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GOVERNOR OF
HAWAII



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

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SUZANNE D. CASE
CHAIRPERSON
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KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

**Testimony of
SUZANNE D. CASE
Chairperson**

**Before the Senate Committee on
WATER AND LAND**

**Monday, February 4, 2019
1:15 PM
State Capitol, Conference Room 229**

**In consideration of
SENATE BILL 1260
RELATING TO THE TAKING OF NATURAL RESOURCES**

Senate Bill 1260 proposes to clarify that any police officer or agent of the Department of Land and Natural Resources upon whom the Board of Land and Natural Resources has conferred police powers may, in the performance of their primary duties, inspect certain items for compliance with Title 12, Chapters 6D, 6E, and 6K, Hawaii Revised Statutes, and any rule adopted thereunder, relating to the protection and conservation of natural resources. **The Department of Land and Natural Resources (Department) strongly supports this Administrative bill and offers the following comments.**

The protection and preservation of Hawaii's natural resources held in public trust by the State is one of the Department's most important priorities. The State has long recognized the value of our natural resources and has strived to conserve and maintain these resources, including wildlife, for the public's use and enjoyment, for their intrinsic and ecological values, and for their aesthetic, educational and cultural uses. To this end, many statutes and regulations in Hawaii specify the manner in which natural resources may be taken, such as hunting and fishing seasons, bag and possession limits, manner, place, means, and hours of taking as well as sex, maturity, size, and other distinctions. Many of these regulations, such as bag and size limits, are impossible to adequately enforce without the ability to perform inspections of persons engaged in the take of natural resources.

Under current laws and procedure, officers of the Department's Division of Conservation and Resources Enforcement (DOCARE) may not perform an inspection of a person engaged in taking natural resources unless they have probable cause of a violation or consent. This measure

would clarify that an enforcement officer may inspect certain items of an individual who is reasonably believed to be, or recently has been, engaged in an extractive activity. This inspection would include 1) any licenses, permits or written authorizations required to engage in the extractive activity; 2) any gear or method of take; and 3) any natural resources in possession. The inspection authority provided for in this measure will not extend to those individuals for whom an officer cannot reasonably articulate is, or has recently been, engaged in an extractive activity.

In Hawaii, concerns have been raised around the State constitution and the Article I language regarding Rights of Individuals and privacy. These articles closely resemble that of other states like California, where such inspection authority has been upheld as constitutional.¹ In addition Article XI makes clear the State of Hawaii's responsibility and authority to protect the natural environment. The two must be balanced.

Courts in states throughout the nation have maintained that extractive activities involving natural resources, including but not limited to hunting and fishing, are highly regulated activities, and as a consequence have a diminished reasonable expectation of privacy with regard to items directly related to such activity. The minimal intrusion associated with inspecting game or fish, a public resource, that have been taken from state land or waters can more than offset the concerns about an individual's right to privacy. That right to privacy would not even be questioned if they were not participating in the highly regulated activity.

With regard to concerns about the potential abuse of inspection authority, DOCARE officers undergo thorough training on how to properly interact with persons engaged in taking natural resources. Requesting the consent of an individual to submit to inspection will continue. The authority to inspect will only be used when an individual declines to provide consent or fails to comply with a lawful request to exhibit the aforementioned items upon demand.

The Department has a trust responsibility to ensure compliance with our laws and regulations. This measure is a necessary tool for the proper and efficient supervision and management of these highly regulated activities involving the take of Hawaii's natural resources.

Thank you for the opportunity to comment on this measure.

¹ See State of California v. Bouhn Maikhio, (“...we conclude that (1) the state's interest in protecting and preserving the wildlife of this state for the benefit of current and future generations of California residents and visitors constitutes a special and important state interest and need that is distinct from the state's ordinary interest in crime control, (2) the administrative regulations that are required to serve this interest — involving, for example, limits on the number, size, and species of fish or game that may be taken at different times and in different locations — are of such a nature that they would be impossible to adequately enforce if a game warden could stop, and could demand to be shown all fish or game that have been caught by, only those anglers and hunters who the warden reasonably suspected had violated the fish and game laws, and (3) the impingement upon privacy engendered by such a stop and demand procedure is minimal because (i) the stops are limited to those persons who have voluntarily chosen to engage in the heavily regulated activity of fishing or hunting and as a consequence have a diminished reasonable expectation of privacy with regard to items directly related to such activity, and (ii) the required demands are limited to items directly related to fishing and hunting and do not require disclosure of intimate or confidential matters as to which such persons retain a substantial privacy interest.”)



SB1260
RELATING TO THE TAKING OF NATURAL REOSURCES
Senate Committee on Water and Land

February 4, 2019

1:15 p.m.

Room 229

The Office of Hawaiian Affairs (OHA) Committee on Beneficiary Advocacy and Empowerment will recommend that the OHA Board of Trustees **COMMENT** on SB1260, which seeks to facilitate the enforcement of laws regulating the taking of natural and cultural resources.

