

## ACT 237

S.B. NO. 1089

A Bill for an Act Relating to Endangered Species.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. Section 195D-4, Hawaii Revised Statutes, is amended by amending subsections (g), (h), and (i) to read as follows:

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

- (1) The applicant, to the maximum extent practicable, shall minimize and mitigate the impacts of the take;
- (2) The applicant shall guarantee that adequate funding for the plan will be provided;
- (3) The applicant shall post a bond, or deposit a sum of money in the fund created by section 183D-10.5, adequate to ensure monitoring of the species by the State and to assure that the applicant takes all actions necessary to minimize and mitigate the impacts of the take;
- (4) The plan shall increase the likelihood that the species will survive and recover;
- (5) The plan takes into consideration the full range of the species on the island so that cumulative impacts associated with the take can be adequately assessed;
- (6) The measures, if any, required under section 195D-21(b) shall be met, and the department has received any other assurances that may be required so that the plan may be implemented;
- (7) The activity, which is permitted and facilitated by issuing the license to take a species, does not involve the use of submerged lands, mining, or blasting;
- (8) The cumulative impact of the activity, which is permitted and facilitated by the license, provides net environmental benefits; and
- (9) The take is not likely to cause the loss of genetic representation of an affected population of any endangered, threatened, proposed, or candidate plant species.

Board approval shall require an affirmative vote of not less than two-thirds of the authorized membership of the board[.] after holding a public hearing on the matter on the affected island. The department shall notify the public of [its intent to issue] a proposed license under this section [and make the application available for public review and comment] through publication in the periodic bulletin of the office of [[environmental[]] quality control and make the application and proposed license available for public review and comment for not less than sixty days prior to approval.

(h) Licenses issued pursuant to this section may be suspended or revoked for due cause, and if issued pursuant to a habitat conservation plan or safe harbor

agreement, shall run with the land for the term agreed to in the plan or agreement and shall not be assignable or transferable separate from the land. Any person whose license has been revoked shall not be eligible to apply for another license until the expiration of two years from the date of revocation.

(i) The department shall work cooperatively with federal agencies in concurrently processing habitat conservation plans, safe harbor agreements, and incidental take licenses pursuant to the Endangered Species Act. After notice in the periodic [bulletins] bulletin of the office of environmental quality control and a public hearing on the islands affected, which shall be held jointly with the federal agency, if feasible, whenever a landowner seeks both a federal and a state safe harbor agreement, habitat conservation plan, or incidental take license, the board, by a two-thirds majority vote, may approve the federal agreement, plan, or license without requiring a separate state agreement, plan, or license if the federal agreement, plan, or license satisfies, or is amended to satisfy, all the criteria of this chapter. All state agencies, to the extent feasible, shall work cooperatively to process applications for habitat conservation plans and safe harbor agreements on a consolidated basis including concurrent processing of any state land use permit application that may be required pursuant to chapter 183C or 205, so as to minimize procedural burdens upon the applicant.”

SECTION 2. Section 195D-21, Hawaii Revised Statutes, is amended by amending subsections (a), (b), and (c) to read as follows:

“(a) The [board] department may enter into [agreements] a planning process with any landowner for the purpose of preparing and implementing a habitat conservation plan. An agreement may include multiple landowners. Applications to enter into a planning process shall identify:

- (1) The geographic area encompassed by the plan;
- (2) The ecosystems, natural communities, or habitat types within the plan area that are the focus of the plan;
- (3) The endangered, threatened, proposed, and candidate species known or reasonably expected to occur in the ecosystems, natural communities, or habitat types in the plan area;
- (4) The measures or actions to be undertaken to protect, maintain, restore, or enhance those ecosystems, natural communities, or habitat types within the plan area;
- (5) A schedule for implementation of the proposed measures and actions; and
- (6) An adequate funding source to ensure that the proposed measures and actions are undertaken in accordance with the schedule.

After a habitat conservation plan is prepared, the board shall notify the public of [its intent to enter into] the proposed habitat conservation plan [and make the plan and the application available for public review and comment] through the periodic bulletin of the office of [[environmental]] quality control [for] and make the proposed plan and the application available for public review and comment not less than sixty days prior to approval. The notice shall include, but not be limited to, identification of the area encompassed by the plan, the proposed activity, and the ecosystems, natural communities, and habitat types within the plan area. The notice shall solicit public input and relevant data.

