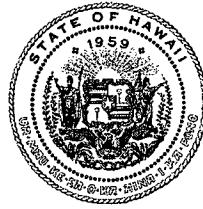


HB 1144 HD1

LINDA LINGLE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
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LAURA H. THIELEN
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

RUSSELL Y. TSUJI
FIRST DEPUTY

KEN C. KAWAHARA
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING

FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

Testimony of
LAURA H. THIELEN
Chairperson

Before the Senate Committee on
ENERGY AND ENVIRONMENT

Tuesday, March 24, 2009
2:55 PM

State Capitol, Conference Room 225

In consideration of
HOUSE BILL 1144, HOUSE DRAFT 1
RELATING TO CONSERVATION OF THREATENED AND ENDANGERED SPECIES

House Bill 1144, House Draft 1 proposes 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 – including the issuance of “certificates of inclusion”. The Department of Land and Natural Resources (Department) notes that the House Draft 1 of this measure provides additional oversight for issuance of “certificates of inclusion” by requiring that they be reviewed and approved by the Endangered Species Recovery Committee as a condition of issuance. The Department strongly supports this Administration bill and the changes in House Draft 1 except for its effective date of June 20, 2020. As such, the Department respectfully asks that this bill be further amended to restore the effective date back to "upon approval".

Federal resource conservation agencies are adopting large landscape scale ecosystem-based approaches to conserve endangered species and their habitats. The most recent example of this is the ecosystem-based approach used by the United States Fish and Wildlife Service to list 48 bird, plant, and insect species on Kauai as endangered species. By addressing the common threats that occur across ecosystems, the resource agencies can more effectively focus conservation efforts on restoring the functions of habitats shared by these species. This holistic approach will benefit the recovery of listed species and also all the species within the native ecological community. The new ecosystem-based approach to the listing and critical habitat designation process is designed to protect multiple species that occur in shared ecosystems and experience common threats.

Federal and non-governmental conservation organizations have developed and begun to implement new tools for encouraging regional ecosystem-based and multi-party initiatives in endangered species conservation. These entities are developing and promoting programmatic

approaches that provide a framework for many landowners over large landscapes to enroll in programs that have been developed and permitted to encourage SHAs to enhance habitat for multiple endangered species, or to develop HCPs to mitigate endangered species conflicts that are an issue on a regional basis. Previous testimony on this bill suggests that programmatic HCPs, SHAs and issuance of certificates of inclusion are not allowed under federal law. This is not the case. Programmatic HCPs and SHAs have been approved by United States Fish and Wildlife Service (USFWS) and NOAA, and are currently implemented in a number of states, including but not limited to Texas and California. The USFWS has already approved a programmatic SHA for NRCS within the State of Hawai'i. The Hawaii Endangered Species Law does not specifically mention all the tools and approaches now being used by the under programmatic agreements. This change in chapter 195D, HRS, would make Hawaii's statute consistent with federal programs and encourage and facilitate future use in Hawaii.

Programmatic approaches will streamline the time and regulatory burdens on interested participants who otherwise would need to develop their own duplicative agreements with identical terms and conditions. Providing standardized programs encourages many landowners to get involved because it gives them a finished product to evaluate and agree to and enter. It removes the uncertainty about final product and outcomes. It also enables the development of management actions that encompass a landscape scale and offer benefits that may otherwise not be possible with a single landowner agreement.

One misconception about this bill is that programmatic HCPs and SHAs will not allow for public input. The Endangered Species Recovery Committee (ESRC) was designated by the State to review HCPs and SHAs, and public review is included in development of all programmatic HCPs and SHAs. The revisions made in HD1 also provide that any certificate of inclusion issued would need to be reviewed and approved by the ESRC. The ESRC meetings are subject to the Sunshine Law and require public notice and are open to the public for input.

Another misconception is that programmatic agreements allow intentional take of protected species; and would authorize take of protected species without any prior agreement to mitigation. Programmatic HCPs and SHAs can only allow incidental ('accidental') take of protected species, and intentional take is not permitted. Any programmatic HCPs do have mitigation requirements that are agreed upon when developed, and all participants signing on would have to agree to carryout those mitigation actions to be authorized for incidental take. Programmatic HCPs allow development of the most effective recovery efforts by state-wide experts, rather than piece-meal mitigation efforts developed by each individual landowner. Programmatic HCPs and SHAs allow development of uniform, programmatic recovery efforts, and a consolidated licensing process.

