

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Division of Forestry and Wildlife  
Honolulu, HI, 96813

February 25, 2011

Chairperson and Members  
Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

Land Board Members:

**SUBJECT: REQUEST FOR APPROVAL OF INCIDENTAL TAKE LICENSE AND HABITAT CONSERVATION PLAN FOR KAUAI ISLAND UTILITY COOPERATIVE, ISLAND OF KAUAI**

**SUMMARY:**

Submitted for your approval are the Incidental Take License and the Habitat Conservation Plan (HCP) for Kauai Island Utility Cooperative. The purpose of the HCP is to provide for avoidance, minimization, mitigation, and monitoring of potential incidental take of three endangered or threatened species (hereinafter referred to as the covered species), the 'A'o or Newell's Shearwater (*Puffinus auricularis newelli*), the 'Ua'u or Hawaiian Petrel (*Pterodroma sandwichensis*), and the State listed (and Federal candidate for listing) 'Akē'akē or Band-rumped Storm-Petrel (*Oceanodroma castro*). The HCP also outlines measures to ensure net recovery benefit to the covered species.

**BACKGROUND:**

The Kauai Island Utility Cooperative (KIUC) is a not-for-profit, tax-exempt, cooperative association and is responsible for the production, purchase, transmission, distribution, and sale of electricity on the Island of Kauai, Hawaii. KIUC owns and operates a variety of electric utility installations on Kauai, these include numerous lights, fossil-fuel-fired generating stations at Port Allen and Lihue, the upper and lower Waiaihi hydroelectric stations within the Wailua watershed, seven electrical substations and five switchyards located throughout the island, approximately 160 miles of electrical transmission lines, approximately 560 miles of 12.5 kV electrical distribution lines, and approximately 425 miles of secondary lines (120/240 volts) that carry power from step-down transformers that are part of the distribution network to individual homes and businesses. KIUC's electrical transmission and distribution system is largely above ground and consists of poles and wires that extend from 25 to more than 100 feet above ground.

The overhead wires and poles occupy airspace through which the covered species fly, usually after dark, and take of covered species has been attributed to the overhead wires and poles as a result of collision with these structures. Lights are also a source of take because they attract

birds, leading to fallout or collision with other structures. Its other facilities, including generating stations, substations, equipment baseyards, offices, and other facilities are of less concern, but some take has been attributed to them.

KIUC has already implemented many measures to *avoid, minimize, and mitigate* the potential impacts. These measures include:

- Shielding all KIUC owned street lights to eliminate upward projecting light that could disorient seabirds;
- Pursuing opportunities to underground existing and proposed power lines;
- Supporting and funding the Save-Our-Shearwaters (SOS) program;
- Experimenting with methods to increase the visibility of power lines;
- Supporting seabird predator control on Lehua Island;
- Carrying out extensive research designed to identify seabird breeding colonies where measures can be taken to enhance the successful reproduction of the species.

The HCP provides additional measures for *avoidance and minimization* for take of covered species. These measures include:

- Undergrounding lines (the Wailua area);
- Reconfiguring (including undergrounding) lines at and near Keālia Beach;
- Reconfiguring numerous other distribution line segments to reduce the number of wire layers with which birds could potentially collide and lowering the height sufficiently to bring them beneath shielding terrain, vegetation, or structures.

The HCP provides measures to *mitigate* for take of covered species, as well as provide a *net recovery benefit*. These measures include:

- Implementing the SOS Program for the term of the ITL;
- Carrying out seabird colony management and predator control in the Limahuli Valley and at the Hono o Na Pali Natural Area Reserve for the term of the ITL;
- Updating Spear et al.'s (1995) estimates of at-sea seabird populations;
- Conducting a two-year auditory survey to locate additional seabird breeding colonies;
- Funding development and implementation of a DOFAW-conducted underline monitoring program aimed at better-understanding take by overhead utility structures;
- For each of the years that the ITL remain in effect beyond Year 3, undertake habitat management within Wainiha Valley or other suitable location and possibly providing financial support for the continuation of DOFAW's existing radar survey program should other funding sources become unavailable.

Because the information that exists about the covered species is insufficient to grant long-term take authorization, the HCP provides short-term (up to 5 years) take authorization. For purposes of obtaining long-term take authorization, KIUC would do so by obtaining coverage through the island-wide Kauai Seabird HCP (KSHCP), which DOFAW is currently developing.

The take authorization provided by this HCP would be valid until such time as the KSHCP is approved, or up to 5 years from the time of issuance, whichever is shorter. The potential 5-year term of this HCP ensures that KIUC will continue implementing conservation measures in the event the KSHCP is delayed.

The conservation measures and related obligations under this HCP will roll over and continue to be obligations under the KSHCP (unless they are specifically modified during the course of the KSHCP process, which itself will require public review and agency approval), and will be supplemented by additional obligations associated with the KSHCP's long-term take authorizations.

In the unlikely event that long-term take authorizations under the KSHCP are not available to KIUC at the end of the 5-year term of this HCP, this HCP and its associated incidental take authorizations may be extended with the agreement of KIUC, DOFAW and the USFWS, to the extent allowed by law.

The HCP also allows for adaptive management. Adaptive management is defined as a formal, structured approach to dealing with uncertainty in natural resources management, using the experience of management and the results of research as an on-going feedback loop for continuous improvement. Adaptive approaches to management recognize that the answers to all management questions are not known and that the information necessary to formulate answers is often unavailable. Adaptive management also includes, by definition, a commitment to change management practices when determined appropriate.

The HCP outlines detailed monitoring and reporting protocols to account for injury or mortality to the covered species, as well as to ensure avoidance, minimization, and mitigation measures are being accomplished and goals and objectives are being met.

The Board of Land and Natural Resources approved release of the HCP for public review at the August 28, 2009 meeting. The Division held a public hearing on December 10, 2009. At the public hearing, the Division received one verbal comment. During the 60-day comment period, the Division received six written comments. The Division has made extensive revisions to the HCP based on the public comments. The HCP was also revised based on public comments received during the public review conducted by the U.S. Fish and Wildlife Service.

The revised HCP was reviewed by the ESRC. The Endangered Species Recovery Committee recommended the Board approve the HCP at the September 16, 2010 meeting, conditional on the inclusion of specific revisions. The Division is satisfied such revisions to the HCP have been made, and reported this finding to the ESRC at its December 6, 2010 meeting. A summary of the changes recommended by the ESRC are attached.

All comments received were reviewed and appropriate revisions were made to the HCP based on those comments. Attachment 1 provides a compilation of all comments and notes on the Division's response to the comment. Attachment 2 provides the comment letters.

In accordance with the "Exemption List for the Division of Forestry and Wildlife of The Department of Land and Natural Resources, Reviewed and concurred Upon by the Environmental Council on June 12, 2008," the proposed activities are exempt from the preparation of an environmental assessment. Specifically, the proposed activities fall under Exemption Class 5, "Basic data collection, research, experimental management, and resource evaluation activities which do not result in a serious or major disturbance to an environmental resource:" Sub-Class No. 5, "Wildlife management actions including predator control, insect control, snail control, non-native bird control, controlled grazing or burning as a management tool and use of toxicants or herbicides. All use of chemicals follow label instructions or restrictions." Division analysis of the proposed action concluded it will provide a positive environmental benefit and will be done in a manner to have no negative impact on the conditions that define the area. Furthermore, the cumulative impact of these and similar actions over the duration of the HCP will not have a significant adverse impact and will have minimal or no significant effect on the environment and are exempt from the need to prepare an environmental assessment.

RECOMMENDATION:

The Department recommends that the Board:

1. Approve the Incidental Take License and Habitat Conservation Plan (HCP) for Kauai Island Utility Cooperative by the required two-thirds vote of the authorized membership, subject to review and approval by the Attorney General.
2. Authorize the Chairperson of the Board of Land and Natural Resources to issue the ITL.

Respectfully submitted,



Paul J. Conry, Administrator  
Division of Forestry and Wildlife

APPROVED FOR SUBMITTAL:



William J. Aila, Interim Chairperson  
Board of Land and Natural Resources

Attachment: Habitat Conservation Plan

Attachment: Habitat Conservation Plan (track changes)

Attachment: Incidental Take License

Attachment: ESRC Recommendations

Attachment: Responses to Public Comments and ESRC Recommendations

Attachment: Public Comments

State of Hawaii Incidental Take License  
Department of Land and Natural Resources  
Division of Forestry and Wildlife  
1151 Punchbowl Street, Room 325  
Honolulu, Hawaii 96813

Number: ITL-11

Date of Issue:

Valid Until: Until such time as the Kauai Seabird Habitat Conservation Plan is approved, or up to 5 years from the time of issuance, whichever is shorter.

### INCIDENTAL TAKE LICENSE

**To accompany:**

**“Short-Term Habitat Conservation Plan Kauai Island Utility Cooperative”**

The Board of Land and Natural Resources hereby grants permission under the authority of §195D-4(g) Hawaii Revised Statutes and all other applicable laws, to:

**Kauai Island Utility Cooperative (KIUC)**

**For:**

Continued operation and maintenance of all existing KIUC facilities, and the installation, operation and maintenance of certain future KIUC facilities

**To:** Take of (if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity);

**The following species:**

Common Name	Scientific Name	Annual Take Limit
‘Ua‘u (Hawaiian petrel)	<i>Pterodroma sandwichensis</i>	2

<b>‘Akē‘akē (Band-rumped Storm-Petrel)</b>	<i>Oceanodroma castro</i>	<b>2</b>
<b>‘A‘o (Newell's shearwater)</b>	<i>Puffinus auricularis newelli</i>	<b>125 lethal; 55 non-lethal</b>

**Subject to the following conditions:**

**I. GENERAL CONDITIONS**

1. This license only authorizes incidental take of the covered species by the licensee for continued operation and maintenance of all existing KIUC facilities, and the installation, operation, and maintenance of certain future KIUC facilities on the island of Kauai, Hawaii at the time this license is issued pursuant to the “Short-Term Habitat Conservation Plan Kauai Island Utility Cooperative” dated December, 2010 (hereafter “HCP”).
2. This license is valid only if Kauai Island Utility Cooperative abides by the terms and conditions of this license, the HCP, and Implementing Agreement for the duration of the license.
3. This license is valid for species protected by federal law only if accompanied by valid federal authorization.
4. This license shall become valid upon completion of the following:
  - i. A legal representative of Kauai Island Utility Cooperative has acknowledged understanding and agreement to abide by its conditions by signing two copies of this license.
  - ii. Both copies of the signed license must be returned to the Division of Forestry and Wildlife. Upon approval by the Chairperson of the Board of Land and Natural Resources, a copy of the license will be returned to the applicant.
5. The Board may suspend or revoke this license if the HCP is suspended or revoked. The Board may also suspend or revoke this license in accordance with applicable laws and regulations in force during the term of the license.
6. Persons in violation of the terms and conditions of this license and/or related or appropriate laws may be subject to criminal and or administrative penalty under §§183D-5, 183D-21, 195D-9, and 195D-27, Hawaii Revised Statutes, and §124-8, Hawaii Administrative Rules, or as otherwise provided by law, and/or revocation of this permit.

**II. SPECIAL CONDITIONS**

1. The allowable incidental take authorized by this license for the covered species includes observed, unobserved, direct and indirect take as defined in the HCP.
2. The estimation of incidental take for the covered species will be calculated according to adjustments made to the observed direct take according to methods detailed in the HCP, including but not limited to adjustments to include unobserved and indirect take.
3. DLNR will be notified within 3 days of any mortalities, injuries, or disease observed on the property. Injured individuals or carcasses will be handled according to guidelines in the HCP.
4. The take authorization provided by this ITL will be valid until such time as the Kauai Seabird Habitat Conservation Plan is approved, or up to 5 years from the time of issuance, whichever is shorter. In the event that long-term take authorizations under the Kauai Seabird Habitat Conservation Plan are not available to KIUC at the end of the 5-year term of this ITL, this ITL and its associated Habitat Conservation Plan may be extended with the agreement of KIUC, DOFAW and the USFWS, to the extent allowed by law.

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William J. Aila, Interim Chairperson  
Department of Land and Natural Resources

Cc: DOFAW Kauai Branch  
DOCARE  
USFWS Pacific Islands Office, Honolulu  
USFWS-Law Enforcement, Honolulu

The undersigned has read, understands and hereby agrees to abide by the General Conditions and the Special Conditions stipulated in this license.

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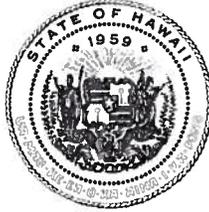
Representative of Kauai Island Utility Cooperative

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Date

\*All signing parties to this ITL must include notarization.

NEIL ABERCROMBIE  
GOVERNOR OF HAWAII



**STATE OF HAWAII**  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
DIVISION OF FORESTRY AND WILDLIFE  
1151 PUNCHBOWL STREET, ROOM 325  
HONOLULU, HAWAII 96813

**WILLIAM J. AILA, JR.**  
INTERIM CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

**GUY H. KAULUKUKUI**  
FIRST DEPUTY

**WILLIAM M. TAM**  
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAIHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

February 25, 2011

**TO:** Honorable Chairperson and Members  
Board of Land and Natural Resources

**FROM:** Endangered Species Recovery Committee

William J. Aila, DLNR  
Loyal Meyerhoff, USFWS  
Gordon Tribble, USGS  
Cliff Morden, University of Hawaii Environmental Center  
Patrick Hart, Appointed Member  
John Harrison, Appointed Member

**SUBJECT:** Endangered Species Recovery Committee Recommendation of Approval of the  
Habitat Conservation Plan and Incidental Take License for Kauai Island Utility  
Cooperative

The Endangered Species Recovery Committee recommended approval the Habitat Conservation Plan and Incidental Take License for Kauai Island Utility Cooperative at the September 16, 2010 meeting. The Committee's recommendation of approval was conditional upon revisions to the HCP, and provided that the Committee receive an update of additional revisions from the federal public review at the December 6, 2010 meeting. Both of these conditions were met, as confirmed by the ESRC at the December 6, 2010 meeting.

