

# Renewable Energy Facility Siting Process Action Plan

*Prepared for:*

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## 1.0 INTRODUCTION

As part of Tetra Tech, Inc.'s (Tetra Tech) contract for professional services with the Hawaii State Energy Office, a division within the Department of Business, Economic Development and Tourism (DBEDT), Tetra Tech is providing this Action Plan for DBEDT's review. The purpose of the Action Plan is to assist DBEDT with identifying services to facilitate the siting and permitting of renewable energy facilities in Hawaii. The information presented in this Action Plan should not be considered a legal opinion but rather a summary of information that is based on Tetra Tech's consultation with DBEDT and our experience supporting the permitting and development of renewable energy projects throughout Hawaii and the United States.

The scope of services included in Tetra Tech's contract calls for Tetra Tech to prepare an Action Plan for DBEDT's implementation of the Renewable Energy Facility Siting Process (herein "201N") as described under Chapter 201N, Hawaii Revised Statutes (HRS) and Title 15, Chapter 36, Hawaii Administrative Rules (HAR) (see Section 3 of this Action Plan for a detailed description of 201N). Tetra Tech's scope of services was originally developed to assist DBEDT with completing the 201N implementation activities identified in DBEDT's *December 2013 Periodic Report to the Legislature*. However, internal review and feedback from several state and county agencies identified several significant potential flaws with the 201N process. Based on these findings, DBEDT directed Tetra Tech to first conduct a comprehensive evaluation of 201N. Tetra Tech summarized the challenges and limitations identified with HRS §201N and HAR §15-36, and in light of these findings, DBEDT determined that Tetra Tech's scope should focus on providing a description of 201N's benefits, challenges and limitations as well as identification of 201N components that are likely impracticable or of little value to renewable energy developers. DBEDT also directed Tetra Tech to identify permitting assistance tools and services that can be implemented immediately and to identify possible amendments to 201N for consideration. Finally, DBEDT directed Tetra Tech to evaluate the following actions that DBEDT could consider for 201N:

- Repeal 201N;
- Amend 201N; or,
- Keep 201N as written.

Thus, in response to DBEDT's direction, this Action Plan includes the following sections:

- Section 2.0 Operational Goals for Permit Facilitation – includes the identification of DBEDT's Energy Office's operational goals;
- Section 3.0 Renewable Energy Facility Siting Process – includes a description of 201N and its existing challenges and limitations;
- Section 4.0 Addressing 201N Issues and Challenges – includes an evaluation of three possible actions DBEDT could move forward with 201N;

- Section 5.0 Tools Outside of 201N to Assist Renewable Energy Projects – includes a range of tools or services DBEDT can provide to support renewable energy facility siting outside of 201N; and
- Section 6.0 Conclusion – provides a summary of benefits and risks for each evaluated action for addressing the issues and challenges with 201N.

## **2.0 OPERATIONAL GOALS FOR PERMIT FACILITATION**

Before evaluating 201N or identifying tools that support energy facility siting and permitting, Tetra Tech worked with DBEDT to identify its Operational Goals that support its directive to facilitate renewable energy projects while balancing technical, economic, cultural, and environmental considerations. Tetra Tech conducted a meeting with DBEDT on June 18, 2014, in which DBEDT identified the following Operational Goals concerning permit facilitation:

1. Assist the State of Hawaii in meeting its clean energy goals.
2. Increase transparency and efficiency in the renewable energy permitting and development process for developers, regulatory agencies, and the community; thereby, helping to reduce overall project cost and development time which ultimately allows the State to achieve its clean energy goals most cost-effectively.
3. Provide resources and support to renewable energy development for both developers and government agencies to clarify permit requirements and to facilitate timely permit processing. Example resources and support include:
  - a. Providing permitting tools and resources that offer guidance;
  - b. Directing developers to the appropriate permitting agency resources;
  - c. Clarifying ambiguities in permit requirements (i.e. triggers) and application processing;
  - d. Supporting the implementation of online permitting by Hawaii permitting agencies; and,
  - e. Serving as a neutral third party to facilitate communication between permitting agencies and applicants.
4. Encourage responsible development of renewable energy by:
  - a. Facilitating public awareness of proposed developments; and,
  - b. Guiding applicants of renewable energy projects to meet legal requirements and conduct appropriate due diligence.

