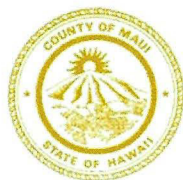


RICHARD T. BISSEN, JR.
Mayor

VICTORIA J. TAKAYESU
Corporation Counsel

MIMI DESJARDINS
First Deputy

LYDIA A. TODA
Risk Management Officer



DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
200 SOUTH HIGH STREET, 3RD FLOOR
WAILUKU, MAUI, HAWAII 96793
EMAIL: CORPCOUN@MAUICOUNTY.GOV
TELEPHONE: (808)270-7740

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July 16, 2026

Via email only at county.clerk@mauicounty.us

Honorable Alice L. Lee, Chair
and Members of the Council
County of Maui
Wailuku, Hawai'i 96793

SUBJECT: Litigation Matter – Settlement Authorization: *CONSERVATION COUNCIL FOR HAWAII' AND AMERICAN BIRD CONSERVANCY v. HAWAIIAN ELECTRIC COMPANY, INC. AND MAUI ELECTRIC COMPANY LTD. AND COUNTY OF MAUI*; CIVIL 1:24-CV-00494-MWJS-WRP

Dear Chair Lee and Council Members:

Please find attached separately a Proposed Resolution entitled "*AUTHORIZING SETTLEMENT OF CONSERVATION COUNCIL FOR HAWAII' AND AMERICAN BIRD CONSERVANCY V. HAWAIIAN ELECTRIC COMPANY, INC. AND MAUI ELECTRIC COMPANY LTD. AND COUNTY OF MAUI*; CIVIL 1:24-CV-00494-MWJS-WRP."

The purpose of the proposed resolution is to discuss settlement options with regards to the above-referenced lawsuit.

May I request that the proposed resolution be directly referred to the Council for discussion and action as soon as possible, as this matter is set for a status conference with the presiding federal court judge on September 9, 2025, and the parties to the litigation are wanting to resolve proposals to address the 2026 fledging season of the federally-listed endangered species 'ua 'u, 'a 'o, and 'akē 'akē."¹

Executive session will be necessary to discuss questions and issues pertaining to the powers, duties, privileges, immunities, and liabilities of the County, the Council, and/or the Committee.

¹ The Hawaiian Petrel, Newell's Shearwater, and Band-Rumped Storm Petrel, respectively.

Honorable Alice L. Lee, Chair

July 16, 2026

Page | 2

If you have any questions or concerns, please do not hesitate to contact us. Thank you for your anticipated assistance in this matter.

Sincerely,

A handwritten signature in black ink that reads "BRIAN A. BILBERRY". The signature is written in a bold, slightly stylized font with some ink bleed-through.

Brian A. Bilberry
Deputy Corporation Counsel

Attachments:

- (1) Proposed Resolution: *"AUTHORIZING SETTLEMENT OF CONSERVATION COUNCIL FOR HAWAII AND AMERICAN BIRD CONSERVANCY V. HAWAIIAN ELECTRIC COMPANY, INC. AND MAUI ELECTRIC COMPANY LTD. AND COUNTY OF MAUI; CIVIL 1:24-cv-00494-MWJS-WRP"*
- (2) Complaint filed November 19, 2024

DAVID L. HENKIN #6876
MAHESH CLEVELAND #11023
EARTHJUSTICE
850 Richards Street, Suite 400
Honolulu, Hawai'i 96813
T: (808) 599-2436
Email: dhenkin@earthjustice.org
mcleveland@earthjustice.org

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI'I

CONSERVATION COUNCIL FOR	)	CASE NO. CV 24-00494
HAWAI'I and AMERICAN BIRD	)	
CONSERVANCY,	)	COMPLAINT FOR
	)	DECLARATORY AND
Plaintiffs,	)	INJUNCTIVE RELIEF
	)	
v.	)	
	)	
HAWAIIAN ELECTRIC COMPANY,	)	
INC., and MAUI ELECTRIC	)	
COMPANY, LTD.,	)	
	)	
and	)	
	)	
COUNTY OF MAUI,	)	
	)	
Defendants.	)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Conservation Council for Hawai‘i and American Bird

Conservancy (collectively, “the Conservation Groups”) hereby complain of the actions of Defendants Hawaiian Electric Company, Inc. and Maui Electric Company, Ltd. (collectively, “the Company”) and Defendant County of Maui (“the County”) as follows:

