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IMPLEMENTING AGREEMENT
KAHEAWA PASTURES WIND ENERGY GENERATION FACILITY
January 26, 2006
As Amended February 26, 2006

1.0 PARTIES

The parties to this Implementing Agreement are Kaheawa Wind Power, LLC; the United States Fish and Wildlife Service (FWS) and the State of Hawaii Department of Land and Natural Resources (DLNR) through its Division of Forestry and Wildlife.

2.0 RECITALS AND PURPOSES

2.1 Recitals. The parties have entered into this agreement in consideration of the following facts:

(a) The Kaheawa Pastures Wind Energy Generation Facility project site has been determined to provide, or potentially provide, habitat for the following listed species: the endangered Hawaiian Petrel (*Pterodroma sandwichensis*), the threatened Newell's (Townsend's) Shearwater (*Puffinus auricularis newelli*), the endangered Nene (*Brunta sandvicensis*), and the endangered Hawaiian Hoary Bat (*Lasiurus cinereus semotus*); and

(b) Permittee has developed a series of measures, described in the Habitat Conservation Plan (HCP), to minimize and mitigate to the maximum extent practicable the effects of take of Covered Species incidental to Permittee's Covered Activities.

2.2 Purposes. The purposes of this agreement are:

(a) To ensure implementation of each of the terms of the HCP and further benefit the Covered Species;

(b) To describe remedies and recourse should any party fail to perform its obligations as set forth in this agreement; and

(c) To provide assurances to Permittee that as long as the terms of the HCP, the permits, and this agreement are performed, no additional mitigation will be required of Permittee, with respect to Covered species except as provided for in this agreement or required by law and/or applicable regulations.

3.0 DEFINITIONS

The following terms as used in this agreement will have the meanings set forth below. Terms used in this agreement and specifically defined in the Endangered Species Act (ESA) or in regulations adopted by FWS or DLNR under the ESA have the same meaning as in the ESA and those implementing regulations, unless this agreement expressly provides otherwise.

3.1 "Adaptive Management" means a flexible approach to the long-term management of the fish, wildlife and habitat resources of the project area that is directed over time by the results of ongoing monitoring activities and other information.

3.2 "Changed Circumstances" means changes in circumstances affecting a Covered Species or the geographic area covered by the HCP that can reasonably be anticipated by the Parties to the HCP and that can reasonably be planned for in the HCP (e.g. the listing of a new species, or a fire or other natural catastrophic event in areas prone to such event). Changed Circumstances and the planned responses to those circumstances are described in Section VI ("Implementation") of the HCP. Changed Circumstances are not Unforeseen Circumstances.

3.3 "Covered Activities" means certain activities carried out by Permittee on Covered Lands that may result in incidental take of Covered Species to be permitted. Covered Activities means the following activities, provided that these activities are otherwise lawful: construction and operation of 20 wind turbines (model GE 1.5, manufactured by General Electric, each capable of generating 1.5 megawatts, and each having a 55-meter tower and 70.5-meter-diameter rotors); construction, use and operation of an operations and maintenance facility and electrical substation, both located on-site in proximity to the turbines; erection and use of meteorological tower(s) on-site to monitor and transmit wind data; construction and use of an intrasite roadway network; use of an access roadway to the project site; maintenance of all of the aforementioned and related infrastructure; site visits by appointment for public education and outreach, and management of on-site vegetation in coordination with wildlife and forestry officials.

3.4 "Covered Species" means the following species, each of which the HCP addresses in a manner sufficient to meet all of the criteria for issuing an incidental take permit under ESA Section 10(a)(1)(B) and an incidental take license under Chapter 195D Hawaii Revised Statutes (HRS): the endangered Hawaiian Petrel (*Pterodroma sandwichensis*), the threatened Newell's (Townsend's) Shearwater (*Puffinus auricularis newelli*), the endangered Nene (*Brunta sandvicensis*), and the endangered Hawaiian Hoary Bat (*Lasiurus cinereus semotus*).

3.5 "HCP" means the Habitat Conservation Plan prepared pursuant to ESA Section 10(a)(2)(A) by Permittee for the Kaheawa Pastures Wind Energy Generation Facility.

3.6 "Listed Species" means a species (including a subspecies, or a distinct population segment of a vertebrate species) that is listed as endangered or threatened under the ESA.

