

DAVID Y. IGE
GOVERNOR OF
HAWAII



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

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

OFFICE OF CONSERVATION AND COASTAL LANDS
POST OFFICE BOX 621
HONOLULU, HAWAII 96809

**Testimony of
SUZANNE D. CASE
Chairperson**

**Before the Senate Committee on
AGRICULTURE AND ENVIRONMENT**

**Wednesday, February 3, 2021
1:00 PM
State Capitol, Via Videoconference**

**In consideration of
SENATE BILL 580
RELATING TO BEACHES**

Senate Bill 580 proposes to exclude locally sources sand from the definition of “water pollutant” within Hawaii’s water pollution statutes. **The Department of Land and Natural Resources (Department) supports this measure.**

One amongst many of the Department’s missions is to manage the state’s coastal and marine resources. The Department is engaged in a wide range of conservation and capital improvement efforts that involve activities in or near marine waters. These efforts include managing the State’s marine and freshwater resources and protecting aquatic habitat and reefs through the Division of Aquatic Resources (DAR), management of small boat harbors and ocean recreation areas through the Division of Boating and Ocean Recreation (DOBOR), as well as conservation and restoration of public beach and coastal resources through the Office of Conservation and Coastal Lands (OCCL).

Many of the Department’s projects require 401 Water Quality Certifications (WQCs) for activities in state waters. It has been the Department’s experience that approvals for 401 WQCs typically require substantial resources and time to complete. While such permits are essential for many classes of projects that pose a threat to water quality, the Department feels that it can protect water quality without having to go through the 401 WQC process for small scale beach restoration and management efforts.

The Department recently published a Programmatic Environmental Assessment (PEA) http://oeqc2.doh.hawaii.gov/EA_EIS_Library/2020-08-08-ST-FEA-Statewide-Small-Scale-

[Beach-Restoration-Program.pdf](#) to support its Small Scale Beach Restoration (SSBR) program. The PEA contains in-depth discussions about water quality and necessary best management practices to protect water quality during sand placement activities. The PEA contains strict requirements on sand quality and quantity such that water quality should be protected when small scale beach restoration projects are implemented. It is the goal of the Department to streamline the permit process for small scale beach restoration projects at the state and federal levels. These efforts are aimed at protecting and enhancing our beaches from the effects of sea level rise. Senate Bill 580 supports our efforts.

It is the Department understanding that this bill is not intended to limit the protections under the Federal Clean Water Act, nor does it do so. Rather, the Department feels this bill is intended to facilitate and expedite beach restoration project that utilize clean Hawaiian native beach sand.

Thank you for the opportunity to comment on this measure.



**WRITTEN TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2021**

ON THE FOLLOWING MEASURE:

S.B. NO. 580, RELATING TO BEACHES.

BEFORE THE:

SENATE COMMITTEE ON AGRICULTURE AND ENVIRONMENT

DATE: Wednesday, February 3, 2021 **TIME:** 1:00 p.m.

LOCATION: State Capitol, Via Videoconference

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**
(For more information, contact Dale Sakata,
Deputy Attorney General, at 587-3050)

Chair Gabbard and Members of the Committee:

The Department of the Attorney General provides the following comments.

This bill amends the definition of “water pollutant” in section 342D-1, Hawaii Revised Statutes (HRS), to exclude sand that is:

- (1) Naturally occurring sand sourced from a beach, stream mouth, or channel that is located in the State; and
- (2) Utilized on the adjoining beach or littoral cell for the purposes of beach erosion mitigation, sediment management, beach restoration, erosion control, or dune restoration.

We believe this proposed amendment will likely be held to be in contradiction with provisions of the federal Clean Water Act (CWA) and, therefore, in violation of the Supremacy Clause of the U.S. Constitution.

The case of *Northern Plains Resource Council v. Fidelity Exploration & Development Co.*, 325 F.3d 1155 (9th Cir. 2003), examined a similar situation. In that case, the Ninth Circuit held that Montana did not have the authority to create a permit exemption to the CWA for discharges that would otherwise be subject to the National Pollution Discharge Elimination System permitting process. *Northern Plains* at 1157-1158. Absent statutory authority in the CWA for Montana to create such exemptions,

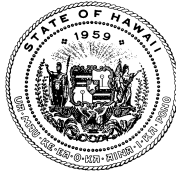
Montana law could not contradict or limit the scope of the CWA, as that would be a violation of the Supremacy Clause of the U.S. Constitution. *Id.* at 1165.

