

LINDA LINGLE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

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CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
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FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

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Department of Land and Natural Resources Testimony

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Testifier's Name/Position/Title: Paul Conry, Forestry and Wildlife Division Administrator

Committee the comments are directed to: HOUSE COMMITTEE ON WATER, LAND, &
OCEAN RESOURCES (WLO)

The Date & Time of Hearing: Monday, March 2, 2009
10:15 AM, Conference, Room 325

Measure Number: HB 1144 RELATING TO CONSERVATION OF THREATENED AND
ENDANGERED SPECIES

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**Testimony of
LAURA H. THIELEN
Chairperson**

**Before the House Committee on
WATER, LAND, AND OCEAN RESOURCES**

**Monday, March 2, 2009
10:15 AM
State Capitol, Conference Room 325**

**In consideration of
HOUSE BILL 1144
RELATING TO CONSERVATION OF THREATENED AND ENDANGERED SPECIES**

House Bill 1144 proposes 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. The Department of Land and Natural Resources (Department) strongly supports this Administration bill and welcomes it as a means to encourage greater endangered species restoration on private lands.

Federal resource conservation agencies are adopting large landscape scale ecosystem-based approaches to conserve endangered species and their habitats. The most recent example of this is the ecosystem-based approach used by the United States Fish and Wildlife Service to list 48 bird, plant, and insect species on Kauai as endangered species. By addressing the common threats that occur across ecosystems, the resource agencies can more effectively focus conservation efforts on restoring the functions of habitats shared by these species. This holistic approach will benefit the recovery of listed species and also all the species within the native ecological community. The new ecosystem-based approach to the listing and critical habitat designation process is designed to protect multiple species that occur in shared ecosystems and experience common threats.

Federal and non-governmental conservation organizations have developed and begun to implement new tools for encouraging regional ecosystem-based and multi-party initiatives in endangered species conservation. 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 multiple 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 mention all the tools and approaches now being used by the United States Fish and Wildlife

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Service under programmatic agreements. This change in chapter 195D, HRS, would make Hawaii's statute consistent with federal programs and encourage and facilitate future use in Hawaii.

Programmatic approaches will streamline the time and regulatory burdens on interested participants who otherwise would need to develop their own duplicative agreements with identical terms and conditions. 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 a landscape scale and offer benefits that may otherwise not be possible with a single landowner 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. A streamlined process for SHAs and HCPs reduces landowner's time and cost to participate in these programs, and encourages more participation and recovery effort for endangered species.

The Department strongly urges passage of this Administration bill.



**DEPARTMENT OF BUSINESS,
ECONOMIC DEVELOPMENT & TOURISM**

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Statement of
THEODORE E. LIU
Director
Department of Business, Economic Development, and Tourism
before the
HOUSE COMMITTEE ON
WATER, LAND USE, & OCEAN RESOURCES

Monday, March 2, 2009
10:00 a.m.
State Capitol, Conference Room 325

in consideration of

HB 1144
RELATING TO CONSERVATION OF THREATENED AND ENDANGERED SPECIES

Chair Ito, Vice Chair Har, and Members of the Committee.

The Department of Business, Economic Development, and Tourism (DBEDT) strongly supports HB 1144, which would allow private landowners and developers to use programmatic safe harbor agreements (SHAs) and programmatic habitat conservation plans (HCPs) to aid in the recovery of endangered species in Hawaii. Programmatic HCPs would allow much more efficient and effective recovery efforts for impacted species, while at the same time greatly reduce the amount of time and redundancy in HCP development for renewable energy projects that have similar impacts. By allowing developers of similar renewable technologies, or developers in the same areas to work together on a programmatic HCP, recovery efforts could be planned on an island, county, or state level for a particular species or group of species. Three direct benefits of this cooperative process would be (1) mitigation opportunities are planned and prioritized toward effective, concerted recovery of the species, rather than developed separately

and in isolation by individual applicants who do not have the knowledge or infrastructure to prioritize effective recovery efforts; (2) mitigation dollars are applied more effectively, by pooling applicant funds into larger, more effective projects, that are cost effective for the applicants, and provide larger benefit to the species; and (3) HCP development, review, monitoring, and administrative time and costs are greatly reduced by eliminating duplication of effort. Using a cooperative and streamlined process for SHAs and HCPs will reduce the developer's time and cost to participate in these programs, and encourages more participation and recovery effort for endangered species.

