

JOSH GREEN, M.D.  
GOVERNOR | KE KIA'ĀINA

SYLVIA LUKE  
LIEUTENANT GOVERNOR | KA HOPE KIA'ĀINA



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

P.O. BOX 621  
HONOLULU, HAWAII 96809

DAWN N.S. CHANG  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE  
MANAGEMENT

RYAN K.P. KANAKA'OLE  
FIRST DEPUTY

DEAN D. UYENO  
ACTING DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
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CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES  
ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

**LATE**

Testimony of  
DAWN N. S. CHANG  
Chairperson

Before the House Committee on  
WATER AND LAND  
and  
AGRICULTURE AND ENVIRONMENT

Monday, February 5, 2024  
1:15 PM

State Capitol, Conference Room 229 and Via Videoconference

In consideration of  
SENATE BILL 3161  
RELATING TO CONSERVATION OF THREATENED SPECIES

Senate Bill 3161 proposes to authorize the Department of Land and Natural Resources to issue temporary threatened species licenses and draft administrative rules for the conservation of threatened species. **The Department supports this measure with amendments.**

The Department recognizes the need to issue temporary take licenses for threatened species to ensure state law operates in parallel and is consistent with federal law. This bill would authorize the Department to authorize non-lethal take activities otherwise prohibited in section 195D-4(e), Hawaii Revised Statutes (HRS), for threatened species by temporary license and outlined in administrative rules.

Under federal law, 16 U.S.C. §1533(d), whenever a species is listed as threatened, the United States Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) are required to issue regulations as deemed necessary and advisable to provide for the conservation of the threatened species. These regulations may include prohibitions on take. In 1978, USFWS and NMFS extended take prohibitions to all threatened species by federal regulation called a "blanket 4(d) rule." This blanket 4(d) rule can be modified by a species-specific 4(d) rule authorizing take of a threatened species for conservation efforts that have long-term benefits to the threatened species and for low levels of take that do not contribute to the threats facing a species continued existence.

Under state law, threatened and endangered species are conferred identical protections. Currently, the Department may issue temporary licenses that allow any act otherwise prohibited by section 195D-4(e), HRS, for scientific purposes or to enhance the propagation or survival of a threatened or endangered species. In addition, the Board of Land and Natural Resources (Board) may (1) issue temporary licenses that allow take otherwise prohibited by section 195D-4(e), HRS, that is incidental and not the purpose of an otherwise lawful activity, as part of a habitat conservation plan, pursuant to section 195D-4(g), HRS; or (2) approve safe harbor agreements that authorize take that is incidental and not the purpose of an otherwise lawful activity of an endangered, threatened, proposed, or candidate species, pursuant to section 195D-22, HRS. With respect to threatened or endangered species, acts prohibited in section 195D-4(e), HRS, are export, take, possess, process, sell, offer for sale, deliver, carry, transport, ship, violate any rule pertaining to the conservation of such species adopted under chapter 195D, HRS, or violate the terms or obligations under a temporary license and habitat conservation plan or temporary license and safe harbor agreement.

This bill would authorize the Department to issue temporary licenses for non-lethal take of threatened species as outlined by administrative rules. These temporary licenses could only be issued for actions that do not interfere with the survival and recovery of the threatened species; and any take is non-lethal and is part of a conservation action, project, or program that confers a net recovery benefit.

The Department notes that the bill as drafted allows the Department to issue these temporary licenses. The Department proposes to amend page 7, line 14, to authorize the Board or authorized representative to issue temporary licenses.

The Department also notes that the bill as drafted allows the Department to issue administrative rules for the terms and conditions of these temporary licenses. The Department proposes to amend page 7, line 14, to include the requirement that the Department consult with the Endangered Species Recovery Committee before promulgating these administrative rules.

The Department proposes to remove the condition that the activity does not reduce survival and reproductive success of the species in page 7, lines 21 and 22 because it is duplicative.

