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KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

**Testimony of**  
**DAWN N. S. CHANG**  
**Chairperson**

**Before the House Committee on**  
**WATER & LAND**

**Tuesday, January 30, 2024**  
**9:00 AM**

**State Capitol, Conference Room 430 and Via Videoconference**

**In consideration of**  
**HOUSE BILL 2473**  
**RELATING TO CONSERVATION MITIGATION PROGRAMS**

House Bill 2473 proposes to authorize the Department of Land and Natural Resources (Department) to operate and approve conservation bank and conservation in-lieu fee mitigation programs. **The Department supports this measure with amendments.**

The Department recognizes the need to establish and operate conservation banks for compensatory mitigation to mitigate the impacts to threatened and endangered species from approved incidental take associated with Habitat Conservation Plans and Incidental Take Licenses. The Department makes recommendations to the Board of Land and Natural Resources on whether to issue temporary Incidental Take Licenses for threatened or endangered species as part of Habitat Conservation Plans, where incidental take of a threatened or endangered species may occur while a licensee is carrying out an otherwise lawful activity. Habitat Conservation Plans must include provisions to minimize and mitigate the impacts of take to the maximum extent practicable. One method to provide mitigation is by contributing to a conservation bank. A conservation bank is a site established under a legal instrument for the purposes of conserving and managing to provide ecological functions and services expressed as credits for listed species. With compensatory mitigation, multiple Incidental Take Licensees would be able to pay for listed-species conservation activities within a conservation bank.

Under federal law, conservation banks are established under a conservation bank instrument that protects the land from development in perpetuity, such as a conservation easement or other method approved by the United States Fish and Wildlife Service. Federal conservation banks

are conserved and managed to provide ecological functions and services expressed as credits for a specific threatened or endangered species, candidate species, or other at-risk species.

The Department notes that this bill, as drafted, could authorize incidental take of threatened or endangered species without requiring a Habitat Conservation Plan where prospective damages to threatened or endangered species are expected to occur. The Department strongly recommends striking page 4, lines 16-17, of this bill that applies to threatened, endangered, candidate, or proposed species to avoid any conflicts with existing law for Habitat Conservation Plans. The Department also recommends the Endangered Species Recovery Committee be consulted with respect to establishing and reviewing conservation mitigation banks and conservation in-lieu fee programs.

**Commented [RK1]:** I cannot find HRS section 195-34 in existing statutes. Moreover, this bill creates a new part of 195D, and we cannot assume the Revisor of Statutes will assign 195D-34 as the start of the new Part III. *Instead, insert reference to parts of the bill that you intend to affect.*

The Department therefore offers the following amendments to page 4, line 4, through page 6, line 7, of this bill:

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

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

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

(2) For past damages to threatened, endangered, candidate, proposed, or indigenous species and their habitats where the use of conservation banking or conservation in-lieu fee mitigation is approved by the agency requiring mitigation; or

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

~~[(b)]~~ (c) Conservation banks shall be established under a conservation bank instrument on public or private lands, protected in perpetuity under a site protection instrument, and approved by the board. The Endangered Species Recovery Committee shall review and recommend to the department all conservation banks before transfer or sale of credits.

~~[(e)]~~ (d) Conservation in-lieu fee mitigation programs shall be established and operated under a legal contract, protected in perpetuity under a site protection instrument, and approved by the board. The Endangered Species Recovery Committee shall review and recommend to the department all conservation in-lieu fee mitigation programs before transfer or sale of credits.

~~[(d)]~~ (e) Sponsors may sell or transfer credits to persons required to provide compensatory mitigation as provided in subsections (a) and (b).

~~[(e)]~~ (f) The department may collect fees or payment for costs incurred including, but not limited to, costs incurred by the department during its rulemaking process; and during the approval, establishment, monitoring, and oversight of conservation bank and conservation in-lieu fee mitigation programs.

~~[(f)]~~ (g) The department shall work cooperatively with federal agencies in concurrently processing mitigation requirements pursuant to federal law.

~~[(g)]~~ (h) Provisions in this section shall not apply to aquatic species and their habitat.

Mahalo for the opportunity to provide testimony in support of this measure.



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

TESTIMONY IN OPPOSITION TO HOUSE BILL NO. 2473  
RELATING TO CONSERVATION MITIGATION PROGRAMS

January 30, 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 appreciate the opportunity to testify regarding House Bill 2473, which would authorize the Department of Land and Natural Resources (DLNR) to operate and approve conservation bank and conservation in-lieu fee mitigation programs for, among other things, “off-site mitigation to offset adverse impacts to a threatened, endangered, candidate, or proposed species as part of an approved habitat conservation plan and incidental take license.” HB 2473 at 5.

