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**A BILL FOR AN ACT**

RELATING TO CONSERVATION OF THREATENED AND ENDANGERED SPECIES.

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

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

4           "Certificate of inclusion" means a type of license that is  
5 used to enroll interested landowners into a programmatic safe  
6 harbor agreement or programmatic habitat conservation plan and  
7 extends coverage of an incidental take license to those  
8 landowners identified in the agreement or plan and who  
9 subsequently enroll in the agreement or plan.

10          "Habitat conservation plan" means a plan that covers single  
11 or multiple landowners, or a class of landowners such as in a  
12 programmatic plan, and may include a single property or extend  
13 over a wide area or region.

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

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

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

- 11 (1) The applicant, to the maximum extent practicable,  
12 shall minimize and mitigate the impacts of the take;
- 13 (2) The applicant shall guarantee that adequate funding  
14 for the plan will be provided;
- 15 (3) The applicant shall post a bond, provide an  
16 irrevocable letter of credit, insurance, or surety  
17 bond, or provide other similar financial tools,  
18 including depositing a sum of money in the endangered  
19 species trust fund created by section 195D-31, or  
20 provide other means approved by the board, adequate to  
21 ensure monitoring of the species by the State and to

- 1           ensure that the applicant takes all actions necessary  
2           to minimize and mitigate the impacts of the take;
- 3           (4) The plan shall increase the likelihood that the  
4           species will survive and recover;
- 5           (5) The plan takes into consideration the full range of  
6           the species on the island so that cumulative impacts  
7           associated with the take can be adequately assessed;
- 8           (6) The measures, if any, required under section 195D-  
9           21(b) shall be met, and the department has received  
10          any other assurances that may be required so that the  
11          plan may be implemented;
- 12          (7) The activity, which is permitted and facilitated by  
13          issuing the license to take a species, does not  
14          involve the use of submerged lands, mining, or  
15          blasting;
- 16          (8) The cumulative impact of the activity, which is  
17          permitted and facilitated by the license, provides net  
18          environmental benefits; and
- 19          (9) The take is not likely to cause the loss of genetic  
20          representation of an affected population of any  
21          endangered, threatened, proposed, or candidate plant  
22          species.

1 Board approval shall require an affirmative vote of not less  
2 than two-thirds of the authorized membership of the board after  
3 holding a public hearing on the matter on the affected island.  
4 The department shall notify the public of a proposed license  
5 under this section through publication in the periodic bulletin  
6 of the office of environmental quality control and make the  
7 application and proposed license available for public review and  
8 comment for not less than sixty days prior to approval. A  
9 programmatic habitat conservation plan may also provide for  
10 issuance of certificates of inclusion to extend the coverage of  
11 the incidental take license to landowners enrolling in the  
12 programmatic plan at a later date.

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

1           (i) The department shall work cooperatively with federal  
2 agencies in concurrently processing habitat conservation plans,  
3 safe harbor agreements, [~~and~~] incidental take licenses, and  
4 certificates of inclusion pursuant to the Endangered Species  
5 Act. After notice in the periodic bulletin of the office of  
6 environmental quality control and a public hearing on the  
7 islands affected, which shall be held jointly with the federal  
8 agency, if feasible, whenever a landowner seeks both a federal  
9 and a state safe harbor agreement, habitat conservation plan, or  
10 incidental take license, the board, by a two-thirds majority  
11 vote, may approve the federal agreement, plan, or license  
12 without requiring a separate state agreement, plan, or license  
13 if the federal agreement, plan, or license satisfies, or is  
14 amended to satisfy, all the criteria of this chapter. All state  
15 agencies, to the extent feasible, shall work cooperatively to  
16 process applications for habitat conservation plans and safe  
17 harbor agreements on a consolidated basis including concurrent  
18 processing of any state land use permit application that may be  
19 required pursuant to chapter 183C or 205, so as to minimize  
20 procedural burdens upon the applicant."

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

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

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

16           In carrying out programs authorized by this chapter, the  
17 department may enter into agreements with federal agencies,  
18 counties, private landowners, and organizations for the  
19 administration and management of any area or facility  
20 established under section 195D-21 or 195D-22, or public lands  
21 [~~utilized~~] used for conserving, managing, enhancing, or

1 protecting indigenous aquatic life, wildlife, land plants,  
2 threatened and endangered species, and their habitat."

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

5 "(d) Notwithstanding any other law to the contrary, the  
6 board shall suspend or revoke the approval of any habitat  
7 conservation plan or individual landowner's portion thereof  
8 approved under this section if the board determines that:

9 (1) Any parties to the plan, or their successors, have  
10 breached their obligations under the plan or under any  
11 agreement implementing the plan and have failed to  
12 cure the breach in a timely manner, and the effect of  
13 the breach is to diminish the likelihood that the plan  
14 will achieve its goals within the time frames or in  
15 the manner set forth in the plan;

16 (2) The plan no longer has the funding source specified in  
17 subsection (a) or another sufficient funding source to  
18 ensure the measures or actions specified in subsection  
19 (b) are undertaken in accordance with this section; or

20 (3) Continuation of the permitted activity would  
21 appreciably reduce the likelihood of survival or

1 recovery of any threatened or endangered species in  
2 the wild."

