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GOVERNOR OF HAWAII



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DEPARTMENT OF LAND AND NATURAL RESOURCES

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LAND
STATE PARKS

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

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

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

March 17, 2008

Senate Bill 3103, Senate 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 Department of Land and Natural Resources strongly supports this Administration bill and welcomes it as a means to encourage greater endangered species restoration on private lands.

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), HRS, 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 version of this measure, House Bill 3181, was passed by these committees with a House Draft 1 that incorporated additional oversight for issuance of certificates of inclusion. However, the language added in House Draft 1, effectively negated the purpose and value of a programmatic agreement by requiring every landowner to go through the same detailed process and findings that would be required for an individual permit. Recognizing this concern, below is suggested alternative language that provides additional oversight on the issuance of certificates of inclusion, but which the Department believes would not bog down or duplicate the process nor discourage landowner participation.

Suggested amendments to Senate Bill 3103, Senate Draft 1, SECTION 3, page 3, lines 6-14.

SECTION 3. Amendments to §195D-4(f).

(f) The department may issue temporary licenses, under such terms and conditions as it may prescribe, to allow any act otherwise prohibited by subsection (e), for scientific purposes or to enhance the propagation or survival of the affected species. Licenses issued as part of a programmatic safe harbor or programmatic habitat conservation plan may also provide for the issuance of certificates of inclusion to extend the coverage of the incidental take license to landowners enrolling in the programmatic agreement or plan at a later date; provided that prior to issuance, the certificates of inclusion shall require the review and concurrence of the department that they are consistent with the terms and conditions of the programmatic agreement or plan."

Also attached for your information is a copy of correspondence from Michael J. Bean, Co-Director of the Center for Conservation Incentives with the National Environmental Defense Fund, who is the father of Safe Harbor Agreements, who has experience with programmatic Safe Harbor Agreements across the nation and provides comments on the Hawaii bill and the House Bill 3181, House Draft 1 amendments. 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

HAWAII BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO
Gentry Pacific Design Center, Suite 215A
560 N. Nimitz Highway, #50
Honolulu, Hawaii 96817
(808) 524-2249 - FAX (808) 524-6893

March 14, 2008

Honorable Representative Ken Ito, Chair
Honorable Representative Jon Riki Karamatsu, Vice Chair
Members of the House Committee on Water, Land, Ocean Resources &
Hawaiian Affairs
Hawaii State Capital
415 South Beretania Street
Honolulu, HI 96813

RE: IN OPPOSITION OF SB3103, SD1
RELATING TO ENDANGERED SPECIES
Hearing: Monday, March 17, 2008, 9:30 a.m.

Dear Chair Ito, Vice Chair Karamatsu and the House Committee on Water, Land,
Ocean Resources & Hawaiian Affairs:

For the Record my name is Buzz Hong the Executive Director for the Hawaii
Building & Construction Trades Council, AFL-CIO. Our Council is comprised
of 16-construction unions and a membership of 26,000 statewide.

The Council opposes the passage of SB3103, SD1, which authorizes the
development and use of programmatic safe harbor agreements and
programmatic habitat conservation plans that cover multiple landowners or a
class of landowners and over a wide area or region.

Thank you for the opportunity to submit this testimony in opposition of SB3103,
SD1.

Sincerely,

William "Buzz" Hong

WBH/dg



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REPRESENTATIVE KEN ITO, CHAIR
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REPRESENTATIVE HERMINA M. MORITA, CHAIR
REPRESENTATIVE MELE CARROLL, VICE-CHAIR
COMMITTEE ON ENERGY & ENVIRONMENTAL PROTECTION

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

March 17, 2008, 9:30 a.m.
Conference Room 312

Good morning Chairs Ito and Morita, Vice-Chairs Karamatsu and Carroll, and members of the Committees:

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. Earthjustice opposes this bill because it would allow the issuance of licenses to kill endangered and threatened species, without any reliable guarantee 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

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.

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.

The difference between what the law currently allows and what SB 3103, S.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, by introducing the notion of “certificate of inclusion,” arguably allows the Board to authorized 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.

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 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’s approach to endangered species protection is akin to issuing a sub-prime mortgage in the hope that 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.

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



ENVIRONMENTAL DEFENSE FUND

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March 4, 2008

The Honorable Tommy Waters
51st Representative District
Hawaii State Capitol, Room 302
415 South Beretania Street
Honolulu, HI 96813

Dear Representative Waters:

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 (HB3181 and SB3103). Based on our experience, we believe the legislation should be approved as originally introduced, 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 currently endangered species to the less imperiled status of