3.7 "Permit" means the incidental take permit issued by the FWS to Permittee pursuant to ESA Section 10(a)(1)(B) for take incidental to Covered Activities relating to the Kaheawa Pastures Wind Energy Generation Facility, as it may be amended from time to time. For the purposes of this agreement, "permit" also means the incidental take license issued by DLNR to Permittee pursuant to Chapter 195D HRS, for take incidental to Covered Activities relating to the Kaheawa Pastures Wind Energy Generation Facility, as it may be amended from time to time. "Permits" means the FWS and DLNR permits together.

3.8 **"Permittee"** means Kaheawa Wind Power, LLC.

3.9 **"Plan Area"** means the lands upon which the permit authorizes incidental take of Covered Species and the lands to which the HCP's conservation and mitigation measures apply. These lands are described in Appendix 1 of the HCP.

3.10 **"Take"** means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect any listed or unlisted Covered Species. Harm means an act that actually kills or injures a member of a Covered Species, including an act that causes significant habitat modification or degradation where it actually kills or injures a member of a Covered Species by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

3.11 **"Unforeseen Circumstances"** means changes in circumstances affecting a species or geographic area covered by a conservation plan that could not reasonably have been anticipated by plan developers and FWS/DLNR at the time of the HCP's negotiation and development, and that result in a substantial and adverse change in the status of the Covered Species.

3.12 **"Unlisted Species"** means a species (including a subspecies, or a distinct population segment of a vertebrate species) that is not listed as endangered or threatened under the ESA, including proposed, candidate and other species.

4.0 OBLIGATIONS OF THE PARTIES

4.1 Obligations of Permittee.

4.1.1 General

(a) Chapter V of the HCP identifies impacts to Covered Species from Covered Activities. As identified in Chapter V of the HCP, the Permittees are to perform measures to avoid, minimize and monitor those impacts to Covered Species during the Covered Activities. In addition, as identified in Chapters V and VI of the HCP, the Permittees will undertake mitigation measures and implement a monitoring program in order to assure that potential effects on Covered Species are mitigated to the maximum extent practicable. As identified in Chapter VI of the HCP, the Permittees will engage in monitoring and adaptive management. The Permittee's activities under the HCP will be subject to Service review and approval as described in the HCP.

(b) Permittee will fully and faithfully perform all obligations assigned to it under this agreement, the permit and the HCP.

(c) Permittee will pay the mitigation obligations described in Appendix 11 of the HCP out of (1) project operating revenues; (2) a Letter of Credit (LOC) posted in the amount of the contingency funds described in the HCP ("Contingency LOC"); (3) a Letter of Credit posted in the amount of $500,000 ("Mitigation LOC"); and (4) a Guaranty Agreement provided by third-party equity holders in the project. Except as provided in

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(b) Permittee will fully and faithfully perform all obligations assigned to it under this agreement, the permit and the HCP.

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subsection (d), the Mitigation LOC shall be renewed each year for the full amount of $500,000 for the life of the project. If the amount of the Mitigation LOC is decreased or increased pursuant to subsection (d), it shall be renewed at the revised level until the amount is changed pursuant to that subsection.

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

(e) The Guaranty Agreement provided by Permittee shall be for the maximum amount of $3.76 million, which is the total amount of estimated costs of all mitigation and monitoring measures, including contingency funds, that may be expended for all four species covered under the HCP, as described in Appendix 11 to the HCP. In no event shall the Guaranty Agreement provide a guarantee for, or the Permittee be obligated to pay, more than $3.76 million for mitigation over the life of the project. The maximum Guaranty Agreement amount will be reduced over time by the actual amount expended by Permittee for mitigation and monitoring.

(f) If the issuing bank of any LOC provided to satisfy mitigation obligations under this Implementing Agreement elects not to renew a LOC, and Permittee is unable to provide a replacement LOC, DLNR as beneficiary is entitled to draw the full amount remaining under the LOC to fund mitigation obligations under this agreement.

(g) The Permittee will provide notice to FWS and DLNR on the status of the Mitigation LOC and Contingency LOC no later than three (3) months prior to their respective expiration dates. No later than 30 days prior to such expiration date(s), Permittee will provide notice to FWS and DLNR stating whether the LOCs have been extended or new LOCs have been issued.

