



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-EIGHTH LEGISLATURE, 2015**

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**ON THE FOLLOWING MEASURE:**

H.B. NO. 483, RELATING TO OCEAN RESOURCES.

**BEFORE THE:**

HOUSE COMMITTEE ON JUDICIARY

**DATE:** Friday, February 27, 2015

**TIME:** 3:00 p.m.

**LOCATION:** State Capitol, Room 325

**TESTIFIER(S):** Russell A. Suzuki, Attorney General, or  
Colin J. Lau, Deputy Attorney General

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Chair Rhoads and Members of the Committee:

The Department of the Attorney General opposes this bill in its current form as the administrative inspection scheme it proposes does not narrowly tailor the interactions between the inspector and the inspectee to limit the intrusion into a person's privacy. The bill appears to violate article I, sections 6 and 7, of the Hawaii State Constitution that protect the right of people to privacy and the right to be free of unreasonable searches, seizures, and invasions of privacy.

The original intent of this bill was to create a new section in chapter 188F, Hawaii Revised Statutes, to allow for warrantless, suspicionless inspections without probable cause in an administrative context based on prior consent arising from the issuance of a commercial license or permit. The inspections are to examine: (1) any commercial license, permit, or registration issued under subtitle 5 of title 12 of the Hawaii Revised Statutes; and (2) the contents of any bag or container used to carry aquatic life, the area of a vessel or vehicle used to transport aquatic life; and the premises, containers, fishing equipment, marine animals, and records of any person shipping aquatic life within the State or to another state. One of the stated reasons for the bill is that probable cause requirements render criminal investigation and enforcement an inappropriate and insufficient tool for resource compliance monitoring within the West Hawaii Regional Fishery Management Area (WHRFMA).

Refusing to consent to a search of containers or to cooperate with producing a required license, permit, or registration results in the immediate suspension of the related license, permit, or registration without a due process hearing being provided. Evidence obtained by these

inspections may not be used in any criminal proceeding, but may be used in civil enforcement or forfeiture proceedings.

Under search and seizure law, a prolonged encounter by law enforcement with the public is subject to a reasonable suspicion standard in which a law enforcement officer must be able to state specific and articulable facts that an offense has been committed under the totality of circumstances. An exception to the requirement of reasonable suspicion is where an administrative inspection scheme has been established as part of a general regulatory scheme in furtherance of an administrative purpose. *U.S. v. McCarty*, 648 F.3d 820, 831 (9th Cir. 2011).

Generally, administrative inspection schemes such as “airport screening searches...are constitutionally reasonable administrative searches because they are ‘conducted as part of a general regulatory scheme in furtherance of an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings.’” *Id.* However, because warrantless, suspicionless administrative searches remain subject to the Fourth Amendment, a *particular* search is “constitutionally reasonable [only where] it ‘is no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives [and where] it is confined in good faith to that purpose.’” *Id.* (citations omitted).

Under federal law, even inspections of commercial property “may be unreasonable if they are unnecessary to further important [government] interests, or if their occurrence is so random, infrequent, or unpredictable that the owner has no real expectation that property will from time to time be inspected by government officials.” *U.S. v. Kaiyo Maru No. 53*, 699 F.2d 989 (9th Cir. 1983) [citation omitted]. “A warrant may be required where the legislative or regulatory scheme is so unrestrictive that business owners are exposed to ‘the unbridled discretion [of] executive and administrative officers,’ without the assurance that ‘reasonable legislative or administrative standards for conducting an...inspection are satisfied.’” *Id.* citing *Camara v. Municipal Court*, 387 U.S. 523, 538, 87 S. Ct. 1727, 1735 (1967).

As written, the bill is overbroad in that it extends the jurisdiction of the WHRFMA beyond its geographic boundaries.<sup>1</sup> Proposed subsection (a)(3) and (4) allows “[a]ny area of a

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<sup>1</sup> The WHRFMA is defined in HRS section 188F-2, HRS, as the “**ocean area** on the west coast of Hawaii Island, from Ka Lae, Kau (South Point) to Upolu Point, North Kohala, but not including Kawaihae commercial harbor.”

vessel or vehicle that the officer reasonably believes may be used to transport [harvested] aquatic life” as well as the “premises, containers ... of any shipping agent or other person placing or attempting to place aquatic resources into interstate or intrastate commerce” to be inspected. Shipping agents (e.g., air cargo) and wholesale outlets selling aquatic resources are not a designated part of the WHRFMA and subject to WHRFMA jurisdiction. Vehicles and buildings are also beyond the ocean jurisdiction of the WHRFMA.