Examples of agreements that are stalled pending this change are a statewide programmatic SHA with landowners enrolling in Farm Bill conservation programs to improve habitat for endangered waterbirds and a regional programmatic HCP on Kauai that would mitigate the take of endangered seabirds where they are vulnerable to utility lines and attraction of light. Without these tools, affected landowners will need to develop and process individual agreements and plans at considerable administrative burdens for both landowner and regulatory agencies. A streamlined process for SHAs and HCPs reduces landowner's time and cost to participate in these programs, and encourages more participation and recovery effort for endangered species.

Report Title:

Endangered Species

Description:

Authorizes the development and use of comprehensive safe harbor agreements and comprehensive habitat conservation plans that cover multiple landowners or a class of landowners or extend over a wide area or region. (HB1144 HD1 discussion draft for SD1)

HOUSE OF REPRESENTATIVES
TWENTY-FIFTH LEGISLATURE, 2009
STATE OF HAWAII

H.B. NO. 1144
H.D. 1
Proposed
S.D.1

A BILL FOR AN ACT

RELATING TO CONSERVATION OF THREATENED AND ENDANGERED SPECIES.

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

SECTION 1. Section 195D-2, Hawaii Revised Statutes, is amended by adding three new definitions to be appropriately inserted and to read as follows:

"Certificate of inclusion" means a type of incidental take license that is used to enroll interested landowners into an comprehensive safe harbor agreement or comprehensive habitat conservation plan."

"Habitat conservation plan" means a plan that covers single or multiple landowners, or a class of landowners such as in a

comprehensive plan, and may include a single property or extend over a wide area or region.

"Incidental Take" means take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."

"Safe harbor agreement" means an agreement that covers single or multiple landowners, or a class of landowners such as in a comprehensive agreement, and may include a single property or extend over a wide area or region."

SECTION 2. Section 195D-4, Hawaii Revised Statutes, is amended by amending and reordering subsections (g), (h), and (i) and adding a new section to read as follows:

"(g) After consultation with the endangered species recovery committee, the board may issue a temporary incidental take license as a part of a habitat conservation plan or comprehensive habitat conservation plan to allow a take otherwise prohibited by subsection (e) if the take is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity; provided that:

- (1) The applicant, to the maximum extent practicable, shall minimize and mitigate the impacts of the take;
- (2) The applicant shall guarantee that adequate funding for the plan will be provided;

- (3) The applicant shall post a bond, provide an irrevocable letter of credit, insurance, or surety bond, or provide other similar financial tools, including depositing a sum of money in the endangered species trust fund created by section 195D-31, or provide other means approved by the board, adequate to ensure monitoring of the species by the State and to ensure that the applicant takes all actions necessary to minimize and mitigate the impacts of the take;
- (4) The plan shall increase the likelihood that the species will survive and recover;
- (5) The plan takes into consideration the full range of the species on the island so that cumulative impacts associated with the take can be adequately assessed;
- (6) The measures, if any, required under section 195D-21(b) shall be met, and the department has received any other assurances that may be required so that the plan may be implemented;
- (7) The activity, which is permitted and facilitated by issuing the license to take a species, does not involve the use of submerged lands, mining, or blasting;

- (8) The cumulative impact of the activity, which is permitted and facilitated by the license, provides net environmental benefits; and
- (9) The take is not likely to cause the loss of genetic representation of an affected population of any endangered, threatened, proposed, or candidate plant species.

Board approval shall require an affirmative vote of not less than two-thirds of the authorized membership of the board after holding a public hearing on the matter on the affected island. The department shall notify the public of a proposed license under this section through publication in the periodic bulletin of the office of environmental quality control and make the application and proposed license available for public review and comment for not less than sixty days prior to approval.

