



VIA ELECTRONIC AND CERTIFIED MAIL; RETURN RECEIPT REQUESTED

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RE: Notice of Intent to Sue for Violations of the Migratory Bird Treaty Act, the Endangered Species Act, and the Resource Conservation and Recovery Act Relating to Lead-Based Paint on Midway Atoll

This letter serves as a notice on behalf of the Center for Biological Diversity (“Center”) of intent to sue the Secretary of Commerce and the National Oceanic and Atmospheric Administration (collectively “NOAA”), the Secretary of Interior and the Fish and Wildlife Service (collectively “USFWS”), and the State of Hawai'i Department of Land and Natural Resources (“State of Hawai'i”) for violations of the Migratory Bird Treaty Act (“MBTA”), the Endangered Species Act (“ESA”), and the Resource Conservation and Recovery Act (“RCRA”) relating to lead-based paint and other waste on Midway Atoll, as detailed below. The USFWS is receiving this notice letter based on its responsibility for the administration of the Midway Islands pursuant to Executive Order 13022. 61 Fed. Reg. 56875 (Nov. 4, 1996). In addition, all three Co-Trustees of the Papahānaumokuākea Marine National Monument (the USFWS, NOAA, and the State of Hawai'i) will be included in the suit based on their cooperative management of the Monument pursuant to the December 2006 Memorandum of Agreement for Promoting Coordinated Management of the Northwestern Hawaiian Islands Marine National Monument.

The Center is a non-profit, public interest environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has over 43,000 members throughout the United States and internationally. The Center and its members are vitally concerned about and actively involved in the protection of Hawaiian species and their habitat. The Center's members and staff engage in professional, recreational, aesthetic, and scientific activities involving these species and their habitat. The Center urges USFWS, NOAA, and the State of Hawai'i to promptly comply with the MBTA, ESA, and RCRA, and correct the violations described below.

I. The Status of the Lead-Based Paint Problem on Midway Atoll, Papahānaumokuākea Marine National Monument

Midway Atoll, an unincorporated territory of the United States, is located approximately 1,800 km northwest of Honolulu (28°13' N, 177°22' W) and consists of three islands (Sand, Eastern, and Spit) totaling about 1,500 acres. The United States Navy had custody of Midway from 1903 until 1996 when Midway Atoll was transferred from the Department of the Navy to the Department of the Interior. Midway became a National Wildlife Refuge in 1988 when it was still under the primary jurisdiction of the Navy. The only atoll/island in the Hawaiian archipelago that is not part of the State of Hawai'i, Midway Atoll National Wildlife Refuge is owned and administered by the USFWS (USFWS 2008b). Midway became part of the Papahānaumokuākea Marine National Monument in 2006, which is managed by the USFWS and NOAA in coordination with the State of Hawai'i.

Midway supports the world's largest breeding population of Laysan albatross (*Phoebastria immutabilis*) (~450,000 pairs) and second largest breeding population of black-footed albatross (*Phoebastria nigripes*) (~25,000 pairs) (2008 USFWS data, <http://www.fws.gov/midway/midwaywildlifebirds.html>). Laysan and black-footed albatrosses are designated as Vulnerable to extinction and Endangered, respectively, by the World Conservation Union (IUCN) in the 2009 Red List of Threatened Species. The black-footed albatross is currently under review for ESA listing. Midway also supports one of two global populations of the federally endangered Laysan duck (*Anas laysanensis*) which is listed as Critically Endangered by the IUCN.

Sand Island hosts Midway's active runway and is where the residents (~20-40 people) of Midway live. Approximately 95 structures exist on Sand Island with exterior and interior lead-based paint. Two-thirds of these structures are unused and/or abandoned. Deterioration of these structures over time has resulted in lead-based paint chips throughout Sand Island with high concentrations of chips immediately surrounding buildings. Some of these structures also contain asbestos in addition to lead-based paint. As the deterioration of these structures continues, the hazards they represent will increase in terms of diminished structural integrity (e.g., falling plaster) and increased dispersal of lead-based paint chips and asbestos materials.

