

JAN 22 2008

A BILL FOR AN ACT

RELATING TO ENDANGERED SPECIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Section 195D-2, Hawaii Revised Statutes, is
2 amended by adding three new definitions to be appropriately
3 inserted and to read as follows:

4 "Certificate of inclusion" means a type of license that is
5 used to enroll interested landowners into a programmatic safe
6 harbor agreement or programmatic habitat conservation plan and
7 extends coverage of an incidental take license to those
8 landowners identified in the agreement or plan and who
9 subsequently enroll in the agreement or plan.

10 "Programmatic habitat conservation plan" means a habitat
11 conservation plan that covers multiple landowners or a class of
12 landowners and over a wide area or region.

13 "Programmatic safe harbor agreement" means a safe harbor
14 agreement that covers multiple landowners or a class of
15 landowners and over a wide area or region."

16 SECTION 2. Section 195D-2, Hawaii Revised Statutes, is
17 amended by amending the definition of "Landowner" to read as
18 follows:

1 ""Landowner" means an owner of land, an agent acting on
2 behalf of the landowner, or any estate or interest in that land
3 when acting with the consent of the fee owner. In the case of
4 government-owned lands, the consent shall be required of any
5 government department or agency to which management or control
6 of that land has been assigned."

7 SECTION 3. Section 195D-4, Hawaii Revised Statutes, is
8 amended by amending subsections (e) through (i) to read as
9 follows:

10 "(e) With respect to any threatened or endangered species
11 of aquatic life, wildlife, or land plant, it is unlawful, except
12 as provided in subsections (f), (g), and (j) for any person to:

- 13 (1) Export any such species from this State;
14 (2) Take any such species within this State;
15 (3) Possess, process, sell, offer for sale, deliver,
16 carry, transport, or ship, by any means whatsoever,
17 any such species;
18 (4) Violate any rule pertaining to the conservation of the
19 species listed pursuant to this section and adopted by
20 the department pursuant to this chapter; or
21 (5) Violate the terms of, or fail to fulfill the
22 obligations imposed and agreed to under, any license

1 issued under subsection (f), (g), or (j) any habitat
2 conservation plan or programmatic habitat conservation
3 plan authorized under section 195D-21, or any safe
4 harbor agreement or programmatic safe harbor agreement
5 authorized under section 195D-22.

6 (f) The department may issue temporary licenses, under
7 such terms and conditions as it may prescribe, to allow any act
8 otherwise prohibited by subsection (e), for scientific purposes
9 or to enhance the propagation or survival of the affected
10 species. Licenses issued as part of a programmatic safe harbor
11 or programmatic habitat conservation plan may also provide for
12 issuance of certificates of inclusion to extend the coverage of
13 the incidental take license to landowners enrolling in the
14 programmatic agreement or plan at a later date.

15 (g) After consultation with the endangered species
16 recovery committee, the board may issue a temporary license as a
17 part of a habitat conservation plan or programmatic habitat
18 conservation plan to allow a take otherwise prohibited by
19 subsection (e) if the take is incidental to, and not the purpose
20 of, the carrying out of an otherwise lawful activity; provided
21 that:

- 1 (1) The applicant, to the maximum extent practicable,
2 shall minimize and mitigate the impacts of the take;
- 3 (2) The applicant shall guarantee that adequate funding
4 for the plan will be provided;
- 5 (3) The applicant shall post a bond, provide an
6 irrevocable letter of credit, insurance, or surety
7 bond, or provide other similar financial tools,
8 including depositing a sum of money in the endangered
9 species trust fund created by section 195D-31, or
10 provide other means approved by the board, adequate to
11 ensure monitoring of the species by the State and to
12 ensure that the applicant takes all actions necessary
13 to minimize and mitigate the impacts of the take;
- 14 (4) The plan shall increase the likelihood that the
15 species will survive and recover;
- 16 (5) The plan takes into consideration the full range of
17 the species on the island so that cumulative impacts
18 associated with the take can be adequately assessed;
- 19 (6) The measures, if any, required under section 195D-
20 21(b) shall be met, and the department has received
21 any other assurances that may be required so that the
22 plan may be implemented;

1 (7) The activity, which is permitted and facilitated by
2 issuing the license to take a species, does not
3 involve the use of submerged lands, mining, or
4 blasting;

5 (8) The cumulative impact of the activity, which is
6 permitted and facilitated by the license, provides net
7 environmental benefits; and

8 (9) The take is not likely to cause the loss of genetic
9 representation of an affected population of any
10 endangered, threatened, proposed, or candidate plant
11 species.

