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GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

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CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
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KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

**TESTIMONY OF THE CHAIRPERSON
OF THE BOARD OF LAND AND NATURAL RESOURCES**

**on House Bill 2823, House Draft 1-Relating To Dam Safety
BEFORE THE HOUSE COMMITTEE ON JUDICIARY**

February 12, 2008

House Bill 2823, House Draft 1 amends Chapter 179D, Hawaii Revised Statutes (HRS), by adding a new Part relating to Limitations on Liability which limits personal injury or property damage liability for any entity or person that owns, controls or operates a dam or reservoir and allows for immunity from liability for stockholders, directors and officers of a corporation that owns, operates or controls a dam or reservoir. The Department of Land and Natural Resources (Department) is strongly opposed to the limiting or waiving of liability for dams that are solely or corporately owned by an entity, stockholders or individuals that operate the dam for profit or other beneficial purposes as the Department believes that doing so will reduce the effectiveness of the Hawaii Dam Safety Program and decrease the importance and funding provided for improvements, repairs, and maintenance necessary for aging dams in the State.

The Department notes that this bill could affect 99 of the 136 state regulated dams that are operated by entities other than government or non-profit organizations. Of these 99 dams, 90 have a proposed high hazard classification and may affect over 21,000 persons and almost 120 critical facilities if they should fail.

By limiting liability, owners may place a lower priority on maintenance and improvements necessary for the safe and efficient operation of their dams and reservoirs. Owners may be willing to put up money for maintenance but not on capital improvements or substantial improvements for deferred maintenance expenses. Due to the age of the dams in the State, on-going maintenance, monitoring and repairs are needed to safeguard against typical embankment dam failures.

The Department believes this measure does not afford any protection for State and/or County owned dams. Currently, Section 179D-4, HRS (Liability for damages), provides relief and protection for the Department and its employees in carrying out their duties in administration of the Dam Safety Program. This protection does not extend to the State as a dam owner which would pertain to such agencies as the Department, Department of Agriculture (DOA), DOA-

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Agribusiness Development Corporation, and Department of Hawaiian Home Lands. Additionally the various Counties own dams and reservoirs for flood control and water supply and it appears this measure does not afford any relief to these agencies also.

The Department is not aware of any other State that has provided this type of blanket immunity or limitation of liability to dam owners. The Department is concerned with the precedence that this measure proposes, and will unduly place the public at risk not only to dam failures but also in not providing adequate reciprocity to property owners downstream should there be a failure or partial failure of a dam.

House Bill 2823, House Draft 1 also provides for a limitation on liability if the owner holds a valid liability insurance policy or adequate substitution for insurance at a time that damage occurs. The Department is unclear what impact this will have on the recourse options available for downstream homeowners of a dam facility should there be an incident at the dam that causes flooding, damage to property, and/or loss of life.

In consultation with the Department of Accounting and General Services (DAGS) Risk Management Office, state-owned dams are currently covered as a rider policy on the State's excess-insurance policy. It is unclear how this measure would affect the state's own insurance coverage and are concerned that if this measure passes the State may lose this coverage. Additionally, in consultation with DAGS Risk Management Office, the Department believes that the coverage provided in this measure are substantially low and that the coverage should be tailored to address the value of the asset, reflect the danger posed by the facility and risks involved.

After the dam break in 2006, the State and County of Kauai initially spent over \$4,500,000 to mitigate damages from the flooding. Additionally, the State and Federal government will be spending another \$5,000,000 to clean up the areas of Wailapa Stream and Kilauea River.

The Department again restates its strong opposition to this measure and is highly concerned with potential consequences should it pass. By limiting liability for certain owners and also insurance requirements, will the public now file lawsuits against the State to recover for damages to make up for any shortfalls?

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**TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE CONSUMER
LAWYERS OF HAWAII (CLH) IN OPPOSITION TO H.B. NO. 2823, HD 1, RELATING
TO DAM SAFETY**

February 12, 2008

To: Chairman Tommy Waters and Members of the House Committee on Judiciary:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Consumer Lawyers of Hawaii (CLH) in strong opposition to H.B. No. 2823, HD 1.

