



June 30, 2021

VIA HAND DELIVERY

David Ige Governor
State of Hawai'i
415 S. Beretania Street
Honolulu, HI 96813

Jade Butay
Director
Hawai'i Dept. of Transportation
869 Punchbowl St., Room 509
Honolulu, HI 96813

**VIA CERTIFIED U.S. MAIL
RETURN RECEIPT REQUESTED**

Debra Haaland
Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Martha Williams
Principal Deputy Director
U.S. Fish and Wildlife Service
1849 C Street, N.W.
Washington, D.C. 20240

Re: 60-Day Notice of Intent to Sue Over Violations of the Endangered Species Act

To Whom It May Concern:

This letter serves as a sixty-day notice, on behalf of Conservation Council for Hawai'i ("CCH") and the Center for Biological Diversity ("CBD"), of their intent to sue Jade Butay, in his official capacity as Director of the Hawai'i Department of Transportation ("HDOT"), over violations of Section 9 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1538, for unpermitted "take" of threatened Newell's shearwaters (*Puffinus auricularis newelli*), endangered Hawaiian petrels (*Pterodroma sandwichensis*), and Band-rumped Storm petrels (*Oceanodroma castro*) from the endangered Hawai'i distinct population segment (collectively, "imperiled seabirds") associated with HDOT's airport and harbor facilities on the islands of Maui and Lāna'i. This letter is provided pursuant to the 60-day notice requirement of the ESA's citizen suit provision. See 16 U.S.C. § 1540(g).

Background

Attraction to bright lights is a major threat to the continued survival and recovery of the Newell's shearwater (listed as threatened in 1975), the Hawaiian petrel (listed as endangered in 1967), and the Hawai'i distinct population segment of Band-rumped Storm-petrel (listed as endangered in 2016). Imperiled seabirds use the moon and stars to navigate and are often distracted by artificial lights on their way out to sea. Disoriented birds will circle artificial lights

until they fall to the ground from exhaustion or strike other human-made structures (“fallout”). Grounded birds are vulnerable to death from starvation, dehydration, automobile strikes, and predation. The risk of fallout from artificial lights is most acute during the fledging season, which lasts from late September to early December, but fallout of adult birds has been documented nearly year-round.

The Maui Nui Seabird Recovery Project (“MNSRP”) has documented unauthorized take of Newell’s shearwaters and Hawaiian petrels at HDOT facilities on the islands of Maui and Lāna’i almost every year since 2011. Specifically, MNSRP has recovered downed birds at Kahului Airport and Kahului Harbor on Maui, and at Lāna’i Airport on Lāna’i, with grounded birds recovered between the beginning of May and the end of December.

This documented harm represents only the tip of the iceberg. Disoriented birds often crash into the nearby ocean or surrounding vegetation and are not accounted for, or die before being recovered and are excluded from the available data. Further, because of its small size and dark coloring, the Band-rumped Storm petrel is almost never recovered when grounded. Consequently, the take of storm petrels is not fully represented in MNSRP data, even though the species is vulnerable to fallout from artificial light.

Over the past few decades, the population of Newell’s shearwaters has declined precipitously. The Newell’s shearwater population on Kaua’i (the center of abundance of the species) suffered an estimated decline of 94% between 1993 and 2013. The number of endangered Hawaiian petrels on Kaua’i plummeted by 78% in the same period. Population trends are inconclusive for Hawaiian petrel breeding colonies located on Maui and Lāna’i.¹ However, the health of these island-specific metapopulations is critical to the recovery of the species,² particularly because the largest Hawaiian petrel breeding colony is located on Maui in

¹ See Pacific Islands Fish and Wildlife Office, U.S. Fish and Wildlife Service, *5-Year Review, Short Form Summary, Hawaiian Petrel* (*Pterodroma sandwichensis*) (Jul. 5, 2017) (explaining why population trend estimates are not possible at this time), available at https://ecos.fws.gov/docs/five_year_review/doc5234.pdf.

² See Pacific Region, U.S. Fish and Wildlife Service, *Amendment to the Hawaiian Dark-rumped Petrel and Newell’s Manx Shearwater Recovery Plan* (Aug. 7, 2019) (describing island-specific Hawaiian petrel metapopulations and recovery criteria for metapopulations), available at https://ecos.fws.gov/docs/recovery_plan/Hawaiian_Petrel_Final_Recovery_Plan_Amendment_2_0190807.pdf.

Haleakalā crater, and the second largest breeding colony is located on Lānaʻi.³ A breeding colony of Band-rumped Storm petrels was recently discovered at Hauola Gulch on Lānaʻi and is only the third such breeding colony to be identified in the State, making Lānaʻi an important site for future efforts to protect and recover this species.

While there are other sources of bright light, HDOT's airport and harbor facilities are among the largest documented sources of seabird take from light attraction on Maui and Lānaʻi. The lights used by HDOT facilities are tall, freestanding, and exceptionally bright, making them attractive to threatened and endangered seabirds. Moreover, coastal lights like those at Kahului Airport and Kahului Harbor cause more fallout than inland lights, meaning these lights are particularly dangerous for imperiled seabirds. Accordingly, alterations to coastal harbor and airport facilities are a priority for reducing take and improving the survival and recovery prospects of imperiled seabirds across the state.

