

## **CHAPTER 195D**

### **CONSERVATION OF AQUATIC LIFE, WILDLIFE, AND LAND PLANTS**

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## **Note**

Chapter heading amended by L 1983, c 111, §1.

Department of transportation's bridge rehabilitation and replacement program; temporary exemption from certain construction requirements of this chapter through June 30, 2017 or until completion. L 2012, c 218.

## **Cross References**

Environmental courts, jurisdiction over proceedings arising under this chapter, see §604A-2.

## **Attorney General Opinions**

Threatened and endangered plants are protected on Hawaiian home lands under the provisions of this chapter, as well as under the provisions of the federal Endangered Species Act of 1973, to the same extent that the plants are protected elsewhere in Hawaii. Anyone who "takes" threatened or endangered plants on Hawaiian home lands is subject to state and federal civil and criminal penalties. Att. Gen. Op. 95-5.

## **Case Notes**

Chapter does not provide basis for private right of action to stop building of highway. 538 F. Supp. 149.

## [PART I. GENERAL PROVISIONS]

**§195D-1 Findings and declaration of necessity.** Since the discovery and settlement of the Hawaiian Islands by humans, many species of aquatic life, wildlife, and land plants that occurred naturally only in Hawaii have become extinct and many are threatened with extinction, primarily because of increased human use of the land and disturbance to native ecosystems.

All indigenous species of aquatic life, wildlife, and land plants are integral parts of Hawaii's native ecosystems and comprise the living heritage of Hawaii, for they represent a natural resource of scientific, cultural, educational, environmental, and economic value to future generations of Hawaii's people.

To insure the continued perpetuation of indigenous aquatic life, wildlife, and land plants, and their habitats for human enjoyment, for scientific purposes, and as members of ecosystems, it is necessary that the State take positive actions to enhance their prospects for survival. [L 1975, c 65, pt of §1; am L 1983, c 111, §2; gen ch 1993]

### Law Journals and Reviews

Palila v. Hawaii Department of Land and Natural Resources: State Governments Fall Prey to the Endangered Species Act of 1973, Jack R. Nelson. 10 Ecology Law Quarterly 281.

### Case Notes

In light of this chapter and having sought to secure financial advantages under the federal Endangered Species Act, the State has impliedly consented to be sued under that Act and may be required to eradicate feral sheep and goats. 471 F. Supp. 985.

**§195D-2 Definitions.** As used in this chapter:

"Aquatic life" means any type of species of mammal, fish, amphibian, reptile, mollusk, crustacean, arthropod, invertebrate, coral, or other animals that inhabit the freshwater or marine environment, and includes any part, product, egg, or offspring thereof, or freshwater or marine plants, including seeds, roots, and other parts thereof.

"Board" means the board of land and natural resources.

"Candidate species" means any species being considered by the United States Secretary of the Interior for listing as an endangered or threatened species, but not yet the subject of a proposed rule.

"Conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter and the Endangered Species Act are no longer necessary. Such methods and procedures include, but are not limited to, all

activities associated with scientific resources management such as research, census, habitat acquisition and maintenance, propagation, live capture, law enforcement, and transplantation.

"Department" means department of land and natural resources.

"Direct payments" means governmental compensation of landowners for their discovery, care, maintenance, and recovery of endangered, threatened, proposed, or candidate species or their essential habitat.

"Ecosystem" means all natural elements, physical and biological, of the habitat or site in which any aquatic life, wildlife, or land plant species is found, and upon which it is dependent.

"Endangered species" means any species whose continued existence as a viable component of Hawaii's indigenous fauna or flora is determined to be in jeopardy and has been so designated pursuant to section 195D-4.

"Endangered Species Act" means the Endangered Species Act of 1973, 87 Stat. 884, or as such Act may be subsequently amended.

"Habitat banking" means a program that would allow a landowner, on whose property are found endangered, threatened, proposed, or candidate species or their essential habitat that would be impacted by a project being conducted on the property to purchase another property on which those affected species are found for the purposes of preserving those species as part of an approved habitat conservation plan.