Based on the holding of the United States Court of Appeals for the Ninth Circuit in *Northern Plains*, we believe the amendment proposed by this bill will likely be held to contradict provisions of the CWA and, therefore, also in violation of the Supremacy Clause of the U.S. Constitution.

Even before a court has the opportunity to adjudicate the issue, this proposed amendment may result in Hawai'i losing its authorization from the United States Environmental Protection Agency to act as the permitting authority for the CWA.

The Hawai'i Department of Health is allowed to administer the water pollutant permitting program under the CWA through Hawaii's laws because its laws are not less stringent than the CWA. See 33 U.S.C. § 1370. The current HRS definition of "water pollutant" is modeled after CWA § 502(6), which does not exclude any types of sand. Thus, the proposed amendment will result in Hawaii's law having a less stringent standard than that established in the CWA. As a result, Hawaii will risk losing its authorization as the permitting authority.

For these reasons, we request that this bill be held.



STATE OF HAWAII
DEPARTMENT OF HEALTH
P. O. Box 3378
Honolulu, HI 96801-3378
doh.testimony@doh.hawaii.gov

WRITTEN
TESTIMONY ONLY

**Testimony in OPPOSITION to SB0580
RELATING TO BEACHES**

SENATOR MIKE GABBARD, CHAIR
SENATE COMMITTEE ON AGRICULTURE AND ENVIRONMENT

Hearing Date: 2/3/2021

Room Number: Via Videoconference

1 **Fiscal Implications:** None.

2 **Department Testimony:** The Department of Health (Department) respectfully opposes this
3 measure. The purpose of this measure is to amend Hawaii Revised Statutes, §342D-1 definition
4 of “water pollutant” by specifying that sand shall not be considered a water pollutant if it is
5 naturally occurring sand sourced from a beach, stream mouth, or channel that is located in the
6 State; and utilized on the adjoining beach or littoral cell for the purposes of beach erosion
7 mitigation, sediment management, beach restoration, erosion control or dune restoration.

8 All states are required to comply with the Federal Clean Water Act (CWA) requirements.
9 Pursuant to federal regulations, all states, including Hawaii’s “Water Pollution” statutes are
10 required to be at least as stringent as the federal standards prescribed by the CWA. CWA
11 §502(6), excerpted below, defines “sand” as a “pollutant” and does not provide exclusions for
12 any particular types of sand.

13 “Except as otherwise specifically provided, when used in this Act:

14 . . .

15 (6) The term “pollutant” means dredged spoil, solid waste, incinerator residue,
16 sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials,

1 radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt
2 and industrial, municipal, and agricultural waste discharged into water. This term
3 does not mean (A) “sewage from vessels or a discharge incidental to the normal
4 operation of a vessel of the Armed Forces” within the meaning of Section 312 of this
5 Act; or (B) water, gas, or other material which is injected into a well to facilitate
6 production of oil or gas, or water derived in association with oil or gas production and
7 disposed of in a well, if the well used either to facilitate production or for disposal
8 purpose is approved by authority of the State in which the well is located, and if such
9 State determines that such injection or disposal will not result in the degradation of
10 ground or surface water resources.” (emphasis added)

11 Amending Hawaii’s definition of “water pollutant” may cause Hawaii to be in violation of the
12 CWA and related federal regulations.

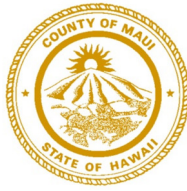
13 The Department supports a separate bill, SB0367, that proposes to eliminate the requirement for
14 a Section 401 Water Quality Certification for any applicant that has received notice of
15 authorization to proceed from the Department of Land and Natural Resources, Office of
16 Conservation and Coastal Lands, under the small scale beach restoration program. That bill
17 would address the concerns that SB0580 seeks to resolve.

18 **Offered Amendments:** None.