(b) Except as otherwise provided by law, the board, upon recommendation from the department, in cooperation with other state, federal, county, or private organizations and landowners, after a public hearing on the island affected, and upon an affirmative vote of not less than two-thirds of its authorized membership, may enter into a habitat conservation plan, if it determines that the plan will further the

purposes of this chapter by protecting, maintaining, restoring, or enhancing identified ecosystems, natural communities, or habitat types upon which endangered, threatened, proposed, or candidate species depend within the area covered by the plan; that the plan will increase the likelihood of recovery of the endangered or threatened species that are the focus of the plan; and that the plan satisfies all the requirements of this chapter. Habitat conservation plans may allow conservation rental agreements, habitat banking, and direct payments. Any habitat conservation plan approved pursuant to this section shall be based on the best available scientific and other reliable data available at the time the plan is approved.

Each habitat conservation plan shall:

- (1) Identify the geographic area encompassed by the plan; the ecosystems, natural communities, or habitat types within the plan area that are the focus of the plan; and the endangered, threatened, proposed, and candidate species known or reasonably expected to be present in those ecosystems, natural communities, or habitat types in the plan area;
- (2) Describe the activities contemplated to be undertaken within the plan area with sufficient detail to allow the department to evaluate the impact of the activities on the particular ecosystems, natural communities, or habitat types within the plan area that are the focus of the plan;
- (3) Identify the steps that will be taken to minimize and mitigate all negative impacts, including without limitation the impact of any authorized incidental take, with consideration of the full range of the species on the island so that cumulative impacts associated with the take can be adequately assessed; and the funding that will be available to implement those steps;
- (4) Identify those measures or actions to be undertaken to protect, maintain, restore, or enhance the ecosystems, natural communities, or habitat types within the plan area; a schedule for implementation of the measures or actions; and an adequate funding source to ensure that the actions or measures, including monitoring, are undertaken in accordance with the schedule;
- (5) Be consistent with the goals and objectives of any approved recovery plan for any endangered species or threatened species known or reasonably expected to occur in the ecosystems, natural communities, or habitat types in the plan area;
- (6) Provide reasonable certainty that the ecosystems, natural communities, or habitat types will be maintained in the plan area, throughout the life of the plan, in sufficient quality, distribution, and extent to support within the plan area those species typically associated with the ecosystems, natural communities, or habitat types, including any endangered, threatened, proposed, and candidate species known or reasonably expected to be present in the ecosystems, natural communities, or habitat types within the plan area;
- (7) Contain objective, measurable goals, the achievement of which will contribute significantly to the protection, maintenance, restoration, or enhancement of the ecosystems, natural communities, or habitat types; time frames within which the goals are to be achieved; [and] provisions for monitoring (such as field sampling techniques), including periodic monitoring by representatives of the department or the endangered species recovery committee, or both; and provisions for evaluating progress in achieving the goals quantitatively and qualitatively; and
- (8) Provide for an adaptive management strategy that specifies the actions to be taken periodically if the plan is not achieving its goals.

(c) The board shall disapprove a habitat conservation plan if the board determines, based upon the best scientific and other reliable data available at the time its determination is made, that the cumulative activities, if any, contemplated to be undertaken within the areas covered by the plan are not environmentally beneficial, or that implementation of the plan:

- (1) Is likely to jeopardize the continued existence of any endangered, threatened, proposed, or candidate species identified in the plan area;
- (2) Is likely to cause any native species not endangered or threatened at the time of plan submission to become threatened or endangered;
- (3) Fails to meet the criteria of subsections (a) and (b); or
- (4) Fails to meet the criteria of section 195D-4(g).

The habitat conservation plan shall contain sufficient information for the board to ascertain with reasonable certainty the likely effect of the plan upon any endangered, threatened, proposed, or candidate species in the plan area and throughout its habitat range.”

SECTION 3. Section 195D-22, Hawaii Revised Statutes, is amended to read as follows:

“**[[§195D-22]] Safe harbor agreements.** (a) To encourage landowners to voluntarily engage in efforts that benefit endangered, threatened, proposed, and candidate species, except as otherwise provided by law, the board, upon approval by not less than two-thirds of the board’s authorized membership, after a public hearing on the island affected, may enter into a safe harbor agreement with one or more landowners to create, restore, or improve habitats or to maintain currently unoccupied habitats that threatened or endangered species can be reasonably expected to use, if the board determines that the cumulative activities, if any, contemplated to be undertaken within the areas covered by the agreement are environmentally beneficial. The board shall notify the public of [its intent to enter into a] the proposed safe harbor agreement [and make the proposed agreement available for public review and comment] through the periodic bulletin of the office of [[environmental]] quality control [for] and make the proposed agreement available for public review and comment not less than sixty days prior to approval.