Thank you for the opportunity to offer these comments.



Sierra Club Hawai'i Chapter

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HOUSE COMMITTEE ON WATER, LAND, & OCEAN RESOURCES

March 2, 2009, 10:15 P.M.

(Testimony is 2 pages long)

TESTIMONY IN OPPOSITION TO HB 1144

Aloha Chair Ito and members of the Committee:

The Sierra Club, Hawai'i Chapter, with over 5500 dues paying members statewide, opposes HB 1144, setting up a procedure for the state and county to establish a programmatic Habitat Conservation Plan (HCP) or Safe Harbor Agreement (SHA) that landowners can join without having to go through the scrutiny of their particular project. We believe that this measure is unnecessary and endangered species issues cannot be resolved in this "one size fits all" manner.

By introducing the open-ended concept of "certificates of inclusion," the bill would allow the issuance of licenses to kill endangered and threatened species without adequate assurances upfront that Hawaii's imperiled animals and plants will not be pushed closer to extinction, much less that adequate measures will be in place to increase the likelihood the species will survive and recover, as Chapter 195D requires.

The existing law already allows multiple landowners to enter into a single HCP or SHA (HRS 195D-21(a), 195D-22(a)). Thus, if all the folks on Kaua'i currently "taking" (killing, harming, etc.) listed seabirds want to enter into an island-wide HCP, they are free to do so. The process would require the assessment of each landowner's specific situation to quantify the level of take for each and determine what types of minimization and mitigation are necessary to confer a net benefit on the species. One option for mitigation would be contribution to efforts to protect seabird colonies from predators (cats, rats, etc.), with all landowners pooling their monetary contributions into one pot.

The difference between the current situation and the programmatic HCP/SHA this bill proposes is that, under existing law, you would need to know which landowners would participate in the multiple landowner agreement. Then, based on detailed information about actual levels of take and offsetting minimization or mitigation, the proposed HCP/SHA could be assessed using real data to determine if it met the statutory standards. In contrast, the bill would allow incidental take to be authorized when you have no idea which/how many landowners would ultimately participate and what the total contribution to a joint effort ultimately would be. Thus, if you needed \$100,000 from each of 10 landowners to reach the \$1 million necessary for effective colony protection, under the existing law, you would grant the incidental take only after you

knew 10 landowners were on board. Under this bill, you might grant incidental take authority to the first 5 landowners who sign up, and never get all the funds needed to carry out mitigation. The species could die with no offsetting benefit.

In the case of endangered species, one size does not fit all. We respectfully ask that this Committee hold HB 1144.

Thank you for the opportunity to testify.



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REPRESENTATIVE KEN ITO, CHAIR
REPRESENTATIVE SHARON E. HAR, VICE-CHAIR
COMMITTEE ON WATER, LAND, & OCEAN RESOURCES

TESTIMONY RE: HOUSE BILL NO. 1144
RELATING TO ENDANGERED SPECIES

March 2, 2009, 10:15 a.m.
Conference Room 325

Good morning Chair Ito, Vice-Chair Har, and members of the Committee:

My name is David Henkin, and I am an attorney with Earthjustice. I appreciate the opportunity to offer this testimony regarding House Bill No. 1144. Earthjustice opposes this bill because it would allow the issuance of licenses to kill endangered and threatened species, without any reliable guarantee that Hawai'i's imperiled animals and plants will not be pushed closer to extinction, much less that adequate measures will be in place to increase the likelihood the species will survive and recover, as Chapter 195D requires. See HRS §§ 195D-4(g)(4).