Unlike an airport administrative inspection scheme, this proposed regulatory scheme does not have a discrete objective in which the limits of the intrusion into a person’s privacy are narrowly tailored to reasonable dictates of the administrative purpose. Although the inspections are conditioned on the presumed prior consent of all commercial licensees, permittees, and registrants as a condition of their application, it is unlikely that an enforcement officer will be able to identify who is a licensee or permittee prior to initiating an inspection.

For the above-stated reasons, we ask that House Bill No. 483 be held.

DAVID Y. IGE  
GOVERNOR OF HAWAII



CARTY S. CHANG  
INTERIM CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

DANIEL S. QUINN  
INTERIM FIRST DEPUTY

W. ROY HARDY  
ACTING 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  
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HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

Testimony of  
CARTY S. CHANG  
Interim Chairperson

Before the House Committee on  
JUDICIARY

Friday, February 27, 2015  
3:00 PM  
State Capitol, Conference Room 325

In consideration of  
HOUSE BILL 483  
RELATING TO OCEAN RESOURCES

House Bill 483 proposes to authorize administrative inspections of commercial fishers and wholesalers within the West Hawaii Regional Fishery Management Area (FMA). **The Department of Land and Natural Resources (“Department”) appreciates the intent of this bill and offers the following comments.**

The Department currently inspects commercial fishers and wholesalers under Sections 187A-15 and 189-14, Hawaii Revised Statutes (HRS). Section 187A-15, HRS, authorizes officers to examine or search the contents of any bag, container, vehicle or other conveyance used to carry or transport aquatic life, provided that the officer has *probable cause* to believe that such bag, container, vehicle or conveyance contains evidence of a natural resource violation. Section 189-14, HRS, authorizes officers, without probable cause, to inspect the *books and records* of commercial fishers and marine dealers. These statutes apply statewide, not just in West Hawaii.

House Bill 483 proposes to provide the Department with additional authority (limited to within the West Hawaii FMA) to conduct administrative inspections of the bags, containers, vehicles, or conveyances of commercial fishers and marine dealers to check compliance without the burden of first establishing probable cause of a violation. The Department would suggest that the measure be expanded to apply statewide instead of only in West Hawaii to provide all enforcement officers the same tools to enforce law. More specifically, we suggest that the proposed language be inserted as an amendment to Section 189-14, HRS, rather than as a new section to Chapter 188F, HRS. This way, the Department’s inspection authority will be codified in one place, and it will apply statewide.

Because this bill raises potential Fourth Amendment issues, the Department would seek the advice of the Department of the Attorney General regarding its legal implications. Specifically, we would like clarification of subsection (b) that would preclude the use of evidence obtained through an administrative inspection for the purposes of criminal prosecution. This provision raises potential concerns, for instance, in cases where an administrative inspection uncovers evidence of more serious criminal misconduct such as the possession of drugs or weapons.



**HB483**  
RELATING TO OCEAN RESOURCES  
House Committee on Judiciary

February 27, 2015

3:00 p.m.

Room 325

The Office of Hawaiian Affairs (OHA) **SUPPORTS** HB483, which would facilitate the verification of commercial fishers' and wholesalers' compliance with aquatic resource laws, through administrative inspections of containers, records, and other relevant items.