This bill provides immunity for owners and operators of dams or reservoirs. Immunity is a measure that should be utilized as a last resort when there are no other reasonable alternatives available. This is because immunity removes accountability and incentive to protect the public safety while arbitrarily eliminating fair and reasonable redress for those harmed by negligent conduct. Large dams have the potential to inflict large damages to people and property below them. Therefore the law should strive to encourage maximum efforts to safely maintain and operate dams and reservoirs to avoid unnecessary death and destruction to innocent persons and property. This measure removes an important incentive to safely operate and maintain dams and reservoirs to avoid liability for inadequate maintenance that cause dam or reservoir failures that imperil the lives and property of those below them.

If limitations on liability are to be afforded dam owners and operators, then the requirement that only those exercising proper maintenance and are not themselves negligent should be afforded the protections provided in this bill. Currently, the requirement that the dam owner be free of negligence applies only to a failure of the structure forming the dam and not to other modes of dam failure that may very well be caused by the negligence of the owner or operator of the dam. Subsection B should be reworded so that the phrase "provided that the failure or partial failure was not proximately caused by the negligence of the entity or person,"

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apply to both Subsections (1) & (2). That same condition that an owner or operator of a dam must not be negligent in order to obtain the protections of his bill should also apply to Subsection (b) relating to waters that flow into the dam or pass through it into a natural stream below.

Subsection C currently provides insurance requirements that if met, would provide immunity to owners and operators of dams or reservoirs. If an insurance (or financial responsibility) alternative to traditional liability is to be utilized, the insurance requirement should fit the circumstances of the dam or reservoir. It is one thing for a small reservoir located in a sparsely populated agricultural environment run by a non profit community organization to be protected by an insurance policy with \$50,000 per claim/\$500,000 per incident policy limits. It is another thing for a major municipal operator such as the Honolulu Board of Water Supply to carry such a small insurance policy for large reservoirs containing a billion gallons or more that have the potential to kill thousands of people and destroy hundreds of millions of dollars of property. The Nuuanu Reservoir can hold more than one billion gallons of water behind a 96-year old dam built of dirt. A failure of that dam could wreak havoc from Nuuanu through downtown Honolulu. There are many other large dams situated above highly populated areas, while there are many smaller dams used for agricultural purposes in sparsely populated areas. Insurance requirements should be tailored to reflect the danger posed by the dam and commensurate with the risks involved. A measure like this should apply only to small operators of agricultural dams and not municipal or large operators who have the ability to properly maintain their dams.

Subsection D provides that the liability limitations of this bill shall not apply to circumstances constituting criminal, fraudulent or malicious acts or omissions. It is suggested

that gross negligence, intentional, willful, wanton, or conduct in reckless disregard of safety be added to include the types of egregious conduct normally excluded from protection.

CLH appreciates this opportunity to testify on this measure and asks that the bill be held or amended as discussed above.

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Food Company Hawaii

1116 Whitmore Avenue Wahiawa, Hawaii 96786

February 12, 2008

Honorable Tommy Waters, Chair, Committee on Judiciary
Hawai'i State Capitol, Conference Room 325
415 South Beretania Street
Honolulu, HI 96813

RE: HB 2823, HD1, RELATING TO DAM SAFETY-SUPPORT

Aloha Chair Waters and Members of the Committee:

I am Dan Nellis, Operations Director of Dole Food Company Hawaii ("Dole"). Thank you for the opportunity to offer testimony in support HB 2823, HD 1, Relating to Dam Safety.

HB 2823, HD 1, limits liability for personal injury or property damage from any person(s) that owns, controls or operates a dam or reservoir. This bill also provides insurance requirements for dam and reservoir owners. Dole supports measures such as this one that keep agribusiness viable in this state.

Dole is fortunate to enjoy continuous agricultural operations in Hawai'i for more than 100 years. At one point in our history, we were one of the largest sugar growers in the state and established the operation of Wahiawa Dam, which at the peak of production provided up to 60 million gallons of water per day for fields stretching from Mokuleia to Waimea Bay. Today, Dole is one of this state's largest pineapple growers. We also farm coffee and cacao on our properties and lease much of our land to diversified agriculture farmers, but our need for irrigation water is just a portion of the system's capacity. We distribute this water amongst a number of other agribusiness and independent farmers that rely on it for irrigating their fields on Oahu's North Shore.