(h) Under an approved comprehensive habitat conservation plan, a certificate of inclusion, after review and approval by the endangered species recovery committee, may also provide authorization for incidental take to landowners as the applicant, as long as such inclusion does not violate the terms, conditions, and take limits of the comprehensive habitat conservation plan, and the certificate of inclusion provides a description of the land and actions covered under the certificate, the species and incidental take limit, a

description of avoidance and minimization efforts, a description of the mitigation obligations to provide net benefit to the species and environment, a schedule, a statement to adhere to the terms and conditions of the comprehensive habitat conservation plan, and an assurance of adequate funding source to ensure that the proposed measures and actions are undertaken in accordance with the schedule."

~~(h)~~(i) Licenses or certificates of inclusion issued pursuant to this section may be suspended or revoked for due cause, and if issued pursuant to a habitat conservation plan or safe harbor agreement, shall run with the land for the term agreed to in the plan or agreement and shall not be assignable or transferable separate from the land. Any person whose license or certificate of inclusion has been revoked shall not be eligible to apply for another license or certificate of inclusion until the expiration of two years from the date of revocation.

~~(i)~~(j) The department shall work cooperatively with federal agencies in concurrently processing habitat conservation plans, safe harbor agreements, ~~and~~ incidental take licenses, and certificates of inclusion pursuant to the Endangered Species Act. After notice in the periodic bulletin of the office of environmental quality control and a public hearing on the islands affected, which shall be held jointly with the federal

agency, if feasible, whenever a landowner seeks both a federal and a state safe harbor agreement, habitat conservation plan, or incidental take license, the board, by a two-thirds majority vote, may approve the federal agreement, plan, or license without requiring a separate state agreement, plan, or license if the federal agreement, plan, or license satisfies, or is amended to satisfy, all the criteria of this chapter. All state agencies, to the extent feasible, shall work cooperatively to process applications for habitat conservation plans and safe harbor agreements on a consolidated basis including concurrent processing of any state land use permit application that may be required pursuant to chapter 183C or 205, so as to minimize procedural burdens upon the applicant."

SECTION 3. Section 195D-5, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) The office of the governor shall review other programs administered by the department and, to the extent practicable, [~~utilize~~] use such programs in furtherance of the purposes of this chapter. The governor or the governor's authorized representative shall also encourage all federal agencies to [~~utilize~~] use their authority in furtherance of the purposes of this chapter. All other state agencies shall use their authority in furtherance of the purposes of this chapter by:

- (1) Carrying out programs for the protection of threatened and endangered species; and
- (2) Taking such action as may be necessary to ensure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of threatened or endangered species.

In carrying out programs authorized by this chapter, the department may enter into agreements with federal agencies, counties, private landowners, and organizations for the administration and management of any area or facility established under section 195D-21 or 195D-22, or public lands [~~utilized~~] used for conserving, managing, enhancing, or protecting indigenous aquatic life, wildlife, land plants, threatened and endangered species, and their habitat."

SECTION 4. Section 195D-21, Hawaii Revised Statutes, is amended by amending subsection (d) to read as follows:

"(d) Notwithstanding any other law to the contrary, the board shall suspend or revoke the approval of any habitat conservation plan or certificate of inclusion 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;

- (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-21, Hawaii Revised Statutes, is amended by amending subsection (e) to read as follows:

"(e) The rights and obligations under any habitat conservation plan or certificate of inclusion shall run with the land and shall be recorded by the department in the bureau of conveyances or the land court, as may be appropriate.

SECTION 6. Section 195D-22, Hawaii Revised Statutes, is amended and reordering subsections as follows:

1. By amending subsection (a) to read:

"(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 or comprehensive 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."

2. By amending subsection (b) to read:

"(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.

Under an approved comprehensive safe harbor agreement, a certificate of inclusion, after review and approval by the endangered species recovery committee, may also provide authorization for incidental take to landowners as the applicant, as long as such inclusion does not violate the terms, conditions, and take limits of the comprehensive safe harbor agreement, and the certificate of inclusion provides a description of the land and actions covered under the certificate, the, a baseline, a description of avoidance and minimization efforts, a description of the obligations by each party to provide net benefit to the species, a schedule, a statement to adhere to the terms and conditions of the comprehensive safe harbor agreement, and assurance of adequate funding source for project activities."

3. By amending subsection (c) to read:

"(c) Notwithstanding any other law to the contrary, the board shall suspend or rescind any safe harbor agreement or certificate of inclusion 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;

- (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."

