

State of Hawaii
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Forestry and Wildlife
Honolulu, Hawaii 96813

April 25, 2014

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

Land Board Members:

SUBJECT: REQUEST FOR DELEGATION OF AUTHORITY TO THE CHAIRPERSON TO NEGOTIATE, APPROVE, EXECUTE, AMEND, AND EXTEND MEMORANDA OF UNDERSTANDING (MOU) WITH KAWAIOLOA WIND, LLC (KAWAIOLOA WIND) AND KAHUKU WIND POWER, LLC (KAHUKU WIND) FOR THE DIVISION OF FORESTRY AND WILDLIFE TO IMPLEMENT CONSERVATION ACTIONS, INCLUDING BUT NOT LIMITED TO SEABIRD MONITORING, PREDATOR CONTROL, AND AUDITORY SURVEYS ON THE ISLAND OF KAUA'I

AND

REQUEST APPROVAL OF DECLARATION OF EXEMPTION TO CHAPTER 343, HRS ENVIRONMENTAL COMPLIANCE REQUIREMENTS FOR THE ACTIVITIES FUNDED BY THE SUBJECT MOU AGREEMENTS.

This submittal requests the Board to authorize the Chairperson to sign Memoranda of Understanding (Agreements) between the Department of Land and Natural Resources (DLNR) and Kawaioloa Wind, LLC (Kawaioloa Wind) and Kahuku Wind Power, LLC (Kahuku Wind) for the purpose of The Division of Forestry and Wildlife (DOFAW) receiving funding from Kawaioloa Wind and Kahuku Wind in order to conduct endangered seabird mitigation work over the course of the 2014-2015 seabird seasons on the island of Kaua'i as obligated under two state-approved habitat conservation plans (HCPs). Additionally, DOFAW requests approval of a declaration of exemption to Chapter 343, HRS requirements for the activities funded under these MOUs.

BACKGROUND:

This work will be conducted as a compliance effort pursuant to two Board of Land and Natural Resources (BLNR) approved Incidental Take Licenses (ITLs) and accompanying HCPs: Kawaioloa Wind's Kawaioloa Wind Power Habitat Conservation Plan (approved by BLNR on November 10, 2011) and Kahuku Wind's Kahuku Wind Power Habitat Conservation Plan (approved by BLNR on May 11, 2010). Obligations set forth in the HCPs and State ITLs

provide that Kawaihoa Wind and Kahuku Wind fund seabird colony-based protection and seabird monitoring on the island of Kaua'i as mitigation for incidental take of the endangered Hawaiian petrel or 'ua'u (*Pterodroma sandwichensis*) and Newell's shearwater or 'a'o (*Puffinus auricularis newelli*).

DISCUSSION:

DOFAW, Kawaihoa Wind, and Kahuku Wind have prepared two draft MOUs (Exhibit A). These MOUs will allow DLNR-DOFAW, Kawaihoa Wind, and Kahuku Wind to enter into mutually beneficial agreements for conservation measures for our endangered seabirds on the island of Kaua'i.

CHAPTER 343 – ENVIRONMENTAL ASSESSMENT:

The MOUs are mutually beneficial agreements between DLNR, Kawaihoa Wind, and Kahuku Wind for conservation measures for our endangered seabirds. These are activities which are exempt from the requirements for the preparation of an environmental assessment in accordance with the requirements of Chapter 343, HRS, and Chapter 11-200, Hawaii Administrative Rules, under the following exemptions:

Exemption Class: DLNR, Division of Forestry and Wildlife, Class 5

Exempt Item Description: Game and non-game wildlife surveys, inventory studies, new transect lines, photographing, recording, sampling, collection and captive propagation (involves walking, driving, and flying in the field (helicopters, light aircraft), use of nets and firearms, temporary traps including snares, mist nets, corral traps, drop door traps or leg hold traps.

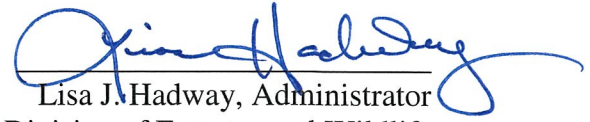
Exempt Item Description: Wildlife management actions including predator control, insect control, snail control, non-native bird control, controlled grazing or burning as a management tool and use of toxicants or herbicides. All use of chemicals follow label instructions or restrictions.