For these reasons, we respectfully urge your passage of HB 2823, HD1. As always, we are grateful for the opportunity to share our views with you.

Sincerely,

Dan Nellis
Operations Manager, Dole Food Company Hawaii

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HAWAII FARM BUREAU FEDERATION
2343 ROSE STREET
HONOLULU, HI 96819

FEBRUARY 12, 2008

HEARING BEFORE THE
HOUSE COMMITTEE ON JUDICIARY

TESTIMONY
HB 2823, HD 1
RELATING TO DAM SAFETY

Chair Waters and Committee Members:

My name is Alan Takemoto, Executive Director, of the Hawaii Farm Bureau Federation, which is the largest non-profit general agriculture organization representing approximately 1,600 farm and ranch family members statewide.

Hawaii Farm Bureau Federation, on behalf of its member farmers, ranchers and agricultural organizations **strongly SUPPORTS HB 2823, HD 1**, providing indemnity protection to landowners and farmers who own and run dams and reservoirs including irrigation infrastructure using good management practices.

Affordable water supplies for agricultural use is largely dependent upon rainfall. The sporadic pattern of Hawaii's rainfall requires that water during heavy rainfall periods be stored in reservoirs (dams) for use during drier times. There are many existing reservoirs and as there is conflict for existing uses, new sources of agricultural water will probably need to be reservoir (dam) dependent. The tragedy at Kaloko has highlighted the risks associated with dams raising issue of liability with landowners. There are threats of closing existing reservoirs or raising lease rents to address liability costs. Either measure will be detrimental to agriculture.

HFBF strongly believes agriculture exists for public benefit. Everyone consumes or uses agricultural products. Successful agriculture is critical to increasing Hawaii's self sufficiency to help us withstand crisis such as 9-11. When crisis hit, it is too late to plant a field or start raising livestock. We therefore believe that it is in the interest of the State to encourage landowners and farmers to install and maintain irrigation infrastructure necessary to grow crops and raise livestock. Indemnity from liability assuming good maintenance practices are carried out is a reasonable policy statement by the State to encourage this investment.

Thank you.

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Island Resources Ltd.

"Resource management with imagination"
Water Land Energy

Stephen P. Bowles
President

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February 9, 2008

Testimony of Stephen Bowles
House Judiciary Committee hearing of 2/12/08 @ 2:05 PM

Reference to HB 2823

I am in favor of this bill. I have been associated with agriculture in Hawaii since the 1950's as a researcher, student, farmer and consultant on water resources. The irrigation of agricultural lands in Hawaii require the use of reservoirs and dams.

The future of Important Agricultural Lands and the sustainability of agricultural lands depends on how well we maintain and protect our water assets for the benefit of farmers. The recent furor over a single dam failure is a unfortunate as it has created a knee jerk reaction of fear. To a large degree, the tragedy was the result of bad planning for human habitation as well as management of the water system. The reservoir existed on the land before the people.

Importantly, we have many reservoirs which are critical to the future of agriculture and care must be taken in protecting these resource assets. Many day reservoirs are not fed by streams but are in fact serviced by ditches and pipelines managed on a regular basis. The State DLNR has chosen to oppose this bill for reasons unknown since it owns land on which a number of reservoirs are located. A particular one, Reservoir 3 of the Kohala system is owned jointly by DLNR with KSBE. We all have a responsibility in supporting our agriculture and running from responsibility by DLNR is not the answer.

To protect the management and operation of these facilities from litigation is critical. Making the operators responsible for bad zoning places the burden in the wrong hands. Houses should not be located in potential floods plains of existing reservoirs, many of which have been place for 100 years- long before the houses.