4.2 Obligations of FWS and DLNR. Upon execution of this agreement by all parties, and satisfaction of all other applicable legal requirements, FWS will issue Permittee a permit under ESA Section 10(a)(1)(B), and DLNR will issue Permittee a permit under Chapter 195D HRS, authorizing incidental take by Permittee of each Covered Species resulting from Covered Activities on Covered Lands.

4.2.1 Permit coverage. The permits will identify all Covered Species. The permits will take effect for Covered Species at the time the permits are issued.

4.2.2 "No surprises" assurances. Provided that Permittee has complied with its obligations under the HCP, this agreement, and the permits (including any provisions for changed circumstances, adaptive management, or any other contingency measures provided for in the HCP), FWS/DLNR can require Permittee to provide mitigation beyond that provided for in the HCP only under Unforeseen Circumstances, and only in accordance with the "No Surprises" regulations at 50 C.F.R. §§ 17.22(b)(5), 17.32(b)(5).

4.3 Interim obligations upon a finding of Unforeseen Circumstances. If FWS/DLNR make a finding of Unforeseen Circumstances, during the period necessary to determine the nature and location of additional or modified mitigation, Permittee will avoid contributing to appreciably reducing the likelihood of the survival and recovery of the affected species.

5.0 INCORPORATION OF HCP

The HCP and each of its provisions are intended to be, and by this reference are incorporated herein. In the event of any direct contradiction between the terms of this agreement and the HCP, the terms of this agreement will control. In all other cases, the terms of this agreement and the terms of the HCP will be interpreted to be supplementary to each other.

6.0 MONITORING AND REPORTING

6.1 Planned period reports. As described in the HCP, Permittee will submit periodic reports describing its activities and results of the monitoring program provided for in the HCP.

6.2 Other reports. Permittee will provide, within 30 days of being requested by FWS/DLNR, any additional information in its possession or control related to implementation of the HCP that is requested by FWS/DLNR for the purpose of assessing whether the terms and conditions of the permits and the HCP, including the HCP's adaptive management plan, are being fully implemented.

6.3 Certification of reports. All reports will include the following certification from a responsible company official who supervised or directed preparation of the report:

> I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of this report, the information submitted is true, accurate and complete.

6.4 Monitoring by FWS/DLNR. FWS/DLNR may conduct inspections and monitoring in connection with the permits in accordance with their regulations. (*See* 50 C.F.R. §13.47).

7.0 CHANGED CIRCUMSTANCES

7.1 General

(a) Chapter VI of the HCP identifies Changed Circumstances. The Permittee shall carry out the responses identified in that chapter, including coordination with FWS/DLNR and other agencies as appropriate.

(b) The Parties acknowledge that, notwithstanding the assurances provided by Section 4.2 herein, future modifications to mitigation that are specifically contemplated under the HCP and this agreement may require adjustments in the mitigation program set forth in the HCP as of the effective date, including Adaptive Management changes in the Plan Area. Such changes are part of the operating conservation program, and do not violate the assurances of Section 4.2. In particular, mitigation actions related to Changed Circumstances and to changes in mitigation deriving from Adaptive Management of the Plan Area remain the responsibility of the Permittee in accordance with the responsibilities under the HCP and this agreement and do not violate the assurances of Section 4.2. Notwithstanding the foregoing, the Parties further acknowledge that such modifications to the mitigation program described in the HCP shall not require funding in addition to that set forth in the HCP.

7.2 Notification of Changed and Unforeseen Circumstances

7.2.1 Permittee-initiated response to Changed Circumstances. Permittee will give notice to FWS/DLNR within seven days after learning that any of the Changed Circumstances listed in Chapter VI of the HCP has occurred. As soon as practicable thereafter, but no later than 30 days after learning of the Changed Circumstances, Permittee will modify its activities in the manner described in Chapter VI of the HCP to the extent necessary to mitigate the effects of the Changed Circumstances on Covered Species, and will report to FWS/DLNR on its actions. Permittee will make such modifications without awaiting notice by FWS/DLNR.

7.2.2 FWS/DLNR-initiated response to Changed Circumstances. If FWS/DLNR determine that Changed Circumstances have occurred and that Permittee has not responded in accordance with Chapter VI of the HCP, FWS/DLNR will so notify Permittee and will direct Permittee to make the required changes. Within 30 days after receiving such notice, Permittee will make the required changes and report to FWS/DLNR on its actions. Such changes are provided for in the HCP, and hence do not constitute Unforeseen Circumstances or require amendment of the permits or HCP.

