



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

ON THE FOLLOWING MEASURE:

S.B. NO. 1403, S.D. 1, RELATING TO MARINE LIFE CONSERVATION DISTRICTS.

BEFORE THE:

SENATE COMMITTEE ON WAYS AND MEANS

DATE: Tuesday, February 19, 2019 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Room 211

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**
(For more information, contact David D. Day,
Deputy Attorney General, at (808) 587-2990)

Chair Dela Cruz and Members of the Committee:

The Department of the Attorney General appreciates the intent of this bill and offers the following comments.

The bill amends section 190-4.5, Hawaii Revised Statutes (HRS), to state that, with respect to the Maui Molokini shoal marine life conservation district, there shall be a total of forty permits issued, and twenty permitted vessels shall be granted entry into the crater at any one time.

The bill may be subject to challenge as a special law concerning lands owned by the State, in violation of article XI, section 5 of the Hawai'i Constitution, which states: "The legislative power over the lands owned by or under the control of the State and its political subdivisions shall be exercised only by general laws, except in respect to transfers to or for the use of the State, or a political subdivision, or any department or agency thereof." A general law must apply uniformly. *Sierra Club v. Dep't of Transp.*, 120 Hawai'i 181, 214, 202 P.3d 1226, 1259 (2009). There is a potential that the bill could be subject to challenge as an exercise of legislative power over State lands by special law because it only applies to a specific area of state marine waters. *Cf. Umberger v. Dep't of Land & Nat'l Res.*, 140 Hawai'i 500, 521, 403 P.3d 277, 298 (2017) (state marine waters are "state lands" under chapter 343, HRS).

This bill could obtain a similar outcome by enacting a general law. A law that applies uniformly to a particular class may be a general law if the class created is genuine and not illusory—that is, not logically limited to a class of one—and is otherwise reasonable. *Sierra Club*, 120 Hawai'i at 214, 202 P.3d at 1259. A class is not illusory if it could include other members in the future. *Id.* We note that House Bill No. 1133, H.D. 2, made an amendment to the previous draft—which only would regulate the Molokini marine life conservation district—to now regulate “any marine life conservation district not accessible by land.” A similar amendment to this bill may provide greater protection against a legal challenge.

We recommend that the bill be amended to regulate marine life conservation districts by general law, if that is in accordance with the legislature’s intent. Alternatively, we recommend that the bill be deferred.

LATE

SB-1403-SD-1

Submitted on: 2/18/2019 10:02:08 AM

Testimony for WAM on 2/19/2019 9:30:00 AM

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

Comments:

LATE

SB-1403-SD-1

Submitted on: 2/18/2019 12:19:02 PM

Testimony for WAM on 2/19/2019 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Andrea Quinn	Individual	Support	No

Comments:

Dear Honorable Committee Members:

Please support SB1403. Coral reefs are already dying, and many of those surviving are under stress from warming oceans, making them more susceptible to disease. Adding snorkelers with chemicals from sunscreen and toiletries on their bodies just adds to that stress.

By issuing permits for Molokini, we protect the health of the reef and thus a valuable economic resource

Thank you for the opportunity to present my testimony.

Andrea Quinn

Kihei

DAVID Y. IGE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

Testimony of
SUZANNE D. CASE
Chairperson

Before the Senate Committee on
WAYS AND MEANS

Tuesday, February 19, 2019
9:30 AM
State Capitol, Conference Room 211

In consideration of
SENATE BILL 1403, SENATE DRAFT 1
RELATING TO MARINE LIFE CONSERVATION DISTRICTS

Senate Bill 1403, Senate Draft 1 proposes to provide that a total of forty permits shall be issued for the Maui Molokini Shoal Marine Life Conservation District and that twenty permitted vessels shall be granted entry to the crater at any one time. **The Department of Land and Natural Resources (Department) opposes this measure.**

There are currently forty Molokini Shoal Marine Life Conservation District (MLCD) use permits in operation, and this number will not increase. Under Chapter 13-31, Hawaii Administrative Rules, the Department may reissue existing permits, but does not allow the issuance of new permits or the transfer of existing permits. As permits are relinquished or revoked, the total number of Molokini permits is reduced. This regulated attrition was established to grandfather existing commercial operators while gradually reducing human impacts to Molokini's unique underwater ecosystem. Despite these limits on the number of commercial vessels permitted to moor at Molokini, the number of visitors continues to grow.