A. Lead Poisoning Impacts from Lead-Based Paint on Midway

1. Lead Poisoning of Laysan Albatross

Laysan albatrosses nest next to structures on Sand Island, Midway Atoll, and their chicks are exposed to substantially elevated levels of lead due to ingestion of lead-based paint (Finkelstein et al. 2003). Laysan albatross chicks nesting within five meters of buildings on Sand Island had average blood lead values of 440 µg/dL, compared to an average blood lead of 6 µg/dL in chicks nesting greater than 100 meters from buildings (Finkelstein et al. 2003). Laysan albatross adults on Sand Island had an average blood lead level of 1 µg/dL, which could be considered the background (or normal) blood lead level for this species. Lead-poisoned chicks on Sand Island have 440 times the background blood lead level and 44 times the Centers for Disease Control's blood lead level of concern for children (10 µg/dL) (CDC 1991). Blood lead values greater than 100 µg/dL have been shown to cause encephalopathy and death in both humans and animals (National Research Council 1993).

A substantial proportion of Laysan albatross chicks nesting in proximity of buildings/structures exhibit clinical signs of lead poisoning -- peripheral neuropathy referred to as "droopwing." Droopwing manifests in the chicks' inability to raise their wings (Figure 1), which commonly drag on the ground resulting in broken bones and open sores. Chicks with droopwing will never be able to fly, and will die either directly as a result of lead poisoning, or, if they manage to survive to fledging age, from starvation at the end of the breeding season when their parents stop feeding them. The total number of birds suffering significant detrimental effects from lead exposure on Midway's Sand Island is greater than the number of chicks observed with droopwing. Greater than 80% of chicks nesting near buildings had blood lead levels high enough (>100 µg/dL, Finkelstein 2003) to cause droopwing or other symptoms of severe clinical toxicity (e.g., encephalopathy, Goyer 1996) which would either prevent the chick from fledging (chicks with droopwing cannot fly) or almost certainly prevent the chick from surviving to reproductive maturity.

Recent research indicates that lead poisoning is having negative population-level effects on the Laysan albatross. Finkelstein et al.(2009) estimated that up to 7% of Laysan albatross chicks on Sand Island, equal to ~10,000 chicks in 2007, fail to fledge as a result of lead poisoning from ingestion of lead-based paint. The lead-poisoning deaths of 7% of chicks on Sand Island each year was projected to create a 16% reduction in the Laysan albatross population size at 50 years into the future. Furthermore, models found that at the current rate of lead-induced chick mortality, lead poisoning would be responsible for a decrease in the Laysan albatross population size by ~100,000 to 360,000 birds in 50 years (Finkelstein et al. 2009).

2. Potential of Lead Poisoning of Other Wildlife Species

Eighteen species of seabirds as well as the endangered Laysan Duck breed on Midway Atoll (<http://www.fws.gov/midway/seabirdpops.pdf>). Although there has been no reported lead poisoning of any species other than Laysan albatross to date, the potential exists for lead-based paint contamination to affect other species.

Most structures have large sections of peeling paint with numerous visible paint chips scattered around their perimeters. On structures that have had no remediation, lead-based paint deterioration is increasing and, with structures subject to extreme weathering processes, the area of the island that is contaminated is increasing. A greater area contaminated with lead-based paint translates to a higher risk for species other than Laysan albatross to be affected. In particular, there is a high risk that increasing lead-based paint contamination in the soil as well as throughout a larger geographic area will harm species including the black-footed albatross, Bonin petrel (*Pterodroma hypoleuca*), and Laysan duck.

The endangered Laysan ducks, observed around the vicinity of the marine barracks, are at risk of exposure. The marine barracks have an extreme amount of deterioration, and lead-based paint chip contamination throughout the surrounding area is significant. Furthermore, as the population of Laysan ducks continues to increase on Sand Island, their potential to inhabit areas contaminated with lead-based paint increases and thus their likelihood of lead exposure increases.

