

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

November 10, 2016

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

08OD-110A

OAHU

Approval of Report on Issuance of Direct Lease to Na Pua Makani Power Partners, LLC, Lessee, for Wind Power Project Purposes; Kahuku-Malaekahana, Koolauloa, Oahu, TMK: (1) 5-6-008:006

BACKGROUND:

At its meeting of October 14, 2016, under Agenda Item D-12, the Board of Land and Natural Resources approved a direct lease of the subject State land to Na Pua Makani Power Partners, LLC (NPM), a Delaware limited liability company, for wind power project purposes. A copy of the approved Board submittal, less its lengthy exhibits, is attached hereto as Exhibit A. One of the statutory provisions under which the Board approved the lease, Section 171-95.3(a), Hawaii Revised Statutes (HRS), provides in part as follows:

Upon completion of the board's evaluation and determination to award or not award a lease to a renewable energy producer, the board shall prepare a report outlining the reasons for the decision.

REPORT:

Based on the Board's approval of the staff submittal and the Board members' discussion of this project at its meeting of October 14, 2016, under Agenda Item D-12, staff offers the following as a report outlining the Board's reasons for its decision to issue the lease:

- Issuance of the lease is in furtherance of Hawaii's Clean Energy Initiative, which sets goals for the state to achieve 100 percent clean energy by 2045 coming from locally generated renewable sources.
- The lease for the wind energy project will contribute to the State's energy independence and security and reduce the import of foreign oil.

- The lease for the project will contribute to the State's diversified portfolio of renewable energy projects, and provide environmental and economic benefits to the State, County and local communities.
- The lease for the project will reduce the production of greenhouse gases that contribute to global warming.
- The State land approved for lease is suitable for a wind energy project due to the agricultural zoning and topography of the land, and its location in an area with favorable conditions for wind energy production.
- The Board incorporates by reference the staff submittal attached as Exhibit A and the reasons, legal grounds and other information set forth therein regarding the issuance of the lease, as well as the minutes of the October 14, 2016 meeting as they relate to Item D-12, once the minutes are approved.

RECOMMENDATION:

That the Board:

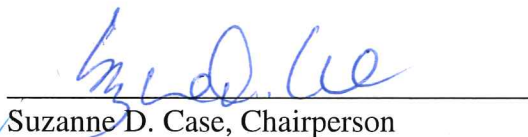
1. Approve the foregoing report as the report of the Board under Section 171-95.3, HRS.

Respectfully Submitted,



Kevin E. Moore
Assistant Administrator

APPROVED FOR SUBMITTAL:



Suzanne D. Case, Chairperson

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

October 14, 2016

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

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Issuance of Direct Lease to Na Pua Makani Power Partners, LLC, Lessee, for
Wind Power Project Purposes; Kahuku-Malaekahana, Koolauloa, Oahu, TMK:
(1) 5-6-008:006

APPLICANT:

Na Pua Makani Power Partners, LLC (NPM), a Delaware limited liability company.

LEGAL REFERENCE:

Sections 171-6, -35, -95, and -95.3, Hawaii Revised Statutes (HRS), as amended.

LOCATION:

Government land situated at Kahuku-Malaekahana, Koolauloa, Oahu, identified by Tax
Map Key: (1) 5-6-008:006, as shown on the attached maps labeled Exhibit 1.

AREA:

Total Parcel Area: 231.927 acres, more or less

ZONING:

State Land Use District: Agricultural
City and County of Honolulu LUO: Agricultural 1 and 2

TRUST LAND STATUS:

Non-ceded. Government land acquired since statehood from the Estate of James
Campbell, Deceased.

APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON
October 14, 2016 *up*

D-12

EXHIBIT A

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

CURRENT USE STATUS:

Vacant and unencumbered, with the exception of a right-of-entry permit dated March 3, 2016 (ROE #4220) issued to the Division of Forestry and Wildlife for a five-acre portion of the premises to be used for mitigation and recovery of *Abutilon menziesii*. The Board approved the issuance of the permit at its meeting of February 26, 2016, under agenda item D-14, as amended.

LEASE TERM:

Forty (40) years with the option for NPM to terminate early under certain circumstances. See remarks section below.

