



Legislative Testimony

**HB 3176, HD 1, RELATING TO ADMINISTRATIVE PENALTIES FOR DAMAGE
TO STONY CORAL AND LIVE ROCK**

House Committee on Finances

February 22, 2008

2:15 p.m.

Room: 308

The Office of Hawaiian Affairs **SUPPORTS, with amendments**, HB 3176, HD 1, which would add needed layers of protection for our coral reefs.

A 2006 National Survey of Fishing, Hunting and Wildlife-Associated Recreation by the U.S. Fish and Wildlife Service shows that wildlife watching is increasing in this State, and so too is the revenue we generate from it. In 2006, Hawai'i's wildlife was given an estimated value of \$402.3 million, and wildlife watching spending has almost increased 50 percent from 2001. Our coral reefs play a large and valuable part in this; for example, Hanauma Bay saw 1 million visitors in 2006.

However, the coral reefs in this State are under enormous strain from a variety of sources both locally and from abroad. Locally, the increase in wildlife-watching has put pressure on these sensitive areas as has poorly planned coastal development and the associated runoff from compromised watersheds. The recent sinking of a tour vessel in Molokini that damaged hundreds of meters of coral is a perfect example of what can happen in an overly-used and poorly managed Marine Life Conservation District.

Abroad, there is increasingly clear knowledge and recognition that climate change places our coral reefs amongst those environments most threatened by this phenomenon. An increase in sea surface temperatures, rising sea levels, and more frequent and severe storms are some of the effects of climate change that can negatively impact coral reefs. These negative impacts lead to declines in biodiversity, coastal protection and income from reef fisheries and tourism. The resulting economic loss can total billions of dollars for our State.

OHA sees that our State is reliant upon our threatened coral reefs for income and food; therefore, the protection of coral reefs should be a top priority for our policy makers. This bill takes us closer towards ensuring protection for a heavily used and stressed asset that we all need and enjoy.

One of the amendments added in this proposed HD 1, however, appears to be far too burdensome for the Department of Land and Natural Resources. They should not have to calculate the relative economic value of the damaged area to determine the fine to be assessed. The fact that the precious, public trust resources were damaged should be enough.

OHA urges the Committee to SUPPORT HB 3176, HD 1, with the above considerations. Thank you for the opportunity to testify.

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

**on House Bill 3176 House Draft 1 -RELATING TO ADMINISTRATIVE PENALTIES
FOR DAMAGE TO STONY CORAL AND LIVE ROCK**

**BEFORE THE HOUSE COMMITTEE ON
FINANCE**

February 22, 2008

House Bill 3176 House Draft 1 would authorize the Board of Land and Natural Resources (Board) to impose administrative penalties for damage to stony coral and live rock based on area, using an accepted economic valuation method to gauge the relative value of the damaged coral area, in addition to a penalty on a per specimen basis. The Department of Land and Natural Resources (Department) opposes House Draft 1 and instead, strongly supports the original version of this Administrative bill.

First, requiring an economic valuation will limit the discretion of the Board in regard to penalties. Specifically, it would prevent the Board from granting more lenient fines in cases where damage was inadvertent and the operator made good faith attempts to prevent it; and could mandate smaller fines in cases where a violator was reckless or intentional in their actions. The reason the Board is currently given such flexibility in every other case where the statutes impose civil fines is to allow for accommodations like this to be made. People who feel their due process was compromised may seek a contested case hearing, and then subsequently appeal to court. The current system thus ensures appropriate checks and balances on the Board's discretion, without the need for an economic valuation.

Second, this is a penalty bill not a mitigation bill. A fine is not based on an economic valuation (which is used to argue for damages relative to restoration costs or compensatory mitigation), but is instead intended to serve as a significant penalty to responsible parties for illegal actions and to encourage compliance with the law on the part of the greater public. For example, when one receives a parking ticket for \$40, the amount of penalty is not based on the size of the parking space that was illegally occupied or on the value of the real estate involved; on the contrary, the fine is designed to be a reasonable punishment for the violation and a deterrent to future violations.

The fine for coral and live rock was to be based, in part, on similar fines already in statute for threatened and endangered aquatic life. Part of the rationale for this is that in addition to monk seals and sea turtles, the only other marine life completely protected against take, damage or harm in Hawaii is live coral and live rock, hence it is logical that the penalties for take of both be

equivalent. A similar threatened and endangered species statute protecting plants allows for a penalty ranging from \$5,000 up to \$10,000, depending on whether a plant is listed as threatened or endangered, further highlighting how the proposed penalty in our original bill is consistent with current precedent.