The Administration's primary justification for this bill is to allow for programmatic approaches that provide a framework for many landowners over large landscapes to enroll in habitat conservation plans (HCPs) and safe harbor agreements (SHAs). If that is the case, there is no need to pass this law, as Chapter 195D as currently written already provides for this. See HRS §§ 195D-21(a), 195D-22(a).¹

Thus, if all the entities on Kaua'i that are currently harming or killing endangered and threatened seabirds want to enter into an island-wide HCP, the current version of Chapter 195D allows them to do so. The process would require the assessment of each entity's specific activities to quantify the level of its take and to determine what types of minimization and mitigation are necessary to ensure the likelihood of the species' recovery will increase. One option for mitigation would be contribution to efforts to protect seabird colonies from predators (i.e., cats, rats, etc.), with all participants pooling their monetary contributions into one pot.

The difference between what the law currently allows and what HB 1144 proposes is that, under existing law, before granting a license to kill or harm listed species, the Board of Land and Natural Resources must first know which entities are participating in the multiple-

¹ Likewise, while the Administration claims the changes are needed to allow for "all the tools and approaches now being used by the United States Fish and Wildlife Service" and to "make Hawai'i's statute consistent with federal programs," we are unaware of any inconsistency between Chapter 195D as currently written and the applicable federal regulations. Justification Sheet at 2; see also 50 C.F.R. §§ 17.22, 17.33.

landowner agreement and, based on detailed information about their actual levels of take and offsetting minimization and mitigation measures, assess the proposed HCP or SHA using real data to determine if it meets statutory standards. In contrast, HB 1144, by introducing the notion of "certificate of inclusion," arguably allows the Board to authorized the killing of endangered species when it has no idea which landowners would ultimately participate in the HCP or SHA, what the total level of "take" would be, and what the total contribution to a joint mitigation effort ultimately would be.

For example, if the Board determined it would need \$20,000 from each of fifty landowners to reach the \$1 million necessary for effective seabird colony protection, under the existing law, it could grant incidental take authorization only after it knew that all fifty landowners were on board. In contrast, HB 1144 arguably would allow the Board to grant incidental take authority to the first twenty landowners who sign up, allowing those landowners to start killing imperiled seabirds immediately, in the hope that others would later join in, but with no guarantee it would actually get all the funds needed to carry out essential mitigation.

HB 1144's approach to endangered species protection is akin to issuing a sub-prime mortgage in the hope that adequate funds to make the monthly payments will later materialize. To protect Hawai'i's natural heritage, the Board should not be allowed to issue licenses to kill endangered species unless there are adequate assurances up-front that necessary mitigation measures will be carried out.

For the foregoing reasons, we respectfully urge you to kill HB 1144. Thank you again for the opportunity to offer this testimony.

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House Committee on Water, Land, & Ocean Resources
Public Hearing: March 2, 2008
10:15 a.m., Room 325

HB 1144 Relating the Conservation of Threatened and Endangered Species

Testimony of
John T. Harrison, Ph.D.

HB 1144 would amend §195D-2, §195D-4, §195D-5, §195D-21, and §195d-22, HRS to authorize the development and use of programmatic safe harbor agreements and programmatic habitat conservation plans that cover multiple landowners or a class of landowners or extend over a wide area or region.

My remarks represent my personal opinion, and do not reflect the official position of any State or other government agency.

I am cautiously supportive of the provisions of HB 1144, to the degree that the advisory role of the Endangered Species Recovery Committee (ESRC) remains objective and ultimately influential in assuring a proper scientific basis for expected success of proposed management plans. As presently constituted, the ESRC is comprised of two field biologists with expertise in conservation biology, a representative of the Board of Land and Natural Resources (usually a senior biologist with the Division of Forestry and Wildlife), a representative of the U. S. Fish and Wildlife Service (FWS), a representative of the U. S. Geological Survey, Biological Resources Division (BRD), and a representative of the director of the University of Hawai'i Environmental Center. Since its inception in 1997, the ESRC has maintained an uncompromisingly objective and professional stance in its deliberations on the scientific and net conservation benefit merits of proposed habitat conservation plans and safe harbor agreements that have been the subject of the committee's deliberations and recommendations. As a charter member of the committee, I feel I may speak with some authority in this regard. My cautious support for the proposals of HB 1144 is tempered only by my experience in other government advisory roles of an undermining of the objective and rational functioning of appointive committees by political or other non-scientific allegiances of representative advisory committee members. To the extent that the ESRC remains untainted by such non-professional dilution, the proposed amendments of this measure will continue to genuinely serve the threatened and endangered species and the broader conservation interests of the State by expanding the potential participant pool involved in effective and closely monitored management activities.

