

STAND. COM. REP. NO. 1194

Honolulu, Hawaii

March 2, 2007

RE: H.B. No. 1905
H.D. 3

Honorable Calvin K.Y. Say
Speaker, House of Representatives
Twenty-Fourth State Legislature
Regular Session of 2007
State of Hawaii

Sir:

Your Committee on Judiciary, to which was referred H.B. No. 1905, H.D. 2, entitled:

"A BILL FOR AN ACT RELATING TO DAM SAFETY,"

begs leave to report as follows:

The purpose of this bill is to ensure the safety of dams and reservoirs in the State by, among other things:

- (1) Prohibiting a dam owner from impounding water unless the owner holds a valid certificate of approval to impound;
- (2) Specifying that agents, employees, and authorized representatives of the Department of Land and Natural Resources (DLNR) shall have the right to enter, without prior notice, any public or private property to investigate the condition, construction, or operation of dams or other artificial barriers;
- (3) Authorizing DLNR to pursue injunctive relief in cases where a person engages or is about to engage in actions or practices that constitute an unlawful act under Chapter 179D, Hawaii Revised Statutes;
- (4) Requiring DLNR to submit annual reports relating to dams and reservoirs;



- (5) Establishing specific requirements and responsibilities for owners of high and significant hazard potential dams and reservoirs; and
- (6) Repealing the existing penalty provisions and inserting more severe civil penalties and establishing criminal penalties for violations.

A member of the Kauai County Council and a concerned individual supported this bill. A concerned individual supported this bill with amendments. The Attorney General, Office of Hawaiian Affairs, DLNR, Department of Agriculture, Agribusiness Development Corporation, Dole Food Company Hawaii, and a concerned individual supported the intent of this measure. Kamehameha Schools and a concerned individual opposed this bill. Alexander & Baldwin, Inc., Hawaiian Commercial & Sugar Company, Kauai Coffee Company, Inc., Hawaii Farm Bureau Federation, Land Use Research Foundation of Hawaii, and several concerned individuals submitted comments.

Your Committee notes that this bill is narrowly focused on emergencies and potential hazards associated with dams and reservoirs. The provisions related to appropriations and special funds for dam safety are contained in HB 652 HD1.

Your Committee is in agreement with the basic policy that private owners of dams and reservoirs should be responsible for the upkeep and repair of their facilities as directed by the State. However, your Committee also recommends that the Legislature consider, based on longstanding tradition and constitutional obligations with respect to important agricultural lands, cost sharing arrangements between the State and private owners in the event that lands possibly affected by an emergency at a privately owned dam or reservoir would result in flood damage or destruction of such valuable farming lands.

Your Committee has, with prior concurrence, amended this bill by:

- (1) Prohibiting operators from impounding water unless the operator holds a valid certificate or approval to impound water at the dam;



- (2) Deleting language that allowed DLNR to seek:
 - (A) A search warrant to allow inspection of a dam if the owner of the property refuses to allow the inspection; and
 - (B) An administrative subpoena compelling production of the drawings, operational records, or other information concerning a dam or reservoir if DLNR has been refused inspection of these documents.
- (3) Providing the authority to DLNR agents or employees, or any authorized representative, to enter any property, public or private, without prior notice for the purpose of investigating the condition, construction, the taking of any necessary remedial actions, or the operation of any dam or artificial barrier without a search warrant or liability for trespass in emergency situations;
- (4) Providing the authority to the Board of Land and Natural Resources (BLNR), its agents, engineers, and other employees access to any land or water in the State that is subject to inspection or investigation under Hawaii's Dams and Reservoirs Law without a search warrant or liability for trespass;
- (5) Expanding DLNR's authority to immediately employ remedial measures necessary to protect persons and property if a dam is threatened by any large flood to include threats to a dam by other disaster;
- (6) Stipulating that moneys collected by DLNR from the owner of the dam or reservoir as recovery fees for fulfilling the duties of DLNR established in this Act and reasonable attorney's fees incurred in the recovery of costs and expenses be deposited in the Dam Safety Special Fund;
- (7) Allowing BLNR to issue orders reciting the existence of a condition that poses a danger to the health and safety of persons or property and allowing any person to whom this order is directed to challenge the order but requiring the person to immediately comply with the order pending later disposition of the challenge;