Even exposure to a small paint chip could severely poison and potentially kill a Laysan duck. Using very simplified calculations, one can predict that a paint chip as small as 0.1 grams can cause lead poisoning in a Laysan duck:

- Finkelstein et al. (2003) reported an average lead concentration of 47000 ug/g in paint samples from Sand Island.
- Assuming a Laysan duck weighs 400 g, with a blood volume of 12% their body weight, they have a blood volume of ~50mLs.
- If a Laysan duck ingests a 0.1 g paint chip with a lead concentration of 47000 ug/g, and assuming conservatively that they absorb 10% of the lead from the chip, they would absorb 470 ug of lead.
- As the lead absorbed by the bird is incorporated in the blood, this would equate to a blood lead concentration of ~ 940 ug/dL, which is well above levels observed in lead poisoned Laysan albatross with droopwing.

3. Implications for Human Health

The lead concentrations measured from paint and soil samples on Sand Island, Midway Atoll pose a possible human health risk. Under the Toxic Substances Control Act (TSCA), paint, dust, and soil are sources of lead that constitute lead-based paint hazards if exposure to them “would result” in adverse human health effects. EPA defines hazardous conditions for paint, dust, and soil as follows: “Lead-based paint means paint or other

surface coatings that contain lead equal to or in excess of 1.0 milligram per square centimeter or 0.5 percent by weight.” 40 C.F.R. § 745.103 (2009); 40 C.F.R. § 745.223 (2009). This equates to a lead concentration of 5000 ug/g. Finkelstein et al.(2003) found that all the paint samples collected from buildings on Sand Island contained lead concentrations that exceeded 5000 ug/g, and thus could be classified as lead-based paint and a hazardous condition.

Furthermore, Sand Island soil samples collected near buildings ranged in lead concentrations from 0.45 - 4,500 ug/g (n=10) (Finkelstein, unpublished data). Under federal standards, lead is considered a hazard if there are greater than 400 ug/g of lead in bare soil in children’s play areas, or 1200 ug/g average for bare soil in the rest of the yard. 40 C.F.R. § 745.65(c) (2009). For soil that contains lead \geq 2000 ug/g, EPA recommends removing or permanently covering the soil. Consequently, the deteriorating lead-based paint on the structures on Sand Island represents an enormous health hazard to any children that may play in the area.

B. History of Lead-based Paint Remediation on Sand Island

Although lead-caused mortality of Laysan albatross chicks has been documented since at least 1982 (Sileo and Fefer 1987), none of the responsible government agencies, including the Navy, USFWS, or NOAA, has undertaken the needed lead remediation to avoid injury to the Laysan albatross. To the best of our knowledge, episodic lead poisoning of Laysan albatross chicks occurred under Navy jurisdiction when paint was stripped from buildings without containment of paint chips during routine facility maintenance operations (Work and Smith 1996). Some lead-based paint remediation on Midway appears to have been conducted in part by Ogden Environmental Group between the years 1994 to 1997 (Ogden Environmental and Energy Services Co. 1997). The USFWS took over the stewardship of the island from the Navy in a collaborative arrangement with Midway Phoenix Corporation. When responsibility for Midway was transferred from the Navy to the USFWS, the Navy provided some funds to Midway Phoenix Corporation to conduct lead-based paint clean up, although it is uncertain that clean up was ever conducted. The USFWS has allowed the deterioration of approximately two-thirds of the ~95 structures that are coated with lead-based paint. These structures shed toxic lead-based paint chips into the environment year-round, and the problem is growing with time as the paint chips disperse farther from these structures.

Past measures to prevent Laysan albatross from nesting near the contaminated buildings have failed. Because funds were not available to initiate lead-based paint abatement of buildings, during the non-breeding season of 2004 and 2005 USFWS employees laid cloth down around 22 buildings determined to be ‘priority hazards.’ The purpose of the shade cloth was to prevent adults from establishing a nest within fifteen feet of buildings because adults do not like to nest on the black surface. In addition, during the breeding season, USFWS refuge personnel were supposed to patrol the shade cloth with backpack vacuum attachments and vacuum up any visible paint chips. The expectation was that the combination of shade cloth around the buildings’ perimeters and frequent vacuuming of the shade cloth for paint chip debris would reduce the exposure of Laysan albatross chicks to lead-based paint.

