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Sent via U.S. Mail and Email

Jerome Ford
Assistant Director, Migratory Bird Program
U.S. Fish and Wildlife Service
1849 C Street, NW
Room 3331
Washington, DC 20240
Jerome_Ford@fws.gov

Re: Request for Enforcement of the Migratory Bird Treaty Act for Intentional Killing of Laysan Albatross at the Marconi Development on the North Shore of O‘ahu, Hawai‘i

Aloha Assistant Director Ford,

On behalf of Center for Biological Diversity, Conservation Council for Hawai‘i, Mālama Marconi Coalition and The Ko‘olau Waialua Alliance, we submit this letter requesting that the U.S. Fish and Wildlife Service (“USFWS” or “the Service”) investigate the killing of a Laysan Albatross on December 2nd at the Marconi Development on the North Shore of O‘ahu, Hawai‘i as a likely violation of the Migratory Bird Treaty Act (“MBTA”). More broadly, the Service also needs to issue a proposed rule to regulate the killing of migratory birds under the MBTA in order to facilitate an effective and consistent enforcement system for developers.

According to the Diagnostic Case Report produced by the U.S. Geological Survey-Biological Resources Division at the National Wildlife Health Center-Honolulu Field Station (attached), the bird was found dead entangled in a fence on the property, but was killed by blunt force trauma, featuring significant gross lesions, including severe trauma to the head and bleeding in the brain.¹ The Case Report further states that they have seen this type of trauma in birds hit with large objects on the head, and given this, it is unlikely the trauma and death could have resulted from the bird running into the fence.²

This is not the first-time harm to sensitive wildlife has occurred on this property. In fact, the Marconi Development is associated with a long list of violations that negatively affect protected species on the parcel. The developers and owners of the land have reportedly made a “Condominium Property Regime” (“CPR”) on the property yet have not received a required Shoreline Management Area (“SMA”) permit for the construction, grubbing, and other activities that have occurred, including the construction of the iron fence in question. This same fence resulted in previous injuries and deaths of several migratory birds, including the Laysan Albatross.

As such, state and federal agencies and the property developers and owners of the Marconi Development have failed to take adequate steps to avoid, minimize, and mitigate take of migratory birds

¹ Diagnostic Case Report produced by the U.S. Geological Survey-Biological Resources Division at the National Wildlife Health Center-Honolulu Field Station; Case # 25939 (Dec 2-4, 2023).

² *Id.*

in violation of the MBTA. Without the Service's enforcement of the MBTA, we are gravely concerned that the continued operation of the parcel will continue to contribute to harm to Laysan albatross and other migratory birds in violation of the MBTA.

We urge the Service to investigate the recent killing of an albatross and take enforcement action. In regard to the construction of the fence and potentially other actions on the property that have harmed and are continuing to harm birds, we urge the Service to issue promised regulations to provide guidelines for developers to avoid harm from occurring in the first place. Birds are harmed by development all over the country on a regular basis and highlight the need for clear regulations.

I. Interested Parties

The Center for Biological Diversity ("Center") is a national, nonprofit organization dedicated to protecting wildlife and wild places through science, law, and creative media. The Center has worked for decades to protect migratory birds by seeking protections for individual species under federal and state laws and taking legal action to ensure migratory birds remain protected under the MBTA. The Center's offices work in locations around the country to prevent the extinction of some of the most imperiled bird species living in the U.S. and other countries.

Conservation Council for Hawai'i ("CCH"), is a non-profit citizens' organization based in Hawai'i with approximately 5,500 members in Hawai'i, the United States mainland, and foreign countries. CCH is the Hawai'i affiliate of the National Wildlife Federation, a non-profit membership organization with over 5.8 million members and supporters nationwide. CCH's mission is to protect native Hawaiian species, including the Laysan Albatross, and to restore native Hawaiian ecosystems for future generations.

Mālama Marconi Coalition is a network of community organizations and individuals across Hawai'i and beyond who are deeply concerned about the protection of Hawai'i's cultural and historic resources, wildlife -- particularly the Laysan Albatross, Yellow-Faced Bees, Green Sea Turtles, and Monk Seals, and native ecosystems at the "Marconi" properties and coastline between Turtle Bay Resort and the James Campbell National Wildlife Refuge.