12 Board approval shall require an affirmative vote of not less
13 than two-thirds of the authorized membership of the board after
14 holding a public hearing on the matter on the affected island.
15 The department shall notify the public of a proposed license
16 under this section through publication in the periodic bulletin
17 of the office of environmental quality control and make the
18 application and proposed license available for public review and
19 comment for not less than sixty days prior to approval.

20 (h) Licenses or certificates of inclusion issued pursuant
21 to this section may be suspended or revoked for due cause, and
22 if issued pursuant to a habitat conservation plan, programmatic

1 habitat conservation plan, safe harbor agreement, or
2 programmatic safe harbor agreement, shall run with the land for
3 the term agreed to in the plan or agreement and shall not be
4 assignable or transferable separate from the land. Any person
5 whose license or certificate of inclusion has been revoked shall
6 not be eligible to apply for another license or certificate of
7 inclusion until the expiration of two years from the date of
8 revocation.

9 (i) The department shall work cooperatively with federal
10 agencies in concurrently processing habitat conservation plans,
11 programmatic habitat conservation plans, safe harbor agreements,
12 [~~and~~] programmatic safe harbor agreements, incidental take
13 licenses, and certificates of inclusion pursuant to the
14 Endangered Species Act. After notice in the periodic bulletin
15 of the office of environmental quality control and a public
16 hearing on the islands affected, which shall be held jointly
17 with the federal agency, if feasible, whenever a landowner or an
18 agent acting on behalf of a landowner or landowners seeks both a
19 federal and a state safe harbor agreement, programmatic safe
20 harbor agreement, habitat conservation plan, programmatic
21 habitat conservation plan, or incidental take license, the
22 board, by a two-thirds majority vote, may approve the federal

1 agreement, plan, or license without requiring a separate state
2 agreement, plan, or license if the federal agreement, plan, or
3 license satisfies, or is amended to satisfy, all the criteria of
4 this chapter. All state agencies, to the extent feasible, shall
5 work cooperatively to process applications for habitat
6 conservation plans [~~and~~], programmatic habitat conservation
7 plans, safe harbor agreements, and programmatic safe harbor
8 agreements on a consolidated basis including concurrent
9 processing of any state land use permit application that may be
10 required pursuant to chapter 183C or 205, so as to minimize
11 procedural burdens upon the applicant."

12 SECTION 4. Section 195D-5, Hawaii Revised Statutes, is
13 amended by amending subsection (b) to read as follows:

14 "(b) The office of the governor shall review other
15 programs administered by the department and, to the extent
16 practicable, utilize such programs in furtherance of the
17 purposes of this chapter. The governor or the governor's
18 authorized representative shall also encourage all federal
19 agencies to utilize their authority in furtherance of the
20 purposes of this chapter. All other state agencies shall use
21 their authority in furtherance of the purposes of this chapter
22 by:

- 1 (1) Carrying out programs for the protection of threatened
2 and endangered species; and
- 3 (2) Taking such action as may be necessary to ensure that
4 actions authorized, funded, or carried out by them do
5 not jeopardize the continued existence of threatened
6 or endangered species.

7 In carrying out programs authorized by this chapter, the
8 department may enter into agreements with federal agencies,
9 counties, private landowners, and organizations for the
10 administration and management of any programmatic agreement,
11 area or facility established under section 195D-21 or 195D-22,
12 or public lands utilized for conserving, managing, enhancing, or
13 protecting indigenous aquatic life, wildlife, land plants,
14 threatened and endangered species, and their habitat."

