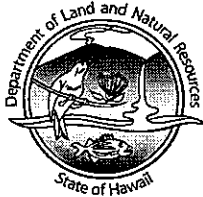


LINDA LINGLE
GOVERNOR OF HAWAII



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

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

LAURA H. THIELEN
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

RUSSELL Y. TSUJI
FIRST DEPUTY

KEN C. KAWAHARA
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

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

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

**BEFORE THE SENATE COMMITTEE ON
JUDICIARY AND LABOR**

April 1, 2008

House Bill 3176, House Draft 1, Senate 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, or by 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. While the Department of Land and Natural Resources (Department) appreciates the intent of the Senate Draft 1 to raise the maximum administrative fine in subsection (3) to \$10,000, the Department nonetheless prefers the original version of this Administrative bill; 1) With the maximum administrative fine in subsection (e) set at \$5,000, 2) Without the necessity of using accepted economic valuation method to gauge the relative value of the damaged coral area, and 3) With the effective date as upon approval.

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 urges this Committee to restore the originally proposed language of this Administrative bill.



Ocean Tourism Coalition

The Voice for Hawaii's Ocean Tourism Industry
820 Mililani Street, #810
(808) 205-1745 Phone (808) 533-2739 Fax
office@oceantourism.org

April 1, 2008

Testimony To: Senate Committee on Judiciary and Labor
Senator Brian T. Taniguchi, Chair

Presented By: James E. Coon, President
Ocean Tourism Coalition

Tim Lyons, CAE
Executive Director

Subject: H.B. 3176, HD 1, SD 1 – RELATING TO ADMINISTRATIVE PENALTIES FOR
DAMAGE TO STONY CORAL AND LIVE ROCK

Chair Taniguchi and Members of the Committee:

This bill is almost right. In fact, it only has 2 problems:

1. In the last Committee the fine was up from \$5000 to \$10,000. We feel that this is entirely too high. Commercial boaters do respect the coral reefs. That is what adds value to the excursions that we sell. We have no desire to damage coral reefs and in fact, when it happens it is only because of horrible mistakes or things beyond our control.

The current law provides for a penalty on a "per specimen" basis. This bill provides that it will be assessed on a "per square meter" basis. As an example a 65 foot boat would have an

approximate 245 square meters foot print. If it "bottomed out" and only touched the reef once, the penalty would be \$2.4 million dollars to that owner. We hope that the Committee will remember that this kind of penalty does not come out of insurance and must come directly out of the pocket of the owner. You can imagine how much gross sales it would take in order to come up with a profit of \$2.4 million in order to be able to pay this kind of penalties. The fines are too high. We would recommend lowering those even if it means you need to increase the penalties in 187A-12.5(c) from the current \$1000/\$2000/\$3000 to \$2000/\$4000/\$6000 and change the square meter charge in (e) to \$100 per square meter.

2. The other item that we wish to bring to the Committee's attention is that the last Committee inserted language that the penalties could be calculated on an economic valuation method or on a flat rate basis, whichever was higher. We do not believe that this will operate correctly and it should read "whichever is in the best interest of the State". There may be instances where penalties could be assessed on the flat basis and the State would not have to go through an economic valuation. That would be in the best interest of the State however, it may not necessarily be a higher fine but it would provide a higher net to the State.

With those two (2) changes, a lowering of the \$10,000 and a change in the wording to "in the best interest of the State", we support this bill and can recommend its passage.

Thank you.

testimony

From: Ron Tubbs [rtmb@hawaiiintel.net]
Sent: Saturday, March 29, 2008 10:16 AM
To: testimony
Subject: Opposed to HB 3176, 4-1-08, 10am, ROOM 016

OPPOSED TO HB 3176 AS IT IS NOW DRAFTED

Thank you for your concern for our reefs as addressed in House Bill 3176. There are a few additional things which should be considered in this bill. First, I do think that it should not apply to accidents from anchorage and running aground of vessels where there is no intentional damage of coral (this was changed but for emergencies only in the sd1). Other cases where nets get caught up in coral and pieces are attached to the net are **unintentional** and should also be excluded. I heard of an instance where fishermen after pulling their net in had coral attached and received tickets. Net layers when diving will run out of air and need to surface quickly when doing so some coral may inadvertently come up the net. Please do not penalize net layers and net divers as coral is so easily broken. There are no restrictions in this bill for anchors. A lot of money could be fined to large ship companies due to anchor damage and this is not the intent of the bill. Most anchor in deeper water where coral is only in patches and not large reef areas.

