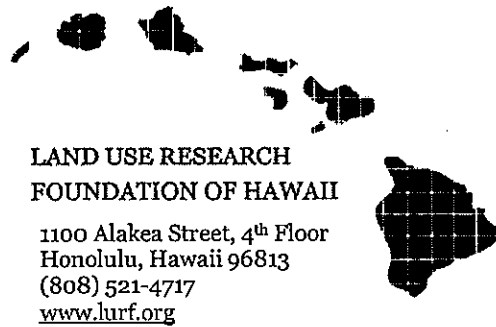


# LATE TESTIMONY



LAND USE RESEARCH  
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February 2, 2012

Representative Jerry L. Chang, Chair  
Representative Sharon E. Har, Vice Chair  
House Committee on Water, Land & Ocean Resources

**Comments and Concerns Relating to HB 2371 – Conservation of Wildlife; Citizen Suits. (Allows citizen suits to enforce certain conservation statutes, habitat conservation plans, and safe harbor agreements against any person; repeals prohibition on HCP, SHA and incidental take licenses after July 1, 2012.)**

**Monday, February 6, 2012, 10:20 p.m., in House Conference Room 325**

My name is Dave Arakawa, and I am the Executive Director of the Land Use Research Foundation of Hawaii (LURF), a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. One of LURF's missions is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii's significant natural and cultural resources and public health and safety.

LURF appreciates the opportunity to provide comments and concerns relating to this bill.

**HB 2371.** This bill proposes to allow suits to be brought against any person to enforce certain conservation statutes, habitat conservation plans, and safe harbor agreements. This bill also proposes to repeal the section of the law which prohibits the issuance of safe harbor agreements SHA, habitat conservation plans (HCP), or incidental take licenses (ITL) after July 1, 2012.

**LURF's Position.** LURF strongly supports Section 2 of HB 2371, which would continue to induce compliance with conservation measures, by repealing the law which currently restricts the Department of Land and Natural Resources (DLNR) from approving SHA, HCP and ITL after July 1, 2012. LURF also strongly opposes Section 1, of this bill, which relates to citizen suits, because it is unnecessary, in that current Hawaii law provides that DLNR is responsible for enforcing the SHAs, HCPs and ITLs, including pursuing citizen complaints, petitions and lawsuits; and there are more than sufficient opportunities for citizens to bring petitions to enforce conservation statutes, HCPs and SHAs. Thus, LURF respectfully requests that **Section 1 be deleted from this HB 2371.**

## Safe Harbor Agreements/Habitat Conservation Plans/Incidental Take Permits should be retained.

- HRS §195D-30 provides that all HCP, SHA and ITLs and subsequent actions authorized under those plans, agreements and licenses shall be designed to result in an overall net gain in the recovery of Hawaii's threatened and endangered species.
- Currently, Chapter 195D, Hawaii Revised Statutes (HRS) provides for criteria and the process for approval of SHA, HCP and ITL, however, it does not allow any new SHA, HCP or ITL after July 1, 2012.
- Thus, LURF strongly supports Section 2 of HB 2371, which repeals of the prohibition on approval of issuance of new SHAs, HCPs and ITLs after July 1, 2012.
- Provisions allowing SHA were included in the Endangered Species Act and in HRS Chapter 195D as a means of encouraging landowners to voluntarily engage in efforts that benefit endangered, threatened, proposed, and candidate species and to undertake conservation efforts on their land in support of the recovery of endangered species.
- Pursuant to HRS §195D-22, SHAs allow landowners to agree with the State to create, restore, or improve habitats or to maintain currently unoccupied habitats that threatened or endangered species can be reasonably expected to use. Without these provisions, some landowners may have a strong *disincentive* to undertake endangered species recovery efforts or other activities that could attract endangered species to their land due to the threat of increased liability under these laws for any harm to endangered species that may occur.
- Provisions allowing HCPs and ITPs were included in both laws as a means of allowing proposed activities with the potential to impact endangered species to proceed provided that measures are taken to ensure an overall benefit to the species (for example, by setting aside habitat for the species outside of the project area). Absent these provisions, important economic activities, including renewable energy projects, would be impossible, and existing land uses which attract endangered species would also be severely impacted.
- **SHAs, HCPs and ITLs provide a net benefit to endangered species** and to the state by encouraging conservation efforts while allowing for important economic development in the state. They are an essential component of our state endangered species law; a crucial and successful tool in achieving an overall net gain in the recovery of Hawaii's threatened and endangered species, and should be retained.

## Citizen Suits are unnecessary.

- Notwithstanding our strong support for Section 2 of HB 2371, which provides for the repeal of the prohibition on new SHAs, HCPs and ITLs, we **strongly urge that proposed provisions of Section 1 of HB 2371 relating to citizen suits be deleted from the legislation.**
- HB 2371 does not include any purpose section or any justification for including a new citizen suit provision against private parties.
- Current Hawaii law provides that DLNR is responsible for enforcing the SHAs, HCPs and ITLs, including pursuing citizen complaints and lawsuits. Under current laws, there are more than sufficient opportunities for citizens to bring petitions to enforce conservation statutes, HCPs and SHAs, as follows:
  - **Immediate Hearing on Citizen Petition.** Any person who believes that a violation of a HCP, SHA or ITL has occurred, is occurring, or is likely to occur

may petition the DLNR Chairperson (Chairperson) for an immediate hearing, which shall be heard within forty-eight (48) hours after the filing of the petition. If the hearings officer determines that there is a substantial likelihood that the continued existence of an endangered or threatened species will be jeopardized unless the violation is immediately enjoined, then the hearings officer shall order temporary injunctive relief. HRS §195D-27(d).

