



January 30, 2024

**VIA CERTIFIED U.S. MAIL  
RETURN RECEIPT REQUESTED**

Hawaiian Electric Industries, Inc.  
Attn: Corporate Secretary (at 29-Z8)  
P.O. Box 730  
Honolulu, HI 96808-0730

Hawaiian Electric Company, Inc.  
Attn Corporate Secretary  
P.O. Box 2750  
Honolulu, HI 96840

Maui Electric Company, Ltd.  
Attn Corporate Secretary  
P.O. Box 2750  
Honolulu, HI 96840

Mayor Richard T. Bissen, Jr.  
Office of the Mayor, County of Maui  
200 South High Street  
Kalana O Maui Bldg. 9th Fl.  
Wailuku, HI 96793

Jordan Molina  
Director of Public Works, County of Maui  
200 S. High Street  
Kalana O Maui Bldg. 4th Fl  
Wailuku, HI 96793

Debra Haaland  
Secretary, U.S. Department of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240

**VIA HAND DELIVERY**

Kurt K. Murao  
Hawaiian Electric Industries, Inc.  
American Savings Bank Tower  
1001 Bishop Street, Suite 2900  
Honolulu, HI 96813

Erin P. Kippen  
Maui Electric Company, Ltd.  
American Savings Bank Tower  
1001 Bishop Street, Suite 1100  
Honolulu, HI 96813

Erin P. Kippen  
Hawaiian Electric Company, Inc.  
1099 Alakea Street, Suite 2200  
Honolulu, HI 96813

Re: 60-Day Notice of Intent to Sue Over Violations of the Endangered Species Act

To Whom It May Concern:

This letter serves as a sixty-day notice, on behalf of American Bird Conservancy and Conservation Council for Hawai'i, of their intent to sue the County of Maui ("County") and Hawaiian Electric Industries, Hawaiian Electric Company, and Maui Electric Company ("MECO")<sup>1</sup> over violations of Section 9 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1538. The violations consist of the unpermitted "take" of the endangered Hawaiian Petrel (*Pterodroma sandwichensis*), threatened Newell's Shearwater (*Puffinus newelli*), and endangered Band-rumped Storm-petrel (*Hydrobates castro*) in the County of Maui caused by power lines owned and operated by HECO, artificial lighting at HECO's facilities, and streetlights owned by the County and operated by HECO.<sup>2</sup> This letter fulfills the 60-day notice requirement of the ESA's citizen suit provision. See 16 U.S.C. § 1540(g).

### Background

The Hawaiian Petrel (listed as endangered in 1967) and the Newell's Shearwater (listed as threatened in 1975) are both endemic to Hawai'i. The Hawai'i Distinct Population Segment of Band-rumped Storm-petrels was listed as endangered in 2016. The U.S. Fish and Wildlife Service has identified power line collisions and attraction to bright, artificial lights as threats to the continued survival and recovery of all three imperiled seabird species.

Breeding Hawaiian Petrels, Newell's Shearwaters, and Band-rumped Storm-petrels fly to and from their nests at night. While the species can detect and avoid natural obstacles like trees and rocky outcroppings, they generally cannot avoid power lines strung across their flightpaths. Since 2010, the Maui Nui Seabird Recovery Project ("MNSRP") and other seabird researchers documented an average of more than one collision each year between ESA-listed seabirds and

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<sup>1</sup> This notice letter refers to Hawaiian Electric Industries, Hawaiian Electric Company, and Maui Electric Company collectively as "HECO."

<sup>2</sup> As discussed below, the ESA broadly defines "take" to include, among other actions, to "harass, harm, ... wound [or] kill" a listed species. 16 U.S.C. § 1532(19).