7.3 Listing of species that are not Covered Species.

(a) The Parties acknowledge that the HCP covers four species listed as endangered or threatened under the ESA which have been found or are likely to be found in the Plan Area. The Parties further acknowledge that the HCP, this agreement and the permits do not authorize any take, or violation of the ESA, with respect to species other than Covered Species which are listed as endangered or threatened, or with respect to species which are listed subsequent to the Effective Date. When and if a species that is not a Covered Species is listed under ESA or a Listed Species other than a Covered Species in the Plan Area is found to be

affected by the Project, the Parties shall follow the procedures of this Section including, if necessary, amendments to the permits.

(b) If a species which is not included as a Covered Species in the HCP is proposed for listing under ESA during the term of this agreement, including a proposal for listing on an emergency basis, and FWS/DLNR determine that the species may be affected by the Covered Activities, FWS/DLNR shall notify the Permittee of the proposed listing as early as feasible. Similarly, FWS/DLNR shall notify the Permittees if other Listed Species are found to be present in the Plan Area.

(c) The Permittee shall evaluate the potential effect of the Covered Activities on the species identified in paragraphs (a) and (b) above, based on the HCP, the information developed through the ongoing management of the Plan Area and other relevant information, and the Permittee shall inform FWS/DLNR in writing of its determination with regard to such potential effect.

(d) If the Permittee notifies FWS/DLNR that the Covered Activities may affect the species, or if FWS/DLNR disagree with the Permittee's determination that the Covered Activities will not affect the species, the Parties shall meet and confer in order to develop an appropriate response.

(e) If FWS/DLNR determine, after consultation with the Permittee, that feasible modifications in the Adaptive Management program or minor adjustments in the Covered Activities can be used to assure that the Covered Activities do not result in take, jeopardy or adverse modification of designated critical habitat of the species, the Permittee will implement those changes and no amendment to the HCP, this agreement or the permits will be necessary. If FWS/DLNR determines after consultation with Permittee that more substantial modifications are necessary in order to avoid take, jeopardy or adverse modification of designated critical habitat of the species, such modification may be made by minor modifications pursuant to Section 12.1 of this agreement, or in the event that the amendment requires NEPA documentation, by standard amendment.

8.0 ADAPTIVE MANAGEMENT

8.1 Adaptive management. Parties will implement the adaptive management provisions in Chapter VI and Appendix 10 of the HCP when changes in management practices are necessary to achieve the HCP's biological goals and objectives or to respond to monitoring results or new scientific information as provided for in the HCP.

8.2 FWS/DLNR-initiated adaptive management. If FWS/DLNR determine that one or more of the adaptive management provisions in the HCP have been triggered and that Permittee has not changed its management practices in accordance with Chapter VI of the HCP, FWS/DLNR will so notify Permittee and will direct Permittee to make the required changes. Within 30 days after receiving such notice, Permittee will make the required changes and report to FWS/DLNR on its actions. Such changes are provided for in the HCP, and hence do not constitute Unforeseen Circumstances or require amendment of the permit or HCP, except as provided in this section.

8.3 No reduction in conservation benefit. Permittee will not implement adaptive management changes that may result in less mitigation than provided for Covered Species under the original terms of the HCP, unless FWS/DLNR first provide written approval. The amount of money spent on mitigation may be less than the estimated amounts included in Appendix 11 of the HCP, provided the mitigation is sufficient to provide a net conservation benefit to the species. Permittee may propose any such adaptive management changes by notice to FWS/DLNR, specifying the adaptive management modifications proposed, the basis for them, including supporting data, and the anticipated effects on Covered Species, and other environmental impacts. Within 120 days of receiving such notice, FWS/DLNR will either approve the proposed adaptive management changes, approve them as modified by FWS/DLNR, or notify Permittee that the proposed changes constitute permit amendments that must be reviewed under Section 12.2 of this agreement.

8.4 No increase in take. This section does not authorize any modifications that would result in an increase in the amount and nature of take, or increase the impacts of take, of Covered Species beyond that analyzed under the original HCP and any amendments thereto. Any such modification must be reviewed as a permit amendment under Section 12.2 of this agreement.

