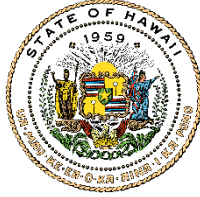


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KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

Testimony of
DAWN N. S. CHANG
Chairperson

Before the House Committee on
JUDICIARY AND HAWAIIAN AFFAIRS

Friday, February 9, 2024
2:00 PM

State Capitol, Conference Room 325 and Via Videoconference

In consideration of
HOUSE BILL 2473 HD1
RELATING TO CONSERVATION MITIGATION PROGRAMS

House Bill 2473 HD1 proposes to authorize 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 amendments.**

The Department notes that the proposed bill, as drafted, could authorize incidental take of threatened, endangered, proposed, or candidate species without requiring a Habitat Conservation Plan where prospective damage to these species are expected to occur. The Department strongly recommends striking all references to use of conservation banks and conservation in-lieu fee mitigation programs as compensatory mitigation for prospective damage on page 2, lines 5 through 6; page 4, line 11; page 4, lines 20 through 21, and page 5, lines 1 through 2.

The Department clarifies that past damage mitigation requirements may be applied to any indigenous species. The Department recommends amending page 5, lines 3 through 4, to apply past damage mitigation to any indigenous species by striking threatened, endangered, candidate, and proposed species.

The Department also clarifies that conditions for establishing and operating conservation banks by requiring sponsors to provide funding assurances in the form of endowment funds or similar mechanisms to support long-term stewardship of the conservation bank by amending page 5, line 17.

The Department further clarifies that conditions for establishing and operating conservation in-lieu fee mitigation programs by requiring conservation in-lieu fee mitigation programs be established and operated under a conservation in-lieu fee instrument with a compensation planning framework, requiring sponsors be qualified government agencies or non-governmental organization, requiring sponsors provide funding assurances in the form of endowment funds or similar mechanisms to support long-term stewardship of the conservation in-lieu fee mitigation program, and requiring that conservation in-lieu fee mitigation instruments include a schedule for implementing mitigation activities. These proposed amendments begin on page 6, line 2.

The Department wants to ensure that sponsors are responsible for performing all necessary work in accordance with the conservation bank instrument or conservation in-lieu fee mitigation instrument, and that sponsors assume responsibility for all mitigation obligations from the entity who purchased or transferred credits to that sponsor. These proposed amendments begin on page 6, line 3.

The Department proposes the components of the conservation bank instruments and conservation in-lieu fee mitigation instruments on page 6, line 18.

Finally, the Department proposes to require the Endangered Species Recovery Committee review each approved conservation bank and conservation in-lieu fee mitigation program annually and make recommendations as necessary on page 6, line 18.

The Department suggests amending the bill to provide the Department authority to establish and operate conservation banks and conservation in-lieu fee mitigation programs:

SECTION 2. Chapter 195D, Hawaii Revised Statutes, is amended by adding a new part to be appropriately inserted and to read as follows:

**"PART III. CONSERVATION BANK AND CONSERVATION IN-LIEU FEE
MITIGATION PROGRAMS**

SECTION 1. The legislature finds that terrestrial conservation bank and conservation in-lieu fee mitigation programs restore, create, enhance, or preserve terrestrial habitats for Hawaii's indigenous species including threatened, endangered, candidate, and proposed~~[, and indigenous]~~ species. The federal government, in conjunction with as many as fourteen other states, has developed successful conservation bank and conservation in-lieu

fee mitigation programs. Conservation bank and conservation in-lieu fee mitigation programs would serve as mechanisms to enhance the recovery and survival of threatened and endangered species and enhance conservation efforts for candidate, proposed, and other indigenous species [~~and~~] or their habitat.

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 entity is required to provide compensatory mitigation as part of an approved habitat conservation plan and incidental take license:

- (1) For unavoidable impacts to threatened, endangered, candidate, or proposed species; and
- (2) ~~Prospectively for damages to indigenous species and their habitat; and]~~
- (3) For past damages to [~~threatened, endangered, candidate, proposed, or~~] indigenous species [~~and~~] or their habitat.

SECTION 2. Chapter 195D, Hawaii Revised Statutes, is amended by adding a new part to be appropriately inserted and to read as follows:

"PART . CONSERVATION BANK AND CONSERVATION IN-LIEU FEE

MITIGATION PROGRAMS

§195D- Definitions. As used in this part:

"Compensatory mitigation" means actions taken to fulfill, in whole or in part, mitigation requirements under state or federal law or a court mandate.

"Compensation planning framework" means a plan used to select, secure, and implement threatened, endangered, candidate, or proposed species mitigation activities.

"Conservation bank" means a type of compensatory mitigation where a site or sites established under a site protection instrument is conserved and managed to provide ecological functions and services expressed as credits for threatened, endangered, candidate, proposed, or indigenous species.

"Conservation bank instrument" means an agreement establishing the conservation bank and describing the terms and conditions of operation, including provisions for the issuance of credits.

