

TESTIMONY
HB 3176 HD1

Senator Clayton Hee, Chair
Senator Russell S. Kokubun, Vice Chair
Committee on Water and Land

Wednesday, March 13, 2008
2:45PM
Conference Room 414

In Support w/Recommendation for Amendment of HB3176 HD1- Administrative penalties; Stony coral and live rock damage.

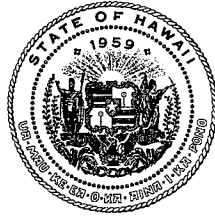
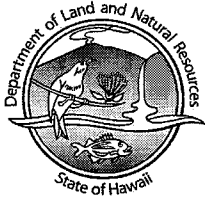
Honorable Committee on Water and Land Chair Hee and Vice Chair Kokubun and committee members. I am Roy Morioka a fisherman and small vessel owner and I thank you for this opportunity to testify in support with reservations of levying administrative penalties when **careless and unnecessary** damage is inflicted on our sensitive and critical reef resources vital to our ocean ecosystem. My recommended amendment results from great concern that when an accident occurs and the party(ies) involved, took all practical precautionary and preventative actions to avoid or mitigate such damage, that these incidents will be exempted and treated with common-sense and fairness.

For example, a vessel loses power and is helplessly drifting toward certain disaster and peril to those on board and the only recourse is to deploy an anchor to stop the drift to protect life and limb, that these circumstances be given consideration and the incident exempted from the fine or minimized greatly. Such incidents are not intentional and because I have seen legislation requesting insurance to cover such incidents as vessel groundings, this legislation may lead to requiring insurance to possibly cover stony coral and live rock damage too. This could be cost prohibitive for small commercial, recreational and subsistence boaters to purchase and the intent (which I believe is to create greater caution and awareness of protecting the reef) of the measure will have been lost.

The concept and appropriate penalties for carelessness and negligence is a good one. However, to protect against over-zealous application of the penalties, please consider those situations and conditions that are life threatening, unintentional and amend this bill to include language that will adequately protect those who did not willfully nor negligently cause such damage to occur are treated fairly. Thank you again for this opportunity to share my qualified support and concerns.

Sincerely Yours,
Roy Morioka

LINDA LINGLE
GOVERNOR OF HAWAII



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

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LAND
STATE PARKS

**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 SENATE COMMITTEE ON
WATER AND LAND**

March 12, 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 the 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 the House Draft 1, and urges the Committee to restore the originally proposed language of this Administrative bill.

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HAWAII NEARSHORE FISHERMEN

THE SENATE
THE TWENTY-FOURTH LEGISLATURE
REGULAR SESSION OF 2008

COMMITTEE ON WATER AND LAND

Senator Clayton Hee, Chair
Senator Russell S. Kokubun, Vice Chair

NOTICE OF HEARING

DATE: Wednesday, March 12, 2008
TIME: 2:45 p.m.
PLACE: Conference Room 414
State Capitol
415 South Beretania Street

From: Tony Costa
Hawaii Nearshore Fishermen
Honolulu, Hawaii
808-540-1308 Tel

Copies needed: 5

TESTIMONY

My name is Tony Costa and I am testifying on behalf of Hawaii Near Shore Fishermen, a loosely organized, tight-knit group of nearshore fishermen.

HB3176 seeks to raise penalties for damage to stony coral and live rock by extrapolating fines to a higher amount through an "economic valuation method".

Although HNF are in support of the intent to "send a strong message" about coral reef protection through scary fines and penalties, we would like to see language that clearly acknowledges accidental reef groundings and or non-malicious stony coral and live rock accidental damages not being subject to these fines.

HB3176 raises several questions about this relatively new idea of criminalizing reef damage and assessing monetary fines as "deterrents". While we agree the reef needs our utmost care and protection, we would like some safeguards:

Examples of accidental or non-malicious breaking of stony coral and or live rock would be when a vessel sinks due to High surf or gale force or hurricane force weather, emergency deployment of an anchor due to power loss (a common practice in emergency situations), or even walking on the crushed rock/rubble at Sandy beach as you body surf.

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HAWAII NEARSHORE FISHERMEN

Another aspect to consider would be ocean dredging and harbor construction - would all coral and live rock damaged be considered a finable violation?

Another question might be would taxpayers pick up the tab to pay for government-contracted vessels that sinks and damage reef? In July 11, 2005 the NOAA contracted vessel CASITAS sank and was pulled and scraped off the reef at the NWHI undoubtedly at considerable damage to the reef.

Malicious intentional breaking of coral and taking of live rock is one thing, but saving lives shouldn't come second to penalties in an emergency situation where an accidental breaking may occur. And, ordinary law abiding citizens shouldn't be held financially responsible for taking extraordinary measures to save lives and protect property.

Hawaii Nearshore Fishermen are support the intent of this bill but have reservations about the lack of language that protects innocent emergency situations that may damage coral.

Respectfully submitted,

Tony Costa



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

March 12, 2008

Testimony To: Senate Committee on Water and Land
Senator Clayton Hee, Chair

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

Tim Lyons, CAE
Executive Director

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

Chair Hee and Members of the Committee:

The Ocean Tourism Coalition (OTC) is Hawaii's statewide tourism boating organization. We represent the 300 small commercial passenger vessels operating out of state harbor facilities. We speak in support of H.B. 3176 basically with the amendments as contained in HD 1 but with further clarification.