INTRODUCTION

1. This case involves three critically imperiled seabirds that are native to Hawai‘i and protected under the federal Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (“ESA”). The Hawaiian Petrel (*Pterodroma sandwichensis*, listed as endangered in 1967 and known in Hawaiian as ‘ua‘u) and the Newell’s Shearwater (*Puffinus newelli*, listed as threatened in 1975 and known in Hawaiian as ‘a‘o) are both endemic to Hawai‘i (*i.e.*, they are found in Hawai‘i and nowhere else on Earth). The Hawai‘i distinct population segment of Band-rumped Storm-petrels (*Hydrobates castro*; known in Hawaiian as ‘akē‘akē) was listed as endangered in 2016.¹ The U.S. Fish and Wildlife Service has identified attraction to bright,

¹ The ESA’s definition of “species” includes “any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16).

artificial lights as a threat to the continued survival and recovery of all three ESA-listed seabird species.

2. ‘Ua‘u, ‘a‘o, and ‘akē‘akē fly to and from their nests at night. They use the moon and stars to navigate and are often distracted by artificial lights on their way out to sea and when returning to land. Disoriented birds will circle artificial lights until they fall to the ground from exhaustion or strike other human-made structures (“fallout”). Once grounded, the seabirds have a hard time becoming airborne and are susceptible to predation, starvation, dehydration, or vehicle strikes. The risk of fallout from artificial lights is most acute during the fledging season, which lasts from September to December, but fallout of adult birds can occur whenever these imperiled seabirds are on-island.

3. Company-owned streetlights that the Company operates for the County attract and cause unauthorized take of ESA-listed seabirds. Since as far back as 1998, researchers have documented scores of unauthorized takes of ESA-listed seabirds in Maui County from fallout that likely resulted from attraction to streetlights. Due to the lack of dedicated searches, the actual toll on imperiled seabirds is undoubtedly much higher.

4. The Conservation Groups bring this action to protect these threatened and endangered birds by compelling compliance by the Company and the County (collectively, “Defendants”) with their mandatory duties under the ESA.

Specifically, as described more fully herein, the Conservation Groups seek a declaratory judgment that, in the absence of a lawful incidental take permit, the Company's operation of streetlights in Maui County—under the County's direction—violates the ESA's prohibition on unpermitted “take” of federally listed species. The Conservation Groups also seek appropriate injunctive relief to protect ‘ua‘u, ‘a‘o, and ‘akē‘akē in Maui County from further harm from Defendants' illegal activities.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over the claims for relief in this action under 28 U.S.C. § 1331 (action arising under the laws of the United States); 16 U.S.C. § 1540(c) (action arising under the ESA); 16 U.S.C. § 1540(g) (citizen suit provisions of the ESA); and 28 U.S.C. §§ 2201-2202 (power to issue declaratory judgments in cases of actual controversy).

6. On January 30, 2024, the Conservation Groups mailed to Hawaiian Electric Company, Maui Electric Company, and the County notices of intent to sue detailing the violations of law alleged herein. Hawaiian Electric Company, Maui Electric Company, and the County each received the notice letter on February 1, 2024.

7. On January 30, 2024, the Conservation Groups mailed to the Secretary of the Interior a notice of intent to sue detailing the violations of law

alleged herein. The Secretary of Interior received the notice letter on February 5, 2024.

8. At least sixty days have elapsed since the Conservation Groups gave notice of their intent to sue, as required by ESA section 11(g)(2)(A), 16 U.S.C. § 1540(g)(2)(A).

9. The Conservation Groups have formally demanded that Defendants bring their streetlight operations into compliance with the ESA, but Defendants have failed and refused, and continue to fail and refuse, to do so. An actual controversy therefore exists between the parties within the meaning of 28 U.S.C. § 2201 (declaratory judgments).

10. Venue lies properly in this judicial district by virtue of 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(b) and (c) because the violations are occurring here, a substantial part of the events or omissions giving rise to the Conservation Groups' claim occurred here, and Defendants reside here.

PARTIES

11. Plaintiff Conservation Council for Hawai'i ("CCH") is a non-profit citizens' organization based in Hawai'i with approximately 4,000 members in Hawai'i, the United States mainland, and foreign countries. CCH is the Hawai'i affiliate of the National Wildlife Federation, a non-profit membership organization with over 5.8 million members and supporters nationwide. CCH's mission is to

protect native Hawaiian species, including the ‘ua‘u, ‘a‘o, and ‘akē‘akē, and to restore native Hawaiian ecosystems for future generations.