If one needs to rationalize via an economic argument a penalty of \$5,000 per square meter for coral and live rock, then this raises the specter of also having to rationalize the penalty amounts for sea turtles and monk seals, or for each listed plant under Forestry and Wildlife's jurisdiction. If this line of reasoning is taken to an extreme, the Department might eventually need to provide an economic justification for any penalty imposed for take, harm or death of a natural resource. While this is important when assessing damage for recovery relative to funding mitigation or restoration projects, it is clearly not a logical direction from a precedent perspective for determining fines.

At the present time, Section 187A-12.5, Hawaii Revised Statutes (HRS), authorizes the Board to impose administrative fines for the taking, killing, or injuring of aquatic life on a "per specimen" basis. This approach has been and remains appropriate for situations involving fisheries violations.

However, section 187A-12.5, HRS, does not apply well to environmental damage or to the breakage of living coral colonies and live rock, especially in circumstances involving vessel groundings and other large-scale resource damage incidents. In such cases it is difficult to determine the number of specimens that might have been originally present once they have been crushed or destroyed in such a grounding event. This allows parties a way to challenge the Department's damage estimates and the associated penalties proposed.

By way of example, the recent grounding of a charter dive vessel in the Molokini Marine Life Conservation District damaged many hundreds of coral colonies, but conducting damage assessments to determine the total number of injured specimens has been time consuming and difficult to quantify. The Department's evaluation by the number of coral heads damaged has been challenged by the responsible party. An area-based approach would have been far more practical in this situation, had this been available to the Department. The measure as proposed would therefore facilitate prosecution of such incidents, and reduce the possibility of challenges to such enforcement.

The State has a public trust obligation and must remain vigilant in its duty to protect Hawaii's natural resources for the benefit of all of its residents and future generations. The Department finds that in recent years, there has been an increase in the intentional violation of and blatant disregard for state natural resource laws and rules. Consequently, the State has been under considerable strain in fulfilling that obligation, due to ineffective enforcement tools, limited financial resources, and a shortage of enforcement personnel.

Examples of such behavior include unauthorized commercial activities on public beaches; operation of all-terrain vehicles on unencumbered or other restricted public lands; damage to archeological, historical or geologic features; destruction, defacing or removal of native trees or plants or other natural resources on public lands; damage to stony coral and live rock; the unauthorized grubbing and grading of conservation-zoned lands; construction of unauthorized single family residences or similar major structures within the Conservation District; and the construction of unauthorized seawalls.

In order to bring more severity to this issue, the Department is proposing three pieces of enforcement legislation, House Bill 3177 - RELATING TO PENALTIES FOR VIOLATIONS WITHIN THE CONSERVATION DISTRICT, House Bill 3178 - RELATING TO CIVIL PENALTIES FOR VIOLATIONS ON PUBLIC LANDS, and this measure, House Bill 3176 - RELATING TO ADMINISTRATIVE PENALTIES FOR DAMAGE TO STONY CORAL AND LIVE ROCK to deter unlawful behavior by increasing penalties for violations of the State's natural resources laws and rules.

Coral reefs are sacred to the Native Hawaiian people, and are signature ecosystems of the Hawaiian Islands. Their living substrate (coral, live rock, and calcareous algae) provides the food and shelter for the myriad of native and endemic reef organisms that populate the State's coastal waters. Hawaii's coral reefs also serve as the backbone for a large part of the State's vibrant marine tourism industry, creating many of our world-famous wave breaks, providing subsistence, recreational, and commercial fishing for residents and visitors alike, and maintaining a marine species endemism rate that ranks among the highest in the world. They also serve an increasingly important role in terms of natural defenses against rising sea levels resulting from global climate change.

In summary, the original bill would authorize the Board to assess administrative penalties for damage to stony coral and live rock on an area basis in addition to a per specimen basis, at the Board's discretion. This will result in more effective and appropriate financial redress in cases of damage to the coral reefs that are vital to the State's ecological and economic security. By contrast, the amended version of the bill would reduce the Board's discretion, and introduce an inappropriate rationale into the process of determining fines for resource damage. The Department therefore opposes House Draft 1, and urges the Committee to restore the originally proposed language of this Administrative bill.