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LAND USE COMMISSION  
STATE OF HAWAII  
2018 DEC 28 A 9:59  
OF COUNSEL  
DAVID W. PROUDFOOT

COUNSEL  
LORNA A. NISHIMITSU  
Federal I.D. No. 99-0317663

December 21, 2018

Mr. Daniel E. Orodener  
Executive Officer  
Land Use Commission  
State of Hawaii  
P. O. Box 2359  
Honolulu, Hawaii 96804-2359

VIA EMAIL & REGULAR MAIL

Re: **Approving Agency: Planning Commission, County of Kauai  
In The Matter Of The Application Of AES LAWA'I SOLAR, LLC,  
a Delaware limited liability company, for a Use Permit, a  
Class IV Zoning Permit, and a Special Permit for real property  
situated at Kōloa and Lāwa'i, Kona, Kaua'i, Hawai'i, identified by  
Kaua'i Tax Map Key No. (4) 2-6-003:001 (por.)  
Use Permit No. U-2018-1  
Class IV Zoning Permit No. Z-IV-2018-1  
Special Permit No. SP-2018-2**  

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**Approving Agency: State Land Use Commission  
In The Matter Of The Application Of AES Lawa'i Solar, LLC For A  
Special Use Permit To Establish A Solar Energy Facility On  
Approximately 196.33 Acres Of Land Within The State Land Use  
Agricultural District At Kōloa And Lāwa'i, Kaua'i, Hawai'i,  
Tax Map Key (4) 2-6-003:001 (portion)  
Docket No. SP17-408**

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Dear Mr. Orodener:

I have attached a copy of the AES Lawa'i Solar, LLC 2018 Annual Report-Special Use Permit Compliance ("2018 Report") for your review. The 2018 Report is being submitted pursuant to the conditions contained in the following approvals:

Mr. Daniel E. Orodener  
December 21, 2018  
Page 2

1. Condition 8 of the Conditions of Approval contained in the Order Adopting The County Of Kauai Planning Commission's Recommendation, Findings Of Fact, Conclusions Of Law, And Decision And Order To Approve The State Special Use Permit, With Modifications (Docket No. SP17-408) approved by the State Land Use Commission, filed November 22, 2017.

2. Condition 8 of the Conditions of Approval contained in Findings Of Fact, Conclusions Of Law, And Decision And Order (Special Permit SP-2018-2, Use Permit U-2018-1, and Class IV Zoning Permit Z-IV-2018-1) approved by the Planning Commission of the County of Kauai on September 26, 2017.

Please contact me if you have any questions or need additional information concerning the 2018 Annual Report.

Thank you very much.

Sincerely yours,

BELLES GRAHAM PROUDFOOT  
WILSON & CHUN, LLP

A handwritten signature in black ink, appearing to read 'Max W. J. Graham, Jr.', with a long, sweeping horizontal line extending to the left and curving upwards to the right.

Max W. J. Graham, Jr.

MWJG:jgm  
Enclosure

AES LAWA'I SOLAR, LLC,  
2018 Annual Report - Special Use Permit Compliance

LAND USE COMMISSION  
STATE OF HAWAII

2018 DEC 28 A 9:59

#	LAWA'I PERMIT COMPLIANCE/CONDITIONS	2018 AES RESPONSES
1	The solar utility facility shall be constructed and operated as represented. Any changes to the facility and/or operation shall be reviewed by the Department to determine whether Planning Commission review and approval is required.	AES commenced construction in early 2018 and as of December 2018 are still under construction and nearing energization and operation of the project. The construction of the project has progressed as represented.
2	Usable lands of the Petition Area, including areas under PV panels, shall be made available for compatible agricultural use at a lease rate that is at least 50 percent below the fair market rent for comparable properties, as long as the Project is in operation. Compatible agricultural operations shall be established by the Applicant and its successors and/or assigns within six 6 months of the start of commercial power generation. Extensions to this deadline may be granted by the Director of the County of Kaua'i Planning Department (PD) for unforeseen extenuating circumstances. Additional consideration may be given if the Applicant is actively seeking to have such operations established.	As of December, 2018 the project is not yet in operation but once in operation in 2019 AES will include a compatible agricultural use of having Sheep grazing at the project site.
3	If at any time during the term of the Special Permit (SP) no compatible agricultural operations exist on the usable lands of the Petition Area for 6 months, the Applicant shall notify the Director of the Kaua'i PD in writing within 30 days of the end of the 6-month period. If requested by the Planning Director, the Applicant shall attend a meeting of the Planning Commission and submit a report to the Planning Commission detailing the Applicant's actual and reasonable efforts to establish compatible agricultural operations on the usable lands of the Petition Area. The Planning Commission may determine whether probable cause exists to re-evaluate the SP and to hold a hearing pursuant to the Rules of the Planning Commission. Extensions to the 6- month deadline may be granted by the Planning Director for unforeseen extenuating circumstances.	Not applicable. See comment above in #2.
4	<p>The Applicant shall submit for review and obtain the approval of the following: rom the Director of the Kaua'i PD, prior to the issuance of a grading or building permit:</p> <ul style="list-style-type: none"> <li>a. Applicant shall minimize or avoid clearing and grading activities from June 1 through September 15.</li> <li>b. A survey map accompanied by a metes and bounds description of the APPROVED Petition Area.</li> <li>c. A site plan showing the area required under Condition 1, above, relating to the minimum</li> </ul>	AES provided all requested documents and received its grading permit on April 4, 2018.