"Indigenous species" means any aquatic life, wildlife, or land plant species growing or living naturally in Hawaii without having been brought to Hawaii by humans.

"Jeopardize the continued existence of an endangered or threatened, proposed, or candidate species" means any action that would be expected, directly or indirectly, to reduce the likelihood of the survival or recovery of the species in the wild, including the loss of genetic diversity of its populations where the species is a plant species.

"Landowner" means an owner of land or any estate or interest in that land when acting with the consent of the fee owner. In the case of government-owned lands, the consent shall be required of any government department or agency to which management or control of that land has been assigned.

"Land plant" means any member of the plant kingdom, including seeds, roots and other parts thereof, except freshwater or marine plants.

"License" means written permission by the department of land and natural resources to do a particular act or series of acts which without such permission would be unauthorized or prohibited.

"Natural communities" means a natural assemblage of plants or animals that occurs within certain elevation, moisture, and habitat conditions.

"Person" means an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the federal government, of any state or political subdivision thereof, or of any foreign government.

"Private lands" mean lands that are not "public lands", as defined in this section.

"Proposed species" means any species that is the subject of a proposed rule for listing as an endangered or threatened species pursuant to the Endangered Species Act.

"Public lands" means lands owned by the federal government, the State, or a county, or lands owned by any political subdivision of the federal government, the State, or a county.

"Recovery" or "recover" means that the number of individuals of the protected species has increased to the point that the measures provided under this chapter or the federal Endangered Species Act are no longer needed.

"Species" means and shall include any subspecies or lower taxa of aquatic life, wildlife, or land plants.

"State marine waters" means all waters of the State extending from the upper reaches of the wash of the waves on shore seaward to the limit of the State's police power and management authority, including the United States territorial sea, notwithstanding any law to the contrary.

"Take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect endangered or threatened species of aquatic life or wildlife, or to cut, collect, uproot, destroy, injure, or possess endangered or threatened species of aquatic life or land plants, or to attempt to engage in any such conduct.

"Technical assistance program" means a program that includes department staff designated to assist landowners in developing, reviewing, or monitoring habitat conservation plans by providing technical assistance.

"Threatened species" means any species of aquatic life, wildlife, or land plant which appears likely, within the foreseeable future, to become endangered and has been so designated pursuant to section 195D-4.

"Wildlife" means any nondomesticated member of the animal kingdom, whether reared in captivity or not, including any part, product, egg, or offspring thereof, except aquatic life as defined in this section. [L 1975, c 65, pt of §1; am L 1983, c 111, §3; am L 1990, c 126, §6; gen ch 1993; am L 1997, c 380, §3; am L 2002, c 152, §1; am L 2003, c 35, §3; am L 2011, c 147, §2]

**§195D-3 Determination by the department relating to conservation of particular**

**species.** (a) The department is authorized to conduct investigations on any species of aquatic life, wildlife, and land plants in order to develop information relating to their biology, ecology, population, status, distribution, habitat needs, and other limiting factors to determine conservation measures necessary for their continued ability to sustain themselves successfully.

(b) The department is authorized to adopt pursuant to chapter 91, rules relating to the taking, possession, transportation, transplantation, importation, exportation, processing, selling, offering for sale, or shipment of any species of aquatic life, wildlife, and land plant for the purpose of conserving the same.

(c) Except as permitted by rules adopted by the department, it shall be unlawful for any person to take, possess, transport, transplant, export, process, sell, offer for sale, or ship any species of aquatic life, wildlife, or land plants deemed by the department to be in need of conservation pursuant to this section. [L 1975, c 65, pt of §1; am L 1983, c 111, §4; am L 1988, c 68, §1]

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

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

- (1) The present or threatened destruction, modification, or curtailment of its habitat or range;
- (2) Overutilization for commercial, sporting, scientific, educational, or other purposes;
- (3) Disease or predation;
- (4) The inadequacy of existing regulatory mechanisms; or
- (5) Other natural or artificial factors affecting its continued existence within Hawaii.