HECO's power lines on Maui and Lāna'i, including birds found beneath power lines with their wings sheared off. *See Attachment A.*<sup>3</sup>



Hawaiian Petrel found in 2020 under power lines above Mānele Bay, Lāna'i

These documented takes are only the tip of the iceberg. Studies of power line collisions involving these same species on Kaua'i showed that, even when there are dedicated searches for downed birds, the searches underestimated collisions by 78-88% due to injured birds moving outside of the underline search area. No dedicated searches have been conducted on Maui and Lāna'i, and so the actual number of collisions is likely orders of magnitude higher than the documented take. That conclusion finds strong support in the detection by acoustic sensors deployed on high-risk power lines on Maui in 2022 of over 200 potential collisions with ESA-listed seabirds in less than four months.

Attraction to bright lights is another a major threat to the continued survival and recovery of the Hawaiian Petrel, Newell's Shearwater, and Band-rumped Storm-petrel. Those seabirds use the

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<sup>3</sup> Also, on December 13, 2007, MNSRP recovered a Band-rumped Storm-petrel with visible injuries from underneath HECO power lines at Kealia, Maui, another documented collision.

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

County-owned and HECO-operated streetlights and bright lights at HECO facilities in Maui County attract and cause unauthorized take of ESA-listed seabirds. As far back as 1998, the Hawai'i Division of Forestry and Wildlife documented a threatened Newell's Shearwater striking a MECO-operated streetlight in Pā'ia. In October 2010, a Hawaiian Petrel fledgling was downed at MECO's baseyard in Kahului. Since 2009, MNSRP has documented scores of unauthorized takes of ESA-listed seabirds in Maui County from fallout that likely resulted from attraction to artificial lights at HECO facilities and to County-owned and HECO-operated streetlights.<sup>4</sup> Again, due to the lack of dedicated searches, the actual toll on imperiled seabirds is undoubtedly much higher.

HECO knows that its power lines, facility lights, and streetlights kill and injure imperiled seabirds. It announced in 2022 that it will apply for an incidental take permit under the ESA, though not until 2027 and not covering its operations on Lāna'i. It will likely take well beyond 2027 for HECO to secure a permit. In the meantime, HECO's operations continue to kill and injure imperiled seabirds, and HECO has rejected calls to implement vital measures to minimize and mitigate that ongoing, illegal take.

The County is likewise aware of the illegal take of imperiled seabirds from its streetlights. In 2019, the U.S. Fish and Wildlife Service wrote to the County and warned that “[o]utdoor lighting, including fully-shielded LED lighting, is known to result in seabird disorientation, fallout, and injury or mortality.”<sup>5</sup> Noting that “existing Maui County streetlights” have “resulted in documented take of listed seabirds,” the U.S. Fish and Wildlife Service emphasized

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<sup>4</sup> Attachment B shows the locations where MNSRP has documented fallout of ESA-listed seabirds on Maui and Lāna'i from 2009 to 2023. The overwhelming majority of the documented fallout occurred in locations where HECO operates streetlights for the County. *See* County of Maui Department of Public Works, Draft Environmental Assessment for the Maui County Streetlight Conversion Project (July 2022) at figs. 1.1 and 1.3 (Attachment C).

<sup>5</sup> September 20, 2019, Letter from Pacific Islands Fish and Wildlife Office, U.S. Fish and Wildlife Service, to Rowena M. Dagdag-Andaya, Director of Public Works, County of Maui.

that the ESA prohibits all take of listed seabirds in the absence of an incidental take permit.<sup>6</sup> In the years since then, the County has taken no steps to come into compliance with the ESA.

### HECO's and the County's ESA Violations

In the absence of a valid incidental take permit, "with respect to any endangered species of fish or wildlife[,] ... it is unlawful for any person subject to the jurisdiction of the United States to—take any such species within the United States or the territorial sea of the United States." 16 U.S.C. § 1538(a)(1)(B); *see also* 50 C.F.R. § 17.21. The same prohibition protects the threatened Newell's Shearwater. *See* 50 C.F.R. § 17.31(a).

The term "take" is defined broadly, including to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" a listed species. 16 U.S.C. § 1532(19). Thus, each Hawaiian Petrel, Newell's Shearwater, or Band-rumped Storm-petrel that is harmed, killed, injured, or otherwise "taken" by HECO's power lines, HECO's facility lights, or streetlights owned by the County and operated by HECO without an incidental take permit constitutes an independent violation of the ESA. As the MNSRP and other data make clear, HECO and the County are responsible for illegally killing and injuring endangered and threatened seabirds on an ongoing basis.