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	<p>land area to be made available for compatible agricultural use.</p>	
<p>5</p>	<p>Prior to the closing of the building permit for the facility, the Applicant shall submit to the Kaua'i PD proof of financial security, such as a letter of credit or similar assurance, from a creditworthy financial institution satisfactory to Kaua'i PD. The security shall remain in place for the duration of the operation of the Project, with evidence of same provided to the Director of the Kaua'i PD on an annual basis, in an amount approved by the Kaua'i PD as sufficient to decommission the Project and restore the Petition Area to substantially the same physical condition as existed prior to the development of the facility.</p> <p>The applicant shall decommission the facility, including the removal of all equipment related to the facility, within twelve (12) months following the termination of operations of the facility. A change in project ownership or a change in ownership of the land subject to the SP, which warrants a new proof of financial security to decommission the project, shall be submitted to the Kaua'i DP for processing through the Planning Commission, within three (3) months of the ownership change.</p> <p>The Applicant shall incorporate this condition in the license and/or lease agreement with the land owner, and said license and/or lease agreement shall be reviewed for approval by the Kaua'i PD.</p>	<p>AES has a requirement in its executed Grant of Easement Agreement with McBryde Sugar Company, LLC that "on or prior to the Operational Period, Grantee shall cause to be delivered to Grantor either (i) a guaranty from AES Distributed Energy, Inc. of Grantees Removal Obligations provided that AES Distributed Energy, Incs liability under such guaranty shall be limited to \$2,100,000 or (ii) such other security as the parties may mutually agree."</p> <p>This requirement starts at commercial operations and runs through the entire term of the agreement.</p> <p>Once the system reaches commercial operation, AES will ensure there is the \$2,100,000 guaranty in place to ensure removal of the system.</p>
<p>6</p>	<p>The Applicant shall mitigate impacts to fauna on site as follows:</p> <ol style="list-style-type: none"> <li>a. Applicant shall develop an endangered species awareness training module, which shall include all potential endangered species that may frequent the Petition area.</li> <li>b. All construction workers and solar facility employees shall undergo endangered species awareness training prior to starting work.</li> <li>c. In order to minimize adverse impacts on the Federally Listed Threatened Species, Newell's Shearwater and other seabirds, external lighting shall be only of the following types: shielded lights, cut-off luminaries, or indirect lighting. Spotlights aimed upward or spotlighting of structures, landscaping or the ocean shall be prohibited.</li> <li>d. Barbed wire shall not be used on the top of any fencing.</li> <li>e. Applicant shall monitor avian injuries occurring at the photovoltaic system, and report occurrences to the USFWS.</li> </ol>	<ol style="list-style-type: none"> <li>a) AES developed and implemented an endangered species awareness training module which was prepared by a local biologist and is attached to this report: <a href="https://aesde.box.com/shared/static/1il2pia666xt2bzdw64wr3nmjn2hzj8.pdf">https://aesde.box.com/shared/static/1il2pia666xt2bzdw64wr3nmjn2hzj8.pdf</a></li> <li>b) All construction workers and solar facility employees underwent the training prior to starting work on site.</li> <li>c) Training held March 18<sup>th</sup> onsite before start of work.</li> <li>d) Barbed wire is not used on any top of any fencing.</li> <li>e) During construction AES has been monitoring for avian injuries occurring at the photovoltaic system and any incidents immediately reported.</li> </ol>



AES LAWAI SOLAR, LLC,  
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| 7  | <p>The Applicant shall establish the Project within two (2) years of the date of the LUC's Decision and Order approving the SP. Requests for extension of this deadline shall be submitted to the Director of the Kaua'i PD prior to the expiration of the deadline. The LUC may grant an extension to the deadline to establish the Project due to unforeseen circumstances that were beyond the control of the Applicant. This SP shall be valid for a period of thirty-five (35) years from the start of commercial operations, subject to further extensions upon a timely request for extension filed with the Planning Commission at least one hundred twenty (120) days prior to the SP's expiration. Approval of time extensions shall not be required from the LUC.</p> | <p>As of December 2018 AES is nearly complete with construction of the facility and will reach commercial operations by end of year or in January 2019, well within the 2 year time period from decision from the State LUC.</p>                                 |
| 8  | <p>On or before December 31 of each year that the SP is in effect; the Applicant or its successor shall file an annual report to the LUC, OP, and the Kaua'i PD that demonstrates the Applicants' compliance with conditions of the SP.</p>  | <p>This report shall serve as the annual report as required to demonstrate our compliance with conditions of the SP.</p>   |
| 9  | <p>Major modifications to: (1) the Project plans, including but not limited to significant increases in the number of PV panels; (2) amendments to the conditions of approval; (3) significant expansions of the approved area; or (4) change in uses stated herein, shall be subject to the review and approval of the Planning Commission and the LUC. Minor modifications including minor additions to accessory uses and structures, and new incidental uses and structures in the approved area are subject to review and approval by the Director of Kaua'i PD.</p>  | <p>There were no major modifications to the Project Plans including but not limited to significant increases in the number of PV panels, amendments to conditions of approval, significant expansions of the approved area or changes in uses stated herein.</p> |
| 10 | <p>The Applicant and/or landowner shall notify the Director of Kaua'i PD of:</p> <ul style="list-style-type: none"><li>a. Any change or transfer of licensee on the Petition Area.</li><li>b. Any change in uses on the Petition Area.</li><li>c. Termination of any uses on the Petition Area; and/or</li><li>d. Transfer in ownership of the Petition Area.</li></ul>  | <p>There was no change termination or transfer of any items listed to the Petition Area.</p>   |
| 11 | <p>Enforcement of the conditions of the SP shall be pursuant to the Rules of the Planning Commission, including the issuance of an order to show cause as to the reason the SP should not be revoked if the Planning Commission has reason to believe that there has been a failure to perform the conditions herein.</p>  | <p>No comment.</p>   |
| 12 | <p>If the PV array creates a hazardous condition for pilots or motorists, the facility operator shall immediately mitigate the hazard upon notification by the DOT, Airports Division, or the FAA.</p>   | <p>There have been no notifications from DOT, Airports or FAA.</p>   |