Unfortunately, tarp material that was used in the summer of 2005 was not of the quality that the USFWS personnel intended. Therefore, this tarp did not withstand the harsh winds and sun on Midway, and started to fray during the breeding season. Even though USFWS spent hundreds of staff and volunteer hours, Laysan chicks (n = 9 dead, 138 entangled alive), adults (n = 3 dead, 1 entangled alive), and Bonin petrels (n = 6 dead) were entangled in the tarp, causing injury and death. Furthermore, surveys conducted in 2006 indicated that the shade cloth was ineffective at reducing lead poisoning of Laysan albatross chicks.

During the non-breeding season of 2006, USFWS purchased equipment to initiate lead-based paint abatement for some of the buildings on Sand Island. According to a press statement by the deputy refuge manager for Midway Atoll, John Klavitter (October 28, 2009), the USFWS has spent \$1.5 million on lead paint clean-up on Midway Atoll since 2005 and has been able to clean-up 24 buildings. Additionally, the USFWS has recently received additional funds to remediate all of the two story officer quarters (~10 buildings) as well as conduct some remediation of three of the four cable company buildings on Sand Island. As discussed below, this leaves ~61 structures with lead-based paint that need to be remediated.

C. Current Lead-based Paint Clean up Efforts are Inadequate

With the additional proposed clean up, there is still a significant amount of lead-based paint remediation that needs to be conducted on Midway Atoll. Given that the completed and proposed clean-up has or will result in the absolute removal and/or encapsulation the lead-based paint from 34 structures on Sand Island, ~61 structures (~64%) remain with lead-based paint that needs to be remediated. Using data from Finkelstein et al.(2009), a 64% reduction of the estimated Laysan albatross lead poisoning deaths would still equal a 10% reduction in the total Laysan albatross population size in 50 years.

There are five cable company buildings on Sand Island that were constructed in 1904 (Odgen Environmental and Energy Services Co. 1997); all are extremely deteriorated with paint chip contamination throughout the surrounding area. Anecdotal evidence suggests that a large proportion of the Laysan albatross chicks with nests in the vicinity of the cable company buildings are lead poisoned. These buildings and surrounding area will remain a significant source of lead contamination unless their remediation and restoration results in complete removal of the lead-based paint from all interior and exterior walls as well as the contaminated soil.

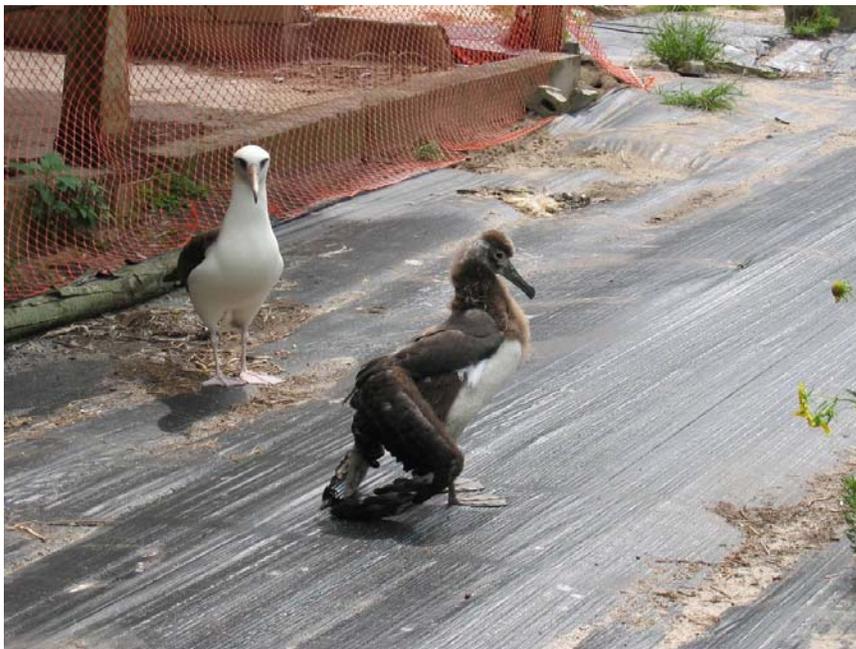
Notably, as Midway Atoll is subject to extreme weathering processes, the deterioration of non-remediated structures with lead-based paint is increasing over time such that a few buildings in the future will be the equivalent to many buildings today in terms of the amount of lead-based paint peeling off of them and potentially poisoning wildlife.

