H.B. NO. 3181

A BILL FOR AN ACT

RELATING TO ENDANGERED SPECIES.

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

SECTION 1. Section 195D-2, Hawaii Revised Statutes, is amended by adding three new definitions to be appropriately inserted and to read as follows:

""Certificate of inclusion" means a type of license that is used to enroll interested landowners into a programmatic safe harbor agreement or programmatic habitat conservation plan and extends coverage of an incidental take license to those landowners identified in the agreement or plan and who subsequently enroll in the agreement or plan.

"Programmatic habitat conservation plan" means a habitat conservation plan that covers multiple landowners or a class of landowners and over a wide area or region.

"Programmatic safe harbor agreement" means a safe harbor agreement that covers multiple landowners or a class of landowners and over a wide area or region."

SECTION 2. Section 195D-2, Hawaii Revised Statutes, is amended by amending the definition of "Landowner" to read as follows:

1 ""Landowner" means an owner of land, an agent acting on
2 behalf of the landowner, or any estate or interest in that land
3 when acting with the consent of the fee owner. In the case of
4 government-owned lands, the consent shall be required of any
5 government department or agency to which management or control
6 of that land has been assigned."
7 SECTION 3. Section 195D-4, Hawaii Revised Statutes, is
8 amended by amending subsections (e) through (i) to read as
9 follows:
10 "(e) With respect to any threatened or endangered species
11 of aquatic life, wildlife, or land plant, it is unlawful, except
12 as provided in subsections (f), (g), and (j) for any person to:
13 (1) Export any such species from this State;
14 (2) Take any such species within this State;
15 (3) Possess, process, sell, offer for sale, deliver,
16 carry, transport, or ship, by any means whatsoever,
17 any such species;
18 (4) Violate any rule pertaining to the conservation of the
19 species listed pursuant to this section and adopted by
20 the department pursuant to this chapter; or
21 (5) Violate the terms of, or fail to fulfill the
22 obligations imposed and agreed to under, any license

issued under subsection (f), (g), or (j) any habitat conservation plan or programmatic habitat conservation plan authorized under section 195D-21, or any safe harbor agreement or programmatic safe harbor agreement authorized under section 195D-22.

(f) The department may issue temporary licenses, under such terms and conditions as it may prescribe, to allow any act otherwise prohibited by subsection (e), for scientific purposes or to enhance the propagation or survival of the affected species. Licenses issued as part of a programmatic safe harbor or programmatic habitat conservation plan may also provide for issuance of certificates of inclusion to extend the coverage of the incidental take license to landowners enrolling in the programmatic agreement or plan at a later date.

(g) After consultation with the endangered species recovery committee, the board may issue a temporary license as a part of a habitat conservation plan or programmatic 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, provide an irrevocable letter of credit, insurance, or surety bond, or provide other similar financial tools, including depositing a sum of money in the endangered species trust fund created by section 195D-31, or provide other means approved by the board, adequate to ensure monitoring of the species by the State and to ensure 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 a proposed license under this section 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 <u>or certificates of inclusion</u> issued pursuant to this section may be suspended or revoked for due cause, and if issued pursuant to a habitat conservation plan<u>, programmatic</u>

habitat conservation plan, safe harbor agreement, or programmatic 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 or certificate of inclusion has been revoked shall not be eligible to apply for another license or certificate of inclusion 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, programmatic habitat conservation plans, safe harbor agreements, [~~and~~] programmatic safe harbor agreements, incidental take licenses, and certificates of inclusion pursuant to the Endangered Species Act. After notice in the periodic 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 or an agent acting on behalf of a landowner or landowners seeks both a federal and a state safe harbor agreement, programmatic safe harbor agreement, habitat conservation plan, programmatic 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~~], programmatic habitat conservation plans, safe harbor agreements, and programmatic 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 4. Section 195D-5, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) The office of the governor shall review other programs administered by the department and, to the extent practicable, utilize such programs in furtherance of the purposes of this chapter. The governor or the governor's authorized representative shall also encourage all federal agencies to utilize their authority in furtherance of the purposes of this chapter. All other state agencies shall use their authority in furtherance of the purposes of this chapter by:

(1) Carrying out programs for the protection of threatened and endangered species; and

(2) Taking such action as may be necessary to ensure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of threatened or endangered species.