9.0 FUNDING

Permittee warrants that it has, and will expend, such funds as may be necessary to fulfill its obligations under the HCP. Permittee will promptly notify FWS/DLNR of any material change in Permittee's financial ability to fulfill its obligations. In addition to providing any such notice, Permittee will provide FWS/DLNR with a copy of its annual report each year of the permits, or with such other reasonably available financial information that the Parties agree will provide adequate evidence of Permittee's ability to fulfill its obligations.

10.0 EFFECTIVE DATE AND TERM

10.1 Effective date and term of the agreement. This agreement and the HCP will become effective on the date that FWS/DLNR issue the respective permits. This agreement, the HCP and the permits will remain in effect for a period of twenty (20) years from issuance of each original permit, except as provided below.

10.2 Permit suspension or revocation. FWS/DLNR may suspend or revoke the respective permits for cause in accordance with the laws and regulations in force at the time of such suspension or revocation (50 C.F.R. §§13.27, 13.28) except that FWS/DLNR may revoke the permits based on a determination that the continuation of the permitted activity would be likely to jeopardize the continued existence of the Covered Species only if the FWS/DLNR have not been successful in remedying the situation in a timely fashion through other means as provided in the No Surprises rule, 50 C.F.R. §§17.22(b)(5), 17.32(b)(5).

10.3 Relinquishment of the permits.

10.3.1 Generally. Permittee may relinquish the permits in accordance with the regulations of FWS/DLNR in force on the date of such relinquishment. (These regulations currently are codified at 50 C.F.R. §13.26). Notwithstanding relinquishment of the permits,

Permittee will be required to provide post-relinquishment mitigation for any take of Covered Species that FWS/DLNR determine will not have been fully mitigated under the HCP by the time of relinquishment. Permittee's obligations under the HCP and this agreement will continue until FWS/DLNR notify Permittee that no post-relinquishment mitigation is required, or that all post-relinquishment mitigation required by FWS/DLNR is completed. Unless the Parties agree otherwise, FWS/DLNR may not require more mitigation than would have been provided if Permittee had carried out the full term of the HCP.

10.3.2 Procedure for relinquishment. If Permittee elects to relinquish the permits before expiration of the full term of the HCP, Permittee will provide notice to FWS/DLNR at least 120 days prior to the planned relinquishment. Such notice will include a status report detailing the nature and amount of take of all Covered Species, the mitigation provided for those species prior to relinquishment, and the status of Permittee's compliance with all other terms of the HCP. Within 120 days after receiving a notice and status report meeting the requirements of this paragraph, FWS/DLNR will give notice to Permittee stating whether any post-relinquishment mitigation is required and, if so, the amount and terms of the mitigation, and the basis for the FWS/DLNR conclusions. If FWS/DLNR determine that no post-relinquishment mitigation is required, all obligations assumed by the Parties under this agreement will terminate upon the FWS/DLNR issuance of such notice. If Permittee disagrees with the FWS/DLNR determination, the Parties may choose to use the dispute resolution procedures described in Section 13 of this agreement. Permittee will continue to carry out its obligations under the HCP until any such dispute is resolved. If the Parties are unable to agree, FWS/DLNR will have the final authority to determine whether Permittee is required to provide post-relinquishment mitigation.

10.3.3 Extension of the permits. Upon agreement of the Parties and compliance with all applicable laws, the permits may be extended beyond their initial terms under regulations of FWS/DLNR in force on the date of such extension. If Permittee desires to extend the permits, it will so notify FWS/DLNR at least 180 days before the then-current terms are scheduled to expire. Extension of the permits constitutes extension of the HCP and this agreement for the same amount of time, subject to any modifications that FWS/DLNR may require at the time of extension.

11.0 LAND TRANSACTIONS

11.1 Acquisition of land by Permittee. Nothing in the agreement, the HCP or the permits limits Permittee's right to acquire additional lands. Any lands that may be acquired will not be covered by the permits except upon amendment of the permits as provided in Section 12.2 of this agreement.