4. By amending subsection (d) to read:

"(d) The rights and obligations under any safe harbor agreement or certificate of inclusion shall run with the land for the term agreed to in the agreement and shall be recorded by the department in the bureau of conveyances or the land court, as may be appropriate."

SECTION 7. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 8. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 9. This Act shall take effect on June 20, 2020.



OFFICE OF HAWAIIAN AFFAIRS
Legislative Testimony

**HB 1144 HD1, RELATING TO CONSERVATION
OF THREATENED AND ENDANGERED SPECIES**

Senate Committee on Energy and Environment

March 24, 2009

2:55 p.m.

Room: 225

The Office of Hawaiian Affairs (OHA) cautiously SUPPORTS H.B.1144, H.D. 1, which seeks to authorize the development and use of programmatic safe harbor agreements and programmatic habitat conservation plans that cover multiple landowners or a class of landowners or extend over a wide area or region.

OHA understands that this bill seeks to encourage greater endangered species restoration on private lands. However, we are unsure of how this bill has the potential to do so more so than what our current laws allow.

We see the wisdom in allowing larger-scaled and ecosystem-based approaches to management of species of concern. This potentially could benefit native species that are not threatened or endangered as well because they share common habitats and experience similar threats. Further, it makes sense to try to streamline the processes that potential landowners will enter into as well as try to eliminate duplicative efforts, all of which may be off-putting to potential candidates for these types of agreements. OHA is also supportive of efforts to clarify the results of these agreements so that they become more attractive and less uncertain to landowners before they enter into them. This will serve to have more habitat that these species use assessed because landowners will be assured of the benefit for doing so. The end result will be that these species of concern will benefit.

However, OHA points out that existing law already allows multiple landowners to enter into a single habitat conservation plan or safe harbor agreement. (See Hawaii Revised Statutes (HRS) 195D-21(a), 195D-22(a)). As such, we are unsure of the new benefits that this bill offers in these terms. OHA is unsupportive of any amendments that would allow the state to enter into an agreement authorizing a take without a full understanding of how many participants the plan or agreement entails or their contributions or full responsibilities. This is a risk that this bill potentially raises, and we ask that this be clarified.

OHA closes by noting that regardless of whether this bill passes, HRS §195D-30 will still require any habitat conservation plan, safe harbor agreement or incidental take license to result in a net gain of the recovery of Hawai'i's threatened and endangered species.

Therefore, OHA urges the Committee to PASS H.B. 1144, H.D.1, with clarifying language. Thank you for the opportunity to testify.



SENATOR MIKE GABBARD, CHAIR
SENATOR J. KALANI ENGLISH, VICE-CHAIR
COMMITTEE ON ENERGY AND ENVIRONMENT

TESTIMONY RE: HOUSE BILL NO. 1144, H.D. 1
RELATING TO ENDANGERED SPECIES

March 24, 2009, 2:55 p.m.
Conference Room 225

Good afternoon Chair Gabbard, Vice-Chair English, and members of the Committee:

My name is David Henkin, and I am an attorney with Earthjustice. I appreciate the opportunity to offer this testimony regarding House Bill No. 1144, H.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 bill's text is extremely cryptic, giving no insight into what is intended by "programmatic habitat conservation plans" and "programmatic safe harbor agreements," new concepts introduced by this proposal and nowhere defined. The lack of clarity is reason enough to reject the bill, which would expand in uncertain ways permits to kill and injure Hawai'i's unique and imperiled natural heritage. The Legislature should not so lightly authorize the destruction of public trust resources.

To get any sense of what the bill hopes to accomplish, one needs to look to the Administration's Justification Sheet, which claims the bill would allow for 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, since Chapter 195D as currently written already provides for this. See HRS §§ 195D-21(a), 195D-22(a).¹ There is no need to amend Chapter 195D to accomplish the Administration's stated goals.

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

¹ Likewise, while the Administration claims the changes are needed to allow for "all the tools and approaches now being used by the United States Fish and Wildlife Service" and to "make Hawai'i's statute consistent with federal programs," 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, 17.32.

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.

The difference between what the law currently allows and what HB 1144, 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, HB 1144, 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.

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, HB 1144, 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.

HB 1144'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 Legislature should not allow the Board 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 HB 1144, H.D. 1. Thank you again for the opportunity to offer this testimony.