Prepared and Submitted by:

Scott Fretz, Wildlife Program Manager  
Division of Forestry and Wildlife

## Attachment 1

# Kauai Island Utility Cooperative (KIUC) Short-Term HCP DOFAW Responses to Public Comments and ESRC Comments

### Public Comments (comment period 10/23/09 to 12/23/09)

#### 1. Earthjustice Comment Letter

Mr. David L. Henkin  
Earthjustice  
223 South King Street, Suite 400  
Honolulu, HI 96813-4501

#### INTRODUCTION

##### Earthjustice Comment 1:

*The illegal operations of KIUC and its predecessor, Kaua'i Electric ("KE"), bear substantial responsibility for that precipitous decline, with power lines and associated structures killing many thousands of shearwaters since the species' listing as threatened in 1975 (at rates of 400 or more shearwaters killed annually in the 1980s through mid-1990s), all without incidental take authorization. Id. at 4-2 to 4-4.<sup>1</sup> The power lines and associated structures that KIUC now seeks permission to operate, maintain, and expand thus are directly responsible for a major share of the tens of thousands of shearwaters documented as "taken" on Kaua'i in the past three decades, to our knowledge the largest documented take of any ESA-listed bird species. See id. at E-7 (Save Our Shearwaters ("SOS") program has retrieved and released more than 31,000 Newell's Shearwaters and other seabirds since 1970s).*

**Response:** The comment concerns past events, and is not related to the HCP which would authorize future incidental take. Consequently, no change to the HCP was required.

##### Earthjustice Comment 2:

*KIUC now seeks authorization to kill 125 shearwaters each year, with another 55 shearwaters annually subject to allegedly "non-lethal" take. Id. at 1-7.<sup>2</sup> This lower level of estimated annual take (as compared to the mid-1990s) is due solely to the fact that, largely as a result of KIUC's and KE's operations, there are now fewer shearwaters left on Kaua'i to kill, not that KIUC has taken effective measures to reduce its operations' toll on listed seabirds. Id. at 4-3; see also id. at 4-4 (changes to electrical power lines along the Powerline Trail between Wailua Reservoir and Hanalei likely resulted in increased take), E-3 (installation of marker balls on power lines did not result in "measurable benefits"). In considering what steps must "be taken to minimize ... all negative impacts," it is vital to ensure KIUC is not permitted to profit from its past violations of state and federal endangered species laws, which have reduced the number of birds for which it now needs*

*permit coverage by contributing to the species' disastrous population decline. Haw. R. Stat. §195D-21(b)(2)(C).*

**Response:** The comment concerns past events, and is not related to the HCP which would authorize future incidental take. The department can only respond to and authorize future take requested by the applicant. Consequently, no change to the HCP was required.

### **FAILURE TO MINIMIZE TAKE "TO THE MAXIMUM EXTENT PRACTICABLE"**

#### **Earthjustice Comment 3:**

*Under both the federal ESA and Chapter 195D, approval of KIUC's draft HCP depends on whether KIUC will minimize its take of listed seabirds "to the maximum extent practicable." 50 C.F.R. §§ 17.22(b)(2)(B), 17.32(b)(2)(B); Haw. R. Stat. § 195D-4(g)(1); see also Haw. R. Stat. § 195D-21(c)(4). The draft HCP falls far short of satisfying that mandate, with KIUC stating merely it will "continue existing efforts" and promising vaguely to "pursue any new opportunities to avoid and minimize adverse effects of its facilities." HCP at 1-7.<sup>3</sup> KIUC has failed to carry its burden of demonstrating "that the proposed program is the maximum that can be reasonably required by that applicant." HCP Handbook at 7-3 (Nov. 4, 1996).*

**Response:** DOFAW concurs that the Draft HCP circulated for public review did not adequately demonstrate that the minimization measures included in the HCP constituted minimization of the impact of take to the maximum extent practicable as required by HRS §195D-4(g)(1). As a result, the discussion of minimization measures in the HCP has been substantially revised to identify a suite of minimization measures to be completed during the term of this HCP and which constitute the maximum practicable given the short term of this HCP. Those revisions are contained in Section 5.4 of the Revised Short-Term HCP.

#### **Earthjustice Comment 4:**

*In analyzing what it means for KIUC to minimize take of listed seabirds "to the maximum extent practicable," it is vital to bear in mind that KIUC made a business decision to acquire a going concern - Kaua'i Electric - knowing full well that it had been operating for years in blatant violation of the ESA's and Chapter 195D's prohibitions on unpermitted take. See HCP at 1-4. KIUC should have included in its business plan adequate resources to bring the company's operations into compliance with the ESA and Chapter 195D, just as it would provide for any other necessary infrastructure repair or upgrade. If KIUC failed to do so, the Newell's shearwater, Hawaiian petrel and band-rumped storm petrel should not suffer for its recklessness.*

**Response:** The comment concerns past activities, and does not relate to the content of the HCP which addresses future incidental take. Consequently, no change to the HCP was required.

#### **Earthjustice Comment 5:**

*In addition, what is "practicable" in this case must be evaluated in light of the ESA's and Chapter 195D's prohibition on activities that jeopardize the continued existence of listed species. See 16 U.S.C. § 1536(a)(2); Haw. R. Stat. § 195D-21(c)(1). It must also be viewed in light of the prohibition on authorizing incidental take that "appreciably reduce[s] the likelihood of the ... recovery of the species in the wild." 16 U.S.C. § 1539(a)(2)(B)(iv). The documented, dramatic decline in Newell's shearwater numbers indicates that, unless KIUC immediately takes action to reduce take, this species may cease to exist in the wild or, at a minimum, its prospects for recovery will be all but eliminated. To avoid the need to shut down its operations altogether, KIUC must promptly implement the necessary measures to avoid pushing the Newell's shearwater to extinction and to promote the species' recovery.*

**Response:** DOFAW agrees that the Board of Land and Natural Resources cannot approve the HCP if the Board determines that implementation of the plan is likely to jeopardize the continued existence of any listed species and has determined that approval of this short term plan will not jeopardize the continued existence of any listed species. Rather, the plan implements the most critical conservation measures available at this time for these species and therefore will contribute to recovery.

**Earthjustice Comment 6:**

*Finally, one must bear in mind that, under Hawai'i state law, incidental take is permitted only where the associated HCP "will increase the likelihood of recovery of the endangered or threatened species that are the focus of the plan." H.R.S. § 195D-21(b)(1)(B) (emphasis added); see also id. § 195D-4(g)(4). Since KIUC cannot operate without both federal and state incidental take permits, the higher standard imposed under state law informs what is "practicable" in this case. The baseline for the analysis of whether the HCP would increase the likelihood that Kaua'i's imperiled seabirds will recover must be the conditions that would prevail if KIUC removed the utility structures and lights that currently cause unpermitted take, not, as KIUC would have it, whether the HCP would improve conditions over the illegal status quo. See HCP at 6-1 (describing "no take" alternative).*

**Response:** DOFAW concurs that net recovery benefit must be assessed relative to the total amount of take caused by KIUC's activities.

DOFAW also notes that because these species nest in colonies located in very rugged and remote montane areas, management actions for the recovery of these species are very difficult to implement and their success is very difficult to quantify. DOFAW, USFWS and KIUC have been working since 2002 to identify breeding colonies on Kauai which are suitable for conducting habitat management work which is likely to improve reproductive success. At the time of the State public review period, sufficient information was available for only one colony, in the Upper Limahuli Valley, to justify beginning habitat management work there (which work has begun in cooperation with the landowner, the National Tropical Botanical Garden). Subsequent to the State public review period, DOFAW determined that habitat management work could also be performed at an additional breeding colony, located at the Hono o Na Pali Natural Area Reserve, and KIUC has committed to conducting such work at this additional location as described in Section 5.6.3 of the December 2010 Short-Term HCP. While other breeding colonies have been identified, habitat management work cannot proceed until additional surveys have been completed to provide documentation of the presence of birds at those sites, and proof that such work is feasible and likely to be of measurable benefit to the species. The ability to make such critically important determinations will be substantially enhanced through the development of new scientific information about these species which does not presently exist. The crucial scientific studies that KIUC will fund under the Short-Term HCP will produce information needed to identify additional recovery actions which can be implemented as part of subsequent long-term take authorizations and through other means.

**Earthjustice Comment 7:**

*Against this backdrop, it is clear KIUC has failed to demonstrate that the few minimization measures described in the HCP - the bulk of which have already been implemented - constitute the maximum effort one can reasonably require of KIUC going forward. In the category of "Ongoing Efforts to Avoid & Minimize Impacts of Existing Facilities," the HCP includes only participation in a federally funded effort to underground 1.7 miles of lines in the Wailua River area (of a total of more than 1,100 miles of lines island-wide). Id. at 5-7; see also id. at 1-1. It then explains that, while KIUC "supports the undergrounding of existing power lines," it allegedly "is not financially feasible for KIUC to underground any significant amount of its existing lines except in situations," such as in the Wailua River*

area, "where road realignments or other factors make sizeable cost-sharing possible." *Id.* at 5-7, 5-9.

**Response:** As described in Response to Earthjustice Comment #3, the HCP discussion of minimization measures has been revised.

**Earthjustice Comment 8:**

*Even if one were to accept KIUC's claim that undergrounding more lines is not currently practicable (and its statement that, to date, its "margins have been sufficient to consistently exceed its required ratios" calls that claim seriously into question), the draft HCP nowhere discusses — much less justifies KIUC's refusal to implement — any other, less expensive minimization measures. *Id.* at 5-8. It is certainly not the case that KIUC is ignorant of alternate means it could employ to reduce the number of seabirds its operations kill each year. Such measures were spelled out over fourteen years ago in a study funded by KIUC's predecessor and carried out by the Electric Power Research Institute ("EPRI") that the HCP identifies as providing "the best scientific and commercial data available." *Id.* at 4-1; see EPRI, *The Ecology of Newell's Shearwater and Dark-Rumped Petrel on the Island of Kaua'i: Final Report Task 2 at 57-59 (Feb. 8, 1995).*<sup>4</sup> Take minimization recommendations the HCP improperly ignores include:*

- *Lowering power lines in identified flyways (e.g., Waimea Valley, Lawai Valley, Moalepe Valley, Hanalei Valley) to below tree-top level to divert shearwaters upward over the wires;*
- *Where adequate vegetation does not exist at hotspots, transplanting large trees to provide the required diverting mass;*
- *Where there are bridges that cross flyways, lowering wires to bridge height above the water, so the physical mass of the bridge would divert the shearwaters; and*
- *Elsewhere, replacing all utility poles with significantly shorter poles (less than 15 meters and no higher than tree-top height) and having wires positioned horizontally, rather than vertically, on the poles.*

**Response:** As described in Response to Earthjustice Comment #3, the HCP discussion of minimization measures has been revised (see, for example, Section 5.4.2.4 of the HCP).

**Earthjustice Comment 9:**

*While the HCP states that KIUC will generally use "flat designs for all newly constructed lines," it neither discusses the EPRI recommendation to minimize take by realigning existing power lines nor does it justify KIUC's refusal to implement that recommendation, or any of the others presented in the EPRI report. *Id.* (emphasis added).*

**Response:** As described in Response to Earthjustice Comment #3, the HCP discussion of minimization measures has been revised.

**Earthjustice Comment 10:**

*Similarly, the draft HCP states that, to minimize potential impacts on listed species from installation of a new 69 kV line on the north shore of Kaua'i, "[i]n all of the areas where the plan calls for wires where none presently exist[,] the additions are either shielded by existing vegetation and/or topography or are attached to the side of the Kuhio Highway*

bridge across the Kalihiwai River." *Id.* at 2-21. The HCP emphasizes that "[t]his design choice completely eliminates the potential adverse effect on the species in this route segment." *Id.* Moreover, "[i]n all cases where additional above-ground transmission wires are proposed," KIUC plans to "offset the effect of the additional circuit by changing the existing 12 kV distribution wires to a horizontal (i.e., one-level) arrangement (in lieu of their present vertical configuration)." *Id.* The HCP fails completely to address why KIUC refuses to implement similar measures to eliminate - or, at least, minimize - take associated with existing power lines.

**Response:** As described in Response to Earthjustice Comment #3, the HCP discussion of minimization measures has been revised.

**Earthjustice Comment 11:**

*There is no justification for delaying such measures merely because the term of this initial HCP is for only "up to 5 years" (assuming no further extensions), since there can be no serious question that the impacts on listed seabirds from KIUC's operations will continue into the indefinite future. HCP at 1-6. As the draft HCP notes, "[t]he only ways that KIUC could eliminate the possibility of take from its facilities and operations are (1) undergrounding of all overhead electrical lines (distribution lines, transmission lines, and individual service lines) and (2) eliminating street lighting and divesting itself of all responsibility for the many utility poles which support telephone and cable television lines owned by other entities." *Id.* at 6-1. The draft HCP makes clear that KIUC has no plans - in the short- or long-term - to eliminate these various sources of take. To address the inevitable long-term take, KIUC should be required immediately to begin implementing long-term take minimization measures, rather than limit the scope of minimization measures to what KIUC can accomplish in the short-term, as is currently proposed. Cf. HCP Handbook Addendum, 65 Fed. Reg. 35,242, 35,256 (June 1, 2000) ("if the permittee's action ... continually occur[s] over a long period of time,...the permit would need to encompass that time period"); HCP at 5-1 (noting "it is unusual for an HCP covering such a large area to have such a short term").*

**Response:** As described in Response to Earthjustice Comment #3, the HCP discussion of minimization measures has been revised.

**UNJUSTIFIED RELIANCE ON SOS PROGRAM TO SATISFY LEGAL REQUIREMENTS**

**Earthjustice Comment 12:**

*Based on its assumption that seabirds released in the SOS program actually survive, KIUC asserts that "the SOS+ program alone would be sufficient to satisfy the Chapter 195D standard for producing a net environmental benefit and increasing the likelihood of species survival and recovery." *Id.* at 5-22; *see also id.* at 5-11 (claiming "SOS+ saves literally hundreds of individual Covered Species birds each year").<sup>8</sup>*

*The only scientific study KIUC cites in support of its analysis is the EPRI report, which KIUC characterizes as concluding "that population decline in the Newell's Shearwater population would be almost twice as great in the absence of SOS as it would be in its presence." *Id.* at 5-22. In truth, the EPRI report was more equivocal regarding the SOS program's contribution to seabird survival, noting that "[t]he very low recovery rate of shearwaters initially banded as fledglings by SOS could be a result of ... a lower than natural survival of these birds (deemed to*

have been 'rescued' only because they were able to fly away)" and calling for additional research to evaluate the program's effectiveness. EPRI report at 49.

**Response:** DOFAW concurs that the survival rate of SOS birds may be lower than natural survival rates and that further research is needed to document survival of SOS birds. Because the survival of the SOS birds is not known, the HCP does not use SOS to provide mitigation credit to the applicant. Rather, SOS represents an important component of the program for its *potential* contribution to minimization and mitigation, and its highly beneficial contribution to community outreach and education. What is certain is that downed seabirds will die if not retrieved by the SOS program, as these birds are largely unable to regain flight from flat ground regardless of their physical condition, and are thus subject to predation, dehydration, starvation, and vehicle strikes.

Because of all of these factors, DOFAW fully supports the continued operation of the current SOS program, and believes based on the best available information that it provides a significant conservation benefit to these seabirds.

