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Sent via Email and Certified Mail Return Receipt Requested

The Honorable Ashton Carter
Secretary
U.S. Department of Defense
1000 Defense Pentagon
Washington, DC 20301
whs.pentagon.esd.mbx.cmd-correspondenc@mail.mil

Deborah Lee James
Secretary of the Air Force
1670 Air Force Pentagon
Washington, DC 20301
usaf.pentagon.af/ja.mbx.afloa/jac/workflow@mail.mil

Lt. Col. Christopher A. Jarratt
Commander
169 Air Defense Squadron
Wheeler Army Air Field, HI 96786
christopher.jarratt@us.af.mil

Re: Violations of Section 9 of the Endangered Species Act Through Unauthorized Take of Newell's Shearwater and Hawaiian Petrel

Dear Secretary Carter, Secretary James, and Lt. Col. Jarratt,

On behalf of the Center for Biological Diversity, I hereby provide notice, pursuant to Section 11(g) of the Endangered Species Act (“ESA” or “Act”) that the Department of Defense and the Kokee Air Force Base (“Kokee AFB”) has violated the Act through the unauthorized take of six endangered Hawaiian Petrel and over 100 threatened Newell’s Shearwater, and is in continuing violation of the Act through its failures to comply with Section 7 and Section 9.¹ We also take this opportunity to inform you that the Department of Defense is in clear violation of the Migratory Bird Treaty Act (“MBTA”), and we will be urging the Department of Justice and Department of Interior to pursue these violations.

The Center for Biological Diversity (“Center”) is a non-profit, public interest corporation with one million members and supporters throughout the United States including Hawaii. The Center and its members are dedicated to protecting diverse native species and habitats through science,

¹ 16 U.S.C. § 1540(g); *see also*, 16 U.S.C. §§ 1536, 1539.

policy, education, and law. Our members are harmed by the Department of Defense's continuing failures to prevent the illegal and unauthorized take of these two declining seabirds.

The Newell's shearwater is a federally threatened seabird that has experienced substantial declines since it was first protected in 1975. The endangered Hawaiian petrel has also declined substantially since it was first protected as an endangered species in 1967. As ESA protected species, "take" or killing, injuring, or harming of these birds is prohibited. These two species are threatened by several factors including attraction to artificial night-time lighting and collisions with power lines, which result in injury and even death of the birds. Attraction to bright lights at night causes these two species to fly towards the lights — causing them to become disoriented and "fallout," or crash, onto the ground. Many birds are injured and simply die in the forest or brush because they are unable to become airborne again, or are killed by non-native mammals after being grounded. Other birds collide with human structures, breaking their wings, are otherwise injured, or killed.

In 2015, Kokee Air Force Base caused the take of at least 121 Newell's Shearwaters and 6 Hawaiian Petrels, including harassment, harm, injury and the lethal take (i.e., death) of multiple seabirds, due to the Base's night-time lighting. This number is the *minimum* known take. The total amount of take of these two species is likely higher because Kokee Air Force Base is located high in the mountains of Kauai and it is likely that disoriented seabirds crashed in the surrounding forest vegetation beyond the base's perimeter and were not accounted for. Second, many of the birds that were taken to the Save Our Shearwaters rehabilitation facility were confirmed to be breeding adults and their chicks were likely lost due to the reduced parental care while rehabilitation occurred.

Due to the on-going take of Newell's shearwaters and Hawaiian petrels in 2010, the Kokee Air Force Base consulted with the U.S. Fish and Wildlife Service ("Service") under Section 7 of the ESA. The Service provided the Air Force with a biological opinion and incidental take statement ("ITS") that authorized the take of:

13 Newell's shearwaters (2 subadults or breeding adults and 11 fledglings) and one Hawaiian petrel during the two-year term of this Biological Opinion. The incidental take of Newell's shearwaters and Hawaiian petrel is expected to be in the form of injury or death as a result of collision with the tower or due to attraction and fallout from lighting associated with the facilities. The Service anticipates an indirect loss of one (1) Newell's shearwater egg or dependent chick during the two-year term of this Biological Opinion.