COMMENCEMENT DATE:

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

LEASE CHARACTER OF USE:

The lease character of use is a wind power project site. The details are set forth at Section 13 of the proposed lease form attached hereto as Exhibit 2.¹

ANNUAL RENT:

The minimum annual rent for the first 20 years of the lease term has been determined by an independent appraiser contracted for by the State and approved by the Chairperson, and is as follows:

Years 2-10: \$120,000 per year
Years 11-20: \$150,000 per year

Additionally, NPM will be required to pay percentage rent of 2.5% of gross revenue as defined in the lease, to the extent such amount exceeds the minimum annual rent in any one year. Pursuant to HRS Section 171-6(7), NPM has requested a waiver of rent for the first year of the lease as its proposed use of the land will require the placement of substantial improvements on the property in order for NPM to utilize the site for its wind energy project. The proposed lease grants the one-year rent waiver.

¹ Exhibits A and A-1 to the proposed lease form, which are the map and description of the premises respectively, are being prepared by DAGS Survey Division and will be attached to the final lease, if approved. Exhibit D of the proposed lease form, which is the environmental site assessment for the property, is omitted as an attachment due to its length, but will be included in the final lease in whole or in part, if the lease is approved.

METHOD OF PAYMENT:

Semi-annual payments, in advance.

RENTAL REOPENINGS:

Rent for the first 20 years of the lease has been determined by independent appraisal. Rent will be reopened at the 21st year of the lease and at "Repowering," defined in the proposed lease as follows:

"Repowering" means: (i) the renewal or replacement of the majority (more than 80%) of the wind turbines as evidenced by, but not limited to, contemporaneous replacement of the wind turbines with different models, or (ii) a significant modification to the portion of the Wind Project located on the premises such that a significant revision to the existing land use permit or a new land use permit is required for the premises. The following shall not constitute Repowering: (1) reuse of the Project Improvements, including, without limitation, roads, erosion control and premises access improvements, meteorological towers or transmission interconnection related to the premises, (2) replacement of any Wind Project substation for any reason, (3) replacement of wind turbines on the premises with substantially the same make and model in the same locations, or (4) replacement of any or all of the wind turbines and Project Improvements on the premises as a result of casualty or loss.

PERFORMANCE BOND:

\$1,500,000.

PROPERTY CHARACTERISTICS:

Utilities – There is no existing electrical service to the property, although distribution lines are located in the vicinity. There are no public water systems or public water wells on the property. There is no wastewater system servicing the property.

Slope – 2-40%

Elevation – From 72 feet to 614 feet above mean sea level.

Rainfall – Average annual rainfall is between 45-60 inches.

SCS Soil Series – Predominantly Paumaulu-Badland complex, with smaller areas of Paumaulu silty clay, Haleiwa silty clay, Kaena clay, and Lahaina silty clay.

Land Study Bureau – Category E (least productive soils).

Legal access to property – Staff has verified that there is legal access off of Kamehameha Highway via local roads in the area to lands under the jurisdiction of the Department of Agriculture (DOA) under Executive Order No. 3867. The DOA lands are adjacent to the subject property. NPM reports that DOA is agreeable to granting NPM an easement over roads on the DOA lands to reach the subject property.

Subdivision – Staff has verified that the subject property is a legally subdivided lot.

Encumbrances – Staff has verified that there are no encumbrances on the property with the exception of ROE #4220 to DOFAW for a five-acre portion of the premises to be used for mitigation and recovery of *Abutilon menziesii*.

Environmental – A Phase I Environmental Site Assessment dated May 20, 2014 found that the subject parcel is “vacant wooded and scrub-vegetated land, with no evidence of past or current agricultural use.” No recognized environmental conditions were identified with respect to the property.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

The Final Environmental Impact Statement (FEIS) for the wind project was accepted by the Board of Land and Natural Resources at its meeting of July 22, 2016, Item D-11, and published in the Office of Environmental Quality Control’s The Environmental Notice on July 23, 2016. The Board’s acceptance letter was published in The Environmental Notice on August 8, 2016.

DCCA VERIFICATION:

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>

APPLICANT REQUIREMENTS:

1. Pay for the costs of public notice pursuant to section 171-16, if applicable.

BACKGROUND:

The State is the fee simple owner of certain real property containing an area of approximately 231.927 acres, described as Lot 1168, Map 137, Land Court Application 1095, Kahuku-Malaekahana, Koolauloa, Oahu.

At its August 8, 2008 meeting, under agenda item D-10, the Board of Land and Natural Resources (i) approved the withdrawal of the premises from Governor’s Executive Order 3867, (ii) approved in principle the issuance of a direct lease to West Wind Works, LLC (West Wind) covering the premises, (iii) authorized the Department of Land and Natural Resources to negotiate exclusively with West Wind for a direct lease of the premises, and (iv) authorized the issuance of a right-of-entry permit to West Wind to enter upon the premises to conduct due diligence, subject to certain terms and conditions.