Anchors which damage any coral could receive these large fines making all boaters who anchor at risk!

Corals grow 3 to 5 inches a year and when large ships run aground in Kaneohe Bay coral regrowth is very quick. Deeper corals are more at risk as they are slower growing as coral growth rates are dependant on the amount of light corals receive. The Molokini incident will be with us for some time. Large ships anchors drag 10 foot wide strips clearing smaller coral when their anchors drag outside Honolulu Harbor and off Barbars Point. Secondly, please do not forget about the dredging of harbors and channels which needs to be excluded. Is there a state exemption for dredging? Third, please also consider a coral growing zone for aquaculture purposes and the "planting" of coral to grow more reef. Kaneohe Bay, near Sam Pan channel, and other areas around Kaneohe reefs with ten foot sandy areas would be perfect for this. What about permits to remove small amounts of natural corals for this project. When small pieces of coral are broken it stimulates and increases coral growth rates. Waikiki Aquarium grows and sells Acropora Coral which grows 7 inches a year by breaking pieces off for sell and then it regrows quickly. The State could charge for areas and small coral removal monitored projects.

There must be an allowance for aquacultured coral to be broken in the aquarium or Waikiki Aquarium and others with special permits could be fined. This bill should only apply to wild coral. There should be an exclusion by permit for research, dredging, aquaculture farming ect.

One hundred million tons of coral was dredged from Kaneohe in the 1940's for preparation for a back up harbor for WW11. Kaneohe has seen a regrowth in many of the areas with 6 feet deep coral. Private channels and redredging of the growing areas will need to be done for ship transportation across the state.

Sustainable coral and aquiculture projects can be done with no impact to the environment and provide much needed jobs for a declining tourism based economy.

There are no Tropical Fish Divers taking or selling coral!!! It is illegal now. But we need to think about future sustainable industries.

Maui harbor is to be dredged soon rather than throwing the coral away use it to start coral aquiculture for a fee. CRAMP is also looking into large coral transplants from Hawaii's harbors-tropical fishermen could do this for free with supervision. I know of huge 60 foot patches of coral that have grown in the past three years. Done correctly this would be a great industry. Hawaii is the only state to outlaw coral. Live rock and coral aquariums are very popular. Reef cement or ceramic casts to lay a foundation for coral growth should be encouraged or even taken up by the state. What about demolition of cement buildings used in some desolate areas as reef foundations. This would be a very beneficial use of cement garbage. Hope some of these ideas help. Other than

3/29/2008

that It looks like a good bill.

We wish to thank the DNLR and the state legislature for all the legislation in the past that has led to increase fish counts, monk seal counts up from one in the 80's to 25 today, turtle counts up and whale counts up to 10,000 across the state-GREAT JOB!!

Please continue to support artificial reefs they create condos for all the fish and greatly increase populations of all fish; They are nearly impossible for fishermen especially tropical fish divers to collect fish in so they are great for the fish!!

Sincerely,
Ron Tubbs
RT Distributors
259-9997
Hawaii Tropical Fish Association

LATE



Legislative Testimony
**HB 3176, HD 1, SD 1, RELATING TO ADMINISTRATIVE PENALTIES
FOR DAMAGE
TO STONY CORAL AND LIVE ROCK**
Senate Committee on Judiciary and Labor

April 1, 2008
Room: 016

10:00 a.m.

The Office of Hawaiian Affairs (OHA) SUPPORTS, with amendments, H.B. 3176, H.D. 1, S.D. 1, which would add needed layers of protection for our coral reefs.

The coral reefs in Hawai'i are under enormous strain from a variety of sources both locally and from abroad. Locally, the increase in eco-based tourism 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 among 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 Hawai'i.

OHA notes that Hawai'i is reliant upon our threatened coral reefs for income, subsistence and Hawaiian gathering and access rights; therefore, the protection of coral reefs should be a top priority for our policy makers. This bill takes us closer to ensuring protection for a heavily used and stressed asset that we all need and enjoy.

OHA appreciates that the Senate has amended this bill to raise the minimum fine to \$10,000 from the originally proposed \$5,000, and we hope that the effective date will also be further amended to effective upon approval instead of in 2050.

OHA urges the Committee to PASS H.B. 3176, H.D. 1, S.D. 1, with the above considerations. Mahalo for the opportunity to testify.