Maxx E. Phillips 10032
66-250 Kamehameha Hwy, Suite D103
Hale'iwa, HI 96712
Telephone: (808) 388-3825
MaxxEPhillips@gmail.com

David Kimo Frankel 5791
1638-A Mikahala Way
Honolulu, HI 96816
davidkimofrankel@hawaiiantel.net

Attorneys for Keep the North Shore Country

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STATE OF HAWAII

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF A Contested Case Hearing Re Final Habitat Conservation Plan and Incidental Take License for the Na Pua Makani Wind Energy Project by Applicant Na Pua Makani Power Partners, LLC; Tax Map Key Nos. (1) 5-6-008:006 and (1) 5-6-006:018, Koolauloa District, Island of O'ahu, Hawai'i.	Case No. BLNR-CC-17-001 KEEP THE NORTH SHORE COUNTRY'S MOTION AND MEMORANDUM TO RECUSE SAM GON III IN RESPONSE TO MINUTE ORDER NO. 13; CERTIFICATE OF SERVICE

KEEP THE NORTH SHORE COUNTRY'S MOTION AND MEMORANDUM TO RECUSE SAM GON III IN RESPONSE TO MINUTE ORDER NO. 13

Prior to the Board of Land and Natural Resources' January 12, 2018, it seemed obvious to Keep the North Shore Country that Sam Gon III would be recused from participating in this matter. To confirm its understanding, counsel called the deputy attorney general advising the board before the January 12 oral argument. Although Keep the North Shore Country received no assurance from the deputy attorney general, it was shocked to see that Gon intended to participate in this matter, and therefore raised its oral objection. Pursuant to Minute Order No. 13 and HAR § 13-1-34, Keep the North Shore Country moves to recuse Sam Gon III from participation in this contested case hearing and requests remedial relief. Gon should not have participated in this contested case hearing for two reasons.

I. Gon's Participation Violates HRS §§ 91-9(g) and 91-13

"A contested case hearing . . . provides a high level of procedural fairness and protections to ensure that decisions are made based on a factual record that is developed through a rigorous adversarial process." *Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.*, 136 Hawai'i 376, 380, 363 P.3d 224, 228 (2015). HRS § 91-9(g) forbids board members from considering matters that are not specifically in the record: "No matters outside the record shall be considered by the agency in making its decision except as provided herein." HRS § 91-13 forbids board members from consulting "any person on any issue of fact except upon notice and opportunity for all parties to participate, save to the extent required for the disposition of ex parte matters authorized by law." The Hawai'i Supreme Court has held:

> Hawai'i Revised Statutes (HRS) § 91-9(g) (1985) provides that "[n]o matters outside the record shall be considered by the agency in making its decision except as provided herein." Accordingly, administrative agencies may not consult sources outside the record when acting in an adjudicatory capacity. Where an agency consults outside sources, the right of a party to cross-examine those sources and present rebuttal evidence is violated.
>
> However, where an agency conducts further proceedings such as a rehearing, and affords the parties the opportunity to cross-examine the outside source and to present rebuttal evidence, the improper effect of the agency consulting sources outside the record may be cured.

Mauna Kea Power Company Inc. v. BLNR, 76 Hawai'i 259, 262, 874 P.2d 1084, 1087 (1994) (internal citations omitted).

In this case, Gon served on the Endangered Species Recovery Committee during its December 15, 2015 and February 25, 2016 meetings. *See* Exhibits A-35 and A-36. It seems obvious that his participation would have provided him very specific information about this habitat conservation plan that is not in the record. In any case, at the January 12, 2018 meeting, Gon specifically made reference to knowledge that is **not** in the record. In other words, he

confirmed that he was relying on information that is not in the record. He said:

> The fact that it does not show up in the HCP record, kind of flies in the face of the fact that the ESRC went to visit as many of these projects in person to look at the areas that were being surveyed, to consider the records for each of those places, the different conditions and habitat, everything from the vegetation, to typical wind behavior and the like, in order to assess what was most appropriate to apply to this particular HCP.[1]

Keep the North Shore Country disputes Gon's recollection of what the Endangered Species Recovery Committee did.[2] In any case, his alternate version of the facts is not supported by any of the evidence in the record. His recitation of the facts demonstrates that he violated HRS §§ 91-9(g) and 91-13. He is relying on information that is not part of the record. And it taints this entire board's deliberative process.

Once Gon is recused, Keep the North Shore Country must be given the opportunity to (a) question DLNR staff members as to the accuracy of Gon's comments (b) question Endangered Species Recovery Committee members as to the accuracy of Gon's comments and (c) present this corrected information to the board (of course, with other parties' rights to participate as well).

II. Gon's Prior Participation on the Endangered Species Recovery Committee Prejudiced His Viewpoint.

"In an adjudicatory proceeding before an administrative agency, due process of law generally prohibits decisionmakers from being biased, and more specifically, prohibits decisionmakers from prejudging matters and the appearance of having prejudged matters." *Mauna Kea,* 136 Hawai'i at 389, 363 P.3d at 237. "Indeed, if there exists any reasonable doubt about the adjudicator's impartiality at the outset of a case, provision of the most elaborate procedural safeguards will not avail to create [an] appearance of justice." *Id.* at 390, 363 P.3d at

[1] Although an official transcript from the January 12, 2018 oral argument has not been made available to Keep the North Shore Country, a recording of that meeting captures Gon's comments. The BLNR should ensure it has a copy of the transcript from that meeting before resolving this motion.

[2] He was not on the committee during the meeting or one site visit in March 2015. *See* A-33 and A-34.

