

NEIL ABERCROMBIE  
GOVERNOR OF HAWAII



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

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

**WILLIAM J. AILA, JR.**  
INTERIM CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

**GUY H. KAULUKUKUI**  
FIRST DEPUTY

**WILLIAM M. TAM**  
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  
KAIHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

**Department of Land and Natural Resources  
Testimony Transmittal Cover Sheet**

**Date Submitted: Tuesday, February 01, 2011**

**Testifier's Name/Title:** William M. Tam, Commission on Water Resource Management  
Deputy Director

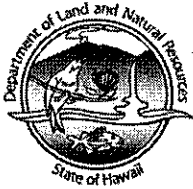
**Committee Name:** HOUSE COMMITTEE ON HAWAIIAN AFFAIRS (HAW)

**Day and Date:** Wednesday, February 02, 2011  
**Time/Location:** 8:30 AM, Conference Room 329

**Measure Number:** HB 895 – RELATING TO STATE AGENCIES.

**Requested Copies:** 3 (including original) to Room 313 in the State Capitol.

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**Testimony of  
WILLIAM J. AILA, JR.  
Chairperson**

**Before the House Committee on  
HAWAIIAN AFFAIRS**

**Wednesday, February 2, 2011  
8:30 AM  
State Capitol, Conference Room 329**

**In consideration of  
HOUSE BILL 895  
RELATING TO STATE AGENCIES**

House Bill 895 proposes to amend Sections 174C-7, 171-4, and 205-1, Hawaii Revised Statutes (HRS), respectively, to add an additional member to the (1) Commission on Water Resource Management (Water Commission), (2) Board of Land and Natural Resources, and (3) Land Use Commission, respectively, to be appointed by the Office of Hawaiian Affairs (OHA) Board of Trustees to represent OHA's interests.

The Department of Land and Natural Resource (Department) comments are limited to SECTION 1 of the measure only.

The Department does not support this measure for the following reasons.

First, the Hawaii Water Code, Section 174C-7(b) HRS, was amended in 2003 to *require* that at least one member of the Water Commission "shall have substantial experience in traditional Hawaiian water resource management techniques and in traditional riparian usage pursuant to section 174C-101." This bill would duplicate the existing requirement.

Second, the Hawaii State Constitution, article XI, Section 7 and the Water Code, Section 174C-101(d), HRS, specifically protect appurtenant water rights.

Third, the Hawaii Water Code specifically protects "Native Hawaiian water rights." Section 174C-101(c), HRS, states:

(c) Traditional and customary rights of ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by this chapter. Such traditional and customary rights shall include, but not be

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limited to, the cultivation or propagation of taro on one's own kuleana and the gathering of hihiwai, opae, o'opu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes.

Fourth, pursuant to the Hawaii Supreme Courts decision in *In Re Waiahole*, the Water Commission has a public trust obligation *as a Commission* to protect native Hawaiian water rights.

Fifth, pursuant to both the Water Code, Sections 174C- 31(q) and -101(a), HRS, and the Hawaiian Homes Commission Act, section 220(d), the Water Commission has a legal obligation to protect the water rights of the Department of Hawaiian Home Lands.

Given these specific protections in the State Constitution, the Water Code, the Hawaiian Homes Commission Act, the Hawaii Supreme Court's express holdings regarding the exercise of native Hawaiian and traditional and customary rights, the public trust duties (outlined in the *Waiahole* decision), and the 2003 Legislature's amendment to expressly provide for a seventh member on the Water Commission who shall "have substantial experience in traditional Hawaiian water resource management techniques and in traditional riparian usage pursuant to Section 174C-101[.]" there is no basis to add yet another member to the Water Commission.

The Water Commission was created with a broad mandate and organized so that no special or geographic test applied to any particular member precisely to ensure that all members had all and the same duties. The practice of deferring or acquiescing to a member with a special interest or from a geographic locale was to be avoided.

To require an eighth member specially appointed by OHA could create a perception that the other commissioners have little or no obligation to consider these important rights or that particular interests deserve a designated seat. These ideas were debated in 1987 when the Water Code was written and rejected. We strongly believe that the obligation to insure that native Hawaiian water rights are not abridged or denied rests with the entire Water Commission and not a single member.