Most people are aware that State and Federal laws prohibit the "take" of an endangered species, where "take" is broadly defined to include not only killing or injury, but most actions that would result in possible harm to the protected species. An unintended consequence of these sanctions is that private landowners wishing to develop or

otherwise derive economic benefit from their property may face legal obstacles in the event that an endangered species is found on their lands. Understandably, landowners have been reluctant to allow government scientists access to their lands for surveys to establish whether or not threatened or endangered species are present.

Because private lands comprise the majority of endangered species habitat, State and Federal conservation managers have long sought ways to encourage private landowners to become partners in the protection and enhancement of threatened and endangered (T&E) plants and animals. To this end, the State Legislature amended Hawai'i's Endangered Species Act (Chapter 195D, HRS) in 1997 to provide two types of cooperative agreement between landowners and the Department of Land and Natural Resources (DLNR): the Safe Harbor Agreement (SHA) and the Habitat Conservation Plan (HCP).

One of these two agreements must be in place before the DLNR will issue a permit allowing any take of a protected species incidental to the carrying out of an otherwise lawful activity. The major difference between an SHA and an HCP involves the amount of incidental take relative to the baseline population on the subject property prior to the proposed action. The SHA allows the landowner to undertake activities that will enhance the population above baseline levels, but she may subsequently be allowed to take protected species, as long as the population on her property does not fall below the original baseline. With an HCP, the landowner can reduce the population of the protected species below the baseline level. However, offsite habitat enhancement or other mitigating measures provided for in the plan must demonstrate an overall increase in species population, or a "net conservation benefit."

Thus, landowners who wish to conduct activities that are likely to increase the population of a T&E species on their land but are concerned about their liability for an incidental take in the future generally would pursue a Safe Harbor agreement. For example, restoring a native koa forest with the intent to harvest trees later on would fall into this category when there is an existing population of an endangered species prior to planting. With enhanced habitat, the species population is likely to increase, but the landowner may derive economic benefit from harvesting the grown trees, as long as the protected population does not fall below the original baseline.

Similarly, where a landowner wishes to pursue an activity that will reduce or eliminate an existing population of an endangered species, an HCP will allow the incidental take, as long as the landowner implements habitat improvements elsewhere which ensure that the overall protected population increases. Thus, grading or building on the site of a population of endangered plants will be allowed only if viable, enhanced populations of the same plants are successfully established in an offsite location through a mitigation activity with adequate funding to assure long-term success.

Specific legal provisions for an SHA may be found in HRS Chapter 195D-22, and the HCP details are in HRS Chapter 195D-21. Also, because T&E wildlife are protected by both State and Federal laws, SHA's and HCP's in Hawai'i involve cooperative

agreements between three parties: DLNR, the US Fish and Wildlife Service (USFWS), and the landowner. However, if only T&E plants are involved, there's no Federal involvement, since no Hawaiian plants are Federally listed.

Persons interested in pursuing an SHA or an HCP should note that the joint Federal/State approval process involves multiple stages of consultation and review by agency staff, the State Endangered Species Recovery Committee (ESRC), the Board of Land and Natural Resources (BLNR), and the public, including a public hearing on the Island affected. Additional information may be obtained through the DLNR Division of Forestry and Wildlife (DOFAW) or from the USFWS.

Thank you for the opportunity to provide comments, I hope that my description of the relevant statutory basis and conceptual framework for this important conservation endeavor helps in your understanding of the underlying issues.