### 3.0 RENEWABLE ENERGY FACILITY SITING PROCESS

#### 3.1 BACKGROUND

In 2008, the Hawaii State Legislature established a full-time, temporary Renewable Energy Facilitator position within DBEDT (“Facilitator” established in HRS §201-12.5). At the same time, the Legislature established 201N (Act 207, Session Laws of Hawaii, 2008) to encourage the timely development of renewable energy projects. Amendments were made to these laws in 2009, 2011, and 2013 resulting in expansion of the applicability of 201N and the Renewable Energy Facilitator’s duties. As provided under Act 207, interim HARs were adopted by DBEDT in June 2010 – Renewable Energy Facility Siting Process Rules, Title 15, Chapter 36.

The intent of 201N is to efficiently shepherd a renewable energy project through the various county, state, and federal permitting processes and to provide a predictable timeframe for receiving permits. 201N provides a mechanism in which the developer of a qualified renewable energy project pays DBEDT to facilitate a comprehensive permit plan that assures a set timeframe for state and county permitting agencies to act on the project permits. 201N requires applicable permits to be issued within 12 months of acceptance of the Final Environmental Impact Statement (FEIS) in accordance with HRS Chapter 343 Environmental Impact Statements (herein “Chapter 343”). Projects 200 megawatts (MW) and larger are automatically eligible for participation, whereas projects between 5 MW and 199 MW, and biofuel production facilities or distribution infrastructure with capacity to produce or distribute 100,000 gallons or more annually, are admitted into 201N at DBEDT’s discretion.

#### 3.2 POTENTIAL ISSUES AND CHALLENGES

Tetra Tech conducted a detailed review of HRS §201N, HAR §15-36, and DBEDT’s *December 2013 Periodic Report to the Legislature* and found that 201N as currently written does not meet its intent to streamline the permit process particularly due to its inherent limitations, lack of clarity, and implementation challenges. 201N benefits only a narrow class of renewable energy projects because most projects’ permitting requirements would typically be completed within 12 months of FEIS acceptance even in the absence of the process; therefore, 201N would not shorten the permit approval timeline. Also, 201N includes language that is unclear and/or contradictory. The following is a summary of potential challenges with 201N including an overview of components that in Tetra Tech’s professional opinion, are likely impracticable or of little value to renewable energy developers.

1. **Limited Definition of Permit.** Under §201N-1, Definitions, the term “permit” is defined as including only eight specific types of permits or approvals, which are:
  - a. State Land Use District Boundary Amendment (SLUDBA)
  - b. County Development, Community, or Community Development Plan Amendment (CPA)
  - c. County Change in Zoning (CIZ)
  - d. State Conservation District Use Permit (CDUP)
  - e. State Special Use Permit (SUP)

- f. Special Management Area Permit (SMA)
- g. Shoreline Setback Variance (SSV)
- h. State and County Easement (Easement)

There is ambiguity in the current definition as to whether the other county and state permits not listed would be eligible to be included in the facilitated 201N process. Power Purchase Agreement decisions by the Public Utility Commission (PUC) and federally delegated environmental permits (e.g., most Department of Health permits) are explicitly listed as not included in the 201N process.

2. **Benefits a Narrow Class of Renewable Energy Projects.** 201N primarily benefits large renewable energy projects that involve complex and lengthy permit processes. Under §201N-1, “renewable energy facility” or “facility” is defined as having the capacity of 200 MW or more. Most renewable energy projects have a capacity less than 200 MW as evidenced by DBEDT’s list of Hawaii Clean Energy Leaders on renewable energy projects. However, the definition also provides that a facility with a minimum size of 5 MW, or 100,000 gallons of biofuel production or distribution, may apply for designation as a renewable energy facility and would be accepted into 201N at DBEDT’s discretion. This provision allows for smaller projects to utilize 201N, but many of these projects will likely find that 201N does not provide noticeable advantages on permit approval timing (see explanation below). Also, it is DBEDT’s understanding that 201N appears to indicate that it does not apply to transmission projects unless they are tied to a renewable energy facility that meets the definition in 201N. Thus, it is likely that a transmission cable project alone does not qualify for 201N.
3. **Limited Advantage in Timing of Permit Issuance.** In general, the 201N process would take approximately 14-16 months after the FEIS is accepted before permits would be issued by state and county agencies. For the majority of renewable energy projects, 201N would not provide a schedule advantage compared to seeking permits outside of 201N, for the following reasons:
  - a. 201N requires applicants to prepare a Chapter 343 Environmental Impact Statement (EIS). For those projects that would not otherwise trigger Chapter 343, this requirement would add a lengthy (potentially 12 months or more) environmental review process. Also, for projects that would otherwise only need to prepare an Environmental Assessment (EA), this would add approximately 6-9 months of time to the permit process. Developers of projects that do not require a Chapter 343 EIS or that only require an EA may opt to not utilize 201N to avoid the additional time and cost of preparing an EIS.
  - b. Of the eight permits that are subject to 201N, five have permit processes that take less than a year. Typically a CDUP, SUP, SMA, SSV, and Easement can be processed in approximately 6-9 months. Most developers of renewable energy projects have, so far, not needed to process the lengthier land use amendment permits (SLUDBA, CPA, and CIZ) that typically take longer than a year to be issued because developers generally site renewable energy facilities in areas that meet permitted land uses.