12. To protect its interests in Hawai‘i’s imperiled seabirds and the interests of its members and staff, CCH (together with co-plaintiff American Bird Conservancy) filed lawsuits in 2010 to protect ‘ua‘u and ‘a‘o from death and injury associated with the activities of the Kaua‘i Island Company Cooperative (“KIUC”) and the St. Regis Princeville Resort, including harm associated with attraction to bright lights at facilities owned and operated by KIUC and at the St. Regis. The plaintiffs’ lawsuit against KIUC resulted in KIUC securing incidental take permit coverage for its harmful activities, while the plaintiffs’ lawsuit against St. Regis culminated in a settlement pursuant to which the resort implemented measures to reduce seabird attraction, committed to secure incidental take permit coverage, and made monthly contributions to fund projects to benefit the imperiled seabirds. The St. Regis has since obtained incidental take permit coverage.

13. Since 2017, CCH also has been involved in efforts, including litigation, to protect ESA-listed seabirds from harm associated with the bright lights at the State of Hawai‘i Department of Transportation’s (“HDOT’s”) harbors and airports on Maui, Lāna‘i, and Kaua‘i. HDOT obtained incidental take permit coverage for take of ESA-listed seabirds at its Kaua‘i facilities, and modified its

lighting so as to minimize take. HDOT is in the process of seeking incidental take permit coverage for its airports and harbors on Maui and Lānaʻi.

14. In 2019, CCH brought a lawsuit against the County for implementing a project to replace high pressure sodium streetlights with light-emitting diode (“LED”) fixtures without first analyzing the impacts of the LED lights on threatened and endangered wildlife, including the ESA-listed seabirds, as required by the Hawaiʻi Environmental Policy Act, Hawaiʻi Revised Statutes chapter 343. As a result of this lawsuit, CCH secured an injunction halting the replacement project pending the County’s review of the environmental effects of LED lights on imperiled wildlife, and consideration of less harmful alternatives. The County also agreed to dim the LED streetlights that were installed before the lawsuit was filed to minimize harm to wildlife.

15. In 2022 and 2024, CCH filed lawsuits in this Court seeking to enforce the ESA to minimize and mitigate the unauthorized take of ‘ua‘u caused by bright lights at the Grand Wailea Resort on Maui. In November 2024, CCH and co-plaintiff American Bird Conservancy filed an ESA lawsuit in this Court seeking to minimize and mitigate the unauthorized take of ‘ua‘u, ‘a‘o, and ‘akē‘akē caused by the Company’s power lines and lights at its facilities on Maui and Lānaʻi.

16. In addition to undertaking litigation to protect ESA-listed seabirds in Hawaiʻi from injury and death, CCH and its members frequently advocate for

management activities that protect and rehabilitate seabird breeding habitat necessary for the survival and recovery of the species. For example, CCH was involved in the creation of two Natural Area Reserves that protect ‘ua‘u and ‘a‘o breeding and nesting habitat from predators and invasive species: Hono o Nā Pali on Kaua‘i and Nākula on Maui. CCH and its members also regularly advocate for increased efforts to remove and exclude feral sheep, goats, deer, and pigs from suitable habitat on state lands, as feral ungulates eat seabird eggs and chicks and destroy the native vegetation that imperiled seabirds need to establish their nesting colonies. Similarly, CCH and its members advocate for increased funding and management activities to remove alien vegetation that endangers native Hawaiian ecosystems that the ESA-listed seabirds use for breeding and nesting activities.

17. To increase public support for wildlife protection and habitat restoration, CCH conducts educational programs about Hawai‘i’s imperiled wildlife. For example, as part of their Manu Kai (Seabird) Campaign, CCH educates children about Hawai‘i’s seabirds and the threats that they face.

18. CCH members include wildlife biologists, Native Hawaiian cultural practitioners, fishers, educators, artists, community leaders and others who study, observe, photograph, research, and enjoy ‘ua‘u, ‘a‘o, and ‘akē‘akē in the wild on a regular and ongoing basis. CCH members include native Hawaiians seeking to perpetuate traditional fishing practices that rely on native seabirds to locate schools

of fish. CCH members who live outside of Hawai‘i visit the islands to observe and enjoy Hawai‘i’s native wildlife, including the ESA-listed seabirds. CCH’s members and staff derive scientific, cultural, recreational, conservation, educational, and aesthetic benefits from the existence of these animals in the wild. CCH brings this action on behalf of itself and its adversely affected members and staff.

