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TESTIMONY OF THE CHAIRPERSON OF THE BOARD OF LAND AND NATURAL RESOURCES

On Senate Bill 3103, Senate Draft 1, House Draft 1 - Relating To Endangered Species

BEFORE THE HOUSE COMMITTEE ON JUDICIARY

March 25, 2008

Senate Bill 3103, Senate Draft 1, House Draft 1 proposes to amend Chapter 195D, Hawaii Revised Statutes (HRS), 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 House Draft 1 amended the Senate version of the bill, which originated as an Administration bill, by adding an additional review by the Endangered Species Recovery Committee (ESRC) and approval by the Board of Land and Natural Resources (Board) before a certificate of inclusion can be issued. The Department of Land and Natural Resources (Department) strongly supports the programmatic approaches in the bill, and is willing to implement the additional review by the ESRC and approval by Board process proposed in the House Draft 1, although the added administrative processes will likely discourage some landowners from participating.

Federal resource conservation agencies and non-governmental conservation organizations have begun to implement programmatic agreements to encourage regional landscape-scale and multi-party initiatives for endangered species. Examples of programmatic agreements are a statewide programmatic SHA with landowners enrolling in Farm Bill conservation programs to improve habitat for endangered waterbirds, or a regional programmatic HCP on Kauai that would mitigate the impacts on endangered seabirds from utility lines or attraction to lights. To provide private landowners the assurances that these tools will be available in the future, the Hawaii Endangered Species Law should be amended to specifically recognize these tools, similarly as has been done in federal regulations.

Programmatic approaches are beneficial because they enable interested landowners to sign-on to regional agreements and not need to develop and process their own individual agreements and plans at considerable time, cost and administrative burdens for both landowner and regulatory agencies. Programmatic agreements and plans encourage many landowners to get involved because it gives them a finished product to evaluate and agree to and removes the uncertainty about final product and outcomes. Programmatic agreements enable the development of regional management actions that encompass scale and offer benefits that are not possible with single agreements and result in greater recovery gains for endangered species.

State programmatic SHAs and HCPs similar to federal tools will streamline the processing of endangered species permits and meets the directive in Section 195D-4(i), Hawaii Revised Statutes, to work cooperatively and concurrently with federal agencies. Hawaii has 329 listed threatened or endangered species, more than any other State in the Nation. Hawaii needs tools that can help enlist the cooperation of private landowners in these worthy efforts.

The House subject committees amended this bill by requiring review by the Endangered Species Committee review and approval by the Board before the issuance of certificates of inclusion. This follows the system of oversight put in place by the Legislature for State issued licenses that has been working well. The Department can work this into the overall review and approval schedule and it will add up to 4 months more processing time to sign-up new landowners for farm bill habitat restoration projects and programmatic SHAs. The major concern the Department has is that without a streamlined process, the federal agencies, non-governmental conservation organizations and some landowners may not participate. The Department is willing to implement the program and evaluate its effectiveness and return to the Legislature if it needs further refinement in the future.

Also attached for your information is a copy of the correspondence from Michael J. Bean, Co-Director of the Center for Conservation Incentives with the National Environmental Defense Fund, who is the father of SHAs, who has experience with programmatic SHAs across the Nation and provides comments on the Hawaii bill. The Environmental Defense Fund's experience nationally is that "programmatic" safe harbor agreements have proven to be very useful and effective in furthering conservation of endangered species, and they support this measure and urge its passage.

Attach copy of Letter from Michael J. Bean

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TESTIMONY OF
ENVIRONMENTAL DEFENSE FUND, INCORPORATED

On Senate Bill 3103, Senate Draft 1 - Relating To Endangered Species

BEFORE THE HOUSE COMMITTEES ON
WATER, LAND, OCEAN RESOURCES & HAWAIIAN AFFAIRS
and
ENERGY AND ENVIRONMENT PROTECTION

March 17, 2008

The Environmental Defense Fund, which has extensive experience with endangered species Safe Harbor Agreements, would like to share with you its thoughts regarding the use of "programmatic" Safe Harbor Agreements, which have proven to be very useful and effective in furthering the conservation of endangered species. Legislation that would clarify the authority of the Hawaii Department of Land and Natural Resources to approve programmatic Safe Harbor Agreements and Habitat Conservation Plans is currently pending in the Hawaii legislature (SB3103). Based on our experience, we believe the legislation should be approved, at least with respect to Safe Harbor Agreements.

It should be noted at the outset that although the proposed legislation addresses both Habitat Conservation Plans and Safe Harbor Agreements, there are very important differences between these two types of agreements. A landowner on whose land an endangered species occurs may not legally carry out any activity that "takes" that species without first securing state and federal approval of a Habitat Conservation Plan to mitigate the impact of that taking. Thus, Habitat Conservation Plans are not truly voluntary; if a landowner wants to use his land in a particular way, he or she must pay the price of a Habitat Conservation Plan. On the other hand, Safe Harbor Agreements are truly voluntary. Landowners who have no legal obligation to do something beneficial for endangered species nevertheless agree to do so, provided only that they be allowed at some point in the future to return their property to its original, "baseline" conditions if they so wish. Safe Harbor Agreements provide the landowners who enter into them the assurance that, notwithstanding their voluntary beneficial activities, they will in the future be able to engage in the same uses of their land that they may legally engage in today.