- c. If an agency fails to process and take action on a permit within the 12-month permit plan deadline, the process for requiring a decision/permit issuance could take another 6 months, for a total of 18 months from permit plan acceptance to permit issuance. Most permits, including construction permits, can be obtained within 12 months of FEIS approval, assuming no major issues.
4. **Language Is Unclear Whether Specific Decision-Making Bodies Are Subject to the 201N Permit Plan and Associated Permit Deadlines.** Many permits need discretionary approval from a county or state board, commission, or council. It is unclear if these decision-making bodies are included in the jurisdiction of 201N. For example, a SUP requires a recommendation for approval from the county planning commissions. The definition of “County Agency” in §201-1 includes “county council” but does not specify the county planning commissions. The definition of “State Agency” makes no mention of commissions or boards. Although both definitions include “other organizations of a county/state government,” “other organizations” is not clearly defined. Another concern is that even if these decision-making boards were subject to 201N, usurping their authority to declare the permit approved or denied when the decision-making body fails to meet the 201N permit plan deadlines may be a politically unpopular measure due to home rule concerns. Ultimately, implementation of 201N would be largely dependent on obtaining commitments from state or county agencies to process a given permit within a given timeframe. As agencies cannot guarantee that a board, commission, or council will act on a permit within a given timeframe, agencies will be reluctant to commit in writing to permit processing deadlines. It is also possible that if a state or county agency determines, in good faith, that 201N conflicts with their agency regulations and responsibilities, the agency can refuse to participate in 201N.
5. **Timing of Public Meetings Out of Sync with Chapter 343 Process.** HRS §201N-10 requires DBEDT to hold a public meeting after acceptance of the permit plan to solicit public and community sentiment regarding the proposed development and incorporate this input into the planning of the facility. This means that 201N requires an additional public meeting after the FEIS is accepted; a point in which further design changes to the project would be difficult to incorporate. As this public meeting would occur late in the design/permitting process, any changes to the design requested by the public/political leadership could conflict with the FEIS proposed action. In the worst case scenario for a developer, the changes could be deemed significant enough that a Supplemental EIS would need to be prepared and processed. This potential risk to the project would cause delays in the overall permit process, thereby potentially increasing planning costs to the developer and potentially impacting other construction and operations commitments. Also, holding a public meeting late in the design/permitting process may create the public perception that the project design is fixed and any comments received will not be considered in a meaningful way.
6. **Timing of Inter-Agency Work Group Out of Sync with Chapter 343 Process.** HAR §15-36-15(a) and (b) describes a process where DBEDT facilitates timely processing of the permit plan with the state agencies who have agreed to the permit plan. Section 15-36-16(a) and (b) describes the same process for county agencies. This process could involve conducting discussions, meetings, working groups, etc. This facilitation could be a useful tool for streamlining permits;

however, the timing of these efforts, as called out in these sections, would not occur until after the permit plan is accepted, which occurs after the FEIS is accepted. Facilitation and coordination with various permitting agencies would be most valuable earlier in the permitting process prior to or concurrent with the development of the Draft EIS. During this time, all the necessary permits are identified and studies are conducted to assess potential impacts from the proposed project. Early coordination with the permitting agencies is important to ensure appropriate project design alternatives are identified and the methodology for assessing potential impacts is agreed upon. Under 201N, these coordination efforts would occur too late in the permitting process to be useful, or at best be redundant as most developers would have engaged the various permitting agencies as part of the EIS process.