At its July 13, 2012 meeting, under agenda item D-14, the Board approved an amendment to the August 8, 2008 Board action by consenting to the assignment and assumption from West Wind to Na Pua Makani Power Partners, LLC (NPM) of the direct lease approved in principle, and extending the right-of-entry permit to expire on the commencement date of the lease. At its October 12, 2012 meeting, under agenda item D-

7, the Board approved an amendment to the July 13, 2012 Board action by deleting the assignment of lease and replacing West Wind with NPM as the applicant.

At its meeting of December 13, 2013, Item D-31, the Board amended its prior action of August 8, 2008, Item D-10, to authorize the Chairperson to negotiate and enter into a development agreement with NPM for the wind project as an interim agreement prior to the Board entering into a lease agreement with NPM. Subsequently, a Development Agreement between the Board and NPM was executed on December 26, 2013.

At its meeting of February 26, 2016, Item D-14, as amended, the Board approved an amendment to the Development Agreement making the following changes: (i) authorizing five acres of the proposed lease premises to be withdrawn and set aside to the Division of Forestry and Wildlife for protection of the endangered plant species, *Abutilon menziesii*; (ii) allowing the Development Agreement to be extended up to March 31, 2018;² (iii) allowing NPM to secure a Habitat Conservation Plan and Incidental Take License after the issuance of the lease; (iv) allowing NPM to obtain a Conditional Use Permit from the City and County of Honolulu and provide evidence of financial ability to construct the project after the issuance of the lease but no later than March 31, 2018. An Amendment of Development Agreement instrument was prepared and signed by the parties on March 30, 2016. NPM exercised a one-year extension of the amended Development Agreement by notice dated March 31, 2016.

At its meeting of July 22, 2016, Item D-11, the Board accepted the FEIS for the wind project. The FEIS was published in The Environmental Notice on July 23, 2016. The Board's acceptance was published in The Environmental Notice on August 8, 2016.

Pursuant to Section 171-95.3, HRS, public hearings regarding the proposed renewable energy project were held in the Boardroom at the Kalanimoku Building on Wednesday, August 24 at 6:00-7:30 PM and Saturday, August 27, 2016 at 1:00-2:30 PM. Notice of the hearings was published in the Honolulu Star-Advertiser on Tuesday, August 9, 2016 as required by the statute, and was also posted on the Land Division website. The Department procured court reporters to transcribe the testimony at the hearings, and the full transcripts are attached hereto as Exhibit 3. Additionally, notice of today's Board meeting on the final approval of the issuance of a lease to NPM was published in the Honolulu Star-Advertiser on September 21, 2016 as required by Section 171-95.3, HRS, and posted on the Land Division website.

REMARKS:

The proposed wind energy project is located partly on the subject land and partly on private land in the area. The applicant is requesting a direct lease pursuant to HRS Sections 171-95 and 171-95.3 for the state-owned parcel, TMK: (1) 5-6-008:006, with an area of approximately 231.927 acres. The parcel was previously set aside to the Hawaii Department of Agriculture (DOA) via Governor's Executive Order (EO) 3867 for Kahuku Agricultural Park purposes. In order to pursue the lease for the project, the

² The Development Agreement was previously set to expire on March 31, 2016.

parcel was withdrawn from EO 3867 by EO 4482, dated March 23, 2015. The state owned parcel is currently vacant. The applicant is also seeking to obtain a lease over adjacent private lands owned by Malaekahana Hui West, LLC, as well as access easements over state lands set aside to DOA. The total leased area plus the State-owned access is approximately 707 acres. Within the leased area, all proposed project activities would occur within a smaller approximately 464-acre project area.

NPM and the Department have negotiated a form of lease to be issued to NPM for the wind project, subject to Board approval. See Exhibit 2 attached. Some of the key terms and conditions are as follows:

Section 9. Improvements. The standard lease form requires the lessee to post a bond in a sufficient amount to complete the construction of any improvements the lessee undertakes. In this case, if the lessee were not able to complete the construction of the wind turbines for any reason, the State would not step into the lessee's shoes to complete the erection of the turbines and operate a wind farm. Rather, the State would want to ensure that any turbines or other improvements that were partially completed were removed. So this provision requires the lessee to post a bond in the amount of \$100,000 per wind turbine as a removal bond.

