

**SB632**

**SD1**



## *The Judiciary, State of Hawai‘i*

**Testimony to the Senate Committee on Judiciary and Labor**  
The Honorable Clayton Hee, Chair  
The Honorable Maile S. L. Shimabukuro, Vice Chair

Thursday, February 20, 2014, 10:30 a.m.  
State Capitol, Conference Room 016

By

Elizabeth Zack  
Supreme Court Staff Attorney

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**Bill No. and Title:** Senate Bill No. 632, Senate Draft 1, Relating to the Environmental Courts.

**Purpose:** Establishes environmental courts as divisions within the circuit court to hear all proceedings, including chapter 91, Hawaii Revised Statutes, proceedings arising from certain environmental laws. Requires the Judiciary to report to the Legislature on the total number of environmental-related cases filed in the last five years. Effective 1/1/2015. (SD1)

### **Judiciary's Position:**

The Judiciary offers the following comments.

Senate Bill No. 632, Senate Draft 1 would establish within each circuit an environmental court with separate rules, based upon the belief that “environmental disputes are currently dealt with in a variety of courts” and “[T]his organizational structure inadvertently promotes inconsistent application of the wide variety of environmental laws.” In addition to establishing an environmental court in each circuit, Section 6 of SB 632, SD 1 requires the judiciary to conduct a study to determine the number of environmental-related cases within the past five years and to report findings to the legislature not less than 20 days prior to the regular session of 2015.



Senate Bill No. 632, Senate Draft 1 Relating to the Environmental Courts  
Senate Committee on Judiciary and Labor  
February 20, 2014, 10:30 a.m.  
Page 2

The Judiciary understands the intent of wanting courts to develop expertise and consistency in environmental cases. We believe, however, that the judiciary already has in place processes to ensure consistency in all cases, including cases brought pursuant to the statutory provisions listed in section 7 of Senate Bill 632, SD1.

At present, all agency appeals to the circuit court, including agency appeals covering environmental issues, are assigned regularly to one designated judge in the first judicial circuit and are rotated among the civil judges in the second, third, and fifth judicial circuits, and are handled in due course. Furthermore, if any party in an environmental case is dissatisfied with the outcome in the circuit courts, that party has a remedy by way of appeal to the Intermediate Court of Appeals and then to the Supreme Court. This appellate process insures consistent application of environmental laws for the trial courts are bound to follow the appellate court decisions.

We recognize that other jurisdictions have established environmental courts after increases in environmental violations, housing/safety code violations, and/or an increase of abandoned residences or littered properties. We do not believe the same issues are present in Hawai'i. However, if the legislature identifies particular areas of concern, it would be beneficial if the bill could be narrowed to focus on those areas as a pilot program. We further suggest that an environmental calendar be considered in place of an environmental court. Considering this alternative takes into account the present workload of our sitting judges and the reality that the addition of an environmental court may require expenditures for additional court staff. Having an environmental calendar, rather than an environmental court, would allow a judge assigned to the calendar to hear other types of cases during those periods when there are no environmental cases.

We make this suggestion based on our preliminary survey of cases based on the sections of HRS cited in Senate Bill 632, SD1. *See* Attachment. The total number of such cases filed in district and circuit courts from 2001 through 2013 is 53. The total number of cases is slightly higher, 67, if cases filed before 2000 are included. We note that there are some categories of cases, such as violations of Hawai'i Administrative Rules provisions relating to conservation and resource protection, which may not be reflected in this list.

Although the judiciary believes the present system is adequate in addressing the concerns expressed in this measure, we are always open to discussion and we welcome any questions regarding these matters.

Thank you for the opportunity to comment on Senate Bill No. 632, Senate Draft 1.