(b) A safe harbor agreement may authorize the take of an endangered, threatened, proposed, or candidate species incidental to an otherwise lawful activity in or affecting the created, restored, maintained, or improved habitat; provided that based on the best scientific and other reliable data available at the time the safe harbor agreement is approved, if these data are applicable:

- (1) The take would not jeopardize the continued existence of any endangered, threatened, proposed, or candidate species;
- (2) The take would not reduce the population of endangered, threatened, proposed, or candidate species below the number found on the property prior to entering into the agreement;
- (3) The agreement proposes to create, restore, maintain, or improve significant amounts of habitat for a minimum of five years;
- (4) There is adequate funding for the agreement and the source of that funding is identified;
- (5) The safe harbor agreement increases the likelihood that the endangered or threatened species for which a take is authorized will recover;
- (6) Any take authorized pursuant to this subsection shall occur only in the habitat created, restored, maintained, or improved; and
- (7) The cumulative impact of the activity, which is permitted and facilitated by the take, provides net environmental benefits.

(c) Notwithstanding any other law to the contrary, the board shall suspend or rescind any safe harbor agreement approved under this section if the board determines that:

- (1) Any parties to the safe harbor agreement, or their successors, have breached their obligations under the safe harbor agreement or under any other agreement implementing the safe harbor agreement and have failed to cure the breach in a timely manner, and the effect of the breach is to diminish the likelihood that the agreement will achieve its goals within the time frames or in the manner set forth in the agreement; or
- (2) To the extent that funding is or will be required, the funding source specified in subsection (b) no longer exists and is not replaced by another sufficient funding source to ensure that the measures or actions specified in subsection (b) are undertaken in accordance with this section.

(d) The rights and obligations under any safe harbor agreement shall run with the land for the term agreed to in the agreement and shall be recorded by the department in the bureau of conveyances or the land court, as may be appropriate.”

SECTION 4. Section 195D-25, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

“(b) The endangered species recovery committee shall:

- (1) Review all applications and proposals for habitat conservation plans, safe harbor agreements, and incidental take licenses and make recommendations, based on a full review of the best available scientific and other reliable data and in consideration of the cumulative impacts of the proposed action on the recovery potential of the endangered, threatened, proposed, or candidate species, to the department and the board as to whether or not they should be approved, amended, or rejected;
- (2) Review all habitat conservation plans, safe harbor agreements, and incidental take licenses on an annual basis to ensure compliance with agreed to activities and, on the basis of any available monitoring reports, and scientific and other reliable data, make recommendations for any necessary changes;
- (3) Consider and [develop] recommend appropriate incentives to encourage landowners to voluntarily engage in efforts that restore and conserve endangered, threatened, proposed, and candidate species;
- (4) Perform such other duties as provided in this chapter; [and]
- (5) Consult with persons possessing expertise in such areas as the committee may deem appropriate and necessary in the course of exercising its duties[.]; and
- (6) Not conduct more than one site visit per year to each property.”

SECTION 5. Section 195D-27, Hawaii Revised Statutes, is amended to read as follows:

“**[§195D-27] Administrative enforcement of rules, plans, agreements, or licenses.** (a) Any person may petition the chairperson to appoint a hearings officer to hear a request to enjoin any person, including the State and any other government agency, alleged to be in violation of<sup>1</sup> this chapter, including any rule adopted pursuant to this chapter, habitat conservation plan, safe harbor agreement, or incidental take license, or to require the State to take action to enforce this chapter, including any rule adopted pursuant to this chapter or any term of a habitat conservation plan, safe harbor agreement, or incidental take license.

(b) Upon receipt of [the] a petition, the chairperson shall make a diligent effort to resolve the subject matter of the petition and, if appropriate, to cause the noncomplying or other responsible party to comply with the habitat conservation plan, safe harbor agreement, or incidental take license. If the chairperson is unable to resolve the subject matter of the petition within a period of time deemed reasonable under the circumstances, but in no event more than ninety days; or if the petitioner is not satisfied with the chairperson's resolution of the subject matter, then the chairperson shall appoint a hearings officer to hear the petition. The hearings officer shall commence a contested case hearing in accordance with chapter 91 and, within thirty days of the completion of the hearing, grant in whole or in part, or deny the petition.