**Earthjustice Comment 13:**

*Drs. Ainley's and Podolsky's follow-up comments were more blunt in rejecting "funding SOS" as a "viable mitigation[]" for KIUC's take. 10/15/04 Scoping Letter from Ainley and Podolsky at 2. They stressed: "While the SOS data are cost effective for purposes of monitoring Newell's Shearwater population trends, ... for the reasons given in our first letter, the program seems not to be effective at saving shearwaters to the extent necessary to contribute to the species' recovery." Id. In comments on the current draft HCP, Dr. Podolsky stated categorically: "the SOS program does nothing to avoid, minimize and mitigate take." 12/22/09 Podolsky Comment Letter at 2 (enclosed).*

**Response:** DOFAW does not concur. The survival rate of SOS birds is simply not known. It is likely to be lower than natural rates but is also likely to be higher than zero. Unfortunately, the data are not sufficient to provide a statistically significant estimate of survival. See also Response to Earthjustice Comment #12.

**Earthjustice Comment 14:**

*Drs. Ainley and Podolsky are clearly not alone in questioning the SOS program's effectiveness as a mitigation measure. The very purpose of the two-year at-sea capture study is to "produce empirical evidence concerning the survival rate of SOS-banded birds." HCP at 5- 15; see also id. at 1-6 (study's purpose to "determine the proportion of birds which survive following release through the SOS program"). Even if fully successful, this study will, at most, evaluate "the feasibility, cost, and usefulness of collecting and using data from periodic surveys of this sort to develop a database that has sufficient statistical power to extrapolate survival rates of Newell's Shearwaters and Hawaiian Petrels retrieved and released by the SOS Program." Id. at 5-16.*

**Response:** Please refer to Responses to Earthjustice Comments #12 and #13. Also, as noted in Response to Earthjustice Comment #6, following the State public comment period another seabird breeding colony became available for performing habitat management work designed to increase breeding success (Hono o Na Pali Natural Area Reserve). As a result DOFAW recommended, and KIUC agreed, that KIUC should eliminate the previously proposed two-year at-sea capture study, and instead direct funds from that effort to habitat management work at Hono o Na Pali.

**Earthjustice Comment 15:**

*Clearly, there are currently no data with "sufficient statistical power" to support any conclusions about the SOS program's effectiveness in saving listed seabirds (and these data will not be available for many years to come, after future periodic surveys), much less any data to support the rosy assessments on which KIUC bases its claim that, despite the annual slaughter of over 180 listed seabirds from its operations, the modest efforts proposed in the draft HCP would both increase the likelihood of those species' survival and recovery and result in a net environmental benefit.<sup>9</sup> (<sup>9</sup>Since the available data casts substantial doubt on whether any significant number of seabirds banded and released in the SOS program survive, KIUC has no basis for assuming that the 55 fledgling shearwaters annually downed by light attraction associated with KIUC facilities constitute "non-fatal" take. Rather, in the absence of any data indicating that listed seabirds released by the SOS program are likely to survive, one must assume that all 180 of KIUC's estimated annual shearwater takes result in mortality.)*

*KIUC's assessment of its proposed activities - in particular, its reliance on the SOS program to offset anticipated take - lacks any scientific support. To pass legal muster, the draft HCP must be substantially revised to provide an analysis that is based on scientific fact, not rhetoric and supposition.*

**Response:** DOFAW concurs. Please refer to Responses to Earthjustice Comments #12 and #13.

**FAILURE TO ACCOUNT FOR "INDIRECT" TAKE AND OTHER INDIRECT ENVIRONMENTAL HARM**

**Earthjustice Comment 16:**

*While the draft HCP purports to consider indirect take, estimating "the impact of adult (i.e. parent) mortality on egg and chick survival," it fails to assess substantial sources of seabird mortality that would not exist but for KIUC's operations. HCP at 4-1. For example, the draft HCP notes that telephone lines and cable television lines strung on KIUC's utility poles are responsible for 5-20% of the annual mortality of seabirds from collisions with utility structures. *Id.* at 4-2. Based on that analysis, the draft HCP attributes 90% of annual mortality from collisions as direct take from KIUC's power lines and associated structures, but fails completely to consider whether any portion of the take assigned to telephone lines and cable television lines should be considered "indirect take" due to KIUC's placement and maintenance of its utility poles. *Id.*<sup>10</sup> It is only logical to assume that, in the absence of KIUC's utility poles, there would be fewer telephone lines and cable television lines strung across seabirds' flyways, either because it would be prohibitively expensive to extend service in the absence of pre-existing poles or, without the cost savings associated with use of pre-existing poles, more telephone lines and cable television lines would be placed underground. In either case, the indirect take associated with KIUC's operations must be evaluated.*

**Response:** DOFAW does not concur. To the extent listed seabirds collide with cable and phone lines, that constitutes direct take which is the responsibility of the entities which own and operate those cable and phone lines. Moreover, KIUC has a joint-use agreement with those entities regarding such poles on which electrical and communication lines are mounted, and that agreement does not give KIUC the right to remove existing shared-use poles, or the cable or phone lines that they support. Thus, the commenter's conclusion that the removal of overhead KIUC powerlines would result in the presence of fewer overhead cable and telephone lines is incorrect. Consequently, no change to the HCP was required.

**Earthjustice Comment 17:**

*In addition, the draft HCP fails to consider the growth-inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate associated with KIUC's centralized distribution of electricity. It cannot seriously be questioned that, without KIUC's activities (i.e., if every business and residence needed to generate its own electricity), there would be far fewer artificial lights on Kaua'i. Accordingly, a portion of the take associated with attraction to non-KIUC lights is properly attributed to KIUC as indirect take, a factor the draft HCP improperly ignores.*

**Response:** Regardless of whether KIUC's activities influence past or future growth, the HCP authorizes a specific level of take for a short term period and provides measures to comply with HRS 195D in that HCP. Any take above that level, regardless of whether or how it was induced, is not authorized, and therefore illegal. Therefore, no change was made to the HCP.

**Earthjustice Comment 18:**

*Moreover, without KIUC's current infrastructure and planned expansion or upgrades, there would be far less residential and commercial growth on Kaua'i. To determine whether KIUC's proposal "provides net environmental benefits," as Chapter 195D requires, the draft HCP was required to - but fails to - evaluate the impacts associated with these indirect effects, including, but not limited to, congestion, sprawl, demands on Kaua'i's limited water supply, demands for additional infrastructure (roads, schools, police, fire, etc.), and habitat destruction. Haw. R. Stat. § 195D-4(g)(8).<sup>11</sup>*

**Response:** Please refer to Response to Earthjustice Comment #17.

**FAILURE ADEQUATELY TO DESCRIBE PROPOSED FUTURE ACTIVITIES**

**Earthjustice Comment 19:**

*Under both state and federal law, an HCP must [d]escribe the activities contemplated to be undertaken within the plan area with sufficient detail to allow the department to evaluate the impact of the activities on the particular ecosystems, natural communities, or habitat types within the plan area that are the focus of the plan." Haw. R. Stat. § 195D-21(b)(2)(B); see also 50 C.F.R. §§ 17.22(b)(1)(i), 17.32(b)(1)(i). The draft HCP's description of the future additional facilities it proposes for coverage falls far short of satisfying this requirement.*

*For example, KIUC proposes coverage for new connections within existing service areas. As proposed, these activities could involve new power lines up to a quarter-mile in length and up to 45 feet in height. See HCP at 2-14. Without knowing where on the island these new connections will be located (e.g., their proximity to seabird flyways) and how many will be installed during the permit term, there is no way meaningfully to evaluate the impacts of this activity.*

*Similarly, the HCP provides inadequate information to evaluate proposed installation of new streetlights to serve new subdivisions or existing thoroughfares. Even when shielded, streetlights have the potential to cause take of listed seabirds. See *id.* at 4-2 (noting "downed birds were collected via the SOS program since the lights [under KIUC's control] were shielded"). In the absence of any information about the locations of these new sources of light attraction, their proximity to seabird flyways, and the number of lights to be installed, it is impossible to perform the analyses required under federal and state law.*

**Response:** The HCP description of new future facilities categorizes such facilities based on their potential impact on seabirds. For example, the best available scientific information (consisting of visual and radar seabird flight observations reported in the EPRI reports, independent scientific journals, and three-dimensional radar studies of seabird flight conducted by KIUC during the preparation of the HCP) indicates that powerlines less than 15 meters (~49 feet) above the ground surface on Kauai pose a small collision risk to seabirds. Nevertheless, the HCP has been revised (Section 2.2.1.1) to include a numerical limit on the number of new connections within existing service areas authorized under the HCP. The HCP has also been revised (Section 2.2.1.5) to include a numerical limit on the number of new streetlights authorized under the HCP. In addition, Section 2.2.1.5 now also requires KIUC to promptly forward to both DOFAW and the USFWS any requests it receives to install new streetlights. This will provide the agencies with the opportunity to review such requests, and to contact the requesting party if the agencies have any concerns about potential impacts to seabirds.

**Earthjustice Comment 20:**

*The HCP's failure to include vital details about KIUC's future activities also violates Chapter 195D's requirement to provide "sufficient information for the board to ascertain with reasonable certainty the likely effect of the plan upon any endangered, threatened, proposed, or candidate species in the plan area and throughout its habitat range." Haw. R. Stat. § 195D-21(c). Moreover, it violates Chapter 195D's public participation requirements, which mandate notice to the public regarding "the proposed activity" to be covered under an HCP and guarantee the public's right to provide "input and relevant data." Id. § 195D-21(a). Without adequate information about KIUC's proposed future activities, the public cannot possibly provide meaningful input or relevant data.*

**Response:** The Draft HCP provides information about specific future projects, and about categories of potential future but currently unknown projects. The Draft HCP also specifies measures that would be incorporated into such future projects to minimize their potential effects. Please also refer to Response to Earthjustice Comment #19. Consequently, no change to the HCP was required.

**FAILURE TO ADEQUATELY TO DESCRIBE ADDITIONAL MITIGATION IN YEARS 4 AND 5**

**Earthjustice Comment 21:**

*The draft HCP states:*

*If the HCP and associated incidental take authorizations remain in effect beyond three years, then at the end of the first three years KIUC shall meet with the USFWS and DOFAW and evaluate, based on new information generated through the implementation of the mitigation measures described above, whether to implement any additional mitigation measures in Years 4 and 5 beyond the measures described above.*

*HCP at 5-21. It then lists several potential "additional mitigation measures," without providing any detail regarding what those measures may entail. Id.*

*The draft HCP's failure to describe in any meaningful way the additional mitigation measures, if any, that would be required in years 4 and 5 makes it impossible to evaluate whether those measures would be adequate to (1) avoid jeopardy, (2) ensure that listed species' likelihood of recovery would increase, and (3) ensure that the HCP will confer net environmental benefits, as required under state and/or federal law. These ill-defined*

measures cannot, therefore, properly be taken into account in assessing the HCP's compliance with the applicable legal standards. *See* Haw. R. Stat. § 195D-21(c) (requirement to contain "sufficient information" to evaluate "with reasonable certainty" HCP's "likely effect"). Moreover, as discussed above, the failure to include adequate information about additional mitigation measures deprives the public of its right to provide "input and relevant data." *Id.* § 195D-21(a).

**Response:** DOFAW concurs that clarification and details are needed for years 4-5 in the event that the long term HCP is not complete. The HCP as therefor revised (Section 5.6.8) to clarify the mitigation measures that would be implemented in years 4 and 5.

## 2. Carl Berg Comment Letter

Carl J. Berg, Ph.D.  
Hawaiian Wildlife Tours  
2637 Apapane Street  
Lihue, HI 96766

### **Berg Comment 1:**

*This HCP plan is insufficient for it fails to meet the statutory criteria of Section 10 for issuance of the permit: to show that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.*

*Similarly it does not meet criteria of HRS 195D because it does not support*

- a) That the plan increases the likelihood that the species will survive and recover.*
- b) The cumulative impact of the activity, which is permitted and facilitated by the license, provides net environmental benefits.*

**Response:** Please refer to Responses to Earthjustice Comments #3, #6 and #12 for information concerning the changes that were made to the HCP. Also, DOFAW has determined based on the best available scientific information that the combination of minimization measures enacted and to be enacted by KIUC (as described both in the Draft HCP, and the revisions to the HCP made in response to public comments as reflected in the Revised HCP), and mitigation measures enacted and to be enacted by KIUC, increases the likelihood of species survival and recovery, and provides a net environmental benefit.

### **Berg Comment 2:**

*A major flaw in the "take" is that it cannot show that the downing of the birds and subsequent release does not, in fact, kill them. There is no evidence that the SOS process leads to the survival of the downed birds. Therefore, until such time that studies show that downing, tagging and release allows for the long-term survival of each individual bird, then all downed birds must be considered as "lethal take".*

**Response:** Please refer to Response to Earthjustice Comment #12 for information concerning the revisions that were made to the HCP.

**Berg Comment 3:**

*1.2.7. Implementation of mitigating measures section contains only one actual mitigating measure, the habitat work in Limahuli. All other efforts are simply monitoring the taking of the covered species. I do not feel that this is sufficient to meet the statutory criteria of Section 10 nor HRS 195D. Monitoring the collapse of these species populations is not mitigating the effects of the takings. The SOS program over the past 30 years has shown in the in-effectiveness of that program in saving actual birds and the electric company's efforts at mitigation. SOS and the radar studies have documented and provided enough evidence for the decline of the populations. While monitoring is important mitigation is the only thing that has any hope of reversing the population decline.*

**Response:** DOFAW does not concur. Chapter 5 of the HCP describes multiple mitigation measures, including but not limited to performing habitat management work in the Limahuli breeding colony. These measures constitute a highly significant suite of recovery tasks available at this time based on consultation with recovery biologists. Please also refer to Response to Earthjustice Comment #6 regarding revisions to the HCP requiring additional breeding colony habitat management work at the Hono o Na Pali Natural Area Reserve.

**Berg Comment 4:**

*4.3.6 The fallacy in this argument is that it assumes an equal amount of effort yearly on the part of the populace. This is not the case and really questions the validity of SOS data at estimating population size. Only radar data should be used.*

*Also it assumes a constant rate of population decline. It appears that we have just experienced a major crash in the populations, then these calculations are worthless.*

*And finally it assumes that public will pick up dead birds and bring them in. Most people do not bother with the birds once they see they are dead.*

*The EPRI study also used vertical pointing radar, indicating the height at which birds flew. Why is this ignored?*

**Response:** DOFAW agrees that radar data provides a more scientifically robust means of estimating population. In recent years DOFAW has conducted extensive radar surveys at multiple locations on Kauai, and is using that data to develop a population viability analysis which it expects to be available for use in the forthcoming island-wide KSHCP. DOFAW agrees that the EPRI study also used vertical pointing radar. Please note, however, that the flight-altitude radar data reported in the EPRI report is consistent with the more recent and more extensive data that was documented and discussed in the Draft HCP. As a result, the flight-altitude conclusions contained in the Draft HCP remain unchanged.