7. **No Direct Trigger for Chapter 343.** HRS §201N-8 states that HRS Chapter 343 shall apply to any Permit Plan Application for a renewable energy facility. However, as HRS §343-5(a) doesn't call out "Renewable Energy Facility" as a trigger, it is unclear if a renewable energy facility that is undergoing 201N is a "trigger" for Chapter 343. Further, HRS §343-5 subsection (e) specifies that a draft EIS shall be prepared for an action that proposes the establishment of a renewable energy facility. This language is unclear as renewable energy facility is not listed in subsection (a) as a trigger for Chapter 343. When an EA or EIS is prepared without a clear Chapter 343 trigger, the document is considered an environmental disclosure document according to Office of Environmental Quality Control. The implication of issuing an environmental disclosure document is that there is no known process for handling legal challenges as there is no law or set of rules associated with the preparation of this type of document.
8. **Adds Additional Costs and Risks to Permit Process.** 201N describes a cost reimbursement structure that is intended to fund DBEDT's services in overseeing the permit plan process as well as costs incurred from state or county agencies to process permits (see HRS §201N-4). Permit applicants may be hesitant to take on additional permitting costs if 201N cannot guarantee a benefit to the project such as permit approval timeframes and if 201N creates possible risks for delay in permit issuance and/or legal challenges. In addition to the potential risks listed above, the 201N process is untested; the first few projects to fully undergo 201N would take on the risk of not knowing the extent of potential legal challenge or litigation, as there are no prior case law for projects litigated under 201N. The ambiguities identified herein are potential areas of litigation.
9. **Needs Clarification.** The permit plan process as described in both 201N and HAR §15-36 requires clarification in several areas.
  - a. The term "permit" is used inconsistently throughout 201N. At times "permit" appears to reference an exhaustive list of permits needed for the siting and permitting of a facility, and at other times it appears to refer only to the permits that are included in the definition of "permit." This inconsistency leads to lack of clarity in many parts of the 201N statute, including the description of the permit plan contents in §201N-4(d).
  - b. HAR §15-36-09(b) contains confusing language that references the post-conference report from the pre-application meeting (see §15-36-05(b)) as satisfying the requirement for a written report that explains any deficiencies in the applicant's Permit Plan Application. The

post-conference report would be issued before the Permit Plan Application is received; therefore, the post-conference report cannot provide an analysis of the Permit Plan Application completeness as the Permit Plan Application has not been submitted.

- c. The applicability of the wind energy decommissioning requirement in §201N-31 to 33 appears to be unclear. Under §201N-32(a), there is language that indicates only wind projects “utilizing the renewable energy facility siting process shall be responsible ... for decommissioning of the wind energy facility upon abandonment or the end of the useful life of the ... wind energy facility.” However, under §201N-33(e) it appears that the decommissioning financial security requirement applies to construction of any commercial wind energy facility, not just those undergoing the 201N process. This lack of clarity between §201N-32 and 33 is confusing and could pose a risk to DBEDT as it appears that DBEDT has no mechanism to implement decommissioning requirements, including financial security requirements outside of the 201N process.
10. **Responsibility Associated with Permit Approvals Issued Under 201N.** Under §201N-4(g) and HAR §15-36-14(b), DBEDT can deem a state or county permit approved if the permitting agency fails to approve or deny a permit within 18 months following the approval of a completed Permit Plan Application (and following the FEIS acceptance). If DBEDT utilizes this authority, DBEDT may be at risk of accepting responsibility for that permit approval as well as responsibility for enforcement of permit conditions and associated penalties for non-compliance. 201N does not explicitly require DBEDT to evaluate whether the permit application is compliant with all state or county permit requirements before issuing the permit on behalf of the appropriate agency. By not having this requirement, 201N does not provide any assurance to agencies and the public that permits issued under 201N are compliant with applicable state and county laws.
  11. **Agency Reluctance or Unwillingness to Participate in the 201N Process.** Some permitting agencies consulted by Tetra Tech and DBEDT stated an unwillingness or reluctance to participate in the 201N process due to: (a) the lack of need for 201N permit facilitation given that typical permit processing times outside of 201N are can be shorter than the permit processing time required under 201N; (b) the potential conflict between 201N and other agency laws or policies; and/or, (c) the increased administrative burden placed on agencies to implement 201N (including, but not limited to, the preparation of costs estimates, collection and processing of 201N permit fees, and coordination with other agencies including DBEDT).
  12. **Issues with Implementation of the Subdivision Exemption.** Renewable energy projects may require site acreage or configurations that do not coincide with existing, already subdivided boundaries, and subdivision laws and ordinances generally prohibit the transfer of an interest in land that is not an entire subdivided lot. §201N-14 is beneficial in that it allows leases and easements on portions of parcels to be exempt from formal subdivision requirements and conditions/exactions (such as mandatory infrastructure improvements like roadways, sewer and water that may not be needed for renewable energy projects), thereby facilitating the financing and development of renewable energy projects. §201N-13 and §201N-14 are potentially problematic in that early outreach indicated some counties did not have processes in place to recognize the exempted subdivided parcels, legally record them, or ensure the exempted

subdivided parcels were otherwise in conformance with county land use laws. §201N-13 contains a sunset provision that repeals the law on June 30, 2020 but provides that any lease or easement that received subdivision exemptions under this law may continue to be effective.

