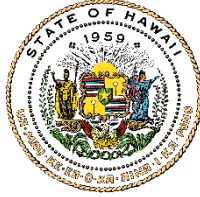


JOSH GREEN, M.D.
GOVERNOR | KE KIA'ĀINA

SYLVIA LUKE
LIEUTENANT GOVERNOR | KA HOPE KIA'ĀINA



STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAI'I
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
COMMISSION ON WATER RESOURCE
MANAGEMENT
CONSERVATION AND COASTAL LANDS
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LAND
STATE PARKS

Testimony of
DAWN N. S. CHANG
Chairperson

Before the House Committee on
FINANCE

Monday, February 26, 2024
3:30 PM

State Capitol, Conference Room 308 and Via Videoconference

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

House Bill 2473 House Draft 2 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 comments.**

The Department supports this bill as it authorizes the Department to operate and approve conservation bank and conservation in-lieu fee mitigation programs. Conservation banks and conservation in-lieu fee mitigation programs are alternative options for mitigation already required when an entity, like a wind-energy facility, receives an incidental take license for incidental take of a threatened or endangered species. It does not replace any existing requirements for incidental take licensees and should provide better outcomes for protected species recovery.

The intent of this bill is for conservation banks and conservation in-lieu fee mitigation programs to be established and operated to benefit Hawai'i's vulnerable and unique species. Conservation banks and conservation in-lieu fee mitigation programs in other jurisdictions have a higher rate of success than licensee-responsible mitigation. The State of Hawai'i currently requires licensee-responsible mitigation for incidental take licensees because it is our only mitigation option. Incidental take licensees can walk away from permittee-responsible mitigation after their obligation is met leaving endangered and threatened species vulnerable. Conservation banks and conservation in-lieu fee mitigation programs offer greater certainty for both permittees and permitting agencies and improve conservation outcomes.

Where the Department operates a conservation bank or conservation in-lieu fee program on land managed by the Department, the Department could use funds paid by incidental take licensees for conservation projects, including fencing, habitat restoration, and predator-control. Where a non-governmental organization or other qualified sponsor operates a conservation bank or conservation in-lieu fee program on other than state land, this bill requires the site be protected in perpetuity and under terms and conditions to benefit the species it is created for.

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



REPRESENTATIVE KYLE YAMASHITA, CHAIR
REPRESENTATIVE LISA KITAGAWA, VICE-CHAIR
HOUSE COMMITTEE ON FINANCE

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

February 26, 2024, 3:30 p.m.

Good afternoon, Chair Yamashita, Vice-Chair Kitagawa, and members of the committee:

Thank you for accepting our testimony in **STRONG OPPOSITION** to the HB2473, HD 2. Earthjustice urges your Committee to defer action on this bill to establish a “conservation bank” and conservation in-lieu fee mitigation programs until after an expert working group has developed recommendations for the Legislature to adopt. As currently drafted, **HB2473 HD2 risks significantly undermining ongoing efforts to protect Hawai‘i’s native species from extinction.**

While this bill may be well-intentioned, the devil lurks in the details when it comes to protecting endangered and threatened native species. Fundamentally, we do not object to the basic concept of allowing those at the Department of Land and Natural Resources who protect imperiled native species to pool financial resources in ways that allow for larger scale habitat restoration projects. This type of habitat conservation has been successfully employed in some situations in other jurisdictions, but only after implementing a litany of pre-requisites, safeguards, and guarantees.

HOWEVER, the proposal in **this bill does not implement the painful lessons learned** from other attempts to establish conservation banks and in-lieu mitigation fee systems. We are grateful to see that the House Judiciary Committee acknowledged the concerns we raised in testimony before their Committee. Unfortunately, an annual review by the Endangered Species Recovery Committee falls far short of the detailed statutes, rules, and guidelines required to ensure that in-lieu mitigation fees and conservation banking do not inadvertently set up pay-to-violate mechanisms that do more damage than good in the long, hard work of native species protection and habitat restoration.

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. For an overview of the multitude of complex considerations that must be untangled in order for this type of policy to be successful, we offer these resources:

- Sebastian Theis, Mark Poesch, “Current capacity, bottlenecks, and future projections for offsetting habitat loss using Mitigation and Conservation banking in the United States,” *Journal for Nature Conservation*, Volume 67 (2022). Available at: <https://doi.org/10.1016/j.jnc.2022.126159>
- Department of the Interior, Office of Policy Analysis. “Conservation Banking Overview and Suggested Areas for Future Analysis,” page 1-65 (2016). Available at: www.doi.gov/sites/doi.gov/files/uploads/cb_sponsors_and_managers_survey_report_final_092716.pdf
- Rogers, D.L., “Preparing for Perpetuity – Decision support for Calculating the Perpetual Costs of Stewardship,” *Wetland and Stream Mitigation: A Handbook for Land Trusts*, The Environmental Law Institute and Law Trust Alliance, page 128-155 (September 2012). Available at: www.cnlm.org/wp-content/uploads/ELI-Mitigation-Handbook-2012-PAR-box-w-cover-2.pdf
- Mills, Christopher, “Incentives and The ESA: Can Conservation Banking Live Up To Potential?” *14 Duke Environmental Law & Policy Forum* 2, pages 523-562 (Spring 2004). Available at: <https://scholarship.law.duke.edu/delpf/vol14/iss2/1>

In the last document on this list, the author concluded that the structural requirements necessary to ensure successful conservation banking are “**politically impossible**” to achieve. They wrote that “[f]or conservation banking schemes to be successful... they must employ a currency that is easy to use and that serves as an accurate proxy for the social value that the [legal protections for threatened and endangered species] seek[] to capture. Conservation banking must ... operate within a structure that does not thin the market. ...**Unless there is a significant shift in priorities such that the private property rights lobby is greatly weakened, conservation banking will be unlikely to achieve its full potential for promoting endangered species health and recovery. It appears that we may have the way, but lack the will.**” Mills at 560 (emphasis added).

HB2473 HD2 could cripple current habitat protection efforts because it is not specific enough to avoid the known pitfalls of conservation banking practices. Accordingly, **we urge the Committee to establish an expert working group, rather than pass this bill.**

Mahalo for the opportunity to provide this testimony.