- **Citizen Petition to DLNR Chairperson.** Any person may petition the Chairperson to appoint a hearings officer to hear a request to enjoin any person, including the state and any other government agency, alleged to be in violation of Chapter 195-D (this Chapter), including any rule adopted pursuant to this Chapter, HCP, SHA, or ITL, or to require the State to take action to enforce this Chapter, or any term of the HCP, SHA, or ITL. HRS §195D-27(a).
- **Chairperson action to resolve Citizen Petition.** Upon receipt of a petition, the Chairperson shall make a diligent effort to resolve the subject matter of the petition, and if appropriate, to cause the non-complying or other responsible party to comply with the HCP, SHA, or ITL. HRS §195D-27(b).
- **Chapter 91 Contested Case Hearing on Citizen Petition.** If the Chairperson is unable to resolve the Citizen petition within ninety (90) days or if the citizen petitioner is not satisfied with the Chairperson's resolution of the subject matter, then the Chairperson shall appoint a hearings officer to hear the Petition. The hearings officer shall commence a contested case hearing in accordance with HRS Chapter 91 and, within thirty (30) days of the completion of the hearing, grant in whole or in part, or deny the petition. HRS §195D-27(b).
- **Citizen suits against any State or county agency, DLNR or the Board of Land and Natural Resources (BLNR).** Current Hawaii law provides for any person, acting as a private attorney general, to commence a civil suit on the person's behalf: against any state or county agency or instrumentality that is alleged to be in violation of the terms of, or fails to fulfill the obligations imposed and agreed to under any HCP, SHA and accompanying license for public lands, pursuant to HRS §195D-32(a)(1); and against the DLNR or BLNR, where there is an alleged a failure of DLNR or BLNR to perform any act or duty required under a HCP, SHA, and accompanying license for public lands, pursuant to HRS §195D-32(a)(2).
- We understand that the Natural Resources Committee of the U.S. House of Representatives has recently undertaken a review of the Endangered Species Act and concluded that excessive litigation under the Act threatens species recovery, job creation, and economic growth.
- In the view of many, one of the greatest obstacles to the success of the ESA is the way that it has become a tool for excessive litigation. As of December 2011, Interior Department agencies were dealing with a combined total of 180 pending ESA-related lawsuits, and the U.S. Fish and Wildlife Service was spending so much of its listing budget on litigation and responding to petitions that it had almost no money left to devote to placing new species under federal protection.
- Litigation is re-directing scarce resources intended to be used for species protection into plaintiff's coffers, where it can be used to perpetuate the cycle of litigation.

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- The citizen suit provisions of the Endangered Species Act are so lenient as to encourage and foster Endangered Species Act lawsuits, regardless of their merit. The “cost recovery” provision often result in enormous costs to public and private parties, sometimes with no benefit to any species and no proof of any violation of the Act.
- We believe that the current Hawaii law and process provide more than enough public review, reports, and administrative enforcement of rules, plans agreements or licenses, as well as citizen lawsuits against DLNR and any state or county agency. Thus, LURF believes it is unnecessary to incorporate new citizen suit provisions into HRS Chapter 195D, which will have similar adverse effects in the State of Hawaii, and therefore strongly urge that these provisions be deleted from Section 1 of the bill.

Thank you for the opportunity to provide comments and concerns relating to this proposed measure.



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**Monday, February 6, 2012  
10:20 am  
Conference Room 325**

**House Committee on Water, Land, and Ocean Resources  
Testimony on HB 2371  
RELATING TO ENDANGERED AND THREATENED SPECIES**

Aloha Chair Chang, Vice Chair Har, and Members of the Committee,

I am Janet Ashman, testifying on behalf of the Hawaii Farm Bureau Federation (HFBF). Organized since 1948, the HFBF is comprised of 1,800 farm family members statewide, and serves as Hawaii's voice of agriculture to protect, advocate and advance the social, economic and educational interests of our diverse agricultural community.

**We strongly support one part of this measure;** the continued availability of safe harbor agreements, habitat conservation plans, and incidental take licenses under HRS Chapter 195D. The bill accomplishes this by deletion of the July 2012 sunset date for approvals of these programs that provide a net benefit to endangered species through conservation agreements, while allowing important activities to take place within the state.

**We strongly oppose the addition of citizen suit provisions.** Instead of providing incentives for conservation and stewardship, citizen suit provisions punish those whose lands may be used as habitat for endangered species. Hawaii's farms and ranches are an attraction for many endangered species and we encourage our members to be protective of those species that find our lands a suitable habitat. However, we are concerned about increased liability under additional citizen suit provisions for any harm to endangered species that may *accidentally* occur. At a time when food sustainability is a priority for Hawaii, we cannot afford to jeopardize the viability of our food producers.

It is common knowledge that endangered species litigation is expensive, diverts resources from conservation actions that promote species recovery, and threatens jobs and economic growth. In fact, the federal Endangered Species Act citizen suit provisions, already available for use, are considered by many to be counter-productive to meaningful species recovery and environmental progress.

The U.S. Fish and Wildlife Service currently spends so much of its budget on litigation and responding to petitions that it is unable to effectively place new species under federal protection.

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Instead, environmental plaintiffs who are often awarded the costs of litigation use those funds to go on to file the next suit, and the cycle continues.

Citizen suits are already available under state statute for alleged violations of safe harbor agreements, habitat conservation plans, and incidental take licenses. Immediate injunctive relief is also available under our current statutes under certain circumstances.

HFBF respectfully requests that this committee delete the proposed amendments relating to citizen suits and instead begin to consider appropriate incentives to encourage landowners, especially farmers and ranchers, to engage in efforts that restore and conserve endangered and threatened species.