#### 4.0 ADDRESSING 201N ISSUES AND CHALLENGES

DBEDT requested that Tetra Tech evaluate three possible actions DBEDT could consider to address the issues and challenges described above: 1) Repeal 201N; 2) Amend 201N; and 3) Leave 201N as written. Each option is explored in more detail below.

#### 4.1 REPEAL 201N (EXCEPT FOR §201N-13 TO 14; EXEMPTION FROM SUBDIVISION REQUIREMENTS)

Considering the issues and challenges inherent in 201N and its associated administrative rules, DBEDT may consider recommending repeal of 201N in its entirety, except for the §201N-13 to 14 exemption from subdivision requirements, during a future legislative session. This option has several benefits and risks.

Benefits: The principle benefit of repeal would be to relieve DBEDT from risks associated with attempting to implement the law as written, or alternatively, risks associated with failing to implement a law with issues identified herein which remains in the HRS (see discussion in section 4.3 below). Also, DBEDT would save time and resources that would be spent maintaining the Renewable Energy Facility Siting Special Fund. DBEDT can continue to offer permit facilitation and assistance tools (as described in Table 1, Section 5), as these services and tools are authorized under HRS §196-4<sup>1</sup>, §201-12.5, and §201-61 through 65<sup>2</sup>.

Risks: Repealing 201N may create a public perception that DBEDT is not supporting renewable energy development. For this reason, it would be important for DBEDT to engage with renewable energy stakeholders in advance to educate them on the reasons for the repeal of 201N and the resources still available through DBEDT.

As mentioned above, DBEDT may consider recommending repeal of 201N in its entirety, **except for the subdivision exemption requirements**. The following discussion presents the benefits and risks associated with §201N-13 to 14 as currently written.

- a. **§201N-13 to 14 Exemption from subdivision requirements.** Repeal of §201N-13 and -14 may be considered a loss of statutory authority as this exemption is not provided elsewhere in the HRS. Also noteworthy: HRS §201N-13 contains a sunset provision that repeals the law on June 30, 2020, but provides that any lease or easement that received subdivision exemptions under this law may continue to be effective.

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<sup>1</sup> HRS §196-4 describes the powers and duties of the DBEDT energy resources coordinator.

<sup>2</sup> HRS §201-61 through 65 describes DBEDT's facilitation of permit processing.

Benefits of this Exemption: §201N-14 is beneficial in that it allows leases and easements on portions of parcels to be exempt from formal subdivision requirements and conditions or exactions (such as mandatory infrastructure improvements like roadways, sewer and water that may not be needed for renewable energy projects), thereby facilitating the financing and development of renewable energy projects.

If §201N-13 and -14 are repealed, there may be some risk for projects that have already received approvals under the subdivision exemption. For example, if a project has received approval under 201N-13 and -14 and these statutes were repealed, the legality of the lease or easement that was granted on land that was subdivided per this exemption could be called into question as the safeguard provision in §201N-13(a) would be repealed, leaving the project vulnerable to becoming an existing non-conforming development. If a complete repeal of 201N is pursued, DBEDT could consider moving §201N-13 and 14 to another statute in the HRS other than 201N (e.g., HRS §46-4 (County zoning)), thus preserving the subdivision exemption for renewable energy facilities outside of the 201N statute.

Risks of this Exemption: §201N-13 and §201N-14 are potentially problematic in that early outreach indicated some counties did not have processes in place to recognize the exempted subdivided parcels, legally record them, or ensure the exempted subdivided parcels were otherwise in conformance with county land use laws.

## 4.2 AMEND 201N

DBEDT could develop a legislative package to amend 201N in a future legislative session. If 201N were amended in a way that would make the permit plan process more attractive to developers, it could be a beneficial law that helps facilitate permitting. However, in order for this to happen, the following issues, at the minimum, would need to be addressed in the amendments to 201N.

### 1. §201N-1 Definitions.

- Broaden and clarify the definition of “Permit” so that it applies to more state and county permits than those currently listed. Also, revise the use of the term permit throughout 201N to address any inconsistency and lack of clarity as to whether permit refers to the defined meaning of permit or if it applies to an exhaustive list of permits the project may be subject to. These changes could address the issues described under items 1, 2, 3, and 9a under Section 3.2 “Potential Issues and Challenges.”
- Clarify both in the §201N-1 and throughout 201N whether decision-making bodies are subject to the 201N permit plan and associated permit deadlines. These changes could address the issues described under item 4 under Section 3.2 “Potential Issues and Challenges.”