We agree with the intent of this bill and protecting the reef, but we wanted a more scientific formula for determining the per meter values of various coral reefs. Not just one blanket value. Areas of coral have different values based on the amount of use an area sees by the public. For example, Hanauma Bay is the most valuable reef in Hawaii as is Molokini Crater with

approximately 1000 visitors per day. It would seem appropriate to take the study by DAR which is based on Cesar et al.'s study of the economics of Hawaii's coral reefs (Cesar et. al., 2002). The DAR report uses Hanauma Bay results as a proxy for values associated with other MLCD's and reefs. (The reported Hanauma Bay value of \$91.63 per m2 per year contrasts to Cesar's estimates of \$3.51 per m2 per year for Kihei coast, and \$.73 per m2 per year for the Kona Coast found in the same report.)

There are some points that need to be considered. First, the very high per m2 figure for Hanauma Bay is due to the very high levels of use there (up to 3000 people per day). Since almost all of the economic value estimated in Cesar et. al. is a result of human use (about 96% of the total value); the more users in a location, the higher total use value per m2.

We propose to make the Hanauma Bay economic values the base line in determining the value of any specific reef damage. Economists and ecologists can then determine the number of years that an area will be out of service and apply the appropriate yearly recovery rate based on the estimated amount of use an area sees on a daily basis.

Based on prior objections we offer yet another proposed SD 1 which allow for a flat penalty or economical calculated penalty, whichever is in the best interests of the State.

If you pass this bill, please keep the amendments to reflect a more scientific basis to establish reef value.

Thank you.

testimony

From: carl [mjellings@hawaii.rr.com]
Sent: Monday, March 10, 2008 8:46 PM
To: testimony
Subject: HB 3176, HD 1

DATE: Wednesday, March 12, 2008
TIME: 2:45 p.m.
PLACE: Conference Room 414

HB 3176, HD 1

COMMITTEE ON WATER AND LAND

Honorable Senator Clayton Hee, Chair

Honorable Senator Russell S. Kokubun, Vice Chair

Honorable Committee Members

Judiciary and Labor Committee

Honorable Senator Brian T Taniguchi Chair

Honorable Senator Clayton Hee Vice Chair

Administrative Penalties; Stony Coral and Live Rock Damage//

3/10/2008

. Mahalo for hearing HB3176,,, My Name is Carl Pao Jellings from Waianae a full time fisherman In Support who has Strong Concerns for the growing amounts of vessels anchoring offshore ,In my whole life I have never seen such dramatic growth off our Coast . Recreational Private and Commercial Vessels many in the 10 to 20 ton range in high winds if the anchor is not set by an expert diver this kind of indiscriminant anchoring can have devastating long term impacts on our reefs by just the cumultive amounts of incidents involving green horn types who know very little about seamanship. waterman, or just the reef itself, I would like to ask the Good Senators to amend HB 3176 HD1 to make allowances for times of emergency rescue and lifesaving operations ,TwoYears ago the vessel Island Spirit from Waianae purposely ran aground to get a drowned tourist to paramedics as quickly as possible this is the kind of urgency I speek of Coral will "always" in time" regrow " ,A humin Life once LOST is lost FOREVER,,,

Mahalo Nui for the oppportunity to testify

on this Matter Carl P Jellings

Testimony of The Nature Conservancy of Hawai'i
Supporting With Amendments H.B. 3176 HD 1 Relating to Administrative Penalties for
Damage to Stony Coral and Live Rock
Senate Committee on Water and Land
Wednesday, March 12, 2008, 2:45PM, Room 414

The Nature Conservancy of Hawai'i is a private non-profit conservation organization dedicated to the preservation of Hawaii's native plants, animals, and ecosystems. The Conservancy has helped to protect nearly 200,000 acres of natural lands for native species in Hawai'i. Today, we actively manage more than 32,000 acres in 11 nature preserves on O'ahu, Maui, Hawai'i, Moloka'i, Lāna'i, and Kaua'i. We also work closely with government agencies, private parties and communities on cooperative land and marine management projects.

The Nature Conservancy of Hawaii supports H.B. 3176 Relating to Administrative Penalties for Damage to Stony Coral and Live Rock.

However, we recommend that the economic valuation language included by the Judiciary Committee be removed and the bill be amended back to its original draft.

There is widespread agreement amongst a variety of stakeholders that Hawaii's fragile environment is in need of improved enforcement and prosecution of violations of our State natural resource laws. Currently, the DLNR does not have an appropriate way to deal with violations that involve large areas of coral damage such as vessel groundings.

As originally drafted, this bill would provide the Department with an appropriate method to calculate areas of coral damage and apply a level of fine that will appropriately punish and deter future violations of this type.

The problem with the economic valuation language added by the Judiciary Committee is that it appears to be based on testimony that suggested that some coral reefs have more monetary value than other coral reefs based solely on how many people use or visit the site where the coral is growing. Human use of an area is just one measure of value. Other measures include ecosystem services provided by a coral reef like fisheries support and protection from storm surge, as well as the arguably intangible—some might say priceless—value of intact and healthy natural ecosystems.

Furthermore, the penalty suggested in the original bill is not for the purpose of funding restoration or mitigation of loss. The primary purpose is to punish violations and effectively deter future unlawful action and damage to uniquely fragile natural resources. The economic value language added to the bill uses an unduly limited and misplaced rationale for setting fines for coral damage.

Please restore H.B. 3176 to its original draft.

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HB 3176 HD1

(END)