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

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

Except with respect to species of aquatic life, wildlife, or land plants determined to be endangered or threatened pursuant to the Endangered Species Act, the department, upon its own recommendation or upon the petition of three interested persons who have presented to the department substantial evidence that warrants review, shall conduct a review of any listed or unlisted indigenous species proposed to be removed from or added to the lists published pursuant to this subsection.

(e) With respect to any threatened or endangered species of aquatic life, wildlife, or land plant, it is unlawful, except as provided in subsections (f), (g), and (j) for any person to:

(1) Export any such species from this State;

(2) Take any such species within this State;

(3) Possess, process, sell, offer for sale, deliver, carry, transport, or ship, by any means whatsoever, any such species;

(4) Violate any rule pertaining to the conservation of the species listed pursuant to this section and adopted by the department pursuant to this chapter; or

(5) Violate the terms of, or fail to fulfill the obligations imposed and agreed to under, any license issued under subsection (f), (g), or (j) any habitat conservation plan authorized under section 195D-21, or any 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.

(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, 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 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 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.

(j) Subsection (e) and any other provision of law to the contrary notwithstanding, the department shall adopt rules in accordance with chapter 91 authorizing the propagation, possession, ownership, and sale of selected endangered and threatened land plant species grown from cultivated nursery stock and not collected or removed from the wild. [L 1975, c 65, pt of §1; am L 1983, c 111, §5; am L 1997, c 380, §4 and c 381, §2; am L 1998, c 237, §1; am L 2004, c 144, §2]

### **Revision Note**

Subsection (j) redesignated pursuant to §23G-15(1).

### **Cross References**

Interim rules, see §195D-6.5.

### **Attorney General Opinions**

Threatened and endangered plants are protected on Hawaiian home lands under the provisions of chapter 195D, as well as under the provisions of the federal Endangered Species Act of 1973, to the same extent that the plants are protected elsewhere in Hawaii. Anyone who "takes" threatened or endangered plants on Hawaiian home lands is subject to state and federal civil and criminal penalties. Att. Gen. Op. 95-5.

### **Case Notes**

Destruction of habitat not covered by statute. 538 F. Supp. 149.

**[§195D-4.5] Taking a monk seal prohibited.** (a) A person commits the offense of taking a monk seal if the person intentionally or knowingly takes a Hawaiian monk seal (*Monachus schauinslandi*).

(b) Any person convicted of taking a monk seal shall be guilty of a class C felony; provided that in addition to any other sentence, the environmental court may impose a fine up to \$50,000. [L 2010, c 165, §2; am L 2014, c 218, §8]

**§195D-5 Conservation programs.** (a) The department shall conduct research on indigenous aquatic life, wildlife, and land plants, and on endangered species and their associated ecosystems, and shall utilize the land acquisition and other authority vested in the department to carry out programs for the conservation, management, and protection of such species and their associated ecosystems. In addition, the department is hereby authorized to acquire by purchase, donation or otherwise, lands or interests therein needed to carry out the programs relating to the intent and purpose of this chapter.

(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 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.

(c) In carrying out programs authorized by this section, the department may enter into agreements with federal agencies and with the counties for administration and management of any area established under this section, or utilized for conserving, managing, enhancing, or protecting indigenous aquatic life, wildlife, land plants, and endangered species.

(d) In carrying out programs authorized by this section, priority shall be given to the conservation and protection of those endangered aquatic life, wildlife, and land plant species and their associated ecosystems, whose extinction within the State would imperil or terminate, respectively, their existence in the world.

(e) The department shall coordinate with the natural area reserves commission and the animal species advisory commission all research, investigations, lists of indigenous and endangered aquatic life, wildlife, and land plants, and programs for the conservation, management, enhancement, and protection of species that are authorized by this chapter.

