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STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAII'  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
KA 'OIHANA KUMUWAIWAI 'ĀINA

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KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

Testimony of  
DAWN N. S. CHANG  
Chairperson

Before the Senate Committee on  
WATER AND LAND

Wednesday, March 13, 2024  
1:00 PM

State Capitol, Conference Room 229 and Via Videoconference

In consideration of  
HOUSE BILL 2473 HOUSE DRAFT 2  
RELATING TO CONSERVATION MITIGATION PROGRAMS

House Bill 2473 HD2 authorizes the Department of Land and Natural Resources (Department) to operate and approve conservation bank and conservation in-lieu fee mitigation programs. **The Department supports this measure with comments.**

This bill is part of the Department's legislative package. Before introduction, the Department sent a draft of this bill to and asked for comments from Earthjustice, American Bird Conservancy, the Sierra Club, Magnolia Land Partners, and many current incidental take licensees to get feedback on the draft bill. We only received responses from Earthjustice. We met with Earthjustice twice before this bill was approved to go into the Department's package and once afterward but before any legislative hearings were scheduled. As this bill moved through the House, we made revisions to this bill based on comments from the meetings with Earthjustice and from comments in their testimony.

The California Department of Fish and Wildlife (CDFW) has a conservation and mitigation banking program (CDFW Program) that has served as a model for other states developing conservation bank programs (<https://wildlife.ca.gov/Conservation/Planning/Banking>). The Department met with staff from the CDFW Program to learn about its program and effectiveness. In drafting this bill, the Department has reviewed applicable California laws, policies, and guidelines and incorporated lessons learned from the CDFW Program.

In drafting this bill, the Department also reviewed federal laws and guidelines for implementing conservation and mitigation bank programs under the Clean Water Act and Endangered Species

Act. In 2008, the United States Army Corp of Engineers published the final Compensatory Mitigation for Losses of Aquatic Resources regulations, 40 Code of Federal Regulations (CFR) Part 230, which put in place a suite of changes governing the implementation of compensatory mitigation, including mitigation banks and mitigation in-lieu fee programs. In 2023, the United States Fish and Wildlife Service published the FWS Endangered Species Act Compensatory Mitigation Policy. The changes outlined in these documents were designed to improve the ecological outcomes of compensatory mitigation projects and increase transparency, predictability, and consistency in compensatory mitigation project decision-making.

The Department will employ lessons learned from other conservation and mitigation programs. In the bill, properties with conservation banks and conservation in-lieu fee mitigation programs must be protected by long-term management under a conservation easement in favor of the Department or a non-government organization, deed restriction, condition, or covenant. A conservation bank relies on a unique credit system, defined in the conservation banking instrument, based on the species protected and the conservation actions implemented. Hawai'i Revised Statutes (HRS) §195D-30 requires, “[a]ll habitat conservation plans, safe harbor agreements, incidental take licenses, 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.” Therefore, the number of credits purchased as compensatory mitigation for habitat conservation plans would be calculated to result in a net gain in the recovery of the specific species. Understanding this policy goal is key to a successful conservation bank or in-lieu-fee program. Most importantly, the establishment of conservation banks and conservation in-lieu-fee mitigation programs will result in two significant benefits: (1) larger-scale conservation actions with measurable, enforceable biological performance standards, resulting in credits pre-approved for potential use by permit applicants and (2) significant time savings and certainty for permit applicants and regulatory agencies who utilize conservation bank or ILF program credits to satisfy the mitigation requirements of a habitat conservation plan.

This bill would establish terrestrial conservation bank authority like that existing for aquatic species and habitats under Section 187A-41, HRS.

The Department proposes three amendments to this bill. The first proposed amendment is to the preamble on page 2, lines 1 through 6. It clarifies that compensatory mitigation could be used in two scenarios: (1) either for past damages to indigenous species or their habitat or (2) for unavoidable impacts to threatened endangered, candidate, or proposed species or their habitats as part of an approved habitat conservation plan and incidental take license.

The purpose of this Act is to authorize the department of land and natural resources to operate and approve conservation bank and conservation in-lieu fee mitigation programs where a person or an entity is required to provide compensatory mitigation [~~as part of an approved habitat conservation plan and incidental take license~~]:

- (1) For past damages to indigenous species or their habitats;
- and

(2) For unavoidable impacts to threatened, endangered, candidate, or proposed species or their habitats as part of an approved habitat conservation plan and incidental take license.

The second proposed amendment is to page 8, lines 14 through 16, and requires the Department to establish an interagency review working group. The purpose of the interagency review working group would be to ensure concurrent state and federal review and processing of conservation banks and conservation in-lieu fee mitigation programs.

(g) The department shall work cooperatively with federal agencies in concurrently processing mitigation requirements pursuant to federal law and shall establish an interagency review working group.

The third proposed amendment is to page 9, line 10, by adding the requirement for conservation bank instruments and conservation in-lieu fee instruments to identify the indigenous species for which a conservation bank or conservation in-lieu fee mitigation program is established as compensatory mitigation for past damages to that indigenous species.