11.2 Disposal of land by Permittee. FWS permits may be transferred in accordance with regulations in force at the time of transfer (50 C.F.R. §13.25). Permittee's transfer of ownership or control of Covered Land will require prior approval by FWS/DLNR and an amendment of the permits in accordance with Section 12.2 of the agreement, except that transfers of Covered Lands may be processed as minor modifications in accordance with Section 12.1 of this agreement if:

(a) The land will be transferred to an agency of the federal government and, prior to transfer, FWS/DLNR have determined that transfer will not compromise the effectiveness of the HCP based on adequate commitments by that agency regarding management of such land;

(b) The land will be transferred to a non-federal entity that has entered into an agreement acceptable to FWS/DLNR (e.g. an easement held by the County of Maui with FWS/DLNR as third-party beneficiaries) to ensure that the lands will be managed in such a manner and for such duration so as not to compromise the effectiveness of the HCP;

(c) The land will be transferred to a non-federal entity that, prior to completion of the land transaction, has agreed to be bound by the HCP as it applies to the transferred land and has obtained an incidental take permit/license following normal permit procedures covering all species then covered by the Permittee's permits; or

(d) FWS/DLNR determine that the amount of land to be transferred will not have a material impact on the ability of the Permittee to comply with the requirements of the HCP and the terms and conditions of the permits.

12.0 MODIFICATIONS AND AMENDMENTS

12.1 Minor modifications.

(a) Minor modifications to the HCP shall not require amendment of the agreement or the permits.

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

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

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

the original HCP, (ii) adverse effects on the environment that are new or significantly different from those analyzed in connection with the original HCP, or (iii) additional take not analyzed in connection with the original HCP.

12.2 Standard Amendment

(a) Standard amendments to the HCP are any amendments not treated as minor modifications. Standard amendments to the HCP shall require an amendment to this agreement and to the permits.

(b) The Parties anticipate that amendment of the permits will be treated as original permit applications, pursuant to applicable legal requirements under the ESA, NEPA, HRS Chapter 195D and applicable regulations. Such applications typically will require submittal of a revised Habitat Conservation Plan, a complete permit application form with appropriate fees, a revised implementation agreement, and may require environmental review documents prepared in accordance with NEPA. However, the Parties acknowledge that specific documentation requirements may vary based on the nature of the amendment.

13.0 REMEDIES, ENFORCEMENT AND DISPUTE RESOLUTION

13.1 In general. Except as set forth below, each Party shall have all remedies otherwise available to enforce the terms of this agreement, the permits and the HCP.

13.2 No monetary damages. No Party shall be liable in damages to any other Party or other person for any breach of this agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this agreement or any other cause of action arising from this agreement.

13.3 Injunctive and temporary relief. The Parties acknowledge that the Covered Species are unique and that therefore injunctive and temporary relief may be appropriate to ensure compliance with the terms of this agreement.

13.4 Enforcement authority of the United States. Nothing contained in this agreement is intended to limit the authority of the United States government to seek civil or criminal penalties or otherwise fulfill its enforcement responsibilities under the ESA or other applicable law.

13.5 Dispute resolution. The Parties recognize that disputes concerning implementation of, compliance with, or termination of this agreement, the HCP and the permits may arise from time to time. The Parties agree to work together in good faith to resolve such disputes, using the informal dispute resolution procedures set forth in this section, or such other procedures upon which the Parties may later agree. However, if at any time any Party determines that circumstances so warrant, it may seek any available remedy without waiting to complete the informal dispute resolution.

13.5.1 Informal dispute resolution process . Unless the Parties agree upon another dispute resolution process, or unless an aggrieved Party has initiated administrative

proceedings or suit in federal court as provided in this section, the Parties may use the following process to attempt to resolve disputes:

(a) The aggrieved Party will notify the other Parties of the provision that may have been violated, the basis for contending that a violation has occurred, and the remedies it proposes to correct the alleged violation.

(b) The Party alleged to be in violation will have 30 days, or such other time as may be agreed, to respond. During this time it may seek clarification of the information provided in the initial notice. The aggrieved Party will use its best efforts to provide any information then available to it that may be responsive to such inquiries.

(c) Within thirty (30) days after such response was provided or was due, representatives of the Parties having authority to resolve the dispute will meet and negotiate in good faith toward a solution satisfactory to all Parties, or will establish a specific process and timetable to seek such a solution.

(d) If any issues cannot be resolved through such negotiations, the Parties will consider non-binding mediation and other alternative dispute resolution processes and, if a dispute resolution process is agreed upon, will make good faith efforts to resolve all remaining issues through that process.

14.0 MISCELLANEOUS PROVISIONS

14.1 No partnership. Neither this agreement nor the HCP shall make or be deemed to make any Party to this agreement the agent for or the partner of any other Party.

