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GOVERNOR OF HAWAII



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

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**Testimony of  
SUZANNE D. CASE  
Chairperson**

**Before the House Committee on  
FINANCE**

**Friday, March 31, 2017  
3:00 PM  
State Capitol, Conference Room 308**

**In consideration of  
SENATE BILL 110, SENATE DRAFT 2, HOUSE DRAFT 1  
RELATING TO AQUATIC RESOURCES**

Senate Bill 110, Senate Draft 2, House Draft 1 proposes to grant the Department of Land and Natural Resources (Department) authority to establish and operate in-lieu fee mitigation, the purpose of which is to restore, create, enhance, or preserve aquatic habitats or resources as compensatory mitigation where a person is required to provide compensatory mitigation prospectively and the use of in-lieu fee mitigation is approved by the agency requiring mitigation, or for past damages to aquatic habitats or resources. **The Department strongly supports this measure and offers the following comments.**

Hawaii's rich and diverse aquatic habitats support an abundant array of aquatic life; however, these habitats, particularly our coral reefs, are susceptible to degradation from human and natural stressors. Mitigation banking and in-lieu fee are mechanisms that the Department may use to promote aquatic resource recovery, with a strong focus on restoring Hawaii's coral reef ecosystems. From the 2016 Legislative Session, the Department obtained authority to establish and operate mitigation banks for the same purposes. Mitigation banking is a mechanism in which a mitigation bank sponsor selects degraded aquatic habitats, restores aquatic functions, and quantifies these "banked" improvements as "credits" that are made available for purchase by responsible parties required by state and federal resource agencies to mitigate prospective or actual damage to aquatic resources. In-lieu fee is essentially mitigation banking in reverse: a third party in-lieu fee mitigation sponsor first collects funds from permit applicants or responsible parties required to mitigate actual natural resource damage and then the sponsor creates restoration projects using those funds. In-lieu fee mitigation sponsors typically combine the fees collected from many permitted projects or damage settlements to create larger and more ecologically-valuable mitigation projects. As the mitigation bank and in-lieu fee mitigation sponsor, the Department would be able to engage in more long-term resource restoration measures and better address aquatic resource losses. The Department expects to accept fees in-lieu of mitigation from two sources: 1) permittees required to mitigate

SUZANNE D. CASE  
CHAIRPERSON  
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damage from discharge or dredge and fill activities permitted under Section 404 of the Clean Water Act; and 2) unauthorized resource damage settlements, fines, and penalties.

The primary objective of both mitigation banking and in-lieu fee mitigation is to reduce aquatic resource losses where there are identifiable parties responsible for damaging these resources and resource agencies require these parties to compensate for those losses through “compensatory mitigation.” Compensatory mitigation refers to the restoration, creation, enhancement, or preservation of aquatic habitats or resources for the purposes of offsetting unavoidable adverse impacts that remain after all appropriate and practicable avoidance and minimization has been achieved. Compensatory mitigation originated under the Clean Water Act’s Section 404 permit program (Section 404 program), established to regulate the discharge of dredge and fill material into the waters of the United States. Section 404 requires a permit from the United States Army Corps of Engineers (Corps) before dredged or fill material may be discharged into waters of the United States. In evaluating Section 404 permit applications, the Corps first makes a determination that potential impacts have been avoided to the maximum extent practicable; remaining unavoidable impacts will then be mitigated to the extent appropriate and practicable; and, finally, the Corps will require compensation for unavoidable aquatic resource losses. Permittees may either conduct the compensatory mitigation projects themselves, known as “permittee-responsible mitigation,” or transfer their obligations to a third party by paying into a mitigation bank or in-lieu fee. Although mitigation banking and in-lieu fee have traditionally been used under permit programs, these resource recovery mechanisms can also be used in the context of unauthorized resource damage, such as coral damage from ship groundings, where responsible parties are required to pay to remediate damages.

Natural resource agencies prefer mitigation banks and in-lieu fee mitigation to permittee-responsible mitigation because these third party mitigation bank or in-lieu fee sponsors are often public or private entities with more restoration experience, scientific expertise, and vested long-term interest in natural resource conservation. This measure would provide the Department with another innovative mechanism to improve state stewardship of aquatic public trust resources and habitats, increase accountability for aquatic resource damage, and provide higher quality remediation to make damaged resources whole again. Although in-lieu fee mitigation has been predominantly used to restore wetland and stream habitats in other parts of the United States, there has been an increasing national interest in using in-lieu fee mitigation to improve coral reef, sea grass, and estuarine habitats. The Department intends to be the first state in the nation to establish in-lieu fee mitigation for coral reefs.