15 SECTION 5. Section 195D-21, Hawaii Revised Statutes, is
16 amended to read as follows:

17 "**§195D-21 Habitat conservation plans[-] and programmatic**
18 **habitat conservation plans.** (a) The department may enter into
19 a planning process with any landowner, or agent acting on behalf
20 of multiple landowners, for the purpose of preparing and
21 implementing a habitat conservation plan[-] or programmatic
22 habitat conservation plan. An agreement may include multiple

1 landowners. Applications to enter into a planning process shall
2 identify:

- 3 (1) The geographic area encompassed by the plan;
- 4 (2) The ecosystems, natural communities, or habitat types
5 within the plan area that are the focus of the plan;
- 6 (3) The endangered, threatened, proposed, and candidate
7 species known or reasonably expected to occur in the
8 ecosystems, natural communities, or habitat types in
9 the plan area;
- 10 (4) The measures or actions to be undertaken to protect,
11 maintain, restore, or enhance those ecosystems,
12 natural communities, or habitat types within the plan
13 area;
- 14 (5) A schedule for implementation of the proposed measures
15 and actions; and
- 16 (6) An adequate funding source to ensure that the proposed
17 measures and actions are undertaken in accordance with
18 the schedule.

19 After a habitat conservation plan is prepared, the board shall
20 notify the public of the proposed habitat conservation plan or
21 programmatic habitat conservation plan through the periodic
22 bulletin of the office of environmental quality control and make

1 the proposed plan and the application available for public
2 review and comment not less than sixty days prior to approval.
3 The notice shall include, but not be limited to, identification
4 of the area encompassed by the plan, the proposed activity, and
5 the ecosystems, natural communities, and habitat types within
6 the plan area. The notice shall solicit public input and
7 relevant data.

8 (b) (1) Except as otherwise provided by law, the board, upon
9 recommendation from the department, in cooperation
10 with other state, federal, county, or private
11 organizations and landowners, after a public hearing
12 on the island affected, and upon an affirmative vote
13 of not less than two-thirds of its authorized
14 membership, may enter into a habitat conservation
15 plan, or programmatic habitat conservation plan, if it
16 determines that:

17 (A) The plan will further the purposes of this
18 chapter by protecting, maintaining, restoring, or
19 enhancing identified ecosystems, natural
20 communities, or habitat types upon which
21 endangered, threatened, proposed, or candidate

1 species depend within the area covered by the
2 plan;

3 (B) The plan will increase the likelihood of recovery
4 of the endangered or threatened species that are
5 the focus of the plan; and

6 (C) The plan satisfies all the requirements of this
7 chapter.

8 In the event the board votes to enter into a habitat
9 conservation plan or programmatic habitat conservation
10 plan for which the majority of the endangered species
11 recovery committee recommended disapproval, the board
12 may not enter into the habitat conservation plan or
13 programmatic habitat conservation plan unless the plan
14 is approved by a two-thirds majority vote of both
15 houses of the legislature. Habitat conservation plans
16 or programmatic habitat conservation plans may allow
17 conservation rental agreements, habitat banking, and
18 direct payments. Any habitat conservation plan or
19 programmatic habitat conservation plan approved
20 pursuant to this section shall be based on the best
21 available scientific and other reliable data available
22 at the time the plan is approved.

- 1 (2) Each habitat conservation plan or programmatic habitat
2 conservation plan shall:
- 3 (A) Identify the geographic area encompassed by the
4 plan; the ecosystems, natural communities, or
5 habitat types within the plan area that are the
6 focus of the plan; and the endangered,
7 threatened, proposed, and candidate species known
8 or reasonably expected to be present in those
9 ecosystems, natural communities, or habitat types
10 in the plan area;
- 11 (B) Describe the activities contemplated to be
12 undertaken within the plan area with sufficient
13 detail to allow the department to evaluate the
14 impact of the activities on the particular
15 ecosystems, natural communities, or habitat types
16 within the plan area that are the focus of the
17 plan;
- 18 (C) Identify the steps that will be taken to minimize
19 and mitigate all negative impacts, including
20 without limitation the impact of any authorized
21 incidental take, with consideration of the full
22 range of the species on the island so that