**Berg Comment 5:**

*4.4 I would argue, for lack of better evidence, and having found these birds myself, that the KIUC take of Hawaiian Petrel is 90% of the total or 18 birds. There is no data to refute my assumption and the HCP must err on the side being too conservative. No taking of Hawaiian petrels should be permitted.*

**Response:** The commenter has not provided any data or analysis that supports such an allocation or that contradicts the analysis in the HCP. Consequently, no change to the HCP was required.

**Berg Comment 6:**

*4.5 I would argue again, that more birds are being killed by KIUC wires and are not being retrieved. The HCP must err on the side of conservation. No taking of storm-petrels should be permitted.*

**Response:** The covered take is based on best available data. DOFAW acknowledges, however, inadequacies in that data and has therefore included a rigorous program for take monitoring to ensure that actual levels of take are in compliance with the terms of the ITL.

**Berg Comment 7:**

*5.7 For all its rhetoric, there is no evidence that the SOS program benefits the populations of the covered species, because there is no evidence that the birds survive the injury and tagging and actually return and breed. And, for all of SOS efforts over the years, the populations of Covered Species are crashing. So how can you say that it would lead to species recovery? It hasn't.*

*Therefore the SOS must not be considered a mitigation effort, just a crude population monitoring project. If the SOS+ program is so much more successful, then why has the number of birds retrieved crashed? Is it because of less public participation or fewer birds because of no net benefit of the SOS+ to the bird population? Or both?*

*For all of the money spent in the past few years on publicity for SOS+, what is the measure of success of these programs? Were more birds retrieved or more of the public actually involved in bringing birds in?*

**Response:** Please refer to Response to Earthjustice Comment #12 for the revisions made to the HCP. DOFAW does not believe that SOS alone will lead to species recovery and in fact has a draft recovery plan in review now that identifies all needed conservation measures.

**Berg Comment 8:**

*6.3 Surveying of just five breeding sites is not adequate. The HCP should be more focused on identifying other sites and protecting the breeding colonies. It is not as easy or as glamorous to the public, but it is the only effective means of protecting the Covered Species. It was indentified in the EPRI funded studies of the early 1990s. If the electric company had done something meaningful then, instead of stonewalling on doing a HCP or hiding behind SOS, then the populations probably would not be in the shape they are now.*

**Response:** DOFAW has for several years been working to identify and survey other breeding colonies, and evaluating their suitability for habitat management and predator control efforts. Please refer to Response to Earthjustice Comment #6 regarding the availability of a second breeding colony (Hono o Na Pali Natural Area Reserve) where KIUC will fund habitat management work pursuant to this HCP. Habitat management work at other breeding colonies will be implemented through the island-wide Kauai Seabird HCP, which KIUC has indicated it will participate in.

**Berg Comment 9:**

*If KIUC is allowed an incidental take permit for doing these things that will not appreciably do anything but monitor the demise of the populations, then every bird "retrieved", dead or*

*alive, over the take limit should cause KIUC to be fined for non-permissible take. I would suggest a \$100,000 fine per bird "retrieved" by SOS+ over the permitted take.*

**Response:** Any take caused by KIUC beyond that authorized by an Incidental Take License would constitute a violation potentially subject to the enforcement provisions in HRS Chapter 195D. Consequently, no change to the HCP was required.

### 3. Richard Podolsky Comment Letter

Richard Podolsky, Ph.D.  
Senior Ecologist  
P.O. Box 1066  
Rockport, ME 04856-1066  
Email: podolsky@att.net

#### **General Comment:**

*During the EPRI studies we concluded that mortality caused by KIUC (at that time it was known as Kauai Electric Co.) utility lines and polls was imperiling the aforementioned populations such that if allowed to continue without recommended mitigation would lead to drastic declines and possible extinction of these species on Kauai. The reason for this is that we concluded that the population size and the breeding biology of these species is inherently incapable of offsetting/compensating for the very high mortality being caused by KIUC infrastructure. Therefore, our various reports and publications made very specific recommendations to KIUC regarding modest modification to KIUC facilities and activities that would have, if implemented in the early 90's, helped to stabilize and possibly reverse the population declines KIUC was causing. I say modest because throughout our studies Dr. Ainley and I were always mindful of trying to seek mitigation actions that KIUC could take that would be cost-effective and biologically effective. We knew that by doing so would increase the chance for our mitigation recommendations being actually implemented. For example, we determined through our scientific studies that 90% of the KIUC-induced mortality was taking place at less than 10% of KIUC above-ground utility service. Hence, we strongly advised that those "hot spot" sections of KIUC grid be put underground or under bridges and thereby remove the collision risk. But this advice (by way of example), along with a long list of other equally cost-effective recommendations to KIUC for mitigating their severe harm to these populations were completely ignored. Rather, KIUC has, in a most egregious way, ignored all of the good advice of the ornithological experts and instead chosen a path of focusing on biologically irrelevant actions such that these two species continue to decline precipitously and are now very much closer to extinction than they were over 20 years ago.*

**Response:** Please refer to Response to Earthjustice Comment #3 for revisions that were made to the HCP.

#### **Podolsky Comment 1:**

*Fully funding implementation of the SOS Program for 5 years. It is my assertion that it has been known for over 20 years that the SOS program does nothing to avoid, minimize and mitigate take and that at best it is only a crude, indirect monitor of populations status. Therefore, to the extent that fully funding SOS would reduce funds for known activities that*

would help KIUC avoid, minimize and mitigate take that the SOS program should rather be suspended in favor of funding actions that result in actual mitigation.

**Response:** DOFAW does not concur. Please refer to Response to Earthjustice Comment #12. Consequently, funding for continued operation of the SOS Program remains in the program outlined in the HCP.

**Podolsky Comment 2:**

*Funding seabird colony management and predator control in Limahuli Valley. It is my assertion that colony management and predator control in only Limahuli Valley would be biologically irrelevant. Rather, colony management and predator control needs to take place in at least all known nesting colonies or at least in those associated with mortality "hot spots" previously identified.*

**Response:** DOFAW agrees that colony management and predator control work needs to occur in multiple breeding colonies. Please refer to Response to Earthjustice Comment #6, and Responses to Berg Comments #7 and #8.

**Podolsky Comment 3:**

*Funding a two-year at-sea capture study aimed at assessing the survival of SOS-released birds is a completely useless study because we already know that very few of the SOS-released birds survive to come back to Kauai. Let me very clear — what is the justification to go offshore and try to find SOS birds when the only thing that matters is the numbers of SOS birds that return to Kauai and we already know FROM THE SOS PROGRAM ITSELF that very few SOS-released birds ever return to Kauai?*

**Response:** The statement makes the false and presumptuous assumption that survival of SOS birds is known. Please refer to Responses to Earthjustice Comments #12 and 14 for revisions made to the HCP.

**Podolsky Comment 4:**

*Updating Spear et al.'s (1995) estimates of at-sea seabird populations is another complete waste of time and money would be better spent on Kauai itself at KIUC infrastructure where the mortality is occurring.*

**Response:** DOFAW disagrees. The information that would be obtained by updating the Spear estimates is an essential component of the overall species recovery effort. It is also important to the development and implementation of measures that will contribute to species recovery and has been identified as such in the peer reviewed draft recovery plan. Consequently, no change to the HCP was required.

**Podolsky Comment 5:**

*Funding a two-year auditory survey to locate additional seabird breeding colonies is a good idea but only if it is also linked to implementing a predator protection plan for each identified colony. Otherwise, in the absence of such a linkage identification alone is essentially useless and might even lead to attracting feral predators into these colonies and lead to their destruction.*

**Response:** DOFAW agrees, and that is what is being done. Consequently, no change to the HCP was required.

**Podolsky Comment 6:**

*Funding development and implementation of an underline monitoring program aimed at better understanding take by overhead utility structures is also in my opinion a complete waste of time. We do not need more monitoring because for over 20 years we have had published report that give specific mitigation actions that if implemented would have stabilized and perhaps reversed the population declines caused by KIUC infrastructure.*

**Response:** DOFAW does not concur. Monitoring is a required component of an HCP under 195D and will serve to provide an ongoing estimate of take to ensure compliance and to provide a basis for the assessment of the mitigation net benefit. Monitoring will also be used to assess the success of actions designed to reduce or minimize take, such as changing line configurations. Consequently, no change to the HCP was required.

**Podolsky Comment 7:**

*Funding additional work to be stipulated by the agencies during the fourth and fifth year of the permit is in my opinion just another vehicle for KIUC to perpetuate their legacy of avoiding taking real actions to actually reduce the mortality they are causing at the known mortality hot spots and/or providing real protection at colonies that results in actual conservation that results in numerical offset to their incidental take.*

**Response:** Please refer to Response to Earthjustice Comment #21 for the revisions that were made to the HCP.

## 4. David Ainley Comment Letter

Mr. David Ainley  
105 Headlands Court  
Sausalito, CA 95965

**Ainley Comment 1:**

*EPRI-funded studies of which I was co-Principal Investigator with Richard Podolsky on Kauai during the early 1990s concluded with a series of science-based recommendations about how to cost-effectively reduce KIUC's take problem to the point that these listed species could begin to recover rather than continue to decrease in population size.*

*Near as I know, none of those recommendations have been implemented (see Earthjustice letter) and, thus, it is not surprising that these species' populations on Kauai have, as predicted by our population modeling and confirmed by subsequent SOS results, continued their steep downward trend. The reason for this is that the breeding biology of these species is inherently incapable of compensating for the very high mortality of fledglings especially, but also adults, being caused by KIUC infrastructure, coupled with mortality of adults at colonies due to feral animals. Please see: [D.G. Ainley R.R. Podolsky, N. Nur, L. DeForest & G.A. Spencer. 2000. Status and population trends of the Newell's Shearwater on Kauai: a model for threatened petrels on urbanized tropical oceanic islands. In (J.M. Scott, S. Conant*

& C. van Riper III, eds.) *Ecology, Conservation and Management of Endemic Hawaiian Birds: A Vanishing Avifauna. Studies in Avian Biology* 22: 108-123.]

**Response:** The comment concerns past events, and is not related to the HCP which would authorize future incidental take. Consequently, no change to the HCP was required.

**Ainley Comment 2:**

*I believe the case could be easily justified to now up-list the Newell's Shearwater from threatened to endangered under the ESA, for whatever benefit that might bring. Maybe it would finally get the deserved attention of USFWS and DOFAW. More importantly, it is my opinion that the only effective HCP would be one that included measures implemented that would lead to the recovery of Newell's Shearwaters on Kauai, not in monitoring the species' demise. Stop-gap measures, including SOS as presently practiced, and monitoring, no longer have any direct usefulness, other than to know when, with no more shearwaters, the problem is solved. That appears to be the management strategy to date.*

**Response:** The suggestion of uplisting the Newell's Shearwater is not relevant to the HCP; the commenter is advised to separately pursue that suggestion with the USFWS. With regards to HCP measures needing to contribute to recovery of the species, please refer to Responses to Earthjustice Comments #12 and #13, and the Response to Berg Comment #1 for the revisions that were made to the HCP.

**Ainley Comment 3:**

*The only efforts that would be effective, other than letting these birds go extinct, is for KIUC to alter the 10% of their above-ground infrastructure that has been accounting for 90% of the lethal take, and any continued take be used as the basis for mitigation to conserve the last remaining colonies (fencing and predator control).*

**Response:** Please refer to Responses to Earthjustice Comments #3 and #6 for the revisions that were made to the HCP.

**Ainley Comment 4:**

*On the basis of our EPRI study, 15 years ago we strongly advised that those "hot spot" sections of the KIUC grid be put underground, under bridges, or below tree height level where possible, with wire-spacing arrays set horizontal rather than vertical, and thereby significantly reduce the collision risk. We also recommended that an ecologically meaningful series of colonies be identified and protected from mortality from utility collisions and feral animals. Nowadays, these colonies would be whatever ones that still remain. Unfortunately for the listed Newell's Shearwater, and it should be unfortunate for KIUC itself (in the form of penalties that would pay for effective mitigation), this advice, along with a long list of other equally cost-effective recommendations for reducing severe harm to these populations has been ignored.*

**Response:** Revisions to the HCP are outlined in Responses to Earthjustice Comments #3 and #6 regarding minimization measures, and Response to Podolsky Comment #2.

### Ainley Comment 5:

*The draft HCP now includes items, which while certainly increasing our knowledge of these seabirds' on-island natural history, and which in better circumstances might be useful for management, would not now contribute to reversing the ongoing decrease in population size. These interesting items of little mitigation value include analysis of the NMFS at-sea data set and the effort to find banded birds by an unproven at-sea effort. Placing radio transmitters on birds at sea, along with a significant amount of other effort, might help to find the last colonies.*

**Response:** Please refer to Responses to Earthjustice Comments #3, #6, #12 and #14. Updating the at-sea data set will provide essential insights into the question of whether the observed decline in seabird populations is the result of changes on Kauai or is due to factors (such as changes in food supply) that cannot be influenced by the kinds of measures that are within DOFAW's control.

With regard to the actions identified in the HCP to obtain information, these are essential actions identified in the overall recovery plan that need to be addressed and can be addressed in the short term.

## 5. Bonnie P. Bator and 'Ohana Comment Letter

Ms. Bonnie P. Bator and 'Ohana  
P.O. Box 30848  
Anahola, Hawai'i 96703-0848

### Bator Comment 1:

*"...What was once a population of around 80,000 Newell's shearwaters in the mid-1990s has dwindled to less than 20,000. The drop is primarily due to development on the island, including artificial lights, utility lines and buildings..." according to biologist Nick Holmes (Kaua'i Endangered Seabird Recovery Project) – as paraphrased by reporter Coco Zickos on the front page of The Garden Island (12/15/09). The article went on to say: "...KIUC is asking for an incidental take of 125 Newell's shearwater mortalities and 55 "non-lethal injuries" annually..." It seems that KIUC's artificial lights, utility lines and etc. have contributed greatly to the demise of the 'Ua'u, A'o, and 'Ake'ake. Kaua'i is one of the last of the peopled populated Hawaiian islands which also serves as 'home' to the endangered and threatened seabird populations – KIUC should not have permission for an 'Incidental Take License'. I realize they fund the S.O.S. program however, KIUC must do more since their electrical lines and lighting are contributing to the destruction of the last of Kaua'i seabirds. These endangered and/or threatened seabirds populations are decimated severely as data collection has reflected."*

**Response:** HRS 195D provides for the issuance of an Incidental Take License when certain criteria are satisfied. DOFAW has concluded that the HCP, as revised in response to public comments, satisfies those criteria.