Attachment

## Environmental Law Cases in District and Circuit Court Criminal Caseload FY 2011 through FY 2013<sup>1</sup>

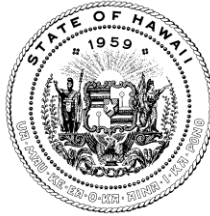
Attachment  
to Judiciary  
testimony  
SB632, SD1  
JDL 2/20/14

Violations	Filed Before 2000	Filed Between 2001 and 2010	Filed Between 2011 and 2013 <sup>1</sup>	Grand Total
<b>HRS 128D</b> - Environmental Response Law				<b>0</b>
<b>HRS 339-4(a)(2)</b> - Litter outside of receptacle	13	3	27	<b>43</b>
<b>HRS 339D</b> - Electronic Waste				<b>0</b>
<b>HRS 340A</b> - Solid Waste				<b>0</b>
<b>HRS 340E</b> - Safe Drinking Water				<b>0</b>
<b>HRS 342B-45</b> - Air Pollution			7	<b>7</b>
<b>HRS 342B-49(b)</b> - Air Pollution, false statement in records or rendering inaccurate device		1		<b>1</b>
<b>HRS 342C</b> - Ozone Layer Protection				<b>0</b>
<b>HRS 342D-33(1)</b> - Knowing violation of Water Pollution Statutes		5	1	<b>6</b>
<b>HRS 342E</b> - Nonpoint Source Pollution				<b>0</b>
<b>HRS 342F-9(a)</b> - Noise Pollution			1	<b>1</b>
<b>HRS 342G</b> - Integrated Solid Waste Management				<b>0</b>
<b>HRS 342H-30</b> - Solid Waste Pollution		2		<b>2</b>
<b>HRS 342H-37(a)(1)</b> - Unauthorized disposal ten or more cubic yards - felony		2		<b>2</b>
<b>HRS 342H-39(a)(1)</b> - Solid Waste Pollution-petty misd, unauth. disposal			1	<b>1</b>
<b>HRS 342I</b> - Special Waste Recycling				<b>0</b>
<b>HRS 342J-9(c)(1)</b> - Hazardous Waste		1		<b>1</b>
<b>HRS 342J-9(c)(2)</b> - Hazardous Waste		1		<b>1</b>
<b>HRS 342J-9(c)(3)</b> - Hazardous Waste			1	<b>1</b>
<b>HRS 342L</b> - Underground Storage Tanks				<b>0</b>
<b>HRS 342P-23</b> - Violation of laws, permit or variance relating to asbestos, lead	1			<b>1</b>
<b>HRS 343</b> - Environmental Impact Statements				<b>0</b>
<b>HRS 508C</b> - Uniform Environmental Covenants Act				<b>0</b>
<b>Grand Total</b>	<b>14</b>	<b>15</b>	<b>38</b>	<b>67</b>

<sup>1</sup>District Court: FY2011 to FY2013; Circuit Court FY 2011 to 2nd quarter FY 2014

Notes: All cases were in the first and third circuits  
Cases that were closed prior to FY2011 are not included in these numbers  
11 cases were in Circuit Court; 12 were filed 2008 or before; 1 was filed in September 2012  
56 cases were in District Court; 18 were filed prior to FY2011; 38 have been filed since October, 2010

NEIL ABERCROMBIE  
GOVERNOR OF HAWAII



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

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

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

**Before the Senate Committee on  
JUDICIARY AND LABOR**

**Thursday, February 20, 2014  
10:30 a.m.  
State Capitol, Conference Room 016**

**In consideration of  
SENATE BILL 632, SENATE DRAFT 1**

Senate Bill 632, Senate Draft 1 proposes to establish environmental courts as divisions within the circuit courts to hear both original actions (involving environmental laws) and appeals from administrative agencies under Hawaii Revised Statutes, Chapter 91. In addition, the Judiciary is to report to the Legislature on the total number of environmental-related cases filed in the last five years. **The Department of Land and Natural Resources (Department) prefers the original version of this measure which included statutes under the purview of the Department which were deleted in the Senate Draft 1. The Department respectfully requests that chapters 6D, 6E, 6K, and Title 12, Hawaii Revised Statutes, be reinserted into this measure.**

The Department recognizes that consistent application of environmental laws plays a critical role in the management and protection of Hawaii's natural and cultural resources. Consolidating environmental and natural resource law cases to a single judge in one circuit could facilitate the timely, fair, and equitable disposition of such cases.