1 cumulative impacts associated with the take can
2 be adequately assessed; and the funding that will
3 be available to implement those steps;

4 (D) Identify those measures or actions to be
5 undertaken to protect, maintain, restore, or
6 enhance the ecosystems, natural communities, or
7 habitat types within the plan area; a schedule
8 for implementation of the measures or actions;
9 and an adequate funding source to ensure that the
10 actions or measures, including monitoring, are
11 undertaken in accordance with the schedule;

12 (E) Be consistent with the goals and objectives of
13 any approved recovery plan for any endangered
14 species or threatened species known or reasonably
15 expected to occur in the ecosystems, natural
16 communities, or habitat types in the plan area;

17 (F) Provide reasonable certainty that the ecosystems,
18 natural communities, or habitat types will be
19 maintained in the plan area, throughout the life
20 of the plan, in sufficient quality, distribution,
21 and extent to support within the plan area those
22 species typically associated with the ecosystems,

1 natural communities, or habitat types, including
2 any endangered, threatened, proposed, and
3 candidate species known or reasonably expected to
4 be present in the ecosystems, natural
5 communities, or habitat types within the plan
6 area;

7 (G) Contain objective, measurable goals, the
8 achievement of which will contribute
9 significantly to the protection, maintenance,
10 restoration, or enhancement of the ecosystems,
11 natural communities, or habitat types; time
12 frames within which the goals are to be achieved;
13 provisions for monitoring (such as field sampling
14 techniques), including periodic monitoring by
15 representatives of the department or the
16 endangered species recovery committee, or both;
17 and provisions for evaluating progress in
18 achieving the goals quantitatively and
19 qualitatively; and

20 (H) Provide for an adaptive management strategy that
21 specifies the actions to be taken periodically if
22 the plan is not achieving its goals.

1 (c) The board shall disapprove a habitat conservation plan
2 or programmatic habitat conservation plan if the board
3 determines, based upon the best scientific and other reliable
4 data available at the time its determination is made, that the
5 cumulative activities, if any, contemplated to be undertaken
6 within the areas covered by the plan are not environmentally
7 beneficial, or that implementation of the plan:

8 (1) Is likely to jeopardize the continued existence of any
9 endangered, threatened, proposed, or candidate species
10 identified in the plan area;

11 (2) Is likely to cause any native species not endangered
12 or threatened at the time of plan submission to become
13 threatened or endangered;

14 (3) Fails to meet the criteria of subsections (a) and (b);
15 or

16 (4) Fails to meet the criteria of section 195D-4(g).

17 The habitat conservation plan or programmatic habitat
18 conservation plan shall contain sufficient information for the
19 board to ascertain with reasonable certainty the likely effect
20 of the plan upon any endangered, threatened, proposed, or
21 candidate species in the plan area and throughout its habitat
22 range.

1 (d) Notwithstanding any other law to the contrary, the
2 board shall suspend or revoke the approval of any habitat
3 conservation plan or programmatic habitat conservation plan or
4 individual landowners' portion thereof approved under this
5 section if the board determines that:

6 (1) Any parties to the plan, or their successors, have
7 breached their obligations under the plan or under any
8 agreement implementing the plan and have failed to
9 cure the breach in a timely manner, and the effect of
10 the breach is to diminish the likelihood that the plan
11 will achieve its goals within the time frames or in
12 the manner set forth in the plan;

13 (2) The plan no longer has the funding source specified in
14 subsection (a) or another sufficient funding source to
15 ensure the measures or actions specified in subsection
16 (b) are undertaken in accordance with this section; or

17 (3) Continuation of the permitted activity would
18 appreciably reduce the likelihood of survival or
19 recovery of any threatened or endangered species in
20 the wild.

21 (e) The rights and obligations under any habitat
22 conservation plan or programmatic habitat conservation plan

1 shall run with the land and shall be recorded by the department
2 in the bureau of conveyances or the land court, as may be
3 appropriate.