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| <p><b>13</b> If required to mitigate visual impacts, new landscaping shall be installed and maintained around the Solar Project to screen it when viewed from Aka Road or Koloa Road. The Planning Department shall determine whether additional landscape screening is necessary and the degree at which it is provided.</p>  | <p>As discussed in the permit hearings AES maintained a vegetative screening barrier around the site such that it is not visible from any major roads. There have been no complaints and we have a vegetative screening and dust fence installed so there is no visibility to our site from any major roads.</p>   |
| <p><b>14</b> In the event that historic resources, including human skeletal remains, structural remains, cultural deposits, artifacts, sand deposits, or sink holes, are identified during demolition and/or construction activities, all work shall cease in the immediate vicinity of the find, the find shall be protected from additional disturbance, and the SHPD and Kaua 'i Island Burial Council, as applicable, shall be contacted immediately. Without any limitation to any other condition found herein, if any burials or archaeological or historic sites are discovered during the course of construction of the facility, all construction activity in the vicinity of the discovery shall stop until the issuance of an archaeological clearance from the SHPD that mitigation measures have been implemented to its satisfaction.</p> | <p>AES implemented its approved Archaeological Monitoring Plan (as reviewed and approved by SHPD). AES had archaeologists on site during grading work and implemented contractor training for what to do in the event of a finding. There have been no significant findings. Agricultural findings were of no concern to archeologist and full reports can be provided. No findings.</p> |
| <p><b>15</b> The Applicant shall comply with the requirements of the State Department of Health, the County's Fire Department, the Department of Water, and the Department of Public Works, as well as any other applicable government agencies.</p>   | <p>AES is in compliance with all listed governmental agencies. Prior to construction AES received its required permits including grading, noise and NPDES and has maintained those as required through construction.</p>   |
| <p><b>16</b> The Applicant shall develop and utilize Best Management Practices (BMP's) during all phases of development in order to minimize erosion, dust, and sedimentation impacts of the project to abutting properties.</p>   | <p>Dust Control, Matting, Silt fencing and all SWPPPs were utilized as best practices during all phases of construction to minimize erosion, dust, and sedimentation impacts. No reports from any neighbor or county, nor anyone else downstream of the site complained and we did not impact any abutting properties or waterways.</p>  |
| <p><b>17</b> The Applicant shall develop and operate the facility, including the implementation of measures to mitigate potential impacts of the Project, in substantial compliance with the representations made to the Planning Commission and the LUC as reflected in this Decision and Order. Such mitigation measures include, but are not limited to, the use of temporary and pennant BMPs to ensure that the development and operation of the facility do not result in an increase in storm water runoff that adversely impacts downstream properties. Failure to so develop the Petition Area may result in revocation of the SP.</p>  | <p>See above response to #16. The project has not yet reach commercial operations.</p>   |



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| 18 | To the extent possible within the confines of union requirements and applicable prohibitions against discrimination in employment, the Applicant shall seek to hire Kaua'i contractors, and shall seek to employ residents of Kaua'i in temporary construction and permanent jobs. It is recognized that the applicant may have to employ non-Kaua'i residents for particular skilled jobs where no qualified Kaua'i resident possesses such skills. For the purpose of this condition, the Commission shall relieve the applicant of this requirement if the applicant is subjected to anti-competitive restraints on trade or other monopolistic practice. | AES hired and used local Kauai contractors for the construction of the project. |
| 19 | The Applicant shall implement to the extent possible sustainable building techniques and operational methods for the project, such as Leadership in Energy and Environmental Design (LEED) standards or another comparable state approved, nationally recognized, and consensus-based guideline, standard, or system, and strategies, which may include but is not limited to recycling, natural lighting, extensive landscaping, solar panels, low-energy fixtures, low energy lighting and other similar methods and techniques. All such proposals shall be reflected on the plans submitted for building permit review.                                  | Not applicable to our project.  |
| 20 | The Planning Commission reserves the right to revise, add, or delete conditions of approval in order to address or mitigate unforeseen impacts the project may create, or to revoke the permits through the proper procedures should conditions of approval not be complied with or be violated.   | No comment.   |
| 21 | The Applicant is advised that additional government agency conditions may be imposed. It shall be the applicant's responsibility to resolve those conditions with the respective agencies.   | No comment.   |
| 22 | As recommended by the State Office of Planning the Applicant shall develop an endangered species awareness training module, which shall include all potential endangered species that may frequent the Petition area. The County shall receive a copy of the training module materials before utilization.   | See above answer to #6. The training module is attached to this report.         |
| 23 | As recommended by the State office of Planning, Applicant shall ensure all construction workers and solar facility employees shall undergo endangered species awareness training prior to starting work.   | See above answer to #6.   |