Nationwide, more than four million acres of privately-owned land have been voluntarily enrolled in Safe Harbor Agreements, many of which have contributed significantly to the conservation of endangered species. In Texas, for example, Safe Harbor Agreements have played a key role in boosting the northern aplomado falcon's numbers in the wild from zero less than two decades ago to roughly fifty pairs today, just short of the sixty pairs that the falcon's recovery plan sets as a goal for reclassifying this

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currently endangered species to the less imperiled status of "threatened."[1] In South Carolina, on the 422,563 acres of private forest land that have been enrolled in Safe Harbor Agreements, the endangered red-cockaded woodpecker has increased in numbers (as measured by the number of family groups) by more than ten percent, in stark contrast to the steady decline of this species on private lands generally prior to the initiation of Safe Harbor Agreements.[2] Similar results for the woodpecker have been documented in Georgia. One of the nation's rarest birds, the Attwater's prairie chicken, hovers dangerously close to extinction despite four decades of protection under federal endangered species legislation and despite the establishment of a National Wildlife Refuge specifically for it. The bird's last best hope may be that it will fare better on private land where its habitat has been restored pursuant to a Safe Harbor Agreement, and where prairie-chickens were recently translocated.[3]

All of the examples above involve "programmatic" Safe Harbor Agreements. Under these programmatic agreements, a single permit is issued to an agency or organization that then reaches out to landowners who are willing to cooperate by agreeing to take beneficial actions of a type explicitly described in the programmatic agreement. By signing a standardized cooperative agreement with the permit holder, the individual participating landowner is included within the scope of the permit. A "certificate of inclusion" is issued to the individual participating landowner to certify this fact.

The advantages of programmatic Safe Harbor Agreements are many. They avoid the need undergo the full, formal permitting process for fundamentally similar activities on each individual property. In the case of the programmatic Safe Harbor Agreement for the red-cockaded woodpecker in North Carolina, there are now more than one hundred participating landowners who have joined the program since its inception in 1995. A single permit, requiring a single Federal Register notice, launched this successful program. Had it not been possible to proceed programmatically, more than a hundred individual permit applications, more than a hundred individual Federal Register notices, and the attendant expense and delay, would have been necessary.

Moreover, had programmatic permits not been available, it is virtually certain that many of the hundreds of currently participating landowners would not have participated. That is because many landowners do not wish to have their names and property locations prominently published in the Federal Register. A further reason is that many landowners

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[1] See Susan McGrath, Let's Make a Deal: With a Signature and a Handshake, an Innovative Legal Tool is Allaying Private Landowner's Fear of One of the Nation's Most Powerful Environmental Laws to Create Critical Wildlife Habitat, *Audubon* (Jan.-Feb. 2008) at 73-79.

[2] Data through 2003 is summarized in A. Nicole Chadwick, South Carolina's Safe Harbor Program for Red-Cockaded Woodpeckers, in *Red-Cockaded Woodpecker: Road to Recovery* (R. Costa and S.J. Daniels, eds. 2003). Current data supplied by Ralph Costa, Red-Cockaded Woodpecker Recovery Coordinator, U.S. Fish and Wildlife Service.

[3] Terry Rossignol, Attwater's Prairie Chicken Recovery is Still a Challenge, *Refuge Update* (U.S. Fish and Wildlife Service, Jan.-Feb. 2008) at 4.

are willing to enter into cooperative agreements brokered by the agency or entity that administers the programmatic permit, because they know and trust that agency or entity.[4] The same landowners, however, would not have been willing to deal directly with the regulatory agencies that issue permits (the Fish and Wildlife Service and its state counterparts). We know this to be the case because we have for several years administered a programmatic Safe Harbor Agreement for the endangered black-capped vireo in Texas, and have recently begun administering one for the ocelot as well, and we have commonly encountered such landowners. Further, we have helped others, including The Nature Conservancy, The Peregrine Fund, and other organizations, develop programmatic Safe Harbor Agreements, and they report the same thing about many of the landowners with whom they work.

Hawaii has more endangered species than any other state in the nation. To date, not a single one of those species has recovered to the point that it has been removed from the endangered and threatened species list. None has even yet made sufficient progress toward recovery to be reclassified from endangered to threatened, and very few are judged by the Fish and Wildlife Service to be improving. According to the Fish and Wildlife Service's most recent report to Congress, six percent of all endangered or threatened species are judged to be "improving" but only two percent of Hawaii's listed species are doing so. Given that background, there is no good reason for Hawaii not to utilize a conservation tool that has a proven record of success in helping endangered species elsewhere in the nation. The arguments that have been made against the wisdom of allowing programmatic Safe Harbor Agreements are unpersuasive. For example, it has been argued that there is no need for programmatic agreements because under existing law multiple landowners can enter into a single agreement. This is true only if the multiple landowners act together in concert at the same time. Programmatic Safe Harbor Agreements allow multiple landowners to enroll their lands at any time. The experience with programmatic Safe Harbor Agreements thus far has been that after one or a few landowners initially enroll, other landowners become more willing to do so, because they see that the initial enrollees are satisfied with their experience.[5] Thus, programmatic Safe Harbor Agreements have repeatedly been shown to be an effective way of enlisting multiple landowners in voluntary conservation efforts. The theoretical possibility that multiple landowners could act in concert to join a single agreement under existing law is exactly that – a theoretical possibility that has not happened in practice.