4 (f) Participants in a habitat conservation plan, or agent
5 thereof, shall submit an annual report to the department within
6 ninety days of each fiscal year ending June 30, that includes a
7 description of activities and accomplishments, analysis of the
8 problems and issues encountered in meeting or failing to meet
9 the objectives set forth in the habitat conservation plan, areas
10 needing technical advice, status of funding, and plans and
11 management objectives for the next fiscal year, including any
12 proposed modifications thereto."

13 SECTION 6. Section 195D-22, Hawaii Revised Statutes, is
14 amended to read as follows:

15 "**§195D-22 Safe harbor agreements[-] and programmatic safe**
16 **harbor agreements.** (a) To encourage landowners to voluntarily
17 engage in efforts that benefit endangered, threatened, proposed,
18 and candidate species, except as otherwise provided by law, the
19 board, upon approval by not less than two-thirds of the board's
20 authorized membership, after a public hearing on the island
21 affected, may enter into a safe harbor agreement or programmatic
22 safe harbor agreement with one or more landowners to create,

1 restore, or improve habitats or to maintain currently unoccupied
2 habitats that threatened or endangered species can be reasonably
3 expected to use, if the board determines that the cumulative
4 activities, if any, contemplated to be undertaken within the
5 areas covered by the agreement are environmentally beneficial.
6 In the event the board votes to enter into a safe harbor
7 agreement or programmatic safe harbor agreement for which the
8 majority of the endangered species recovery committee
9 recommended disapproval, the board may not enter into the safe
10 harbor agreement or programmatic safe harbor agreement unless
11 the agreement is approved by a two-thirds majority vote of both
12 houses of the legislature. The board shall notify the public of
13 the proposed safe harbor agreement or programmatic safe harbor
14 agreement through the periodic bulletin of the office of
15 environmental quality control and make the proposed agreement
16 available for public review and comment not less than sixty days
17 prior to approval.

18 (b) A safe harbor agreement or programmatic safe harbor
19 agreement may authorize the take of an endangered, threatened,
20 proposed, or candidate species incidental to an otherwise lawful
21 activity in or affecting the created, restored, maintained, or
22 improved habitat; provided that based on the best scientific and

1 other reliable data available at the time the safe harbor
2 agreement or programmatic safe harbor agreement is approved, if
3 these data are applicable:

4 (1) The take would not jeopardize the continued existence
5 of any endangered, threatened, proposed, or candidate
6 species;

7 (2) The take would not reduce the population of
8 endangered, threatened, proposed, or candidate species
9 below the number found on the property prior to
10 entering into the agreement;

11 (3) The agreement proposes to create, restore, maintain,
12 or improve significant amounts of habitat for a
13 minimum of five years for private lands and for a
14 minimum of fifteen years for public lands;

15 (4) There is adequate funding for the agreement and the
16 source of that funding is identified;

17 (5) The safe harbor agreement or programmatic safe harbor
18 agreement increases the likelihood that the endangered
19 or threatened species for which a take is authorized
20 will recover;

1 (6) Any take authorized pursuant to this subsection shall
2 occur only in the habitat created, restored,
3 maintained, or improved; and

4 (7) The cumulative impact of the activity, which is
5 permitted and facilitated by the take, provides net
6 environmental benefits.

7 (c) Notwithstanding any other law to the contrary, the
8 board shall suspend or rescind any safe harbor agreement or
9 programmatic safe harbor agreement or individual landowners'
10 portion thereof approved under this section if the board
11 determines that:

12 (1) Any parties to the safe harbor agreement [~~7~~] or
13 programmatic safe harbor agreement, or their
14 successors, have breached their obligations under the
15 safe harbor agreement or programmatic safe harbor
16 agreement or under any other agreement implementing
17 the safe harbor agreement and have failed to cure the
18 breach in a timely manner, and the effect of the
19 breach is to diminish the likelihood that the
20 agreement will achieve its goals within the time
21 frames or in the manner set forth in the agreement;

1 (2) To the extent that funding is or will be required, the
2 funding source specified in subsection (b) no longer
3 exists and is not replaced by another sufficient
4 funding source to ensure that the measures or actions
5 specified in subsection (b) are undertaken in
6 accordance with this section; or

7 (3) Continuation of the permitted activity would
8 appreciably reduce the likelihood of survival or
9 recovery of any threatened or endangered species in
10 the wild.