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24.	Prior to building permit submittal, the Applicant shall hold a public meeting for residents in the areas of Lawa'i, Oma'o, Koloa, Kalaheo and Po'ipu to review the construction plans for the Solar Project to solicit input and mitigate where possible concerns raised.	AES held a public meeting at the Koloa Neighborhood Center on Thursday January 25, 2018 and notified local area residences. A newspaper article about the event is attached hereto.  <a href="http://www.thegardenisland.com/2018/01/27/hawaii-news/amping-up-solar/">http://www.thegardenisland.com/2018/01/27/hawaii-news/amping-up-solar/</a>
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Site Construction Photos



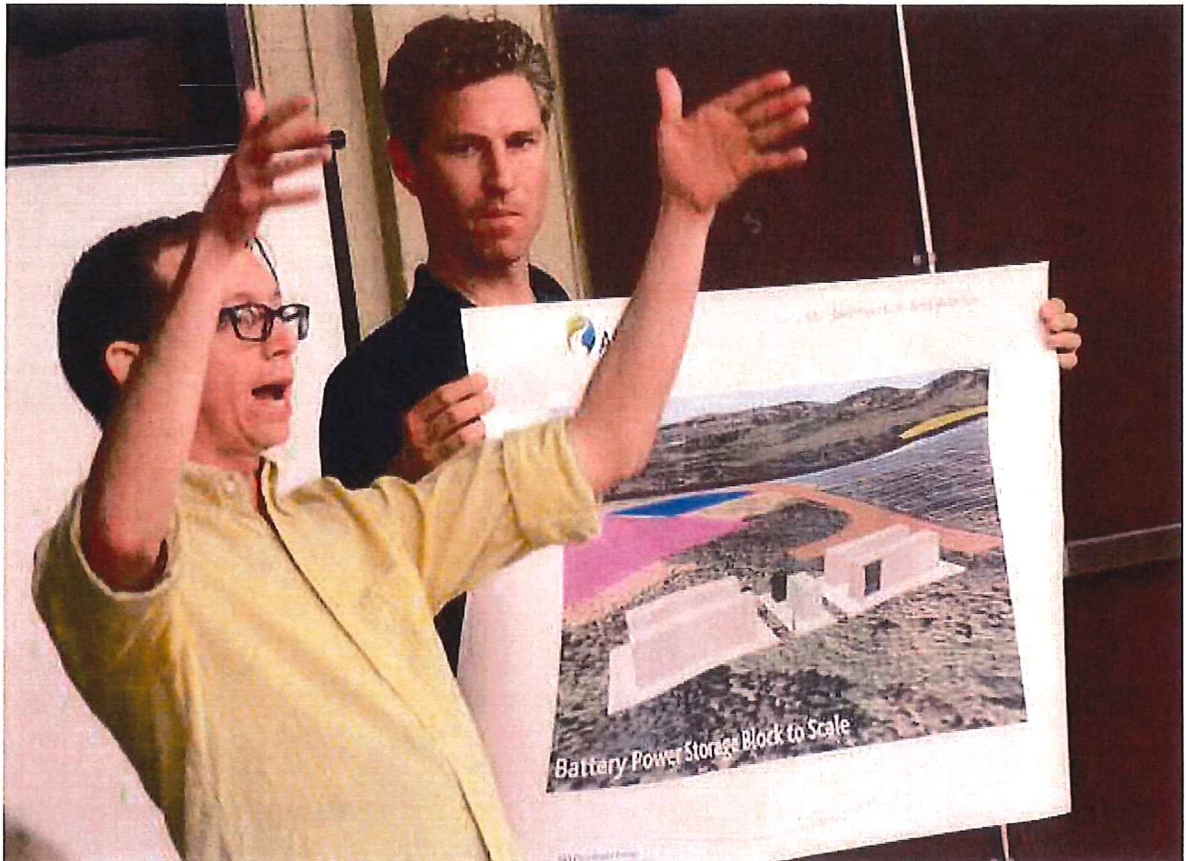


Hawaii News

# Amping up solar

By [Jessica Else The Garden Island](#) | Saturday, January 27, 2018, 12:05 a.m.

*Share this story*



**Jessica Else / The Garden Island**

Sam Ley, AES Distributed Energy energy systems engineer, left, explains the company's upcoming solar project for a group of about 20 people in Koloa Thursday evening.



LAWAI — A solar project about twice the size of the Tesla facility is set for Lawai and if all goes according to plan, the array will be delivering power to Kauai's grid by year's end.

The project is located on A&B-leased land. AES Distributed Energy owned and maintained equipment will provide 20 megawatts of energy for five hours after sundown for a total of 100 megawatt hours.

"The project will provide 11 percent of Kauai's electric generation; increasing Kauai Island Utility Cooperative's renewable sourced generation to close to 60 percent," said David Bissell, KIUC president.

For comparison, the Tesla facility provides 13 MW for four hours, for a total of 52 MWh.

KIUC will operate the system and buy the power through a fixed purchase power agreement, at 11 cents per kWh.

"The pricing is well below the cost of diesel and will not only provide downward pressure on rates, but also helps us avoid the use of 3.7 million gallons of diesel each year," Bissell said.

All of the energy generated from the AES Lawai Project will go to KIUC, according to Sam Ley, energy systems engineer, who brought the public up to speed on the project Thursday night.