The Ko'olau Waialua Alliance ("KWA") is a grassroots network of residents and community groups across O'ahu's north and windward shores. KWA mission is to foster a just and sustainable region for current and future generations.

II. Factual Background

a. December 2, 2023, Marconi Property Incident

On December 2, 2023, community members were informed of the death of a Laysan Albatross at the Marconi Development on the North Shore of O'ahu, Hawai'i. Volunteer albatross monitors working on the adjacent property reported that the bird (banded V389) was injured and horribly entangled with a fence and trying to escape a weedwhacker. The bird was transported to the local wildlife veterinarian at Feather and Fur in Kailua, but died before it was seen by a vet. The body was examined and no broken bones were found, but there was dried blood in the mouth and on beak and the vet suspected a head injury. In fact, the U.S. Geological Survey-Biological Resources Division at the National Wildlife Health Center-Honolulu Field Station found that the specimen had died due to blunt force trauma inflicted

upon it, with the presence of gross lesions pointing to severe head trauma as the cause of death.³ The Resources Division goes on to report that the trauma appeared to originate from the right side of the head, and resembles the type of trauma seen in birds hit with large objects (e.g. golf club, large stick, golf ball) on the head, or running headlong into obstacles whilst in full flight.⁴ As a result, the Resources Division indicated that “it is difficult to see how trauma seen here could result from [the reported] scenario.”⁵



Figure 1. Left-Note severe diffuse bleeding over skull. Right-Severe bleeding in right brain (arrow).



³ *Id.*

⁴ *Id.*

⁵ *Id.*

Figure 2. Albatross caught in fence on Maroni property 12/2/20.

b. The Impact & Insufficiency of State & Private Regulatory Mechanisms

Everywhere birds visit, they perform essential ecosystem services that have economic value and are necessary for the functioning of ecosystems. Following major wildfires like those in Canada, birds that return to burned areas can disperse seeds and aid forest landscape regeneration.⁶ Global increases in temperatures contribute to the increase in insect populations, and birds that feed on them can help curb the issues that pose a threat for humans and food systems.⁷ Additionally, recovery of nesting seabird populations results in more resilient coral reefs, due to positive nutrient flows.⁸

As acknowledged by the Service, “[o]ver the last 50 years, the total population of North American birds has declined by an estimated 3 billion birds,” and “[m]any of the 1,093 species of birds protected under the MBTA [] are experiencing population declines due to increased threats across the landscape.”⁹

Specifically, a lack of enforcement of the MBTA has allowed for private landowners to develop properties that cause take of birds like the Laysan Albatross in direct violation of the law. And while various organizations and government agencies are working tirelessly to conserve Hawai‘i’s threatened and endangered bird species by engaging in such important activities as habitat restoration, captive breeding programs, and public education campaigns, they have also simply turned a blind eye to site-specific violations of both the MBTA and the ESA through direct killing of individual species via incidents like these.

III. Legal Background

The Migratory Bird Treaty Act of 1918, as amended, 16 U.S.C. § 703 *et seq.* (MBTA), is intended to ensure the sustainability of all protected migratory bird species. It implements Conventions between the United States and four neighboring countries (Canada, Mexico, Japan, and Russia) for the protection of migratory birds.¹⁰

⁶ *Birds as mediators of passive restoration during early post-fire recovery*, Biol. Cons., <https://www.sciencedirect.com/science/article/abs/pii/S0006320712004247#:~:text=Remnant%20trees%20or%20artificial%20perches,shrubs%20in%20post%20fire%20areas> (Vol. 158, February 2013, pgs. 342 – 350).

⁷ *Insect Disturbance and Climate Change*, U.S. Forest Service, <https://www.fs.usda.gov/ccrc/topics/insect-disturbance-and-climate-change#:~:text=forest%20insect%20species,-,In%20some%20cases%2C%20larger%20and%20more%20frequent%20insect%20outbreaks%20may,to%20forest%20insect%20population%20growth> (last visited October 11, 2023).

⁸ Benkwitt, C. E., D'Angelo, C., Dunn, R. E., Gunn, R. L., Healing, S., Mardones, M. L., Wiedenmann, J., Wilson, S. K., & Graham, N. A. J. (2023). Seabirds boost coral reef resilience. *Science advances*, 9(49), ead390. <https://doi.org/10.1126/sciadv.adj0390>.