### 2. §201N-4 Permit plan application; coordinator; fee; pre- application conference. Under subsection (a), remove the portion of the statute that requires fees and cost reimbursement to the permitting agencies. Under subsection (g) add a requirement for DBEDT to evaluate whether a permit application is compliant with the applicable state or county permit

requirements before issuing the permit on behalf of the appropriate agency. Also add language that delegates enforcement of any permit conditions issued by DBEDT to the state or county typically responsible for the permit's enforcement. These changes could address the issues described under items 4, 8, 10 and 11 under Section 3.2 "Potential Issues and Challenges."

3. **§201N-5 Approval of state permits.** Keep this section to provide DBEDT statutory authority to facilitate the timely processing of a permit plan that requires state permits.
4. **§201N-6 Approval of county permits.** Keep this section to provide DBEDT statutory authority to facilitate the timely processing of a permit plan that requires state permits.
5. **§201N-8 Environmental impact review process; applicability.** Adjust the required timing of permit plan acceptance to occur simultaneous to the publishing of the Draft EIS so that the Chapter 343 process and the permit plan process can work concurrently. This change could help address the issues described under items 5, 6, 7, and 8 under Section 3.2 "Potential Issues and Challenges."
6. **§201N-10 Public participation; public meetings.** Change the public meeting requirement to be fulfilled, as an option determined by DBEDT and the developer, by meetings required as part of Chapter 343. This change could help address the issues described under items 5 and 8 under Section 3.2 "Potential Issues and Challenges."
7. **§201N13 and -14 Subdivision exemptions.** Consult the counties on how best to implement and administer the subdivision exemptions allowed under §201N-13 and §201N-14 and encourage them to make any needed amendments to county code. DBEDT should also gain a full understanding of the processes in place within the various counties to exempt certain projects from full subdivision requirements.
8. **§201N-32 Decommissioning of wind energy facilities and §201N-33 Evidence of financial security.** Address the lack of clarity as to whether the wind energy decommissioning requirements apply to all wind energy facilities or just those undergoing 201N. These changes could address the issues described under item 9c under Section 3.2 "Potential Issues and Challenges."
9. **HAR §15-36-09 Action on permit plan application.** Amend HAR §15-36-09 part (b) to remove language that references the post-conference report from the pre-application meeting as satisfying the requirement for a written report that explains any deficiencies in the applicant's Permit Plan Application. This change could address the issues described under item 9b under Section 3.2 "Potential Issues and Challenges."

Other than the amendments suggested above, a review of consistency and clarity of the statute will be needed. Outside of the 201N amendments, Tetra Tech also recommends DBEDT consider an amendment to HRS §343-5(a) and (e) to clarify that a renewable energy facility utilizing 201N (i.e. submitting a Permit Plan Application) is a trigger for Chapter 343.

Benefits: If 201N were amended to address the issues and challenges described in Section 3 of this Action Plan, the benefit would be a renewable energy facility siting process that may be more appealing to developers as it could apply to a broader number of permits and could potentially streamline the overall permit process for renewable energy projects.

Risks: It will be difficult to amend 201N to address the issues and challenges described in Section 3 of this Action Plan. As with any legislative effort to introduce and pass a bill, there is an inherent risk that the final form of the proposed amendments may not achieve the original intent of the bill. This risk could result in changes to 201N that DBEDT did not anticipate. Also, there will likely be challenges from both agencies and private parties to any proposed amendments to 201N. For example, if 201N were amended to broaden the definition of “permit” to include more than just the permits currently listed in §201N-1, DBEDT may receive objections from agencies responsible for permits proposed to be added to the definition.

Also, if 201N were amended and the provision under §201N-4(g) were retained that allows for permits to be processed and issued within a specific timeframe, DBEDT would be accepting responsibility for permits approved under 201N. If an amendment were added to 201N that required DBEDT to evaluate whether the permit application is compliant with the applicable agency’s permit requirements before issuing the permit on behalf of the agency, risks may be reduced but not eliminated, as DBEDT would still be usurping the authority of the state or county decision-making bodies to issue discretionary approval of permits. This authority may be a politically unpopular measure due to home rule concerns. Also, if the permit plan were retained, DBEDT would need to provide staff with the expertise to review permits and make judgments about permit compliance. Staff expertise would need to be broad enough to evaluate all permits that would be included in 201N under the amended definition of “permit”.

