

# S.B. NO. 3161

JAN 24 2024

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## A BILL FOR AN ACT

RELATING TO THE CONSERVATION OF THREATENED SPECIES.

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

1           SECTION 1. The legislature finds that threatened species  
2 licenses are necessary to ensure state law operates in parallel  
3 and is consistent with federal law with respect to regulating  
4 take of threatened species. Threatened species licenses  
5 authorize temporary limited take of threatened species to  
6 license holders where acts resulting in take are approved by the  
7 department of land and natural resources. Such acts do not  
8 interfere with the survival and recovery of a threatened  
9 species; are non-lethal and are part of a conservation action,  
10 project, or program that confers a net recovery benefit; or do  
11 not reduce survival and reproductive success of the species.

12           The purpose of this Act is to authorize the department of  
13 land and natural resources to issue temporary licenses for acts  
14 otherwise prohibited by section 195D-4(e), Hawaii Revised  
15 Statutes, for threatened species following administrative rules.

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

S.B. NO. 3161

1           "§195D-4    **Endangered species and threatened**  
2 **species.** (a) Any species of aquatic life, wildlife, or land  
3 plant that has been determined to be an endangered species  
4 pursuant to the Endangered Species Act shall be deemed to be an  
5 endangered species under this chapter and any indigenous species  
6 of aquatic life, wildlife, or land plant that has been  
7 determined to be a threatened species pursuant to the Endangered  
8 Species Act shall be deemed to be a threatened species under  
9 this chapter. The department may determine, in accordance with  
10 this section, however, that any such threatened species is an  
11 endangered species throughout all or any portion of the range of  
12 such species within this State.

13           (b) In addition to the species that have been determined  
14 to be endangered or threatened pursuant to the Endangered  
15 Species Act, the department, by rules adopted pursuant to  
16 chapter 91, may determine any indigenous species of aquatic  
17 life, wildlife, or land plant to be an endangered species or a  
18 threatened species because of any of the following factors:

- 19           (1) The present or threatened destruction, modification,  
20                 or curtailment of its habitat or range;  
21           (2) Overutilization for commercial, sporting, scientific,  
22                 educational, or other purposes;

S.B. NO. 3161

1 (3) Disease or predation;

2 (4) The inadequacy of existing regulatory mechanisms; or

3 (5) Other natural or artificial factors affecting its  
4 continued existence within Hawaii.

5 (c) The department shall make determinations required by  
6 subsection (b) on the basis of all available scientific,  
7 commercial, and other data after consultation, as appropriate,  
8 with federal agencies, other interested state and county  
9 agencies, and interested persons and organizations.

10 (d) The department shall issue rules containing a list of  
11 all species of aquatic life, wildlife, and land plants that have  
12 been determined, in accordance with subsections (a) to (c), as  
13 endangered species and a list of all such species so designated  
14 as threatened species. Each list shall include the scientific,  
15 common, and Hawaiian names, if any, and shall specify with  
16 respect to each such species over what portion of its range it  
17 is endangered or threatened.

18 Except with respect to species of aquatic life, wildlife,  
19 or land plants determined to be endangered or threatened  
20 pursuant to the Endangered Species Act, the department, upon its  
21 own recommendation or upon the petition of three interested  
22 persons who have presented to the department substantial

S.B. NO. 3161

1 evidence that warrants review, shall conduct a review of any  
2 listed or unlisted indigenous species proposed to be removed  
3 from or added to the lists published pursuant to this  
4 subsection.

5 (e) With respect to any threatened or endangered species  
6 of aquatic life, wildlife, or land plant, it is unlawful, except  
7 as provided in subsections (f), (g), and [~~+~~+] (k) for any  
8 person to:

- 9 (1) Export any such species from this State;
- 10 (2) Take any such species within this State;
- 11 (3) Possess, process, sell, offer for sale, deliver,  
12 carry, transport, or ship, by any means whatsoever,  
13 any such species;
- 14 (4) Violate any rule pertaining to the conservation of the  
15 species listed pursuant to this section and adopted by  
16 the department pursuant to this chapter; or
- 17 (5) Violate the terms of, or fail to fulfill the  
18 obligations imposed and agreed to under, any license  
19 issued under subsection (f), (g), or [~~+~~+] (k) any  
20 habitat conservation plan authorized under section  
21 195D-21, or any safe harbor agreement authorized under  
22 section 195D-22.

S.B. NO. 3161

1 (f) The department may issue temporary licenses, under  
2 such terms and conditions as it may prescribe, to allow any act  
3 otherwise prohibited by subsection (e), for scientific purposes  
4 or to enhance the propagation or survival of the affected  
5 species.

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

12 (1) The applicant, to the maximum extent practicable,  
13 shall minimize and mitigate the impacts of the take;

14 (2) The applicant shall guarantee that adequate funding  
15 for the plan will be provided;

16 (3) The applicant shall post a bond, provide an  
17 irrevocable letter of credit, insurance, or surety  
18 bond, or provide other similar financial tools,  
19 including depositing a sum of money in the endangered  
20 species trust fund created by section 195D-31, or  
21 provide other means approved by the board, adequate to  
22 ensure monitoring of the species by the State and to

S.B. NO. 3161

- 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.

