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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 Senate Committee on
WATER AND LAND**

**Wednesday, February 1, 2017
2:45 PM
State Capitol, Conference Room 224**

**In consideration of
SENATE BILL 110
RELATING TO AQUATIC RESOURCES**

Senate Bill 110 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 bill also proposes to establish two special funds: the Aquatic Mitigation Banking Special Fund and the Aquatic In-Lieu Fee Mitigation Special Fund. **The Department strongly supports this measure and offers the following comments.**

Compensatory mitigation refers to the restoration, creation, enhancement, or preservation of aquatic habitats or resources for the purposes of offsetting unavoidable adverse impacts. Generally, when prospective permittees anticipate damages to natural resources, natural resource agencies require that all reasonable measures are taken to avoid and minimize the impact on the natural resources at the site of the project. When unavoidable damage does occur, resource agencies will require compensatory mitigation to offset the resource losses. Permittees must then either conduct the new compensatory mitigation projects themselves or transfer their obligations to mitigate damage to a third party by paying into a mitigation bank or in-lieu fee. These two third party compensatory mitigation 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 experience, scientific expertise, and vested long-term interest in natural resource conservation.

SUZANNE D. CASE
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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. In 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” which can then be sold to 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 accepts funds from permit applicants or responsible parties required to provide compensation in order to mitigate actual natural resource damage and then develops restoration projects. In-lieu fee mitigation sponsors typically combine the fees collected from many permitted projects or damage settlements with smaller scale impacts and create larger and more ecologically-valuable mitigation projects.

The Department expects to accept fees in-lieu of mitigation from two sources: 1) permittees required to mitigate damage by the Army Corps of Engineers under the Federal Clean Water Act’s section 404 (“Section 404 program”) permit program, which regulates the discharge of dredge and fill material into the waters of the United States; and 2) unauthorized resource damage settlements, fines, and penalties. 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 Department further encourages the establishment of the two special funds in the bill. Both special funds are intended to support ecologically valuable restoration projects with self-sustaining sources of funding. The special funds will receive monies for mitigation and the Department will subsequently use them to create new aquatic restoration projects or support existing ones. Special funds dedicated to aquatic mitigation banking and in-lieu fee mitigation would ensure that moneys coming in from permittees and responsible parties are further spent to fulfill the Department’s obligations as a mitigation bank or in-lieu fee mitigation sponsor, including long-term monitoring and adaptive management. In particular, the federal regulatory structure for qualifying in-lieu fee mitigation under the Section 404 program requires detailed bookkeeping and federal oversight under 33 C.F.R. § 332.8 and a special fund dedicated to in-lieu fee mitigation will ensure that the Department satisfies its federal regulatory requirements.

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 and the establishment of the two special funds are the next steps in the process of creating innovative tools mechanisms for aquatic resource conservation to protect the state’s fragile and valuable public trust resources. In conclusion, as mentioned previously, the Department supports this measure as written.

Testimony of The Nature Conservancy of Hawai'i
Supporting S.B. 110 Relating to Aquatic Resources
Senate Committee on Water and Land
Wednesday, February 1, 2017, 2:45PM, Room 224

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.

The Nature Conservancy supports S.B. 110 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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TAX FOUNDATION OF HAWAII

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

BILL NUMBER: SB 110

INTRODUCED BY: K. RHOADS

BRIEF 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: Upon approval.

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.