Ignoring the fact that the Biological Opinion only provided take coverage for two years, and the Department of Defense should have reinitiated consultation in 2013, any such incidental take coverage for Kokee Air Force Base was *vastly* exceeded in 2015. Yet, the Department of Defense failed to reinitiate consultations. On May 9 of 2016, Kokee Air Force Base caused the take of an additional shearwater and maintains lighting facilities that will continue to cause take of shearwaters and petrels. To date, the Department has *still* not reinitiated consultations. Because Kokee Air Force Base is operating without incidental take authorization, and its

operations are causing take of listed seabirds, Kokee Air Force Base and the Department of Defense are in violation of the Endangered Species Act.

LEGAL AND FACTUAL BACKGROUND

I. The Endangered Species Act

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”² Its fundamental purposes are “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species.”³

Section 9 of the ESA prohibits any “person” from “taking” or causing take of any member of an endangered species including the Hawaiian petrel.⁴ The take prohibition has been extended to the Newell’s shearwater.⁵ The term “take” is defined broadly, and includes to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” or cause another to do so.⁶ The Service has further defined “harass” to include “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, including breeding, feeding, or sheltering.”⁷ In addition, “harm” is defined as “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”⁸ The ESA’s legislative history supports “the broadest possible” reading of the prohibition against take.⁹

The ESA authorizes private enforcement of the take prohibition through a broad citizen suit provision. “[A]ny person may commence a civil suit on his own behalf to enjoin any person, including...any... governmental instrumentality or agency...who is alleged to be in violation of any provision of [the ESA].”¹⁰ Citizens may seek to enjoin both present activities that constitute an ongoing take and future activities that are reasonably likely to result in a take.¹¹ The ESA’s citizen suit provision also provides for the award of costs of litigation, including reasonable attorney’ fees and expert witness’ fees.¹²

II. Newell’s Shearwater and Hawaiian Petrel

² *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978)

³ 16 U.S.C. § 1531(b).

⁴ 16 U.S.C. § 1538(a).

⁵ 50 C.F.R. § 17.31

⁶ 16 U.S.C. § 1532(19).

⁷ 50 C.F.R. § 17.3

⁸ *Id.*

⁹ *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704-05 (1995)

¹⁰ 16 U.S.C. § 1540(g)

¹¹ *National Wildlife Federation v. Burlington Northern Railroad*, 23 F.3d 1508, 1511 (9th Cir. 1994)

¹² 16 U.S.C. § 1540(g)(4).

The Newell's shearwater, or `a`o in the Hawaiian language, was first protected as a threatened species in 1975. The shearwater is a medium-sized seabird — 12-14 inches in length with a wing span of 30-35 inches. The shearwater has a glossy black top, a white underside, with small white patches observable on the sides of the rump in flight. Its claws are well adapted for burrow excavation and climbing. The shearwater feeds on squid and other pelagic prey items in the tropical Pacific offshore waters, although its pelagic range is poorly understood and may extend further. During the nine-month breeding season from April through November, it nests in burrows under forested mountain slopes and ridge lines. Because of its ground-nesting behavior, it is vulnerable to non-native mammalian predators.

Although once common on all of the Hawaiian islands, today the Newell's shearwater is mainly found on Kauai, where 75 to 90 percent of the population nests. Analysis of at-sea data collected from 1984 to 1993 yielded an abundance estimate of 83,739 (95% confidence interval, 57,360 to 115,093) birds.¹³ Since the early 1990s, the shearwater has experienced a sharp population decline on Kauai. The number of fallout birds retrieved by the Save Our Shearwaters (SOS) program on Kauai has steadily declined since 1979, from an average of 1,500 per year between 1979 and 1990 to an average of less than 350 between 1999 and 2010.¹⁴ Preliminary summaries of the results of radar studies indicate a decline of approximately 75 percent between 1993 and 2008.¹⁵ Following Hurricane Iniki, which struck Kauai in 1992, all of the power lines were restrung in a vertical alignment. This alignment increases the risk of collision and is likely leading to an increase in mortality of the shearwaters. Monitoring of power lines on Kauai has recorded over 1,000 strikes by seabirds annually that may result in injury or death for some significant portion of collisions.¹⁶