Sierra Club Hawai'i Chapter

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SENATE COMMITTEE ON ENERGY AND ENVIRONMENT

March 24, 2009, 2:55 P.M.

(Testimony is 2 pages long)

TESTIMONY IN STRONG OPPOSITION TO HB 1144, HD1

Aloha Chair Gabbard and members of the Committee:

The Sierra Club, Hawai'i Chapter, with over 5500 dues paying members statewide, opposes HB 1144, HD1, setting up a procedure for the state and county to establish a programmatic Habitat Conservation Plan (HCP) or Safe Harbor Agreement (SHA) that landowners can join without having to go through the scrutiny of their particular project. We believe that this measure is unnecessary and endangered species issues cannot be resolved in this "one size fits all" manner.

As an initial matter, please note that while the Administration claims this measure is necessary to allow "all the tools and approaches now being used by the United States Fish and Wildlife Service" and to "make Hawai'i's statute consistent federal programs," the Sierra Club is unaware of any inconsistency between Chapter 195D as currently written and the applicable federal regulations. *See* 50 C.F.R. §§ 17.22, 17.33. In fact, this proposal may conflict with federal law.

By introducing the open-ended concept of "certificates of inclusion," the measure would allow the issuance of licenses to kill endangered and threatened species without adequate assurances up-front that Hawaii'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.

The Department of Land and Natural Resources contests this bill would allow, for example, "a regional programmatic HCP on Kauai that would mitigate the endangered seabirds where they are vulnerable to utility lines and attraction of light." The existing law, however, already allows multiple landowners to enter into a single HCP or SHA (HRS 195D-21(a), 195D-22(a)). Thus, if all the folks on Kauai currently "taking" (killing, harming, etc.) listed seabirds want to enter into an island-wide HCP, they are free to do so. The Department could proactively assess each landowner's specific situation to quantify the level of take for each and determine what types of minimization and mitigation are necessary to confer a net benefit on the species. One option for mitigation would be contribution to efforts to protect seabird colonies from predators (cats, rats, etc.), with all landowners pooling their monetary contributions into one pot.

The Department of Business Economic Development & Tourism's testimony probably better captures the motivation for the Administration's support for this bill. This Department references the desire to create one HCP/SHA for all similar types of renewable energy. Then, for example, any future windfarm development would be eligible to participate in the killing or harassing of seabirds without an individual examination of the location of the project, the type of windmills, the number of windmills, the size of the windmills, or any further mitigation steps that may be reasonable or necessary.

Under existing law we need to know which landowners would participate in the multiple landowner agreement. Then, based on detailed information about actual levels of take and offsetting minimization or mitigation, the proposed HCP/SHA could be assessed using real data to determine if it met the statutory standards.

In contrast, the bill would allow incidental take to be authorized with no idea of which/how many landowners would ultimately participate and what the total contribution to a joint effort ultimately would be. Thus, if you needed \$100,000 from each of 10 landowners to reach the \$1 million necessary for effective colony protection, under the existing law, you would grant the incidental take only after you knew 10 landowners were on board. Under this bill, you might grant incidental take authority to the first 5 landowners who sign up, and never get all the funds needed to carry out mitigation. The species could die with no offsetting benefit.

Further, any future recipients of a "certificate of inclusion" would evade stringent public participation requirements and review by the Board (such as the requirement of obtaining a two-thirds vote). There would be no examination of the current status of the mitigation efforts, no establishment the proposed participant has the funding necessary, no review of current science regarding the status of the endangered species, nor even notice to the public. ***Our natural resources deserve better.***

In the case of endangered species, one size does not fit all. We respectfully ask that this Committee hold HB 1144, HD1.

Thank you for the opportunity to testify.



D. NOELANI KALIPI
DIRECTOR, GOVERNMENT & COMMUNITY RELATIONS
FIRST WIND ENERGY, LLC

TESTIMONY IN SUPPORT OF
HB 1144, HD 1
RELATING TO CONSERVATION OF THREATENED AND ENDANGERED SPECIES

BEFORE
THE SENATE
COMMITTEE ON ENERGY & ENVIRONMENT

Tuesday, March 24, 2009
2:55 p.m.
State Capitol, Conference Room 225

My name is D. Noelani Kalipi and I am the Director of Government & Community Relations for First Wind. First Wind supports HB 1144, HD 1 which proposes to encourage greater participation in the development and use of programmatic safe harbor agreements and programmatic habitat conservation plans.

