

ACT 35

S.B. NO. 843

A Bill for an Act Relating to Conservation of Aquatic Life, Wildlife, and Land Plants.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. The legislature finds that amendments to Hawaii’s endangered species law are needed to bring state law closer into conformity with current federal regulations regarding habitat conservation plans and safe harbor agreements, and to provide checks and balances to ensure the protection of Hawaii’s endangered and threatened species. Hawaii, home to over three hundred endangered and threatened species, has the distinction of being the “endangered species capital of the world”. The State and its citizens have a shared responsibility to ensure the survival and protection of our endangered and threatened plants and animals. Once an endangered species is pushed to extinction, it represents an irreparable loss to both Hawaii’s natural heritage and the earth’s biodiversity.

In 1997, the legislature amended chapter 195D, Hawaii Revised Statutes (conservation of aquatic life, wildlife, and land plants), to provide private landowners with incentives to promote the conservation and recovery of threatened and endangered species and their habitats. The amendments allowed for the incidental “taking” (i.e., killing, harming, wounding, and harassing) of Hawaii’s endangered and threatened species through habitat conservation plans and safe harbor agreements. At the time the amendments were enacted, individuals and organizations involved in protecting our native flora and fauna expressed concerns that habitat conservation plans or safe harbor agreements might lock the State into plans or agreements allowing activities that, in the future, would push endangered and threatened species to extinction, if not expressly conditioned to allow the modification or revocation of the plans or agreements. It was feared that the 1997 amendments placed the responsibility on the State rather than on the landowners who benefit from incidental takings to carry out any mitigation measures based on new circumstances or information to avoid species extinction.

The legislature further finds that, since 1997, the United States Fish and Wildlife Service substantially revised its policy on habitat conservation plans and

safe harbor agreements and that the federal regulations now provide for incidental take permits to be revoked if continuing the authorized activity would appreciably reduce the likelihood that any listed species will survive and recover. Now, in the rare instance in which a habitat conservation plan or safe harbor agreement threatens to push an imperiled species to extinction, the federal government retains the authority to revoke the incidental take permit allowing that activity to continue.

The legislature further finds that it is appropriate to allow state and county agencies to enter into habitat conservation plans and safe harbor agreements only if certain checks and balances are in place, since those agencies have public trust responsibilities and affirmative mandates to promote species conservation.

The purpose of this Act is to:

- (1) Bring Hawaii's endangered species law closer into conformity with current federal regulations regarding habitat conservation plans and safe harbor agreements; and
- (2) Provide appropriate checks and balances to the habitat conservation plan and safe harbor agreement process to ensure that these incentives actually promote the conservation of threatened and endangered species and prevent the intentional or unintentional actions of landowners, public or private, from either pushing species to extinction or preventing their recovery.

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

**“§195D- Citizen suits.** (a) Except as provided in subsection (b), any person, acting as a private attorney general, may commence civil suit on the person's behalf:

- (1) Against any state or county agency or instrumentality that is alleged to be in violation of the terms of, or fail to fulfill the obligations imposed and agreed to under any habitat conservation plan or safe harbor agreement and accompanying license for public lands as authorized under sections 195D-21 and 195D-22; or
- (2) Against the department or board, where there is alleged a failure of the department or board to perform any act or duty required under a habitat conservation plan or safe harbor agreement and accompanying license issued for public lands.

(b) The circuit courts shall have jurisdiction to enforce this section or to order the department or board to perform any act or duty required under this section, provided that:

- (1) No action may be commenced under subsection (a)(1) less than sixty days after written notice of the alleged violation has been given to the department, and to the state or county agency or instrumentality alleged to be in violation of this section, except that the action may be brought immediately after the notification in the case of an emergency posing a significant risk to the well-being of any species of fish, wildlife, or plant; and
  - (2) No action may be commenced under subsection (a)(2) less than sixty days after written notice of the alleged violation has been given to the department, except that the action may be brought immediately after the notification in the case of an emergency posing a significant risk to the well-being of any species of fish or wildlife, or plant.
- (c) Any suit brought pursuant to this section may be brought in the judicial circuit where the alleged violation occurred or is occurring. In any suit brought

pursuant to this section, where the State is not a party, the attorney general, at the request of the department, may intervene on behalf of the State as a matter of right.

(d) The injunctive relief provided by this section shall not restrict any right that any person or class of persons may have under any other law, including common law, to seek enforcement of any standard or limitation or to seek any other relief, including relief against any instrumentality or agency of the State.”

SECTION 3. Section 195D-2, Hawaii Revised Statutes, is amended as follows:

1. By adding two new definitions to be appropriately inserted and to read as follows:

““Private lands” mean lands that are not “public lands,” as defined in this section.

“Public lands” means lands owned by the federal government, the State, or a county, or lands owned by any political subdivision of the federal government, the State, or a county.”

