

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (“Agreement”) is made and entered into as of this 30th day of October, 2024, by and between Plaintiffs CONSERVATION COUNCIL FOR HAWAI‘I and AMERICAN BIRD CONSERVANCY (together, “the Conservation Groups”) and Defendants HAWAIIAN ELECTRIC COMPANY, INC. and MAUI ELECTRIC COMPANY, LTD. (collectively, “the Company”).

RECITALS

WHEREAS, on January 30, 2024, the Conservation Groups served the Company and Hawaiian Electric Industries, Inc. (“HEI”) with a notice of intent to sue pursuant to the federal Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (“ESA”), alleging unauthorized take of the endangered Hawaiian Petrel (*Pterodroma sandwichensis*), threatened Newell’s Shearwater (*Puffinus newelli*), and endangered Band-rumped Storm-petrel (*Hydrobates castro*) (collectively, “ESA-listed seabirds”) due to, *inter alia*, the Company’s power lines and associated facilities on Maui and Lāna‘i;

WHEREAS, the notice served by the Conservation Groups (the “60-day Notice”) was served also on the County of Maui (the “County”), alleging certain violations by the County of the ESA.

WHEREAS, following receipt of the 60-day Notice, the Conservation Groups met and conferred with the Company on means by which the claims asserted therein with respect to the Company's power lines and associated facilities on Maui and Lāna'i might be settled.

WHEREAS, the foregoing discussions were successful and resulted in the establishment of commitments that the Company is willing to make to (i) minimize and mitigate the potential effects of the Company's power lines and associated facilities on Maui and Lāna'i on the ESA-listed seabirds and (ii) pursue a permit or license from the State of Hawai'i and the U.S. Fish and Wildlife Service, respectively, to authorize the incidental take of the ESA-listed seabirds on Maui in accordance with a habitat conservation plan ("HCP") to be prepared by the Company (collectively, the "Conservation Commitments").

WHEREAS, as more fully set forth below, the Conservation Groups are willing to release their claims against the Company until September 30, 2027, in exchange for the Company's promise to undertake and implement the Conservation Commitments.

AGREEMENT

NOW THEREFORE, FOR GOOD AND VALUABLE CONSIDERATION, the Conservation Groups and the Company (collectively, "the Parties") hereby agree as follows:

INCIDENTAL TAKE COVERAGE

1. The Company will make good faith efforts to secure an incidental take permit from the U.S. Fish & Wildlife Service (“USFWS”) and an incidental take license from the Hawai‘i Department of Land and Natural Resources, Division of Forestry and Wildlife (“DOFAW”), for take of certain seabirds listed under the federal Endangered Species Act (“ESA-listed seabirds”) allegedly due to the Company’s power lines and associated facilities on Maui. The permit and license shall be on terms consistent with the requirements of the Federal Endangered Species Act and Chapter 195D, Hawai‘i Revised Statutes, respectively, and set forth in an approved HCP.

ASSESSMENT AND QUANTIFICATION OF TAKE DUE TO POWER LINES AND ASSOCIATED FACILITIES

2. No later than March 31, 2025 (with respect to subparagraph (a) below) and June 30, 2025 (with respect to subparagraph (b) below), the Company will commence:

- a. additional studies to assess and quantify take of ESA-listed seabirds due to the Company’s power lines and associated facilities on Maui; and
- b. studies to assess take of ESA-listed seabirds due to the Company’s power lines and associated facilities on Lāna‘i.

Once commenced, the Company will thereafter make a good faith effort to diligently complete these studies.

3. No later than April 30, 2025, the Company will present to the Conservation Groups by video conference its preliminary analysis of the radar data that it gathered for power lines on Maui during Fall 2023. The Conservation Groups understand that, according to the Company, (i) the limited purposes of such radar data were to assess the suitability of sites for further radar study (based upon certain factors including: topography, line of sight, and related site conditions) and to conduct where possible limited validations of radar detections with visual observations and that (ii) a meaningful, valid and reliable analysis of the combined radar data cannot be accomplished until after the Company's radar studies in 2025.

4. The Parties will confer on the studies described in paragraph 2, including, but not limited to, the scope of the take quantification program and the methodologies to be used.