3 SECTION 5. Section 195D-22, Hawaii Revised Statutes, is  
4 amended to read as follows:

5 **"§195D-22 Safe harbor agreements.** (a) To encourage  
6 landowners to voluntarily engage in efforts that benefit  
7 endangered, threatened, proposed, and candidate species, except  
8 as otherwise provided by law, the board, upon approval by not  
9 less than two-thirds of the board's authorized membership, after  
10 a public hearing on the island affected, may enter into a safe  
11 harbor agreement with one or more landowners to create, restore,  
12 or improve habitats or to maintain currently unoccupied habitats  
13 that threatened or endangered species can be reasonably expected  
14 to use, if the board determines that the cumulative activities,  
15 if any, contemplated to be undertaken within the areas covered  
16 by the agreement are environmentally beneficial. In the event  
17 the board votes to enter into a safe harbor agreement for which  
18 the majority of the endangered species recovery committee  
19 recommended disapproval, the board may not enter into the safe  
20 harbor agreement unless the agreement is approved by a two-  
21 thirds majority vote of both houses of the legislature. The  
22 board shall notify the public of the proposed safe harbor



1 agreement through the periodic bulletin of the office of  
2 environmental quality control and make the proposed agreement  
3 available for public review and comment not less than sixty days  
4 prior to approval. A programmatic safe harbor agreement may  
5 also provide for issuance of certificates of inclusion to extend  
6 the coverage of the incidental take license to landowners  
7 enrolling in the programmatic agreement at a later date.

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

15 (1) The take would not jeopardize the continued existence  
16 of any endangered, threatened, proposed, or candidate  
17 species;

18 (2) The take would not reduce the population of  
19 endangered, threatened, proposed, or candidate species  
20 below the number found on the property prior to  
21 entering into the agreement;

1           (3) The agreement proposes to create, restore, maintain,  
2                    or improve significant amounts of habitat for a  
3                    minimum of five years for private lands and for a  
4                    minimum of fifteen years for public lands;

5           (4) There is adequate funding for the agreement and the  
6                    source of that funding is identified;

7           (5) The safe harbor agreement increases the likelihood  
8                    that the endangered or threatened species for which a  
9                    take is authorized will recover;

10          (6) Any take authorized pursuant to this subsection shall  
11                    occur only in the habitat created, restored,  
12                    maintained, or improved; and

13          (7) The cumulative impact of the activity, which is  
14                    permitted and facilitated by the take, provides net  
15                    environmental benefits.

16          (c) Notwithstanding any other law to the contrary, the  
17 board shall suspend or rescind any safe harbor agreement or  
18 individual landowner's portion thereof approved under this  
19 section if the board determines that:

20           (1) Any parties to the safe harbor agreement, or their  
21                    successors, have breached their obligations under the  
22                    safe harbor agreement or under any other agreement

1 implementing the safe harbor agreement and have failed  
2 to cure the breach in a timely manner, and the effect  
3 of the breach is to diminish the likelihood that the  
4 agreement will achieve its goals within the time  
5 frames or in the manner set forth in the agreement;

6 (2) To the extent that funding is or will be required, the  
7 funding source specified in subsection (b) no longer  
8 exists and is not replaced by another sufficient  
9 funding source to ensure that the measures or actions  
10 specified in subsection (b) are undertaken in  
11 accordance with this section; or

12 (3) Continuation of the permitted activity would  
13 appreciably reduce the likelihood of survival or  
14 recovery of any threatened or endangered species in  
15 the wild.

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

20 SECTION 6. This Act does not affect rights and duties that  
21 matured, penalties that were incurred, and proceedings that were  
22 begun, before its effective date.

H.B. NO. 1144

1 SECTION 7. Statutory material to be repealed is bracketed  
2 and stricken. New statutory material is underscored.

3 SECTION 8. This Act shall take effect upon its approval.

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INTRODUCED BY: Calvin K. Day  
BY REQUEST

JAN 26 2009

**Report Title:**

Endangered Species

**Description:**

Authorizes 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.

HB1144

JUSTIFICATION SHEET

DEPARTMENT: Land and Natural Resources

TITLE: A BILL FOR AN ACT RELATING TO CONSERVATION OF THREATENED AND ENDANGERED SPECIES.

PURPOSE: 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.

MEANS: Amend sections 195D-2, 195D-4(g), (h), and (i), 195D-5(b), 195D-21(d), and 195D-22, Hawaii Revised Statutes (HRS).

JUSTIFICATION: Federal resource conservation agencies are adopting large landscape scale ecosystem-based approaches to conserve endangered species and their habitat. The most recent example of this is the recent 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. The Hawaii Endangered Species Law does not specifically mention all the tools and approaches now being used by the United States Fish and Wildlife Service 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 scale and offer benefits that may otherwise not be possible with a single landowner agreement.

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.

Impact on the public: 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.

Impact on the department and other agencies: Provide tools to adopt ecosystem-based approaches for multiple species on a large regional scale. Also provides streamlined processes for SHAs and HCPs and reduces agency time and cost to process agreements and plans and encourage more participation and recovery effort for endangered species.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM DESIGNATION: LNR 402.

OTHER AFFECTED AGENCIES: State Department of Transportation and other state agencies desiring to process programmatic SHAs and HCPs. Federal natural resource conservation agencies, including United States Fish and Wildlife Service, National Oceanic and Atmospheric Administration, and United States Department of Agriculture-Natural Resources Conservation Service, taking ecosystem approaches to endangered species conservation.

EFFECTIVE DATE: Upon approval.