2. By amending the definition of “landowner” to read as follows:

~~““Landowner” means [the owner of the fee simple interest in private land and may include public lands limited to the following projects:~~

(1) ~~North-South Road, Ewa, Oahu, project no. HWY 0-01-92 as described in the draft environmental assessment, September 1998; and the project described as Kapolei Parkway, Ewa, Oahu, project no. E-13 of the Oahu Regional Transportation Plan adopted by the Oahu metropolitan planning organization on April 6, 2001;~~

(2) ~~Cyanotech Corporation, incidental take permit and habitat conservation plan as described in the Federal Register, January 2, 2002 (volume 67, number 1); and~~

(3) ~~Kealahou planned community proposed by the housing and community development corporation of Hawaii and the department of Hawaiian home lands on lands within tax map key numbers 7-4-8: parcel 17, 7-4-8: portion 12, 7-4-8: parcel 43, and 7-4-19: portion 43.] an owner of land or any estate or interest in that land when acting with the consent of the fee owner. In the case of government-owned lands, the consent shall be required of any government department or agency to which management or control of that land has been assigned.”~~

SECTION 4. Section 195D-21, Hawaii Revised Statutes, is amended as follows:

1. By amending subsection (b) to read:

~~“(b) Except as otherwise provided by law, the board, upon recommendation from the department, in cooperation with other state, federal, county, or private organizations and landowners, after a public hearing on the island affected, and upon an affirmative vote of not less than two-thirds of its authorized membership, may enter into a habitat conservation plan, if it determines that [the]:~~

(1) ~~The plan will further the purposes of this chapter by protecting, maintaining, restoring, or enhancing identified ecosystems, natural communities, or habitat types upon which endangered, threatened, proposed, or candidate species depend within the area covered by the plan; [that the]~~

(2) ~~The plan will increase the likelihood of recovery of the endangered or threatened species that are the focus of the plan; and [that the]~~

(3) ~~The plan satisfies all the requirements of this chapter.~~

In the event the board votes to enter into a habitat conservation plan for which the majority of the endangered species recovery committee recommended disapproval,

the board may not enter into the habitat conservation plan unless the plan is approved by a two-thirds majority vote of both houses of the legislature. Habitat conservation plans may allow conservation rental agreements, habitat banking, and direct payments. Any habitat conservation plan approved pursuant to this section shall be based on the best available scientific and other reliable data available at the time the plan is approved.

Each habitat conservation plan shall:

- (1) Identify the geographic area encompassed by the plan; the ecosystems, natural communities, or habitat types within the plan area that are the focus of the plan; and the endangered, threatened, proposed, and candidate species known or reasonably expected to be present in those ecosystems, natural communities, or habitat types in the plan area;
- (2) Describe the activities contemplated to be undertaken within the plan area with sufficient detail to allow the department to evaluate the impact of the activities on the particular ecosystems, natural communities, or habitat types within the plan area that are the focus of the plan;
- (3) Identify the steps that will be taken to minimize and mitigate all negative impacts, including without limitation the impact of any authorized incidental take, with consideration of the full range of the species on the island so that cumulative impacts associated with the take can be adequately assessed; and the funding that will be available to implement those steps;
- (4) Identify those measures or actions to be undertaken to protect, maintain, restore, or enhance the ecosystems, natural communities, or habitat types within the plan area; a schedule for implementation of the measures or actions; and an adequate funding source to ensure that the actions or measures, including monitoring, are undertaken in accordance with the schedule;
- (5) Be consistent with the goals and objectives of any approved recovery plan for any endangered species or threatened species known or reasonably expected to occur in the ecosystems, natural communities, or habitat types in the plan area;
- (6) Provide reasonable certainty that the ecosystems, natural communities, or habitat types will be maintained in the plan area, throughout the life of the plan, in sufficient quality, distribution, and extent to support within the plan area those species typically associated with the ecosystems, natural communities, or habitat types, including any endangered, threatened, proposed, and candidate species known or reasonably expected to be present in the ecosystems, natural communities, or habitat types within the plan area;
- (7) Contain objective, measurable goals, the achievement of which will contribute significantly to the protection, maintenance, restoration, or enhancement of the ecosystems, natural communities, or habitat types; time frames within which the goals are to be achieved; provisions for monitoring (such as field sampling techniques), including periodic monitoring by representatives of the department or the endangered species recovery committee, or both; and provisions for evaluating progress in achieving the goals quantitatively and qualitatively; and
- (8) Provide for an adaptive management strategy that specifies the actions to be taken periodically if the plan is not achieving its goals.”

2. By amending subsection (d) to read:

“(d) Notwithstanding any other law to the contrary, the board shall suspend or revoke the approval of any habitat conservation plan approved under this section if the board determines that:

- (1) Any parties to the plan, or their successors, have breached their obligations under the plan or under any agreement implementing the plan and have failed to cure the breach in a timely manner, and the effect of the breach is to diminish the likelihood that the plan will achieve its goals within the time frames or in the manner set forth in the plan; [or]
- (2) The plan no longer has the funding source specified in subsection (a) or another sufficient funding source to ensure the measures or actions specified in subsection (b) are undertaken in accordance with this section[-]; or
- (3) Continuation of the permitted activity would appreciably reduce the likelihood of survival or recovery of any threatened or endangered species in the wild.