To comply with the ESA, HECO and the County of Maui must each immediately secure an incidental take permit, which includes a habitat conservation plan ("HCP") that minimizes take of imperiled seabirds "to the maximum extent practicable." *Id.* § 1539(a)(2)(B)(ii). The HCP would also require HECO and the County to mitigate "to the maximum extent practicable" any incidental take that could not be avoided through the implementation of minimization measures. *Id.*

Due to their locations, HECO's power lines and facility lights and the County-owned and HECO-operated streetlights will likely remain sources of seabird take even after implementation of all feasible minimization measures. Thus, mitigation measures, such as nesting colony protection, will be integral parts of any HCP for HECO's and the County's activities.

### Conclusion

HECO and the County are both violating the ESA by taking imperiled seabirds without an incidental take permit. If HECO and the County do not, within 60 days, bring their activities into compliance with the ESA, we intend to file suit in federal court to seek appropriate relief to

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<sup>6</sup> *Id.*

January 30, 2024

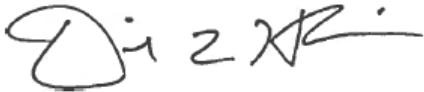
Page 6

protect imperiled Hawaiian Petrels, Newell's Shearwaters, and Band-rumped Storm-petrels from continued death and injury.

We would welcome the opportunity to meet with you in the hope of securing your agreement to comply promptly with the ESA and thus help ensure the continued survival of Hawai'i's imperiled seabirds.<sup>7</sup>

Mahalo for your prompt attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "DLH", with a stylized flourish extending to the right.