HDOT is certainly aware that its facilities on Maui and Lānaʻi kill and injure imperiled seabirds. For years, HDOT has claimed that it is working on a habitat conservation plan ("HCP") to address unauthorized take at its Maui and Lānaʻi facilities. Further, as a participant in the HCP covering take of these same imperiled seabirds on the island of Kauaʻi, HDOT is well aware of the low-cost measures that are readily available to minimize take, such as shielding lights and eliminating unnecessary lights altogether. HDOT is also aware of the measures available to mitigate unavoidable take—such as fencing breeding colonies and predator control.

Despite HDOT's awareness of ongoing, illegal take at its Maui and Lānaʻi facilities, and the expertise HDOT gained through participation in the island-wide HCP on Kauaʻi, HDOT has yet to secure the mandated incidental take permit coverage for its Maui and Lānaʻi facilities, as we previously requested. HDOT's failure to address in a timely fashion the harm its facilities inflict on critically imperiled seabirds is particularly troubling given that the agency has an independent, constitutional duty to conserve and protect Hawaiʻi's natural resources. *See* Haw. Const. art. XI, § 1.

³ *See, e.g., Marie Vanzandt et al., Nesting Characteristics and Habitat Use of the Endangered Hawaiian Petrel (Pterodroma sandwichensis) on the Island of Lanai, 37 WATERBIRDS 43, 43-44 (Mar. 2014), available at https://www.researchgate.net/publication/260131993_Nesting_Characteristics_and_Habitat_Use_of_the_Endangered_Hawaiian_Petrel_Pterodroma_sandwichensis_on_the_Island_of_Lanai.*



At Left : *Lights on the northeast side of Kahului Harbor as seen from the south (2018). During the 2020 fledgling season, MNSRP recovered two Hawaiian petrels from Kahului Harbor property, one of which died before it could be rehabilitated and released back into the wild.*

HDOT's ESA Violations

In the absence of a valid incidental take permit, the ESA categorically prohibits the “take” of “any [listed] species within the United States or the territorial sea of the United States.” 16 U.S.C. § 1538(a)(1)(B); *see also* 50 C.F.R. §§ 17.21, 17.31. The term “take” is defined broadly, including to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” a listed species. 16 U.S.C. § 1532(19). Thus, each threatened Newell’s shearwater, endangered Hawaiian petrel, and endangered Band-rumped Storm petrel that is harmed, killed, injured, or otherwise “taken” by HDOT’s operations without a permit constitutes an independent violation of the ESA. As the MNSRP data makes clear, HDOT’s airport and harbor facilities on the islands of Maui and Lāna‘i illegally kill and injure imperiled seabirds on an ongoing basis.

To come into compliance with the ESA, HDOT must immediately secure an incidental take permit, which includes an HCP that minimizes take of imperiled seabirds “to the maximum extent practicable.” *Id.* § 1539(a)(2)(B)(ii). Pursuant to a lawful HCP, HDOT would also be obliged to mitigate “to the maximum extent practicable” any incidental take that could not be avoided through the implementation of minimization measures. *Id.* Due to the location of HDOT’s harbor and airport facilities, HDOT will remain a significant source of seabird take even after implementation of all feasible lighting minimization measures. Thus, mitigation measures, such as nesting colony protection, will be integral parts of any legally compliant HCP prepared by HDOT for its Maui and Lāna‘i facilities.

Conclusion

As the foregoing makes clear, HDOT is currently operating its Maui and Lānaʻi facilities in violation of the ESA by taking imperiled seabirds without an incidental take permit. If Director Butay does not, within 60 days, bring HDOT's operations into compliance with the ESA, we intend to pursue litigation in federal court to seek appropriate relief to protect Newell's shearwaters, Hawaiian petrels, and Band-rumped Storm petrels from continued death and injury.

We would welcome the opportunity to sit down with you in the hope of securing your agreement to bring HDOT's Maui and Lānaʻi facilities promptly into compliance with the ESA and thus help ensure the continued survival of Hawaiʻi's imperiled seabirds. To that end, please contact the undersigned counsel to discuss this matter.⁴

Mahalo for your prompt attention to this matter.

Sincerely,



Leinā'ala L. Ley
Senior Associate Attorney

Copy: Ella Foley Gannon (ella.gannon@morganlewis.com)

⁴ The address of the Conservation Council for Hawaiʻi is 250 Ward Avenue #220, Honolulu, Hawaiʻi, 96814 and its telephone number is (808) 593-0255. The address of the Center for Biological Diversity is 1188 Bishop Street, Suite 2412 Honolulu, Hawaiʻi 96813, and its telephone number is (808)284-0007. Please note that both organizations are represented by Earthjustice. You are hereby requested to contact Leinā'ala Ley at lley@earthjustice.org or (808) 599-2436 if you would like to discuss the contents of this letter.