Again, I am in favor of this bill to assist in the security of our agricultural water assets. In the future we should spend our efforts and money on improving these assets and not suing them



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KAMEHAMEHA SCHOOLS

February 12, 2008

The Honorable Tommy Waters, Chair and Members
Committee on Judiciary
The House of Representatives
Hawaii State Capitol
415 South Beretania Street, Room 325
Honolulu, Hawaii 96813

Dear Chair Waters and Members:

Testimony in Support of House Bill No 2823 HD1 Relating to Dam Safety

I am Kapu C. Smith, Senior Land Asset Manager for Kamehameha Schools' Kawailoa Plantation in Waialua, Oahu. I am here to testify in support of HB2823 HD1 because it recognizes that continued operation and maintenance of irrigation systems, dams and reservoirs that deliver water for agricultural use are essential to "important agricultural land" (IAL). In fact, you can't have one without the other. As such, landowners statewide need to be provided incentives which encourage the retention and expansion of these systems.

The Department of Land and Natural Resources (DLNR) contends the opposite will occur, landowners will instead take the opportunity to leave their systems in a state of disrepair. This argument fails to recognize that HB2823 HD1 does not relieve the landowner of the requirement to repair and maintain irrigation systems in keeping with Chapter 179. More importantly they fail to acknowledge the alternative, if repair and maintenance is economically unfeasible, our choice is to decommission. As such, passage of HB2823 HD1 will instead improve the economic feasibility of retaining irrigation systems which are essential to the goal of protecting "important agricultural land".

Thank you for the opportunity to express our views on this matter.

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JUDtestimony

From: David Whatmore [REDACTED]
Sent: Tuesday, February 12, 2008 12:26 AM
To: JUDtestimony
Subject: HB2823 HD1 Liability Limitation for Dams

Committee on Judiciary
 Rep. Tommy Waters Chair
 Hawaii House of Representatives

Feb11, 2008

David Whatmore
 Kilauea Ag. Water Assn.

[REDACTED]
 Kilauea, Hi 96754
 [REDACTED]

Re; HB2823 HD1 Hearing on Feb 12, 2008, 2:05 PM (Liability Immunity and Limitation for Dam Owners and Operators)

Aloha Chair Waters and Committee Members,

I oppose HB2823 HD1 because it merely would reduce the cost of liability insurance for dam owners at the expense of victims in the unlikely rare event of another dam failure, and provides some immunity for owners that reduces the incentive for operating dams safely and diligently. Reducing insurance costs can be better achieved by continuing to support the dam safety program that is being operated by the DLNR that provides for regular inspections and monitoring of dams and their safety features which will instill confidence to insurers who will thus provide insurance at more reasonable rates.

In my opinion, the larger prohibitive costs that dam owners and operators face are the recent shifting of the cost burden for new fees for inspections and fees for dam safety programs, and expensive mandated engineering studies to be done at the expense of dam owners. This puts the survival of many reservoirs at risk as well as the many huge public benefits of these reservoirs that will be lost. The Dam Safety Act that passed last year unfortunately included new fees and huge mandated expenses even for dam owners who are not in violation. This creates a huge disincentive for dam owners to maintain and keep reservoirs in service, and as a result many of the direct and indirect public benefits of surface water storage may be lost and our sustainability severely reduced in many ways. Because of the public benefits of storing excess surface water, there is ample justification for spending public funds to secure what the public wants and needs: WATER! The sustainability of our society and the preservation of our ecosystem here are totally dependent upon ample water. This precious resource has been stored in reservoirs by civilizations for drought mitigation for thousands of years.

Excess surface water such as storm surges that flow out to the ocean are wasted instead of being stored in reservoirs. Storing excess surface water protects our streamwater and diminishing underground aquifers by reducing our demands upon them. Use of stored surface water for agriculture actually recharges our aquifers underground. In some cases, reservoir water can preserve stream flows during extreme drought by giving water back. Some of the important reasons for storing water are agriculture, commerce, fire protection, habitat protection for endangered species, preservation of aquifers, hydroelectric potential, food security, energy conservation and energy independence. Reservoirs also

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2/12/2008

reduce mud and silt that flows in streams that would otherwise be a detriment to wildlife and recreation in coastal waters. The agricultural operations that require reservoirs support tourism by preserving open spaces, agrotourism, farmers market produce for tourists, and local produce for hotels and restaurants. Local produce sold on the mainland advertises Hawaii to potential tourists. Growing food locally saves energy and jobs and protects us from any future interruption of shipping. Surface water will also be needed more and more in the future for domestic use if our population grows.