David L. Henkin  
Senior Attorney

DLH/tt  
Attachments

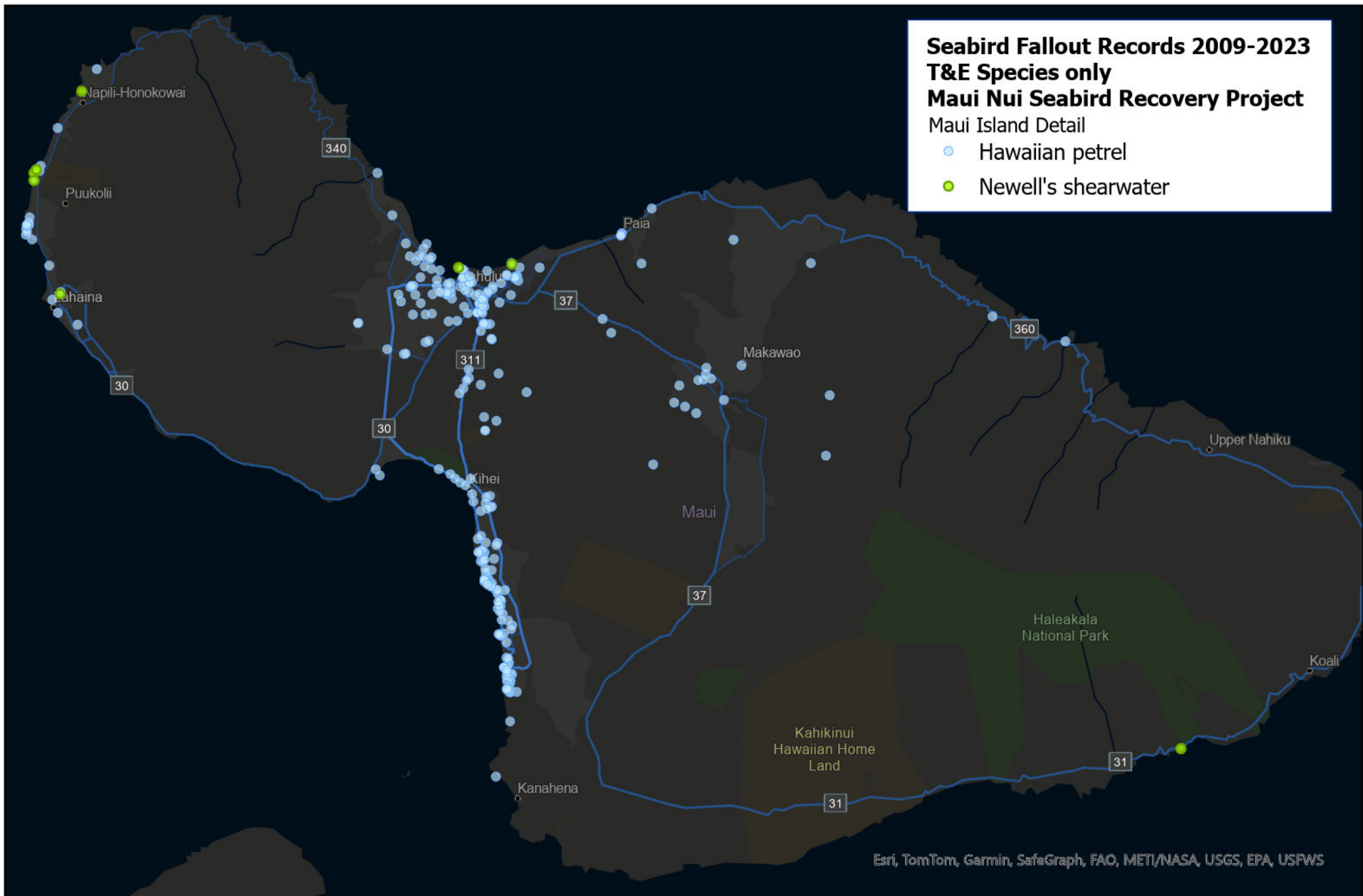
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<sup>7</sup> The address of American Bird Conservancy is 4249 Loudoun Avenue, P.O. Box 249, The Plains, VA 20198, and its telephone number is (540) 253-5780. The address of Conservation Council for Hawai'i is P.O. Box 2923, Honolulu, Hawai'i 96802, and its telephone number is (224) 338-6511. Please note that these organizations are represented by Earthjustice. Kindly contact David L. Henkin at [dhenkin@earthjustice.org](mailto:dhenkin@earthjustice.org) or (808) 599-2436 if you wish to discuss the contents of this letter.

## Documented Collisions with HECO Power Lines: 2010 to 2023

<u>Date</u>	<u>Species</u>	<u>Location</u>	<u>Lat</u>	<u>Long</u>
11/1/2010	Hawaiian Petrel	Kahului	20.874177	-156.463
10/10/2011	Hawaiian Petrel	Wailuku	20.88864	-156.492
10/22/2012	Hawaiian Petrel	Kahului	20.8838	-156.474
11/1/2012	Hawaiian Petrel	Kahului	20.87755	-156.465
10/18/2014	Hawaiian Petrel	Pulehu	20.794458	-156.36555
10/22/2014	Hawaiian Petrel	Kahului	20.88417	-156.474
6/12/2020	Hawaiian Petrel	Above Mānele Bay		
7/11/2021	Newell's Shearwater	Kipahulu	20.644725	-156.0877
7/24/2021	Hawaiian Petrel	Haleakalā	20.71595	-156.257
4/14/2022	Hawaiian Petrel	Kamehamenui	20.720274	-156.257263
4/14/2022	Hawaiian Petrel	Kamehamenui	20.717947	-156.257411
5/23/2022	Hawaiian Petrel	Launiupoko	20.84482	-156.63402
11/15/2022	Hawaiian Petrel	Kamehamenui	20.723653	-156.256746
11/21/2023	Hawaiian Petrel	Kamehamenui	20.72496	-156.25693