Dianna and Kelley Phillips were among the about 20 people that attended the meeting at the Koloa Neighborhood Center, and they dropped by because their home is across the street from the construction and staging area on Koloa Road.

An increase in traffic on Koloa Road was a main concern for the couple. Ley said he and AES representatives on-island would talk further about their recommendations for the project.

"Traffic is a problem on Koloa Road," Dianna Phillips said. "It should be considered."

Traffic management plans are under review, according to Cameron Haughey, project manager.

Other concerns raised during that meeting revolved around dust generation, access and roadway improvements and the details of the solar array, which is under a 25-year agreement with KIUC.

Fishing in the surrounding reservoirs was a point of question at the meeting, and AES representatives said they're aware that the reservoir near the part of the property they're leasing is popular.

"The area we are leasing is contained inside the property," Ley said. "(We'll have) a seven-foot fence around the leased area, but there's still a lot of property not under our control."

The solar photovoltaic (PV) system that's planned for the project will be fully integrated with the Battery Energy Storage System (BESS) and the energy from the solar will be stored either in the BESS or delivered directly to the grid.

The stored energy will be used by KIUC during evening peaks and to provide consistent nighttime power.

Construction is set to begin in this summer, and AES will be building eight power blocks, each operating independently and it will be built so the land can be simultaneously used for agriculture.

"The system generates all the power it needs to power itself and the wiring through the project is underground," Ley said. "There's the secondary agricultural usage for the property — in this case, vegetation management with sheep under the array."

And after 25 years, Ley said AES will take a look at the array and evaluate the possibility of renegotiating the lease if it is still usable.

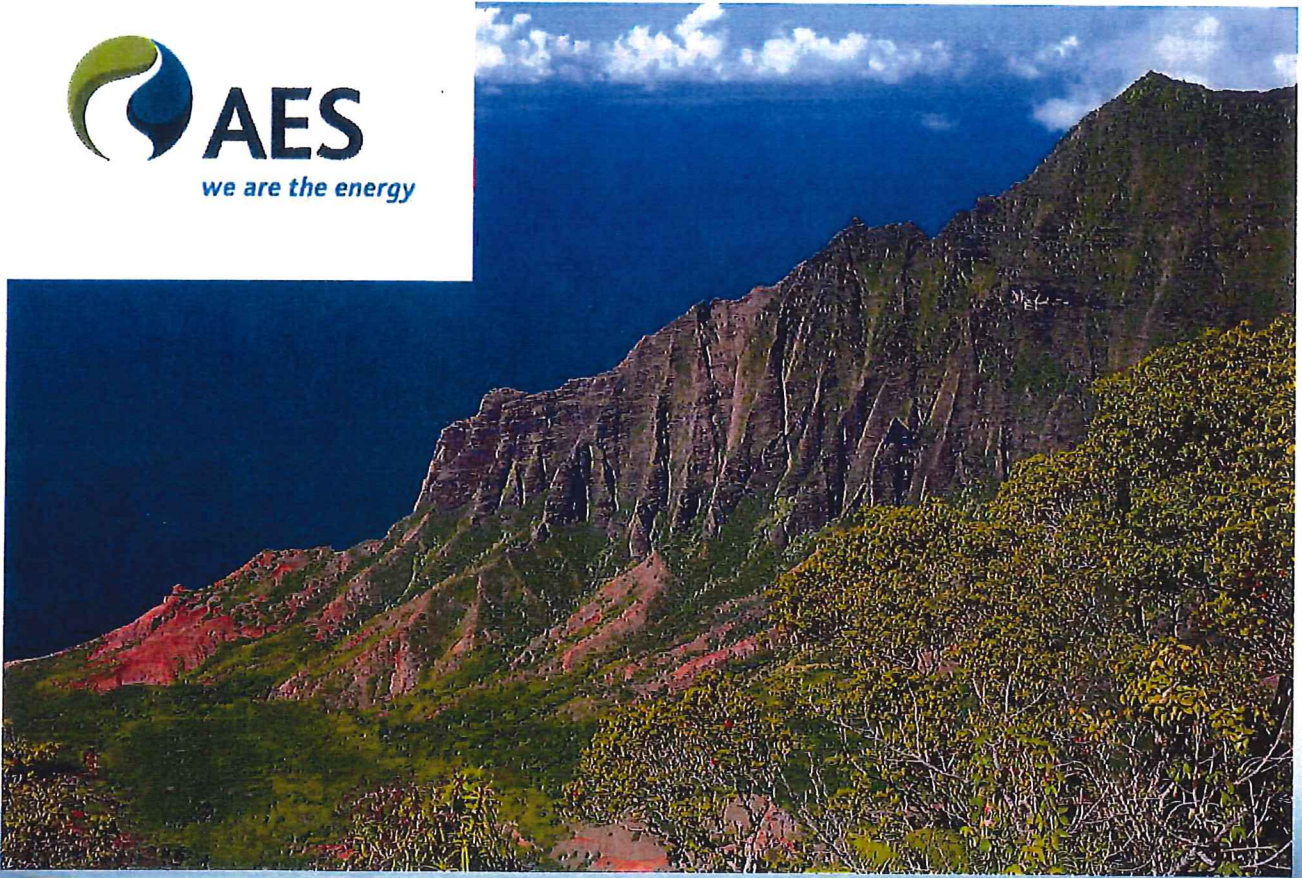
"We do have an obligation to remove all operations, scrape the land clean, and return it to ag (at the end of the agreement)," Ley said. "And there's a possibility we keep it going."