The Department suggests amending the bill to provide the Department authority to establish and operate conservation banks:

SECTION 2. Section 195D-4, Hawaii Revised Statutes, is amended to read as follows:

**"§195D-4 Endangered species and threatened**

**species.** (h) Whenever any species is listed as a threatened species pursuant to subsections (a), (b), or (c), the department may adopt administrative rules, pursuant to chapter 91, as it

deems necessary and advisable to provide for the conservation of such species, after consultation with the endangered species recovery committee. The [department] board or authorized representative may issue a temporary license under such terms and conditions as determined by administrative rule, to allow any act otherwise prohibited by subsection (e), for threatened species as long as such act does not interfere with the survival and recovery of such species; and any take authorized under this section is non-lethal and is part of a conservation action, project, or program that confers a net recovery benefit[; ~~or does not reduce survival and reproductive success of the species~~]. The rules may vary from county to county.

Mahalo for the opportunity to testify on this measure.



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

SENATOR MIKE GABBARD, CHAIR  
SENATOR HERBERT M. "TIM" RICHARDS, III, VICE-CHAIR  
SENATE COMMITTEE ON AGRICULTURE AND ENVIRONMENT

TESTIMONY IN STRONG OPPOSITION TO SENATE BILL NO. 3161  
RELATING TO THE CONSERVATION OF THREATENED SPECIES

February 5, 2024, 1:15 p.m.

Good afternoon, Chairs Inouye and Gabbard, Vice-Chairs Elefante and Richards, and members of the Committees:

My name is David Lane Henkin, and I am an attorney with Earthjustice. We **strongly oppose Senate Bill 3161**, which would strip critical protections from Hawai'i's threatened species, contravening the Legislature's goal to "insure the continued perpetuation of indigenous aquatic life, wildlife, and land plants." HRS § 195D-1. This bill would harm such iconic native (and threatened) species as the honu (Green sea turtle), Manu-o-Kū (Fairy Tern), 'āhinahina (Haleakalā silversword), and 'a'o (Newell's Shearwater).

Under current Hawai'i law, all imperiled native species—whether endangered or threatened—automatically enjoy the same protections against activities that could kill, injure, harass, or otherwise harm them. HRS § 195D-4(e); *see also id.* § 195D-2 (defining "take"). The Legislature has insisted that, if someone wants permission to kill or harm a threatened species, they must go through the same process to secure an incidental take license as someone whose activities kill or harm an endangered species. *Id.* § 195D-4(g). Among other things, the applicant must commit to a habitat conservation plan that "shall **increase the likelihood** that the species will survive and recover" *id.* § 195D-4(g)(4) (emphasis added), and the authorized activity must "provide[] **net environmental benefits.**" *Id.* § 195D-4(g)(8) (emphasis added). To provide additional safeguards, the Legislature has prohibited the Board of Land and Natural Resources from approving any plan and issuing any incidental take license unless the experts on the Endangered Species Recovery Committee make the scientific determination that the plan complies with Chapter 195D's species conservation mandates. *Id.* § 195D-21(b).

SB 3161 would strip these vital protections from native species that are threatened with extinction. As the Justification Sheet candidly admits, the bill would give the Department of Land and Natural Resources (DLNR) the power to "allow certain acts for threatened species that would not be allowed for endangered species." The bill would do this in several ways:

1. DLNR could override the Legislature's judgment that all threatened species need the highest level of protection. At the time a species is listed as threatened, DLNR would have total discretion to issue an administrative rule that gives a blanket authorization for activities that kill and harm the species.
2. Even where the prohibition on killing or harming threatened species would otherwise apply, the bill would give DLNR the power to override the Endangered Species Recovery Committee and issue an incidental take license by administrative rule, even when the experts on the Endangered Species Recovery Committee have concluded that the proposed activity would hasten the species' extinction.
3. No longer would an applicant for an incidental take license be required to ensure that prospects for a threatened species' survival and recovery would increase or that net environmental benefits would be provided.