For the reasons above, we urge enactment of SB 3103 and support the amendment to it recommended by the Chair of the Board of Land and Natural Resources. The amendments to HB 3181 that were previously adopted in committee effectively negate the purpose and value of a programmatic agreement by requiring for each participating landowner the same detailed findings that a series of individual permits

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[4] Michael J. Bean, J. Peter Jenny, and Brian van Eerden, Safe Harbor Agreements: Carving Out a New Role for NGOs, *Conservation Biology in Practice* (Spring 2001) at 9-16.

[5] Daowei Zhang and Sayeed R. Mehmood, Safe Harbor for the Red-Cockaded Woodpecker: Private Forest Landowners Share Their Views, *Journal of Forestry* (July-Aug. 2002) at 24-29.

would require. If the recovery of endangered species is to be accomplished in Hawaii, the cooperation of private landowners will be essential for many such species. Programmatic Safe Harbor Agreements, precisely because they are simple to understand and easy to implement, are a proven way of enlisting landowner cooperation. Hawaii should amend its laws to encourage their use.

Respectfully submitted,

Michael J. Bean, Esq.
Co-Director, Center for Conservation Incentives

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HOUSE COMMITTEE ON JUDICIARY

TESTIMONY RE: SENATE BILL NO. 3103, S.D. 1, H.D. 1
RELATING TO ENDANGERED SPECIES

March 25, 2008, 4:05 p.m.
Conference Room 325

Good afternoon Chair Waters, Vice-Chair Oshiro, and members of the Committee:

My name is David Henkin, and I am an attorney with Earthjustice. We appreciate the opportunity to offer this testimony regarding Senate Bill No. 3103, S.D. 1, H.D. 1. Earthjustice opposes this bill because the current law is adequate to achieve the proposal's stated goals. Of course, if the bill were merely redundant, its passage would be of no consequence. The problem is that, 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 up-front 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.

[1] Likewise, while the Administration claims the changes are needed to allow for "concurrent processing of federal and Hawaii SHAs and HCPs," 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.

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The difference between what the law currently allows and what SB 3103, S.D. 1, H.D. 1 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-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, SB 3103, S.D. 1, H.D. 1, by introducing the notion of "certificate of inclusion," arguably allows the Board to authorize 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. There is an unavoidable tension between the concept of a certificate of inclusion – which, by definition, would be issued to a landowner who has not agreed to participate in a plan at its inception – and the current law's requirement that, before licenses to kill endangered species are granted, the Board must "ascertain with reasonable certainty the likely effect of the plan upon any endangered, threatened, proposed, or candidate species in the plan area and throughout its habitat range." H.R.S. § 195D-21(c).

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, SB 3103, S.D. 1, H.D. 1 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.

SB 3103, S.D. 1, H.D. 1's approach to endangered species protection is akin to issuing a sub-prime mortgage in the hope 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.

H.D. 1 improves slightly on the Senate bill by requiring that, before a certificate of inclusion is issued, the endangered species committee must perform a review and the Board must approve to ensure consistency between the certificate and the programmatic agreement or plan. Such procedures cannot, however, cure the bill's inherent flaw of allowing agreements and plans that authorize killing endangered species in the absence of reliable, up-front information about (1) who will be permitted to have incidental take, (2) the total level of incidental take that will be authorized, and (3) the mitigation measures that will be implemented to ensure against extinction and that the net result of the plan will be to increase the likelihood of species recovery. The Legislature should not allow the issuance of incidental take licenses based on mere speculation about what activities hopefully will occur in the future to offset harm to endangered species that is certain to occur in the present.

In addition, H.D. 1 fails to provide vital checks-and-balances regarding the issuance of incidental take licenses that the Legislature wisely included in the present law to protect these irreplaceable public trust resources. Specifically, the bill fails to provide that, should a majority of the endangered species committee disapprove of a certificate of inclusion, it may not be issued absent a two-thirds majority vote of the legislature. See H.R.S. §§ 195D-21(b)(1), 195D-22(a). Nor does H.D. 1 specify that the Board must hold a public hearing on the affected islands prior to approval of a certificate. See H.R.S. §§ 195D-4(g), (i), 195D-21(b)(1), 195D-22(a).

For the foregoing reasons, we respectfully urge you to kill SB 3103, S.D. 1, H.D. 1. Thank you again for the opportunity to offer this testimony.