RECOMMENDATIONS:

That the Board:


1. Authorize the Chairperson to negotiate and sign MOUs between the DLNR-DOFAW, Kawaihoa Wind, and Kahuku Wind for the purpose of conducting conservation measures on endangered seabirds on the island of Kaua'i, pursuant to the terms in Exhibit A, subject to review and approval by the Office of the Attorney General.
2. Approve a declaration of exemption to Chapter 343, HRS requirements for these MOUs.

Respectfully submitted,



Lisa J. Hadway, Administrator
Division of Forestry and Wildlife

APPROVED FOR SUBMITTAL:



William J. Aila, Jr., Chairperson
Board of Land and Natural Resources

Exhibit A: DLNR-DOFAW, Kawailoa Wind, and Kahuku Wind MOUs

MEMORANDUM OF UNDERSTANDING

BETWEEN

KAHUKU WIND POWER, LLC

AND

**THE STATE OF HAWAI‘I
Department of Land and Natural Resources
Division of Forestry and Wildlife**

(Predator Control within Newell’s Shearwater Colonies on the Island of Kaua‘i – Seabird Mitigation Obligations under the Kahuku Wind Power Habitat Conservation Plan)

1. Preface.

This Memorandum of Understanding (“MOU”) is made on April ____, 2014 by and between Kahuku Wind Power, LLC (hereinafter referred to as “Kahuku Wind”) and The State of Hawai‘i, Department of Land and Natural Resources, Division of Forestry and Wildlife (“DOFAW”).

WHEREAS, on May 27, 2010 the Board of Land and Natural Resources (“BLNR”) approved Kahuku Wind’s Kahuku Wind Power Habitat Conservation Plan (the “HCP”) and issued to Kahuku Wind a State Incidental Take License (“ITL”) pursuant to Hawai‘i Revised Statute Chapter 195D, authorizing the incidental take of the following Covered Species: Newell’s Shearwater (*Puffinus auricularis newelli*), Hawaiian Petrel (*Pterodroma sandwichensis*), Hawaiian Duck (*Anas wyvilliana*), Hawaiian Stilt (*Himantopus mexicanus knudseni*), Hawaiian Coot (*Fulica alai*), Hawaiian Moorhen (*Gallinula chloropus sandvicensis*), Hawaiian Hoary Bat (*Lasiurus cinereus semotus*), and Hawaiian Owl (*Asio flammeus sandwichensis*);

WHEREAS, the HCP and State ITL provide that Kahuku Wind is to fund certain seabird colony-based protection on Kaua‘i;

WHEREAS, DOFAW and Kahuku Wind have identified unprotected seabird colonies on the Island of Kaua‘i that will benefit from colony-based management and predator control actions;

WHEREAS, Kahuku Wind and DOFAW, by mutual agreement, desire to establish a MOU pursuant to which Kahuku Wind and DOFAW will collaborate on efforts to protect endangered seabird populations on Kaua‘i; DOFAW will provide staff to conduct seabird colony-based monitoring and predator control over the course of the 2014-2015 seabird seasons; and Kahuku Wind will purchase directly all necessary equipment deemed appropriate and provide DOFAW with staff funds necessary;

NOW, THEREFORE, Kahuku Wind and DOFAW mutually agree to the following:

2. Purpose.

The purpose of this Agreement is to establish a MOU whereby:

- Kahuku Wind will adhere to the *Scope of Work for Predator Control and Monitoring of Newell’s Shearwater Colonies on Kaua‘i: Implementation of Kahuku Wind Power and*

Kawailoa Wind Power Habitat Conservation Plan Seabird Mitigation Actions
(hereinafter referred to as "Scope of Work");

- DOFAW will implement certain activities as part of the Scope of Work; and
- Kahuku Wind will provide the funds to DOFAW necessary to implement such activities.

This MOU does not negate or affect any other agreements in effect between Kahuku Wind and DOFAW. The attached Scope of Work may be updated by agreement from both parties in order to maintain the purpose and intent of this MOU, in concurrence with the U.S. Fish and Wildlife Service, Pacific Islands Fish and Wildlife Office ("USFWS PIFWO").