**This bill would facilitate the exploration of noncriminal alternatives to meaningful and effective enforcement of aquatic resource laws.** Over the last decade, it has become clear that numerous issues continue to inhibit the effective enforcement of aquatic resource laws and regulations under the jurisdiction of the Department of Land and Natural Resources (DLNR). Such enforcement difficulties expose our natural and cultural resources to ongoing abuse and misuse, limit management approaches to those amenable to “practical” enforcement, and foster public distrust and skepticism of state conservation resource enforcement officers and environmental policymakers alike. While funding and overall capacity are clear and obvious challenges to resources enforcement, **it appears that the current, nearly exclusive reliance on the criminal court system has also presented significant barriers to the effective enforcement of our natural and cultural resource laws.** Such barriers include:

1. The reluctance of district court judges and prosecutors to impose criminal liability commensurate with criminal property damage, drug possession, or third degree assault for natural resource violations;
2. The substantive and procedural burdens of proof required to establish a criminal violation, including the “beyond a reasonable doubt” criminal burden of proof, **probable cause requirements for criminal searches and seizures**,<sup>1</sup> and the relatively stringent Hawai'i Rules of Evidence;
3. A lack of substantive institutional knowledge within the criminal district court system of specific natural resource laws, their jurisdictional bases, and how they are or should be interpreted or applied; and
4. The disproportionate cost of enforcing rare and esoteric natural and cultural resource cases in an overburdened criminal court docket, consisting almost entirely of more familiar and readily established crimes.

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<sup>1</sup> U.S. CONST. AMEND. IV. The Hawai'i State Constitution contains a similar provision. See HAW. CONST. ART. I, SEC. 7; HRS §§ 187A-15, 199-7. But see infra n. 2.

This bill would both directly and indirectly address the issues noted above. By providing for administrative, non-criminal inspections of commercial fish containers and other items related to commercial fishing, based upon prior consent through license or permit conditions and the lowered expectation of privacy in West Hawai‘i’s pervasively regulated commercial fishing industry, this bill would allow substantive enforcement of season, bag, size, and gear limits that have been found difficult to enforce by questions regarding constitutional search and seizure protections. **Simply put, a “bag” limit on take cannot be enforced without the ability to look into a bag and count the number of fish taken.** This bill clarifies and guides the constitutional authority of conservation resource enforcement officers to inspect bags, containers, records, and vessels to ensure regulatory compliance within West Hawai‘i’s commercial fishing industry.<sup>2</sup>

In addition, the administrative, noncriminal enforcement actions taken as a result of inspections under this bill will allow the exploration of administrative alternatives to the aforementioned criminal justice approach to aquatic resources enforcement. Such administrative enforcement by the DLNR may provide a more fair, consistent, and effective alternative to resources enforcement, by an agency with the expertise and appropriate concern to protect and conserve our natural and cultural resources.<sup>3</sup>

Therefore, the OHA urges the Committee to **PASS** HB483. Thank you for the opportunity to testify.

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<sup>2</sup> See, e.g., *State v. Boyer*, 42 P.3d 771, 776 (Mont. 2002) (“Thus, no objectively reasonable expectation of privacy exists when a wildlife enforcement officer checks for hunting and fishing licenses in open season near game habitat, inquires about game taken, and requests to inspect game in the field”); *Balelo v. Baldrige*, 724 F.2d 753, 765-66 (9th Cir. 1984) (“[C]ommercial fishing has a long history of being a closely regulated industry”); *United States v. Kaiyo Maru No. 53*, 699 F.2d 989 (9th Cir. 1983) (warrantless searches and seizures of foreign fishing vessels allowable under the Fishery Conservation and Management Act); *United States v. Raub*, 637 F.2d 1205 (9th Cir. 1980) (allowing warrantless stopping and searching of salmon fishing vessel due to pervasive regulation of commercial salmon fishing, limitations on opportunities for abuse, and important federal interests at stake); see also *New York v. Hill*, 528 U.S. 110, 114 (2000) (“[T]he most basic rights of criminal defendants are . . . subject to waiver”); *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) (“absent some affirmative indication of Congress’ intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties”).

<sup>3</sup> See Fish and Coral Think Tank, The Authorizing the Board to Use Transformative, Fair, and Consistent Enforcement (ABOUT FACE) Act, <http://factt.weebly.com/about-face-act.html> (last accessed February 9, 2015).