(f) The department may permit, under terms and conditions adopted by rule, the taking, possession, transportation, or exportation of any indigenous aquatic life, wildlife, or land plant on the endangered species list for scientific purposes and for propagation of such species in captivity for preservation purposes. [L 1975, c 65, pt of §1; am L 1981, c 17, §1; am L 1983, c 111, §6; gen ch 1985; am L 1997, c 380, §5]

**[§195D-5.1] Protection of Hawaii's unique flora and fauna.** The department of land and natural resources shall initiate amendments to the conservation district boundaries consistent with section 205-4 in order to include high quality native forests and the habitat of rare native species of flora and fauna within the conservation district. The department may seek assistance from appropriate public, private, and nonprofit agencies and may employ consultants as necessary to implement this section. [L 1987, c 82, §2]

## Cross References

Biological survey; designation, see §6E-61.

**[§195D-5.5] Products to support the environment.** (a) There is established within the department a program to financially benefit the environment by the development of environmentally-themed products such as collectible stamps, credit cards, and coins to be commercially sold to the public. The department may enter into contracts with private entities for the production of existing and new environmentally-themed products as the department deems appropriate.

(b) Each product developed under this program shall require the approval of the chairperson of the board of land and natural resources and the governor, after consultation with appropriate environmental organizations.

(c) Except for direct costs to administer, produce, and market the products, all revenues from the sale of products under this section shall be paid into the endangered species trust fund established pursuant to section 195D-31 to support programs of the department that:

- (1) Benefit the environment; and
- (2) Are related to the environmental theme of the product sold.

(d) The department shall submit an annual report of the program's products, costs, and revenues to the legislature no later than twenty days before the convening of each regular session. [L 2002, c 186, §2]

**§195D-6 Rules.** The department may adopt rules pursuant to chapter 91 necessary to carry out the purposes of this chapter. [L 1975, c 65, pt of §1; am L 1983, c 111, §7; am L 1997, c 380, §6]

**[§195D-6.5] Interim rulemaking.** (a) The department, subject to the provisions of this section, may declare any indigenous species as endangered and establish, implement, and enforce interim rules governing the exportation from the State or the taking, possession, sale, offer for sale, delivery, or transport within the State, by any means whatsoever, of any such endangered species. These rules shall not be subject to chapter 91.

(b) An interim rule may be adopted in the event that the exportation, taking, possession, sale, offer for sale, delivery, or transport of any indigenous species, in the absence of effective rules, creates a significant risk of a local extirpation or species extinction, which is so imminent in nature as to constitute an emergency. No interim rule may be adopted without such finding by the department.

(c) Interim rules adopted pursuant to this section shall be effective as stated by the rules; provided that:

(1) Any interim rule shall be published statewide at least once as provided in section 1-28.5(a)(1) within five days after issuance; and

(2) No interim rule shall be effective for more than one hundred eighty days. [L 2004, c 32, §2]

**§195D-7 Enforcement.** (a) Any employee or agent of the department upon whom the board has conferred powers of police officers, including the power to serve and execute warrants and arrest offenders, or issue citations throughout the State, and any police officer of the counties of this State shall have the authority to enforce any of the provisions of this chapter or any rule adopted under this chapter.

(b) Any employee or agent of the department, for the purpose of enforcing the terms and conditions of any license issued under this chapter and upon written notification to the affected landowner, may enter upon, cross over, be upon, or remain upon privately owned lands for such purposes and shall not be subject to arrest for trespass while so engaged or for such cause thereafter.