OHA appreciates the intent of this measure, to reduce barriers that may inhibit conservation and resources enforcement officers from ensuring compliance with laws protecting our natural and cultural resources and sites. OHA also notes that other jurisdictions have implemented various warrantless inspection and search mechanisms for resource enforcement purposes, in recognition of their significant interest in protecting their respective natural resources; OHA itself has previously supported narrower, non-criminal administrative inspection proposals, based on the concerns raised by rural Native Hawaiian communities regarding the state's lack of capacity to address illegal fishing activity, and thereby protect their ability to perpetuate their traditional and customary and subsistence gathering practices.

However, OHA does have concerns regarding the breadth of this measure, which would allow for warrantless searches of any individual in any area suspected of having any natural resources in their possession, including resources gathered in the exercise of Native Hawaiian traditional and customary practices. Such authority may have an inadvertent but substantial chilling effect on Native Hawaiian cultural practitioners who may feel intimidated by the potential for an unexpected intrusion of privacy by law enforcement, any time they seek to gather resources or visit cultural sites in the course of conducting their constitutionally protected practices. The breadth of the proposed inspection authority may also raise constitutional challenges that would otherwise undermine the intent and effect of this measure.

To minimize the chilling potential of this measure and to mitigate any constitutional issues, OHA respectfully recommends amending SB1260 to 1) expressly recognize the rights of Native Hawaiian traditional and customary practitioners in statute; 2) limit the proposed inspection authority to discrete, specific, and highly-regulated areas, such as community based subsistence fishing areas and natural area reserves; and 3) limit enforcement actions arising out of evidence gathered from warrantless inspections to civil liability, rather than criminal liability, to read as follows:

S.B. NO.1260 S.D.1

A BILL FOR AN ACT

RELATING TO THE TAKING OF NATURAL RESOURCES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAI'I:

1 SECTION 1. The legislature finds that the State of Hawaii
2 has a substantial interest in regulating the extraction of its
3 natural resources under the Hawaii Constitution and statutory
4 scheme. As such, many laws and rules are in place for the
5 purpose of regulating and, where appropriate, prohibiting the
6 extraction of natural resources so as to establish the taking of
7 resources as highly regulated activities, including commercial
8 trade and distribution. These laws and rules are critical to
9 upholding the constitutional public trust in natural and
10 cultural resources, and in some cases are also specifically
11 intended to perpetuate Native Hawaiian traditional and customary
12 practices through the restoration, maintenance, and community-
13 based stewardship of natural resources harvested or otherwise
14 used in such practices.

15 However, these regulations cannot be effectively enforced
16 without proper inspection authority as a check and balance on
17 unfettered harvest. The legislature also finds that in light of
18 the number and nature of regulations that apply to resource

S.B. NO. 1260 S.D.1

1 extraction and the type of enforcement procedures that are
2 necessary to enforce such regulations, persons involved in the
3 extraction of resources, particularly in public areas subject to
4 specific, place based regulations, have a reduced expectation of
5 privacy under the Fourth Amendment, especially when engaged in
6 such activity.

7 The legislature further finds that a warrantless
8 administrative search scheme is the only reasonable way to
9 enforce natural resource regulations intended to prevent the
10 improper and illegal extraction of natural resources.

11 SECTION 2. Chapter 199, Hawaii Revised Statutes, is
12 amended by adding a new section to be appropriately designated
13 and to read as follows:

14 "§199- **Inspection; exhibit upon demand.** (a) Section
15 199-7 notwithstanding, any police officer or agent of the
16 department of land and natural resources upon whom the board of
17 land and natural resources has conferred police powers may, in
18 the performance of the officer's or agent's primary duties, stop
19 and temporarily detain any person within or within 50 yards of
20 the boundaries of any designated natural area reserve, wildlife
21 sanctuary, fishery management area, public fishing area, marine
22 life conservation district, community-based subsistence fishery

S.B. NO. 1260 S.D.1

1 management area, or fish replenishment area or any other area
2 designated under chapter 188F or rules adopted thereunder, whom
3 the officer or agent reasonably believes is, or recently has
4 been, engaged in fishing, hunting, gathering, or any other
5 activity involving the take of natural resources, and may
6 inspect any license, permit, stamp, tag, or any written
7 authorizations, as well as all natural resources in the person's
8 possession, including the contents of any bag or container of
9 any kind used to carry natural resources, and any equipment,
10 article, instrument, aircraft, vessel, vehicle, or conveyance
11 being used, to determine whether the person is in compliance
12 with title 12, chapters 6D, 6E, and 6K, and any rules adopted
13 thereunder, relating to the protection and conservation of
14 natural resources. For purposes of this section, "natural
15 resources" includes, but is not limited to, any archaeological
16 artifacts; minerals; any aquatic life or wildlife or parts
17 thereof, including their eggs; and any land plants or parts
18 thereof, including seeds.

19 (b) Any license, permit, stamp, tag, or other written
20 authorizations, any natural resources in the person's
21 possession, and any device or apparatus designed to be or
22 capable of being used to take natural resources, shall be

S.B. NO. 1260 S.D.1

1 exhibited upon demand to any person authorized by the department
2 of land and natural resources to enforce title 12, chapters 6D,
3 6E, and 6K, and any rule adopted thereunder, relating to the
4 protection and conservation of natural resources.

