

# S.B. NO. 3162

JAN 24 2024

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## A BILL FOR AN ACT

RELATING TO CONSERVATION MITIGATION PROGRAMS.

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

1           SECTION 1. The legislature finds that terrestrial  
2 conservation bank and conservation in-lieu fee mitigation  
3 programs restore, create, enhance, or preserve terrestrial  
4 habitats for threatened, endangered, candidate, proposed, and  
5 indigenous species. The federal government in conjunction with  
6 as many as fourteen other states have developed successful  
7 conservation bank and conservation in-lieu fee mitigation  
8 programs. Conservation bank and conservation in-lieu fee  
9 mitigation programs would serve as mechanisms to enhance the  
10 recovery and survival of threatened and endangered species and  
11 enhance conservation efforts for candidate, proposed, and  
12 indigenous species and their habitat.

13           The purpose of this Act is to authorize the department of  
14 land and natural resources to operate and approve conservation  
15 bank and conservation in-lieu fee mitigation programs where a  
16 person or entity is required to provide compensatory mitigation  
17 as part of an approved habitat conservation plan and incidental  
18 take license for (1) unavoidable impacts to threatened,

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1 endangered, candidate, or proposed species; (2) prospectively  
2 for damages to threatened, endangered, candidate, proposed, or  
3 indigenous species and their habitat; and (3) for past damages  
4 to threatened, endangered, candidate, proposed, or indigenous  
5 species and their habitat.

6 SECTION 2. Chapter 195D, Hawaii Revised Statutes, is  
7 amended by adding a new part to be appropriately designated and  
8 to read as follows:

9 "PART . CONSERVATION BANK AND CONSERVATION IN-LIEU FEE  
10 MITIGATION PROGRAMS

11 §195D- Definitions. As used in this part:

12 "Compensatory mitigation" means actions taken to fulfill,  
13 in whole or in part, mitigation requirements under state or  
14 federal law or a court mandate.

15 "Conservation bank" means a type of compensatory mitigation  
16 where a site or sites established under a site protection  
17 instrument is conserved and managed to provide ecological  
18 functions and services expressed as credits for threatened,  
19 endangered, candidate, proposed, or indigenous species. A  
20 conservation bank shall be established and operated under a  
21 conservation bank instrument.

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1 "Conservation bank instrument" means an agreement  
2 establishing the conservation bank and describing the terms and  
3 conditions of operation.

4 "Credit" means a value based on defined units representing  
5 the accrual or attainment of ecological functions or services at  
6 the conservation bank and released as the conservation bank  
7 meets performance criteria.

8 "Conservation in-lieu fee mitigation program" means a type  
9 of compensatory mitigation where an incidental take licensee or  
10 person or entity required to provide mitigation, pays a fee to  
11 the department or nonprofit approved sponsor to satisfy  
12 mitigation requirements in an approved habitat conservation  
13 plan. The fee charged by a sponsor represents the expected cost  
14 of either increasing the likelihood that a threatened or  
15 endangered species will survive and recover as a result of the  
16 incidental take licensee's project, or enhancing the  
17 conservation of candidate, proposed, or indigenous species and  
18 their habitats.

19 "Site protection instrument" means an interest in real  
20 property that protects a conservation bank or conservation in-  
21 lieu fee mitigation site in perpetuity, such as a conservation  
22 easement, deed restriction, condition, or covenant.

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1 "Sponsor" means a qualified person or entity responsible  
2 for establishing or operating a conservation bank or  
3 conservation in-lieu fee mitigation.

4 §195D- Conservation banking and conservation in-lieu fee  
5 mitigation programs. (a) The department may require a person  
6 or entity complete compensatory mitigation to offset  
7 environmental loss caused by prospective or past damages to  
8 threatened, endangered, candidate, proposed, or indigenous  
9 species and their habitat.

10 (b) The department may operate or approve conservation  
11 bank and conservation in-lieu fee mitigation programs for the  
12 purpose of restoring, creating, enhancing, preserving, or any  
13 combination thereof threatened, endangered, candidate, proposed,  
14 or indigenous species and their habitats where a person or  
15 entity is required to provide compensatory mitigation either:

16 (1) For prospective damages to threatened, endangered,  
17 candidate, proposed, or indigenous species and their  
18 habitats where the use of conservation banking or  
19 conservation in-lieu fee mitigation is approved by the  
20 agency requiring mitigation;

21 (2) For past damages to threatened, endangered, candidate,  
22 proposed, or indigenous species and their habitats

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1           where the use of conservation banking or conservation  
2           in-lieu fee mitigation is approved by the agency  
3           requiring mitigation; or

4           (3) As off-site mitigation to offset adverse impacts to a  
5           threatened, endangered, candidate, or proposed species  
6           as part of an approved habitat conservation plan and  
7           incidental take license.

8           (b) Conservation banks shall be established under a  
9           conservation bank instrument on public or private lands,  
10          protected in perpetuity under a site protection instrument, and  
11          approved by the board.

12          (c) Conservation in-lieu fee mitigation programs shall be  
13          established and operated under a legal contract, protected in  
14          perpetuity under a site protection instrument, and approved by  
15          the board.