Clearly, current pledges to remediate the 34 structures on Sand Island are insufficient and the immediate remediation of the remaining ~61 contaminated structures is required. Proper containment of deteriorating lead-based paint should be conducted expeditiously in

accordance with the U.S. Department of Housing and Urban Development Guidelines for the Evaluation and Control of Lead-based Paint Hazards in Housing (1997). Extreme caution should be used when removing lead-based paint from buildings in order to prevent additional incidental exposure to chicks. Past researchers observed that routine maintenance of a building on Midway without proper containment of paint chips resulted in large numbers of droopwing chicks. The removal of building structures that contain lead-based paint from Sand Island is the most permanent solution for the problem and needed to minimize future lead poisoning. Any buildings with lead-based paint left on the island should be abated and encapsulated by certified contractors and it is imperative that funds are allocated to maintain the encapsulation of these buildings on a regular basis.

Failure to comprehensively remediate the lead-based paint problem will result in continued poisoning of Laysan albatross, a globally vulnerable species, as well as the potential poisoning of other endangered wildlife and humans on the island.

Figure 1: Lead-poisoned Laysan albatross chick (in foreground) with droopwing and Laysan albatross adult (in background) on Sand Island, Midway Atoll.



II. The USFWS, NOAA, and the State of Hawai‘i are Violating the Migratory Bird Treaty Act

USFWS, NOAA, and the State of Hawai‘i are violating the MBTA by allowing the lethal and sub-lethal lead poisoning of Laysan albatross, a species which is included in the list of migratory birds protected by the MBTA. See 50 C.F.R. § 10.13 (2009) (list of protected migratory birds). The MBTA provides that “it shall be unlawful at any time, by any means or in any manner,” to, among many other prohibited actions, “pursue, hunt, take, capture, [or] kill” any migratory bird included in the terms of the treaties. 16 U.S.C. § 703

(emphasis added). The term “take” is defined as to “pursue, hunt, shoot, wound, kill, trap, capture, or collect.” 50 C.F.R. § 10.12 (2009).

USFWS, NOAA, and the State of Hawai‘i cannot dispute that the lead-based paint on Midway kills Laysan albatross chicks protected under the MBTA. In addition, the federally endangered Laysan duck and 17 other seabirds that nest on Midway are at risk of lead poisoning.¹ Species particularly likely to be affected are the black-footed albatross and other ground-nesting seabirds that nest near contaminated buildings as well as burrowing seabirds like the Bonin petrel which excavate nests near and under contaminated buildings. The black-footed albatross is listed as Endangered by the IUCN and is under review for ESA listing.

The MBTA imposes strict liability for killing migratory birds, without regard to whether the harm was intended. Its scope extends to harm occurring “by any means or in any manner,” and is not limited to, for example, poaching. See e.g., U.S. v. Moon Lake Electric Association, 45 F. Supp. 2d 1070 (1999) and cases cited therein. Indeed, the federal government itself has successfully prosecuted under the MBTA’s criminal provisions those who have unintentionally killed migratory birds by poisoning from toxic substances. E.g., U.S. v. Corbin Farm Service, 444 F. Supp. 510, 532-534 (E.D. Cal. 1978), aff’d, 578 F.2d 259 (9th Cir. 1978) (deaths of birds resulting from misapplication of pesticides); U.S. v. FMC Corp., 572 F.2d 902 (2d Cir. 1978) (killing of migratory birds by dumping waste water). In addition, Executive Order 13168 states that “take,” as defined in federal regulations, includes both intentional and unintentional take. Exec. Order No. 13,186, 66 Fed. Reg. 3853 (Jan. 17, 2001). The order defines “unintentional take” as “take that results from, but is not the purpose of, the activity in question.” Id. The USFWS, NOAA, and the State of Hawai‘i’s failure to properly dispose of the lead paint chips, in spite of the knowledge of the harm it is causing the nesting birds, constitutes a violation of the MBTA.