238. The purpose of a contested case hearing is frustrated when a "decisionmaker rules on the merits before the factual record is even developed. Such a process does not satisfy the appearance of justice, since it suggests that the taking of evidence is an afterthought and that proceedings were merely "mov[ing] in predestined grooves." *Id.* at 391, 363 P.3d at 239. In *American Cyanamid Company v. Federal Trade Commission*, 363 F.2d 757 (6th Cir. 1996), the chairman of the Federal Trade Commission had previously served on a Subcommittee on Antitrust and Monopoly. *Id.* at 763. The issue before the FTC and the subcommittee involved "many of the same facts and issues." *Id.* The court noted:

> It is to be emphasized that the Commission is a fact-finding body. As Chairman, Mr. Dixon sat with the other members as triers of the facts and joined in making the factual determination upon which the order of the Commission is based. As counsel for the Senate Subcommittee, he had investigated and developed many of these same facts.

Id. at 767. The court held that

> disqualification is required when, as in the present case, the legislative committee investigation involved the same facts and issues concerning the same parties named as respondents before the administrative agency, and to the extent here presented.

Id. at 768.

In this case, Gon demonstrated bias that should preclude his participation in this contested case hearing. He was the member of the Endangered Species Recovery Committee that made the motion to approve the habitat conservation plan. Exhibit A-36 at 6. The issues before the Endangered Species Recovery Committee are virtually identical to the issues before this board. It is that committee's recommendation that the hearing officer and Keep the North Shore Country found to be lacking. Clearly, Gon views these positions as a criticism of him. He voted against Keep the North Shore Country's participation in this contested case hearing. Exhibit A-41 at 15. Most importantly, before Keep the North Shore County had any opportunity to present any evidence or cross examine the applicant's "experts," he proclaimed that "[t]he

suggestion that the habitat conservation plan is fatally flawed or inadequate researched its problematic in his mind." *Id.* at 14. Gon's statement reveals prejudice as to the adjudicative facts. It also appears to improperly shift the burden on to Keep the North Shore Country to prove flaws in the habitat conservation plan when it is the applicant that has the burden of proof. *See* unchallenged Minute Orders 6 and 7; HAR § 13-1-35(k); and HRS § 195D-4(g).

The attorney general's office's reliance upon *Liberty Dialysis-Hawaii, LLC v. Rainbow Dialysis, LLC, et al.*, 130 Hawai'i 95, 306 P.3d 140 (2013) is misplaced. That case considered the narrow issue as to whether the Department of Health's rules applied to the State Health Planning & Development Agency's committees. *Id.* at 96, 306 P.3d at 141. The court held that recusal was not required because a specific statute, HRS § 323D-47 expressly intended that an administrator participate in an initial decision and in a subsequent reconsideration:

> However, in crafting the reconsideration statute, Hawai'i Revised Statutes § 323D–47, the legislature clearly intended that the SHPDA administrator participate in both the initial decision on a Certificate of Need, and in any reconsideration of that decision. Because HAR § 11–1–25(a)(4) conflicts with this intent, it would be invalid if applied in the circumstances here. Accordingly, we hold that HAR § 11–1–25(a)(4) is inapplicable.

Id. at 97, 306 P.3d at 142. In reaching its holding, the court did not interpret HRS chapter 91. The appellant did **not** argue that recusal was required pursuant to either HRS chapter 91 or due process. It boggles the mind why anyone would think that this case has any relevance to the case at hand. *Liberty Dialysis* involves a different state agency, different administrative rules, different state statutes, and different legal issues. The only portion of the *Liberty Dialysis* case that has any relevance to this case is the court's observation in passing that "bias or prejudice is a form of conflict of interest," *id.* at 110, 306P.3d at 155, and that "due process requires disqualification where "circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on [the adjudicator's] impartiality." *Id.* at 111, 306P.3d at 156. That is

precisely the problem with Gon's participation in this case.

DATED: Honolulu, Hawai'i, January 24, 2018.

David Kimo Frankel
Maxx E. Phillips
Attorney for Keep the North Shore Country

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF A Contested Case Hearing Re Final Habitat Conservation Plan and Incidental Take License for the Na Pua Makani Wind Energy Project by Applicant Na Pua Makani Power Partners, LLC; Tax Map Key Nos. (1) 5-6-008:006 and (1) 5-6-006:018, Koolauloa District, Island of O'ahu, Hawai'i.	Case No. BLNR-CC-17-001 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Keep The North Shore Country's Motion and Memorandum to Recuse Sam Gon III in response to Minute Order No. 13 was served upon the following parties by hand delivery or electronically, on January 24, 2018, at the addresses below:

SUZANNE D. CASE, CHAIRPERSON
Chairperson
Kalanimoku Building
1151 Punchbowl St.
Honolulu, HI 96813
Suzanne.Case@hawaii.gov

CINDY Y. YOUNG, ESQ.
Deputy Attorney General
Department of the Attorney General
465 South King Street, Room 300
Honolulu, Hawai'i 96813
Counsel for the Board of Land
and Natural Resources
cindy.y.young@hawaii.gov

MS. ELIZABETH J. RAGO
56-331 Kekauoha Street
Kahuku, Hawai'i 96731
elizabethrago@gmail.com

NA PUA MAKANI POWER PARTNERS LLC
John P. Manaut, Esq.
Puananionaona P. Thoene, Esq.
jpm@carlsmith.com and pthoene@carlsmith.com

DATED: Honolulu, Hawai'i, January 24, 2018.

DAVID KIMO FRANKEL
MAXX E. PHILLIPS
Attorneys for Keep the North Shore Country