### Bator Comment 2:

*I request that a Public Hearing be scheduled on this momentous proposal to allow for an 'Incidental Take License' of species(s) by the KIUC – Unless DLNR/DOFAW denys (sic) the 'Incidental Take License'. The Public Meeting (12/10/09) and Public Comment Period Deadline is/was held during the hectic holidays with inadequate publicity. It appears that*

*many folk's are/were intent on Holiday Events – and were not cognizant a Public Meeting (which has 'no meat' in legal terms) had been scheduled. Whereas a Public Hearing has legal standing...the gravity of the survival of these species warrants a Public Hearing.*

**Response:** DOFAW followed all legal requirements and standards for the public hearing, which was held on December 10, 2010, not during the holidays. Information about the public hearing was published in the *Garden Island Weekly* on December 2, 2009, and in the *Honolulu Star-Bulletin* on December 2, 2009. Stories about the public hearing appeared in the *Honolulu Advertiser* on December 8, 2009, and the *Honolulu Star-Bulletin* on December 7, 2009. Information about the public hearing was also posted via the Lt. Governor's office, the online State E-Calendar, and the DLNR website. The 60 day public comment period was announced in the October 23, 2009 Office of Environmental Quality Control's *The Environmental Notice*.

## 6. Maka'ala Kaaumoana Oral Comment at Public Hearing

Maka'ala Kaaumoana  
Oral Testimony from Public Meeting  
December 10, 2009

### **Kaaumoana Comment 1:**

*Inadequate take minimization regarding undergrounding and reorienting powerlines*

**Response:** Please refer to Response to Earthjustice Comment #3 for the revisions that were made to the HCP.

### **Kaaumoana Comment 2:**

*Failure to address indirect effects of central power stations; more light will result in more take from light*

**Response:** Please refer to Responses to Earthjustice Comments #16 and #17 for revisions that were made to the HCP.

### **Kaaumoana Comment 3:**

*Princeville Hotel-St. Regis; Claims they are mitigating for fallout. Went with Earthjustice for a tour of hotel made claims of mitigation plans. Revisited hotel on night of October 17, 2009. Pool light was on (should be off) and bar screens were down (should be up).*

**Response:** This comment is not relevant to the KIUC HCP. Consequently, no change to the HCP was required.

### **Kaaumoana Comment 4:**

*Would like a map of all seabird colonies, power lines, flyways, and areas of fallout*

**Response:** DOFAW staff will contact the commenter to address this request.

### **Kaaumoana Comment 5:**

*Consider undergrounding lines*

**Response:** Please refer to Response to Earthjustice Comment #3 for revisions that were made to the HCP.

### **Kaaumoana Comment 6:**

*Consider using alternative funding for undergrounding lines*

**Response:** The agencies and KIUC do and will continue to pursue and secure any and all options for Federal or other funding to support these actions. Consequently, no change to the HCP was required.

**Kaaumoana Comment 7:**

*Consider undergrounding lines on a priority basis*

**Response:** Please refer to Response to Earthjustice Comment #3 for revisions that were made to the HCP.

**Kaaumoana Comment 8:**

*Consider having BLNR meeting on Kaua'i*

**Response:** BLNR meetings are determined by the Chair's office, and based on the most financially responsible location for members to meet. No change to the HCP was required.

## **Changes Requested by ESRC (September 16, 2010)**

KIUC, in consultation with DOFAW and the USFWS, revised the HCP based on public comment received during the state public comment process, as discussed above. The revised HCP was then reviewed and considered by the Endangered Species Recovery Committee during its September 16, 2010 public meeting. At that meeting, the ESRC received additional oral comments from members of the public, and the ESRC members themselves provided comments on the revised HCP. The ESRC then voted to recommend that the BLNR approve the Short-Term HCP, and issue the requested Incidental Take License, subject to KIUC making six specific changes to the document. These changes are described briefly below. DOFAW staff confirmed that all changes requested by the ESRC were made.

**ESRC Requested Change 1:**

*With respect to the proposed line reconfiguration projects to be implemented to minimize impacts to Covered Species, (1) define key terms in a glossary, (2) provide additional explanation and justification for the options that were selected, (3) review the HCP text and the table of reconfiguration projects to be sure they are consistent, and (4) provide more detail on the location (mauka or makai) and range of heights of shielding vegetation.*

**Response:** (1) key terms are defined in the glossary in Chapter 9 of the HCP; (2) additional explanation and justification are now contained in the third column of Table 5.2 (beginning on page 5-12); (3) the HCP text and the table of reconfiguration projects (Table 5.2) are now consistent; and (4) details on the location and range of heights of shielding vegetation are now also contained in the third column of Table 5.2.

**ESRC Requested Change 2:**

*Delete that portion of a sentence in Section 5.6.1 regarding DOFAW's belief about the likely survival of birds handled and released by the SOS program.*

**Response:** The requested deletion was made to Section 5.6.1.

**ESRC Requested Change 3:**

*Add new text describing how the results of take monitoring will be used over time to evaluate the incidental take limits contained in the HCP.*

**Response:** New text was added to the second bulleted paragraph in Section 7.2.3 (p. 7-10). It states that the DOFAW and USFWS comments on the draft Annual Report to be prepared by KIUC each year will address the Agencies' conclusions, based on their analysis of the Underline Monitoring data described in Section 5.6.6 and the prior year's SOS data, of KIUC's compliance with the HCP take limits.

**ESRC Requested Change 4:**

*Clarify in the HCP text that KIUC will fully implement the minimization and mitigation measures in the HCP, and that implementation will not be constrained by a cost cap.*

**Response:** Such clarification is now provided in new Footnote 50 (p. 5-22) for minimization measures, and in the Section 5.6 text (beginning on p. 5-24) describing each of the mitigation measures.

**ESRC Requested Change 5:**

*Add new text discussing KIUC's lack of legal control over the preservation of vegetation which may shield adjacent powerlines from collisions by seabirds, and steps KIUC will take to preserve such vegetation or respond to a loss of such vegetation.*

**Response:** New text added to Section 5.4.2.4 (p. 5-9), in new Footnote 49. The new text indicates that KIUC will use its best efforts to ensure the continued and ongoing presence of such vegetation by seeking appropriate agreements from the landowner in question. A loss of shielding vegetation will be handled as a Changed Circumstance pursuant to Section 7.4.2.5.

**ESRC Requested Change 6:**

*Add new text committing to apply impact minimization measures in the course of relocating or replacing line segments and/or poles.*

**Response:** The requested new language was added to the end of Section 5.4.2.4 (p. 5-22).

## **Additional Changes Presented to ESRC (December 6, 2010)**

Following the incorporation of the changes requested by the ESRC, as described above, the USFWS then made the further revised HCP available for public review and comment as required by the Federal ESA. The USFWS published a Notice of Availability in the *Federal Register* on October 13, 2010, which began a 45-day public comment period that ended on November 29, 2010. Following the close of the federal public comment period, KIUC and the two Agencies reviewed the written comments received by the USFWS, and agreed to make seven additional changes to the HCP document. As the ESRC had directed at its September 16, 2010 meeting, DOFAW presented these additional changes to the ESRC at its December 6, 2010 public meeting. Each of these additional

changes is described briefly below. All of these changes are reflected in the December 2010 final version of the Short-Term HCP which is now before the BLNR (and the USFWS) for final approval.

**Additional Change #1:** In the discussion of powerline reconfiguration projects (Section 5.4.2.4), former references to lowering lines in “hot spot” areas to within five feet of the height of adjacent vegetation were deleted. While KIUC originally identified that as a criteria for evaluating potential reconfiguration projects, in practice that criteria proved to be irrelevant as it played no role in the reconfiguration alternatives that were analyzed or selected. All line segments that will be lowered as described in Section 5.4.2.4 will be lowered to average vegetation height for that line segment.

**Additional Change #2:** A new minimization measure (Section 5.5.1 p. 5-23) has been added, pursuant to which KIUC will analyze the feasibility of implementing certain new streetlight technologies and practices which have the potential to further reduce streetlight impacts on the Covered Species.

**Additional Change #3:** A new minimization measure (Section 5.4.2.1, p. 5-8) has been added, pursuant to which KIUC will identify and address any particularly problematic streetlights in terms of seabird downings, based on SOS data and any anecdotal information it receives.

**Additional Change #4:** Some of the line reconfiguration projects KIUC has agreed to implement (Section 5.4.2.4) rely in part upon the existence of adjacent shielding vegetation. The HCP already stated that KIUC would use its best efforts to acquire a conservation easement or other appropriate arrangement with the private landowner where that vegetation is located to ensure that such vegetation is maintained. Additional text was added to address the circumstance in which such shielding vegetation is destroyed, and the specific steps KIUC will take in response. This text is located in the Changed Circumstance section, at Section 7.4.2.5 (p. 7-14).

**Additional Change #5:** The HCP already identified categories of certain future activities which are expected to have no or extremely minor impacts on the Covered Species, such as installing a low altitude service connection to a single individual new home. Additional text was added to place a limit on the number of such actions which are authorized under the HCP and associated ITP and ITP. KIUC will also report on the details of all such actions in each Annual Report. KIUC will also promptly notify both DOFAW and USFWS when it receives a request from a governmental or private entity to install new streetlights. This will give the Agencies an opportunity, should they have any concerns about the proposed new streetlights, to contact and work with the requesting entity to address such concerns. These new provisions are contained in Sections 2.2.1.1 (p. 2-14) and 2.2.1.5 (p. 2-15).

**Additional Change #6:** Table 5.2, which describes the proposed powerline reconfiguration projects, identifies the “hot spot” line segments to be reconfigured, and for each one analyzes several reconfiguration alternatives. For Segment D3 in Kealia, however, none of the alternatives were selected, and the HCP stated that KIUC would plant shielding vegetation in that location. Additional text was added to Table 5.2 (p. 5-13) to more clearly identify KIUC’s commitment to plant shielding vegetation, as well as a new requirement that KIUC implement one of several identified alternatives if vegetation planting proves not to be possible (such as due to landowner refusal).

**Additional Change #7:** The HCP already committed KIUC to provide \$271,000 for habitat management work in the Wainiha Valley in Years 4 and 5. DOFAW subsequently obtained cost estimates for conducting such work which are somewhat higher than that amount. The HCP also already committed KIUC to provide \$80,000 to DOFAW in Year 4 if at that time DOFAW did not have sufficient funds to continue with its own, ongoing seabird radar studies. At DOFAW’s request, the HCP text (Section 5.6.8, p. 5-38) was modified to give DOFAW the discretion to redirect some or all of such \$80,000 to the Wainiha project.

## Attachment 2: Public Comment Letters



**EARTHJUSTICE**  
Because the earth needs a good lawyer

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES  
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

December 23, 2009

Via U.S. Mail and Electronic Mail

Department of Land and Natural Resources  
Division of Forestry and Wildlife  
1151 Punchbowl Street, Room 325  
Honolulu, HI 96813  
Attn: Lauren Goodmiller  
lauren.e.goodmiller@hawaii.gov

Kaua'i Island Utility Cooperative  
4463 Pahee Street, Suite 1  
Lihu'e, HI 96766-2000  
Attn: Carey Koide  
ckoide@kiuc.coop

Re: Short-Term Seabird Habitat Conservation Plan: Kaua'i Island Utility Cooperative

To Whom It May Concern:

Earthjustice – on behalf of Hui Ho'omalua I Ka 'Āina, Conservation Council for Hawai'i, the Center for Biological Diversity, and the American Bird Conservancy – submits the following comments on the draft Short-Term Seabird Habitat Conservation Plan ("HCP") for Kaua'i Island Utility Cooperative ("KIUC"). As described in greater detail below, the draft HCP fails to satisfy the minimum legal requirements set forth in Hawai'i Revised Statutes chapter 195D and the federal Endangered Species Act ("ESA") and, thus, should not be approved in its current form. To pass legal muster, the HCP must be substantially revised to, among other things, ensure the expeditious implementation of additional measures to minimize KIUC's ongoing take of listed species and to assess more accurately whether the plan will "increase the likelihood that [Kaua'i's listed seabirds] will survive and recover" and "provide[] net environmental benefits." Haw. R. Stat. § 195D-4(g)(4), (8); see also id. § 195D-21(b)(1)(B) (HCP must "increase the likelihood of recovery").

Introduction

Before delving into the draft HCP's shortcomings, it is vital to put KIUC's proposed course of action in context. The Newell's shearwater (*Puffinus auricularis newelli*) population on Kaua'i is crashing, with a decline of 75% in only fifteen years (1993-2008). HCP at 4-3. The illegal operations of KIUC and its predecessor, Kaua'i Electric ("KE"), bear substantial responsibility for that precipitous decline, with power lines and associated structures killing many thousands of shearwaters since the species' listing as threatened in 1975 (at rates of 400 or more shearwaters killed annually in the 1980s through mid-1990s), all without incidental take

authorization. Id. at 4-2 to 4-4.<sup>1</sup> The power lines and associated structures that KIUC now seeks permission to operate, maintain, and expand thus are directly responsible for a major share of the tens of thousands of shearwaters documented as “taken” on Kaua’i in the past three decades, to our knowledge the largest documented take of any ESA-listed bird species. See id. at E-7 (Save Our Shearwaters (“SOS”) program has retrieved and released more than 31,000 Newell’s Shearwaters and other seabirds since 1970s).

KIUC now seeks authorization to kill 125 shearwaters each year, with another 55 shearwaters annually subject to allegedly “non-lethal” take. Id. at 1-7.<sup>2</sup> This lower level of estimated annual take (as compared to the mid-1990s) is due solely to the fact that, largely as a result of KIUC’s and KE’s operations, there are now fewer shearwaters left on Kaua’i to kill, not that KIUC has taken effective measures to reduce its operations’ toll on listed seabirds. Id. at 4-3; see also id. at 4-4 (changes to electrical power lines along the Powerline Trail between Wailua Reservoir and Hanalei likely resulted in increased take), E-3 (installation of marker balls on power lines did not result in “measurable benefits”). In considering what steps must “be taken to minimize ... all negative impacts,” it is vital to ensure KIUC is not permitted to profit from its past violations of state and federal endangered species laws, which have reduced the number of birds for which it now needs permit coverage by contributing to the species’ disastrous population decline. Haw. R. Stat. § 195D-21(b)(2)(C).