The Hawaiian petrel, or `ua`u in the Hawaiian language, was first protected as an endangered species in 1967. This similarly sized seabird has a dark gray head, wings, and tail, and a white forehead and belly. It has a stout grayish-black bill that is hooked at the tip, and pink and black feet. The petrel's distinctive and eerie call during the breeding season sounds like its Hawaiian name. The petrel forages for squid, fish, and crustaceans throughout the Pacific ocean and ranges as far north as the waters of Japan, Alaska, and the west coast of the United States. The breeding season is from March to October, and like the shearwater, the petrel nests in burrows high in the mountains. The petrel has significant breeding colonies on Kauai, Maui, Lanai, and smaller colonies on the Big Island. Threats to petrel include predation by non-native mammals, development, light attraction and collisions. Although petrels have always represented a small percentage of birds that fallout on Kauai, when petrels are attracted to lights and fallout, those birds tend to be adult individuals, meaning that their chicks are likely to die if the parent is unable to continue caring for the young. The petrel's population is much smaller than its historic abundance, however the species' current trend is unknown.¹⁷ Pelagic surveys

¹³ Spear L.B., D.G. Ainley, N. Nur, S.N.G. Howell. 1995. Population size and factors affecting alsea distributions of four endangered Procellariids in the tropical pacific. *Condor* 97(3):613-638.

¹⁴ USFWS 2011. Newell's Shearwater (*Puffinus auricularis newelli*) 5-Year Review: Summary and Evaluation at 7.

¹⁵ *Id.*

¹⁶ Travers, M., et. al. 2014. UNDERLINE MONITORING PROJECT ANNUAL REPORT – 2014 .

¹⁷ USFWS 2011. Newell's Shearwater (*Puffinus auricularis newelli*) 5-Year Review: Summary and Evaluation at 8.

estimate the total Hawaiian petrel population at 19,000 (95% confidence interval equals 11,000-34,000), including a best estimate of 4,500-5,000 breeding pairs.¹⁸

III. Take of Seabirds at Kokee Air Force Base

In March of 2011, the U.S. Air Force initiated consultations on the continued operation of the Kokee AFB, the Kokee Microwave Antenna Site (MAS) and the installation of U.S. Coast Guard Rescue 21 monopole at the Kokee AFB on the Hawaiian petrel, Newell's shearwater, Hawaiian hoary bat, and Hawaiian goose. The Service completed a Biological Opinion ("BiOp") on July 29, 2011 which covered operations at the Kokee AFB through August 2013.¹⁹ The BiOp noted significant night-time light pollution from base facilities which would likely result in take of Hawaiian Petrels and Newell's Shearwaters. After reviewing what FWS considered to be the likely take from the Base's operations — 13 shearwaters and 1 petrel over two years — compared to the total estimated population size, the BiOp concluded that the operation of the Kokee AFB would not jeopardize either species. As a result, an ITS was issued to cover any take from 2011-2013. During that time, the BiOp stated that the Service would not "refer the incidental take of any migratory bird for prosecution under the Migratory Bird Treaty Act of 1918 if such take is in compliance with the terms and conditions specified herein."²⁰

The BiOp includes two very straightforward Reasonable and Prudent Measures ("RPMs") that the Kokee AFB should have been able to comply with, although facts from 2015 strongly suggest otherwise:

1. The Air Force will minimize the direct and indirect effects of lighting at Kokee AFS on listed seabirds.
2. The Air Force will minimize seabird mortality through on the ground activities by developing a project-specific search protocol, training personnel about listed seabird fallout and methods for searching for downed birds, conducting searches for downed listed seabirds, and implementing predator control.

The BiOp also provided several terms and conditions in order to implement the RPMs which were nondiscretionary:

- 1(a): Evaluate the effectiveness of the Green Lights Study will include seabird carcass removal, evaluation of searcher efficiency to find downed birds, and ornithological radar surveys to evaluate passage rates, pre- and post-implementation of green lights.