19. Plaintiff American Bird Conservancy (“ABC”) is a non-profit corporation dedicated to the conservation of wild birds and their habitats throughout the Americas and in Hawai‘i. ABC’s Oceans & Islands Division – Hawai‘i Program includes a specific focus on Hawai‘i’s endangered and threatened birds, including the ‘ua‘u, ‘a‘o, and ‘akē‘akē. ABC advances bird conservation through direct action and by building partnerships of conservation groups, scientists, government agencies, and members of the public. ABC has approximately 29,000 members nationwide, including members residing in Hawai‘i. ABC’s members include conservationists, ornithologists, and birders, among others. ABC members who live outside of Hawai‘i visit the islands to observe, study, and enjoy Hawai‘i’s native wildlife, including the ‘ua‘u, ‘a‘o, and ‘akē‘akē.

20. ABC has demonstrated long-standing commitment to protecting ‘ua‘u, ‘a‘o, and ‘akē‘akē. ABC has worked to reduce the impacts of feral and free-

ranging cats and other predators and to increase public awareness about Hawai‘i’s imperiled seabirds through its website, magazine and newsletter, and special reports, and as a contributor to the State of the Birds report.

21. ABC has participated in litigation seeking to compel the Federal Communications Commission to consult under the ESA regarding harm to ‘ua‘u and ‘a‘o from striking communications towers in Hawai‘i. ABC also was a co-plaintiff (with CCH) in the above-described lawsuits to protect ‘ua‘u and ‘a‘o from death and injury associated with the activities of KIUC and the St. Regis Princeville Resort (in 2010) and to enforce the ESA with respect to the Company’s power lines and facility lights in Maui County (in 2024).

22. Outside of the courtroom, ABC has advocated in support of a robust ESA permitting and habitat conservation planning process for ‘ua‘u, ‘a‘o, and ‘akē‘akē on the island of Kaua‘i, and has worked directly with KIUC to ensure that take caused by power lines and streetlights is minimized while KIUC’s long-term habitat conservation plan is developed.

23. ABC funds projects to create seabird habitat and keep it safe from predators by installing predator-proof fencing around ideal nesting sites and sometimes translocating birds to establish new colonies. On Kaua‘i, one such project is completed, and is now home to translocated ‘ua‘u and ‘a‘o which have

begun breeding at the new site. ABC is funding a similar project on Moloka‘i, the fencing portion of which was completed in 2024.

24. Defendants’ operations harm ABC and its members who conduct research and conservation projects, monitor and observe birds on Maui, and have interests in studying and protecting the endangered ‘ua‘u, the threatened ‘a‘o, and the endangered ‘akē‘akē. ABC brings this action on behalf of itself and its adversely affected members and staff.

25. The above-described aesthetic, conservation, recreational, scientific, cultural, and educational interests of the Conservation Groups and their respective members have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely affected and irreparably injured by Defendants’ continued refusal to comply with their obligations under the ESA, as more fully set forth below. The individual interests of the Conservation Groups’ members as well as the Conservation Groups’ organizational interests are thus directly and adversely affected by Defendants’ unlawful actions.

26. Defendant Hawaiian Electric Company, Inc. (“HECO”) is a corporation that was organized under the laws of the Territory of Hawai‘i, and now exists under and by virtue of the laws of the State of Hawai‘i. HECO owns and operates streetlights in Maui County that cause take of listed seabirds.

27. Defendant Maui Electric Company, Ltd. (“MECO”) is a corporation organized under the laws of the Territory of Hawai‘i, and now exists under and by virtue of the laws of the State of Hawai‘i. The Conservation Groups are informed and believe, and on the basis thereof allege, that MECO has been a subsidiary of HECO since 1968, and directly operates HECO’s streetlights in Maui County.

28. Defendant County of Maui is a municipal corporation and political subdivision of the State of Hawai‘i. The Conservation Groups are informed and believe, and on the basis thereof allege, that the County determines how and where the Company operates streetlights along the County’s roads, including whether those streetlights are modified to avoid or minimize fallout of ESA-listed seabirds.

LEGAL FRAMEWORK

29. “[T]he Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). In furtherance of Congress’ goal to conserve species, the ESA generally prohibits the “take” of any species listed as endangered or threatened. 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. §§ 17.21, 17.31(a).²

² As noted above, the ESA’s definition of “species” includes distinct population segments. 16 U.S.C. § 1532(16).