"Conservation in-lieu fee mitigation instrument" means the agreement for the establishment, operation, and use of a conservation in-lieu fee mitigation program.

"Conservation in-lieu fee mitigation program" means a type of compensatory mitigation where an incidental take licensee or person or entity required to provide mitigation pays a fee to the department- or nonprofit-approved sponsor to satisfy mitigation requirements in an approved habitat conservation plan, where the fee charged by the sponsor represents the expected cost of either:

- (1) Increasing the likelihood that a threatened or endangered species will survive and recover as a result of the incidental take licensee's project; or
- (2) Enhancing the conservation of candidate, proposed, or indigenous species [~~and~~] or their habitats.

"Credit" means a value based on defined units representing the accrual or attainment of ecological functions or services at the conservation bank or conservation in-lieu fee mitigation program and released as the conservation bank or conservation in-lieu fee mitigation program meets performance criteria.

"Qualified" means a person or entity, including a government agency and non-governmental organization, approved by the interagency review working group.

"Site protection instrument" means an interest in real property that protects a conservation bank or conservation in-lieu fee mitigation site in perpetuity, such as a conservation easement in favor of the department or non-governmental organization, deed restriction, condition, or covenant.

"Sponsor" means a qualified person or entity responsible for establishing or operating a conservation bank or conservation in-lieu fee mitigation.

§195D- Conservation banking and conservation in-lieu fee mitigation programs. (a) The department may require a person or entity complete compensatory mitigation to offset environmental loss

caused by [~~prospective or~~] past damages to [~~threatened, endangered, candidate, proposed, or~~] indigenous species [~~and~~] or their habitat.

(b) The department may operate or approve conservation bank and conservation in-lieu fee mitigation programs for the purpose of restoring, creating, enhancing, preserving, or any combination thereof threatened, endangered, candidate, proposed, or any indigenous species [~~and~~] or their habitats where a person or entity is required to provide compensatory mitigation either:

~~[(1) For prospective damages to indigenous species and their habitats where the use of conservation banking or conservation in-lieu fee mitigation is approved by the agency requiring mitigation;]~~

[(2)] (1) For past damages to ~~threatened, endangered, candidate, proposed, or~~ any indigenous species ~~and~~ or their habitats where the use of conservation banking or conservation in-lieu fee mitigation is approved by the agency requiring mitigation; or

~~[(3)]~~ (2) [~~As off-site mitigation to~~] To offset adverse impacts to a threatened, endangered, candidate, or proposed species as part of an approved habitat conservation plan and incidental take license.

(c) Conservation banks shall be established and operated under a conservation bank instrument on public or private lands, protected in perpetuity under a site protection instrument, and approved by

the board. [~~The endangered species recovery committee shall review and recommend to the department all conservation banks before the transfer or sale of credits.~~]

- (1) The endangered species recovery committee shall review and recommend to the department all conservation banks before transfer or sale of credits; and
- (2) The conservation bank instrument shall include financial assurances for the performance and completion of conservation bank construction, management, monitoring, and any remedial action. Funding assurances shall include an endowment fund or other similar financial tools adequate to ensure long-term stewardship of the conservation bank.

(d) Conservation in-lieu fee mitigation programs shall be established and operated under a [~~legal contract~~] conservation in-lieu fee mitigation instrument with a compensation planning framework, protected in perpetuity under a site protection instrument, and approved by the board. [~~The endangered species recovery committee shall review and recommend to the department all conservation in-lieu fee mitigation programs before the transfer or sale of credits.~~]

- (1) The endangered species recovery committee shall review and recommend to the department all conservation in-lieu fee

mitigation programs before operation and transfer or sale of credits;

(2) Sponsors of conservation in-lieu fee mitigation programs shall only be qualified government agencies or non-governmental organizations;

(3) The conservation in-lieu fee mitigation instrument shall include financial assurances for the performance and completion of conservation in-lieu fee mitigation program construction, management, monitoring, and any remedial action. Funding assurances shall include an endowment fund or other similar financial tools adequate to ensure long-term stewardship of the conservation in-lieu fee mitigation program.

(4) The conservation in-lieu fee mitigation instrument shall include a schedule for implementing mitigation activities.

(e) Sponsors shall be responsible for performing all necessary work in accordance with the conservation bank instrument or conservation in-lieu fee mitigation program to establish, enhance, restore, monitor, and maintain threatened, endangered, candidate, proposed, or indigenous species or their habitat. Sponsors may sell or transfer credits to persons required to provide compensatory mitigation as provided in subsections (a) and (b). Upon sale or transfer of credits, the sponsor assumes responsibility for all

mitigation obligations from the entity who purchased or transferred credits to that sponsor.

(f) The department may collect fees or payment for costs incurred including, but not limited to, costs incurred by the department during:

- (1) Its rulemaking process; and
- (2) The approval, establishment, monitoring, and oversight of conservation bank 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.