The flexibility to use both mitigation banking and in-lieu fee mitigation will enable the Department, state and federal resource agencies, permit applicants, and other affected parties to select the most appropriate mitigation mechanism to restore damaged resources and reduce further net losses to public trust resources. The authority to conduct in-lieu fee mitigation is the next step in the process of creating innovative tools mechanisms for aquatic resource conservation to protect the state’s valuable public trust resources. In conclusion, as mentioned previously, the Department supports this measure as written.

Thank you for the opportunity to comment on this measure.

# TAX FOUNDATION OF HAWAII

126 Queen Street, Suite 304

Honolulu, Hawaii 96813 Tel. 536-4587

SUBJECT: MISCELLANEOUS, Aquatic Mitigation Banking and In-Lieu Fee Special Fund

BILL NUMBER: SB 110, HD-1

INTRODUCED BY: House Committees on Ocean, Marine Resources, & Hawaiian Affairs and Water & Land

EXECUTIVE SUMMARY: Part of this bill establishes a new special fund for aquatic mitigation banking and in-lieu fees. The apparent intent is to divert fees and fines to this special fund. This would reduce transparency and accountability by bypassing the normal appropriations process.

EFFECTIVE DATE: December 24, 2088.

STAFF COMMENTS: In 2002, the Legislature set requirements for establishing and continuing special and revolving funds. Sections 37-52.3 and 37-52.4, HRS, now state that the criteria used to review special and revolving funds are the extent to which each fund:

- Serves a need, as demonstrated by the purpose of the program to be supported by the fund; the scope of the program, including financial information on fees to be charged, sources of projected revenue, and costs; and an explanation of why the program cannot be implemented successfully under the general fund appropriation process;
- Reflects a clear nexus between the benefits sought and charges made upon the program users or beneficiaries, or a clear link between the program and the sources of revenue—as opposed to serving primarily as a means to provide the program or users with an automatic means of support, removed from the normal budget and appropriation process;
- Provides an appropriate means of financing for the program or activity, that is used only when essential to the successful operation of the program or activity; and
- Demonstrates the capacity to be financially self-sustaining.

The normal appropriations process is a way in which the legislature exercises its constitutionally guaranteed oversight over executive branch agencies, and special funding is a way for the agencies to bypass this oversight, leading to decreased transparency and accountability. Thus, the diversion of fines and user fees, which presumably now go to the general fund, to the fund established by this bill raises concerns. There is no explanation of why this special funding mechanism is required as opposed to the normal general fund appropriations process.

If the current state funding for aquatic resources management is not adequately funded, consideration should be given to adjusting the licensing fees or fines appropriately or making the case for additional appropriations from the general fund.

Digested 3/17/2017



The Nature Conservancy  
Hawai'i Program  
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Honolulu, HI 96817

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Testimony of The Nature Conservancy of Hawai'i  
Supporting S.B. 110 SD2 HD1 Relating to Aquatic Resources  
House Committee on Finance  
Friday, March 31, 2017, 3:00PM, Room 308

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*The Nature Conservancy of Hawai'i is a private non-profit conservation organization dedicated to the preservation of the lands and waters upon which life depends. The Conservancy has helped to protect nearly 200,000 acres of natural lands in Hawai'i. We manage 40,000 acres in 14 preserves and work in 19 coastal communities to help protect the near-shore reefs and waters of the main Hawaiian Islands. We forge partnerships with government, private parties and communities to protect Hawai'i's important watershed forests and coral reefs.*

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The Nature Conservancy supports S.B. 110 SD2 HD1 that would authorize the Department of Land and Natural Resources to use in-lieu fee mitigation to restore, create, enhance, or preserve aquatic resources as compensatory mitigation.

Hawai'i's nearshore waters are home to more than 7,000 forms of marine life, a quarter of them found nowhere else on Earth. In addition to biological significance, the vast coral reef ecosystem is a valuable asset that contributes culturally and economically to Hawai'i's future. The coral reef ecosystem creates habitat for many fish and invertebrate species with commercial value, supports tourism and recreational industries, and shelters coastlines from natural disturbances. Life in Hawai'i depends upon a healthy and thriving marine environment.

Over the past several decades, the health of Hawai'i's rich aquatic environment has been significantly altered due to human caused and natural stresses. With the added threats from global climate change predicted to occur within the next 50 years, the need to protect our reefs and other aquatic resources has never been more urgent.