We have no objection to the bill’s basic concept of establishing a mechanism to pool resources to allow for larger scale habitat restoration projects for Hawai’i’s imperiled species. Whenever the Legislature adopts policies related to endangered and threatened species, however, the devil is in the details. HB 2473 lacks critical details, which could undermine vital protections in existing law for Hawai’i’s unique and irreplaceable native species in situations where entities seek an incidental take license under HRS § 195D-4(g) to kill, injure, or otherwise “take” endangered and threatened species. *See* HRS § 195D-2 (defining “take”).

Our main concerns with HB 2473 are:

1. The bill does not provide for the experts on the Endangered Species Recovery Committee (ESRC) to review and approve any use of conservation credits to mitigate take for purposes of an incidental take license (ITL) and habitat conservation plan (HCP). When the Legislature amended HRS chapter 195D to authorize the incidental taking of imperiled species, it insisted that the ESRC must sign off on all ITLs and HCPs to ensure that they are based on sound science and will confer the promised conservation benefits. HRS § 195D-25(b). The Legislature further provided that, even if the DLNR recommends approval of an ITL or HCP, the experts on the ESRC have the final say; the ESRC’s disapproval can be overridden by only a supermajority of the Legislature. HRS § 195D-21(b)(1). HB 2473’s vague language authorizing DLNR to “approve conservation bank and conservation in-lieu fee mitigation programs” where an entity must “provide compensatory mitigation ... as part of an approved habitat conservation plan and incidental take license” improperly opens the door to arguments

that DLNR can unilaterally make the call that proposed mitigation using credits is adequate, even if the experts on the ESRC conclude that the proposal would be disastrous.

2. HB 2473 fails to specify what happens if someone buys credits from a conservation bank to mitigate for the harm they inflict on imperiled species, and it then turns out that the anticipated benefits from the conservation project are not realized (*e.g.*, because of climate change or a natural disaster, or because the assumptions on which the anticipated benefits were based turn out to be wrong). Under current law, an HCP must “[p]rovide for an adaptive management strategy that specifies the actions to be taken periodically if the plan is not achieving its goals.” HRS § 195D-21(b)(2)(I). Moreover, the Board of Land and Natural Resources must suspend or revoke an HCP if “[c]ontinuation of the permitted activity would appreciably reduce the likelihood of survival or recovery of any threatened or endangered species in the wild.” HRS § 195D-21(c)(3). In other words, the Legislature insisted that the applicant for an incidental take license—not the imperiled species—is on the hook if things do not go according to plan. Under HB 2473, if things are not working out, would the entity running the conservation bank be responsible to make and pay for the changes needed to confer the promised benefit to the imperiled species? Would the ITL holder who bought conservation credits? The bill is silent, creating the unacceptable prospect that nothing will be done, and the imperiled species will suffer.

As the foregoing makes clear, establishing an entirely new conservation mitigation program involves complex policy issues and, unless those issues are thought through carefully, risks undermining important protections for Hawai‘i’s irreplaceable imperiled species. Because HB 2473 is not fully fleshed out, we urge the Committee **to hold the bill and establish an expert working group** to develop proposed bill language that ensures adequate protection for imperiled species. The Legislature can then consider that proposal next session.

Mahalo for the opportunity to offer this testimony.

**HB-2473**

Submitted on: 1/29/2024 8:51:40 AM

Testimony for WAL on 1/30/2024 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Leah Kocher	Individual	Support	Written Testimony Only

Comments:

Aloha Chair Ichiyama, Vice Chair Poepoe, and the Committe on Water and Land,

I am writing in support of HB 2473 Relating to Conservation Mitigation Programs, with some changes. The idea of conservation bank and conservation in-lieu fee mitigation programs looks to benefit those affected species. In the future, we can only hope to not have any accidental takes of species, requiring these services. However, in the meantime, it is important to hold individuals and agencies accountable for their actions and to seek remediation of affected species or habitats.

While I support these methods, there needs to be further clarification and language introduced into this bill. The ESRC needs to be able to review and approve these conservation credits per existing law. This is not stated in the bill. Please add this language.

Also, there needs to be language introduced about follow-through and verification that the conservation credits are doing what they intend. While individuals need to be held accountable for endangered species takes, we need to ensure that their compensation and remedy is delivering results as intended. And if not, who is reponsible for making sure corrective action is taken. Should the conservation credits not become realized into a benefit for the species, who is responsible for change? Please be sure to look into this and add a check system in place to ensure that the outcome of this is as desired.

Thank you for your time,

Leah Kocher

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