To this end, it is important that an environmental court judge possess adequate experience and expertise in environmental and natural resource laws, and be well versed in the Department's numerous guiding statutes and administrative rules. The Department would like to work with the State Judiciary in outlining the characteristics of such a system.

Many natural resource enforcement cases are adjudicated at the district court level rather than the circuit court level. The District Courts need greater consistency and equitable disposition. The current bill should be amended to add a separate provision providing cases in the districts of a circuit be consolidated to one district judge or judges sitting in the environmental court.

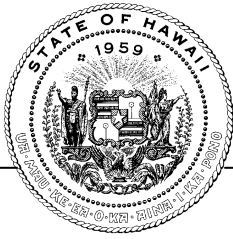
The Department would be happy to work with the Courts in establishing such a system.

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

**ESTHER KIA'AINA**  
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  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS



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Statement of  
**JESSE K. SOUKI**  
Director, Office of Planning  
before the  
**SENATE COMMITTEE ON JUDICIARY AND LABOR**

Thursday, February 20, 2014  
10:30 AM  
State Capitol, Conference Room 016

in consideration of  
**SB 632 SD1**  
**RELATING TO ENVIRONMENTAL COURTS.**

Chair Hee, Vice Chair Shimabukuro, and Members of the Senate Committee on Judiciary and Labor.

The Office of Planning supports the intent of the creation of an environmental court in the State of Hawaii with the following comments.

A judicial process that fosters clearly articulated decisions resolving the complex laws and technical facts related to environmental and land use disputes will benefit landowners, regulators, and the public. However, the court should include land use matters and be renamed accordingly.

The focus of the court should not be constrained to "environment." Our key state land use and environmental laws expect decision-makers to balance several needs in the interest of the public's welfare. In particular, the purpose of the Hawaii Environmental Policy Act ("HEPA") is "to establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations. See L. 1979, c 197, § 1(1), codified as HRS § 343-1. The purpose of Hawaii's land use law is to "preserve, protect and encourage the development of the lands in the State for those uses to which they are best suited for the public welfare[.]" See L. 1961, c 187, § 1. The

purpose of the Hawaii State Planning Act, which guides all county and state agency decisions, is “to set forth the Hawaii state plan that shall serve as a guide for the future long-range development of the State[.]” See L. 1978, c 100, pt of § 2, codified as HRS § 226-1.

The focus of the bill should be on the capacity and expertise of judges on the subject of “land use law,” which includes planning, permitting, and environmental laws. To achieve the purposes of Hawaii’s key land use laws, the Hawaii land use system has evolved with the advancement of science to better mitigate, avoid, and minimize reasonably foreseeable impacts from proposed projects on the environment, community, and economy. A court that is well versed in the practice of land use and environmental laws will provide timely, consistent, predictable, and clearly articulated decisions to the benefit of all parties involved.

Consistent with the above, we recommend amending the bill to include judicial review of administrative proceedings, proceedings for declaratory judgment on the validity of agency rules, and legislative county decisions related to subdivision, permitting, and zoning. In addition, the name of the court should be changed to, “Land Use Courts,” to reflect these broader interests.

Thank you for the opportunity to provide testimony on this measure.



**SB632 SD1**  
RELATING TO THE ENVIRONMENTAL COURTS  
Senate Committee on Judiciary and Labor

February 20, 2014

10:30 a.m.

Room 016

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The Office of Hawaiian Affairs (OHA) **SUPPORTS** SB632 SD1, which would establish an environmental division within the circuit courts, for the consistent and informed adjudication of disputes regarding Hawai'i's environmental laws.