5 (c) Any person not otherwise engaged in an activity
6 protected by Article XII, Section 7, HRS 1-1, HRS 7-1, or any
7 other law, rule, or court opinion which protects the proper and
8 lawful exercise of traditional and customary Native Hawaiian
9 rights for subsistence, religious, and cultural purposes, found
10 to be violating this chapter or any rule adopted thereunder for
11 which a penalty is not otherwise provided, shall be guilty of a
12 petty misdemeanor and any natural resources in the person's
13 possession, and any device or apparatus designed to be or
14 capable of being used to take natural resources, shall be
15 subject to seizure.

16 (d) Any item, article, natural resource, or other
17 evidence, when obtained through an administrative inspection
18 pursuant to subsection (a) that occurs without probable cause of
19 a violation of law, may be used to pursue any and all authorized
20 civil penalties, including any authorized monetary fines,
21 natural resources-related community service, or asset
22 forfeiture."

S.B. NO. 1260 S.D.1

1 SECTION 3. This Act does not affect the right to engage in
2 the lawful exercise of traditional and customary Native Hawaiian
3 rights for subsistence, religious, and cultural purposes; i.e.,
4 activities protected by Article XII, Section 7, HRS 1-1, HRS 7-
5 1, or any other law, rule, or court opinion, or rights or duties
6 that have matured, penalties that were incurred, and proceedings
7 that were begun before its effective date.

8 SECTION 4. New statutory material is underscored.

9 SECTION 5. This Act shall take effect upon its approval.

S.B. NO. 1260 S.D.1

SB-1260

Submitted on: 2/2/2019 5:49:19 PM

Testimony for WTL on 2/4/2019 1:15:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Inga Gibson	Testifying for Pono Advocacy, For the Fishes	Support	Yes

Comments:

Testimony of The Nature Conservancy of Hawai'i
Supporting SB 1260 Relating to the Taking of Natural Resources
Senate Committee on Water and Land
Monday, February 4, 2019, 1:15 PM, Room

LATE

The Nature Conservancy of Hawai'i is a non-profit conservation organization dedicated to the preservation of the lands and waters upon which all life depends. The Conservancy has helped protect more than 200,000 acres of natural lands in Hawai'i and Palmyra Atoll. We manage 40,000 acres in 13 nature preserves and work in over 30 coastal communities to help protect the near-shore reefs, waters and fisheries of the main Hawaiian Islands. We forge partnership with government, private parties and communities to protect forests and coral reefs for their ecological values and the many benefits they provide to people.

The Nature Conservancy The Nature Conservancy of Hawai'i supports SB 1260.

The state's fishers, hunters, hikers, divers, and other natural resource users and enthusiasts have long called for more enforcement of natural resources regulations. A 2006 State Auditor's report concluded that the State's environmental enforcement officers are spread too thin, would benefit from additional training, and lack the equipment they need to do their jobs. Much of these circumstances continue to today.

In addition to funding, manpower and equipment, conservation and resource enforcement officers need the support of laws that will allow them to be effective. That's where SB 1260 comes in. This measure would establish an improved mechanism for officers to lawfully and reasonably inspect coolers, bags, and other containers to ensure that what people are harvesting is in compliance with State resource use rules. Someone following those rules has nothing to hide.

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SB-1260

Submitted on: 1/31/2019 8:06:24 PM

Testimony for WTL on 2/4/2019 1:15:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Erica Scott	Individual	Support	No

Comments:

SB-1260

Submitted on: 2/1/2019 10:42:24 AM

Testimony for WTL on 2/4/2019 1:15:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Benton Kealii Pang, Ph.D.	Individual	Support	No

Comments:

I support SB1260 because it enables law enforcement personnel to treat everyone as equal regarding natural resources, and gives them the ability to check on their compliance with state laws.

SB-1260

Submitted on: 2/2/2019 2:51:38 PM

Testimony for WTL on 2/4/2019 1:15:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
cheryl	Individual	Comments	No

Comments:

How does this apply to Native Hawaiian gathering rights? There is no permit or authority needed for cultural and traditional practices. IT seems that the "STATE" every session looks for ways to punish and fine people for doing what is part of their daily lives.

LATE

SB-1260

Submitted on: 2/3/2019 9:30:12 PM

Testimony for WTL on 2/4/2019 1:15:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Leimomi Khan	Individual	Comments	No

Comments:

Support with amendment.

At the outset, let me say that I full support the protection of our natural resources... it is a Native Hawaiian value to malama 'aina and natural resources, however, in reviewing this bill, I immediately became concerned about the impact that it might have on cultural practitioners, such as halau hula and the ability of students to pick flowers and foliage for the exercise of cultural practices without being unduly burdened by police officers or DLNR. The bill seems to be too broad and could be used to stop one who is legally and appropriately engaged in Traditional and Customary Native Hawaii gathering and other rights. Accordingly, I support this bill with the amendments offered by the Office of Hawaiian Affairs in their testimony on this bill.