(i)(3) The endangered species, threatened species, proposed species, and candidate species known or reasonably expected to occur in the ecosystems, natural communities, or habitat types in the conservation bank or conservation in-lieu fee mitigation program. Where a conservation bank or conservation in-lieu fee mitigation is established as compensatory mitigation for past damages to an indigenous species or their habitat, the conservation bank instrument or conservation in-lieu fee instrument shall identify that indigenous species;

The Department recommends changing the effective date from July 1, 3000, to “[t]his act shall take effect upon its approval.”

Mahalo for the opportunity to provide comments in support of this measure.



SENATOR LORRAINE R. INOUE, CHAIR  
SENATOR BRANDON J.C. ELEFANTE, VICE-CHAIR  
SENATE COMMITTEE ON WATER AND LAND

TESTIMONY IN OPPOSITION TO HOUSE BILL NO. 2473, HD 2  
RELATING TO CONSERVATION MITIGATION PROGRAMS

March 13, 2024, 1:00 p.m.  
Conference Room 229

Good afternoon, Chair Inouye, Vice-Chair Elefante, and members of the committee:

My name is David Lane Henkin, and I am an attorney with Earthjustice. We appreciate the opportunity to testify in **STRONG OPPOSITION** to House Bill 2473, HD 2, which would authorize the Department of Land and Natural Resources (DLNR) to operate and approve conservation bank and conservation in-lieu fee mitigation programs. As discussed below, **we urge the Committee to create an expert working group, rather than pass this bill, which threatens to undermine important legal protections in current law that protect Hawai'i's species from extinction.**

We have no objection to the bill's basic concept of establishing a mechanism to pool resources to allow for larger-scale habitat restoration projects for Hawai'i's imperiled species. **Whenever the Legislature adopts policies related to endangered and threatened species, however, the devil is in the details. Unless done properly, even well intentioned legislation can threaten critically imperiled native species with extinction.**

We met with DLNR representatives twice before this year's legislative session to discuss HB 2473 and raised alarms that the proposal was not fully thought through and would undermine critical protections in existing law for imperiled species. Unfortunately, DLNR opted to press ahead with this bill regardless.

When the Legislature amended HRS Chapter 195D decades ago to provide for incidental take licenses (ITLs) and habitat conservation plans (HCPs), which allow people to kill, injure, or otherwise "take" endangered and threatened species, it enacted critical safeguards to further Hawai'i's commitment to "insure the continued perpetuation of indigenous aquatic life, wildlife, and land plants." HRS § 195D-1; *see also* HRS § 195D-2 (defining "take"); *id.* § 195D-4(g) (authorizing incidental take licenses "as a part of a habitat conservation plan"):

- The Legislature created an expert panel called the Endangered Species Recovery Committee (ESRC) and tasked those experts with ensuring that any license to kill or harm imperiled native species would be based on sound science and will confer the

promised conservation benefits. HRS § 195D-25(b). The Legislature further provided that, even if the DLNR supports approval of an ITL or HCP, the experts on the ESRC have the final say; only a supermajority of the Legislature can override the ESRC's recommendation to disapprove. HRS § 195D-21(b)(1).

- The Legislature also insisted that any permission to kill or harm imperiled species must “[p]rovide for an adaptive management strategy that specifies the actions to be taken periodically if the plan is not achieving its goals.” HRS § 195D-21(b)(2)(I).
- The Legislature further required the Board of Land and Natural Resources to suspend or revoke a permit authorizing harm to listed species if “[c]ontinuation of the permitted activity would appreciably reduce the likelihood of survival or recovery of any threatened or endangered species in the wild.” HRS § 195D-21(c)(3). In other words, the Legislature insisted that the person whose actions harm endangered or threatened species—not the imperiled species—would be on the hook if things do not go according to plan.

The current version of HB 2473 is so poorly drafted that it appears to give DLNR the power to ignore the experts on the ESRC and give credit for mitigation over the experts' objections. This would undo the key protection for imperiled species on which the Legislature insisted when it first authorized permits to kill or injure imperiled species: Whenever the ESRC says “no,” only a supermajority the Legislature can override it because the decision would be a policy, rather than a scientific, one.

In addition to this fundamental flaw, the bill fails to address many key issues, including (but not limited to):

- How are mitigation credits from a conservation bank or conservation in-lieu fee mitigation program calculated, and who is responsible for calculating them?
- Who ultimately decides whether the anticipated conservation benefits are being realized?
- What happens if anticipated conservation benefits aren't being realized and harm to imperiled species is going unmitigated and unaddressed?
- What happens if DLNR tries to authorize a conservation bank or conservation in-lieu fee mitigation program over the ESRC's objection?
- What happens if DLNR tries to approve mitigation credits over the ESRC's objection?
- What happens if DLNR ignores the ESRC's recommendations for necessary changes to a conservation bank or conservation in-lieu fee mitigation program?
- What is the “interagency review working group” (which the bill tasks with identifying entities that are “qualified” to establish and operate conservation banks and conservation in-lieu fee mitigation programs)?

