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KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

Testimony of
DAWN N. S. CHANG
Chairperson

Before the House Committee on
WATER AND LAND

Thursday, February 8, 2024
9:00 AM

State Capitol, Conference Room 430 and Via Videoconference

In consideration of
HOUSE BILL 2472
RELATING TO CONSERVATION OF THREATENED SPECIES

House Bill 2472 proposes to authorize the Department of Land and Natural Resources (Department) to issue temporary threatened species licenses and draft administrative rules for the conservation of threatened species. **The Department supports this measure with amendments.**

The Department recognizes the need to issue temporary take licenses for threatened species to ensure state law operates in parallel and is consistent with federal law. This bill would authorize the Department to authorize non-lethal take activities otherwise prohibited in section 195D-4(e), Hawaii Revised Statutes (HRS), for threatened species by temporary license and outlined in administrative rules.

Under federal law, 16 U.S.C. § 1533(d), whenever a species is listed as threatened, the United States Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) are required to issue regulations as deemed necessary and advisable to provide for the conservation of the threatened species. These regulations may include prohibitions on take. In 1978, USFWS and NMFS extended take prohibitions to all threatened species by federal regulation called a "blanket 4(d) rule." This blanket 4(d) rule can be modified by a species-specific 4(d) rule authorizing take of a threatened species for conservation efforts that have long-term benefits to the threatened species and for low levels of take that do not contribute to the threats facing a species continued existence.

Under state law, threatened and endangered species are conferred identical protections. Currently, the Department may issue temporary licenses that allow any act otherwise prohibited by section 195D-4(e), HRS, for scientific purposes or to enhance the propagation or survival of a threatened or endangered species. In addition, the Board of Land and Natural Resources (Board) may (1) issue temporary licenses that allow take otherwise prohibited by section 195D-4(e), HRS, that is incidental and not the purpose of an otherwise lawful activity, as part of a habitat conservation plan, pursuant to section 195D-4(g), HRS; or (2) approve safe harbor agreements that authorize take that is incidental and not the purpose of an otherwise lawful activity of an endangered, threatened, proposed, or candidate species, pursuant to section 195D-22, HRS. With respect to threatened or endangered species, acts prohibited in section 195D-4(e), HRS, are export, take, possess, process, sell, offer for sale, deliver, carry, transport, ship, violate any rule pertaining to the conservation of such species adopted under chapter 195D, HRS, or violate the terms or obligations under a temporary license and habitat conservation plan or temporary license and safe harbor agreement.

This bill would authorize the Department to issue temporary licenses for non-lethal take of threatened species as outlined by administrative rules. These temporary licenses could only be issued for actions that do not interfere with the survival and recovery of the threatened species; and any take is non-lethal and is part of a conservation action, project, or program that confers a net recovery benefit.

The Department notes that the bill as drafted allows the Department to issue these temporary licenses. The Department proposes to amend page 7, line 14, to authorize the Board or authorized representative to issue temporary licenses.

The Department also notes that the bill as drafted allows the Department to issue administrative rules for the terms and conditions of these temporary licenses. The Department proposes to amend page 7, line 14, to include the requirement that the Department consult with the Endangered Species Recovery Committee before promulgating these administrative rules.

The Department proposes to remove the condition that the activity does not reduce survival and reproductive success of the species in page 7, lines 21 and 22 because it is duplicative.

The Department suggests amending the bill to provide the Department authority to issue temporary threatened species licenses and draft administrative rules for the conservation of threatened species:

SECTION 2. Section 195D-4, Hawaii Revised Statutes, is amended to read as follows:

"§195D-4 Endangered species and threatened species.

(h) Whenever any species is listed as a threatened species pursuant to subsections (a), (b), or (c), the department may adopt administrative rules, pursuant to chapter 91, as it deems

necessary and advisable to provide for the conservation of such species, after consultation with the endangered species recovery committee. The [department] board or authorized representative may issue a temporary license under such terms and conditions as determined by administrative rule, to allow any act otherwise prohibited by subsection (e), for threatened species as long as such act does not interfere with the survival and recovery of such species; and any take authorized under this section is non-lethal and is part of a conservation action, project, or program that confers a net recovery benefit[; ~~or does not reduce survival and reproductive success of the species~~]. The rules may vary from county to county.

Mahalo for the opportunity to testify on this measure.



REPRESENTATIVE LINDA ICHIYAMA, CHAIR
REPRESENTATIVE MAHINA POEPOE, VICE-CHAIR
HOUSE COMMITTEE ON WATER AND LAND

TESTIMONY IN STRONG OPPOSITION TO HOUSE BILL NO. 2472
RELATING TO THE CONSERVATION OF THREATENED SPECIES

February 8, 2024, 9:00 a.m.

Good morning, Chair Ichiyama, Vice-Chair Poepoe, and members of the committee:

My name is David Lane Henkin, and I am an attorney with Earthjustice. We **strongly oppose House Bill 2472**, which would strip critical protections from Hawai'i's threatened species, contravening the Legislature's goal to "insure the continued perpetuation of indigenous aquatic life, wildlife, and land plants." HRS § 195D-1. This bill would harm such iconic native species as the honu (Green sea turtle), Manu-o-Kū (Fairy Tern), 'āhinahina (Haleakalā silversword), and 'a'o (Newell's Shearwater), all of which are listed as "threatened" under state law.