There is no justification for removing these critical protections from threatened species, as SB 3161 proposes. The preamble's claim that the bill is needed to ensure consistency with federal law is false. The federal Endangered Species Act expressly provides that Hawai'i law "may be more restrictive than" the federal law. 16 U.S.C. § 1535(f). For decades, Chapter 195D has automatically extended the same protections to both endangered and threatened species, and there has been no conflict with federal law.

Nor is this bill needed for DLNR to authorize non-lethal take as "part of a conservation action, project, or program that confers a net recovery benefit," the only provision in SB 3161 that arguably promotes species conservation. DLNR already has that authority under HRS § 195D-4(f).

Because SB 3161 would subvert Chapter 195D's command to "take positive actions to enhance [threatened species'] prospects for survival," HRS § 195D-1, we urge the Committees **to hold this bill.**

Mahalo for the opportunity to offer this testimony.



# SIERRA CLUB OF HAWAI'I

## SENATE COMMITTEE ON WATER AND LAND SENATE COMMITTEE ON AGRICULTURE AND ENVIRONMENT

February 5, 2024

1:15 PM

Conference Room 229

### In **OPPOSITION** to **SB3161**: RELATING TO THE CONSERVATION OF THREATENED SPECIES

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Aloha Chair Inouye, Chair Gabbard, Vice Chair Elefante, Vice Chair Richards, and Members of the Committees,

On behalf of our 20,000 members and supporters, the Sierra Club of Hawai'i **OPPOSES SB3161**, which would roll back critical protections for native and endemic species threatened with extirpation or extinction.

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.

Unfortunately, climate destabilization, habitat disruption, invasive species, and the pressures of an ever-growing human population are rendering our native and endemic species and their habitats ever more vulnerable to potentially irreversible loss. We must accordingly double down on our efforts to recover and protect our remaining native species and ecosystems.

This measure, however, would do the opposite, and roll back existing protections for Hawai'i's threatened native species. Habitat conservation plans that *increase* the likelihood of such species' recovery and that provide for bonds and other assurances of compliance would no longer be required from those whose activities may harm threatened species; instead, such activities may be authorized based on a simple and inherently unreliable finding that they would "not interfere with the survival and recovery of such species," OR that they do "not reduce survival or reproductive success of the species." The uncertainty inherent in such findings could lead to the further loss of species and habitat that have served as the physical, cultural, and spiritual foundation of our islands for millenia. This measure could also override other critical mechanisms, such as scientific and cultural expert review by the endangered species recovery committee, that are essential to minimizing the threat of potentially irreversible loss of our native biota.

Accordingly, the Sierra Club of Hawai'i respectfully but strongly urges the Committees to **HOLD** SB3161. Mahalo nui for the opportunity to testify.

**SB-3161**

Submitted on: 2/2/2024 1:45:43 PM

Testimony for WTL on 2/5/2024 1:15:00 PM

| <b>Submitted By</b> | <b>Organization</b>                      | <b>Testifier Position</b> | <b>Testify</b>         |
|---------------------|--|---------------------------|------------------------|
| Brad Keitt          | Testifying for American Bird Conservancy | Oppose                    | Written Testimony Only |

Comments:

American Bird Conservancy strongly opposes SB3161. Incidental take permits require thoughtful review and thorough assessment. SB3161 would remove important safeguards in the incidental take permit process, leading to less protections for the species that need them the most. Equally important, the ESRC is a valuable and impartial review panel. Their independent expertise is critical to the state making decisions based on the best available science and removing political aspects from these decisions. Please do not pass SB 161.