In carrying out programs authorized by this chapter, the department may enter into agreements with federal agencies, counties, private landowners, and organizations for the administration and management of any programmatic agreement, area or facility established under section 195D-21 or 195D-22, or public lands utilized for conserving, managing, enhancing, or protecting indigenous aquatic life, wildlife, land plants, threatened and endangered species, and their habitat."

SECTION 5. Section 195D-21, Hawaii Revised Statutes, is amended to read as follows:

"§195D-21 Habitat conservation plans[~~,~~] and programmatic habitat conservation plans. (a) The department may enter into a planning process with any landowner, or agent acting on behalf of multiple landowners, for the purpose of preparing and implementing a habitat conservation plan[~~,~~] or programmatic 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 the proposed habitat conservation plan <u>or programmatic habitat conservation plan</u> through the periodic bulletin of the office of environmental quality control 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)(1) 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, <u>or programmatic habitat conservation plan,</u> if it determines that:

(A) 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;

(B) The plan will increase the likelihood of recovery of the endangered or threatened species that are the focus of the plan; and

(C) The plan satisfies all the requirements of this chapter.

In the event the board votes to enter into a habitat conservation plan or programmatic habitat conservation plan for which the majority of the endangered species recovery committee recommended disapproval, the board may not enter into the habitat conservation plan or programmatic habitat conservation plan unless the plan is approved by a two-thirds majority vote of both houses of the legislature. Habitat conservation plans or programmatic habitat conservation plans may allow conservation rental agreements, habitat banking, and direct payments. Any habitat conservation plan or programmatic 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.

(2) Each habitat conservation plan or programmatic habitat conservation plan shall:

(A) 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;

(B) 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;

(C) 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;

(D) 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;

(E) 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;

(F) 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;

(G) 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; 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

(H) 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 or programmatic 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 or programmatic 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.

(d) Notwithstanding any other law to the contrary, the board shall suspend or revoke the approval of any habitat conservation plan or programmatic habitat conservation plan or individual landowners' portion thereof approved under this section if the board determines that:

(1) Any parties to the plan, or their successors, have breached their obligations under the plan or under any agreement implementing the plan and have failed to cure the breach in a timely manner, and the effect of the breach is to diminish the likelihood that the plan will achieve its goals within the time frames or in the manner set forth in the plan;

(2) The plan no longer has the funding source specified in subsection (a) or another sufficient funding source to ensure the measures or actions specified in subsection (b) are undertaken in accordance with this section; or

(3) Continuation of the permitted activity would appreciably reduce the likelihood of survival or recovery of any threatened or endangered species in the wild.

(e) The rights and obligations under any habitat conservation plan or programmatic habitat conservation plan

shall run with the land and shall be recorded by the department in the bureau of conveyances or the land court, as may be appropriate.

(f) Participants in a habitat conservation plan, or agent thereof, shall submit an annual report to the department within ninety days of each fiscal year ending June 30, that includes a description of activities and accomplishments, analysis of the problems and issues encountered in meeting or failing to meet the objectives set forth in the habitat conservation plan, areas needing technical advice, status of funding, and plans and management objectives for the next fiscal year, including any proposed modifications thereto."

SECTION 6. Section 195D-22, Hawaii Revised Statutes, is amended to read as follows:

"§195D-22 Safe harbor agreements[~~.~~] and programmatic 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 or programmatic 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. In the event the board votes to enter into a safe harbor agreement or programmatic safe harbor agreement for which the majority of the endangered species recovery committee recommended disapproval, the board may not enter into the safe harbor agreement or programmatic safe harbor agreement unless the agreement is approved by a two-thirds majority vote of both houses of the legislature. The board shall notify the public of the proposed safe harbor agreement or programmatic safe harbor agreement through the periodic bulletin of the office of environmental quality control and make the proposed agreement available for public review and comment not less than sixty days prior to approval.