(c) A landowner of property on which an endangered species exists shall not be liable for civil damages for injuries to employees of, or persons under contract with the department if injury to those employees or persons caused by their own negligence occurs while those employees or persons are enforcing the terms and conditions of any license issued under this chapter. [L 1975, c 65, pt of §1; am L 1983, c 111, §8; am L 1997, c 380, §7]

**§195D-8 Search and seizure.** Any officer or agent authorized pursuant to section 195D-7 shall have the authority to conduct searches as provided by law and to seize any equipment, business records, merchandise, aquatic life, wildlife, or land plant taken, possessed, transported, sold, offered for sale, or used in violation of any section of this chapter or any rule adopted hereunder, and any of the foregoing so seized shall be held by the department pending disposition of environmental court proceedings, or the department prior to forfeiture, may direct the transfer of aquatic life, wildlife, or land plants so seized to a qualified ichthyological, zoological, botanical, educational, or scientific institution for safekeeping, costs thereof to be paid by the defendant. Upon conviction of the person or persons from whom the seizure was made, the environmental court shall declare the items seized forfeited to the State. Such items shall be destroyed or disposed of in any manner as the department may deem appropriate. [L 1975, c 65, pt of §1; am L 1983, c 111, §9; am L 2014, c 218, §8]

**§195D-9 Penalty.** (a) Any person who violates any of the provisions of this chapter [or] the provisions of any rule adopted hereunder shall be guilty of a misdemeanor and shall be punished as follows:

(1) For a first offense by a fine of not less than \$250 or by imprisonment of not more than one year, or both; and

(2) For a second or subsequent offense within five years of a previous conviction by a fine of not less than \$500 or by imprisonment of not more than one year, or both.

(b) In addition to the above penalties, except for violations under approved habitat conservation plans under section 195D-21 or approved safe harbor agreements under section 195D-22 as determined by the board, a fine of \$5,000 for each specimen of a threatened species and \$10,000 for each specimen of an endangered species intentionally, knowingly, or recklessly killed or removed from its original growing location, shall be levied against the convicted person.

(c) The disposition of fines collected for violations of the provisions concerning wildlife conservation shall be subject to section 183D-10.5.

(d) Except as otherwise provided by law, the board or its authorized representative by proper delegation is authorized to set, charge, and collect administrative fines or bring legal action to recover administrative fees and costs as documented by receipts or affidavit, including attorneys' fees and costs, or bring legal action to recover administrative fines, fees, and costs, including attorneys' fees and costs, or payment for damages or for the cost to correct damages resulting from a violation of this chapter or any rule adopted thereunder. The administrative fines shall be as follows:

(1) For a first violation, a fine of not more than \$2,500;

(2) For a second violation within five years of a previous violation, a fine of not more than \$5,000; and

(3) For a third or subsequent violation within five years of the last violation, a fine of not more than \$10,000.

(e) In addition, an administrative fine of up to \$5,000 may be levied for each specimen of wildlife or plant taken, killed, injured, or damaged in violation of this chapter or any rule adopted thereunder.

(f) Any criminal action against a person for any violation of this chapter or any rule adopted thereunder shall not be deemed to preclude the State from pursuing civil legal action to recover administrative fines and costs against that person. Any civil legal action against a person to recover administrative fines and costs for any violation of this chapter or any rule adopted thereunder shall not be deemed to preclude the State from pursuing any criminal action against that person. [L 1975, c 65, pt of §1; am L 1983, c 111, §10; am L 1988, c 67, §3; am L 2001, c 93, §2]

### **Attorney General Opinions**

Threatened and endangered plants are protected on Hawaiian home lands under the provisions of chapter 195D, as well as under the provisions of the federal Endangered Species Act of 1973, to the same extent that the plants are protected elsewhere in Hawaii. Anyone who "takes" threatened or endangered plants on Hawaiian home lands is subject to state and federal civil and criminal penalties. Att. Gen. Op. 95-5.

**§195D-10 Severability.** Should any section, subsection, sentence, clause, or phrase of this chapter, or any rule adopted pursuant thereto be for any reason held by a court of competent jurisdiction to be invalid, such decision shall not affect the validity of the remaining portions of this chapter or rule adopted pursuant thereto. [L 1975, c 65, pt of §1; am L 1983, c 111, §11]

## **[PART II. RECOVERY]**

**§195D-21 Habitat conservation plans.** (a) The department may enter into 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 the proposed habitat conservation plan 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, 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 for which the majority of the endangered species recovery committee recommended disapproval, the board may not enter into the habitat conservation plan unless the plan is approved by a two-thirds majority vote of both houses of the legislature. 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.