The MBTA applies to federal agencies such as USFWS and NOAA as well as private persons. See Humane Society v. Glickman, No. 98-1510, 1999 U.S. Dist. LEXIS 19759 (D.D.C. July 6, 1999), aff’d, Humane Society v. Glickman, 217 F.3d 882, 885 (D.C. Cir. 2000) (“There is no exemption in § 703 for farmers, or golf course superintendents, or ornithologists, or airport officials, or state officers, or federal agencies.”). Following Glickman, USFWS issued Director’s Order No. 131, confirming that it is USFWS’s position that the MBTA applies equally to federal and non-federal entities, and that “take of migratory birds by Federal agencies is prohibited unless authorized pursuant to regulations promulgated under the MBTA.” In addition, courts have held that private parties may challenge agency actions alleged to have violated the MBTA. E.g., City of Sausalito v. O’Neill, 386 F.3d 1186 (9th Cir. 2004) (citing Seattle Audubon Soc’y v. Evans, 952 F.2d 297, 302-3 (9th Cir. 1991);

¹ The 17 breeding seabirds protected by the MBTA that have a potential for take from lead poisoning include the short-tailed albatross (*Phoebastria albatrus*), black-footed albatross (*Phoebastria nigripes*), Bonin petrel (*Pterodroma hypoleuca*), Wedge-tailed shearwater (*Puffinus pacificus*), Christmas shearwater (*Puffinus nativitatis*), white-tailed tropicbird (*Phaethon lepturus*), red-tailed tropicbird (*Phaethon rubricauda*), masked Booby (*Sula dactylatra*), brown booby (*Sula leucogaster*), red-footed booby (*Sula sula*), great frigatebird (*Fregata minor*), little tern (*Sterna albifrons*), least tern (*Sterna antillarum*), gray-backed tern (*Sterna lunata*), sooty tern (*Sterna fuscata*), brown noddy (*Anous stolidus*), black noddy (*Anous minutus*), and white tern (*Gygis alba rothchildi*).

Humane Soc’y of the U.S. v. Glickman, 217 F.3d 883, 888 (D.C. Cir. 2000); Newton County Wildlife Ass’n v. U.S. Forest Serv., 113 F.3d 110, 114-15 (8th Cir. 1997).

III. The USFWS, NOAA, and the State of Hawai‘i Are In Violation of the Endangered Species Act With Respect to the Laysan Duck

This letter serves as a sixty day notice on behalf of the Center of intent to sue the USFWS, NOAA, and the State of Hawai‘i for violations of Sections 2, 7 and 9 of ESA. *See* 16 U.S.C. §§ 16 U.S.C. § 1531(c)(1), 1536(a) and 1538(a)(1). This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA, to the extent such notice is deemed necessary by a court. *See* 16 U.S.C. § 1540(g).

Section 2(c) of the ESA establishes that it is “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.” § 16 U.S.C. § 1531(c)(1). The ESA defines “conservation” to mean “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.” 16 U.S.C. § 1532(3).

Similarly, Section 7 of the ESA requires that the USFWS and other federal agencies shall use their programs and authorities to conserve endangered and threatened species. § 1536(a)(1). In addition, each federal agency shall insure “that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence” of any endangered or threatened species or any species proposed to be listed, or “result in the destruction or adverse modification” of the critical habitat or the proposed critical habitat of any endangered or threatened species. § 1536(a)(2) and (4).

Section 9 of the ESA makes it illegal to take an endangered species of fish or wildlife “within the United States or the territorial sea of the United States.” 16 U.S.C. § 1538(a)(1). *Take* means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532. *Harm* in the definition of “take” in the Act means “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” 50 CFR § 17.3 (2009).

In NOAA’s final rule defining “harm,” the agency gave examples of habitat-modifying activities that may harm a listed species and thereby constitute a take under the ESA. 64 Fed. Reg. 60727, 60730 (Nov. 8, 1999). These examples include contaminating a listed species’ habitat with pollutants and “poisoning, or contaminating plants, fish, wildlife, or other biota required by the listed species for feeding, sheltering, or other essential behavioral patterns.” *Id.* Based on studies of the effects of lead on Sand Island bird species and the presence of the federally endangered Laysan duck on Sand Island, it can be inferred that the failure to remediate lead-based paint contamination on Sand Island is causing the

take of the Laysan duck, and that the probability of take will increase as the Laysan duck population on Sand Island grows. As detailed above, the Laysan duck is susceptible to lethal and sub-lethal lead poisoning on Sand Island because: (a) the Laysan duck uses areas surrounding lead-contaminated buildings; (b) the Laysan duck's behaviors involve probing soil that has a high likelihood of lead contamination and foraging for plants and insects which place it at risk of inadvertently ingesting paint chips; and (c) ducks can be poisoned by the ingestion of a small paint chip (~0.1 grams). Thus it is likely that unauthorized take of Laysan ducks is occurring on Sand Island in violation of the Endangered Species Act.