30. The ESA’s prohibition on “take” includes actions that “harass,” “harm” and “kill” listed species. 16 U.S.C. § 1532(19). The ESA’s regulations define “harass” as “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 which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. “Harm” is defined as “an act which actually kills or injures wildlife.” *Id.*

31. To comply with the ESA, Defendants’ activities may not “take” any endangered ‘ua‘u, threatened ‘a‘o, or endangered ‘akē‘akē unless Defendants first obtain and comply with the terms of an incidental take permit in accordance with ESA section 10(a), 16 U.S.C. § 1539(a).

32. The U.S. Fish and Wildlife Service may not issue an incidental take permit unless it first concludes that a permit applicant’s activities will not “appreciably reduce the likelihood of the survival and recovery of [any endangered or threatened] species in the wild.” 16 U.S.C. § 1539(a)(2)(B)(iv).

33. The ESA further conditions the issuance of an incidental take permit on the applicant developing and committing to implement a habitat conservation plan that, among other things, minimizes and mitigates the impacts of any incidental take of endangered or threatened species to the maximum extent practicable. *Id.* § 1539(a)(2)(A)(ii), (B)(ii).

BACKGROUND FACTS

‘Ua‘u



Photo: Jim Denny

34. The ‘ua‘u (*Pterodroma sandwichensis*) is an endemic Hawaiian seabird that forages widely across the central, northern, and eastern Pacific Ocean for squid, fish, and crustaceans. The ‘ua‘u was listed as an endangered species in 1967.³

³ At the time of listing, the ‘ua‘u was known as the Hawaiian Dark-rumped Petrel (*Pterodroma phaeopygia sandwichensis*). See 32 Fed. Reg. 4,001 (Mar. 11, 1967); 75 Fed. Reg. 9,282, 9,286 (Mar. 1, 2010).

35. Satellite-tagged ‘ua‘u have been tracked traveling more than 10,000 kilometers on a single foraging trip to and from their breeding colonies in the main Hawaiian Islands.

36. The largest ‘ua‘u breeding colonies are located on Maui, in and around Haleakalā crater, and on Lāna‘i. The ‘ua‘u also has smaller remnant breeding colonies on Hawai‘i Island and on Kaua‘i, and possibly also on O‘ahu and Moloka‘i.

37. On Haleakalā, where the soil is dry and vegetation is scarce, ‘ua‘u nest in cavities in the volcanic terrain, such as cracked lava tubes and crevices, and dig burrows where sufficient soil exists. On Lāna‘i, west Maui, and east Maui below 8,000 feet, ‘ua‘u nest within the valleys and uplands, where the birds excavate burrows beneath dense vegetation along valley headwalls, favoring steep slopes covered with uluhe fern.

38. ‘Ua‘u have a low reproductive rate. They lay only one egg per year, do not breed until five or six years of age, and, once mature, may not breed every year.

39. On Haleakalā, ‘ua‘u begin arriving on breeding grounds to pair in mid-February. Egg-laying generally occurs in April and May. On Lāna‘i and in west Maui, ‘ua‘u arrive in March-April and lay eggs in June.

40. 'Ua'u chicks hatch in July and August. Male and female parents share in both egg incubation and feeding their chick. Thus, if either one of the parents is killed, the chick will die too. After a chick hatches, its parents briefly stay and brood the chick before beginning a routine of extended ocean foraging and feeding. After approximately 90 to 120 days, the parents will abandon their young, around September or October of each year, and leave the nesting colony until the next breeding season.

41. Fledging begins in late September on Haleakalā and in late October on Lāna'i and in west Maui. By December, adult and successful fledging birds have left Hawai'i. Once the chicks leave, they may not return to land for up to six years, when they return to prospect for nests and a mate.

42. There are currently only an estimated 4,000-5,000 breeding pairs of 'ua'u on Maui, but overall population trends are inconclusive, and updated global population estimates do not currently exist for the species.

43. Protection of known breeding colonies and island-specific metapopulations is critical to the survival of the species.

‘A‘o



Photo: Jim Denny

44. The ‘a‘o (*Puffinus newelli*) is endemic to Hawai‘i and was listed as a threatened species in 1975.⁴

45. ‘A‘o forage over deep water, generally hundreds of kilometers out to sea, feeding by diving several meters below the ocean’s surface to retrieve squid and fish.

46. ‘A‘o colonies are found at high elevations inland, with nests often located under dense vegetation in open native forest dominated by ‘ōhia, with a dense understory of uluhe fern.

⁴ At the time of listing, the ‘a‘o was known as the Newell’s Manx Shearwater (*Puffinus puffinus newelli*). See 40 Fed. Reg. 44,149 (Sept. 25, 1975); 88 Fed. Reg. 7,134, 7,139 (Feb. 2, 2023).