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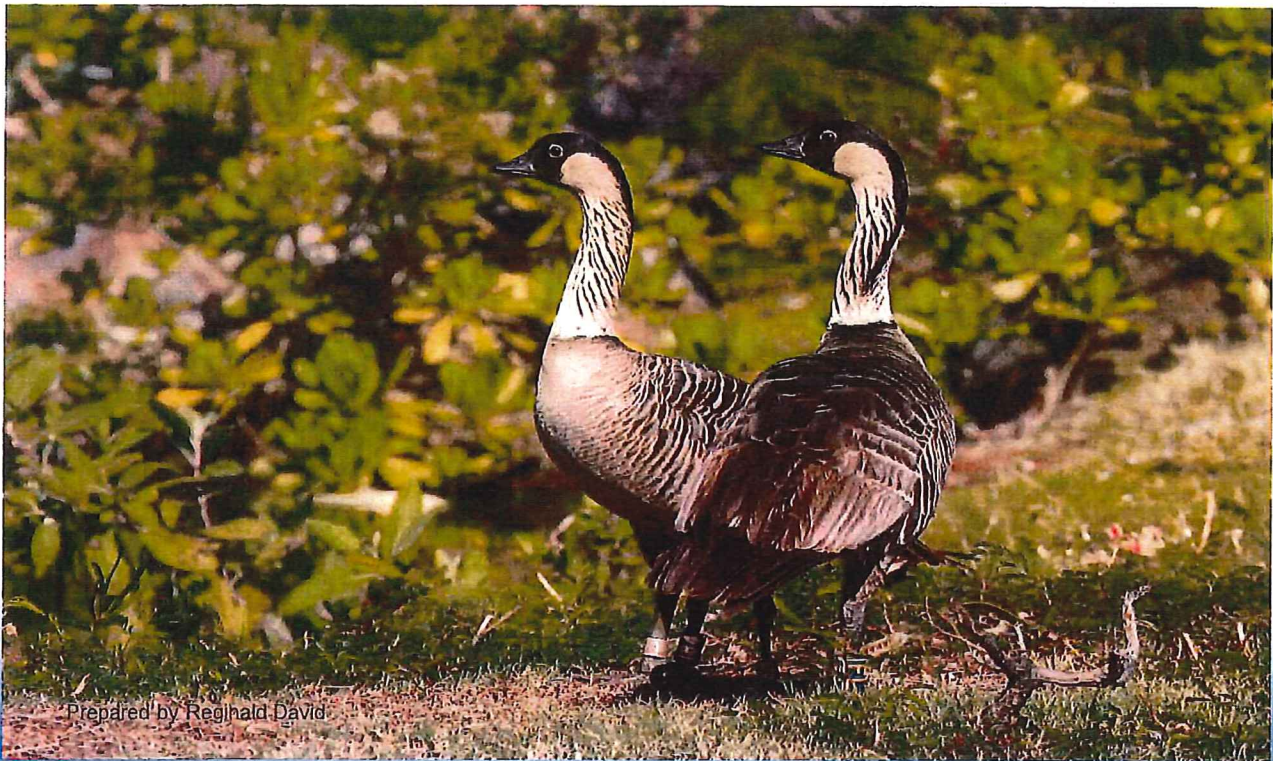
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3137 Kuhio Hwy., Lihue, HI 96766 Telephone: (808) 245-3681







# **AES Lawa'i Solar Endangered Species Awareness Program - Construction - 2018**



Prepared by Reginald David

## Purpose of Training

- Several endangered bird species may be present on the site on a seasonal basis
- AES Lawa'i Solar Facility is committed to the protection of these species
- AES Lawa'i Solar Facility has specific endangered bird protocols in place that all construction personnel must follow
- There are potentially significant legal implications if any of these protocols are not followed





## **Regulatory Setting - Protected Species**

### **Federal -**

**The Endangered Species Act of 1973, as amended (ESA)**

**Migratory Bird Treaty Act (MBTA)**

### **State of Hawai'i -**

**Hawaii Revised Statutes (Chapter 195-D)**

### **IT IS ILLEGAL TO:**

**“harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct” any species listed under any of these statutes**



## Agency and Endangered Species Program Contacts

### Who to Call

- State Department Land & Natural Resources DOFAW
- Thomas Kaiakapu: Wildlife Manager: (808) 274-3440
  - AES Lawa'i Solar Program Coordinator
- Cameron Haughey: (720) 381-4620, mobile: (720) 450-4360
- AES Incident Reporting Hotline (833) 302-1539
  - AES Lawa'i Solar Biological Consultant
- Reggie David: Cell: (808) 937-0124, email: davidr003@hawaii.rr.com