5. Prior to conducting the studies described in paragraph 2, the Company will share with the Conservation Groups the methodologies that the Company will use to assess and quantify take on Maui and to assess take on Lānaʻi. The Conservation Groups acknowledge that the Company intends to conduct the studies as agreed between the Company, the USFWS and DOFAW. The Conservation Groups reserve their right to object to the adequacy of the

Company's studies, including but not limited to, in comments on any proposed incidental take permit or license and in a legal challenge to any issued incidental take permit or license. Within fourteen (14) calendar days following the completion of the final report quantifying or assessing take on Maui or Lānaʻi, respectively, the Company will share with the Conservation Groups such final report and all data that was considered in preparing the reports.

POWER-LINE TAKE MINIMIZATION

Haleakalā

6. Before securing an incidental take permit and incidental take license for its power lines on Maui, the Company will maintain the *status quo* for the power lines near the Haleakalā summit from pole “37” to pole “87,” meaning that no shield wires/static lines will be installed on these lines and existing installed diverters will be maintained in working order.

7. The Company will make good faith efforts to secure as quickly as practicable any required regulatory approvals (including, without limitation and as needed, approvals from the Hawaiʻi Public Utilities Commission, the National Park Service, the Hawaiʻi Office of Conservation and Coastal Lands, USFWS and DOFAW) for “Phase 1 (A and B)” of the “Above-Grade Conduit Project” at the summit of Haleakalā (the “Conduit Project”). See **Attachment 1**. Where an

opportunity exists, the Company will request expedited regulatory approval for the project (e.g., from the Hawai'i Public Utilities Commission).

8. If the Company secures any expedited regulatory approvals, where possible, it will update and expedite the schedule in Attachment 2, with the goal of completing "Phase 1 (A and B)" of the Conduit Project as early as is practicable.

9. The Company will seek permission from the USFWS and DOFAW to construct "Phase 1 (A) and (B)" of the Conduit Project during times when Hawaiian Petrels are present on Haleakalā or such activities may be considered take. If the USFWS and DOFAW grant permission for the Company to construct any portion of "Phase 1 (A and B)" during such periods, the Company will update and expedite the schedule in Attachment 2, with the goal of completing "Phase 1 (A and B)" of the Conduit Project as early as is practicable.

10. The Company will provide notice to the Conservation Groups within fourteen (14) calendar days of any update to the schedule pursuant to paragraph 8 or 9.

11. Subject to the provisions for Force Majeure, *infra*, the Company will complete construction of:

- a. "Phase 1 (A)" of the Conduit Project as expeditiously as is practicable and no later than February 23, 2029, or any earlier date set forth in any update to the schedule pursuant to paragraph 8 or 9; and

- b. “Phase 1 (B)” of the Conduit Project as expeditiously as is practicable and no later than February 22, 2030, or any earlier date set forth in any update to the schedule pursuant to paragraph 8 or 9.

12. In any review required under the National Environmental Policy Act or the Hawai‘i Environmental Policy Act for “Phase 1 (A and B)” of the Conduit Project, the Company will include analysis of an alternative that includes construction of “Phase 2” of the Conduit Project. The Company’s analysis will be as detailed as reasonably practicable in light of the information then available regarding “Phase 2.” The goal of including this analysis will be to expedite regulatory approval of “Phase 2” if the Company later elects or is required to construct “Phase 2.”

13. The Parties will confer and seek agreement on the measures the Company will implement to ensure that the Conduit Project will be marked to improve visibility to seabirds as they leave or approach their burrows.

Installation of Diverters

14. No later than December 31, 2024, the Company will install FireFly HW diverters on approximately 5,600 feet of power lines at Launiupoko in West Maui. See **Attachment 3**.

15. No later than December 31, 2024, the Company will install FireFly HW diverters on approximately 8,000 feet of power lines above Mānele Bay on Lāna‘i. See **Attachment 4**.