¹⁸ Ainley, D. G., T. C. Telfer, and M. H. Reynolds. 1997. Townsend's and Newell's Shearwater (*Puffinus auricularis*). In *The Birds of North America*, No. 297 (A. Poole and F. Gill, eds.). The Academy of Natural Sciences, Philadelphia, PA, and The American Ornithologists' Union, Washington, D.C.

¹⁹ USFWS 2011. FORMAL SECTION 7 CONSULTATION FOR THE CONTINUING OPERATIONS OF THE KOKEE AIR FORCE STATION AND KOKEE MICROWAVE ANTENNA SITE AND INSTALLATION OF U.S. COAST GUARD RESCUE 21 MONOPOLE AT KOKEE AIR FORCE STATION, KAUAI (hereafter "2011 BiOp").

²⁰ *Id.* Citizens are not empowered to enforce the MBTA to the same extent as federal wildlife agencies. Therefore, I note that the Air Force Base is in violation of the MBTA and we intend to provide documentation of these violations to the U.S. Department of Justice.

- 1(b): Document the effectiveness of all avoidance and minimization measures. The written reports will summarize annual minimization measures implemented and success of those measures to the Service by February each calendar year.
- 1(c): The Service will be notified by telephone and email within 24 hours upon the discovery of an injured or dead bird. A written summary of the incident should be provided to the Service within 72 hours of incident.
- 1(d): Should there be a mortality, the depository designated to receive specimens of any Newell's shearwaters or Hawaiian petrels that are found is the B.P. Bishop Museum
- 2(a): The Service will review and approve the searcher and downed seabird data logs prior to implementation in 2011.
- 2(b): A qualified biologist will train personnel to look for Newell's shearwaters and Hawaiian petrels circling lights associated with Kokee AFS by September 1, 2011. Personnel will record information about each event on data sheets and submit copies to the Service twice a year.
- 2(c): The Air Force will develop a protocol and implement a program to turn off the security lights during a seabird circling event so that the listed seabird(s) have the opportunity to reorient and continue their flight to the sea. This will be completed and implemented by September 1, 2011.
- 2(d): The Air Force will train security personnel to look for downed birds after a listed seabird has been observed circling lights associated with Kokee AFS by September 1, 2011.

During 2015 there were particularly high fallout events due to Kokee AFB's failure to comply with clause 2(c). Despite email pleas from the Fish and Wildlife Service imploring the Kokee AFB to shut off its lights, the base simply ignored those pleas and the legal requirements of the Endangered Species Act.²¹ Even while biologists from the Kauai Endangered Seabird Team were present on site, the Kokee AFB remained completely intransigent about turning off its lights for several days. This is what the lights looked like at the base on September 10, 2015:



²¹ The Center received numerous records via the Freedom of Information Act documenting the Kokee AFB's ESA violations and the relevant records are attached as an appendix to this notice letter.

A biologist with the Kauai endangered seabird team documented and described the following factual situations occurring at the Kokee AFB:

The main issue appears to be the perimeter lights (in particular three main areas) - they are very bright, and orientated in such a way that they are facing outwards or in some cases partially upwards (see photos). This means that in foggy conditions in particular (but I would also imagine to a lesser degree during clear nights) they are creating a huge glow that is bringing breeding adults in from nearby colonies. These lights need to be turned off as in their current state they will continue to pull birds in every night. If that's not possible then at the very least they need to be orientated downwards and heavily shielded. I would strongly recommend that this occurs ~ if at all possible as I can pretty much guarantee that this situation will continue tonight, especially if it is foggy again. To make matters worse we are coming into the dark phase of the moon over the next two weeks - when the moon glow is not present in the night sky, this exacerbates the problem of light attraction. So we can expect the situation to get worse if all things stay the same.