In 2010, a social carrying capacity study found that over 2/3 of all visitors felt crowded and that too many boats were in Molokini crater. At the time, visitor numbers were around 300,000 per year. Now, Molokini has well over 350,000 visitors annually. A 2016 reef predator movement study found that fifty percent of omilu (a key nearshore reef predator) were displaced outside of the shallow crater into deeper water when the number of boats exceeded 12. The Department is currently working with permitted Molokini operators to explore how to best address this overcrowding concern while minimizing impacts to commercial tour operations.

SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
FIRST DEPUTY

M. KALEO MANUEL
DEPUTY DIRECTOR - WATER

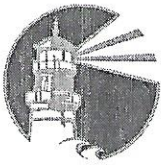
AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

Molokini commercial use data show that the average number of boats in the crater at the same time during peak use periods is ten and that 12 boats is exceeded about 1/3 of the days. There are only about 5 days a year when the total number of boats in Molokini crater exceeds 20. The attached photo shows 12 boats moored in Molokini Crater. Based on existing numbers, a workable solution seems highly attainable. Senate Bill 1403, Senate Draft 1 would tie the Department's hands and effectively prevent it from managing the very resources the Legislature has entrusted to it.

The Department strongly believes that any management changes are best pursued through the chapter 91 administrative rulemaking process to allow for broader stakeholder engagement and public input. Other Maui ocean users, such as recreational boaters and cultural practitioners, have not had an opportunity to discuss the actions proposed in this Bill or to provide input. The passing of this bill would be premature given the lack of stakeholder engagement.

Thank you for the opportunity to comment on this measure.





COMMITTEE ON WAYS AND MEANS

Senator Donovan M. Dela Cruz, Chair
Senator Gilbert S.C. Keith-Agaran, Vice Chair

NOTICE OF DECISION MAKING

DATE: Tuesday, February 19, 2019
TIME: 9:30 AM
PLACE: Conference Room 211

**TESTIMONY OF THE OCEAN TOURISM COALITION IN STRONG SUPPORT OF
SB1403 SD1 RELATING TO MARINE LIFE CONSERVATION DISTRICTS**

Chair Dela Cruz, Vice Chair Keith-Agaran and Members of WAM:

My name is James E. Coon, President of the Ocean Tourism Coalition (OTC),
**speaking in Strong Support of SB 1403 SD1 Relating to Marine Life Conservation
Districts.**

The OTC represents over 300 small ocean tourism businesses state wide. All of them operate from State Boating Facilities managed by DLNR/DOBOR/DAR. There are 40 Permitted Snorkel Dive businesses that are permitted access Molokini Shoals MLCD's on a daily basis--weather permitting--to enjoy the Crater before the Trades come in. These 40 Companies annually contribute almost \$3,000,000 to the General Fund and the Boating Special Fund, employ hundreds of people and are an important component to Maui's economy and Visitor industry.

Molokini Shoals MLCD is a very unique place. It is located at the edge of the Alenuihaha Channel. It is the most popular snorkel dive destination in Maui County and possibly the State. The coral is healthy the ecosystem robust the visitor experience safe and excellent. However the trade winds blow into the Crater almost every day often starting between 10:00-11:00 am making all boats leave the area giving about a three hour window of Crater access. The time from 8:00-10:00 is the most valued time in the Crater and the time almost everyone would prefer to be there to conduct snorkel/dive tours.

Because there are 40 Commercial Permits for the Crater and only 24 moorings, each company has had to modify their schedule so that they share time on a specific mooring. It takes a minimum of 1.5 hours to conduct a quality snorkel/dive tour at Molokini.