(2) Each 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 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.

(d) Notwithstanding any other law to the contrary, the board shall suspend or revoke the approval of any habitat conservation plan 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 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 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. [L 1997, c 380, pt of §2; am L 1998, c 237, §2; am L 2003, c 35, §4; am L 2004, c 10, §6]

#### **Note**

The amendment made by L 2014, c 218, §8 is not included in this section.

**§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. In the event the board votes to enter into a 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

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 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 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 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 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;

(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 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. [L 1997, c 380, pt of §2; am L 1998, c 237, §3; am L 2003, c 35, §5]

### **Note**

The amendment made by L 2014, c 218, §8 is not included in this section.

Safe harbor agreements; report to legislature each odd-numbered regular session. L 2016, c 37, §2.

### **Law Journals and Reviews**

Safe Harbor Agreements Under the Endangered Species Act: Are They Right for Hawai'i? 23 UH L. Rev. 507.

**§195D-23 Incentives.** (a) After approval of a habitat conservation plan or safe harbor agreement, or issuance of an incidental take license pursuant to this chapter, no agencies or departments of the State, in order to protect a threatened or endangered species, may impose any new requirements or conditions on, or modify any existing requirements or conditions applicable to, a landowner or successor to the landowner, to mitigate or compensate for changes in the conditions or circumstances of any species or ecosystem, natural community, or habitat covered by the plan, agreement, or license unless:

(1) The landowner, or the landowner's successor, expressly consents to the requirement, condition, or modification;

(2) The board has found, in accordance with those special procedures agreed to by the board and the landowner, or in the absence of any special procedures, in accordance with those procedures that govern the findings generally, that:

(A) The requirement, condition, or modification does not impose any additional restriction on any parcel of land or body of water available for use or development under the plan or agreement; and

(B) The requirement, condition, or modification will not increase the cost to the landowner or other parties to the plan or agreement of implementing the plan or agreement;

(3) The department is prepared to exercise its authority to:

(A) Pay the landowner for the costs of any new requirement or condition or any modification of any existing requirement or condition, which costs may be determined through binding arbitration; and

(B) Take any other action to ensure that any party to the plan or agreement is not, without the party's consent, unduly burdened by the requirement, condition, or modification, in which case the department shall implement that necessary requirement, condition, or modification upon committing to pay the costs, mitigate the actions, or undertake the action;

(4) The board has revoked the approval of the plan or rescinded the agreement in accordance with section 195D-21(d) or 195D-22(c); or

(5) Extraordinary new circumstances or information indicate that failure to modify the plan or agreement is likely to appreciably reduce the likelihood of the survival or recovery of any threatened or endangered species in its natural habitat. If additional mitigation measures are subsequently deemed necessary to provide for the conservation of a species that was otherwise adequately covered under the terms of a habitat conservation plan, safe harbor agreement, or incidental take license as a result of extraordinary circumstances, the primary obligation for executing mitigation measures shall rest with the State, or the federal government with its consent, and not with the landowner.

(b) Entry by a landowner into a habitat conservation plan or safe harbor agreement shall be voluntary.

(c) The department may establish a landowner contact and recognition program that:

(1) Contacts landowners who may have threatened or endangered species or their habitat on their land and that sends information on the species or habitat in question. If the landowner is willing, a nonbinding memorandum of understanding may be signed, which states a general intention to protect the species or habitat found on the land;

(2) If available, provides participating landowners with a current supply of information on the conservation of species and habitat found on their land;

(3) On an annual basis, recognizes one or more private landowners who have demonstrated, through past and current efforts, sound conservation practices and principles on their land; and

(4) On an annual basis, awards a private landowner participating in a habitat conservation plan an "Outstanding Participant of the Year" award.