16          (d) Sponsors may sell or transfer credits to persons  
17          required to provide compensatory mitigation as provided in  
18          subsections (a) and (b).

19          (e) The department may collect fees or payment for costs  
20          incurred including, but not limited to, costs incurred by the  
21          department during its rulemaking process; and during the  
22          approval, establishment, monitoring, and oversight of

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1 conservation bank and conservation in-lieu fee mitigation  
2 programs.

3 (f) The department shall work cooperatively with federal  
4 agencies in concurrently processing mitigation requirements  
5 pursuant to federal law.

6 (g) Provisions in this section shall not apply to aquatic  
7 species and their habitat.

8 §195D- Conservation bank and conservation in-lieu fee  
9 mitigation programs; rules. The department may adopt rules  
10 pursuant to chapter 91 necessary for the purpose of this part."

11 SECTION 3. This Act shall take effect upon its approval.

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INTRODUCED BY: 

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BY REQUEST

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**Report Title:**

Conservation Banks; Conservation In-Lieu Fee Mitigation

**Description:**

Authorizes the Department of Land and Natural Resources to operate and approve conservation bank and conservation in-lieu fee mitigation programs.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

JUSTIFICATION SHEET

DEPARTMENT: Land and Natural Resources

TITLE: A BILL FOR AN ACT RELATING TO CONSERVATION MITIGATION PROGRAMS.

PURPOSE: To authorize the Department to operate and approve conservation bank and conservation in-lieu fee mitigation programs.

MEANS: Add a new part to chapter 195D, Hawaii Revised Statutes (HRS).

JUSTIFICATION: The Department's Division of Forestry and Wildlife (Division) requests authority to operate and approve operation of two types of compensatory mitigation programs - conservation bank and conservation in-lieu fee mitigation. The goals of conservation bank and conservation in-lieu fee mitigation programs would be to provide greater benefit to the survival and recovery of threatened or endangered species and to the conservation of candidate, proposed, or indigenous species than establishing individual mitigation projects because the conservation bank and conservation in-lieu fee mitigation sites would be larger in scale and more funds would be available to sponsors for habitat restoration activities.

This bill would apply to scenarios where (1) the take of a threatened, endangered, candidate, or proposed species is unavoidable and due to an action that is incidental and otherwise lawful activity; or (2) take of threatened, endangered, candidate, proposed, or indigenous species is the result of prospective or past damages to wildlife or their habitat. The Board of Land and Natural Resources (Board) issues incidental take licenses, as part of approved habitat conservation plans, for the incidental take of threatened, endangered, candidate, or proposed species due to the operation of many different types of



projects including energy projects, transportation projects, and hotels. Habitat conservation plans require mitigation where there are unavoidable impacts to threatened, endangered, candidate, or proposed species. Pursuant to sections 195D-4 and 195D-21, HRS, incidental take licensees who have approved habitat conservation plans, must identify the steps to minimize and mitigate all negative impacts, including the impact of incidental take on threatened or endangered species, in their habitat conservation plan. The Division usually works with incidental take licensees to come up with individual species- and site- specific projects that fulfill this requirement. Currently, there is no mitigation requirement for anthropogenic actions that result in prospective or past damages to threatened, endangered, candidate, proposed, or indigenous species or their habitat, with exception to aquatic species or their habitat pursuant to sections 187A-41 and 187A-42, HRS.

The bill authorizes the Department to operate and approve conservation bank and conservation in-lieu fee mitigation programs for the purpose of restoring, creating, enhancing, and/or preserving threatened, endangered, candidate, proposed, or indigenous species and their habitats, excluding aquatic species and their habitats. Conservation banks may be established and operated on public or private land, for perpetuity, under a site protection instrument and conservation bank instrument, after approval from the Board. Conservation in-lieu fee mitigation programs shall be operated under a legal contract, protected in perpetuity under a site protection instrument, and approved by the Board. This bill also authorizes the Department to adopt administrative rules related to conservation bank and

conservation in-lieu fee mitigation programs.

This bill is similar in scope to the United States Fish and Wildlife Service (USFWS) policy for conservation banks authorized under Section 10 of the federal Endangered Species Act (16 U.S.C. §1539). Section 10 of the Endangered Species Act provides the USFWS with authority to issue incidental take permits for threatened, endangered, candidate, or proposed species. Incidental take permits require permittees to conduct off-site mitigation for unavoidable impacts to the threatened, endangered, candidate, or proposed species and their habitat. The USFWS has interpreted conservation banks to be a form of off-site mitigation.

The USFWS has established legal contracts with other entities to operate in-lieu fee programs to offset incidental take of eagles during powerline retrofitting under the Bald and Golden Eagle Protection Act (16 U.S.C. §668), and incidental take of Indiana Bat and Northern Long-Eared Bat under the Endangered Species Act (16 U.S.C. §1636).

Impact on the public: This bill would provide incidental take licensees and other persons or entities required by an agency to provide mitigation with another option for compensatory mitigation.

Impact on the department and other agencies: This bill would also provide flexibility to prescribe administrative rules that govern the operation of conservation bank and conservation in-lieu fee programs.

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

OTHER AFFECTED  
AGENCIES:                   None.

EFFECTIVE DATE:           Upon approval.