3. Responsibilities.

DOFAW:

- Will implement the Scope of Work (Attachment 1). This Scope of Work covers activities during calendar years 2014-2015. This Scope of Work has been reviewed by DOFAW, Kahuku Wind, and the USFWS PIFWO.
- Will begin implementation of the Scope of Work by April, 2014 or as soon as this MOU is executed.
- Will report to Kahuku Wind and USFWS PIFWO as specified in the Scope of Work attached to this Agreement.
- Will deposit checks from Kahuku Wind, described below, in the State of Hawai'i Endangered Species Trust Fund, and ensure that such deposits are specifically designated for use by DOFAW to implement the attached Scope of Work and any subsequent Updated Scopes of Work.
- Will maintain an ongoing accounting of the funds spent implementing the attached Scope of Work including any expenditure reports and will provide these to Kahuku Wind upon request.

Kahuku Wind:

- Will implement the Scope of Work (Attachment 1).
- Will within 30 days of the execution of this MOU and receipt of a list specifying equipment and services needed for DOFAW, purchase such equipment and services (to the extent they are available from the manufacturer) as detailed in the attached Scope of Work.
- Will, within 60 days of the execution of this MOU, deliver a check to DOFAW in the amounts agreed upon in the attached Scope of Work, which shall constitute funds necessary to conduct the 2014 actions.

4. Implementation

The parties agree that this MOU constitutes a commitment by Kahuku Wind and DOFAW to collaborate on the project described in the Scope of Work (Attachment 1); a commitment by Kahuku Wind to provide DOFAW with funds to be used to benefit the Covered Species, specifically seabirds as described in the HCP; and a commitment by DOFAW to utilize such funds to implement the actions described in the attached Scope of Work. Performance by DOFAW of the mitigation actions depends upon the timely receipt of funds, materials, and supplies from Kahuku Wind.

5. Termination

For any reason whatsoever, either party may terminate involvement in this MOU by providing 45 days prior written notice to the other party. Any unused funds will be returned to Kahuku Wind.

6. Counterparts

This MOU may be executed in several counterparts, each of which shall be an original and all of which shall constitute one and the same document.

IN WITNESS WHEREOF the **PARTIES** hereto have executed this, **MEMORANDUM OF UNDERSTANDING** by way of signature and date below.

Kahuku Wind Power, LLC:

By: Kahuku Holdings, LLC, its Member

(Authorizing Signatory Name)
(Signatory Position Title)

Date: _____

Division of Forestry and Wildlife:

William J. Aila, Chairperson
Board of Land and Natural Resources

Date: _____

APPROVED AS TO FORM:

Deputy Attorney General
State of Hawaii

MEMORANDUM OF UNDERSTANDING

BETWEEN

KAWAIILOA WIND, LLC

AND

**THE STATE OF HAWAI'I
Department of Land and Natural Resources
Division of Forestry and Wildlife**

(Monitoring of Newell's Shearwater Colonies on the Island of Kaua'i – Seabird Mitigation Obligations under the Kawaiiloa Wind Power Habitat Conservation Plan)

1. Preface.

This Memorandum of Understanding ("MOU") is made on April ____, 2014 between Kawaiiloa Wind, LLC (hereinafter referred to as "Kawaiiloa Wind") and The State of Hawai'i, Department of Land and Natural Resources, Division of Forestry and Wildlife ("DOFAW").

WHEREAS, on October 27, 2011 the Board of Land and Natural Resources ("BLNR") approved Kawaiiloa Wind's Kawaiiloa Wind Power Habitat Conservation Plan and issued to Kawaiiloa Wind a State Incidental Take License ("ITL") pursuant to Hawai'i Revised Statute Chapter 195D, authorizing the incidental take of the following Covered Species: Newell's Shearwater (*Puffinus auricularis newelli*), Hawaiian Duck (*Anas wyvilliana*), Hawaiian Stilt (*Himantopus mexicanus knudseni*), Hawaiian Coot (*Fulica alai*), Hawaiian Moorhen (*Gallinula chloropus sandvicensis*), Hawaiian Hoary Bat (*Lasiurus cinereus semotus*), and Hawaiian Owl (*Asio flammeus sandwichensis*);

WHEREAS, the Kawaiiloa Wind Power Habitat Conservation Plan and State ITL require that certain mitigation and monitoring tasks be implemented on Kaua'i, and provide that DOFAW or another qualified entity may implement certain of those mitigation and monitoring tasks using funds to be provided by Kawaiiloa Wind;