47. Typical of its family, the 'a'o has a low rate of reproduction. First breeding does not occur until approximately six years of age, and breeding pairs produce only one egg per year. Pairs may or may not breed every year.

48. The 'a'o's breeding season begins in April, when birds return from foraging at sea to previously used nest sites or to prospect for new sites. Egg-laying begins in the first two weeks of June and continues through the early part of July. A single egg is laid at the end of a long burrow, and one adult bird remains on the egg while the second adult goes to sea to feed. Like with the 'ua'u, the death of one parent 'a'o results in the death of the chick. The chick growth period lasts approximately ninety days. Fledging season begins in September, and peaks in October and November, depending on island location.

49. Once the chick has hatched and has been brooded for a few days, both parents will go to sea to provide the growing chick with a supply of food.

50. 'A'o arrive and leave their burrows during darkness, and the birds are rarely seen near land during daylight hours.

51. The 'a'o population was estimated in the 1990s at around 19,000 breeding pairs, but, since then, is estimated to have decreased by around 75% on Kaua'i, where about 90% of the remaining 'a'o are found.

52. Protection of known breeding colonies and island-specific metapopulations is critical to the survival of the species.

‘Akē‘akē

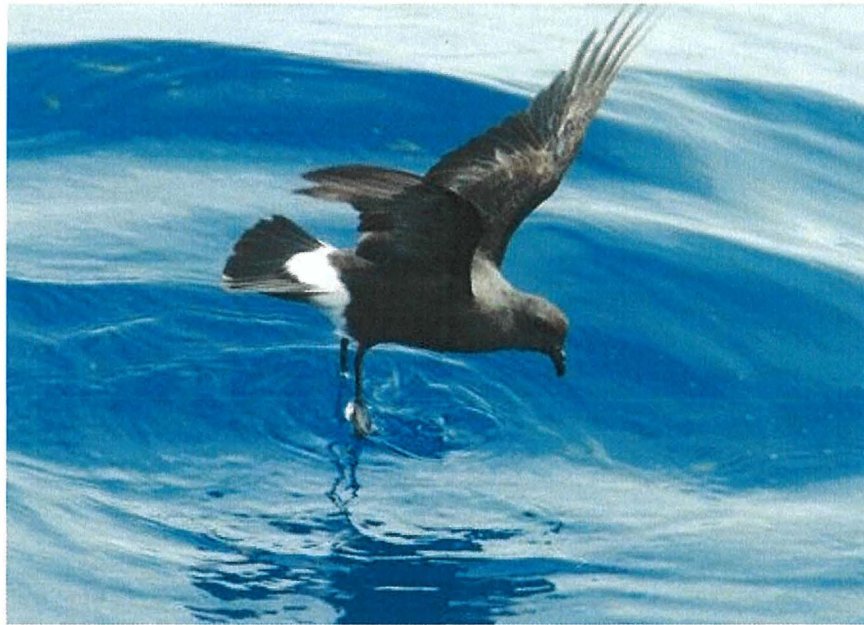


Photo: Mike Danzenbaker

53. The ‘akē‘akē, which is the Hawai‘i Distinct Population Segment of the Band-rumped Storm-petrel (*Hydrobates castro*), was listed as an endangered species in 2016.⁵

54. ‘Akē‘akē range throughout the Pacific Ocean basin and return to Hawai‘i to nest and breed.

⁵ At the time of listing, the ‘akē‘akē’s scientific name was *Oceanodroma castro*. See 81 Fed. Reg. 67,786 (Sept. 30, 2016); 88 Fed. Reg. 7,134, 7,139 (Feb. 2, 2023).

55. ‘Akē‘akē can live up to 20 years in the wild and do not breed until they are 3 to 7 years old. ‘Akē‘akē lay a single egg per season. Eggs are laid between May and June, and nestlings fledge in October.

56. ‘Akē‘akē prefer to nest in crevices high on cliff faces or lava flows and fly to their nesting sites under cover of darkness to avoid attracting predators. The birds have been documented nesting on the steep cliffs of Kaua‘i and on the slopes of Mauna Loa on Hawai‘i Island. They have also been recorded on Lehua, Maui, and Lāna‘i, indicating the presence of breeding colonies on those islands.

57. When not at their nesting sites, ‘akē‘akē spend their time foraging on the open ocean for small fish, squid, and crustaceans. They have been observed feeding during daylight hours, but also feed at night.

