supply of the County of Hawai'i, and that the instrument was signed and sealed in behalf of the Water Board by authority of said Water Board, and said Arthur K. Taniguchi acknowledged the instrument to be the free act and deed of the Water Board.



  
\_\_\_\_\_  
Notary Public, State of Hawai'i  
Janet M. Snyder  
\_\_\_\_\_  
Print name

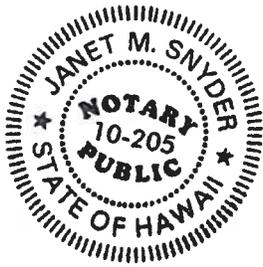
My commission expires: 07/18/2014

NOTARY CERTIFICATION	
Doc. Date: <u>12/23/2013</u>	No. of Pages: <u>7</u>
Notary Name: <u>Janet M. Snyder</u>	Third Circuit
Doc. Description: <u>Assignment of Interest in Renewable Energy Service and Power Purchase Agreement and Related Contract Rights</u>	
 Notary Signature	<u>12/23/2013</u> Date



STATE OF HAWAI'I )  
 ) SS:  
COUNTY OF HAWAI'I)

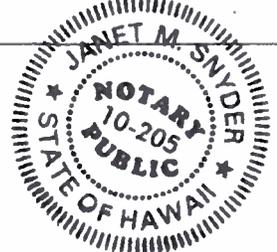
On this 23rd day of December, 2013, before me appeared Keith Okamoto, to me personally known, who, being by me duly sworn, did say that the person is the Deputy of the Department of Water Supply of the County of Hawai'i, and that the seal affixed to the foregoing instrument is the seal of the Department, and that the instrument was signed and sealed in behalf of said agency by authority of the Water Board of the County of Hawai'i, and said Keith Okamoto acknowledged the instrument to be the free act and deed of the Department.



  
\_\_\_\_\_  
Notary Public – Janet M. Snyder  
State of Hawai'i

My commission expires: 07/18/2014

<b><u>NOTARY CERTIFICATION</u></b>	
Document Date: <u>12/23/2014</u>	No. of Pages: <u>7</u>
Notary Name: <u>Janet M. Snyder</u>	Third Circuit
Document Description: <u>Assignment of Interest in Renewable</u>	
<u>Energy Service and Power Purchase Agreement and Related Contract</u>	
Rights	
 _____ Notary Signature	<u>12/23/2013</u> Date

