



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

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**Testimony of
SUZANNE D. CASE
Chairperson**

**Before the House Committees on
WATER, LAND, & HAWAIIAN AFFAIRS
and
ENERGY & ENVIRONMENTAL PROTECTION**

**Wednesday, February 6, 2019
10:30 AM
State Capitol, Conference Room 325**

**In consideration of
HOUSE BILL 589
RELATING TO THE LAND CONSERVATION FUND**

House Bill 589 proposes (1) to require that the Department of Land and Natural Resources (Department) fully implement, within a period of ten months or less, five of the eleven recommendations found in the January 2019 audit of the Land Conservation Fund (Fund); (2) to limit access for the Division of Forestry and Wildlife (DOFAW), but not for other State agencies, to receive funding from the land conservation fund through the grant application process, only; (3) to empower the Auditor, without intervening legislative review, to determine the Department's compliance with this legislative mandate and to conduct, based on that determination, an audit of the entire Department; and (4) to authorize the commencement of a civil action against the Board of Natural Resources (BLNR), the Department, or the Legacy Land Conservation Commission for an alleged violation of Chapter 173A, Hawaii Revised Statutes (HRS). **The Department acknowledges the intent of this bill to foster improvements in the Department's administration and management of the Land Conservation Fund and offers the following comments.**

The Legacy Land Conservation Program (LLCP) is an important, popular, and highly successful public-private partnership that achieves its statutorily authorized program purposes. Since the LLCP obtained a dedicated source of funding in 2005, LLCP has completed thirty acquisitions of land, listed on the LLCP website at <http://dlnr.hawaii.gov/ecosystems/llcp/projects/>, and has closed each transaction within one to five years of funding approval. LLCP performs in a rigorous, transparent, and cost-effective manner that maximizes return on State investments.

The Department's response to the Land Conservation Fund audit acknowledged a brief period in FY 2016 & 2017 of shortcomings in program management due to vacancies in three key positions. This resulted in lapsed grant funds (\$2.2 million did not leave LLCP) and unnecessary payment of \$684,256 of central service fees. DLNR never encumbered or expended funds for which it did not already have legislative budget appropriation.

The Department responds to particular sections of this proposed bill as follows:

SECTION 2, Private right of action

The decision processes established and conducted under Chapter 173A, HRS, are rigorous, multi-layered, and transparent, and provide ample opportunities for an aggrieved person to seek relief and remedy through standard, widely-used mechanisms for administrative and judicial appeal and administrative and legislative correction. The Department is not aware of a statutory private right of action that now exists for enforcing a statutory provision that governs the Department. We are concerned that the proposed private right of action would set an unwieldy precedent for a litigation opportunity that is open-ended and could have immediate, large impacts on the balance of the Land Conservation Fund through the recovery of attorneys' fees. Also, the Department believes that the mere specter of a private right of action can have a chilling effect on our efforts to attract highly qualified citizens to serve as volunteer members of the Legacy Land Conservation Commission and BLNR. Despite the assurances provided under Section 26-35.5, HRS, that limit the personal liability of a member of a board or commission, our experience indicates that it is not unlikely for a candidate or a seated member to worry about an omission, oversight, or loophole in such provisions that could lead to an unwarranted personal nightmare. The Department respectfully opposes this section of the proposed measure.

SECTION 3. Resource land acquisition plan

In our December 2018 response to the draft audit report, the Department described a commitment for completing a resource land acquisition plan using funding from our FY20 and FY21 budgets for contractor assistance. Companion measures introduced this session in each chamber (HB264 and SB703) propose a completion deadline of June 30, 2021, which the Department believes provides a timeframe that is more reasonable to achieve than January 1, 2020 and would result in a thorough, useful plan to guide BLNR in acquiring land that has value as a resource to the State, and that satisfactorily considers all plans prepared by all State and county agencies, relating to the acquisition such land.

SECTION 4, Trust account reporting

In our December 2018 response to the draft audit report, the Department committed to revising our annual report to the legislature to include a synthesis of existing records of each transfer of money from the Land Conservation Fund to the Department trust account and from the trust account back to the Land Conservation Fund. This will provide a single record that serves as a transfer listing of all Land Conservation Fund grant moneys transferred to the trust account.