58. Due to difficulties in studying this small and elusive species, the number of ‘akē‘akē breeding in Hawai‘i is unknown but is thought to be in the low hundreds.

59. Protection of breeding colonies and island-specific metapopulations is critical to the survival of the species.

Defendants’ Activities “Take” ESA-Listed Seabirds

60. Attraction to bright lights, including the streetlights that the Company operates under the County’s direction, is a major threat to the continued survival and recovery of the ‘ua‘u, ‘a‘o, and ‘akē‘akē.

61. ‘Ua‘u, ‘a‘o, and ‘akē‘akē use the moon and stars to navigate and are often distracted by artificial lights on their way out to sea or when returning to land.

62. Disoriented birds will circle artificial lights until they fall to the ground from exhaustion or strike other human-made structures (“fallout”). Once grounded, the seabirds have a hard time becoming airborne, and are susceptible to predation, starvation, dehydration, or vehicle strikes.

63. The risk of fallout from artificial lights is most acute during the fledging season, which typically lasts from September to December, but fallout of adult birds can occur whenever ESA-listed seabirds are returning to or departing from their island nesting colonies.

64. Streetlights in Maui County attract and cause unauthorized take of ESA-listed seabirds. In 1998, the Hawai‘i Division of Forestry and Wildlife documented an ‘a‘o striking a MECO-operated streetlight in Pā‘ia. Since 2009, the Maui Nui Seabird Recovery Project, which works to help the Hawai‘i Department of Land and Natural Resources fulfill its duty to manage and protect seabirds and their habitats in Maui Nui, has documented scores of unauthorized takes of ESA-listed seabirds in Maui County from fallout that likely resulted from attraction to streetlights that the Company operates under the County’s direction. Because there

are no dedicated, systematic searches for downed birds, the actual toll on imperiled seabirds is undoubtedly much higher than the documented take.

65. Defendants lack incidental take permits for the take of ‘ua‘u, ‘a‘o, or ‘akē‘akē associated with the operation of their streetlights. In the absence of a valid incidental take permit, each ‘ua‘u, ‘a‘o, or ‘akē‘akē that is killed, injured, or otherwise “taken” by Defendants’ activities constitutes an independent violation of ESA section 9, 16 U.S.C. § 1538.

66. The County is aware of the illegal take of ESA-listed seabirds caused by the streetlights that the Company operates under the County’s direction. In 2019, the U.S. Fish and Wildlife Service wrote to the County and warned that outdoor lighting is known to result in seabird disorientation, fallout, and injury or mortality. Noting that “existing Maui County streetlights” have “resulted in documented take of listed seabirds,” the U.S. Fish and Wildlife Service emphasized that the ESA prohibits all take of listed seabirds in the absence of an incidental take permit. In the years since then, the County has taken no steps to come into compliance with the ESA.

67. Without valid incidental take permits, Defendants have been violating, and continue to violate, the ESA.

CLAIM FOR RELIEF

(VIOLATION OF ESA PROHIBITION
ON UNAUTHORIZED TAKE – STREETLIGHTS)

68. The Conservation Groups reallege and incorporate by this reference the preceding paragraphs of this Complaint.

69. Defendants’ activities with respect to the Company-owned streetlights on Maui and Lāna‘i that the Company operates at the County’s direction have “taken” and will continue to “take” endangered ‘ua‘u, threatened ‘a‘o, and endangered ‘akē‘akē without incidental take permit coverage. Defendants’ unauthorized “take” has violated and is violating the ESA. 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. §§ 17.21, 17.31(a).

PRAYER FOR RELIEF

WHEREFORE, the Conservation Groups respectfully request that the Court:

1. Enter a declaratory judgment that Defendants’ activities with respect to the Company-owned streetlights on Maui and Lāna‘i that the Company operates at the County’s direction have violated and are violating the Endangered Species Act by taking listed species without incidental take authorization;
2. Issue appropriate injunctive relief;
3. Award the Conservation Groups the costs of this litigation, including reasonable attorney fees; and

4. Provide such other relief as may be just and proper.

DATED: Honolulu, Hawai‘i, November 19, 2024.