First Wind, through its affiliates Hawaii Wind (formerly known as UPC Hawaii Wind) and Hawaii Holdings, has been working in Hawaii since 2004 with a Maui-based firm, Makani Nui Associates. Together, we developed, constructed, and operate Kaheawa Wind Power, a 30MW wind facility located in the West Maui Mountains. Kaheawa is located on State conservation lands, a fact that we are very proud of, given the rigorous permitting requirements associated with doing any type of activity on conservation lands.

We are proud of our demonstrated environmental record in Hawaii, which includes the precedent of, we believe, being the first operating wind farm in the United States to establish a Habitat Conservation Plan (HCP), which required joint jurisdiction between the State of Hawaii's Division of Forestry (DOFAW) and Wildlife and the U.S. Fish and Wildlife Service (USFWS). The HCP is designed to minimize and mitigate potential impacts that may affect four state and federally listed species that may occur in the vicinity of the project. KWP employs two full-time biologists and one technician, whose focus is the successful implementation and execution of the HCP.

We are currently developing five additional wind energy projects in the State of Hawaii on the islands of Maui, Oahu, Molokai and Kauai. We are currently working with DOFAW and the USFWS on two Habitat Conservation Plans for our proposed projects on Maui and Oahu. We



anticipate working closely with these agencies on a Habitat Conservation Plan for our project on Kauai and have included them in the community roundtable discussion we held in December 2008 to discuss siting criteria for our project.

We support the holistic approach that this bill would provide to address the restoration and recovery of listed species. We support programmatic approaches that allow multiple parties sharing the same native ecosystem to participate in SHAs and HCPs to mitigate endangered species conflicts. As a company that works closely with the federal and state processes, we support efforts to make Hawaii's laws consistent with federal programs.



For the Protection of Hawaii's Native Wildlife

HAWAII AUDUBON SOCIETY

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**TO: Committee on Energy and Environment
Senator Mike Gabbard, Chair
Senator J. Kalani English, Vice Chair**

HEARING: Tuesday March 24, 2009; 2:55 P.M., Conference Rm. 225

Re: HB1144, HD1, Relating to Conservation of Threatened and Endangered Species

Testimony in Opposition

Chair Gabbard, Vice Chair English, and members of the Committee on Energy and Environment. Thank you for the opportunity to testify in opposition on this measure. HB1144, HD1, if passed this bill would authorize the development and use of programmatic safe harbor agreements including programmatic habitat conservation plans that cover multiple landowners or a class of landowners or extend over a wide area or region.

The Hawaii Audubon Society was founded in 1939, and it is Hawaii's oldest conservation organization. The primary mission of the society is to foster community values that result in the protection and restoration of native ecosystems and conservation of natural resources through education, science and advocacy in Hawaii and the Pacific.

For us, HB1145 is troublesome as the Society generally supports measures that conserve habitat for our endangered endemic bird species. **However we are opposed to the concept of an open-ended "certificates of inclusion" and concur with Sierra Club, that when addressing endangered species issues a "one size fits all" concept will not address the intricacies involved in the protection of endangered or threatened species.**

We also agree with Earthjustice, that the Administration's primary justification for this measure that **"The Hawaii Endangered Species Law does not specifically mention all the tools and approaches now being used by the United States Fish and Wildlife Services under**

programmatic agreements. The change in chapter 195D, HRS, would make Hawaii's statute consistent with federal programs and encourage and facilitate future use in Hawaii," is invalid. The Society concurs that as currently written, Chapter 195D provides for landowners to enter into "habitat conservation plans" and "safe harbor agreements."

Finally, we find the previous comments offered by Dr. John T. Harrison to be well thought out, and concur that if implemented correctly HB1145, HD1, could "genuinely serve the threatened and endangered species and the broader conservation interest of the State by expanding the potential participant pool involved in effective and closely monitored management activities."

Given the fact that Chapter 195D currently provides for broad landowner participation, we would ask the committee to defer this measure.

Thank you for the opportunity to testify here today.

Sincerely,
George Massengale, JD
Legislative Analyst