SECTION 5, Policies and procedures

(1) and (2) In our December 2018 response to the draft audit report, the Department committed to updating its existing, written, internal procedures (provided to the audit team during the audit process) that guide the grant award and blanket encumbrance process. BLNR sets policy for

Department operations, so any initiative to develop and implement written policies governing the grant award and blanket encumbrance processes, beyond those that already exist in administrative rules and those already implemented through the DLNR Administrative Services Office, would require BLNR approval.

(3) In our December 2018 response to the draft audit report, the Department committed to continue its ongoing file centralization process [which we accelerated in order to fulfill the audit team’s information requests, using methods and timelines agreed upon in advance by the audit team and the Department] and its ongoing review of records retention policies for an approved grant award. The Department also explained that the Division of Forestry and Wildlife (DOFAW) maintains central records for the grant process and overall program functions. However, the grant-funded land acquisition process involves two types of conveyances, one of which results in State ownership of a real property interest. The Land Division is required to maintain official, central records for State land acquisitions, regardless of funding source, while DOFAW maintains official, central records for land acquisitions completed by a state, county, or private entity under a Legacy Land Conservation Program Grant Agreement. Therefore, in order to avoid duplication of effort in maintaining a centralized file system, the Department plans to implement a centralized file directory for multiple file repositories, rather than maintaining a single centralized file archive.

SECTION 5(2), Division of Forestry and Wildlife access to the Land Conservation Fund

The Department emphasizes that Division of Forestry and Wildlife (DOFAW) pursuits of funding from the Land Conservation Fund have been consistent with Chapter 173A. Although it is within the purview of the Legislature to amend the statute to re-engineer, by law, available funding mechanisms, we believe that the Legislature should not require that the Department adopt internal policies and implementing procedures, only, that may contradict existing statutory provisions.

In addition, we note that implementation of this proposed measure would still allow other State agencies that are authorized to hold and manage land having value as a resource to the State (for example the Division of State Parks, Department of Agriculture, Agribusiness Development Corporation, Department of Hawaiian Home Lands, and Office of Hawaiian Affairs)—but not the Division of Forestry and Wildlife (DOFAW)—to submit a budgetary request for an appropriation from the Land Conservation Fund for an applicable land acquisition. Under present circumstances, a State agency can receive funding from the Land Conservation Fund through enactment of that budgetary request or through enactment of a separate, special appropriation bill (for example, two House bills introduced this session as a CIP package for a representative district). In most cases, completing a State land acquisition that received legislative funding requires that BLNR provide final approval in public meeting, and it is difficult for us to conceive of how the legislative appropriation process “reduce[s] accountability and transparency” (page three, lines nine and ten) for any State-funded land acquisition. The Department believes that the proposed restriction (1) would unfairly constrain funding options and strategies for important DOFAW conservation transactions, and (2) would provide an unwarranted advantage for all other State agencies in gaining access to the Land Conservation Fund, and therefore we respectfully oppose this section of the proposed measure.

SECTION 6, Progress Report

We note that that Office of the Auditor follows a standard process and timeline for evaluating the implementation of its recommendations and publishing the results of that evaluation, and we prefer that interim reporting to the Legislature alone, if any, be included in the required annual report rather than provided under separate cover.

SECTION 7, Monitoring of the Department

The Department notes that that Office of the Auditor follows a standard process and timeline for evaluating the implementation of its recommendations and publishing the results of that evaluation. We believe that the Land Conservation Fund should not be treated differently than other auditees, especially given the widespread popularity of and support for the Legacy Land Conservation Program and the obvious and substantial importance, significance, and value of its achievements. It is more appropriately within the purview of the Legislature, rather than the Auditor, to make a final determination about the Department's compliance with legislative requirements. The Office of the Auditor is not otherwise authorized by law to enforce its findings and recommendations against another agency, and the proposed measure does not provide a due process mechanism for the Department to contest the Auditor's findings about Department compliance with statutory provisions. Thus it would be extreme, unprecedented, unreasonable, and unjustified for the Legislature to provide for a comprehensive audit of an entire department that would be based on the Auditor's determination of legal compliance for a single program, for which the Department would not have an opportunity to respond and the Legislature itself did not have an opportunity to review and concur. The Department respectfully opposes this section of the proposed measure.