**COUNTY COUNCIL**

Mel Rapozo, Chair  
Ross Kagawa, Vice Chair  
Mason K. Chock  
Gary L. Hooser  
Arryl Kaneshiro  
KipuKai Kualii  
JoAnn A. Yukimura



**OFFICE OF THE COUNTY CLERK**

Ricky Watanabe, County Clerk  
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Telephone (808) 241-4188  
Fax (808) 241-6349  
Email cokcouncil@kauai.gov

**Council Services Division**  
4396 Rice Street, Suite 209  
Lihue, Kauai, Hawaii 96766

February 24, 2015

**TESTIMONY OF KIPUKAI KUALII**  
**COUNCILMEMBER, KAUAI COUNTY COUNCIL**  
**ON**  
**HB 483, RELATING TO OCEAN RESOURCES**  
House Committee on Judiciary  
Friday, February 27, 2015  
3:00 p.m.  
Conference Room 325

Dear Chair Rhoads and Members of the Committee:

Thank you for this opportunity to submit testimony in strong support of HB 483, Relating to Ocean Resources. My testimony is submitted in my capacity as the Economic Development & Intergovernmental Relations Committee Chair and as an individual Councilmember on the Kauai County Council.

HB 483 authorizes administrative inspections within the West Hawaii regional fishery management area. In 1998, the legislature established the West Hawaii regional fisheries management area which has proven to be successful in improving the sustainability of West Hawaii's nearshore fisheries, reducing user conflicts, and providing important opportunities for scientific research and monitoring. The lack of administrative inspections hampers the ability to successfully monitor this management area, hurts in efforts to minimize the threat of user conflicts, and causes ineffective monitoring compliance with resource regulations, all of which are needed to ensure the success of this management area. HB 483 would provide administrative inspection authority for vessels and catch containers of permitted fisheries within the waters of West Hawaii and the premises of any wholesale outlet selling aquatic resources, which I wholeheartedly support.

For the reasons stated above, I strongly encourage the House Committee on Judiciary to support this measure. Should you have any questions, please feel free to contact me or Council Services Staff at (808) 241-4188.

Sincerely,

KIPUKAI KUALII  
Councilmember, Kauai County Council



**HB483**

Submitted on: 2/26/2015

Testimony for JUD on Feb 27, 2015 15:00PM in Conference Room 325

| Submitted By | Organization                              | Testifier Position | Present at Hearing |
|--------------|---|--------------------|--------------------|
| makani       | hunting, farming, and fishing association | Oppose             | No                 |

Comments: -Individuals should not be allowed to inspect coolers without probable cause. -This is a violation of our constitutional rights

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| Submitted By | Organization | Testifier Position | Present at Hearing |
|--------------|--------------|--------------------|--------------------|
| Tina Owens   | Individual   | Support            | No                 |

Comments: Thank you for hearing this bill. I am strongly in support of this bill. We in West Hawaii have worked long and hard to get the best possible management for our nearshore resources. Over the past 16+ years that the West Hawaii Regional Fishery Management Area has been in place, community members have worked with the state DAR and DLNR to put a number of rules suitable to our situation in place. However, without the ability to check to see if commercial fishers are in compliance, there isn't much point in even having enforcement. Hunters are required to agree to inspection of their bags and vehicles by a special clause in their permits. This should also be applied to commercial fishers in West Hawaii. Thank you. Tina Owens

| <b>Submitted By</b> | <b>Organization</b> | <b>Testifier Position</b> | <b>Present at Hearing</b> |
|---------------------|---------------------|---------------------------|---------------------------|
| Cynthia Urry        | Individual          | Support                   | No                        |

Comments: Please pass this important Bill for us all as the fish collectors need to to be held accountable for everything in their coolers. This I believe is a necessary measure for West Hawaii.

| <b>Submitted By</b> | <b>Organization</b> | <b>Testifier Position</b> | <b>Present at Hearing</b> |
|---------------------|---------------------|---------------------------|---------------------------|
| Charles Young       | Individual          | Support                   | No                        |

Comments: I support this measure as it helps further the desires of the residents of West Hawaii toward better management of their fishery. As a Native Hawaiian I see this measure as being consistent with the intent and spirit of our State Constitution Article XII, Section 7 on gathering rights. It is also consistent with any good management plan that monitors and measures the impacts on a resource for sustainability.