ATTACHMENT A



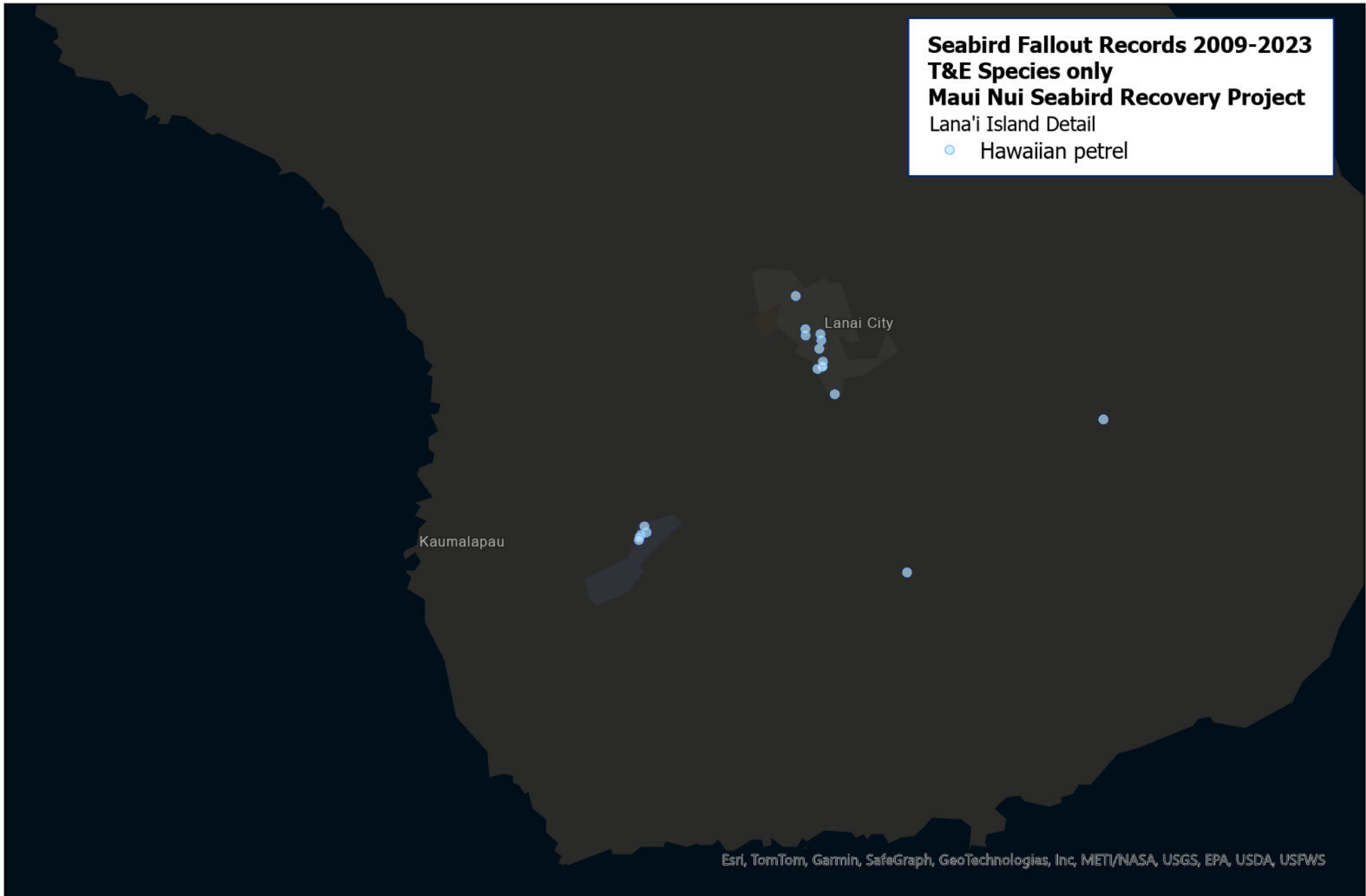
# ATTACHMENT B



**Seabird Fallout Records 2009-2023**  
**T&E Species only**  
**Maui Nui Seabird Recovery Project**

Lana'i Island Detail