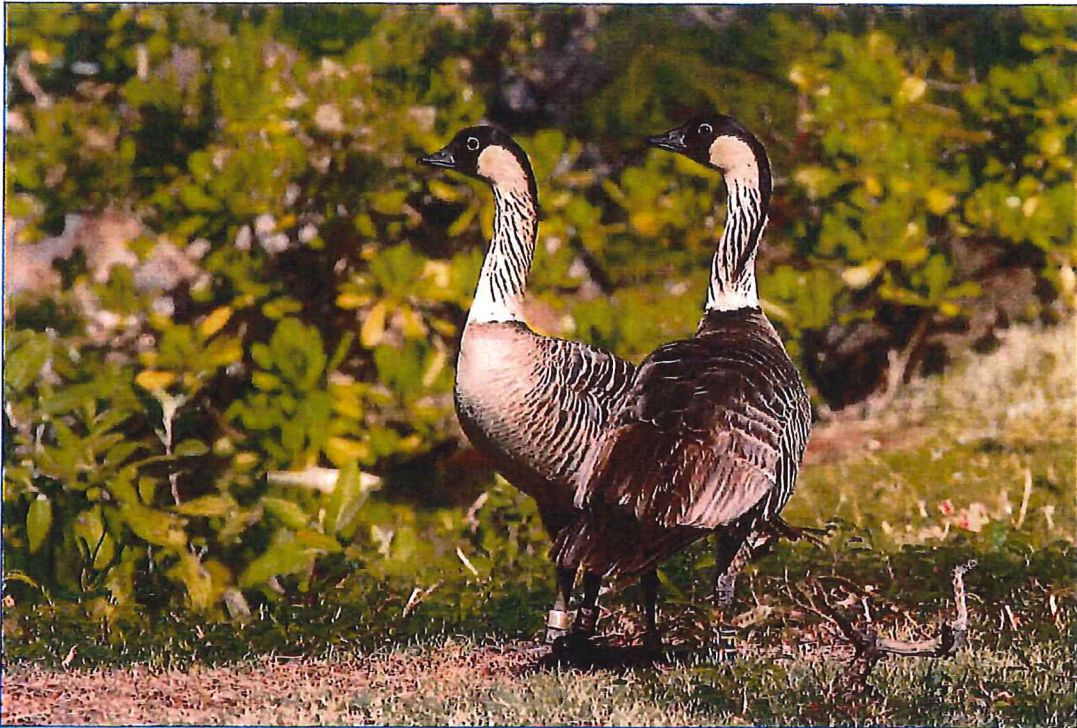


## Endangered Waterbirds Potentially Present Within the AES Lawa'i Solar Facility on a Seasonal Basis

- Hawaiian Goose - *nēnē*
- Hawaiian Coot - *'alaeke'oke'o*
- Common (Hawaiian) Gallinule - *alae'ula*
- Hawaiian Duck - *koloa*
- Hawaiian Stilt - *a'eo*



# Nēnē





## Hawaiian Coot - *'alaeke'oke'o*





**Common (Hawaiian) Gallinule -**  
*'alae'ula*



## Hawaiian Duck - *koloa*





## Black-necked Stilt - *a'eo*





## Waterbird Special Rules

- Slow Down - Speed limit on the site is **15 mph**



## Waterbird Special Rules

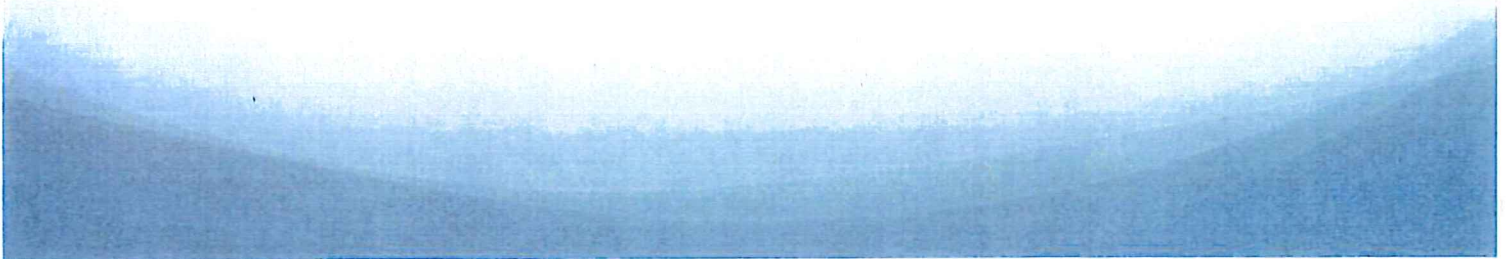
- Check beneath all equipment especially mowers before operating machinery and vehicles
- No pets are allowed on the site
- Dispose of food and trash in covered trash cans
- Don't feed, touch or approach Nēnē or other waterbirds
- Immediately report any injured, sick, injured or dead birds to:

**Cameron Haughey: (720) 381-4620, mobile: (720) 450-4360**

- **Feeding cats or stray dogs on property is expressly prohibited.**

## **Sick or Injured Waterbird Response Protocols**

- If a sick, injured or dead waterbird is found immediately contact your supervisor, and, Cameron Haughey: (720) 381-4620, mobile: (720) 450-4360
- Stay with the bird until an AES employee arrives on the scene, follow their instructions.





## Dead Waterbird Response Protocol

- If you find a dead waterbird immediately contact your supervisor, and, Cameron Haughey: (720) 381-4620, mobile: (720) 450-4360
- Stay with the bird until an AES employee arrives on the scene, follow their instructions.