Thank you for the opportunity to comment on this measure.



HOUSE COMMITTEE ON WATER, LAND, & HAWAIIAN AFFAIRS

The Honorable Ryan I. Yamane, Chair
The Honorable Chris Todd, Vice Chair

HOUSE COMMITTEE ON ENERGY & ENVIRONMENTAL PROTECTION

The Honorable Nicole E. Lowen, Chair
The Honorable Tina Wildberger, Vice Chair

H.B. NO. 589, RELATING TO THE LAND CONSERVATION FUND

Hearing: Wednesday, February 6, 2019, 10:30 a.m.

The Office of the Auditor has **no position** regarding H.B. No. 589, which requires, among other things, that we monitor the Department of Land and Natural Resources' (DLNR) progress in meeting certain obligations under the bill and, if necessary, conduct a financial and management audit of DLNR. **However, we believe the work required by this bill duplicates work we already perform and may be premature.**

This bill requires DLNR to implement certain recommendations made in our Report No. 19-01, *Audit of the Department of Land and Natural Resources' Land Conservation Fund*. Specifically, under H.B. No. 589, DLNR is, among other things, required to establish an initial resource land acquisition plan by January 1, 2020; develop and implement written policies and procedures; develop clear policies and procedures between the Legacy Land Conservation Program and the Division of Forestry and Wildlife regarding the distribution of Land Conservation Fund moneys; and maintain a record of the transfer of funds to and from any DLNR trust account and report these transactions to the Governor and the Legislature.

The bill also requires DLNR submit a report to the Legislature and our office of its progress in meeting the obligations noted above. Following our review of DLNR's report, the bill requires us to conduct a "full financial and management audit of [DLNR]" if we determine that DLNR has failed to meet these obligations.

First, we note that Section 23-7.5, Hawai'i Revised Statutes, already requires us to report to the Legislature annually on each audit recommendation more than one year old that has not been implemented by the audited department or agency. Generally, we require the departments to "self-report" their implementation efforts one year after we issue our report. One year after the self-report, we then actively follow-up on the department's efforts. We believe that two years is a reasonable amount of time for the department to implement recommendations, where one year may be premature. After DLNR has begun implementing the requirements under this bill and the recommendations in our Report No. 19-01, we can provide a more meaningful assessment of the department's compliance efforts.

We further believe that a “full financial and management audit of [DLNR]” may be overly broad since this bill, and our report, focus primarily on DLNR’s management of the Land Conservation Fund. We suggest the bill be amended to identify a specific program or activity we should assess. As part of our audit planning, we will develop audit objectives. But, without a more specific scope, those objectives may not align with the Legislature’s area(s) of interest.

With respect to financial audits, we do not perform any financial audits in-house; rather, we contract with certified public accounting (CPA) firms to audit the financial statements of State agencies and for the State’s Comprehensive Annual Financial Report. DLNR requested a financial audit, which we contracted a CPA firm to perform, of their financial statements for fiscal years ending June 30, 2017, 2018, and 2019. If the intent of this bill is to have DLNR’s financial statements audited annually, we suggest that this bill be amended to include a requirement that the department reimburse us for the cost of any financial audit.

Thank you for considering our testimony related to H.B. No. 589.



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The Trust For Public Land's Testimony Relating To HB 589
House Committees on Water, Land & Hawaiian Affairs, and Energy &
Environmental Protection, Conf. Room 325
Wednesday, February 6, 2019, 10:30 a.m.

Aloha e Chairs Yamane & Lowen and Committee Members:

The Trust for Public Land was part of a coalition legislators and community and environmental groups that worked together to enact the Legacy Land Conservation Program in 2005, which sets aside funding from the real estate conveyance tax to conserve land and special places throughout Hawai'i Nei. The Legacy Land Conservation Program has conserved significant cultural sites, watersheds that produce our drinking, important habitat for native species, agricultural land that increases our food security, beaches and coastal areas enjoyed by all.