11 (d) The rights and obligations under any safe harbor
12 agreement or programmatic safe harbor agreement shall run with
13 the land for the term agreed to in the agreement and shall be
14 recorded by the department in the bureau of conveyances or the
15 land court, as may be appropriate."

16 SECTION 7. This Act does not affect rights and duties that
17 matured, penalties that were incurred, and proceedings that were
18 begun, before its effective date.

19 SECTION 8. Statutory material to be repealed is bracketed
20 and stricken. New statutory material is underscored.

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22

S.B. NO. 3103

1 SECTION 9. This Act shall take effect upon its approval.

2

3

INTRODUCED BY:

~~_____~~
BY REQUEST

4

Report Title:

Endangered Species

Description:

Authorizes the development and use of programmatic safe harbor agreements and programmatic habitat conservation plans that cover multiple landowners or a class of landowners and over a wide area or region.

JUSTIFICATION SHEET

DEPARTMENT: Land and Natural Resources

TITLE: A BILL FOR AN ACT RELATING TO ENDANGERED SPECIES.

PURPOSE: To encourage greater participation in endangered species restoration by private landowners by authorizing the development and use of programmatic safe harbor agreements (SHAs) and programmatic habitat conservation plans (HCPs) and the tools needed to implement them.

MEANS: Amend sections 195D-2, 195D-4(e)-(i), 195D-5(b), 195D-21, and 195D-22, Hawaii Revised Statutes (HRS).

JUSTIFICATION: Federal resource conservation agencies and non-governmental conservation organizations have developed and begun to implement new tools for encouraging regional landscape-scale and multi-party initiatives in endangered species restoration. These entities are developing and promoting programmatic approaches that provide a framework for many landowners over large landscapes to enroll in programs that have been developed and permitted to encourage SHAs to enhance habitat for endangered species, or to develop HCPs to mitigate endangered species conflicts that are an issue on a regional basis. The Hawaii Endangered Species Law does not specifically recognize these tools and their continued and future use in Hawaii requires change in chapter 195D, HRS.

Programmatic approaches will streamline the time and regulatory burdens on interested participants that otherwise would need to develop their own duplicative agreements with identical terms and conditions. This change allows concurrent processing of federal and Hawaii SHAs and HCPs as per the

statutory intent to streamline processes. Providing standardized programs encourages many landowners to get involved because it gives them a finished product to evaluate and agree to and enter. It removes the uncertainty about final product and outcomes. It also enables the development of management actions that encompass scale and offer benefits that may otherwise not be possible with a single agreement.

Examples of agreements that are stalled pending this change are a statewide programmatic SHA with landowners enrolling in Farm Bill conservation programs to improve habitat for endangered waterbirds and a regional programmatic HCP on Kauai that would mitigate the take of endangered seabirds where they are vulnerable to utility lines and attraction of light. Without these tools, affected landowners will need to develop and process individual agreements and plans at considerable administrative burdens for both landowner and regulatory agencies.

Impact on the public: Streamlined processes for SHAs and HCPs reduce landowner's time and cost to participate in these programs and encourage more participation and recovery effort for endangered species.

Impact on the department and other agencies: Streamlined processes for SHAs and HCPs reduce agency time and cost to process agreements and plans and encourage more participation and recovery effort for endangered species.

GENERAL FUND: None.
OTHER FUNDS: None.
PPBS PROGRAM DESIGNATION: LNR 402.

OTHER AFFECTED
AGENCIES:

Department of Transportation and other state
agencies desiring to process programmatic
SHAs and HCPs.

EFFECTIVE DATE:

Upon approval.