16. In 2025, the Company will install diverters on power lines in three additional locations on Maui or Lāna‘i, with a minimum of four miles total of diverters installed at the three locations (in addition to the 5,600 feet of diverters on Maui under paragraph 14 and the 8,000 feet of lines above Mānele Bay under paragraph 15 to be installed in 2024). The Company will confer with the USFWS and the Conservation Groups to identify the locations and the type(s) of diverters that, based on the best information available, would be most effective in minimizing take of ESA-listed seabirds, as long as those diverters are technically feasible and safe to install at a particular location. If the Parties cannot reach agreement regarding locations, the default locations for installing diverters in 2025 will be at Kahakuloa in West Maui (approximately 2 miles), Keālia in Central Maui (approximately 5,200 feet), and Honomanu in East Maui (approximately 5,400 feet), as shown in **Attachment 5**. At each location, the Company will install the type(s) of diverters that would be most effective in minimizing take, as long as those diverters are technically feasible and safe to install at a particular location. No later than ten (10) business days after determining which type(s) of diverters it intends to install at each of the three additional locations and prior to installing the

diverters, the Company will provide notice to the Conservation Groups regarding the type(s) of diverters the Company intends to install at the locations, together with its justification for its choice of diverter(s).

Quarterly Updates

17. Commencing in 2025, on the fifth day of January, April, July, and October, the Company will provide updates to the Conservation Groups on the status of the take minimization projects described in paragraphs 6 through 16. The updates will be in writing, and may include a follow-up virtual meeting to answer any questions the Conservation Groups may have.

Shield Wires/Static Lines

18. Subject to this section, before securing an incidental take permit and incidental take license for its power lines on the island in question, the Company will not install shield wires/static lines on any existing power line on Maui or Lānaʻi that currently does not have shield wires/static lines, and all existing installed diverters will be maintained in working order. Notwithstanding the foregoing, the Company may install shield wires/static lines on new transmission lines erected, or to be erected, in the Lahaina area (see **Attachment 6**) or other areas if necessary to minimize the risk of wildfires. Although the Company has no present intention of installing shield wires on lines other than in the Lahaina area, if it judges them necessary based on new information, the Company will provide

written notice to the Conservation Groups before installing any shield wires/static lines on transmission lines and present to the Conservation Groups a reasonable justification for installing such shield wires based upon relevant factors including wildfire or other safety concerns. In the event that the Company installs any new shield wires/static lines outside of the Lahaina area, it will install diverters on the shield wires/static lines, as long as diverters are technically feasible and safe to install at such locations. For clarification, nothing in this paragraph is intended to prohibit the replacement of shield wires on existing lines that currently contain such wires.

19. No later than March 1, 2025, the Company will consult with the Conservation Groups regarding the Company's plans to study the feasibility and safety of removing existing shield wires/static lines from power lines on Maui and Lāna'i and will consider the Conservation Groups' input. No later than December 31, 2025, the Company will complete the study and will share its results with the Conservation Groups.

ADDITIONAL TAKE MINIMIZATION

20. Subject to the provisions of paragraph 38 (covenant not to sue), the Conservation Groups reserve the right to seek additional take minimization

measures during future discussions regarding the path forward to secure the Company's compliance with the ESA.

FORCE MAJEURE

21. A "Force Majeure event" is any event beyond the control of the Company, the Company's employees, consultants or contractors, or any entity controlled by the Company, that delays or prevents the performance of any obligation under this Agreement despite the Company's best efforts to minimize to the greatest extent practicable any resulting delay in the fulfillment of the relevant obligation. Force Majeure events may or may not include, without limitation, strikes, lock-outs and other labor difficulties; pandemic, inclement weather, inability to secure materials; changes in local, state or federal laws or regulations; the action or inaction of any governmental agency with jurisdiction over any act of the Company hereunder; litigation brought by the Conservation Groups or any third party; enemy action; civil disturbance; war; terrorist act; fire; unavoidable casualty; or any act of God or other cause beyond the reasonable control of the Company which interferes with any obligation of Company under this Agreement. Force Majeure does not include the Company's failure to budget reasonably for its obligations under this Agreement.