The U.S. Army Corps of Engineers (Corps) anticipates dozens of permitting actions in Hawai'i over the next few decades that will likely have unavoidable impacts on aquatic resources under the jurisdiction of the Corps, the Environmental Protection Agency (EPA) and the State of Hawai'i. In such instances, compensatory mitigation may be required to replace the loss of wetland, stream, coral reef and/or other aquatic resource functions and services. The DLNR is proposing to establish mitigation bank (authorized by the Legislature last year) and in-lieu fee (ILF) programs, as contemplated under Corps and EPA laws and regulations, to help make more effective and ecologically sound decisions regarding compensatory mitigation for both unavoidable impacts and for marine violations that harm the nearshore marine resources.

The primary objective of the ILF program is to ensure "no net loss" of acreage and/or function of marine aquatic resources (e.g., coral reefs, sea grass beds, wetlands, streams). The DLNR's proposed ILF and mitigation bank programs will help protect, maintain, and restore functional aquatic ecosystems by consolidating mitigation requirements of multiple projects into an organized plan, locating mitigation projects within proximity of ongoing multi-agency regional conservation efforts to optimize ecological benefits, and achieving accountability by using monitoring and effectiveness standards approved by the Corps and EPA.

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**To:** FINTestimony  
**Cc:** launahele@yahoo.com  
**Subject:** \*Submitted testimony for SB110 on Mar 31, 2017 15:00PM\*

**SB110**

Submitted on: 3/29/2017

Testimony for FIN on Mar 31, 2017 15:00PM in Conference Room 308

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Benton	Individual	Support	No

Comments:

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Conservation Council  
for Hawai'i

*Hawai'i's voice for wildlife*

*Kō Hawai'i leo no nā holoholona lōhiu*



**LATE**

Testimony Submitted to the House Committee on Finance  
By the Conservation Council for Hawai'i  
Hearing: Friday, March 31, 2017 3 pm  
Room 308

Support for the Intent of SB 110 SD 2 HD 1 Relating to Aquatic Resources

Chair Luke, Chair Yamane, Vice Chair Cullen, and Members of the Committee,

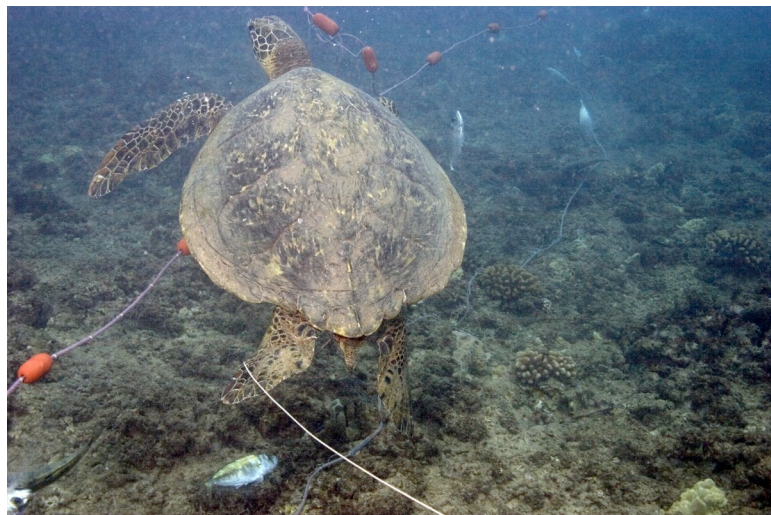
Aloha. The Conservation Council for Hawai'i supports the intent of SB 110 SD 2, which authorizes the Department of Land and Natural Resources to use in-lieu fee mitigation to restore, create, enhance, or preserve aquatic habitats or resources as compensatory mitigation.

We recommend that the department adopt general guidelines and minimum standards and requirements for such mitigation. In the 1990s, the Department of Health Environmental Health branch implemented a similar program. In many cases, the compensatory mitigation was ineffective and useless. Furthermore, the mitigation was not always relevant or closely related to the "crime." If we are going to authorize the DLNR to use in-lieu fee mitigation, there must be a net benefit for the species, habitat, and/or resources harmed, and there must be a clear nexus between the violation and resource, and the mitigation.

Mahalo nui loa for the opportunity to testify.

*Marjorie Ziegler*

Marjorie Ziegler



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Treasurer: Les Welsh | Director: Anne Walton  
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FIN-Jo

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**SB110**

Submitted on: 3/30/2017

Testimony for FIN on Mar 31, 2017 15:00PM in Conference Room 308

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Scott Garris	Individual	Support	No

Comments:

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