February 3, 2024

**LATE**

COMMITTEE ON WATER AND LAND  
Chair Inouye  
Vice Chair Elefante

COMMITTEE ON AGRICULTURE AND ENVIRONMENT  
Chair Gabbard  
Vice Chair Richards

Monday, February 5, 2024 at 1:15pm

Conference Room 229  
State Capitol  
415 South Beretania Street

**Re: TESTIMONY IN OPPOSITION OF SENATE BILL 3161 - RELATING TO THE CONSERVATION OF THREATENED SPECIES.**

Aloha Chair Inouye, Chair Gabbard, Vice Chair Elefante, Vice Chair Richards, and Members of the Committees,

Please accept these comments submitted by the Center for Biological Diversity (Center) in **strong opposition of Senate Bill 3161**, which would allow the Department of Land and Natural Resources to issue “temporary threatened species licenses,” dismantling vital protections afforded to already struggling indigenous wildlife, land plants, and aquatic species under HRS § 195D.

The Center is a non-profit 501(c)(3) membership corporation dedicated to the protection of native, threatened, and endangered species and the habitats they depend on to survive. Through science, policy, and environmental law, the Center is actively involved in endangered, threatened, and native species and habitat protection issues throughout Hawai‘i. The Center has more than 88,000 members throughout the United States, including Hawai‘i, with a direct interest in ensuring the conservation of our Hawaiian species.

Senate Bill 3161 undermines crucial protections for Hawai‘i’s threatened native and endemic species. At a time when many of Hawai‘i’s species are teetering on the brink of extinction due to climate change, habitat disruption, invasive species, and human population growth it is



imperative that we redouble our efforts to recover and safeguard the remaining native species and ecosystems we still have.

However, SB 3161 would have the opposite effect by erasing existing protections for threatened native species in Hawai'i. The bill seeks to eliminate the requirement for habitat conservation plans and bonds from individuals or entities whose activities may pose harm to threatened species. Instead, activities would be authorized based on subjective and inherently unreliable determinations. The inherent uncertainty associated with such determinations could exacerbate the loss of species and habitats that are found nowhere else on earth.

Senate Bill 3161 runs counter to the legislative intent to ensure the perpetuation of indigenous aquatic life, wildlife, and land plants in Hawai'i, as enshrined in HRS § 195D-1. The bill would unduly compromise the conservation of our iconic threatened species, many of which are backbones to struggling ecosystems. Under existing Hawai'i law, both endangered and threatened species benefit from equivalent safeguards against activities that could cause their death, injury, harassment, or other forms of harm. HRS § 195D-4(e). The Legislature has explicitly mandated that anyone seeking permission to harm or kill a threatened species must adhere to the same rigorous process required for obtaining an incidental take license concerning endangered species. HRS § 195D-4(g). Pertinently, the process necessitates the development of a habitat conservation plan that enhances the likelihood of species survival and recovery (HRS § 195D-4(g)(4)), while also ensuring that the authorized activity yields net environmental benefits. HRS § 195D-4(g)(8). Furthermore, the Board of Land and Natural Resources is expressly prohibited from approving any plan or issuing any incidental take license unless the experts on the Endangered Species Recovery Committee affirm that the plan aligns with Chapter 195D's species conservation mandates. HRS § 195D-21(b).

SB 3161 would erode these vital protections for native species facing the very real threat of extinction. As explicitly stated in the Justification Sheet, the bill would empower Department of Land and Natural Resources to authorize acts that would be prohibited for endangered species but allowed for threatened species. This would occur through the issuance of administrative rules that grant blanket authorization for activities that cause harm to threatened species at the time of their listing. Furthermore, even when the prohibition against harming threatened species would otherwise apply, the bill would grant Department of Land and Natural Resources the authority to override the conclusions of the Endangered Species Recovery Committee and issue an incidental take license via administrative rule, even if the committee's experts determine that the proposed activity would hasten the species' extinction. Additionally, the bill eliminates the requirement for applicants to ensure an increase in the prospects for a threatened species' survival and recovery or the provision of net environmental benefits.