22. If and to the extent the Company suffers a delay in performing any of its obligations as a result of a Force Majeure event, (i) the Company shall be

entitled to a reasonable extension of time to complete performance of the delayed obligation, and (ii) the Company shall make its best efforts during such delay to continue to perform its obligations under this Agreement as far as is reasonably practicable.

23. The Company shall provide timely notice to the Conservation Groups orally or by electronic transmission as soon as practicable after the time the Company first becomes aware that a claimed Force Majeure event has commenced or occurred. The notice shall state the nature and (to the extent known by the Company) the then-expected duration of the Force Majeure event, its cause(s), the anticipated delay of performance of any obligation(s) under this Agreement, a schedule for carrying out the obligation whose performance is being delayed (to the extent the duration of the Force Majeure event is known by the Company), and the Company's rationale for attributing the delay to a Force Majeure event. Within seven (7) days following the delivery of such notice, the Company shall provide to the Conservation Groups a formal written notice stating whether such a Force Majeure event has in fact commenced or occurred and (to the extent further information is known by the Company than was known at the time of initial notice) updating the information included in the original notice.

24. If the Conservation Groups disagree that a Force Majeure event has occurred as claimed by the Company, or disagree about the duration of a Force

Majeure event, then they shall initiate informal dispute resolution under paragraph 41 prior to seeking judicial relief unless the delay in performance claimed by the Company is of such a nature that immediate resort to judicial relief is required to prevent or abate a significant, imminent and unanticipated threat to ESA-listed seabirds. In any dispute, the Company shall bear the burden of proving that (a) the identified event is a Force Majeure event and (b) the length of the extension of time that the Company seeks to complete performance is reasonable under the circumstances.

TAKE MITIGATION

25. Beginning no later than October 31, 2024, unless the Parties agree otherwise, and continuing until the Company secures an incidental take permit and incidental take license for its power lines and associated facilities on Maui, the Company will provide annual funding for the Maui Nui Seabird Recovery Project's ("MNSRP's") project to monitor and enhance Hawaiian Petrel habitat in the Nākula Natural Area Reserve and Kahikinui Forest Reserve on Maui (the "Mitigation Project"), which funding shall be in an amount equal to \$486,471.00 per year (the "Annual Mitigation Commitment"). *See **Attachment 7***. If for any reason the Mitigation Project is discontinued, the Company elects to terminate their funding agreement for cause, or MNSRP elects to terminate the funding agreement, the Company will notify the Conservation Groups and will meet and

confer with them to discuss alternative mitigation projects that might be funded with the Annual Mitigation Commitment, which might include projects implemented by the Company. If the Company and the Conservation Groups are unable to identify one or more mutually agreeable alternative projects, then the Company shall continue to satisfy its Annual Mitigation Commitment by paying, for a period of three (3) calendar years, an equivalent amount of funds to the National Fish and Wildlife Foundation (or other qualified organization) to be held in trust until such time as an acceptable alternative for the receipt of such funds can be identified by the Parties and documented contractually.

26. Subject to paragraph 38 (covenant not to sue), the Conservation Groups reserve the right to seek additional mitigation during future discussions regarding the path forward to secure the Company's compliance with the ESA; provided, however, that in no event shall the Company's failure to provide such additional mitigation (or additional minimization under paragraph 20) be considered a breach of this Agreement.

NOTIFICATION

27. Notices. All notices, demands, requests, elections, approvals, disapprovals, consents, or other communications which this Agreement contemplates, requires, or permits either party to give to the other shall be in

writing and shall be personally delivered or transmitted by email, addressed to the respective parties as follows:

Notices to the Company:

Hawaiian Electric Company, Inc.
Legal Department
PO Box 2750
Honolulu, Hawai'i 96840
Attention: Lee N. Smith
Senior Associate General Counsel
Email: lee.smith@hawaiianelectric.com

With a copy to:

Cox, Castle & Nicholson
50 California Street, 32d Floor
San Francisco, CA 94111
Attention: R. Clark Morrison
Email: cmorrison@coxcastle.com

Notices to the Conservation Groups:

David L. Henken
Mahesh Cleveland
Earthjustice
850 Richards Street, Suite 400
Honolulu, HI 96813
Email: dhenkin@earthjustice.org
mcleland@earthjustice.org

or to such other address or email address as the Conservation Groups or the Company may from time to time designate by notice to the other party given in accordance with this section. Personally delivered notice shall be deemed delivered upon the delivery thereof, and notice transmitted by email shall be deemed delivered upon sending provided that the sender has confirmation of such transmission.