S.B. NO. 3/61

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  
4 island. The department shall notify the public of a proposed  
5 license under this section through publication in the periodic  
6 bulletin of the office of planning and sustainable development  
7 and make the application and proposed license available for  
8 public review and comment for not less than sixty days prior to  
9 approval.

10 (h) Whenever any species is listed as a threatened species  
11 pursuant to subsection (a), (b), or (c), the department may  
12 adopt administrative rules, pursuant to chapter 91, as it deems  
13 necessary and advisable to provide for the conservation of such  
14 species. The department may issue a temporary license under  
15 such terms and conditions as determined by administrative rule,  
16 to allow any act otherwise prohibited by subsection (e), for  
17 threatened species as long as such act does not interfere with  
18 the survival and recovery of such species; any take authorized  
19 under this section is non-lethal and is part of a conservation  
20 action, project, or program that confers a net recovery benefit;  
21 or does not reduce survival and reproductive success of the  
22 species. The rules may vary from county to county.

S.B. NO. 3161

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

9       ~~(i)~~ (j) The department shall work cooperatively with  
10 federal agencies in concurrently processing habitat conservation  
11 plans, safe harbor agreements, and incidental take licenses  
12 pursuant to the Endangered Species Act. After notice in the  
13 periodic bulletin of the office of planning and sustainable  
14 development and a public hearing on the islands affected, which  
15 shall be held jointly with the federal agency, if feasible,  
16 whenever a landowner seeks both a federal and a state safe  
17 harbor agreement, habitat conservation plan, or incidental take  
18 license, the board, by a two-thirds majority vote, may approve  
19 the federal agreement, plan, or license without requiring a  
20 separate state agreement, plan, or license if the federal  
21 agreement, plan, or license satisfies, or is amended to satisfy,  
22 all the criteria of this chapter. All state agencies, to the



S.B. NO. 3161

1 extent feasible, shall work cooperatively to process  
2 applications for habitat conservation plans and safe harbor  
3 agreements on a consolidated basis including concurrent  
4 processing of any state land use permit application that may be  
5 required pursuant to chapter 183C or 205, so as to minimize  
6 procedural burdens upon the applicant.

7 ~~[(j)]~~ (k) Subsection (e) and any other provision of law to  
8 the contrary notwithstanding, the department shall adopt rules  
9 in accordance with chapter 91 authorizing the propagation,  
10 possession, ownership, and sale of selected endangered and  
11 threatened land plant species grown from cultivated nursery  
12 stock and not collected or removed from the wild."


13 SECTION 3. Statutory material to be repealed is bracketed  
14 and stricken. New statutory material is underscored.

15 SECTION 4. This Act shall take effect upon its approval.

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INTRODUCED BY:



18

BY REQUEST

# S.B. NO. 3161

**Report Title:**

Threatened Species License; Administrative Rules

**Description:**

Authorizes the Department of Land and Natural Resources to issue temporary threatened species licenses and draft administrative rules for the conservation of threatened species.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

## JUSTIFICATION SHEET

DEPARTMENT: Land and Natural Resources

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

PURPOSE: To authorize the Department to issue temporary threatened species licenses and draft administrative rules for the conservation of threatened species.

MEANS: Amend section 195D-4, Hawaii Revised Statutes (HRS).

JUSTIFICATION: The Department's Division of Forestry and Wildlife (Division) recognizes the need to issue temporary take licenses for threatened species (threatened species licenses) to ensure state law operates in parallel and is consistent with federal law with respect to regulating take of threatened species. This bill would authorize the Department to allow certain actions for threatened species, by permit and outlined in administrative rules, otherwise prohibited for species listed as endangered under section 195D-4(e), HRS.

Under federal law, the Endangered Species Act (ESA) does not automatically confer protections to species listed as threatened, so when a species is listed as threatened, the United States Fish and Wildlife Service (USFWS) must promulgate species-specific protective regulations. Therefore, by regulation, species listed as threatened receive some of the protections conferred to endangered species under the ESA, but the USFWS authorizes certain actions as exemptions to those protections.

State law works a bit differently. Under chapter 195D, HRS, species listed as threatened receive identical protections to species listed as endangered. The Department promulgated a list of threatened or endangered species in chapter 13-124,

Hawaii Administrative Rules, pursuant to section 195D-4(d), HRS. 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 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.

The amendment to section 195D-4, HRS, authorizes the Department to issue threatened species licenses for acts approved by administrative rules. These administrative rules would only apply to species listed as threatened pursuant to chapter 195D, HRS, and not those species listed as endangered. Terms and conditions outlined in the administrative rules would allow licensees to conduct certain acts with respect to species listed as threatened as long as such acts do not interfere with the survival and recovery of such a species; any take authorized 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 such a species. These rules may vary from county to county.

Impact on the public: This bill would allow licensees to conduct certain acts evaluated by the Division when it is determined that threatened species could be impacted by those acts.

Impact on the department and other agencies: The bill would provide the Department flexibility to prescribe administrative rules that allow certain acts for threatened species that would not be allowed for endangered species.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM  
DESIGNATION: LNR 402.

OTHER AFFECTED  
AGENCIES: None.

EFFECTIVE DATE: Upon approval.