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STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

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Testimony of
SUZANNE D. CASE
Chairperson

Before the House Committee on
WATER & LAND

Monday, February 8, 2016
9:00 AM
State Capitol, Conference Room 325

In consideration of
HOUSE BILL 2456
RELATING TO WATER QUALITY CERTIFICATION

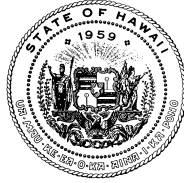
House Bill 2456 establishes time limits for the processing of Clean Water Act Section 401 Water Quality Certifications (401 WQC) for State agency projects by the Department of Health. **The Department supports House Bill 2456.**

As you know, part of the Department's mission is to manage the state's coastal and marine resources. The Department is engaged in a wide range of conservation and capital improvement efforts that involve activities in or near marine waters. These efforts include managing the State's marine and freshwater resources and protecting aquatic habitat and reefs through the Division of Aquatic Resources (DAR), management of small boat harbors and ocean recreation areas through the Division of Boating and Ocean Recreation (DOBOR), as well as conservation and restoration of public beach and coastal resources through the Office of Conservation and Coastal Lands (OCCL).

Many of the Department's projects require 401 WQCs for activities in State waters. It has been the Department's experience that approvals for 401 WQCs typically take several years from the time an application is submitted to final approval resulting in costly delays to projects.

It is the Department understanding that this bill is not intended to limit the protections under the Federal Clean Water Act, nor does it do so. Rather, the Department feels this bill is intended to provide a reasonable timeframe for 401 WQC application processing, comparable to those required for other State permits such as a Conservation District Use Applications, so the State can better plan and implement capital improvement projects.

Thank you for the opportunity to testify on this measure.



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**Testimony in OPPOSITION to H.B.2456
RELATING TO WATER QUALITY CERTIFICATION**

REPRESENTATIVE RYAN YAMANE, CHAIR
HOUSE COMMITTEE ON WATER AND LAND

Hearing Date: 02-08-16

Room Number: 325

Time: 9:00 AM

1 **Fiscal Implications:** Additional staff required to comply.

2 **Department Testimony:** The Department of Health (DOH) respectfully oppose this bill. The
3 purpose of this measure is to establish time limits for the approval or disapproval of water quality
4 certificate applications for state agencies. The bill specifies a time limit of thirty (30) days for
5 DOH to provide written notification to Section 401 Water Quality Certificate (WQC) state
6 agency applicants regarding incomplete information on applications and a time limit of ninety
7 (90) days for DOH to render a decision on a state agency's Section 401 WQC application once it
8 is determined to be complete. If DOH fails to comply with the proposed 30 day time limit, the
9 application shall be deemed as completed and if DOH fails or refuses to render a decision within
10 ninety (90) days, the Section 401 WQC will be automatically approved.

11 This measure presents four major areas of concern. First, DOH has already recently
12 taken two significant actions to streamline its 401 approval process. Most 401 projects in Hawaii
13 relate to Clean Water Act (CWA) Section 404 permits issued by the Department of the Army's
14 Corps of Engineers (DA) for dredging or filling activity in waters of the United States. On
15 August 31, 2015, DOH issued a blanket conditional Section 401 WQC for approximately 85% of
16 DA's Nationwide Permits (NWPs) for the State of Hawaii. This blanket approval is expected to
17 effectively streamline, facilitate and shorten the application process for those permits with a
18 sixty (60) calendar day total turn-around time. The other 15% of projects are complex and

1 require more time to process and thus must go through the individual Section 401 WQC
2 application process and cannot be covered under a blanket NWP.

3 Second, the DOH held a Kaizen event from September 14–18, 2015 to improve and
4 streamline the Section 401 WQC program by collaborating with county, state, and federal
5 agencies. (See attached Kaizen Report Out which includes a list of participants.) DOH
6 combined several ideas generated from the Kaizen event and decided on a streamlining strategy
7 which would require frequent Section 401 WQC applicants to coordinate with their design and
8 construction staff to create standardized Best Management Practices (BMPs) for all of their
9 specific activities. Once the standardized BMPs have been accepted by DOH, the applicant no
10 longer submits the BMPs with their application, they only certify that it will be performed
11 according to DOH approved BMPs. This would streamline the WQC processing because site-
12 specific BMP reviews extend the processing time. The Kaizen participants and other interested
13 parties agreed with this streamlining effort in a follow up Kaizen meeting held on
14 October 28, 2015. (See attached for the follow up Kaizen Meeting attendance sheet and
15 handouts.) Several state and county agencies are currently working on their standardized BMPs.

16 Third, this proposed measure would require DOH to have additional staffing, funding and
17 resources. DOH is currently staffed with only one (1) Section 401 WQC reviewer for the entire
18 State of Hawaii. Without additional staff, it would be infeasible for DOH to comply with the
19 bill's proposed deadlines.

20 Fourth, the proposed measure creates potential problems regarding applicants' responses.
21 The bill lacks any time limits on agencies with incomplete applications to resubmit a revised
22 application that addresses DOH's comments. This creates a potential for delay in the application
23 process where applicants provide little or no response to DOH's comments. After the application
24 is deemed complete, applicants need to publish notice of the public comment period and address
25 all public comments. Without any time limits, applicants may not act expeditiously, especially
26 where the bill provides for automatic approval after 90 days whether or not the applicant has
27 done its part.

1 The proposed measure could undermine the State’s duty to protect State waters in
2 accordance with the Public Trust Doctrine, the Hawaii Constitution, statutes and rules, and the
3 CWA. The State has a fiduciary duty to protect and conserve water resources for the people of
4 Hawai‘i. The Section 401 WQC plays an important role in protecting our state’s water resources
5 from water pollution. A Section 401 WQC is an assertion by the State that a proposed discharge
6 from an activity will not violate Hawai‘i’s Water Quality Standards pursuant to Hawaii
7 Administrative Rules, Title 11, Chapter 54, HRS 342D, and the CWA. It is important that DOH
8 acts thoroughly and prudently in processing Section 401 WQC applications. To automatically
9 “deem” Section 401 WQC applications as complete or to automatically approve a Section 401
10 WQC without requiring that applicants provide needed information within deadlines could
11 undermine the State’s ability to meet its responsibilities and fiduciary duties to protect our state
12 water resources from water pollution.

13 Thank you for the opportunity to testify on this measure.