Typically each mooring accommodates up to two vessels per day. Currently there are, on occasion, unpermitted vessels that “drift” inside the crater with their guests swimming in the Crater. If this persists it will lead to overcrowding in the Crater in the future. This legislation proactively assures that the cap of 40 Commercial Use Permits for Molokini Crater will not be increased as well as a workable limit of 20 Permitted Commercial Vessels that can be in the Crater at any one time. It will also prohibit non permitted commercial vessels from entering the Crater.

There are only 24 Commercial Moorings in Molokini Crater so it cannot be overcrowded if non permitted commercial vessels are prohibited from accessing the crater. The cap of 20 vessels at any given time leaves four unused moorings available when wind and sea conditions may render certain moorings in the Crater unsafe to use.

The Molokini Operators have managed to work together for over four decades. There is currently not a problem in Molokini but this legislation will ensure that Molokini Shoals MLCDC remains pristine and accessible in the future. It also ensures that the 40 Molokini Permit holders will have adequate time in the Crater to conduct their tours and deliver the world class experience our guests deserve.

We humbly ask you to please pass SB 1403 SD1.

Sincerely,



James E. Coon, President

Ocean Tourism Coalition

COMMITTEE ON WAYS AND MEANS
Senator Donovan M. Dela Cruz, Chair
Senator Gilbert S.C. Keith-Agaran, Vice Chair

DATE: Tuesday, February 19, 2019
TIME: 9:30
PLACE: Conference Room 221
State Capitol
415 South Beretania Street

TESTIMONY BY CALYPSO IN STRONG SUPPORT TO SB1403 RELATING TO MOLOKINI:

Chair Dela Cruz, Vice Chair Keith-Agaran and Members of WAM Committee:

Calypso Charters and its affiliates employ close to 100 people in Hawaii’s tourism industry. We have been operating in Molokini crater for more than 30 years. We support SB1403.

Molokini is a perfect example of a successful Marine Life Conservation District (“MLCD”). The reef and biomass population is healthy, and the permitted operators play by the rules. In Molokini, there are 40 permit holders and only 26 moorings. Despite this gap, the Molokini operators have managed to work together for over three decades without significant user conflict, and minimal impact on the resource. In fact, reports cited by the Division of Aquatic Resources (“DAR”) concluded the “coral reefs at Molokini are considered to be relatively healthy in spite of substantial marine recreation use and impacts associated with these activities are mitigated by the site’s isolation and depth.”

Molokini Existing Limitations and Regulations

Molokini’s use is already extremely limited by mother-nature, and there are more than 20 different rules that operators must abide by.¹ Our operation visits Molokini about 1.5 hours a day for about 300 days a year or less. The natural wind limitations of Molokini force all operators out by 10:00a.m., if not earlier. Molokini is often totally inaccessible due to weather conditions. In short, Molokini is already a heavily regulated resource with limited access and extensive rules and prohibitions. The resource is not experiencing any problems and mother-nature limits use.

Benefits of Bill

Unfortunately, based on poor rule drafting, *unpermitted* commercial vessels may access Molokini and “drift” dive, as long as they don’t moor inside the crater. This bill would limit commercial use of Molokini to only *permitted* vessels. Additionally, permitted vessels are regulated by the permit and agree to certain rules and regulations. Those rules and regulations help preserve and protect Molokini. On the contrary, non-permitted vessels avoid the permit restrictions. This bill will further reduce the number of vessels in the crater and make certain the vessels are subject to the permit restrictions.