- Hawaiian petrel

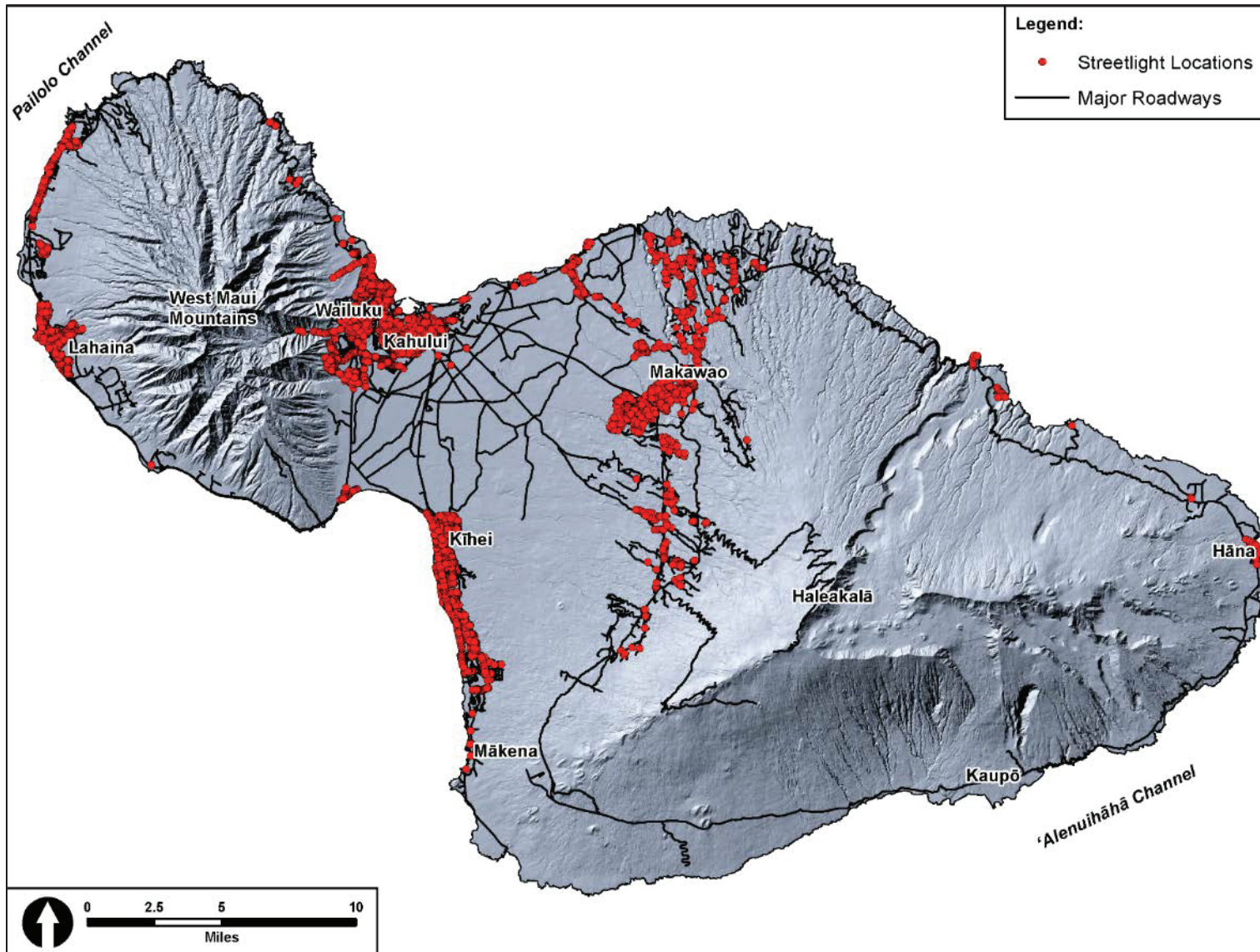


Esri, TomTom, Garmin, SafeGraph, GeoTechnologies, Inc, METI/NASA, USGS, EPA, USDA, USFWS