There is no justifiable rationale for dismantling these critical protections for threatened species, as proposed by SB 3161. The claim made in the bill's preamble regarding the need for consistency with federal law is unfounded. The federal Endangered Species Act explicitly acknowledges that state law, such as that of Hawai'i, may impose more stringent restrictions

than federal law. 16 U.S.C. § 1535(f). For decades, Chapter 195D has consistently extended the same level of protection to both endangered and threatened species in Hawai'i, without any conflict with federal law. Additionally, the DLNR already possesses the authority to authorize non-lethal take as part of conservation actions, projects, or programs that yield a net recovery benefit, as stipulated in HRS § 195D-4(f).

Mahalo for this opportunity to provide testimony in **strong opposition of Senate Bill 3161**.

/s/ Maxx Phillips

Maxx Phillips, Esq.

Hawai'i and Pacific Islands Director, Staff Attorney

Center for Biological Diversity

1188 Bishop Street, Suite 2412

Honolulu, Hawai'i 96813

(808) 284-0007

[MPhillips@biologicaldiversity.org](mailto:MPhillips@biologicaldiversity.org)

**SB-3161**

Submitted on: 2/4/2024 3:41:34 PM

Testimony for WTL on 2/5/2024 1:15:00 PM

**LATE**

| <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, Chair Gabbard, and Committee Members,

Mahalo for the opportunity to testify in opposition to SB3161. This bill opens the door to too much opportunistic uncertainty that could have long term unforeseen catastrophic effects on ESA protected species.

Please defer this bill.

With Aloha,

Lisa Bishop

Hawaii resident, home owner, tax payer, voter

**LATE**

**SB-3161**

Submitted on: 2/4/2024 4:32:57 PM

Testimony for WTL on 2/5/2024 1:15:00 PM

| <b>Submitted By</b> | <b>Organization</b> | <b>Testifier Position</b> | <b>Testify</b>            |
|---------------------|---------------------|---------------------------|---------------------------|
| Gerard Silva        | Individual          | Oppose                    | Written Testimony<br>Only |

Comments:

This has to go through proper Chanel Not Give just any one this power!!!!

**SB-3161**

Submitted on: 2/5/2024 9:22:04 AM

Testimony for WTL on 2/5/2024 1:15:00 PM



| Submitted By | Organization | Testifier Position | Testify                |
|--------------|--------------|--------------------|------------------------|
| Nanea Lo     | Individual   | Oppose             | Written Testimony Only |

Comments:

Hello,

My name is Nanea Lo. I'm born and raised in the Hawaiian Kingdom. I currently reside in Mō'ili'ili on O'ahu. I'm writing to STRONGLY OPPOSE SB3161, which would roll back critical protections for native and endemic species threatened with extirpation or extinction.

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.

Unfortunately, climate destabilization, habitat disruption, invasive species, and the pressures of an ever-growing human population are rendering our native and endemic species and their habitats ever more vulnerable to potentially irreversible loss. We must accordingly double down on our efforts to recover and protect our remaining native species and ecosystems.

This measure, however, would do the opposite, and roll back existing protections for Hawai'i's threatened native species. Habitat conservation plans that increase the likelihood of such species' recovery and that provide for bonds and other assurances of compliance would no longer be required from those whose activities may harm threatened species; instead, such activities may be authorized based on a simple and inherently unreliable finding that they would "not interfere with the survival and recovery of such species," OR that they do "not reduce survival or reproductive success of the species." The uncertainty inherent in such findings could lead to the further loss of species and habitat that have served as the physical, cultural, and spiritual foundation of our islands for millenia. This measure could also override other critical mechanisms, such as scientific and cultural expert review by the endangered species recovery committee, that are essential to minimizing the threat of potentially irreversible loss of our native biota.

Accordingly, I respectfully but strongly urge the Committees to  
HOLD SB3161.

me ke aloha ‘āina,

Nanea Lo, Mō‘ili‘ili, O‘ahu