These unaddressed issues present policy issues that are far too important and complicated to work through during the rush of the legislative session, particularly at this late date. Because the fate of Hawai'i's imperiled species hangs in the balance (and, moreover, there is no urgency to pass a bill this year), **we urge the Committee to establish a working group of experts to develop a fully thought-through proposal for consideration next year, rather than pass this deeply flawed bill.** Earthjustice would be happy to participate in the working group.

Mahalo for the opportunity to offer this testimony.



# SIERRA CLUB OF HAWAI'I

## SENATE COMMITTEE ON WATER AND LAND

March 13, 2024

1:00 PM

Conference Room 229

### In **OPPOSITION** to **HB2473 HD2**: RELATING TO CONSERVATION MITIGATION PROGRAMS

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Aloha Chair Inouye, Vice Chair Elefante, and Members of the Committee,

On behalf of our 20,000 members and supporters, the Sierra Club of Hawai'i **OPPOSES HB2473 HD2**, which risks facilitating undue harm to our native and endemic species threatened with extirpation or extinction.

The Sierra Club appreciates the intent behind this measure, to establish conservation mitigation banks and in-lieu fees that could allow for the more efficient investment of resources intended to mitigate the harms of certain activities, including activities that may harm or kill our native threatened and endangered species.

However, the Sierra Club is very concerned regarding language in this measure that could in fact facilitate harmful activities and contribute to the permanent loss of our endangered and threatened plants and wildlife. We are particularly concerned over language that appears to relegate the Endangered Species Recovery Committee to a mere advisory role in mitigation program decisionmaking, and that lacks clear and detailed safeguards against politically influential entities who could use poorly-developed mitigation programs to simply "greenwash" actions that contribute to the permanent loss of our native species.

As we have previously testified, Hawai'i's native and endemic species not only represent the unique ecological and cultural foundation that has provided for life on these islands since time immemorial, but define the very identity of these islands we call home. When we lose our native and endemic species to extinction we are not just witnessing the human-driven end to millions of years of evolution - we are watching the very essence and soul of Hawai'i nei fade away, forever. Accordingly, we must carefully scrutinize and defend against policies, even well-intentioned ones, that may contribute to the permanent loss of our native species.

Accordingly, the Sierra Club of Hawai'i respectfully but strongly urges the Committee to **HOLD** HB2473 HD2. Mahalo nui for the opportunity to testify.

**HB-2473-HD-2**

Submitted on: 3/9/2024 11:27:57 AM

Testimony for WTL on 3/13/2024 1:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Jacqueline S. Ambrose	Individual	Support	Written Testimony Only

Comments:

Aloha,

Yes to authorize the Department of Land and Natural Resources to operate and approve conservation bank and conservation in-lieu fee mitigation programs



**HB-2473-HD-2**

Submitted on: 3/11/2024 9:55:34 AM

Testimony for WTL on 3/13/2024 1:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Lisa Bishop	Individual	Oppose	Written Testimony Only

Comments:

Aloha Chair Inouye, Vice Chair Elefante, and Committee members,

Mahalo for the opportunity to testify in opposition to this Bill. DLNR is well intentioned, but neither resourced nor experienced in the development and implementation of conservation banks to create the infrastructure from scratch. Tasking a working group with the requisite expertise and political will to do so to report to the legislature is a much better first step if conservation banks are truly needed in Hawaii.

With Aloha,

Lisa Bishop

Hawaii resident, homeowner, tax payer, voter

**LATE**

**HB-2473-HD-2**

Submitted on: 3/12/2024 4:12:27 PM

Testimony for WTL on 3/13/2024 1:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Nanea Lo	Individual	Oppose	Written Testimony Only

Comments:

Hello,

My name is Nanea Lo. I'm born and raised in the Hawaiian Kingdom. I live in Mō'ili'ili. I'm writing in Strong Opposition of HB2473 HD2.

This bill will limit the Endangered Species Recovery Committee to an advisory role over conservation bank programs that are supposed to mitigate the impacts of activities that may harm or kill endangered and threatened species. There needs to be over sight by this committee.

**Oppose HB2473 HD2 now and do the right thing!**

me ke aloha 'āina,

Nanea Lo, Mō'ili'ili, O'ahu

**HB-2473-HD-2**

Submitted on: 3/12/2024 10:02:07 PM

Testimony for WTL on 3/13/2024 1:00:00 PM

**LATE**

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Sherry Pollack	Individual	Oppose	Written Testimony Only

Comments:

I oppose this measure and urge the committee to instead of passing this bill, set up a working group to develop proposed bill language that ensures adequate protection for imperiled species, which the Legislature can then consider that proposal next session.

Mahalo for the opportunity to testify.