Section 10. Ownership of Improvements. The proposed lease provides that the project improvements remain under the ownership of NPM until the expiration or earlier termination of the lease, at which NPM shall remove the improvements. The lease requires NPM to remove the wind turbine foundations to a depth of two feet below grade and otherwise restore the premises to the condition that existed prior to occupancy.

Section 13. Character of Use, subsection c, Transmission and communication facilities. NPM is seeking a reasonableness qualification on the Board's authority to approve the location of the turbines and related infrastructure and improvements to be constructed on the lease premises. Staff is agreeable to the reasonableness qualification. There is no basis to reserve to the Board the right to act unreasonably in disapproving the location of turbines, infrastructure and improvements.

Section 18. Liability Insurance. The proposed lease increases the insurance requirements from the standard \$1,000,000 per occurrence / \$2,000,000 aggregate to \$3,000,000 per occurrence / \$5,000,000 aggregate. Staff viewed this increase as prudent in light of the nature of NPM's operations.

Section 19. Bond, performance. In most of the general leases issued by the Board, the performance bond is calculated at twice the annual rent amount, which would equate to \$240,000 for the first 10 years of the proposed lease. Staff recommends a higher performance bond to ensure the removal of the wind turbines at the end of the lease term. The FEIS contemplates up to nine turbines will be erected. The proposed lease form provides for a performance bond of \$1,500,000, which is in addition to the removal bond mentioned in Section 9 of the lease.

Section 31. Surrender. NPM requested a one-year right-of-entry after expiration or

termination of the lease to allow it to remove its improvements and personalty from the premises. The right-of-entry is to be issued "upon reasonable terms and conditions as set forth by the Board" The alternative to the right-of-entry would be to require NPM to begin removing its improvements and personalty during the term of the lease at a time when the turbines could still be generating power under a PPA with HECO. Staff believes that authorizing a right-of-entry after lease termination for the purpose of removing improvements and personalty is a reasonable method of dealing with end of lease issues. Additionally, the surrender clause of the standard lease form requires the lessee to restore the premises to the condition that existed prior to occupancy. In the proposed NPM lease, section 10 of the lease (discussed above) covers the lessee's obligations with respect to removal of improvements at lease termination. Accordingly, the surrender provision of the proposed NPM lease is drafted to require NPM to restore the premises to the condition required by the lease.

Section 33. Hazardous materials. The standard provision was modified to provide consent to NPM's use of lubricating oil and grease, paint normally used in wind farm applications and cleaning compounds, subject to Lessee's use being within the legal and lawful regulations and standards.

Section 45. Withdrawal Right. This is a non-standard provision that gives the State the right to withdraw five acres of the lease premises and set it aside to the Division of Forestry and Wildlife for mitigation and recovery of the endangered species, *Abutilon menziesii*. The withdrawal and set-aside was approved by the Board at its meeting of February 26, 2016, item D-14, as amended. The lease requires the State to execute the withdrawal and set-aside without materially affecting NPM's plans or operations.

Section 54. Phase I environmental site assessment. The standard lease form requires the lessee to conduct a Phase I environmental site assessment prior to termination, revocation or assignment of the lease. NPM is requesting that the standard provision be qualified so that an assignment for financing purposes does not trigger a Phase I report. Staff believes this is a reasonable request and has included the financing qualification in the proposed lease.

Section 60. Lessee election of early termination of lease term. NPM can only utilize the premises if it maintains a PPA in place with HECO. Accordingly, NPM requested the right to terminate the lease if it loses the PPA. NPM would also have the right under the proposed lease to terminate the lease if it did not accept the minimum annual rent or percentage rent amount resulting from the rent reopening for years 21-40 of the lease.

Section 66. Special Conditions. The amended Development Agreement between the State and NPM imposes a number of special conditions on NPM, which are reiterated in the lease. These include: (1) obtaining a conditional use permit for the project from the City and County of Honolulu, if required, not later than two years after the date of the lease or March 31, 2018, which occurs first; (2) obtaining Board approval of a Habitat Conservation Plan and an Incidental Take License from the Division of Forestry and Wildlife for the project no later than one year after the date of the lease, or March 31, 2017, whichever occurs first; (3) providing evidence to the State of reasonable financial

ability to construct the project (e.g., balance sheets of an affiliate of Lessee or commitment (even if based on reasonable conditions, such as those provided in this Section, for financing)) no later than two years after the date of this Lease, or March 31, 2018, whichever occurs first.