I am opposed to the protection from liability in this bill even though I am a major shareholder in the corporation that owns Waiakalua reservoir, and the agricultural water for my livelihood comes from KaLoko reservoir and KaLoko ditch. I have 20 years of my hard work invested in growing my 800 fruit trees that rely upon this water. I am opposed to this bill because I do not believe that it serves to protect the public interest. By trying to avoid liability, it makes the danger of loss of life and property seem more than it actually is, and may cause members of the public to fear dams and to fear that victims may not receive fair compensation in the unlikely event of an accident. This kind of fear could undermine public support for the surface water storage that the public needs. There are good reasons for not absolving dam operators of liability just as it would be foolish to absolve automobile operators of liability. If dams are operated safely (and they can be), the cost of liability insurance will not be excessive and the risk to owners and the public will be very low.

We need to preserve our reservoirs to prevent the waste of our surface water in order to obtain the "maximum beneficial use of the waters of the State." These waters are held in trust by the State for the people of Hawaii and must be protected and conserved so that enough is available for present and future use. There are better ways of protecting our reservoirs and ditches than relieving and reducing the legal liabilities of the owners and operators. The public should invest to preserve privately operated reservoirs as well as the publicly operated reservoirs since both are necessary for Hawaii's present and future generations.

Sincerely,---David Whatmore Farmer and Co-Director of KAWA

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Maui County Farm Bureau



An Affiliate of the American Farm Bureau Federation and Hawaii Farm Bureau Federation
Serving Maui's Farmers and Ranchers

TESTIMONY

HB 2593 RELATING TO DROUGHT MITIGATION

HEARING BEFORE THE HOUSE COMMITTEE ON JUDICIARY

Chair Waters and Committee Members:

My name is Warren Watanabe, Executive Director of the Maui County Farm Bureau, a non-profit general agriculture organization and an affiliate of the Hawaii Farm Bureau Federation.

Maui County Farm Bureau, on behalf of its member farmers, ranchers and agricultural organizations **strongly SUPPORT HB2823 as amended**, providing indemnity protection to landowners and farmers who own and run irrigation infrastructure including dams using good management practices.

Comments have been submitted concerns that this measure “will reduce the effectiveness of the Hawaii Dam Safety Program and decrease the importance and funding provided for improvements, repairs, and maintenance necessary for aging dams in the State”. Contrary to this implication, the bill clearly states that indemnification applies, “provided that the failure or partial failure was not proximately caused by the negligence of the entity or person.” This means applicable Dam Safety Program requirements must be adhered to. This measure recognizes the need to provide safety to dam users and irrigation infrastructure as well as the community around them. Not to do so would be irresponsible.

Another issue raised is that this indemnity would allow landowners and farmers to place maintenance of these structures lower on their priority list for spending. Water is a precious commodity for farmers. Poorly maintained structures result in losses through leaks, meaning less water for livestock and crops due to poor delivery. This measure is to incentivize owners of these systems to maintain them properly not only for safety but for water conservation.

The waters used by Maui farmers and ranchers originate in watersheds. The major source used by those on the Upper Kula line is from a reservoir mainly filled during storm events. There are often long periods without rainfall and if not for the reservoirs we would have no water. Continued years of droughts and competing uses for water leave farmers dry. Maui County has been extremely supportive of the small farmer and rancher, excluding them from water restrictions even during times of drought. However, farmers often voluntarily do not plant during the summer since they know that

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HB2823 HD1 Dam Safety

water supplies are limited and unrestricted use may end up hurting the entire community if supplies run out before the next rainfall event. We are therefore looking at increasing storage capacity for the systems. Liabilities associated with having reservoirs or irrigation infrastructure transecting their lands may make landowners reluctant to be part of this process. Farmers on Kauai already may be impacted by landowners closing reservoirs due to the huge potential liability associated with its operation. No water will mean no farming. This Bill is important not only for existing structures but to encourage future systems to support increased agricultural development

We therefore, respectfully request an amendment as recommended by the and passage of this Bill. We cannot loose any more farmers or ranchers. Thank you.

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