Under current Hawai'i law, all imperiled native species—whether endangered or threatened—automatically enjoy the same protections against activities that could kill, injure, harass, or otherwise harm them. HRS § 195D-4(e); *see also id.* § 195D-2 (defining "take"). The Legislature has insisted that, if someone wants permission to kill or harm a threatened species, they must go through the same process to secure an incidental take license as someone whose activities kill or harm an endangered species. *Id.* § 195D-4(g). Among other things, the applicant must commit to a habitat conservation plan that "shall **increase the likelihood** that the species will survive and recover" *id.* § 195D-4(g)(4) (emphasis added), and the authorized activity must "provide[] **net environmental benefits.**" *Id.* § 195D-4(g)(8) (emphasis added). To provide additional safeguards, the Legislature has prohibited the Board of Land and Natural Resources from approving any plan and issuing any incidental take license unless the experts on the Endangered Species Recovery Committee make the scientific determination that the plan complies with Chapter 195D's species conservation mandates. *Id.* § 195D-21(b).

HB 2472 would strip these vital protections from native species that are threatened with extinction. As the Justification Sheet candidly admits, the bill would give the Department of Land and Natural Resources (DLNR) the power to "allow certain acts for threatened species that would not be allowed for endangered species." The bill would do this in several ways:

1. DLNR could override the Legislature's judgment that all threatened species need the highest level of protection. At the time a species is listed as threatened, DLNR would have total discretion to issue an administrative rule that gives **blanket permission to carry out activities that kill and harm that threatened species**, without the need for an

incidental take license, even though the same activities would be illegal without a license if the species had been listed as endangered.

2. Even where the prohibition on killing or harming threatened species would otherwise apply, **the bill would give DLNR the power to override the experts on the Endangered Species Recovery Committee** and issue an incidental take license by administrative rule, even when the experts on the Endangered Species Recovery Committee have concluded that the proposed activity would hasten the species' extinction.
3. No longer would an applicant for an incidental take license be required to ensure that prospects for a threatened species' survival and recovery would increase or that net environmental benefits would be provided.

There is no justification for removing these critical protections from threatened species, as HB 2472 proposes. The preamble's claim that the bill is needed to ensure consistency with federal law is false. The federal Endangered Species Act expressly provides that Hawai'i law "may be more restrictive than" the federal law. 16 U.S.C. § 1535(f). For decades, Chapter 195D has automatically extended the same protections to both endangered and threatened species, and there has been no conflict with federal law.

Nor is this bill needed for DLNR to authorize non-lethal take as "part of a conservation action, project, or program that confers a net recovery benefit," the only provision in HB 2472 that arguably promotes species conservation. DLNR already has that authority under HRS § 195D-4(f), so **that aspect of this bill is completely redundant with existing law.**

Because HB 2472 would subvert Chapter 195D's command to "take positive actions to enhance [threatened species'] prospects for survival," HRS § 195D-1, we urge the Committees **to hold this bill.**

Mahalo for the opportunity to offer this testimony.



SIERRA CLUB OF HAWAI'I

HOUSE COMMITTEE ON WATER & LAND

February 8, 2023

9:00 AM

Conference Room 325

In **OPPOSITION** to **HB2472**: RELATING TO THE CONSERVATION OF THREATENED SPECIES

Aloha Chair Ichiyama, Vice Chair Poepoe, and Members of the Committee,

On behalf of our 20,000 members and supporters, the Sierra Club of Hawai'i **OPPOSES HB2472**, which would roll back critical protections for native and endemic species threatened with extirpation or extinction.

Hawai'i's native and endemic species not only represent the unique ecological and cultural foundation that has provided for life on these islands since time immemorial, but define the very identity of this incredibly unique and fragile place we call home. When we lose our native and endemic species to extinction we are not just witnessing the human-driven end to millions of years of evolution - we are watching the very essence and soul of Hawai'i nei fade away, forever.

Unfortunately, climate destabilization, habitat disruption, invasive species, and the pressures of an ever-growing human population are rendering our native and endemic species and their habitats ever more vulnerable to potentially irreversible loss. It is accordingly incumbent on us to double down on our efforts to recover and protect our remaining native species and ecosystems, before even more species are lost on our generation's watch.

This measure, however, would do the opposite, and risk the rolling back of existing protections for Hawai'i's threatened native species. Carefully developed habitat conservation plans (HCPs) that *increase* the likelihood of such species' recovery would no longer be required from those whose activities may inadvertently harm threatened species, and who seek to protect themselves with an incidental take permit. Current incidental take permit requirements, including consultation with the Endangered Species Recovery Committee (ESRC) and bonds and other mechanisms to ensure compliance and appropriate standards of care, would also be excused under this proposal.

In other words, this measure would do away with all HCP requirements, as well as all additional incidental take permit conditions embodied in statute, and provide legal protection for activities that could risk harm or death to threatened specimens based on a simple and inherently unreliable finding that such activities would "not interfere with the survival and recovery of such species," **OR** that they do "not reduce survival or reproductive success of the species."



SIERRA CLUB OF HAWAI'I

The Sierra Club does recognize the Department's proposed amendments to allow the ESRC to provide advice on rules for the issuance of watered-down incidental take permits for threatened species; however, the ESRC cannot and should not be expected to come up with categorical rule provisions that somehow take into account the myriad and granular considerations needed to minimize the risk of harm to threatened species, especially given the wide and unpredictable range of potential permit applicants and permitted actions. Moreover, again, the other assurances provided for under an HCP, and the other critical statutory conditions for an incidental take permit, would also still no longer apply under the Department's proposed amendments.

Finally, the Sierra Club notes that, should the Department truly wish to allow non-lethal "takings" for the purpose of enhancing the survival of our threatened species, such authority already exists under HRS §195D-4(f).

Accordingly, the Sierra Club of Hawai'i respectfully but strongly urges the Committee to **HOLD** HB2472. Mahalo nui for the opportunity to testify.