#### Failure To Minimize Take “To The Maximum Extent Practicable”

Under both the federal ESA and Chapter 195D, approval of KIUC’s draft HCP depends on whether KIUC will minimize its take of listed seabirds “to the maximum extent practicable.” 50 C.F.R. §§ 17.22(b)(2)(B), 17.32(b)(2)(B); Haw. R. Stat. § 195D-4(g)(1); see also Haw. R. Stat. § 195D-21(c)(4). The draft HCP falls far short of satisfying that mandate, with KIUC stating merely it will “continue existing efforts” and promising vaguely to “pursue any new opportunities to avoid and minimize adverse effects of its facilities.” HCP at 1-7.<sup>3</sup> KIUC has failed to carry its burden of demonstrating “that the proposed program is the maximum that can be reasonably required by that applicant.” HCP Handbook at 7-3 (Nov. 4, 1996).

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<sup>1</sup> The estimate of 400 shearwaters per year includes the “indirect take” of shearwater chicks associated with the direct take of each breeding adult. Id. at 4-2.

<sup>2</sup> As discussed below, the HCP’s assumption that shearwaters delivered to, and subsequently re-released by, the SOS program survive is unsubstantiated.

<sup>3</sup> While KIUC claims a right to “receive full credit” for measures it implemented prior to submittal of the draft HCP, it ignores that, during the time period in question, it was killing hundreds of listed birds without permit coverage. Id. at 5-7. KIUC fails to justify giving it prospective credit for measures implemented to reduce past, illegal take. Moreover, the legal standard is whether the HCP minimizes take “to the maximum extent practicable.” If it is practicable for KIUC to do more now to avoid or minimize the killing and injury of listed seabirds from its operations, it is legally bound to do so.

In analyzing what it means for KIUC to minimize take of listed seabirds "to the maximum extent practicable," it is vital to bear in mind that KIUC made a business decision to acquire a going concern – Kaua'i Electric – knowing full well that it had been operating for years in blatant violation of the ESA's and Chapter 195D's prohibitions on unpermitted take. See HCP at 1-4. KIUC should have included in its business plan adequate resources to bring the company's operations into compliance with the ESA and Chapter 195D, just as it would provide for any other necessary infrastructure repair or upgrade. If KIUC failed to do so, the Newell's shearwater, Hawaiian petrel and band-rumped storm petrel should not suffer for its recklessness.

In addition, what is "practicable" in this case must be evaluated in light of the ESA's and Chapter 195D's prohibition on activities that jeopardize the continued existence of listed species. See 16 U.S.C. § 1536(a)(2); Haw. R. Stat. § 195D-21(c)(1). It must also be viewed in light of the prohibition on authorizing incidental take that "appreciably reduce[s] the likelihood of the ... recovery of the species in the wild." 16 U.S.C. § 1539(a)(2)(B)(iv). The documented, dramatic decline in Newell's shearwater numbers indicates that, unless KIUC immediately takes action to reduce take, this species may cease to exist in the wild or, at a minimum, its prospects for recovery will be all but eliminated. To avoid the need to shut down its operations altogether, KIUC must promptly implement the necessary measures to avoid pushing the Newell's shearwater to extinction and to promote the species' recovery.

Finally, one must bear in mind that, under Hawai'i state law, incidental take is permitted only where the associated HCP "will increase the likelihood of recovery of the endangered or threatened species that are the focus of the plan." H.R.S. § 195D-21(b)(1)(B) (emphasis added); see also id. § 195D-4(g)(4). Since KIUC cannot operate without both federal and state incidental take permits, the higher standard imposed under state law informs what is "practicable" in this case. The baseline for the analysis of whether the HCP would increase the likelihood that Kaua'i's imperiled seabirds will recover must be the conditions that would prevail if KIUC removed the utility structures and lights that currently cause unpermitted take, not, as KIUC would have it, whether the HCP would improve conditions over the illegal *status quo*. See HCP at 6-1 (describing "no take" alternative).

Against this backdrop, it is clear KIUC has failed to demonstrate that the few minimization measures described in the HCP – the bulk of which have already been implemented – constitute the maximum effort one can reasonably require of KIUC going forward. In the category of "Ongoing Efforts to Avoid & Minimize Impacts of Existing Facilities," the HCP includes only participation in a federally funded effort to underground 1.7 miles of lines in the Wailua River area (of a total of more than 1,100 miles of lines island-wide). Id. at 5-7; see also id. at 1-1. It then explains that, while KIUC "supports the undergrounding of existing power lines," it allegedly "is not financially feasible for KIUC to underground any significant amount of its existing lines except in situations," such as in the Wailua River area, "where road realignments or other factors make sizeable cost-sharing possible." Id. at 5-7, 5-9.

Even if one were to accept KIUC's claim that undergrounding more lines is not currently practicable (and its statement that, to date, its "margins have been sufficient to consistently exceed its required ratios" calls that claim seriously into question), the draft HCP nowhere

discusses – much less justifies KIUC's refusal to implement – any other, less expensive minimization measures. *Id.* at 5-8. It is certainly not the case that KIUC is ignorant of alternate means it could employ to reduce the number of seabirds its operations kill each year. Such measures were spelled out over fourteen years ago in a study funded by KIUC's predecessor and carried out by the Electric Power Research Institute ("EPRI") that the HCP identifies as providing "the best scientific and commercial data available." *Id.* at 4-1; *see* EPRI, *The Ecology of Newell's Shearwater and Dark-Rumped Petrel on the Island of Kaua'i: Final Report Task 2 at 57-59* (Feb. 8, 1995).<sup>4</sup> Take minimization recommendations the HCP improperly ignores include:

- Lowering power lines in identified flyways (e.g., Waimea Valley, Lawai Valley, Moalepe Valley, Hanalei Valley) to below tree-top level to divert shearwaters upward over the wires;
- Where adequate vegetation does not exist at hotspots, transplanting large trees to provide the required diverting mass;
- Where there are bridges that cross flyways, lowering wires to bridge height above the water, so the physical mass of the bridge would divert the shearwaters; and
- Elsewhere, replacing all utility poles with significantly shorter poles (less than 15 meters and no higher than tree-top height) and having wires positioned horizontally, rather than vertically, on the poles.

EPRI report at 57; *see also* 10/15/04 Scoping Letter from Ainley and Podolsky at 1-2 (enclosed).<sup>5</sup>

For example, with respect to the last of these recommendations, the HCP acknowledges that "the Delta and Vertical [power line] configurations" that KE began installing in the late 1980s "present a greater obstacle to low-flying birds than does the flat design," which "places the three wires in a circuit at approximately the same height above the ground." HCP at 5-9 n.47. While the HCP states that KIUC will generally use "flat designs for all newly constructed lines," it neither discusses the EPRI recommendation to minimize take by realigning existing power lines nor does it justify KIUC's refusal to implement that recommendation, or any of the others presented in the EPRI report. *Id.* (emphasis added).

Similarly, the draft HCP states that, to minimize potential impacts on listed species from installation of a new 69 kV line on the north shore of Kaua'i, "[i]n all of the areas where the plan calls for wires where none presently exist[,] the additions are either shielded by existing vegetation and/or topography or are attached to the side of the Kūhiō Highway bridge across the Kalihiwai River." *Id.* at 2-21. The HCP emphasizes that "[t]his design choice completely eliminates the potential adverse effect on the species in this route segment." *Id.* Moreover, "[i]n

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<sup>4</sup> Excerpts from the EPRI report are enclosed.

<sup>5</sup> Drs. David Ainley and Richard Podolsky, the principal authors of the EPRI study, submitted this comment letter, as well as an October 5, 2004 comment letter (also enclosed), in response to the U.S. Fish and Wildlife Service's ("USFWS's") request for scoping comments regarding environmental review of a proposed incidental take permit and HCP for KIUC. *See* 69 Fed. Reg. 42,447 (July 15, 2004) (notice of scoping); *id.* at 52,519 (Aug. 26, 2004) (same).

all cases where additional above-ground transmission wires are proposed," KIUC plans to "offset the effect of the additional circuit by changing the existing 12 kV distribution wires to a horizontal (i.e., one-level) arrangement (in lieu of their present vertical configuration)." *Id.* The HCP fails completely to address why KIUC refuses to implement similar measures to eliminate – or, at least, minimize – take associated with existing power lines.

KIUC's failure to carry its burden to demonstrate the various mitigation measures recommended in the EPRI report are impracticable mandates revision of the draft HCP to incorporate these necessary measures.<sup>6</sup> There is no justification for delaying such measures merely because the term of this initial HCP is for only "up to 5 years" (assuming no further extensions), since there can be no serious question that the impacts on listed seabirds from KIUC's operations will continue into the indefinite future. HCP at 1-6. As the draft HCP notes, "[t]he only ways that KIUC could eliminate the possibility of take from its facilities and operations are (1) undergrounding of all overhead electrical lines (distribution lines, transmission lines, and individual service lines) and (2) eliminating street lighting and divesting itself of all responsibility for the many utility poles which support telephone and cable television lines owned by other entities." *Id.* at 6-1. The draft HCP makes clear that KIUC has no plans – in the short- or long-term – to eliminate these various sources of take. To address the inevitable long-term take, KIUC should be required immediately to begin implementing long-term take minimization measures, rather than limit the scope of minimization measures to what KIUC can accomplish in the short-term, as is currently proposed. *Cf.* HCP Handbook Addendum, 65 Fed. Reg. 35,242, 35,256 (June 1, 2000) ("if the permittee's action ... continually occur[s] over a long period of time, ... the permit would need to encompass that time period"); HCP at 5-1 (noting "it is unusual for an HCP covering such a large area to have such a short term").

#### Unjustified Reliance On SOS Program To Satisfy Legal Requirements

To demonstrate compliance with Chapter 195D's requirements that "an HCP must increase the likelihood that the Covered Species will survive and recover, and must provide a net environmental benefit," KIUC relies on the alleged success of the SOS program. HCP at 5-21 (citing Haw. R. Stat. §§ 195D-4(g), 195D-21(b)).<sup>7</sup> The draft HCP claims that "the KIUC-supported SOS+ program leads to the retrieval and safe release of far more birds that are downed by causes unrelated to KIUC's activities than its facilities adversely affect." HCP at 5-

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<sup>6</sup> At a minimum, consideration of alternatives that include implementation of these mitigation measures is required to comply with the federal regulations governing issuance of incidental take authorization. *See* 50 C.F.R. §§ 17.22(b)(1)(iii)(C), 17.32(b)(1)(iii)(C) (HCP must specify "alternative actions to such taking the applicant considered and the reasons why such alternatives are not proposed to be utilized").

<sup>7</sup> Presumably, KIUC intends to rely on the SOS program to claim its HCP satisfies similar requirements under the federal ESA. *See, e.g.,* 50 C.F.R. §§ 17.22(b)(2)(D), 17.32(b)(2)(D) (taking cannot "appreciably reduce the likelihood of the survival and recovery of the species in the wild").

21. Based on its assumption that seabirds released in the SOS program actually survive, KIUC asserts that "the SOS+ program alone would be sufficient to satisfy the Chapter 195D standard for producing a net environmental benefit and increasing the likelihood of species survival and recovery." *Id.* at 5-22; *see also id.* at 5-11 (claiming "SOS+ saves literally hundreds of individual Covered Species birds each year").<sup>8</sup>

The only scientific study KIUC cites in support of its analysis is the EPRI report, which KIUC characterizes as concluding "that population decline in the Newell's Shearwater population would be almost twice as great in the absence of SOS as it would be in its presence." *Id.* at 5-22. In truth, the EPRI report was more equivocal regarding the SOS program's contribution to seabird survival, noting that "[t]he very low recovery rate of shearwaters initially banded as fledglings by SOS could be a result of ... a lower than natural survival of these birds (deemed to have been 'rescued' only because they were able to fly away)" and calling for additional research to evaluate the program's effectiveness. EPRI report at 49.

In any event, regardless of the opinions of the EPRI report's authors fourteen years ago, in the intervening years, they have made clear their doubts about the SOS program's effectiveness in promoting seabird survival. In comments to USFWS in 2004, the report's principal authors stated:

Our analysis of SOS data indicated that fewer than 30 of 25,000 banded [Newell's shearwaters] (banded and released in the SOS program) have ever been recovered (i.e. caught again on the island). This exceedingly low return rate at a breeding site (should be around 10% or higher) indicates that either: 1) the population is expanding exponentially, 2) the bands are falling off within about 6 years, 3) the species is moving to colonies more removed from the human settled parts of Kauai, and/or 4) the SOS program is not working and the mortality of 'recovered' shearwaters is much higher than the rate expected in the natural population. We know that choice #1 is not happening and that #2, given that stainless steel bands are used by SOS, is highly unlikely. The fact that the population sampled by SOS is declining precipitously indicates that #3 is a possibility. Research is required to assess the degree to which #2, #3 or #4 is the factor involved and to determine whether funding of the SOS program would be an effective 'mitigation' for take. A[t] present this is not a useful alternative.

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<sup>8</sup> KIUC's analysis assumes that, in the absence of KIUC funding, the SOS program would cease to exist, depriving listed seabirds of the alleged benefits of the program's continued operation. Given that the program operated for decades without KIUC's involvement, this is not necessarily the case. *See id.* at 1-5 n.4 (SOS program established in 1970s), 5-10 (KIUC first provided support for program in 2003). If, in fact, the SOS program would continue to operate regardless of whether the HCP were approved, KIUC cannot claim any credit for the benefits – if any – the program confers on listed seabirds. The only benefit would be a financial one to whatever funding source, public or private, would otherwise support the program.

10/5/04 Scoping Letter from Ainley and Podolsky at 5-6 (emphasis added; citations omitted).

Drs. Ainley's and Podolsky's follow-up comments were more blunt in rejecting "funding SOS" as a "viable mitigation[]" for KIUC's take. 10/15/04 Scoping Letter from Ainley and Podolsky at 2. They stressed: "While the SOS data are cost effective for purposes of monitoring Newell's Shearwater population trends, ... for the reasons given in our first letter, the program seems not to be effective at saving shearwaters to the extent necessary to contribute to the species' recovery." *Id.* In comments on the current draft HCP, Dr. Podolsky stated categorically: "the SOS program does nothing to avoid, minimize and mitigate take." 12/22/09 Podolsky Comment Letter at 2 (enclosed).

Drs. Ainley and Podolsky are clearly not alone in questioning the SOS program's effectiveness as a mitigation measure. The very purpose of the two-year at-sea capture study is to "produce empirical evidence concerning the survival rate of SOS-banded birds." HCP at 5-15; *see also id.* at 1-6 (study's purpose to "determine the proportion of birds which survive following release through the SOS program"). Even if fully successful, this study will, at most, evaluate "the feasibility, cost, and usefulness of collecting and using data from periodic surveys of this sort to develop a database that has sufficient statistical power to extrapolate survival rates of Newell's Shearwaters and Hawaiian Petrels retrieved and released by the SOS Program." *Id.* at 5-16.