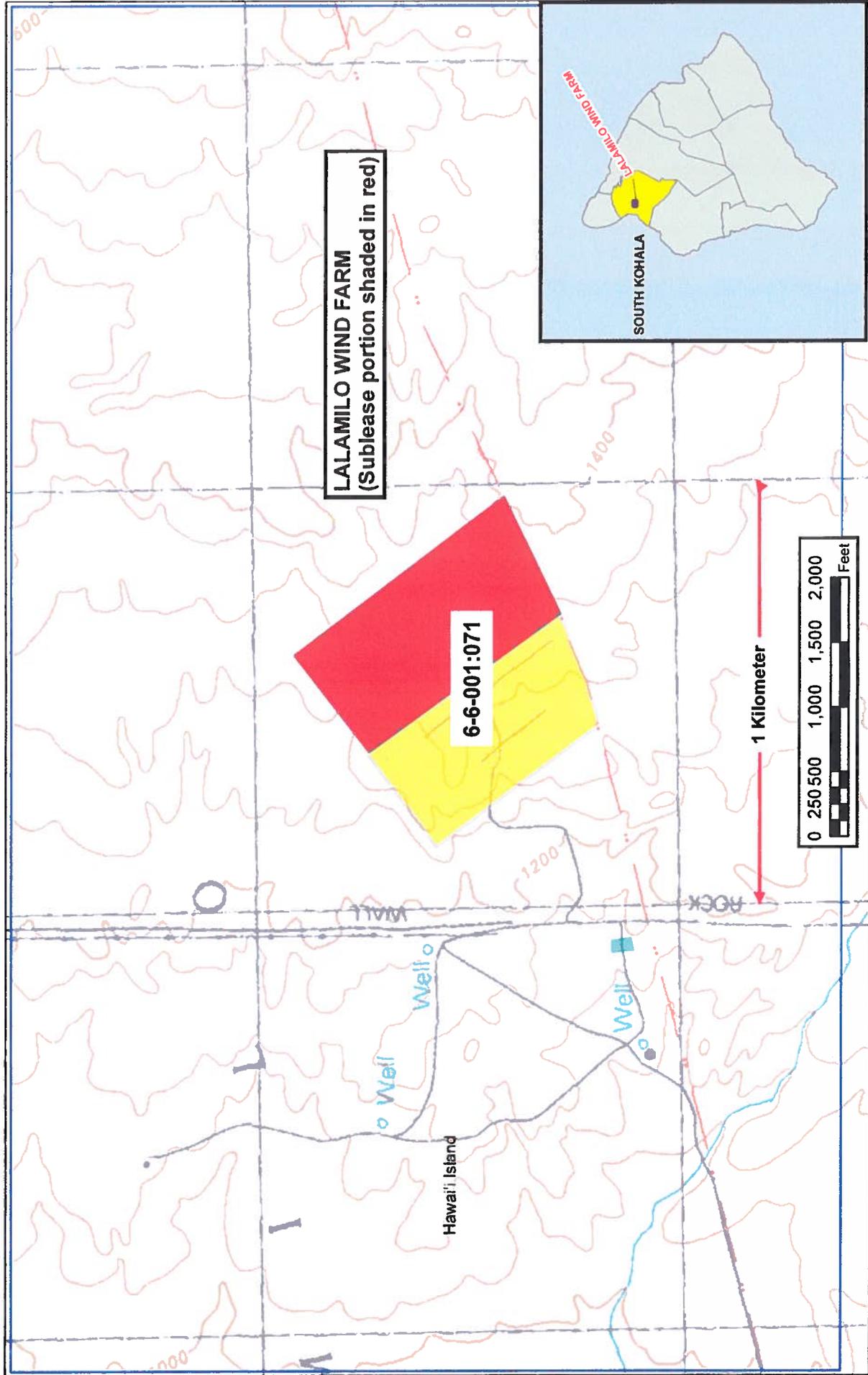


Site Description

Exhibit "B"

**Site Description:**

Northeast Portion Lease Parcel identified by Tax Map Key: 3rd/ 6-6-001:071 being approximately 44.5 acres of the COUNTY MASTER LEASE consisting of 78.081 acres of Government lands of Lalamilo, being an ili of the land of Waimea situated at Lalamilo, South Kohala, Hawaii



Master Lease

Exhibit "C"

FEDERAL AVIATION NOTICE  
CRITERIA TOOL

Exhibit "D"



### Notice Criteria Tool

The requirements for filing with the Federal Aviation Administration for proposed structures vary based on a number of factors: height, proximity to an airport, location and frequencies emitted from the structure, etc. For more details please reference [14 CFR 77.14](#)

- your structure will exceed 200ft above ground level
- your structure will be in proximity to an airport and will exceed the slope ratio
- your structure involves construction of a traverseway (i.e. highway, railroad, waterway etc.) and once adjusted upward with the appropriate vertical distance would exceed a standard of 77.9(a) or (b)
- your structure will emit frequencies, and does not meet the conditions of the
- your structure will be in an instrument approach area and might exceed part 77 Subpart C
- your proposed structure will be in proximity to a navigation facility and may impact the assurance of navigation signal reception
- your structure will be on an airport or heliport
- filing has been requested by the FAA

If you require additional information regarding the filing requirements for your structure please identify and contact the appropriate FAA representative using the [FAA Regional Office List](#) as 'Responsible' for Off Airport construction or contact the [FAA Regional Office List](#) for On Airport construction

The tool below will assist in applying Part 77 Notice Criteria

Latitude:  Deg  M  S

Longitude:  Deg  M  S

Horizontal Datum:

Site Elevation (SE):  (nearest foot)

Structure Height (AGL):  (nearest foot)

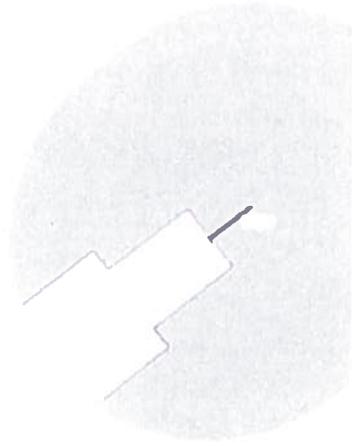
Traverseway:

(Additional height is added to certain structures under 77.9(c))

Is structure on airport:  No  Yes

### Results

You do not exceed Notice Criteria



Subleasehold Mortgage, Security Agreement  
and Financing Statement

Exhibit "E"