¹ Existing regulations, to name a few: No new permits are issued for Molokini (H.A.R. 13-31-5); DAR No Longer Authorizes Temporary Mooring Permits Pursuant to H.A.S. 13-257-52(c); Restrictions on Changing Vessel Size, Height, and/or Weight (Molo Permit, ¶20); Permits are Non-Transferable (H.A.R. 13-231-5); Pre-Trip Passenger Consent Forms Required from All Crew and Passengers (Molo Permit, ¶13); Cannot increase passenger requirement; Zone Area Restrictions; Existing zone restrictions aren’t enforced; Captain experience requirement to pilot Molokini (Molo Permit, ¶17); GPS required for all vessels in Molokini (Molo Permit, ¶6); SCUBA and SNUBA limitations (Molo Permit, ¶10); Monthly Reporting Requirements (Molo Permit, ¶14); Cleaning Snorkel Gear Prohibited (Molo Permit, ¶11); BBQ Prohibited (Molo Permit, ¶11); Speed Restrictions (H.A.R. 13-357-55); Damage to reef prohibited (H.A.R. 13-231-3); 2.5 time limitation (H.A.R. 13-257-3); Vessel Repairs Prohibited (Molo Permit, ¶9); No Fishing or Spearfishing (H.A.R. 13-231-3); No Fish feeding (H.A.R. 13-231-4); No overnight mooring (H.A.R. 13-257-3(b)); and No anchoring (H.A.R. 13-357-55, H.A.R. 13-231-6).

Furthermore, based on the current rules, there is no limitation on the number of permit holders that may enter the crater at any one time. In theory, all 40 boats could enter the crater at any time. SB1403 would limit entry to 20 permit holders at any one time.

Department of Aquatics (DAR) Reports are Inconclusive

Any further reduction of Molokini moorings *below* 20 is unnecessary and unreasonable. It takes a minimum of 20 moorings to service the 40 permitted tour boats, and the boats need at least 90 minutes to conduct a quality tour. If not, companies will go out of business. DAR cites two reports for its justification to overhaul Molokini.

Reef Predators

DAR cites a reef predator report as justification for reducing moorings to 12, which will put companies out of business. Out of the 5 species studies, only Omilu visited the crater during snorkeling hours.

During the 12 hours of daylight, the Omilu were temporally displaced during peak hours between 8:00am and 10:00am, but that “the exact mechanism of displacement [of Omilu] (from A to B) is uncertain.” The report concluded that “further research is needed”, partially because the report was unable to determine the cause of the displacement.

There are so many unknowns in the report, it seems unreasonable to put companies out of business with 12 moorings. Most importantly, “*the consequences of the displacement of bluefin trevally from the shallow waters of Molokini crater during peak hours in human use are unknown.*” That is directly from the report cited by DAR. Also, the report is based on acoustic sound heard by the Omilu. However, DAR isn’t certain of the frequency that Omilu hear sound, and that “the physiological effect of intense anthropogenic noise on fishes is poorly understood.” The method of collecting data also contained important assumptions. For instance, “fluctuations in detection ranges in response to environmental noise are real constraints...and likely introduce a source of error in making conclusions about animal movements” in the report. This is too much error and uncertainty to put long-standing companies out of business.

Customer Satisfaction

DAR also cites a customer satisfaction survey as evidence for reducing moorings below 20. In the survey, ***95% of the visitors that were polled about Molokini stated they were highly satisfied.*** Amazingly, nobody was dissatisfied with the Molokini experience. Also over 80% charter boat passengers in Molokini learned that feeding fish and touching marine life is harmful. These are very encouraging and positive numbers.

Conclusion

Molokini trips offer education along with lifeguarded, supervised natural exploration. Tour boats take pictures and leave bubbles. Tour boats do not feed fish, do not catch fish, do not BBQ in the crater, are faithful stewards of this environment and are the most motivated to keep it pristine. There is currently not a problem in Molokini, but this legislation will ensure that Molokini Crater MLCD remains pristine and usable in the future.

Zachary LaPrade, Calypso Charters

Testimony of The Nature Conservancy of Hawai'i
Opposing SB 1403 SD1 Relating to Marine Life Conservation Districts
Senate Committee on Ways and Means
Tuesday, February 19, 2019, 9:30 AM, Room 211

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 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 opposes SB 1403 SD1. We don't wish to harm the businesses of tour operators who are responsible, caring and who want to see Molokini's resources thrive not just for the health of their businesses, but also their ecological values and other benefits they provide to all people.