Clearly, there are currently no data with "sufficient statistical power" to support any conclusions about the SOS program's effectiveness in saving listed seabirds (and these data will not be available for many years to come, after future periodic surveys), much less any data to support the rosy assessments on which KIUC bases its claim that, despite the annual slaughter of over 180 listed seabirds from its operations, the modest efforts proposed in the draft HCP would both increase the likelihood of those species' survival and recovery and result in a net environmental benefit.<sup>9</sup>

KIUC's assessment of its proposed activities – in particular, its reliance on the SOS program to offset anticipated take – lacks any scientific support. To pass legal muster, the draft HCP must be substantially revised to provide an analysis that is based on scientific fact, not rhetoric and supposition.

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<sup>9</sup> Since the available data casts substantial doubt on whether any significant number of seabirds banded and released in the SOS program survive, KIUC has no basis for assuming that the 55 fledgling shearwaters annually downed by light attraction associated with KIUC facilities constitute "non-fatal" take. Rather, in the absence of any data indicating that listed seabirds released by the SOS program are likely to survive, one must assume that all 180 of KIUC's estimated annual shearwater takes result in mortality.

Failure To Account For "Indirect" Take And Other Indirect Environmental Harm

To determine whether issuance of the proposed HCP and associated incidental take authorization would satisfy Chapter 195D's requirements to increase the likelihood that Kaua'i's listed seabirds will survive and recover and to provide net environmental benefits, one must accurately assess not only the direct take associated with KIUC's operations, but also the indirect take (*i.e.*, effects "that are caused by the proposed action and are later in time, but still are reasonably certain to occur") and other environmental harm that results from KIUC's operations. 50 C.F.R. § 402.02. Consideration of indirect take is also vital to ensure compliance with the ESA's prohibition on "appreciably reduc[ing] the likelihood of the survival and recovery" of any listed species, *id.* §§ 17.22(b)(2)(D), 17.32(b)(2)(D), and the prohibitions in both federal and state law against actions that are "likely to jeopardize the continued existence of any [listed] species." Haw. R. Stat. § 195D-21(c)(1); see also 16 U.S.C. § 1536(a)(2).

While the draft HCP purports to consider indirect take, estimating "the impact of adult (*i.e.* parent) mortality on egg and chick survival," it fails to assess substantial sources of seabird mortality that would not exist but for KIUC's operations. HCP at 4-1. For example, the draft HCP notes that telephone lines and cable television lines strung on KIUC's utility poles are responsible for 5-20% of the annual mortality of seabirds from collisions with utility structures. *Id.* at 4-2. Based on that analysis, the draft HCP attributes 90% of annual mortality from collisions as direct take from KIUC's power lines and associated structures, but fails completely to consider whether any portion of the take assigned to telephone lines and cable television lines should be considered "indirect take" due to KIUC's placement and maintenance of its utility poles. *Id.*<sup>10</sup> It is only logical to assume that, in the absence of KIUC's utility poles, there would be fewer telephone lines and cable television lines strung across seabirds' flyways, either because it would be prohibitively expensive to extend service in the absence of pre-existing poles or, without the cost savings associated with use of pre-existing poles, more telephone lines and cable television lines would be placed underground. In either case, the indirect take associated with KIUC's operations must be evaluated.

In addition, the draft HCP fails to consider the growth-inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate associated with KIUC's centralized distribution of electricity. It cannot seriously be questioned that, without KIUC's activities (*i.e.*, if every business and residence needed to generate its own electricity), there would be far fewer artificial lights on Kaua'i. Accordingly, a portion of the take associated with attraction to non-KIUC lights is properly attributed to KIUC as indirect take, a factor the draft HCP improperly ignores.

Moreover, without KIUC's current infrastructure and planned expansion or upgrades, there would be far less residential and commercial growth on Kaua'i. To determine whether KIUC's proposal "provides net environmental benefits," as Chapter 195D requires, the draft

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<sup>10</sup> With respect to the calculation of direct take, KIUC fails to justify its assumption "that its power lines and associated structures are responsible for 90 percent of such collisions," rather than 95%, the more conservative assumption. *Id.*

HCP was required to – but fails to – evaluate the impacts associated with these indirect effects, including, but not limited to, congestion, sprawl, demands on Kaua'i's limited water supply, demands for additional infrastructure (roads, schools, police, fire, etc.), and habitat destruction. Haw. R. Stat. § 195D-4(g)(8).<sup>11</sup>

#### Failure Adequately To Describe Proposed Future Activities

Under both state and federal law, an HCP must “[d]escribe the activities contemplated to be undertaken within the plan area with sufficient detail to allow the department to evaluate the impact of the activities on the particular ecosystems, natural communities, or habitat types within the plan area that are the focus of the plan.” Haw. R. Stat. § 195D-21(b)(2)(B); see also 50 C.F.R. §§ 17.22(b)(1)(i), 17.32(b)(1)(i). The draft HCP's description of the future additional facilities it proposes for coverage falls far short of satisfying this requirement.

For example, KIUC proposes coverage for new connections within existing service areas. As proposed, these activities could involve new power lines up to a quarter-mile in length and up to 45 feet in height. See HCP at 2-14. Without knowing where on the island these new connections will be located (e.g., their proximity to seabird flyways) and how many will be installed during the permit term, there is no way meaningfully to evaluate the impacts of this activity.

Similarly, the HCP provides inadequate information to evaluate proposed installation of new streetlights to serve new subdivisions or existing thoroughfares. Even when shielded, streetlights have the potential to cause take of listed seabirds. See id. at 4-2 (noting “downed birds were collected via the SOS program since the lights [under KIUC's control] were shielded”). In the absence of any information about the locations of these new sources of light attraction, their proximity to seabird flyways, and the number of lights to be installed, it is impossible to perform the analyses required under federal and state law.

The HCP's failure to include vital details about KIUC's future activities also violates Chapter 195D's requirement to provide “sufficient information for the board to ascertain with reasonable certainty the likely effect of the plan upon any endangered, threatened, proposed, or candidate species in the plan area and throughout its habitat range.” Haw. R. Stat. § 195D-21(c). Moreover, it violates Chapter 195D's public participation requirements, which mandate notice to the public regarding “the proposed activity” to be covered under an HCP and guarantee the public's right to provide “input and relevant data.” Id. § 195D-21(a). Without adequate

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<sup>11</sup> Consideration of these factors would substantially alter the cost-benefit analysis of various take minimization measures. For example, while undergrounding the sections of KIUC's power lines that cross major flyways undoubtedly has a cost, it also confers significant benefits such as improving the island's beauty (aesthetic benefits that translate into the economic benefit of more tourist dollars) and securing the island's electrical grid from disruption in tropical storms or hurricanes. See HCP at 7-11 (“underground lines would be safe from future hurricanes”).

information about KIUC's proposed future activities, the public cannot possible provide meaningful input or relevant data.

Failure Adequately To Describe Additional Mitigation In Years 4 and 5

The draft HCP states:

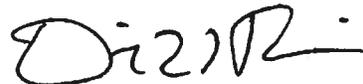
If the HCP and associated incidental take authorizations remain in effect beyond three years, then at the end of the first three years KIUC shall meet with the USFWS and DOFAW and evaluate, based on new information generated through the implementation of the mitigation measures described above, whether to implement any additional mitigation measures in Years 4 and 5 beyond the measures described above.

HCP at 5-21. It then lists several potential "additional mitigation measures," without providing any detail regarding what those measures may entail. Id.

The draft HCP's failure to describe in any meaningful way the additional mitigation measures, if any, that would be required in years 4 and 5 makes it impossible to evaluate whether those measures would be adequate to (1) avoid jeopardy, (2) ensure that listed species' likelihood of recovery would increase, and (3) ensure that the HCP will confer net environmental benefits, as required under state and/or federal law. These ill-defined measures cannot, therefore, properly be taken into account in assessing the HCP's compliance with the applicable legal standards. See Haw. R. Stat. § 195D-21(c) (requirement to contain "sufficient information" to evaluate "with reasonable certainty" HCP's "likely effect"). Moreover, as discussed above, the failure to include adequate information about additional mitigation measures deprives the public of its right to provide "input and relevant data." Id. § 195D-21(a).

For the foregoing reasons, we respectfully request that the draft HCP be rejected. After decades of illegally killing Kaua'i's imperiled seabirds, KIUC must finally take responsibility for its actions and come up with a plan that implements the reasonable mitigation measures the EPRI report identified over fourteen years ago and that adequately mitigates unavoidable take.

Sincerely,



David L. Henkin

DLH\tt  
Enclosures

cc: Scott Fretz, DOFAW  
Perry White, Planning Solutions, Inc.

December 22, 2009

Lauren E. Goodmiller  
Habitat Conservation Planning Associate  
Department of Land and Natural Resources  
Division of Forestry and Wildlife  
1151 Punchbowl Street Room 325  
Honolulu, HI, 96813

Dear Ms. Goodmiller,

I would like to offer comments on the Draft Short Term Seabird Habitat Conservation Plan for Kaua'i Island Utility Cooperative. I am a Ph.D. biologist who was involved with litigation against Kauai Electric for their failure to consider the taking of the Covered Species in their plans for routing power lines through Kalihiwai valley in the early 1990's. This HCP, coming more than 15 years after that settlement, perpetuates the failure of USFWS and DLNR to protect Hawaii's threatened and endangered species. This HCP should be denied for it does little meaningful to protect the Covered Species at a critical time in their populations' demise.

This HCP plan is insufficient for it fails to meet the statutory criteria of Section 10 for issuance of the permit: to show that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild

Similarly it does not meet criteria of HRS 195D because it does not support

- a) That the plan increases the likelihood that the species will survive and recover.
- b) The cumulative impact of the activity, which is permitted and facilitated by the license, provides net environmental benefits.

A major flaw in the "take" is that it cannot show that the downing of the birds and subsequent release does not, in fact, kill them. There is no evidence that the SOS process leads to the survival of the downed birds. Therefore, until such time that studies show that downing, tagging, and release allows for the long-term survival of each individual bird, then all downed birds must be considered as "lethal take".

1.2.7 Implementation of mitigating measures section contains only one actual mitigating measure, the habitat work in Limahuli. All other efforts are simply monitoring the taking of the covered species. I do not feel that this is sufficient to meet the statutory criteria of Section 10 nor HRS 195D. Monitoring the collapse of these species populations is not mitigating the effects of the takings. The SOS program over the past 30 years has shown the in-effectiveness of that program in saving actual birds and the electric company's efforts at mitigation. SOS and the radar studies have documented and provided enough evidence for the decline of the populations.

While monitoring is important mitigation is the only thing that has any hope of reversing the population decline.

4.3.6 The fallacy in this argument is that it assumes an equal amount of effort yearly on the part of the populace. This is not the case and really questions the validity of SOS data at estimating population size. Only radar data should be used.

Also it assumes a constant rate of population decline. It appears that we have just experienced a major crash in the populations, then these calculations are worthless.

And finally it assumes that public will pick up dead birds and bring them in. Most people do not bother with the birds once they see they are dead.

The EPRI study also used vertical pointing radar, indicating the height at which birds flew. Why is this ignored?

4.4 I would argue, for lack of better evidence, and having found these birds myself, that the KIUC take of Hawaiian Petrel is 90% of the total or 18 birds. There is no data to refute my assumption and the HCP must err on the side being too conservative. No taking of Hawaiian petrels should be permitted.

4.5 I would argue again, that more birds are being killed by KIUC wires and are not being retrieved. The HCP must err on the side of conservation. No taking of storm-petrels should be permitted.

5.7 For all its rhetoric, there is no evidence that the SOS program benefits the populations of the covered species, because there is no evidence that the birds survive the injury and tagging and actually return and breed. And, for all of SOS efforts over the years, the populations of Covered Species are crashing. So how can you say that it would lead to species recovery? It hasn't.

Therefore the SOS must not be considered a mitigation effort, just a crude population monitoring project. If the SOS+ program is so much more successful, then why has the number of birds retrieved crashed? Is it because of less public participation or fewer birds because of no net benefit of the SOS+ to the bird population? Or both?

For all of the money spent in the past few years on publicity for SOS+, what is the measure of success of these programs? Were more birds retrieved or more of the public actually involved in bringing birds in?

6.3 Surveying of just five breeding sites is not adequate. The HCP should be more focused on identifying other sites and protecting the breeding colonies. It is not as easy or as glamorous to the public, but it is the only effective means of protecting the Covered Species. It was identified in the EPRI funded studies of the early 1990s. If the electric company had done something meaningful then, instead of stonewalling on doing a HCP or hiding behind SOS, then the populations probably would not be in the shape they are now.

If KIUC is allowed an incidental take permit for doing these things that will not appreciably do anything but monitor the demise of the populations, then every bird "retrieved", dead or alive, over the take limit should cause KIUC to be fined for non-permissible take. I would suggest a \$100,000 fine per bird "retrieved" by SOS+ over the permitted take.

Signed,



Carl J. Berg, Ph.D.

Hawaiian Wildlife Tours

2637 Apapane St.

Lihue, HI 96766



richard podolsky  
<podolsky@att.net>  
12/22/2009 05:23 AM

To <lauren.e.goodmiller@hawaii.gov>  
cc Richard Harris Podolsky <podolsky@att.net>  
bcc  
Subject Dr. Richard H. Podolsky's Comments on KIUC's HCP

**\*\* Lauren - Please use this version below. I found and fixed a typo.**

December 22, 2009

**By Email Transmission**

Ms. Lauren Goodmiller  
1151 Punchbowl Street, #325  
Honolulu, HI

Dear Ms. Goodmiller;

It is my understanding that the Kaua'i Island Utility Cooperative ("KIUC") is seeking incidental take authorization from the U.S. Fish and Wildlife Service (USFWS) and the Hawai'i Department of Land and Natural Resources (DLNR) Division of Forestry and Wildlife (DOFAW) for a period of 5 years regarding their continued operation and maintenance of all existing KIUC facilities, and the installation, operation and maintenance of KIUC facilities. For reasons that I describe below, I am writing to request that incidental take authorization be denied.

I have been associated with efforts to both study and protect the Hawaiian Petrel (*Pterodroma sandwichensis*), Newell's Shearwater (*Puffinus auricularis newelli*) since 1981. First, in the capacity of a volunteer on the SOS Program, subsequently in the late 80's and early 90's as Co-principal Investigator (with Dr. David Ainley), on the EPRI-funded studies, and since that time in the context of my ongoing field work to mitigate the impact of wind turbines and cell phone towers on these same two species. However, it was the EPRI-funded studies that I co-lead with Dr. David Ainley that were the most relevant the KIUC current application.