#### **4.3 LEAVE 201N AS WRITTEN**

The third option is to leave 201N as written. This approach would require DBEDT to: (a) respond to interest from possible applicants on a case-by-case basis; and, (b) fulfill reporting requirements (i.e., “periodic” reports to Legislature, 201N Special Fund reports). This option has both benefits and potential risks.

Benefits: By not repealing 201N, DBEDT would avoid potential negative public perception or concerns associated with the repeal of a law intended to promote renewable energy. Also, it leaves 201N in place so that amendments can be made in the future to address the operational, logistical, and legal challenges.

Risks: Given the challenges and limitations pertaining to 201N as outlined in Section 3 of this Action Plan, a potential risk associated with leaving 201N as written is the requirement to expend public resources to sustain the 201N program when doing so may not be an efficient way to achieve DBEDT’s operational goals for permit facilitation.

Another possible risk is DBEDT having to automatically accept 200 MW or greater projects into the 201N program should a Permit Plan Application be submitted. However, given currently known built or proposed projects<sup>3</sup>, it is unlikely that a 200 MW project would be proposed in the near term; hence, the associated risk is minimal. Furthermore, according to DBEDT, there does not appear to be an obvious legal liability with declining projects that are less than 200 MW or biofuel projects. It is highly unlikely that a developer would pursue entry into the 201N program upon understanding the challenges and limitations as well as additional costs of the existing 201N statute. However, if an application were submitted, DBEDT would need a reason to decline the application in good faith, and there would be some responsibility to explain why DBEDT denied the application.

And finally, the lack of clarity between §201N-32 and 33 could pose a challenge to DBEDT as §201N-33 could be interpreted as applying to all wind energy facilities. DBEDT has no mechanism to implement decommissioning financial security requirements.

## **5.0 TOOLS OUTSIDE OF 201N TO ASSIST RENEWABLE ENERGY PROJECTS**

On July 29, 2014, Tetra Tech and DBEDT discussed the potential permit facilitation assistance that DBEDT could provide outside of the 201N process. DBEDT asked Tetra Tech to provide a summary of possible permit facilitation activities, the types of projects that may benefit from DBEDT's permit facilitation, staffing needs to implement various facilitation actions, and the statutory requirements needed, if any, to implement the permit facilitation activities outside of 201N.

Table 1 describes potential facilitation activities, staffing needs, and regulatory requirements.

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<sup>3</sup> DBEDT's Hawaii Clean Energy Leaders List (<https://energy.hawaii.gov/epd/public/re-projects-home.html>) currently shows no proposed or existing renewable energy projects over 200 MW.

<b>Table 1. Facilitation Activities Outside of 201N</b>				
<b>Description of Facilitation Activity</b>	<b>Type of Project</b>	<b>Potential Staffing Needs</b>	<b>Statutory Requirements</b>	<b>Potential Value Added to Developer and/or Agencies</b>
<b>DBEDT Pre-Application Meeting and Permit Resource</b>				
Conduct a pre-application meeting with developers and serve as a resource point of contact for proposed renewable energy projects.	All projects could benefit, in particular smaller projects with developers that are new to Hawaii. However, projects with non-disclosure agreements and/or a need for confidentiality may not be interested in this service. Many larger development companies have permitting staff or may have already engaged a consultant to identify permits needed for a proposed project.	Junior to mid- level staff with permitting experience.  This activity would be in addition to the services DBEDT already provides.	No new statute needed to allow this facilitation service (Auth. HRS §196-4 and 201-64).	A pre-application meeting may be helpful to developers that don't have the budget or resources to hire consultants at the preliminary phase of a project.  DBEDT serving as a resource point of contact for renewable energy projects may assist state and county agencies by allowing them to direct inquires directly to DBEDT thus freeing up staff time and resources.
<b>Stakeholder Identification</b>				
Provide developers a list of stakeholder groups and recommendations for outreach to appropriate stakeholders.	All projects could benefit, large or small. Many larger development companies have communications staff or may have already engaged a consultant to conduct stakeholder outreach for a proposed project. However, DBEDT may still be able to provide additional insight into what stakeholders should be included in outreach activities.	Junior level staff. Can be part of pre-application/permit identification activity described above.  Can use "Hawaii Community Stewardship Directory" published by Office of Planning.	No new statute needed to allow this service (Auth. HRS §196-4 and 201-64).	This service could help a developer be sure to reach out to important stakeholders, and solicit their comments and concerns, early in the development process. By addressing issues raised by stakeholders early in the development process, permitting time and associated costs may be reduced.
<b>Governmental Liaison</b>				
Provide developers access to agencies and decision-makers by coordinating/scheduling agency and decision-maker meetings.	All projects could benefit, large or small.	Mid- level to more experienced staff that has relationships with other agencies and decision-makers.	No new statute needed to allow this service (Auth. HRS §196-4 and 201-64).	Both the project's permitting schedule and permitting costs may be reduced by assistance with the facilitation and coordination between agencies and