However, this bill:

- Does not reduce current crowding and the effects on marine life at Molokini Shoal Marine Life Conservation District (Molokini);
- Eliminates the ability of the State to carry out its public trust responsibility to manage activities and resources at Molokini; and
- Authorizes levels of use shown to have negative impacts on marine life at Molokini.

Please defer this measure to ensure that a comprehensive process informed by user, community, cultural, and scientific engagement is undertaken to address this important issue.

With all respect to the Legislature's authority to establish overarching policy and law, detailed natural resource management strategies and related use requirements and restrictions should be addressed by the State's comprehensive Chapter 91 rulemaking and stakeholder engagement processes. That is clearly the intent of HRS §190-4.5, which this bills seeks to modify with an exemption for a single location.

DLNR Division of Aquatic Resources' studies have shown that both coral reef predators and the visitor experience is affected by over-crowding at Molokini. The State's 2010 social carrying capacity study finds that over 2/3 of all visitors report feeling crowded and report too many boats at Molokini. And, DAR's 2016 reef predator movement study found 50% of 'ōmilu (a key reef predator) are displaced outside of the shallow crater into deep water when the number of boats exceeds 12.

Coral reef predators occupy the highest level of that ecosystem's food chain and serve a critical ecological purpose. By eating other fish, they structure the reef community and increase the productivity of the system down food chain. If mobile predators are leaving because of activity levels, it is very reasonable to think that less mobile fish that can't leave are also altering their behavior in response to all of the disturbance, therefore, not filling their ecological role. All of this can make the ecosystem less stable and vulnerable to other threats like climate change.

Levels of use at Molokini by commercial operators should be set after careful consideration of impacts to resources and all interested parties. Please defer this bill to ensure that process is undertaken.

Thank you.

The Nature Conservancy, Hawai'i Program

February 16, 2019

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Testimony of Denver Saxton Coon on behalf of Trilogy Corporation, *in Strong Support* of SB1403 SD1, Relating to Marine Life Conservation Districts.

COMMITTEE ON WAYS AND MEANS

Senator Donovan M. Dela Cruz, Chair
Senator Gilbert S.C. Keith-Agaran, Vice Chair

NOTICE OF DECISION MAKING

DATE: Tuesday, February 19, 2019
TIME: 9:30 AM
PLACE: Conference Room 211
State Capitol
415 South Beretania Street

Chair Dela Cruz, Vice Chair Keith-Agaran, and members of WAM:

Aloha. My name is Denver Saxton Coon. I am general counsel for Trilogy Corporation dba Trilogy Excursions on the island of Maui. Trilogy Excursions currently conducts permitted commercial tours at the Molokini Shoal Marine Life Conservation District (“Molokini MLCD”) and is testifying in **strong support** of SB1403 SD 1 (the “Bill”).

There are currently 40 commercial vessels authorized by permit to moor at the Molokini MLCD. The permits are issued by the Department of Land and Natural Resources’ Division of Aquatic Resources (“DLNR-DAR”). However, unpermitted vessels are currently conducting commercial operations in the Molokini MLCD due to a loophole in the wording of the rules. This loophole states that vessels must be permitted in order to moor but fails to address unpermitted commercial operators. This has resulted in unpermitted vessels conducting “drift dive” tours within the crater without the use of a mooring. This not only has led to the overcrowding of the resources but numerous safety concerns. Accordingly, one of the intents of the Bill is to close this loophole for the welfare of the resources and the commercial and recreational visitors to the Molokini MLCD.

In addition, the Bill would limit the number of vessels that may be inside the Molokini MLCD to twenty at any one time. As it currently stands, there are no limitations on the number of permitted and unpermitted vessels that may use the area at any one time. The intent of Bill is to limit commercial use but not restrict access by recreational users.

Please pass SB1403 SD1 with an allowance for 20 permitted vessels at any one time and a cap of 40 Molokini MLCD Permits.

Mahalo,

Denver Saxton Coon
Trilogy Corporation
General Counsel
denver.coon@sailtrilogy.com