

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

October 27, 2017

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

Land Board Members:

**SUBJECT: DETERMINATION THAT A SUPPLEMENTAL ENVIRONMENTAL
IMPACT STATEMENT IS REQUIRED PRIOR TO MAJOR AMENDMENT
TO THE AUWAHI WIND ENERGY HABITAT CONSERVATION PLAN
AND INCIDENTAL TAKE LICENSE; AND**

**DELEGATION OF AUTHORITY TO THE CHAIRPERSON TO DETERMINE
WHETHER SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENTS
ARE REQUIRED FOR FUTURE AMENDMENTS TO HABITAT
CONSERVATION PLANS AND INCIDENTAL TAKE LICENSES FOR WIND
ENERGY PROJECTS**

INTRODUCTION:

This Board Submittal requests the Board's determination that a Supplemental Environmental Impact Statement (SEIS) is required for a major amendment to the Auwahi Wind Energy Habitat Conservation Plan (HCP) and Incidental Take License (ITL), and for a delegation of authority to the Chairperson to make future determinations whether SEISs are required for amendments to HCPS and/or ITLs for wind farm projects.

BACKGROUND:

Auwahi Wind Farm, Maui

The Auwahi Wind Farm is a wind farm located on Maui. On August 9, 2011, the Maui Planning Commission accepted the Final EIS for the project. Among other things, the Final EIS addressed the potential impacts to the Hawaiian hoary bat, as well as other threatened and endangered species. With respect to the Hawaiian hoary bat, the Final EIS stated that Auwahi Wind Energy LLC ("Auwahi") "will implement mitigation measures as described and required by the HCP and ITP [Incidental Take Permit]/ITL. The Final EIS provides for tiers of mitigation measures.

On January 13, 2012, the Board approved the HCP and ITL. Auwahi was issued Incidental Take License designated ITL-17 in February 2012 for incidental take including Hawaiian hoary bats

(*Lasiurus cinereus semotus*). The bat take authorized was 19 adults and 8 juveniles over the course of the 25-year permit term. In April 2015 the Division of Forestry and Wildlife (DOFAW) and US Fish and Wildlife Service (USFWS) agreed to convert 8 juvenile bats to the equivalent of 3 adults, resulting in an adjusted approved take permit for 22 bats. Based on the observed bat fatalities found to date at Auwahi, the US Fish and Wildlife Service has calculated with 80 percent certainty that the take of bats does not exceed 45.

The major amendment, although still in draft form, is expected to request take of bats as high as 10-fold the number represented in the current ITL.

ANALYSIS:

An SEIS is Required:

An SEIS or “supplemental statement” as utilized in Title 11, Chapter 200 of the Hawai‘i Administrative Rules (HAR) is “an additional environmental impact statement prepared for an action for which a statement was previously accepted, but which has since changed substantively in size, scope, intensity, use, location, or timing, among other things.”

HAR §§ 11-200-26 and 11-200-27 govern when an SEIS is required. HAS § 11-200-26 provides general rules governing the SEIS:

General Provisions. A statement that is accepted with respect to a particular action is usually qualified by the size, scope, location, intensity, use, and timing of the action, among other things. A statement that is accepted with respect to a particular action shall satisfy the requirements of this chapter and no other statement for that proposed action shall be required, to the extent that the action has not changed substantively in size, scope, intensity, use, location or timing, among other things. If there is any change in any of these characteristics which may have a significant effect, the original statement that was changed shall no longer be valid because an essentially different action would be under consideration and a supplemental statement shall be prepared and reviewed as provided by this chapter. As long as there is no change in the proposed action resulting in individual or cumulative impacts not originally disclosed, the statement associated with that action shall be deemed to comply with this chapter.

HAR § 11-200-27 provides nuance to when an SEIS is required:

Determination of applicability. The accepting authority or approving agency in coordination with the original accepting authority shall be responsible for determining whether a supplemental statement is required... Proposing agencies or applicants shall prepare for public review supplemental statements whenever the proposed action for which a statement was accepted has been modified to the extent that new or different environmental impacts are anticipated. A supplemental statement shall be warranted when the scope of an action has been substantially increased, when the intensity of environmental impacts will be increased, when the mitigating measures originally planned are not to be implemented, or where new circumstances or evidence have

brought to light different or likely increased environmental impacts not previously dealt with.

Endangered species take and the HCP/ITL amendment process present a need for an SEIS. The take of threatened or endangered species is illegal except as provided in HRS § 195D-4. The ITL allows for the incidental take of endangered species that would otherwise be unlawful. Compliance with the HCP and ITL is an essential component of the action itself. A major amendment to the HCP and ITL are required in order for Auwahi to be compliance with the law. Modifications of the HCP and ITL are required to offset the increased bat take in the major amendment. The major amendment is a substantive change to the Auwahi Wind Farm project itself.

DOFAW's recommendation that the Board require an SEIS is supported by HAR § 11-200-27, which provides that an SEIS shall be warranted where, among other things, "the intensity of environmental impacts will be increased" or "where new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with."

Coordination with applicant and Maui County:

On May 2, 2017, DOFAW sent a letter to Clayton Yoshida, Administrator of Current Planning Division of Maui County, expressing the position that the amendment request warrants an SEIS based on the statement in HAR § 11-200-27 and will require additional mitigation to address increased environmental impacts and solicited Maui County's position. On August 4, 2017, the Department of the Attorney General sent a follow-up letter to William Spence, Director of the Maui County Department of Planning explaining that the Board is required to coordinate with the Maui Planning Commission and seeking comments and concerns in respect to the Final EIS or potential SEIS. By letter dated August 24, 2017, the Maui County Department of Planning responded to DOFAW's request and deferred the determination of an SEIS to DOFAW and the Board, requesting that when new mitigation efforts have been identified, to contact the Department of Planning regarding Maui County's possible permitting obligations and to include such mitigations within the scope of the SEIS itself or a similar mechanism to address possible impacts of those mitigations. The Department of Planning has been notified that the Chairperson of the Planning Commission may contact DOFAW regarding the SEIS at any time.

Request for Delegation of Authority for the Chairperson to Make Future SEIS Determination Regarding Major Amendments to HCPs and ITLs for Wind Farms:

The need for major amendments to HCPs and ITLs due to the increased take of endangered or threatened species is not unique to the Auwahi Wind Farm. DOFAW expects to receive amendment requests from several wind energy projects seeking to increase the take authorized on their Incidental Take License. DOFAW requests that the Board delegate the authority to the Chairperson with the authority to review those requests and make future determinations as to whether SEISs are required prior to any major amendments to HCPs and ITLs for wind farm projects.

RECOMMENDATION: DOFAW recommends that the Board:

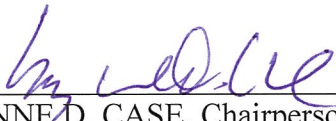
1. Determine that Auwahi is required to prepare a supplemental environmental impact statement pursuant to HAR, Chapter 11-200, prior to any amendment to its HCP and ITL; and
2. Delegate authority to the Chairperson to determine whether supplemental environmental impact statements are required prior to amendments to habitat conservation plans and incidental take licenses for wind energy projects.

Respectfully Submitted,



DAVID G. SMITH, Administrator
DIVISION OF FORESTRY AND WILDLIFE

APPROVED FOR SUBMITTAL:



SUZANNE D. CASE, Chairperson
BOARD OF LAND AND NATURAL REOSURCES