| <b>Submitted By</b> | <b>Organization</b> | <b>Testifier Position</b> | <b>Present at Hearing</b> |
|---------------------|---------------------|---------------------------|---------------------------|
| Dale Sarver         | Individual          | Support                   | No                        |

Comments: Dear Legislators, I support HB 483 and urge you to do the same. The Aquarium Industry is sustainable and supports many families in West Hawaii. In order to keep it that way in this expanding business we need to manage and control it. A limited entry scheme is an ideal way to do that. Many other States have successfully instigated such controls with great success. Everybody wins with these controls, especially the fish populations and the reef ecology. Dale Sarver, Ph.D. Marine Ecologist

| <b>Submitted By</b>  | <b>Organization</b> | <b>Testifier Position</b> | <b>Present at Hearing</b> |
|----------------------|---------------------|---------------------------|---------------------------|
| Elizabeth Kilpatrick | Individual          | Support                   | No                        |

Comments:

| <b>Submitted By</b> | <b>Organization</b> | <b>Testifier Position</b> | <b>Present at Hearing</b> |
|---------------------|---------------------|---------------------------|---------------------------|
| Ronald Tam          | Individual          | Oppose                    | No                        |

Comments: The need for establishment of a statute to provide for search without probable cause is without basis in need and appears, in my non-legal experience, to be unconstitutional. So draconian; beyond reasonableness.

| <b>Submitted By</b> | <b>Organization</b> | <b>Testifier Position</b> | <b>Present at Hearing</b> |
|---------------------|---------------------|---------------------------|---------------------------|
| Douglas Perrine     | Individual          | Support                   | No                        |

Comments: This is a commonsense measure which is absolutely necessary to allow our DOCARE officers to do their job. Failure to pass it will assure continued deterioration of Hawaii's natural marine resources.



Aloha Chair Rhoads and JUD Committee Members,

I support HB483 which allows for the inspection of boats and coolers of commercial fishers. Effective management of a fishery necessitates consistent and effective enforcement. Monitoring and enforcing commercial fishing activities in the West Hawaii Regional Fishery Management Area have proven difficult with the present rules. This inspection program will increase enforcement of the existing fishing rules and enable better data collection on activities and resources within the Management Area.

| <b>Submitted By</b> | <b>Organization</b> | <b>Testifier Position</b> | <b>Present at Hearing</b> |
|---------------------|---------------------|---------------------------|---------------------------|
| Shannon Rudolph     | Individual          | Support                   | No                        |

Comments: Support

| <b>Submitted By</b> | <b>Organization</b> | <b>Testifier Position</b> | <b>Present at Hearing</b> |
|---------------------|---------------------|---------------------------|---------------------------|
| Joni Kamiya         | Individual          | Oppose                    | No                        |

| <b>Submitted By</b> | <b>Organization</b> | <b>Testifier Position</b> | <b>Present at Hearing</b> |
|---------------------|---------------------|---------------------------|---------------------------|
| Tony Sylvester      | Individual          | Oppose                    | No                        |

Comments:

House Committee on Judiciary  
Representative Karl Rhoads Chair  
Representative Joy San Buenaventura Vice Chair

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**Testimony in Support of Bill HB 483**

**February 27, 2015**

Chairperson Rhoads and Committee Members,

My name is Dennis Yamaguchi and I support the passage of HB 483. I am a full time commercial fisherman for aquarium fish on Oahu. Although this bill pertains only to the West Hawaii Fisheries Management Area on Hawaii Island, I believe enforcement of any of Hawaii's fishing laws is necessary for managing the State's resources. Administrative inspection authority within the waters of West Hawaii will be a step in the right direction.

Please pass HB 483. Thank you.

Dennis Yamaguchi

**LATE**

2015

n Feb 27, 2015 15:00PM in Conference Room 325

| <b>Submitted By</b> | <b>Organization</b> | <b>Testifier Position</b> | <b>Present at Hearing</b> |
|---------------------|---------------------|---------------------------|---------------------------|
| Kirby Kester        | Individual          | Oppose                    | No                        |

Comments:

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