(h) Provisions in this section shall not apply to aquatic species [~~and~~] or their habitat.

(i) Conservation bank instruments and conservation in-lieu fee mitigation instruments shall identify:

- (1) The geographic area encompassed by the conservation bank or conservation in-lieu fee mitigation program;
- (2) The ecosystems, natural communities, or habitat types within the conservation bank or conservation in-lieu fee mitigation program;
- (3) The endangered, threatened, proposed, 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;

(4) The measures for property protection;

(5) A provision requiring an annual report by the sponsor be submitted to the department within ninety days of each fiscal year ending June 30;

(6) A resource management plan approved by the department;

(7) An agreement between the landowner and the sponsor or qualified entity for long-term stewardship after all mitigation credits are satisfied; and

(8) A system for assessing conservation bank credits or conservation in-lieu fee mitigation program credits.

(j) The endangered species recovery committee shall review on an annual basis and make recommendations for any necessary changes to approved conservation banks and conservation in-lieu fee mitigation programs.

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



EARTHJUSTICE

REPRESENTATIVE DAVID A. TARNAS, CHAIR
REPRESENTATIVE GREGG TAKAYAMA, VICE-CHAIR
HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

TESTIMONY IN OPPOSITION TO HOUSE BILL NO. 2473, HD 1
RELATING TO CONSERVATION MITIGATION PROGRAMS

February 9, 2024, 2:00 p.m.

Good afternoon, Chair Tarnas, Vice-Chair Takayama, and members of the committee:

My name is David Lane Henkin, and I am an attorney with Earthjustice. We appreciate the opportunity to testify regarding House Bill 2473, HD 1, 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 efforts to 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, this bill could undermine efforts to save critically imperiled native species from extinction.** Because HB 2473 is not fully fleshed out, we urge the Committee to **hold the bill and establish an expert working group** to develop proposed bill language that ensures adequate protection for imperiled species. The Legislature can then consider that proposal next session.

Should the Committee feel the need to pass some form of this bill, we suggest below some **important amendments**, which are necessary to avoid unintended—and irreversible—negative consequences for Hawai'i's threatened and endangered species.

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). Moreover, the Legislature 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 lacks important details, which could undermine these vital protections for Hawai‘i’s irreplaceable native species. Rather than try to work through these complicated issues during the rush of the legislative session, **we urge the Committee to establish a working group of experts to develop a fully thought-through proposal for consideration next year.**

Alternatively, should the Committee feel the need to pass this bill, **we urge the Committee to adopt the following amendments** to ensure that critical protections remain in place:

1. Amend proposed § 195D-__ (b)(1) (page 4, line 20, to page 5, line 2) to read: “For prospective damages to indigenous species (other than threatened, endangered, candidate, or proposed species) and their habitats where the use of conservation banking or conservation in-lieu fee mitigation is approved by the agency requiring mitigation;”

Justification: The House Committee on Water and Land amended this paragraph in HD1 to exclude its application to endangered, threatened, candidate, or proposed species, which were included in the original bill. HRS chapter 195D’s definition of “indigenous species” is, however, very broad, encompassing “endangered,” “threatened,” candidate,” and “proposed” species. HRS § 195D-2. This clarifying amendment is necessary to avoid confusion, making clear that harm to endangered and threatened species is regulated under HRS § 195D-4(e).

2. Amend proposed § 195D-__ (b)(3) (page 5, lines 8-11) to read: “As off-site mitigation to offset adverse impacts to a threatened, endangered, candidate, or proposed species as part of an approved habitat conservation plan and incidental take license, provided that

(i) the habitat conservation plan provides for an adaptive management strategy that specifies the actions to be taken periodically if the conservation banking or conservation in-lieu fee mitigation is not achieving its goals, and (ii) the endangered species recovery committee recommends approval of this form of mitigation.”

Justification: As with any ITL and HCP, an entity seeking authorization to kill, injure or otherwise “take” imperiled species must be required to provide additional or different mitigation for the harm it causes in the event that the anticipated benefits from the conservation project are not realized (*e.g.*, because of climate change or a natural disaster, or because the assumptions on which the anticipated benefits were based turn out to be wrong). In addition, to ensure that approvals of ITLs and HCPs are based on sound science (rather than politics) and will promote the conservation of Hawai‘i’s imperiled species, the experts on the ESRC must review any proposed use of conservation or conservation in-lieu mitigation, and that form of mitigation should not be used unless the ESRC recommends its approval.

As the foregoing makes clear, establishing an entirely new conservation mitigation program involves complex policy issues and, unless those issues are thought through carefully, risks undermining important protections for Hawai‘i’s irreplaceable threatened and endangered species. Accordingly, **we urge the Committee to establish an expert working group, rather than pass this bill.** If the Committee is nonetheless eager to pass some form of this legislation, we encourage you to adopt our proposed amendments.

Mahalo for the opportunity to offer this testimony.