⁹ Migratory Bird Permits; Authorizing the Incidental Take of Migratory Birds, 86 Fed. Reg. 54,667, 54,668 (Oct. 4, 2021).

¹⁰ See Convention Between the United States and Great Britain for the Protection of Migratory Birds, Aug. 16, 1916, 39 Stat. 1702 (Canada Convention); Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, 50 Stat. 1311 (Mexico Convention); Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, Mar. 4, 1972, 25 U.S.T. 3329, T.I.A.S. No. 7990 (Japan Convention); Convention Concerning the Conservation of Migratory Birds and Their Environment, Oct. 13, 1978, 29 U.S.T. 4647, T.I.A.S. No. 9073 (Russia Convention); see also 50 C.F.R. § 10.13(a).

To that end, the MBTA prohibits the killing of protected migratory bird species without prior authorization from the Service.¹¹ Specifically, the MBTA provides that, “[u]nless and except as permitted by regulations . . . it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture or kill” migratory birds.¹² The Service defines “take” as “to pursue, hunt, shoot, wound, kill, trap, capture, or collect” a migratory bird, or to attempt to engage in any of those activities.¹³ The Service has regularly investigated causes of lethal mortality, such as oil pits, power-lines, contaminated waste pools, oil spills, commercial fishing lines and nets, and wind turbines.¹⁴

The Service has used a range of strategies to ensure compliance with the MBTA’s prohibitions, including the use of notices, guidance, informally negotiated remediation, issuance of permits, and—when attempts to achieve voluntary compliance have failed—enforcement actions.¹⁵

Violations of the MBTA are sorted into two categories: criminal penalties and forfeitures. Any person, association, partnership, or corporation who violates the MBTA or its implementing regulations commits a misdemeanor punishable by a fine of up to \$15,000 and imprisonment for up to six months.¹⁶

The Service maintains a list of protected migratory birds,¹⁷ which includes the Laysan Albatross, as killed on the Marconi Development, and many others regularly taken due to a lack of enforcement of the MBTA.

IV. Request to Investigate this Incident and Enforce the Migratory Bird Treaty Act

We first request that the Service investigate the killing of this albatross. In addition, however, we ask the Service to take action to address activities that have occurred on the Marconi Development that are causing repeated and continuous unauthorized take of protected migratory birds, in patent violation of the MBTA, as well as other incidents that potentially involve violations of the Endangered Species Act. As of the date of this letter, state agencies, USFWS, and property developers and owners have failed to effectively or adequately avoid, minimize, and mitigate take of migratory birds on this property.

We also ask the Service to put in place regulations that could minimize take or killing of birds by, for example, preventing developers from constructing a fence in a known area of Laysan albatross nesting. Earlier this month, the Service withdrew much-needed draft migratory bird protection rules that the agency promised to propose two years ago. These rules are necessary to protect migratory birds.

However, it is also important to note that the agency currently has the power to levy fines against parties that cause the death of birds, and federal officials should use their authority to do so. Specifically, USFWS’ website states the following:

¹¹ There is, at present, no system for authorizing take under the MBTA by permit; however, the U.S. Fish and Wildlife Service has indicated its intent to establish such a system. Migratory Bird Permits; Authorizing the Incidental Take of Migratory Birds, 86 Fed. Reg. 54,667 (Oct. 4, 2021).

¹² 16 U.S.C. § 703(a).

¹³ 50 C.F.R. § 10.12.

¹⁴ *NRDC*, 478 F. Supp. 3d at 473.

¹⁵ *Id.* at 473–74.

¹⁶ 16 U.S.C. § 707(a). “Person” as used in the MBTA has been broadly defined to include governmental entities. See *Humane Soc’y of the U.S. v. Glickman*, 217 F.3d 882, 886 (D.C. Cir. 2000).

¹⁷ 50 C.F.R. § 10.13(c).