**Environmental courts will better ensure consistent and informed decision making for disputes involving environmental and cultural laws and resources.** Over the last several years, numerous concerns have been raised regarding potential inconsistencies or lowered judicial scrutiny for legal disputes involving Hawai'i's environmental laws. Such inconsistencies have resulted in the need for protracted and expensive legal appeals, and may foster speculative posturing even in administrative proceedings prior to circuit court involvement. In other jurisdictions, environmental "courts" have been created to address these concerns, by ensuring that environmental laws are adjudicated by a specialized tribunal that can develop institutional knowledge of laws directly related to environmental protection and planning processes. The specialized docket proposed by this bill will provide similar benefits to the adjudication of environmental laws in Hawai'i.

**OHA believes that a circuit court docket specializing in environmental cases may also provide a long-term means to better protect and enforce the rights of OHA's beneficiaries.** Despite the existence of numerous laws recognizing and protecting the interests of Native Hawaiians and the general public in Hawai'i's natural and cultural resources, the enforcement of these laws in some instances requires the possibility of litigation, as well as the ability to confidently assert consistent interpretations of the law to state decision makers. OHA accordingly believes that the existence of a specialized environmental court or docket, as this bill proposes, will in the long-term greatly facilitate the actual implementation of laws that are intended to protect the environmental and cultural interests of both Native Hawaiians and other Hawai'i residents.

Therefore, OHA urges this Committee to **PASS** SB632 SD1. Thank you for the opportunity to testify.





HAWAII

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MAILING ADDRESS

PO. Box23404  
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February 17, 2014

TO: Chair Clayton Hee, Vice Chair Maile Shimabukuro  
Members of the Senate Committee on Judiciary and labor

FROM: John Bickel, President  
Americans for Democratic Action/Hawaii'i

RE: Support and Comments on SB 632

Americans for Democratic Action/Hawaii supports SB 632. Americans for Democratic Action has been advocating for public policies to promote social justice. One part of this is environmental protection.

While we appreciate the many laws in Hawaii'i that do protect the environment, enforcement against violations of our environmental laws is often inconsistent between courts and within agencies. This fosters confusion, undermines compliance, and fuels further litigation. Environmental statutes and regulations are sometimes very technical and require considerable study before judges are equipped to rule in these cases.

Establishing a section of our state court system to adjudicate violations of our environmental laws will help to improve enforcement of these laws. Improved enforcement will lead to reliability in the interpretation of and better compliance with environmental laws. This will lead to a clearer environment and better public health for all residents of Hawaii.

This is why we urge you to pass SB 632.



LAND USE RESEARCH  
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February 18, 2014

Senator Clayton Hee, Chair  
Senator Maile Shimabukuro, Vice Chair  
Senate Committee on Judiciary and Labor

**Testimony in Opposition to SB 632 SD1, Relating to the Environmental Courts (Establishes environmental courts as divisions within the circuit courts to preside over proceedings arising from environmental laws. Requires the Judiciary to report to the Legislature on the total number of environmental-related cases filed in the last five years.)**

**Thursday, February 20, 2014, 10:30 a.m., in Conference Room 016**

The Land Use Research Foundation of Hawaii (LURF) is a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. One of LURF's missions is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii's significant natural and cultural resources and public health and safety.

LURF appreciates the opportunity to provide testimony **in opposition to SB 632 SD1**, and to offer comments.

**SB 632 SD1.** The underlying purpose of this bill is to promote and protect Hawaii's natural environment through consistent and uniform application of environmental laws by establishing environmental courts within the circuit courts. The SD1 version of the bill narrows the subject matter areas of environmental concern by deleting certain statutory provisions pursuant to which cases would be brought in environmental courts.

**LURF's Position.** LURF members include private property owners, farmers, ranchers and agricultural operators who, as agricultural and environmental stakeholders, understand the need to protect the State's natural resources. LURF therefore supports the intent of this bill which is to promote and protect Hawaii's natural environment. From a practical perspective, however, LURF is unable to support the establishment of environmental courts as an appropriate or proper mechanism to attain that stated objective.