(d) The department may establish a habitat conservation technical assistance program to assist landowners in developing, reviewing, or monitoring habitat conservation plans by providing technical assistance. The department may collect fees and payment for costs incurred for use of the technical assistance program in the development, review, or monitoring of a specific habitat conservation plan. Fees shall be charged at an hourly rate of \$50. The fees and

payment for costs collected pursuant to this subsection shall be deposited into the endangered species trust fund established under section 195D-31.

(e) Persons participating within voluntary programs under this chapter may receive consideration from the board to use adjacent public lands for commercial nature tourism activities that increase public education and support for endangered species; provided that an agreed percentage of the fees charged for nature tourism activities shall be donated to the trust fund to implement this chapter.

(f) The execution of habitat conservation plans and safe harbor agreements under sections 195D-21 and 195D-22, respectively, shall, for the purposes of providing incentives and assistance to landowners, be deemed to be a public purpose and in the public interest, and for the general welfare of the State. [L 1997, c 380, pt of §2; am L 2011, c 147, §3]

**§195D-24 Confidentiality.** All information submitted to the board by a landowner pursuant to section 195D-21 or 195D-22, in the course of preparing a habitat conservation plan or safe harbor agreement for private lands, respectively, shall be kept confidential until notice of the proposed plan or agreement is published in the periodic bulletins of the office of environmental quality control. For habitat conservation plans or safe harbor agreements for private lands, the precise location of any threatened or endangered species may remain confidential. [L 1997, c 380, pt of §2; am L 2003, c 35, §6]

**§195D-25 Endangered species recovery committee.** (a) There is established within the department for administrative purposes only, the endangered species recovery committee, which shall serve as a consultant to the board and the department on matters relating to endangered, threatened, proposed, and candidate species. The committee shall consist of two field biologists with expertise in conservation biology, the chairperson of the board or the chairperson's designee, the ecoregion director of the United States Fish and Wildlife Service or the director's designee, the director of the United States Geological Survey, Biological Resources Division or the director's designee, the dean of the University of Hawaii at Manoa college of natural sciences or the dean's designee, and a person possessing a background in native Hawaiian traditional and customary practices, as evidenced by:

(1) A college degree in a relevant field, such as Hawaiian studies, native Hawaiian law, native Hawaiian traditional and customary practices, or related subject area;

(2) Work history that demonstrates an appropriate level of knowledge in native Hawaiian traditional and customary practices; or

(3) Substantial experience in native Hawaiian traditional and customary practices.

Nongovernmental members shall be appointed by the governor pursuant to section 26-34. Nongovernmental members shall not serve for more than two consecutive terms. Nongovernmental members shall serve for four-year staggered terms, except that one of the members first appointed shall serve for two years.

Governmental members from the federal agencies are requested but not required to serve on the committee. The ability of the committee to carry out its functions and purposes shall not be affected by the vacancy of any position allotted to a federal governmental member.

(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 at least one site visit to each property that is the subject of the proposed action, 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 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;

(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 that is the subject of a habitat conservation plan or safe harbor agreement. [L 1997, c 380, pt of §2; am L 1998, c 237, §4; am L 2003, c 35, §7; am L 2014, c 53, §1; am L 2016, c 257, §1]

**[§195D-26] Annual report; endangered species.** The department, after consultation with the endangered species recovery committee, by December 31 of each year, shall prepare a report summarizing:

(1) The status of all endangered, threatened, proposed, and candidate species for which incidental take licenses pursuant to sections 195D-4 and 195D-22 have been issued and the effectiveness of all habitat conservation plans and safe harbor agreements that have been approved;

(2) The condition of the trust fund established under this chapter, including receipts and expenditures over the previous fiscal year; and

(3) Any recommendations to further the purposes of this chapter.