*On October 4, 2021, the Service published a final rule revoking the January 7, 2021, regulation that limited the scope of the MBTA. With this final and formal revocation of the January 7 rule,¹⁸ **the Service returns to implementing the MBTA as prohibiting incidental take and applying enforcement discretion**, consistent with judicial precedent and long-standing agency practice prior to 2017. This final rule goes into effect on December 3, 2021.¹⁹*

V. Necessary Minimization and Mitigation Measures

Hawai'i and other states have turned a blind eye to the taking of wildlife in violation of the MBTA for decades, without putting in place effective, lasting action to mitigate the problem. For these reasons, we ask that the U.S. Fish and Wildlife Service intervene to enforce the MBTA and ensure the establishment of effective, long-term solutions for the ongoing take occurring at the Marconi Development and elsewhere. We also suggest that the property owners specifically be required to individually and collectively take immediate action to prevent and mitigate injuries and deaths of migratory birds, including taking measures to ensure that her property – and the structures upon it – no longer interfere with the survival of the Laysan Albatross.

VI. Conclusion

For these reasons, we respectfully urge the U.S. Fish and Wildlife Service to intervene and, to the extent necessary to address the problem, enforce the MBTA to protect migratory birds on this property.

Thank you for considering our request. If you have any questions or would like copies of the sources cited, please contact Maxx Phillips at mphillips@biologicaldiversity.org or (808) 284-0007. Regardless, we respectfully request a response to this letter within thirty days so that we and other members of the interested public know whether migratory birds will be protected in the manner dictated by federal law.

Sincerely,



Maxx Phillips
Hawai'i and Pacific Islands Director, Staff Attorney
Center for Biological Diversity
(808) 284-0007
mphillips@biologicaldiversity.org

CC: Martha Williams, Director
U.S. Fish and Wildlife Service
1849 C Street, NW
Room 3331
Washington, DC 20240
Martha_Williams@fws.gov

¹⁸ *Regulations Governing Take of Migratory Birds; Revocation of Provisions*, <https://www.federalregister.gov/documents/2021/10/04/2021-21473/regulations-governing-take-of-migratory-birds-revocation-of-provisions> (effective Dec. 3, 2021).

¹⁹ *Governing the take of migratory birds under the Migratory Bird Treaty Act*, U. S. Fish and Wildlife Service, <https://www.fws.gov/regulations/mbta> (last visited October 11, 2023).

DIAGNOSTIC CASE REPORT

U. S. GEOLOGICAL SURVEY-BIOLOGICAL RESOURCES DIVISION
NATIONAL WILDLIFE HEALTH CENTER-HONOLULU FIELD STATION
P. O. BOX 50167, 300 ALA MOANA BLVD., Rm. 8-132
HONOLULU, HAWAII 96850
Tel: 808-792-9520, Fax: 792-9596, Email: thierry_work@usgs.gov

Case Number: 25939

Submitter Name:

Dr. Sheldon Plentovich
US Fish and Wildlife Service
PO Box 50088
Honolulu, Hawaii 96850
United States

Species submitted (n):

Albatross: Laysan (1)

Location:	Yue-sai Kan Property	DateCollected:	12/02/2023
Area:	Honolulu	DateSubmitted:	12/4/2023
State:	Hawaii	DateReceived:	12/4/2023
Country:	United States	DateExamined:	12/4/2023

SPECIMENS SUBMITTED: Carcass-Fresh

History: Submitter reports this bird was found dead reportedly after running into a fence trying to escape weed whacking activity.

Findings: Accession 1-laysan albatross adult female in good body condition. Significant gross lesions included severe trauma to the head and bleeding in the brain, most severe on the right. See attached photos.

Final diagnosis: Accession 1-Trauma-blunt force.

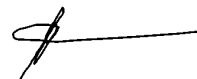
Comments: Gross lesions pointed to severe head trauma as cause of death. The trauma appeared to originate from the right side of the head. We have seen this kind of trauma in birds hit with large objects (e.g. golf club, large stick, golf ball) on the head or running headlong into obstacles whilst in full flight. Given my understanding of the the history (bird startled by weedwhacker, running into fence), it is difficult to see how trauma seen here could result from such a scenario.

Management: Ferretting out what kind of large object could have hit this bird on the head.

Report Date (mm/dd/yyyy): 12/7/2023

Necropy report: Available upon request

Copies of this report sent to:



If you have questions regarding this case, contact Thierry M. Work MS, DVM, MPVM at 808-792-9520. Include above Case Number. Diagnostic findings may not be used for publication without the pathologist's knowledge and consent.

NOTE: Information in this report supersedes any information from previous reports regarding this case



Figure 1. Left-Note severe diffuse bleeding over skull. Right-Severe bleeding in right brain (arrow).