- (8) Declaring that emergency actions provided for in this bill are in the public interest and for the public health, safety, and general welfare of the State;
- (9) Making the requirements for certificates of approval for impounding water at dams and reservoirs completed prior to July 1, 2007, applicable to operators;
- (10) Requiring that approval of plans and specifications for the removal of dams and reservoirs be submitted as part of DLNR's annual report on their activities regarding dam and reservoir safety to the Governor and the Legislature;
- (11) Deleting the requirement that receipts generated for inspections of dams and reservoirs be submitted as part of DLNR's annual report on their activities regarding dam and reservoir safety to the Governor and Legislature;
- (12) Eliminating language that limited the liability of BLNR, its officers, agents, and employees caused by or arising out of any of the following:
 - (A) The construction, maintenance, operation, or failure of a dam or appurtenant works; or
 - (B) The issuance and enforcement of an order or a rule issued or adopted by BLNR to carry out BLNR's duties;
- (13) Stipulating that the general requirements and responsibilities of dam owners is applicable to all owners of dams and reservoirs and not just owners of high and significant hazard potential dams and reservoirs;
- (14) Including, as part of the general requirements and responsibilities of dam owners, requirements for:
 - (A) Maintaining physical clear access for a four wheeled drive vehicle to the dam or reservoir site and appurtenances if required by BLNR; and



- (B) An owner of a high or significant hazard potential dam to have a redundant early warning system in place, as approved by BLNR, if clear access to the dam or reservoir site cannot be sustained particularly during periods of inclement weather;
- (15) Amending the definition of "dam" to include artificial barriers, including appurtenant works, that impounds or diverts water and that meets additional criteria or is specifically exempted as determined by BLNR pursuant to adopted rules;
- (16) Amending the definition of "removal" to include partial elimination of the dam embankment or structure to restore the approximate original topographic contours of the valley;
- (17) Including definitions for the terms "hazard potential", "high hazard", "low hazard", "physical clear access", and "significant hazard";
- (18) Allowing action to be brought against the State, BLNR, DLNR, or any employee of the State, BLNR, and DLNR, for damages sustained through the partial or total failure of any government dam;
- (19) Inserting an exemption for the construction, enlargement, repair, alteration, operation, or removal of a dam or other artificial barrier if it is done to comply with application approvals;
- (20) Passing the penalty for engaging in any unlawful act covered under this Act from a misdemeanor to a class C felony;
- (21) Requiring the owner of a dam or reservoir constructed prior to July 1, 2007, to file an application for the approval of the dam or reservoir with BLNR;
- (22) Requiring inspections or investigations of dams or reservoirs to be carried out at the owners expense;
- (23) Adding additional duties for BLNR including:




- (A) Requiring fees to cover the BLNR's costs in carrying out the administration of dam safety rather than supervision of dam safety;
 - (B) Cooperating with all public and private agencies created for the purpose of enhancing dam safety activities and training, and assisting these organizations and agencies in coordinating the use of their facilities and participating in the exchange of ideas, knowledge, and data with these organization and agencies and maintaining an advisory staff for this purpose;
 - (C) Preparing of, publishing of, and issuing of printed pamphlets, bulletins or advisories or conducting training as BLNR deems necessary for the dissemination of information to the public;
 - (D) The appointing and removing of agents and employees including hearing officers, specialists, and consultants necessary to carry out the purposes of this chapter, who may be engaged by BLNR without regard to the requirements of chapter 76;
 - (E) Cataloging and maintaining an inventory of all regulated dams and reservoirs in the state pursuant to this chapter without regard to chapter 91; and
 - (F) Establishing similar or consistent hazard potential classifications in conjunction with other applicable states or federal guidelines for all regulated dams and reservoirs in the state pursuant to this chapter without regard to chapter 91;
- (24) Authorizing BLNR to set, charge, and collect administrative penalties and recover administrative fees and costs, including attorneys fees and costs, or bring legal action to recover these costs or payment for damages or for the cost to correct damages resulting from a violation of any rule, order, condition, or provision of Hawaii's Dam and Reservoir Law;
- (25) Limiting the administrative penalty for a violation to \$25,000 per day;



- (26) Stipulating that each day during which the violation continues constitutes an additional, separate, and distinct offense;
- (27) Creating a Class C felony for a person who intentionally, knowingly, or after written notice to comply, violates any rule, order, condition, or provision, or knowingly obstructs, hinders, or prevent DLNR's agents or employees from performing their duties;
- (28) Inserting graduated sentencing for conviction of a violation of Hawaii's Dam and Reservoir Law;
- (29) Allowing both civil and criminal actions against a person who violates Hawaii's Dam and Reservoir Law;
- (30) Requiring DLNR to adopt rules no later than July 1, 2007;
- (31) Requiring DLNR to adopt interim administrative rules that are similar or consistent with the rules recommended in Chapter 5 of the Report of the Idependent Civil Investigation of the March 14, 2006, Breach of Ka Loko Dam; and
- (32) Making technical, nonsubstantive amendments for clarity, consistency, and style.

As affirmed by the record of votes of the members of your Committee on Judiciary that is attached to this report, your Committee is in accord with the intent and purpose of H.B. No. 1905, H.D. 2, as amended herein, and recommends that it pass Third Reading in the form attached hereto as H.B. No. 1905, H.D. 3.

Respectfully submitted on
behalf of the members of the
Committee on Judiciary,



TOMMY WATERS, Chair