WHEREAS, DOFAW and Kawaiiloa Wind have identified unprotected seabird colonies on the Island of Kaua'i that will benefit from colony-based management;

WHEREAS, Kawaiiloa Wind and DOFAW, by mutual agreement, desire to establish a MOU pursuant to which Kawaiiloa Wind and DOFAW will collaborate on efforts to protect endangered seabird populations on Kaua'i, and DOFAW will provide staff to conduct seabird colony-based monitoring over the course of the 2014-2015 seabird seasons, and Kawaiiloa Wind will purchase directly all necessary equipment deemed appropriate and provide DOFAW with staff funds necessary for this purpose;

NOW, THEREFORE, Kawaiiloa Wind and DOFAW mutually agree to the following:

2. Purpose.

The purpose of this Agreement is to establish a MOU whereby:

- Kawaioloa Wind will adhere to the *Scope of Work for Predator Control and Monitoring of Newell's Shearwater Colonies on Kaua'i: Implementation of Kahuku Wind Power and Kawaioloa Wind Power Habitat Conservation Plan Seabird Mitigation Actions* (hereinafter referred to as "Scope of Work");
- DOFAW (through its Kaua'i Endangered Seabird Recovery Project or "KESRP") will implement certain activities as part of the Scope of Work; and
- Kawaioloa Wind will provide funds to DOFAW necessary to implement such activities.

This MOU does not negate or affect any other agreements in effect between Kawaioloa Wind and DOFAW. The attached Scope of Work may be updated by agreement from both parties in order to maintain the purpose and intent of this MOU, in concurrence with the U.S. Fish and Wildlife Service, Pacific Islands Fish and Wildlife Office (USFWS PIFWO).

3. Responsibilities.

DOFAW:

- Will implement the Scope of Work (Attachment 1). This Scope of Work covers activities during calendar years 2014-2015. This Scope of Work has been reviewed by DOFAW, Kawaioloa Wind, and the USFWS PIFWO.
- Will begin implementation of the Scope of Work by April 2014 or as soon as this MOU is executed.
- Will report to Kawaioloa Wind and USFWS PIFWO as specified in the Scope of Work attached to this Agreement.
- Will deposit checks from Kawaioloa Wind, described below, in the State of Hawai'i Endangered Species Trust Fund, and ensure that such deposits are specifically designated for use by DOFAW to implement the attached Scope of Work and any subsequent Updated Scopes of Work.
- Will maintain an ongoing accounting of the funds spent implementing the attached Scope of Work including any expenditure reports and will provide these to Kawaioloa Wind upon request.

Kawaioloa Wind:

- Will implement the Scope of Work (Attachment 1).
- Will within 30 days of the execution of this MOU and receipt of a list specifying equipment and services needed for DOFAW/KESRP, purchase such equipment and services (to the extent they are available from the manufacturer) as detailed in the attached Scope of Work.
- Will, within 60 days of the execution of this MOU, deliver a check to DOFAW in the amounts agreed upon in the attached Scope of Work, which shall constitute funds necessary to conduct the 2014 actions.

4. Implementation

The parties agree that this MOU constitutes a commitment by Kawaioloa Wind and DOFAW to collaborate on the project described in the Scope of Work (Attachment 1), a commitment by Kawaioloa Wind to provide DOFAW with funds to be used to benefit the Covered Species, specifically seabirds as described in the HCP, and a commitment by DOFAW to utilize such funds to implement the actions described in the attached Scope of Work. Performance by

DOFAW of the mitigation actions depends upon the timely receipt of funds, materials, and supplies from Kawaiiloa Wind.

5. Termination

For any reason whatsoever, either party may terminate involvement in this MOU by providing 90 days prior written notice to the other party. Any unused funds will be returned to Kawaiiloa Wind.

6. Counterparts

This MOU may be executed in several counterparts, each of which shall be an original and all of which shall constitute one and the same document.

IN WITNESS WHEREOF the **PARTIES** hereto have executed this, **MEMORANDUM OF UNDERSTANDING** by way of signature and date below.

Kawaiiloa Wind, LLC:

(Authorizing Signatory Name)
(Signatory Position Title)

Date: _____

Division of Forestry and Wildlife:

William J. Aila, Chairperson
Board of Land and Natural Resources

Date: _____

APPROVED AS TO FORM:

Deputy Attorney General
State of Hawaii