HB 589 proposes to: (1) create a new private right of action against the State of Hawai'i (i.e., a right to sue); (2) sets a statutory deadline of January 1, 2020 for DLNR to complete an initial land resource acquisition plan, and (3) requires DLNR to keep a record of the balance of and all transfers of funds to or from any DLNR trust account established to hold awards granted to state agencies, including a list a of all projects for which a grant was awarded and the status of each project. The Trust for Public Land has the following comments:

(1) New Right To Sue The State of Hawai'i/Attorneys' Fees & Costs

The Trust for Public Land strongly opposes the creation of a new right to sue the State and recover attorneys' fees and costs. Although Section 1 of HB 589 makes clear that the recent Audit of the State Legacy Land Conservation Program motivated the introduction of this bill, the Audit did **not** recommend that the Legislature create a new right to sue the State of Hawai'i for violations of the statute. It is not clear who would have standing to sue under this provision, or what the purpose of such a lawsuit would be. Even more problematic is the provision that provides: "A person bringing an action pursuant to this section shall be entitled to recover the person's costs and reasonable attorneys' fees." As proposed, the current language of the bill does **not** require the person to have even prevailed against State. This would allow **any person** suing the state to recover attorneys' fees and costs from the State **EVEN IF THAT PERSON FILED A FRIVOLOUS LAWSUIT OR LOST THE LAWSUIT AGAINST THE STATE.**



(2) January 1, 2020 Deadline for Initial Land Resource Acquisition Plan

The Trust for Public Land has no objection to setting a January 1, 2020 deadline for the initial land resource acquisition plan so long as DLNR is provided the funding/resources for the plan and DLNR believes the plan can be completed by the deadline. The Audit of the Legacy Land Conservation Program pointed out that the enabling statute has long required that DLNR complete a land resource acquisition plan in consultation with representatives designated by the Speaker of the House and Senate President. DLNR has requested funding in its budget to complete such a plan, and if such funding is forthcoming and DLNR believes it can meet the deadline (taking into account procurement or other timing issues), The Trust for Public Land has no objection to this provision.

(3) Additional recordkeeping

The Trust for Public Land has no objection to the additional recordkeeping requirements if DLNR believes it can accurately track the items proposed by the bill.

While the Audit identified some administrative deficiencies in the Legacy Land Conservation Program, the DLNR has committed to rectifying them. The Auditor had no complaints about the expert volunteer Legacy Land Conservation Commission and the open and transparent process it conducts to make recommendations for funding to BLNR on an annual basis. Each year, there are many more worthy projects than there is available funding and we urge the Legislature to consider raising the statutory cap and annual budgetary spending ceiling to allow the Legacy Land Conservation Program to conserve more special places throughout Hawai'i Nei.

I apologize that I cannot be present at the hearing of this bill due to scheduling conflicts.

Me ke aloha,



Hawaiian Islands State Director, Edmund C.
Olson Trust Fellow

HB-589

Submitted on: 2/5/2019 10:23:32 AM

Testimony for WLH on 2/6/2019 10:30:00 AM

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|---|---------------------------|---------------------------|
| Melodie Aduja | O`ahu County Committee on Legislative Priorities of the Democratic Party of Hawai`i | Support | No |

Comments:

todd1 - Harrison

From: Justyne Triest <justyne.triest@gmail.com>
Sent: Monday, February 4, 2019 4:02 PM
To: WLHtestimony
Subject: In support of HB808

Hello-

I'm writing to you from my home in Oregon in support of HB808 to help protect sharks and rays and help stop the killing of them. Sharks are extremely important to ecosystems and to me personally. Research shows that a live shark bringing in ecotourism is much more valuable than a dead one. A recent paper

(https://www.researchgate.net/profile/Michele_Barnes2/publication/259434808_Global_economic_value_of_shark_ecotourism_Implications_for_conservation/links/54828b160cf2f5dd63a89dc6/Global-economic-value-of-shark-ecotourism-Implications-for-conservation.pdf?origin=publication_detail) suggests that tourists spend 314 million/year on shark tourism and 10,000 jobs are generated from this. Personally, I visited the beautiful island of Oahu in May of 2018 to go snorkel with sharks in their natural habitat. I chose to spend my money (several thousand dollars) and time (a week) on Oahu because of this and with a company I felt was most respectful of these animals. This is not the first vacation I've taken around sharks and I don't intend for it to be the last.