The other thing I noticed was that a lot of the birds are flying towards the perimeter lights and hitting the outside fence. They were then falling to the ground and scuttling off into the surrounding uluhe and grasses to hide. These birds are unlikely to survive if left alone - we noticed as soon as it got dark that birds were coming out from the uluhe and sitting on the fence line. As this was before returning adults are likely to be in the air over the property, this means these birds are almost certainly birds from the night before and had spent the day hiding in the bushes. When they came out they didn't try to flyaway, they just sat looking at the lights and sitting by the fence line. So that suggests that this pattern would repeat itself each day until they starved or dehydrated. The placement of these birds (which was a substantial number) also indicates to me that they would be unlikely to be found by a perimeter patrol not actively looking for them. I would suggest that we continue to send people to monitor and collect the birds over the next few nights - this would serve two purposes. Firstly it would mean we would be able to rescue downed birds, which considering the fact that they are an endangered species and breeding adults, is critical. Secondly it would mean that we would be able to assess the effectiveness of any immediate actions that the property might take to reduce the light attraction impact of the facility. I can send two people tonight to help with this endeavour. Lastly, I would like to thank the staff that were on site last night - everyone was very helpful and accommodating to the team.

Best regards -Andre

This was the result of the Kokee AFB's actions:



VIOLATIONS OF SECTION 9

The Endangered Species Act prohibits the take of any endangered species and those threatened species to which the Service has extended the take prohibition via regulation. A federal agency may receive authorization to take listed species through the consultation process under Section 7 through the issuance of an ITS. Where a federal action agency either exceeds its ITS limits or otherwise violates the nondiscretionary terms of a biological opinion, its take coverage lapses.²²

²² *Mount Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1580 (9th Cir. 1993); *Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv.*, 637 F.3d 259, 266 (4th Cir. 2011) (“[S]afe harbor from liability under the ESA is finally and exclusively defined by the BiOp” If an applicant “did not comply with all of the terms of the BiOp, they would not be protected by the BiOp’s safe harbor” and would be subject to take liability); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 481 F.3d 1224, 1230 (9th Cir. 2007); *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1239 (9th Cir. 2001); *Or. Natural Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982, 995 (D. Or. 2010); *South Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 629 F. Supp. 2d 1123, 1132 (E.D. Cal. 2009) (“when an agency violates the terms of an ITS, a private party may bring a citizen suit alleging that by virtue of this violation, the agency's failure to reinstate consultation violates the agency's statutory duty under ESA section 7(a)(2).”).

In the case of the Kokee AFB, by the terms of the BiOp itself, its take coverage lapsed in 2013, and even if it had not lapsed, the Base vastly exceeded its ITS in 2015.

In either event, Kokee AFB is operating without authorization under Section 7 of the ESA. Its actions in 2016 — leaving its lights on during the seabird season — and the take of another adult Newell's shearwater make clear that the Kokee AFB continues to operate in a manner that causes take of shearwaters and petrels in violation of the ESA. Until lights are *permanently* disconnected at the Kokee AFB for the entire seabird season, the Base will continue to violate the Act. Without this disconnection, the ability of any employee or contractor to simply flip a switch and turn the lights on means that any other measure will leave seabirds completely at the mercy of indifference of the Air Force.

Due to the extreme remoteness of Kokee AFB, monitoring of compliance with the 2011 BiOp has been limited and no one knows how much take has occurred over the past five years preceding the extreme fallout event in 2015. It is highly likely that the Kokee AFB violated most, if not all, of the RPMs and related terms and conditions, causing an unknown amount of take. More importantly, nothing indicates that the Kokee AFB has changed its night light program and therefore, is reasonably certain to continue taking seabirds during the seabird season.

CONCLUSION

If the Department of Defense does not take expeditious action within 60 days to permanently correct the violations described in this letter, the Center will pursue litigation to seek permanent injunctive relief. Given the likely long-term take at this facility, we believe that the Department of Defense must take substantial, additional steps to fully mitigate its past harms to Newell's shearwaters and Hawaiian petrels. As noted above, we expect Kokee AFB to *immediately* reinstate consultations with the Service — something that should have happened 10 months ago. If this consultation does not occur, then we intend to litigation against Kokee AFB. If you have any questions or would like to discuss this matter, please do not hesitate to contact me.

Sincerely,



Brett Hartl
Endangered Species Policy Director
Center for Biological Diversity
202.817.8121
bhartl@biologicaldiversity.org

Cc: The Honorable Sally Jewell
Secretary
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240

The Honorable Penny Pritzker
Secretary
U.S. Department of Commerce
1401 Constitution Avenue NW
Washington, D.C. 20230