# Endangered and Threatened Seabird Species



## Endangered and Threatened Seabird Issues

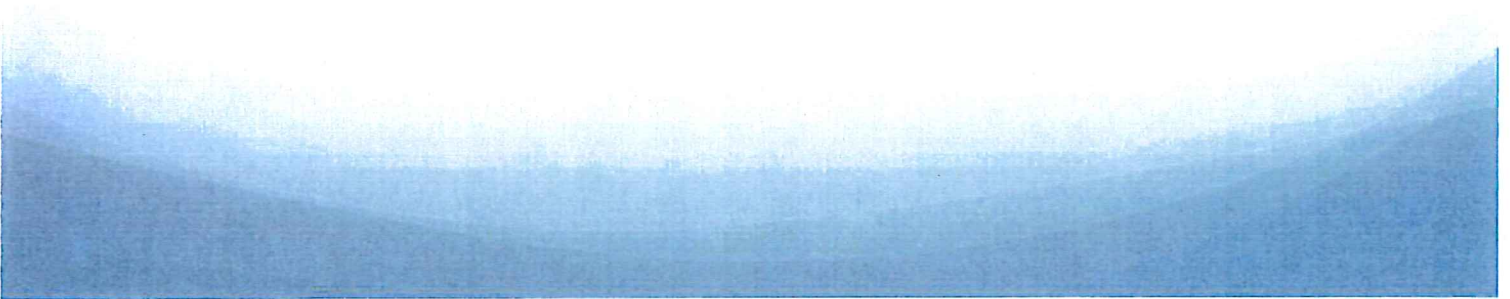
- Night flying seabirds are often attracted to lights
- Fledgling (*keiki*) birds on their way to sea for the first time are often attracted to lights and can be confused by them
- Confused birds may collide with structures, or simply land on the ground too tired to continue flying





## **Endangered and Threatened Seabird Issues cont.**

- Once on the ground they cannot take off again and will die from starvation or be killed by predators if not rescued



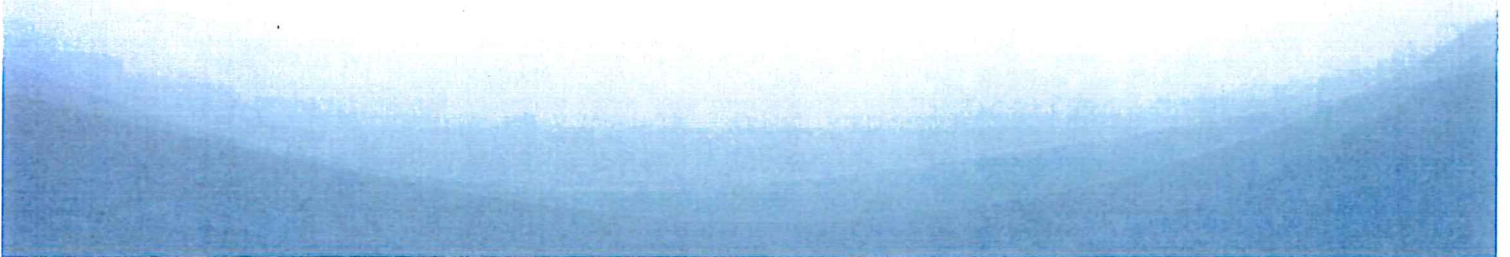
## Downed Seabird Response Protocols

- If a downed seabird is found immediately call your supervisor and Cameron Haughey: (720) 381-4620, mobile: (720) 450-4360
- Stay with the bird until an AES employee arrives on the scene, follow their instructions.



## Take Home Message

- The harming of listed waterbird or seabirds may be construed as “take” under the ESA, and/or HRS 195D.
- The minimization and avoidance of “take” to the maximum extent practicable is required under both federal and State of Hawaii endangered species statutes
- Failure to do so may result in enforcement action, which may result in significant civil and criminal penalties
- Penalties include civil fines of up to \$25,000 per incident, and criminal fines of up to \$50,000, and up to one year federal imprisonment per incident
- **Non compliance with any of the endangered species rules and protocols will result in immediate disciplinary action**



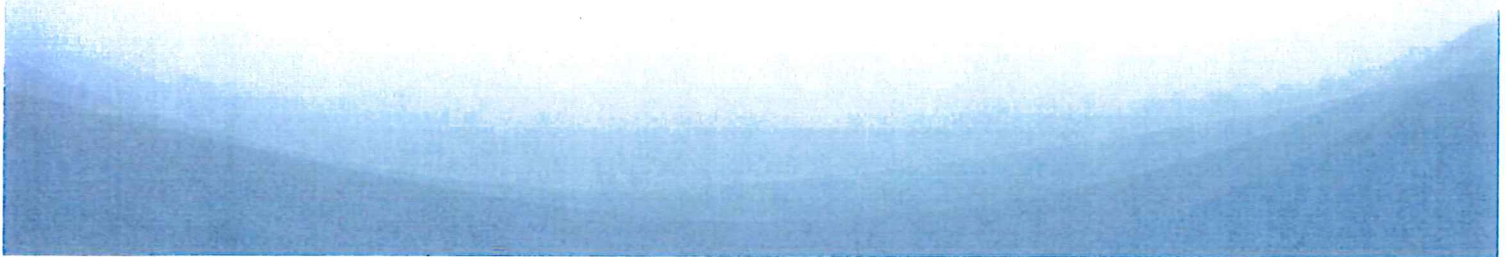


## *Mahalo*

*AES Lawa'i Solar thanks you for your attention to and your assistance with this program*

*AES Lawa'i Solar takes pride in our continued efforts to protect the natural resources on the Island of Kaua'i*

*Protection of these native birds is everyone's responsibility, and is in the common interest of the Island community and future generations*



## *If You Would Like More Information*

- *Other questions? Please see me after the presentation*
- *There is a hardbound copy of all of the protocols with more details in the construction trailer*