(b) A safe harbor agreement or programmatic 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 or programmatic 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 for private lands and for a minimum of fifteen years for public lands;

(4) There is adequate funding for the agreement and the source of that funding is identified;

(5) The safe harbor agreement or programmatic 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 or programmatic safe harbor agreement or individual landowners' portion thereof approved under this section if the board determines that:

(1) Any parties to the safe harbor agreement[,] or programmatic safe harbor agreement, or their successors, have breached their obligations under the safe harbor agreement or programmatic 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;

(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; or

(3) Continuation of the permitted activity would appreciably reduce the likelihood of survival or recovery of any threatened or endangered species in the wild.

(d) The rights and obligations under any safe harbor agreement or programmatic 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 7. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 8. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

1 SECTION 9. This Act shall take effect upon its approval.

2

3 INTRODUCED BY: Calvin K.Y. Say

4 BY REQUEST

JAN 22 2008

Report Title:
Endangered Species

Description:
Authorizes the development and use of programmatic safe harbor agreements and programmatic habitat conservation plans that cover multiple landowners or a class of landowners and over a wide area or region.

HB 3161

JUSTIFICATION SHEET

DEPARTMENT: Land and Natural Resources

TITLE: A BILL FOR AN ACT RELATING TO ENDANGERED SPECIES.

PURPOSE: To encourage greater participation in endangered species restoration by private landowners by authorizing the development and use of programmatic safe harbor agreements (SHAs) and programmatic habitat conservation plans (HCPs) and the tools needed to implement them.

MEANS: Amend sections 195D-2, 195D-4(e)-(i), 195D-5(b), 195D-21, and 195D-22, Hawaii Revised Statutes (HRS).

JUSTIFICATION: Federal resource conservation agencies and non-governmental conservation organizations have developed and begun to implement new tools for encouraging regional landscape-scale and multi-party initiatives in endangered species restoration. These entities are developing and promoting programmatic approaches that provide a framework for many landowners over large landscapes to enroll in programs that have been developed and permitted to encourage SHAs to enhance habitat for endangered species, or to develop HCPs to mitigate endangered species conflicts that are an issue on a regional basis. The Hawaii Endangered Species Law does not specifically recognize these tools and their continued and future use in Hawaii requires change in chapter 195D, HRS.

Programmatic approaches will streamline the time and regulatory burdens on interested participants that otherwise would need to develop their own duplicative agreements with identical terms and conditions. This change allows concurrent processing of federal and Hawaii SHAs and HCPs as per the

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statutory intent to streamline processes. Providing standardized programs encourages many landowners to get involved because it gives them a finished product to evaluate and agree to and enter. It removes the uncertainty about final product and outcomes. It also enables the development of management actions that encompass scale and offer benefits that may otherwise not be possible with a single agreement.

Examples of agreements that are stalled pending this change are a statewide programmatic SHA with landowners enrolling in Farm Bill conservation programs to improve habitat for endangered waterbirds and a regional programmatic HCP on Kauai that would mitigate the take of endangered seabirds where they are vulnerable to utility lines and attraction of light. Without these tools, affected landowners will need to develop and process individual agreements and plans at considerable administrative burdens for both landowner and regulatory agencies.

Impact on the public: Streamlined processes for SHAs and HCPs reduce landowner's time and cost to participate in these programs and encourage more participation and recovery effort for endangered species.

Impact on the department and other agencies: Streamlined processes for SHAs and HCPs reduce agency time and cost to process agreements and plans and encourage more participation and recovery effort for endangered species.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM DESIGNATION: LNR 402.

HB 315

OTHER AFFECTED AGENCIES: Department of Transportation and other state agencies desiring to process programmatic SHAs and HCPs.

EFFECTIVE DATE: Upon approval.