<b>Table 1. Facilitation Activities Outside of 201N</b>				
<b>Description of Facilitation Activity</b>	<b>Type of Project</b>	<b>Potential Staffing Needs</b>	<b>Statutory Requirements</b>	<b>Potential Value Added to Developer and/or Agencies</b>
DBEDT is uniquely suited to provide this facilitation as DBEDT is mandated to encourage the development of indigenous energy resources per HRS §196-4. Also, during DBEDT’s meetings with agencies (as part of the Permit Wizard update), several agencies mentioned that they see DBEDT as a resource for providing information on renewable energy development.				decision-makers. Agencies will also benefit as it will streamline the staff time/resources used to review permits and approval documents.
<b>Agency Coordination</b>				
Assist projects with agency coordination by setting up and facilitating pre-consultation inter-agency meetings at the beginning of a project’s Chapter 343/permitting process. This could be especially beneficial for coordination with agencies that have crossover of jurisdictions (e.g. Office of Conservation and Coastal Lands, National Park Service, National Oceanic and Atmospheric Administration for off-shore developments).	Complex projects involving multiple permits from federal, state, and county agencies.	Mid- level to more experienced staff that has relationships with other agencies.	DBEDT has authority to hold inter-agency meetings and work groups under HRS §196-4 and 201-64.	Both the project’s permitting schedule and permitting costs may be reduced by assisting with the facilitation and coordination of agencies and decision-makers. Agencies will also benefit as it will streamline the staff time/resources used to review permits and approval documents.

## 6.0 CONCLUSION

The intention of 201N is to support and facilitate renewable energy facility siting and permitting; however, the challenges and limitations of 201N make it difficult to implement and not as effective as intended at streamlining the siting and permitting of renewable energy facilities in Hawaii. Of the three potential actions Tetra Tech evaluated in this Action Plan, each has potential benefits and risks. The following is a summary of the benefits and risks associated with the three options outlined in Section 4.

1. Repeal 201N:
  - a. Benefits
    - Would relieve DBEDT from liability associated with not implementing 201N or from the risks associated with implementing 201N as written;
    - Would relieve DBEDT from annual and periodic legislative reporting requirements; and
    - Would not impact the permit facilitation and assistance tools available to DBEDT outside the 201N process.
  - b. Risks
    - May create public perception that DBEDT is not supporting renewable energy development; and
    - Would lose the authority to allow exemptions from subdivision requirements unless the statutes allowing these exemptions were moved to another portion of HRS Chapter 201.
2. Amend 201N to “fix” the permit plan:
  - a. Benefits
    - Would provide a renewable energy facility siting process that may be more appealing to developers and easier to implement.
  - b. Risks
    - May not achieve the original intent of the proposed bill with amendments due to the legislative process and various iterations the bill will likely go through, potentially resulting in changes to 201N that DBEDT did not anticipate and a resulting amended 201N law that does not fix the issues currently in the law.
    - May encounter objections from state or county agencies regarding the expansion of 201N’s definition of “permit.”

- Would cause DBEDT to be liable for any state or county permit deemed approved under 201N.
  - Would require DBEDT to provide staff with the expertise to review permits and make decisions about permit compliance.
3. Keep 201N as written.
- a. Benefits
- Would avoid negative public perception or concerns associated with the repeal of a law intended to promote renewable energy; and
  - Would leave 201N in place so that amendments can be made in the future to address the operational, logistical, and legal challenges allowing for the potential of 201N to be utilized in the future.
- b. Risks
- Expending public resources to sustain the 201N program when doing so may not be an efficient way to achieve DBEDT's operational goals for permit facilitation.
  - Would leave DBEDT liable to implement 201N if a 200 MW or greater projects were to submit a complete Permit Plan Application.
  - The lack of clarity between §201N-32 and 33 could pose a risk to DBEDT as §201N-33 could be interpreted as applying to all wind energy facilities. DBEDT has no mechanism to implement decommissioning financial security requirements.

In conclusion, Tetra Tech recommends that DBEDT evaluate each action listed above and determine which action best supports DBEDT in achieving its Operational Goals.