STREETLIGHT TAKE

28. As set forth in their 60-Day Notice, the Conservation Groups claim that the Company-owned streetlights on Maui and Lāna‘i that the Company operates under direction of the County of Maui (“the County”) cause take of ESA-listed seabirds without an incidental take permit, in violation of the ESA. The Conservation Groups intend to file a complaint challenging unauthorized take from the Company-owned streetlights on Maui and Lāna‘i. At this time, the Company takes no position regarding either liability or remedy with respect to this claim.

JOINT PRESS RELEASE

29. In the interest of preserving the goodwill created between the Parties in connection with their having arrived at the understandings reflected herein, the Parties agree to issue, promptly following their execution of this Agreement, a mutually acceptable joint press release announcing their having entered into this Agreement, and to refrain from public comments on this Agreement that are inconsistent with the substance of the press release.

CONFIDENTIALITY OF SHARED TECHNICAL INFORMATION

30. To govern the use of any technical data or other information shared by the Company with the Conservation Groups that the Company claims to be confidential, the Parties will ask the Court to enter the Stipulated Protective Order attached hereto as **Attachment 8**.

ATTORNEYS' FEES AND COSTS

31. If the Company continues to take no position regarding liability under the ESA with respect to the Company-owned streetlights on Maui and Lāna‘i that the Company operates under the County’s direction, the Conservation Groups will not seek attorneys’ fees or costs from the Company related to the liability phase of the anticipated litigation over the streetlights.

32. If the Company continues to take no position regarding the remedy for any ESA violation from operation of the Company-owned streetlights on Maui and Lāna‘i that the Company operates under the County’s direction, the Conservation Groups will not seek attorneys’ fees or costs from the Company related to the remedy phase of the anticipated litigation over the streetlights.

33. Within thirty (30) days of the Court’s approval of this Agreement, the Company will reimburse the Conservation Groups their reasonable attorneys’ fees and costs incurred in connection with filing the 60-day notice and negotiating this Agreement, which reimbursement shall be in the amount of \$67,871.54. Payment shall be made to “Earthjustice” and shall be delivered to: Earthjustice, 850 Richards Street, Suite 400, Honolulu, HI 96813.

34. The Conservation Groups reserve their rights to seek recovery of attorneys’ fees and costs incurred in enforcing the terms of this Agreement after the Court approves it. The Company reserves its right to oppose any such request.

COURT APPROVAL AND ENFORCEMENT
OF THIS SETTLEMENT AGREEMENT

35. Following the Parties' execution of this Agreement, the Conservation Groups will file a complaint in the United States District Court for the District of Hawai'i asserting claims that the Company's operation of power lines and lights at associated facilities violates the ESA's prohibition on unpermitted "take" of ESA-listed seabirds.

36. After counsel for the Company make their appearances, the Parties will jointly submit this Agreement to the Court and ask the Court to issue an order (1) approving this Agreement to settle the Conservation Groups' complaint alleging unauthorized take of ESA-listed seabirds associated with the Company's operation of power lines and lights at associated facilities, (2) dismissing the Conservation Groups' complaint without prejudice, and (3) retaining jurisdiction to enforce the terms of this Agreement. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994). The Parties' joint submittal will incorporate the operative language set forth in **Attachment 9** ("Proposed Order").

37. The Parties shall not withdraw their consent to this Agreement during the Court's review of the Proposed Order. Either Party has the right to withdraw its consent to this Agreement if the Court changes any term or provision of this Agreement or the Proposed Order or declines to retain jurisdiction to enforce the terms of the Agreement as expressed herein and without modification. Not in

limitation of the foregoing, and notwithstanding any commitment that the Company may make to the USFWS or DOFAW in connection with the HCP process, the Company's obligations to the Conservation Groups to minimize or mitigate impacts on ESA-listed seabirds hereunder shall not become effective unless and until the Court has entered the Proposed Order.