SECTION 5. Section 195D-22, Hawaii Revised Statutes, is amended by amending subsections (a), (b), and (c) to read as follows:

“(a) To encourage landowners to voluntarily engage in efforts that benefit endangered, threatened, proposed, and candidate species, except as otherwise provided by law, the board, upon approval by not less than two-thirds of the board’s authorized membership, after a public hearing on the island affected, may enter into a safe harbor agreement with one or more landowners to create, restore, or improve habitats or to maintain currently unoccupied habitats that threatened or endangered species can be reasonably expected to use, if the board determines that the cumulative activities, if any, contemplated to be undertaken within the areas covered by the agreement are environmentally beneficial. In the event the board votes to enter into a safe harbor agreement for which the majority of the endangered species recovery committee recommended disapproval, the board may not enter into the safe harbor agreement unless the agreement is approved by a two-thirds majority vote of both houses of the legislature. The board shall notify the public of the proposed safe harbor agreement through the periodic bulletin of the office of environmental quality control and make the proposed agreement available for public review and comment not less than sixty days prior to approval.

(b) A safe harbor agreement may authorize the take of an endangered, threatened, proposed, or candidate species incidental to an otherwise lawful activity in or affecting the created, restored, maintained, or improved habitat; provided that based on the best scientific and other reliable data available at the time the safe harbor agreement is approved, if these data are applicable:

- (1) The take would not jeopardize the continued existence of any endangered, threatened, proposed, or candidate species;
- (2) The take would not reduce the population of endangered, threatened, proposed, or candidate species below the number found on the property prior to entering into the agreement;
- (3) The agreement proposes to create, restore, maintain, or improve significant amounts of habitat for a minimum of five years[;] for private lands and for a minimum of fifteen years for public lands;
- (4) There is adequate funding for the agreement and the source of that funding is identified;
- (5) The safe harbor agreement increases the likelihood that the endangered or threatened species for which a take is authorized will recover;
- (6) Any take authorized pursuant to this subsection shall occur only in the habitat created, restored, maintained, or improved; and
- (7) The cumulative impact of the activity, which is permitted and facilitated by the take, provides net environmental benefits.

(c) Notwithstanding any other law to the contrary, the board shall suspend or rescind any safe harbor agreement approved under this section if the board determines that:

- (1) Any parties to the safe harbor agreement, or their successors, have breached their obligations under the safe harbor agreement or under any other agreement implementing the safe harbor agreement and have failed to cure the breach in a timely manner, and the effect of the breach is to diminish the likelihood that the agreement will achieve its goals within the time frames or in the manner set forth in the agreement; ~~or~~
- (2) To the extent that funding is or will be required, the funding source specified in subsection (b) no longer exists and is not replaced by another sufficient funding source to ensure that the measures or actions specified in subsection (b) are undertaken in accordance with this section~~[-]; or~~
- (3) Continuation of the permitted activity would appreciably reduce the likelihood of survival or recovery of any threatened or endangered species in the wild.”

SECTION 6. Section 195D-24, Hawaii Revised Statutes, is amended to read as follows:

“~~[[~~**§195D-24**~~]] Confidentiality.~~ All information submitted to the board by a landowner pursuant to section 195D-21 or 195D-22, in the course of preparing a habitat conservation plan or safe harbor agreement~~[-]~~ for private lands, respectively, shall be kept confidential until notice of the proposed plan or agreement is published in the periodic bulletins of the office of environmental quality control. ~~[The] For habitat conservation plans or safe harbor agreements for private lands, the precise location of any threatened or endangered species may remain confidential.~~”

SECTION 7. Section 195D-25, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

“(b) The endangered species recovery committee shall:

- (1) Review all applications and proposals for habitat conservation plans, safe harbor agreements, and incidental take licenses and make recommendations, based on a full review of the best available scientific and other reliable data and at least one site visit to each property that is the subject of the proposed action, and in consideration of the cumulative impacts of the proposed action on the recovery potential of the endangered, threatened, proposed, or candidate species, to the department and the board as to whether or not they should be approved, amended, or rejected;
- (2) Review all habitat conservation plans, safe harbor agreements, and incidental take licenses on an annual basis to ensure compliance with agreed to activities and, on the basis of any available monitoring reports, and scientific and other reliable data, make recommendations for any necessary changes;
- (3) Consider and recommend appropriate incentives to encourage landowners to voluntarily engage in efforts that restore and conserve endangered, threatened, proposed, and candidate species;
- (4) Perform such other duties as provided in this chapter;
- (5) Consult with persons possessing expertise in such areas as the committee may deem appropriate and necessary in the course of exercising its duties; and

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- (6) Not conduct more than one site visit per year to each property[-] that is the subject of a habitat conservation plan or safe harbor agreement.”

SECTION 8. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 9. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.<sup>1</sup>

SECTION 10. This Act shall take effect upon its approval.

(Approved April 28, 2003.)

**Note**

1. Edited pursuant to HRS §23G-16.5.