USFWS, NOAA, and the State of Hawai'i's failure to remediate lead-based paint from all buildings and contaminated soil on Sand Island jeopardizes the survival and recovery of the Laysan duck. According to the recovery plan, the highest priority recovery action for the Laysan duck is the establishment of multiple self-sustaining populations on suitable islands of the Hawaiian archipelago (USFWS 2009). Midway Atoll was chosen as the best site for translocation based on a suite of factors, including island size, elevation, cover, prey base, habitat quality, presence of predators, logistical feasibility, infrastructure, and land management (www.fws.gov/Pacific/ecoservices/endangered/recovery/LaysanDuckTeam.htm). Since 2004, the USFWS has undertaken an intensive translocation effort for the Laysan duck on Midway Atoll which has resulted in the establishment of the second of two global populations. Unremediated lead contamination puts Laysan ducks on Sand Island at risk of direct mortality from lead poisoning and at risk of sub-lethal effects that make individuals more susceptible to mortality from diseases and other threats. Indeed, the susceptibility of Laysan ducks on Midway to disease was highlighted by the deaths of 181 ducks in August 2008 due to botulism. As chronic low-level lead exposure is known to cause immunological impairment in avian species (Redig et al. 1991), ducks that are sub-lethally exposed to chronic levels of lead may be more vulnerable to diseases such as botulism. Clearly, the failure of USFWS, NOAA, and the State of Hawai'i to comprehensively remediate lead contamination on Sand Island undermines the recovery of this federally listed species.

The failure to fully remediate lead contamination may also cause take and prevent the recovery of other federally endangered species. Short-tailed albatross pairs visit Midway each year, and a future breeding population could be exposed to lead poisoning and deaths of chicks similar to the Laysan albatross. In addition, lead contamination of habitat and food sources may undermine future recovery efforts to establish a Laysan finch population on Midway (USFWS 2008a).

IV. The USFWS, NOAA, and the State of Hawai'i Are Violating the Resource Conservation and Recovery Act By Not Properly Storing and Disposing of Hazardous Waste

Pursuant to sections 7002(a)(1)(A) and 7002(a)(1)(B) of RCRA, the Center hereby notifies you of its intent to sue for the abatement of an imminent and substantial endangerment to health and the environment in connection with the illegal storing and disposal of hazardous wastes at the Midway Atoll National Wildlife Refuge. 42 U.S.C. §

6972(a)(1). This letter is provided pursuant to the 60-day and 90-day notice requirements of the citizen suit provision of RCRA, to the extent such notice is deemed necessary by a court. *See* 42 U.S.C. § 6972(b).

As stated above, approximately 95 structures exist on Sand Island with exterior and interior lead-based paint. Deterioration of the buildings has resulted in exfoliation of lead-based paint, and has scattered paint chips throughout large regions of Sand Island. In addition, some of these structures also contain asbestos. The health and environmental hazards increase each year as the buildings continue to deteriorate and dispersal of hazardous materials increases.

Another area of illegal hazardous waste storage and disposal is known as the Old Bulky Waste Landfill site. The USFWS, NOAA, and the State of Hawai‘i identified that wastes deposited in the landfill include metals (lead, cadmium, chromium, and nickel), gasoline, battery acid, batteries, mercury, lead-based paint, solvents, waste oil, PCBs, dioxins, furans, transmission and brake fluids, vehicles, equipment, tires, and miscellaneous debris. USFWS 2008b. The landfill is eroding, with large holes opening up around the edge and in the center of the landfill. *Id.* Over 500 bird burrows are in the landfill, indicating that the birds are further disturbing the soil and landfill contents. *Id.*