NPM qualifies for the direct issuance of a lease as a renewable energy producer as defined under Sections 171-95 and -95.3 HRS. Attached as Exhibit 4 is a copy of NPM's report on the project including the information required by HRS Section 171-95.3.

At the public hearings held on the project, three people orally testified in opposition to it and one person testified in support. The opponents of the project listed a number of concerns including that Kahuku has unfairly shouldered the burden of accommodating renewable energy projects on Oahu, that the visual impacts will be significant with the wind turbines being taller than anything approved before, resulting in them being the tallest structures on Oahu, that the proposed setbacks of the turbines from schools and residences is inadequate, that there will be negative impacts to wildlife including bats and birds, that the traffic study in the FEIS was inadequate, that wind power will saturate HECO's grid so that residential users will not be able to install solar panels on their homes for electricity, that there will be significant noise impacts from the turbines, and that nobody listens to the opponents of the project. The individual who testified in favor of the project (and is also an employee of NPM) remarked that the project will improve the economy and help achieve the State's goal of 100% renewable energy. See transcripts of testimony from public hearings attached as Exhibit 3.

Several opponents of the project additionally submitted letters and emails detailing the reasons for their opposition. Copies of these letters are attached as Exhibit 5.³

Based on staff's review of the FEIS, the opponents' concerns were addressed in the FEIS. Staff understands, however, that the project opponents view the FEIS as inadequate. As the Board already accepted the FEIS at a prior meeting, staff does not believe it is appropriate to re-evaluate the sufficiency of the FEIS in this submittal.

There are no forest reserves, game management areas, wildlife sanctuaries, public hunting areas, public beaches or unencumbered public lands adjoining the proposed lease parcel. Accordingly, no public access is reserved in the lease to such areas. As referenced in Section 45 of the proposed lease, DOFAW is responsible for securing access to the five-acre portion of the premises to be used for mitigation and recovery of *Abutilon menziesii* (and such access is required to be outside of the lease premises).

NPM 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

³ Mr. Kent Fonoimoana's email dated August 25, 2016 included in Exhibit 5 contains an attachment that is a petition to former Chairperson William Aila, Jr., Governor Ige and Randy Iwase signed by numerous individuals. The entire attachment is 80 pages in length, but only the first three pages are included in Exhibit 5 to keep the length of this submittal manageable. Additionally, the petition includes the residence addresses of the signatories, and all addresses would have to be redacted if staff were to include the full petition.

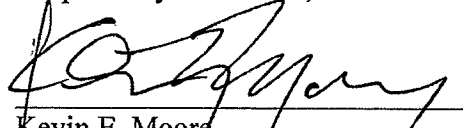
believes the highest and best use of the land is for a wind energy project due to the agricultural zoning and topography of the land, and its location in an area with favorable conditions for wind energy production. In furtherance of Hawaii's Clean Energy Initiative, which sets goals for the state to achieve 100 percent clean energy by 2045 coming from locally generated renewable sources, staff recommends approval of the lease.

RECOMMENDATION:

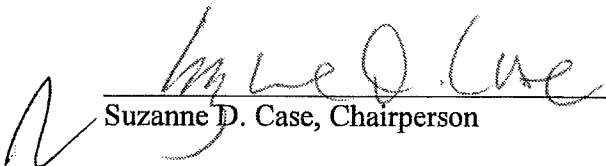
That the Board:

1. Approve the issuance of a direct lease to Na Pua Makani Power Partners, LLC, Lessee, substantially in the form of Exhibit 2 attached hereto, subject to the conditions set forth above and further subject to:
 - a. Final review and approval by the Department of the Attorney General; and
 - b. Such other conditions as may be prescribed by the Chairperson which are in the best interests of the State.
2. Upon full execution of the lease by the parties, authorize the Chairperson to sign permit applications relating to the project (including, without limitation, a City and County of Honolulu Master Conditional Use Permit application) on behalf of the Board of Land and Natural Resources as landowner, subject to:
 - a. Lessee providing a standard indemnity letter in the form required by the Department; and
 - b. Such other conditions as may be prescribed by the Chairperson which are in the best interests of the State.

Respectfully Submitted,


Kevin E. Moore
Assistant Administrator

APPROVED FOR SUBMITTAL:


Suzanne D. Case, Chairperson

Land Board Meeting: October 14, 2016; D-12: Approved as submitted.

Approved as submitted. See attached page.

Land Board Meeting: October 14, 2016; D-12: Approved as submitted.

Approved as submitted.²

² Kent Fonoimoana opposed the project and requested a contested case; Board denied the contested case.