During the EPRI studies we concluded that mortality caused by KIUC (at that time it was known as Kauai Electric Co.) utility lines and polls was imperiling the aforementioned populations such that if allowed to continue without recommended mitigation would lead to drastic declines and possible extinction of these species on Kauai. The reason for this is that we concluded that the population size and the breeding biology of these species is inherently incapable of offsetting/compensating for the very high mortality being caused by KIUC infrastructure. Therefore, our various reports and publications made very specific recommendations to KIUC regarding modest modification to KIUC facilities and activities that would have, if implemented in the early 90's, helped to stabilize and possible reverse the population declines KIUC

was causing. I say modest because throughout our studies Dr. Ainley and I were always mindful of trying to seek mitigation actions that KIUC could take that would be cost-effective *and* biologically effective. We knew that by doing so would increase the chance for our mitigation recommendations being actually implemented. For example, we determined through our scientific studies that 90% of the KIUC-induced mortality was taking place at less than 10% of KIUC above-ground utility service. Hence, we strongly advised that those “hot spot” sections of KIUC grid be put underground or under bridges and thereby remove the collision risk. But this advice (by way of example), along with a long list of other equally cost-effective recommendations to KIUC for mitigating their severe harm to these populations were completely ignored. Rather, KIUC has, in a most egregious way, ignored all of the good advice of the ornithological experts and instead chosen a path of focusing on biologically irrelevant actions such that these two species continue to decline precipitously and are now very much closer to extinction than they were over 20 years ago.

And apparently KIUC’s trend of avoiding the already identified effective mitigation measures in favor of taking biologically irrelevant actions is being repeated again in the the current HCP proposed by KIUC. I do not believe that the actions proposed in the HCP will help KIUC avoid, minimize, or mitigate incidental take of threatened and endangered species as a result of existing or future KIUC facilities and activities.

Specifically, the HCP calls for the following:

- 1. Fully funding implementation of the SOS Program for 5 years.** It is my assertion that it has been known for over 20 years that the SOS program does nothing to avoid, minimize and mitigate take and that at best it is only a crude, indirect monitor of populations status. Therefore, to the extent that fully funding SOS would reduce funds for known activities that would help KIUC avoid, minimize and mitigate take that the SOS program should rather be suspended in favor of funding actions that result in actual mitigation.
- 2. Funding seabird colony management and predator control in Limahuli Valley.** It is my assertion that colony management and predator control in only Limahuli Valley would be biologically irrelevant. Rather, colony management and predator control needs to take place in at least all known nesting colonies or at least in those associated with mortality “hot spots” previously identified.
- 3. Funding a two-year at-sea capture study aimed at assessing the survival of SOS-released birds** is a completely useless study because we already know that very few of the SOS-released birds survive to come back to Kauai. Let me very clear – what is the justification to go offshore and try to find SOS birds when the only thing that matters is the numbers of SOS birds that return to Kauai and we already know FROM THE SOS PROGRAM ITSELF that very few SOS-released birds ever return to Kauai?
- 4. Updating Spear et al.’s (1995) estimates of at-sea seabird populations is**

another complete waste of time and money would be better spent on Kauai itself at KIUC infrastructure where the mortality is occurring.

5. **Funding a two-year auditory survey to locate additional seabird breeding colonies** is a good idea but only if it is also linked to implementing a predator protection plan for each identified colony. Otherwise, in the absence of such a linkage identification alone is essentially useless and might even lead to attracting feral predators into these colonies and lead to their destruction.

6. **Funding development and implementation of an underline monitoring program aimed at better understanding take by overhead utility structures** is also in my opinion a complete waste of time. We do not need more monitoring because for over 20 years we have had published report that give specific mitigation actions that if implemented would have stabilized and perhaps reversed the population declines caused by KIUC infrastructure.

7. **Funding additional work to be stipulated by the agencies during the fourth and fifth year of the permit** is in my opinion just another vehicle for KIUC to perpetuate their legacy of avoiding taking real actions to actually reduce the mortality they are causing at the known mortality hot spots and/or providing real protection at colonies that results in actual conservation that results in numerical offset to their incidental take.

In short, it is my opinion that the work that KIUC proposes to carry out vis-à-vis the HCP will neither enhance our knowledge of the species' biology and distribution nor improve their chances of enhanced reproductive success. The KIUC HCP neither incorporates adaptive management nor will it result in any meaningful mitigation nor improved monitoring of the species' populations if implemented in its present form. Rather it is my recommendation that agencies deny KIUC request for an Incidental Take Permit (ITP) from the USFWS under section 10(a)(1)(B) of the Federal Endangered Species Act, and an Incidental Take License (ITL) from DLNR under sections 195D-4 and 195D-21 of the Hawai'i Revised Statutes. Instead, it is my recommendation that USFWS, DLNR and DOFAW prosecute KIUC for egregiously ignoring all of the most biologically significant recommendations to reduce, minimize, and mitigate the impact of their operations on the three federally and state listed threatened and endangered species and **force KIUC to finally take real actions to eliminate mortality in the identified mortality hot spots coupled with a program to identify and subsequently provide real protection to all breeding colonies from all other sources of mortality** .

Sincerely,

Richard Podolsky

---

**Richard Harris Podolsky, Ph.D.**  
**Senior Ecologist**  
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My Pages: <http://www.richardpodolsky.com/>

My Patent: <http://www.google.com/patents?id=u8ChAAAEBAJ&dq=podolsky+collision>



dainley@penguinscience.com

12/23/2009 06:19 PM

To ckoide@kiuc.coop, lauren.e.goodmiller@hawaii.gov

cc scott.fretz@hawaii.gov, pwhite@psi-hi.com

bcc

Subject KIUC Short-term HCP

Kauai Island Utility Cooperative  
4463 Pahee Street, Suite 1  
Lihue, HI 96766-2000  
Attn: Carey Koide, ckoide@kiuc.coop

Dept of Land and Natural Resources  
Division of Forestry and Wildlife  
1151 Punchbowl Street, Room 325  
Honolulu, HI 96813  
Attn: Lauren Goodmiller, lauren.e.goodmiller@hawaii.gov

23 December 2009

Re: Short-Term Seabird Habitat Conservation Plan ("HCP") for Kauai Island Utility Cooperative ("KIUC")

Dear Ms. Koide and Ms. Goodmiller:

Kauai Island Utility Cooperative ("KIUC") is seeking incidental take authorization of ESA listed seabirds from the U.S. Fish and Wildlife Service (USFWS) and the Hawaii'i Department of Land and Natural Resources (DLNR) Division of Forestry and Wildlife (DOFAW) for a period of 5 years regarding their continued operation and maintenance of all existing KIUC facilities, and the installation, operation and maintenance of additional KIUC facilities. In this regard I fully support points set forth in the letter from Earthjustice (dated today) and in spirit those from Dr. Richard Podolsky (dated 22 Dec 2009).

I have been investigating the biology and ecology of Hawaiian Petrel (*Pterodroma sandwichensis*) and Newell's Shearwater (*Puffinus auricularis newelli*), both on island and at sea, since the 1980s and up to the current time (2009 breeding season) in regard to Hawaiian Petrels on Maui. EPRI-funded studies of which I was co-Principal Investigator with Richard Podolsky on Kauai during the early 1990s concluded with a series of science-based recommendations about how to cost-effectively reduce KIUC's take problem to the point that these listed species could begin to recover rather than continue to decrease in population size.

Near as I know, none of those recommendations have been implemented (see Earthjustice letter) and, thus, it is not surprising that these species' populations on Kauai have, as predicted by our population modeling and confirmed by subsequent SOS results, continued their steep downward trend. The reason for this is that the breeding biology of these species is inherently incapable of compensating for the very high mortality of fledglings especially, but also adults, being caused by KIUC infrastructure, coupled with mortality of adults at colonies due to feral animals. Please see: [D.G. Ainley R.R. Podolsky, N. Nur, L. DeForest & G.A. Spencer. 2000. Status and population trends of the Newell's Shearwater on Kauai: a model for threatened petrels on urbanized tropical oceanic islands. In (J.M. Scott, S. Conant & C. van Riper III, eds.) Ecology, Conservation and Management of Endemic Hawaiian Birds: A Vanishing Avifauna. Studies in Avian Biology 22: 108-123.]

I believe the case could be easily justified to now up-list the Newell's Shearwater from threatened to endangered under the ESA, for whatever benefit that might bring. Maybe it would finally get the deserved attention of USFWS and DOFAW. More importantly, it is my opinion that the only effective HCP would be one that included measures implemented that would lead to the recovery of Newell's Shearwaters on Kauai, not in monitoring the species' demise. Stop-gap measures, including SOS as presently practiced, and monitoring, no longer have any direct usefulness, other than to know when, with no more shearwaters, the problem is solved. That appears to be the management strategy to date.

The only efforts that would be effective, other than letting these birds go extinct, is for KIUC to alter the 10% of their above-ground infrastructure that has been accounting for 90% of the lethal take, and any continued take be used as the basis for mitigation to conserve the last remaining colonies (fencing and predator control). On the basis of our EPRI study, 15 years ago we strongly advised that those "hot spot" sections of the KIUC grid be put underground, under bridges, or below tree height level where possible, with wire-spacing arrays set horizontal rather than vertical, and thereby significantly reduce the collision risk. We also recommended that an ecologically meaningful series of colonies be identified and protected from mortality from utility collisions and feral animals. Nowadays, these colonies would be whatever ones that still remain. Unfortunately for the listed Newell's Shearwater, and it should be unfortunate for KIUC itself (in the form of penalties that would pay for effective mitigation), this advice, along with a long list of other equally cost-effective recommendations for reducing severe harm to these populations has been ignored. The draft HCP now includes items, which while certainly increasing our knowledge of these seabirds' on-island natural history, and which in better circumstances might be useful for management, would not now contribute to reversing the ongoing decrease in population size. These interesting items of little mitigation value include analysis of the NMFS at-sea data set and the effort to find banded birds by an unproven at-sea effort. Placing radio transmitters on birds at sea, along with a significant amount of other effort, might help to find the last colonies.

This take permit should be denied and a new, and effective, draft HCP be written.

Sincerely yours,  
David Ainley

105 Headlands Court  
Sausalito CA 95965  
dainley@penguinscience.com

email copy:  
Scott Fretz, DOFAW: scott.fretz@hawaii.gov

Perry White, Planning Solutions: pwhite@psi-hi.com



DLNR.CO.PublicDLNR/DLNR  
/StateHIUS  
12/08/2009 10:50 AM

To Lauren E Goodmiller/DLNR/StateHIUS@StateHIUS  
cc Scott Fretz/DLNR/StateHIUS@StateHIUS  
bcc  
Subject Fw: Draft Short-Term Seabird Habitat Conservation Plan  
Dawson

----- Forwarded by DLNR.CO.PublicDLNR/DLNR/StateHIUS on 12/08/2009 10:48 AM -----



"Adele Dawson "  
<9977440@gmx.net>  
12/08/2009 10:43 AM

To dinr@hawaii.gov  
cc  
Subject Draft Short-Term Seabird Habitat Conservation Plan

To Whom it may concern,

I fully support the Draft Short-Term Seabird Habitat Conservation Plan for  
Kauai Island Utility Cooperative. It is high time something happened. Enough  
wasting KIUC customers money trying to avoid action.

Adele Dawson  
3939 Omao Road  
Koloa, Kauai  
--

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Anahola, Hawai'i 96703-0848

808-822-5547

15 December 2009

Department of Land and Natural Resources (DLNR)  
Division of Forestry and Wildlife (DOFAW)  
Attn: Lauren Goodmiller  
1151 Punchbowl Street # 325  
Honolulu, Hawai'i 96813

Re: *KIUC's* (Kaua'i Island Utility Cooperative) final draft Short-Term Seabird Habitat Conservation Plan (HCP) and 'Incidental Take License' to DLNR / DOFAW and USFWS (U.S. Fish and Wildlife Service)

Dear Ms Goodmiller and To Whom It May Concern:

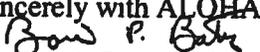
Aloha! I appreciate the opportunity to submit comment on the *KIUC's* proposal to the DLNR / DOFAW and USFWS for an 'Incidental Take License'. This request must be denied by the DLNR / DOFAW and the USFWS (U.S. Fish and Wildlife Service). The Hawaiian petrel ('Ua'u), Newell's shearwater (A'o) and Band-rumped storm-petrel ('Ake'ake) ~ are seabirds which are federally and state listed as threatened or endangered... Their 'threatened and/or endangered' status is based on their quantitative dire and rapidly deteriorating population. It is mandated that the DLNR/DOFAW and the USFWS protect these species – please uphold the state motto of "*Ua Mau Ke Ea O Ka 'Aina I Ka Pono*" which applies to "*Life*" as well as the "Life of the 'Aina".

"...What was once a population of around 80,000 Newell's shearwaters in the mid-1990s has dwindled to less than 20,000. The drop is primarily due to development on the island, including artificial lights, utility lines and buildings..." according to biologist Nick Holmes (Kaua'i Endangered Seabird Recovery Project) - as paraphrased by reporter Coco Zickos on the front page of *The Garden Island* (12/15/09). The article went on to say: "...*KIUC* is asking for an incidental take of 125 Newell's shearwater mortalities and 55 "non-lethal injuries" annually..." It seems that *KIUC's* artificial lights, utility lines and etc. have contributed greatly to the demise of the 'Ua'u, A'o, and 'Ake'ake. Kaua'i is one of the last of the peopled populated Hawaiian islands which also serves as 'home' to the endangered and threatened seabird populations – *KIUC* should not have permission for an 'Incidental Take License'. I realize they fund the S.O.S. program however, *KIUC* must do more since their electrical lines and lighting are contributing to the destruction of the last of Kaua'i seabirds. These endangered and/or threatened seabirds populations are decimated severely as data collection has reflected

I request that a Public Hearing be scheduled on this momentous proposal to allow for an 'Incidental Take License' of species(s) by the *KIUC* – Unless DLNR/DOFAW deny, the 'Incidental Take License'. The Public Meeting (12/10/09) and Public Comment Period Deadline is/was held during the hectic holidays with inadequate publicity. It appears that many folk's are/were intent on Holiday Events – and were not cognizant a Public Meeting (which has 'no meat' in legal terms) had been scheduled. Whereas a Public Hearing has legal standing... the gravity of the survival of these species warrants a Public Hearing.

The survival of these indescribably magnificent seabirds *is* dependent on the decision of the DLNR/DOFAW and USFWS – I earnestly expect that the DLNR/DOFAW and USFWS will deny the 'Incidental Take License'. If these agencies truly have the seabirds' survival at mind & heart – they will make the right decision –

Mahalo for your valuable time and I look forward to a response regarding the decision of *KIUC's* proposal.

Sincerely with ALOHA,  
  
Bonnie P. Bator and 'Ohana

C: U.S. Fish and Wildlife Service / Kaua'i Endangered Seabird Recovery Project / Hui Ho'omalua I Ka 'Aina