- **There is No Justification or Need for This Bill.**
  - **Most Environmental-Related Cases are Resolved by Administrative Proceedings and Not by the Courts.**

LURF believes there is no need for this legislation, as most environmental-related cases in this State are heard by administrative hearings officers and resolved outside of the regular court system. Only appeals of the administrative decisions are brought in State circuit court, and LURF understands that the number of such appeal cases is limited and would not justify the establishment of a special type of court.

- **There is no Evidence that the State Courts' Present System of Handling Environmental Cases is Deficient or that Establishment of Environmental Courts Would Actually Improve the Outcome of Such Cases.**

Proponents of this measure have not identified any actual inadequacies in, or deficiencies of the courts' present handling of environmental cases, or any unsound decisions arising from the courts' application of environmental laws. Neither have proponents of this bill shown that establishment of environmental courts will 1) actually improve the consistency and uniformity of the application of environmental laws<sup>1</sup>; or 2) that consistent and uniform application of laws to environmental cases will "promote and protect Hawaii's natural environment," as claimed.

LURF believes the significant cost and expense of establishing the proposed environmental courts (which would necessarily include the court space, the framework and function of said courts within the existing circuit court system, salaries for judges and staff, equipment, and training, to the development and adoption of new environmental court rules) warrants more than speculative results, and that such a proposal must be supported by convincing data and findings by the State Judiciary (the State's authority on such matters), which has, in fact, provided testimony presenting comments in opposition to this bill.

- **The State Judiciary Does Not Support the Establishment of Environmental Courts.**

In its testimony, the State Judiciary clearly indicates that the present judicial system is believed to be adequate in addressing the concerns expressed in this measure. On Oahu, agency appeals covering environmental issues are already assigned regularly to one designated circuit court judge, and are handled in due course by civil judges on a rotation basis on the other islands. The Judiciary further testified that its research has not found the present court system deficient in providing uniform application of environmental laws, and that any unsatisfied party could appeal to the State appellate courts, which appellate process would safeguard consistent application of environmental laws.

- **The Need for Dedicated Environmental Courts Must be Warranted.**

According to testimony submitted by the Judiciary regarding this proposed measure, there was also no data available to indicate that the establishment of environmental courts would serve to deter further environmental law violations, resolve environmental cases more expeditiously than the present circuit court system.

To justify the time, effort and cost of their establishment, environmental courts will require a caseload of sufficient size and complexity. A separate environmental forum must be determined from court records and statistics to be truly warranted to avoid down-time and inequitable workload distribution within the judiciary. It would make no sense, for example, if environmental judges would need to take on non-environmental matters to fill their calendars.

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<sup>1</sup> It must be further noted that from a legal standpoint, the consistent and uniform application of law (environmental or otherwise) does not necessarily assure a better outcome or decision in a case. Consistent and uniform application of law that is bad, for example, would nevertheless result in poor outcomes and decisions.

- **Creation of Dedicated Court Sets Bad Precedent as There are Other Competing Areas of Law Deserving of Special Attention and Expertise.**

As there are so many other areas of law that are equally or more complex legally and factually (e.g., labor/employment, health), the establishment of a dedicated, expert forum for environmental issues sets bad precedent and leads to the fragmentation of the State's judicial system whereby both judges and subject matter tend to become isolated from the mainstream resulting in skewed decisions and results.

- **Specialized Courts are More Readily Subject to Bias and Influence.**

The specialized knowledge of and experience in environmental law required by those sufficiently qualified to be appointed as environmental court judges will likely have prejudiced those decision makers, so that decisions made may not be neutral. In many environmental courts in other jurisdictions, sitting judges and decision makers have, in fact, come from backgrounds in environmental advocacy and are therefore believed to be "overly environmental" and are not trusted to be fair by opposing interests.

Small, specialized courts such as those proposed to be established by this bill, can also be more prone to influence and control than the general court system. Such an occurrence (referred to as the "capture syndrome") is often experienced in agencies where powerful and influential groups use political pressure to maneuver and control the appointments process, and in some cases, the tenure and salaries of judges sitting in these smaller, isolated courts.

