



June 15, 2017

By Certified U.S. Mail, Return Receipt Requested

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

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Director
Hawai'i Dept. of Transportation
869 Punchbowl St., Room 509
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Ryan Zinke, Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Jim Kurth, Acting 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 Hui Ho'omalua i Ka 'Āina, Conservation Council for Hawai'i, and the Center for Biological Diversity, of intent to sue 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 Kaua'i, 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). During the fledging season (from late September to early December), imperiled seabirds heading to sea are drawn to artificial lights, circling them until they fall to the ground from exhaustion or strike human-made structures. Grounded birds may be unable to take off again and are vulnerable to predation, vehicle collisions, starvation and/or dehydration.

In the past three decades, tens of thousands of shearwaters and hundreds of petrels have been grounded by bright lights and recovered by the Save Our Shearwaters ("SOS") program (a program on Kaua'i which provides locations for the public to turn in downed seabirds for rehabilitation and release). This ongoing harm to Newell's shearwaters represents one of the largest amounts of unauthorized take of a listed species in the United States. As a result of these excessive take levels, the Newell's shearwater population on Kaua'i (the center of abundance of the species) is crashing, with an estimated decline of 94% between 1993 and 2013. The numbers of endangered Hawaiian petrels on Kaua'i plummeted by 78% in the same period.

In recent years, the SOS program on Kaua'i and the Maui Nui Seabird Recovery Project ("MNSRP") have documented unauthorized take of Newell's shearwaters and Hawaiian petrels at HDOT facilities on the islands of Kaua'i, Maui, and Lāna'i. Victims of the bright lights at HDOT facilities include threatened Newell's shearwaters recovered from Līhu'e Airport and Nawiliwili and Port Allen Harbors on Kaua'i and endangered Hawaiian petrels downed at Kahului Airport and Kahului and Ma'alaea Harbors on Maui and at Lāna'i Airport. This documented harm to imperiled seabirds from HDOT operations represents only the tip of the iceberg, given that 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. Moreover, the very small size and dark coloring of the Band-rumped Storm-petrel means that the bird is almost never recovered when grounded. Consequently, the take of storm-petrels is not fully represented in SOS and MNSRP data, even though the birds are vulnerable to fallout from artificial light attraction.

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 in the state. The lights used by HDOT facilities are tall, freestanding and exceptionally bright, making them attractive to these threatened and endangered seabirds. Moreover, coastal lights like those at HDOT harbors cause more fallout than inland lights, meaning the harbor lights are particularly dangerous for imperiled seabirds.



Photo of Nawiliwili Harbor lights taken in May 2017

HDOT is certainly aware that its facilities kill and injure imperiled seabirds. For several years, HDOT participated with the County of Kaua'i, the U.S. Fish and Wildlife Service, and several private entities to develop an island-wide Habitat Conservation Plan ("HCP") that would minimize the take of imperiled seabirds from light attraction on Kaua'i and would offset unavoidable harm by protecting seabird nesting colonies. Unfortunately, on or around October 1, 2016, HDOT removed itself from the HCP development process. By withdrawing from the island-wide HCP process, HDOT is forcing the County of Kaua'i and private entities to bear the burden of minimizing and mitigating HDOT's take of endangered and threatened seabirds, even though the lights at HDOT's facilities are among the largest sources of unauthorized take on the island. HDOT's casual disregard for the harm its operations inflict on critically imperiled seabirds is particularly troubling given that, as a state agency, HDOT has a duty under Hawai'i's state constitution to conserve and protect Hawai'i's natural resources. *See* Haw. Const. art. XI, § 1.

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. § 17.31. 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 constitutes an independent violation of ESA section 9. As the SOS and MNSRP data make clear, HDOT's airport and harbor facilities on the islands of Kaua'i, 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 and implement 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 prominence 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, HDOT must immediately begin investing in measures, such as nesting colony protection, to mitigate the harm associated with its operations.

Conclusion

As the foregoing makes clear, HDOT is currently operating in violation of the ESA. If HDOT does not, within 60 days, bring its 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 take the steps that are necessary for the continued survival of Hawai'i's imperiled seabirds. Among other things, we hope HDOT will reconsider its short-sighted decision to abandon the island-wide HCP planning process for Kaua'i and will rejoin it expeditiously.

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Please feel free to contact me via telephone at (808) 599-2436 or email at dhenkin@earthjustice.org if you have any questions, wish to meet to discuss this matter, or feel this notice is in error.¹ Mahalo for your prompt attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Henkin", written over a horizontal line.

David L. Henkin
Staff Attorney

DLH/tt

¹ The address of Hui Ho'omalū i Ka 'Āina is P.O. Box 1205, Kīlauea, HI 96754, and its telephone number is (808) 346-5458. The address of the Conservation Council for Hawai'i is P.O. Box 2923, Honolulu, HI 96802, and its telephone number is (808) 593-0255. The address of the Center for Biological Diversity is P.O. Box 710, Tucson, AZ 85702, and its telephone number is (520) 623-5252. Please note that all three organizations are represented by the undersigned counsel in this matter. You are hereby requested to contact David Henkin of Earthjustice if you would like to discuss the contents of this letter.