/s/ Mahesh Cleveland
DAVID L. HENKIN
MAHESH CLEVELAND
EARTHJUSTICE

Attorneys for Plaintiffs
Conservation Council for Hawai‘i and
American Bird Conservancy

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Conservation Council for Hawai'i and American Bird Conservancy

(b) County of Residence of First Listed Plaintiff Honolulu
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

David L. Henkin and Mahesh Cleveland
Earthjustice, 850 Richards Street, Suite 400
Honolulu, HI 96813**DEFENDANTS**Hawaiian Electric Company, Inc., and Maui Electric Company, Ltd.
and County of MauiCounty of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF
THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question
(U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity
(Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | ☐ 1 | ☐ 1 | Incorporated or Principal Place of Business In This State | ☐ 4 | ☐ 4 |
| Citizen of Another State | ☐ 2 | ☐ 2 | Incorporated and Principal Place of Business In Another State | ☐ 5 | ☐ 5 |
| Citizen or Subject of a Foreign Country | ☐ 3 | ☐ 3 | Foreign Nation | ☐ 6 | ☐ 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 151 Medicare Act ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans) ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholders' Suits ☐ 190 Other Contract ☐ 195 Contract Product Liability ☐ 196 Franchise	PERSONAL INJURY ☐ 310 Airplane ☐ 315 Airplane Product Liability ☐ 320 Assault, Libel & Slander ☐ 330 Federal Employers' Liability ☐ 340 Marine ☐ 345 Marine Product Liability ☐ 350 Motor Vehicle ☐ 355 Motor Vehicle Product Liability ☐ 360 Other Personal Injury ☐ 362 Personal Injury - Medical Malpractice PERSONAL INJURY ☐ 365 Personal Injury - Product Liability ☐ 367 Health Care/Pharmaceutical Personal Injury Product Liability ☐ 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY ☐ 370 Other Fraud ☐ 371 Truth in Lending ☐ 380 Other Personal Property Damage ☐ 385 Property Damage Product Liability	☐ 625 Drug Related Seizure of Property 21 USC 881 ☐ 690 Other LABOR ☐ 710 Fair Labor Standards Act ☐ 720 Labor/Management Relations ☐ 740 Railway Labor Act ☐ 751 Family and Medical Leave Act ☐ 790 Other Labor Litigation ☐ 791 Employee Retirement Income Security Act IMMIGRATION ☐ 462 Naturalization Application ☐ 465 Other Immigration Actions	☐ 422 Appeal 28 USC 158 ☐ 423 Withdrawal 28 USC 157 PROPERTY RIGHTS ☐ 820 Copyrights ☐ 830 Patent ☐ 840 Trademark SOCIAL SECURITY ☐ 861 HIA (1395ff) ☐ 862 Black Lung (923) ☐ 863 DIWC/DIWW (405(g)) ☐ 864 SSID Title XVI ☐ 865 RSI (405(g)) FEDERAL TAX SUITS ☐ 870 Taxes (U.S. Plaintiff or Defendant) ☐ 871 IRS—Third Party 26 USC 7609	☐ 375 False Claims Act ☐ 400 State Reapportionment ☐ 410 Antitrust ☐ 430 Banks and Banking ☐ 450 Commerce ☐ 460 Deportation ☐ 470 Racketeer Influenced and Corrupt Organizations ☐ 480 Consumer Credit ☐ 490 Cable/Sat TV ☐ 850 Securities/Commodities/Exchange ☐ 890 Other Statutory Actions ☐ 891 Agricultural Acts ☒ 893 Environmental Matters ☐ 895 Freedom of Information Act ☐ 896 Arbitration ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision ☐ 950 Constitutionality of State Statutes
REAL PROPERTY ☐ 210 Land Condemnation ☐ 220 Foreclosure ☐ 230 Rent Lease & Ejectment ☐ 240 Torts to Land ☐ 245 Tort Product Liability ☐ 290 All Other Real Property	CIVIL RIGHTS ☐ 440 Other Civil Rights ☐ 441 Voting ☐ 442 Employment ☐ 443 Housing/Accommodations ☐ 445 Amer. w/Disabilities - Employment ☐ 446 Amer. w/Disabilities - Other ☐ 448 Education PRISONER PETITIONS Habeas Corpus: ☐ 463 Alien Detainee ☐ 510 Motions to Vacate Sentence ☐ 530 General ☐ 535 Death Penalty Other: ☐ 540 Mandamus & Other ☐ 550 Civil Rights ☐ 555 Prison Condition ☐ 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTIONCite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
Section 9 of the Endangered Species Act, 16 U.S.C. § 1538

Brief description of cause:

Violation of Endangered Species Act prohibition on unpermitted take of listed species

VII. REQUESTED IN COMPLAINT:☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. **DEMAND \$**CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

DATE

11/19/2024

SIGNATURE OF ATTORNEY OF RECORD

/s/ Mahesh Cleveland

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____