14.2 Notices. Any notice permitted or required by this agreement shall be in writing, delivered personally to the persons listed below, or shall be deemed given five (5) days after deposit in the United States mail, certified and postage prepaid, return receipt requested and addressed as follows, or at such other address as any Party may from time to time specify to the other Parties in writing. Notices may be delivered by facsimile or other electronic means, provided that they are also delivered personally or by certified mail. Notices shall be transmitted so that they are received within the specified deadlines.

Assistant Regional Director
U.S. Fish and Wildlife Service
911 N.E. 11th Ave.
Portland, Oregon 97232-4181
Telephone: 503-231-6159
Telefax: 503-231-2019

Chairman of the Board
Department of Land and Natural Resources
P.O. Box 621
Honolulu, Hawaii 96809
Telephone: 808-587-0400
Telefax: 808-587-0390

Kaheawa Wind Power, LLC
1043 Makawao Avenue, Suite 208
Makawao, Hawaii 96768
Telephone: 808-572-3011
Telefax: 808-572-8378

14.3 Entire agreement. This agreement, together with the HCP and the permits, constitutes the entire agreement among the Parties. It supersedes any and all other agreements, either oral or in writing, among the Parties with respect to the subject matter hereof and contains all of the covenants and agreements among them with respect to said matters, and each Party acknowledges that no representation, inducement, promise or agreement, oral or otherwise, has been made by any other Party or anyone acting on behalf of any other Party that is not embodied herein.

14.4 Elected officials not to benefit. No member of or delegate to Congress and no member of the Hawaii State Legislature shall be entitled to any share or part of this agreement, or to any benefit that may arise from it.

14.5 Availability of funds. Implementation of this agreement and the HCP by FWS/DLNR is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this agreement will be construed by the Parties to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury or the State of Hawaii. The Parties acknowledge that FWS/DLNR will not be required under this agreement to expend any federal or state agency's appropriated funds unless and until an authorized official of that agency affirmatively acts to commit to such expenditures as evidenced in writing.

14.6 Duplicate originals. This agreement may be executed in any number of duplicate originals. A complete original of this agreement shall be maintained in the official records of each of the Parties hereto.

14.7 No third-party beneficiaries. Without limiting the applicability of rights granted to the public pursuant to the ESA or other federal law, or Chapter 195D HRS or any other state law, this agreement shall not create any right or interest in the public, or any member thereof, as a third party beneficiary hereof, nor shall it authorize anyone not a Party to this agreement to maintain a suit for personal injuries or damages pursuant to the provisions of this agreement. The duties, obligations and responsibilities of the Parties to this agreement with respect to third parties shall remain as imposed under existing law.

14.8 Relationship to the ESA and other authorities. The terms of this agreement shall be governed by and construed in accordance with the ESA, Chapter 195D HRS, and applicable federal and state law. In particular, nothing in this agreement is intended to limit the authority of FWS/DLNR to seek penalties or otherwise fulfill their responsibilities under the ESA and HRS Chapter 195D. Moreover, nothing in this agreement is intended to limit or diminish the legal obligations and responsibilities of FWS or DLNR as agencies of the federal or state government, respectively. Nothing in this agreement will limit the right or obligation of any federal agency to engage in consultation required under Section 7 of the ESA or other federal law; however, it is intended that the rights and obligations of Permittee under the HCP

and this agreement will be considered in any consultation affecting Permittee's use of the Covered Lands.

14.9 References to regulations. Any reference in this agreement, the HCP or the permits to any regulation or rule of FWS/DLNR shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken.

14.10 Applicable laws. All activities undertaken pursuant to this agreement, the HCP, or the permits must be in compliance with all applicable state and federal laws and regulations.

14.11 Successors and assigns. This agreement and each of its covenants and conditions shall be binding on and shall inure to the benefit of the Parties and their respective successors and assigns. Assignment or other transfer of the permits shall be governed by FWS/DLNR regulations in force at the time of assignment or transfer.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Implementing Agreement to be in effect as of the later date that FWS or DLNR issues its permit.

BY _____ Date 3/20/06
Deputy Regional Director
United States Fish and Wildlife Service
Portland, Oregon

BY _____ Date MAR 08 2006
Chairman of the Board
Department of Land and Natural Resources
State of Hawai`i

BY _____ Date 1-MARCH-2006
Paul Gaynor, President
Kaheawa Wind Power, LLC