I'm writing in strong support of this bill as a citizen, tourist, scuba diver, and passionate advocate for sharks. I strongly urge you to pass this bill and continue to keep Hawaii as a place for this amazing (and valuable!) animals.

Respectfully,
Justyne Triest

HB-589

Submitted on: 2/4/2019 8:40:41 PM

Testimony for WLH on 2/6/2019 10:30:00 AM

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|---------------------|---------------------------|---------------------------|
| Nancy Davlantes | Individual | Support | No |

Comments:

HB-589

Submitted on: 2/5/2019 1:31:32 PM

Testimony for WLH on 2/6/2019 10:30:00 AM

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

Comments:



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2019**

LATE

ON THE FOLLOWING MEASURE:

H.B. NO. 589, RELATING TO THE LAND CONSERVATION FUND.

BEFORE THE:

HOUSE COMMITTEE ON WATER, LAND, & HAWAIIAN AFFAIRS AND ON ENERGY & ENVIRONMENTAL PROTECTION

DATE: Wednesday, February 6, 2019 **TIME:** 10:30 a.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Clare E. Connors, Attorney General, or
Bill J. Wynhoff, Deputy Attorney General

Chairs Yamane and Lowen and Members of the Committees:

The Department of the Attorney General submits the following comments on H.B. No. 589.

H.B. No. 589 authorizes a private right of action to enforce alleged violations of chapter 173A, Hawaii Revised Statutes (HRS), Acquisition of Resource Value Lands. The bill also requires the Department of Land and Natural Resources (DLNR) to complete an initial resource land acquisition plan pursuant to section 173A-3 no later than January 1, 2020, keep a record of funds transferred into DLNR trust accounts to hold grant awards to state agencies, develop written policies and procedures governing the grant award and blanket encumbrance processes, develop policies for the Division of Forestry and Wildlife regarding grant funding from the Legacy Land Conservation Program, develop a centralized file system for grant awards, and submit a report on its progress to the Auditor and the Legislature prior to the 2020 regular session. The bill requires the Auditor to monitor the DLNR's meeting of these obligations and, if they are not met, to conduct a full financial and management audit of the DLNR.

Section 2 of the bill adds a new section that authorizes any person to commence a civil action on that person's behalf against the Board of Land and Natural Resources ("Board"), DLNR, or the Legacy Land Conservation Commission ("Commission") for a violation of chapter 173A. The bill is not clear whether civil actions will be limited to the

just the Board, DLNR, and Commission, or if they can be brought against Board and Commission members, individually. If the bill allows actions against individual Board and Commission members, then it directly contradicts section 26-35.5, which provides immunity to members of boards and commissions from “any civil action founded upon a statute or the case law of this State, for damage, injury, or loss caused by or resulting from the member’s performing or failing to perform any duty which is required or authorized to be performed by a person holding the position to which the member was appointed.” Section 2 is also not clear as to who would have standing to bring an action against the Board, DLNR, or Commission. This section requires clarification.

We also respectfully express our concern about the waiver of sovereign immunity in section 2. In general, “the sovereign State is immune from suit for money damages, except where there has been a clear relinquishment of immunity and the State has consented to be sued.” *Bush v. Watson*, 81 Hawai‘i 474, 481, 918 P.2d 1130, 1137 (1996) (citations and internal quotation marks omitted). The main existing waivers of sovereign immunity are in chapters 661 and 662, HRS. These chapters track federal law and represent carefully calibrated policy considerations. We are concerned that waiving the State’s sovereign immunity as to this particular issue might result in unpredictable liability and claims against the state. This bill might also serve as a precedent for particularized waivers in other areas. We respectfully suggest that expanding the state’s exposure to lawsuits should only be done after carefully weighing the potential for state liability with the seriousness of injuries to individuals caused by the mismanagement of the Legacy Land Conservation Program.

Thank you for the opportunity to provide these comments.