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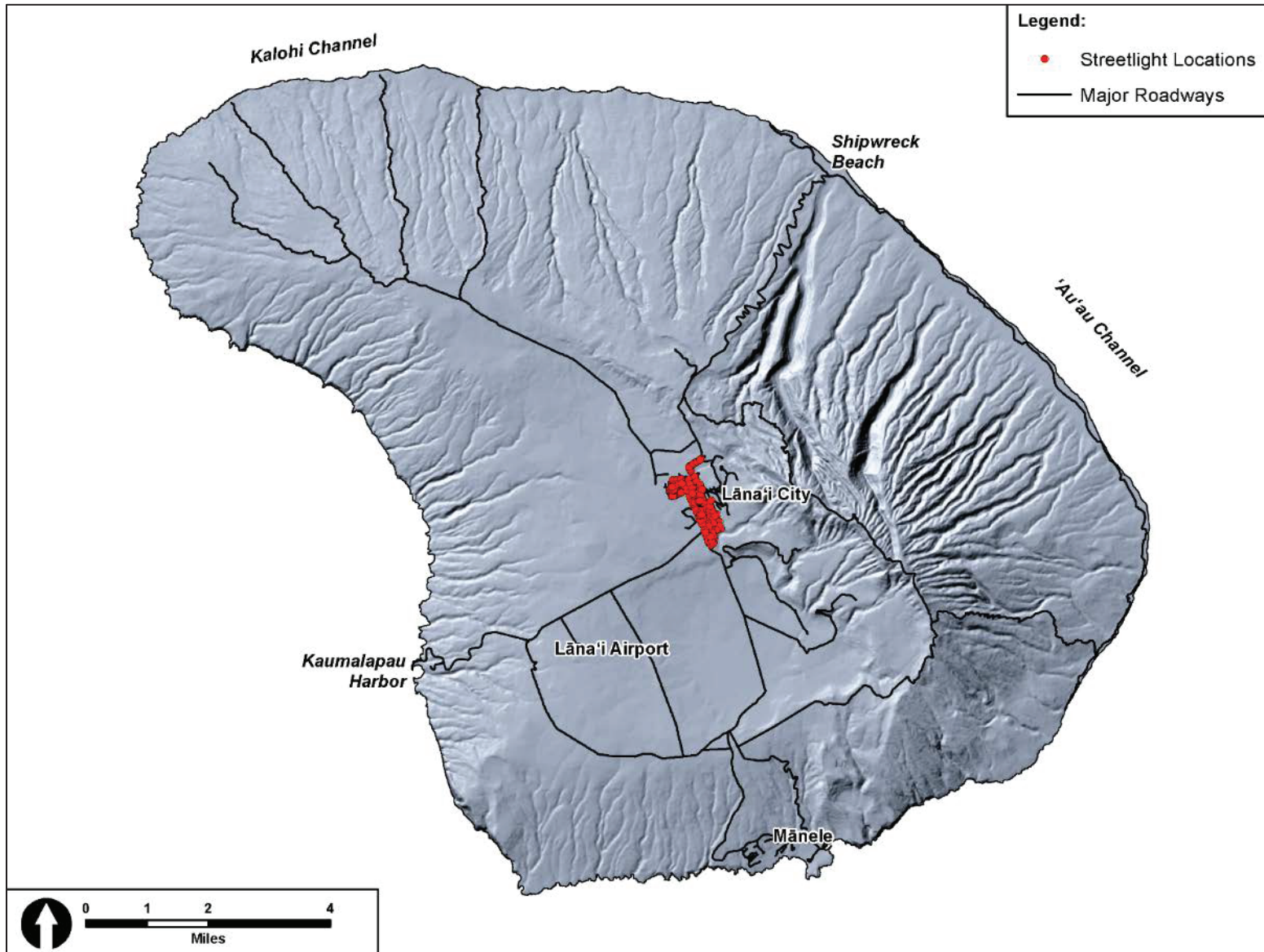
Kilometers

Figure 1.1 Locations of County-owned Streetlights on Island of Maui



Source: Planning Solutions, Inc. (2021)

**Figure 1.3** Locations of County-owned Streetlights on Island of Lāna‘i



Source: Planning Solutions, Inc. (2021)