The report and all information pertaining to incidental take licenses shall be available to the public. [L 1997, c 380, pt of §2]

**§195D-27 REPEALED.** L 2012, c 145, §1.

**§195D-28] Relation of chapter to other laws.** The rights and remedies in this chapter shall be cumulative and in addition to any and all rights and remedies that may exist under applicable state and federal laws. [L 1997, c 380, pt of §2]

**[§195D-29] Release or establishment of endangered or threatened species outside its current range.** The department may authorize the release or establishment of any population, including eggs, propagules, or individuals, of an endangered or threatened species outside its current or historic range, after consulting with the endangered species recovery committee, if the release or establishment is likely to further the conservation of the species. [L 1997, c 380, pt of §2]

**[§195D-30] Net gain in recovery of species.** All habitat conservation plans, safe harbor agreements, incidental take licenses, and subsequent actions authorized under those plans, agreements, and licenses shall be designed to result in an overall net gain in the recovery of Hawaii's threatened and endangered species. [L 1997, c 380, pt of §2]

**§195D-31 Trust fund.** (a) There is established within the state treasury a trust fund to be known as the endangered species trust fund to be administered by the department to implement the purposes of this chapter.

The fund shall consist of moneys from the following sources:

(1) Moneys accrued from the sale of retail items officially sponsored by the department for the fund;

(2) Private contributions for the management and recovery of Hawaii's unique plants and animals;

(3) Fees and assessments charged for the commercial use of public land and waters and designated for the fund;

(4) Penalties, fines, or auctions resulting from enforcement violations;

(5) Legislative appropriations; and

(6) Moneys deposited to implement the obligations of a habitat conservation plan, as security for habitat conservation plan funding, or technical assistance program fees and payment for costs incurred for use of the technical assistance program as set forth in section 195D-23(d).

(b) The fund shall be held separate and apart from all other moneys, funds, and accounts in the state treasury; provided that moneys received as deposits or contributions from private

sources shall be deposited and accounted for in accordance with the conditions established by the agencies or persons making the contribution. Earnings on the investment of the assets of the fund shall become a part of the fund. Any balance in the fund at the end of a fiscal year shall be carried forward to the next fiscal year. [L 1997, c 380, pt of §2; am L 2004, c 144, §3; am L 2011, c 147, §4]

**[§195D-32] Citizen suits.** (a) Except as provided in subsection (b), any person, acting as a private attorney general, may commence a civil suit on the person's behalf:

(1) Against any state or county agency or instrumentality that is alleged to be in violation of the terms of, or [fails] to fulfill the obligations imposed and agreed to under any habitat conservation plan or safe harbor agreement and accompanying license for public lands as authorized under sections 195D-21 and 195D-22; or

(2) Against the department or board, where there is alleged a failure of the department or board to perform any act or duty required under a habitat conservation plan or safe harbor agreement and accompanying license issued for public lands.

(b) The circuit environmental courts shall have jurisdiction to enforce this section or to order the department or board to perform any act or duty required under this section, provided that:

(1) No action may be commenced under subsection (a)(1) less than sixty days after written notice of the alleged violation has been given to the department, and to the state or county agency or instrumentality alleged to be in violation of this section, except that the action may be brought immediately after the notification in the case of an emergency posing a significant risk to the well-being of any species of fish, wildlife, or plant; and

(2) No action may be commenced under subsection (a)(2) less than sixty days after written notice of the alleged violation has been given to the department, except that the action may be brought immediately after the notification in the case of an emergency posing a significant risk to the well-being of any species of fish or wildlife, or plant.

(c) Any suit brought pursuant to this section may be brought in the judicial circuit where the alleged violation occurred or is occurring. In any suit brought pursuant to this section, where the State is not a party, the attorney general, at the request of the department, may intervene on behalf of the State as a matter of right.

(d) The injunctive relief provided by this section shall not restrict any right that any person or class of persons may have under any other law, including common law, to seek enforcement of any standard or limitation or to seek any other relief, including relief against any instrumentality or agency of the State. [L 2003, c 35, §2; am L 2014, c 218, §8]