- **Other, Less Costly and Potentially More Efficient Options Should be Explored and Pursued.**

Other options in lieu of creating a separate, specialized court do not appear to have been discussed or even explored.

- **Establishment of an Improved Administrative Law Judicial System.**

LURF understands, for example, that other State agencies have suggested the establishment of an improved administrative law judicial system, including appointment of long-term hearings officers with specialized knowledge and experience. Such a system could be implemented more economically and could handle environmental, as well as other types of cases arising from all state agencies. If established, such an administrative judicial system could perhaps better fulfill the intent of this bill by ensuring more uniform and consistent application of specialized laws such as environmental laws.

- **Reform From Within the Judiciary.**

If knowledge of environmental law is critical, then all judges and other decision-makers should be given an opportunity to be trained in that special subject matter area. Cases can then be informally directed to those who are particularly interested or experienced in that area of law, and generalist judges would also be better trained to hear environmental cases. This informal assignment approach to environmental cases has reportedly worked in other jurisdictions.

In view of the circumstances, there appears to be no viable justification or support for this proposed measure, especially in view of the availability of less costly and possibly more efficient options. Given the position of the State Judiciary (the State's ultimate authority and expert on matters relating to the courts), it is difficult to understand why SB 632 SD1 continues to be urged.

For the reasons stated above, LURF **must oppose SB 632 SD1**, and respectfully requests that this bill be held in Committee.

Thank you for the opportunity to present testimony regarding this matter.

**From:** [Teresa Trueman-Madriaga](#)  
**To:** [JDLTestimony](#)  
**Subject:** \*\*\*\*\*SPAM\*\*\*\*\* SB632, SD 1  
**Date:** Wednesday, February 19, 2014 10:14:13 AM

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Aloha Senator Hee and members of the Judiciary Committee,

Thank you for this opportunity to testify in strong support of SB 632, SD1 to establish an Environmental Court in the State of Hawaii.

As a society, we in Hawaii value our natural environment above most other things. We enshrined in our constitution that all residents have a right to a "clean and healthful environment." We have departments at the state and county levels entrusted with protecting our natural resources for use now and forever into the future.

Yet, enforcement against violations of our environmental laws is often inconsistent between courts and within agencies. This fosters confusion, undermines compliance, and fuels further litigation. Environmental statutes and regulations are sometimes very technical and require considerable study before judges are equipped to rule in these cases.

Establishing a section of our state court system to adjudicate violations of our environmental laws will help to improve enforcement of these laws. Improved enforcement will lead to reliability in the interpretation of and better compliance with environmental laws. This will lead to a clearer environment and better public health for all residents of Hawaii.

This is why I urge you to pass SB 632, SD1.

Thank you,

Teresa Trueman-Madriaga  
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**Testimony in SUPPORT of SB 632 SD 1 RELATING TO THE ENVIRONMENTAL COURTS**

**Before the  
SENATE COMMITTEE ON JUDICIARY AND LABOR**

**Thursday, February 20, 2014 10:30 a.m.**

Aloha Senator Hee and members of the Judiciary and Labor Committee,

Thank you for this opportunity to testify in strong **SUPPORT** of SB 632 SD 1 to establish an Environmental Court in the State of Hawaii.

Hawaii's constitution ensures that all residents have a right to a "clean and healthful environment." We have departments at the state and county levels entrusted with protecting our natural resources for use now and forever into the future.

Yet, enforcement against violations of our environmental laws is often inconsistent between courts and within agencies. This fosters confusion, undermines compliance, and fuels further litigation. Environmental statutes and regulations are sometimes very technical and require considerable study before judges are equipped to rule in these cases.

I urge you to pass SB 632 because establishing a section of our state court system to adjudicate violations of our environmental laws will help to improve enforcement of these laws. Improved enforcement will lead to reliability in the interpretation of and better compliance with environmental laws. This will lead to a cleaner environment and better public health for all residents of Hawaii.

Thank you for this opportunity to testify.

Erik Kvam