(c) Nothing in this section shall grant any authority whatsoever upon [the] a hearings officer to assess monetary damages or criminal penalties against any party found to be in violation of this chapter, however, the hearings officer shall issue findings of fact and, if appropriate, an order directing the party found to be in violation to take specific action to comply with this chapter.

(d) Any person who believes that a violation of a habitat conservation plan, safe harbor agreement, or incidental take license has occurred, is occurring, or is likely to occur, may petition the chairperson for [the] an immediate [appointment of a hearings officer.] hearing. The petition shall be accompanied by an affidavit alleging:

- (1) Specific facts showing that the continued existence of an endangered or threatened species [will] is likely to be jeopardized unless the alleged violation is immediately enjoined; and
- (2) The efforts that have been made to notify the landowner of the alleged violation.

If the chairperson finds that there exists good cause for a hearing, then a hearings officer shall be appointed who shall conduct a hearing forthwith, and in any event within forty-eight hours after the filing of the petition. If the hearings officer [finds] determines that there is a substantial likelihood that the continued existence of an endangered or threatened species will be jeopardized unless the violation is immediately enjoined, then the hearings officer shall order temporary injunctive relief, which shall expire upon such terms as the hearings officer determines.'

SECTION 6. Section 205-6, Hawaii Revised Statutes, is amended to read as follows:

**“§205-6 Special permit.** (a) The county planning commission may permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified. Any person who desires to use the person's land within an agricultural or rural district other than for an agricultural or rural use, as the case may be, may petition the planning commission of the county within which the person's land is located for permission to use the person's land in the manner desired. Each county may establish the appropriate fee for processing the special permit petition.

(b) The planning commission, upon consultation with the central coordinating agency, except in counties where the planning commission is advisory only in which case the central coordinating agency, shall establish by rule or regulation, the time within which the hearing and action on petition for special permit shall occur. The county planning commission shall notify the land use commission and such persons and agencies that may have an interest in the subject matter of the time and place of the hearing.

(c) The county planning commission may under such protective restrictions as may be deemed necessary, permit the desired use, but only when the use would

promote the effectiveness and objectives of this chapter. A decision in favor of the applicant shall require a majority vote of the total membership of the county planning commission.

(d) Special permits for land the area of which is greater than fifteen acres shall be subject to approval by the land use commission. The land use commission may impose additional restrictions as may be necessary or appropriate in granting such approval, including the adherence to representations made by the applicant.

(e) A copy of the decision together with the complete record of the proceeding before the county planning commission on all special permit requests involving a land area greater than fifteen acres shall be transmitted to the land use commission within sixty days after the decision is rendered. Within forty-five days after receipt of the complete record from the county planning commission, the land use commission shall act to approve, approve with modification, or deny the petition. A denial either by the county planning commission or by the land use commission, or a modification by the land use commission, as the case may be, of the desired use shall be appealable to the circuit court of the circuit in which the land is situated and shall be made pursuant to the Hawaii rules of civil procedure.

(f) Land uses substantially involving or supporting educational ecotourism, related to the preservation of native Hawaiian endangered, threatened, proposed, and candidate species, that are allowed in an approved habitat conservation plan under section 195D-21 or safe harbor agreement under section 195D-22, which are not identified as permissible uses within the agricultural district under sections 205-2 and 205-4.5, may be permitted in the agricultural district by special permit under this section, on lands with soils classified by the land study bureau's detailed land classification as overall (master) productivity rating class C, D, E, or U."

SECTION 7. Section 343-3, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

- “(c) The office shall inform the public of:
- (1) A public comment process or public hearing if a federal agency provides for the public comment process or public hearing to process a habitat conservation plan, safe harbor agreement, or incidental take license pursuant to the federal Endangered Species Act; [and
  - (2) The board of land and natural resources' intent to:
    - (A) Enter into a] (2) A proposed habitat conservation plan or proposed safe harbor agreement, and availability for inspection of the proposed agreement, plan, and application to enter into a planning process for the preparation and implementation of the habitat conservation plan for public review and comment; and
    - [(B) Issue an] (3) A proposed incidental take license as part of a habitat conservation plan or safe harbor agreement.”

SECTION 8. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 9. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 10. This Act shall take effect upon its approval.

(Approved July 20, 1998.)

**Note**

1. Prior to amendment “any” appeared here.