RELEASE AND COVENANT NOT TO SUE

38. Except as such rights are reserved in paragraph 5 or paragraph 39, and effective as of entry of the Proposed Order by United States District Court for the District of Hawai'i, the Conservation Groups hereby release the Company from all known and unknown claims and causes of action which the Conservation Groups raised or could have raised concerning unauthorized take of ESA-listed seabirds due to the Company's power lines and associated facilities on Maui and Lāna'i. Except as such rights are reserved in paragraph 5 or paragraph 39, effective upon the Court's entry of the Proposed Order, the Conservation Groups covenant and agree not to bring any action or claims against the Company related to take of ESA-listed seabirds due to the Company's power lines or associated facilities on Maui and Lāna'i. The Conservation Groups also covenant and agree that they will not encourage or prompt any person or entity to commence or pursue any action or other proceeding based upon any claim or cause of action released in this

Agreement. Nothing in this paragraph shall prevent the Conservation Groups from responding to subpoenas or court orders.

RESERVATION OF RIGHTS

39. The Conservation Groups reserve their right to bring subsequent actions against the Company challenging unauthorized incidental take of ESA-listed seabirds due to the Company's power lines and/or associated facilities on Maui and/or Lāna'i after the entry of the Proposed Order by United States District Court for the District of Hawai'i ("New Claims"); provided, however, the Conservation Groups will not bring any New Claims before September 30, 2027.

NO ADMISSION

40. This Agreement shall not constitute an admission by the Conservation Groups that the Company's compliance with the Agreement satisfies the Company's obligations under the ESA or any other applicable law. This Agreement shall not constitute an admission by the Company that any of its activities are in violation of the ESA or any other applicable law.

INFORMAL DISPUTE RESOLUTION

41. Disputes may arise over either party's rights and/or obligations hereunder, including the interpretation, alleged breach, enforcement, or validity of this Agreement ("Disputes"). It is the objective of the Parties to establish procedures to facilitate the resolution of such Disputes in an expedient manner by

mutual cooperation. To that end, the Parties agree that, if a Dispute arises under this Agreement, the Parties will meet and negotiate in good faith for a period of four (4) weeks to resolve such Dispute before resorting to litigation regarding the Dispute. The Parties may, by mutual agreement, extend the period for informal dispute resolution beyond four weeks. To assist with informal dispute resolution, either Party may refer the dispute to non-binding mediation, provided that the Conservation Groups will not be obliged to pay for mediation.

IN WITNESS WHEREOF, the Parties hereto execute this Agreement effective on October 30, 2024.

CONSERVATION COUNCIL FOR
HAWAI'I

By



Its

Executive Director

Dated: October 30, 2024

AMERICAN BIRD CONSERVANCY

By



Its

Director Oceans & Islands

Dated: October 30, 2024

HAWAIIAN ELECTRIC COMPANY,
INC.

Dated: October ____, 2024

Alberts, Jim Digitally signed by Alberts, Jim
Date: 2024.10.25 06:37:20
-10'00'

Jim Alberts
Senior Vice President &
Chief Operations Officer

Dated: October ____, 2024

Ito, Paul Digitally signed by Ito, Paul
Date: 2024.10.26 15:22:18
-10'00'

Paul Ito
Senior Vice President,
Chief Financial Officer & Treasurer

MAUI ELECTRIC COMPANY, LTD.

Dated: October ____, 2024

Alberts, Jim Digitally signed by Alberts, Jim
Date: 2024.10.25 17:42:27
-10'00'

Jim Alberts
Vice President

Dated: October ____, 2024

Ito, Paul Digitally signed by Ito, Paul
Date: 2024.10.28 16:28:54
-10'00'

Paul Ito
Financial Vice President & Treasurer

APPROVED AS TO FORM:



DAVID L. HENKIN
MAHESH CLEVELAND

Attorneys for

Dated: October 30, 2024

CONSERVATION COUNCIL
FOR HAWAI'I and AMERICAN
BIRD CONSERVANCY



Dated: October 30 2024

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HAWAIIAN ELECTRIC
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