Subtitle C of RCRA generally prohibits the unpermitted storage and disposal of hazardous waste. *See* 42 U.S.C. §§ 6924-25; 40 C.F.R. pts. 264-270. With respect to solid waste disposal practices on Sand Island, there is “no adequate system in place to deal with hazardous waste (asbestos and lead specifically).” USFWS 2008b. Hazardous materials pose health and safety concerns for humans and wildlife. *Id.* The USFWS, NOAA, and the State of Hawai‘i claim that they will address the issue of hazardous waste disposal before any planned reuse, renovation, or removal of existing structures takes place. *Id.* Storage and disposal of hazardous waste, however, has already taken place and is ongoing as the buildings deteriorate. Therefore, the USFWS, NOAA, and the State of Hawai‘i are in violation of RCRA requirements and prohibitions, and are contributing to the storage and disposal of hazardous wastes which present an imminent and substantial endangerment to health and the environment.

The exfoliated lead-based paint chips are a regulated “solid waste.” EPA’s Subtitle C implementing regulations generally define a “solid waste” as “any discarded material.” 40 C.F.R. § 261.2(a)(1). These regulations further define a “discarded material” to include any material that is “abandoned” by being among other things, either “disposed of” or “accumulated [or] stored . . . before or in lieu of being abandoned by being disposed of, burned, or incinerated.” 40 C.F.R. § 261.2(a)(2)(i) & (b). The USFWS has collected paint chips around certain buildings determined to be “priority hazards” by using shade cloth and backpack vacuum attachments. Around other buildings where the paint chips were not vacuumed, the paint waste presumably scattered like litter on the ground. These facts demonstrate that exfoliated paint meets the regulatory definitions of “waste,” specifically because the paint chips were “accumulated [or] stored . . . before or in lieu of being abandoned by being disposed of.” 40 C.F.R. § 261.2(a)(2)(i) & (b).

The paint waste is “hazardous” under federal standards,² as the USFWS, NOAA, and the State of Hawai‘i have acknowledged (USFWS 2008b), and according to the measurement of the average lead concentration in paint samples on Sand Island reported by Finkelstein et al. (2003), which was 47,000 ug/g, or 47,000 parts per million (“ppm”).

Section 7002(a)(1) of RCRA, 42 U.S.C. §6972(a)(1), allows affected citizens to bring suit:

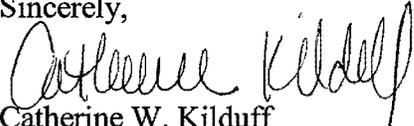
- (A) against any person (including (a) the United States . . .) . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or
- (B) against any person, including the United States . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

Further, section 6001(a) of RCRA, 42 U.S.C. § 6961(a), requires federal facilities, such as those on Midway, to comply with federal requirements respecting control and abatement of hazardous waste disposal and management “in the same manner, and to the same extent, as any person is subject to such requirements.” The Center believes that the USFWS, NOAA, and the State of Hawai‘i have stored and disposed of hazardous waste on Midway Atoll in violation of RCRA standards, regulations, conditions, requirements, prohibitions, and orders, and this presents an imminent and substantial endangerment to health and the environment. USFWS, NOAA, and the State of Hawai‘i have failed to fulfill their obligations to take the necessary actions to comply with RCRA and abate this ongoing and substantial endangerment.

V. Conclusion

If USFWS, NOAA, and the State of Hawai‘i do not act within the appropriate time period to correct these violations of the MBTA, ESA, and RCRA, the Center will pursue litigation in federal court. We will seek injunctive and declaratory relief, and legal fees and costs regarding these violations. If you have any questions or would like to discuss this matter, or believe that this notice is in error, please contact me at 415-632-5312 or ckilduff@biologicaldiversity.org.

Sincerely,



Catherine W. Kilduff

Staff Attorney, Center for Biological Diversity

² Wastes that exceed specified concentrations of certain heavy metals are deemed “hazardous” for “toxicity.” For example, when a waste is being analyzed for lead content, the waste is deemed “hazardous” if, using the toxicity characteristic leaching procedure, the concentration of lead in an extract of the waste exceeds 5 mg/L (or 5 parts per million). 40 C.F.R. § 261.24.

CC (by certified mail):

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