19 Thank you for the opportunity to testify on this measure.

Michael P. Victorino
Mayor

Sananda K. Baz
Managing Director



OFFICE OF THE MAYOR
COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
www.mauicounty.gov

February 3, 2021

TESTIMONY OF MICHAEL P. VICTORINO
MAYOR
COUNTY OF MAUI

BEFORE THE SENATE COMMITTEE ON AGRICULTURE AND ENVIRONMENT
Wednesday, February 3, 2021, 1:00 p.m.
Via Videoconference

SB580 RELATING TO BEACHES

Senator Mike Gabbard, Chair
Senator Clarence K. Nishihara, Vice Chair
Honorable members of the Committee on Agriculture And Environment

Thank you for this opportunity to testify in **STRONG SUPPORT** of **SB580**.

This bill amends the definition of "water pollutant" as used in chapter 342D, HRS, relating to water pollution, to exclude locally sourced sand that meets certain conditions.

This reclassification of sand would help streamline beach and dune restoration projects as it would allow sand to be more readily used in restoration projects. This has been a big barrier for past projects such as dune restoration and beach replenishment. These projects are essential to help mitigate against the effects of sea-level rise.

I strongly urge you to pass this measure, SB580.



Testimony Presented Before the
SENATE COMMITTEE ON AGRICULTURE AND ENVIRONMENT
Wednesday, February 3, 2021
1:00 p.m.
State Capitol (via videoconference)

By Andrew Wycklendt, President
Hawaii Shore and Beach Preservation Association

In consideration of
SENATE BILL 580 RELATING TO BEACHES

Senate Bill 580 clarifies that naturally occurring sand on Hawai'i beaches is not a "water pollutant." The bill proposes to amend Section 342D, Hawaii Revised Statutes, to exclude beach sand from the definition of "water pollutant," provided that it is naturally-occurring beach sand utilized on an adjoining beach or littoral cell for the purposes of beach erosion mitigation, sediment management, beach restoration, erosion control, or dune restoration.

The Hawaii Shore and Beach Preservation Association (HSBPA)* strongly supports Senate Bill 580. Government agencies, coastal land owners, and other stakeholders involved in beach management share a common interest in supporting innovative and environmentally-friendly solutions for managing coastal erosion to preserve our beaches and shoreline environments. Beach erosion is a problem throughout our state. Erosion management techniques such as sand pushing, stream mouth clearing, sand bypassing and back-passing, and nourishment from nearshore sand deposits can be effective means for addressing beach erosion problems and threats to coastal infrastructure when surplus sand is available within a littoral (beach) system to conserve and restore beaches. These types of projects using clean locally-sourced sand provide nature-based alternatives to shoreline hardening options, such as the construction of seawalls and rock revetments, which have been shown to lead to beach narrowing and loss on chronically eroding beaches.

It can be very difficult to implement these nature-based sand management and beach restoration projects in a timely, cost-effective manner because clean naturally-occurring beach sand is considered a "water pollutant" by the State, even if the sand is moved from one section of a beach to another and placed below the high water line. The HSBPA feels that the State's interpretation of clean beach sand as a "water pollutant" for the types of projects described above is an unnecessarily strict interpretation of the Federal Clean Water Act (CWA). As a result of this interpretation, these types of projects are required to go through a CWA Section 401 Water Quality Certification (401 WQC). Often, these projects need to be implemented in a matter of days to weeks in response to a sudden erosion episode. The lengthy 401 WQC process, administered by the Department of Health, can take months to years making implementation of these types of projects time and cost-prohibitive. Excluding clean beach sand from the Definition of "water pollutant," as described above, will support government and stakeholder efforts to manage and preserve our beaches.

The Department of Land and Natural Resources through its Office of Conservation and Coastal Lands recently completed a statewide programmatic environmental assessment for small scale beach restoration projects that assesses potential impacts of localized sand management and beach restoration projects like those described above. The environmental assessment, intended to update the department's permitting programs, provides best management practices including sand and water quality monitoring guidelines based on best-available science and environmentally sound engineering practices.

*The Hawaii Shore and Beach Preservation Association (HSBPA, <https://sites.google.com/site/hisbpa/>), formed in 2014 is an organization of private sector, academic, and government professionals, students and local community members dedicated to the preservation and restoration of Hawaii's beaches and coastal environments. The HSBPA aims to bring together various members of the coastal community to foster dialogue and cooperation on beach and coastal resource conservation, management, and regulation; supporting professional development of chapter members; and providing education to students and community members on Hawaii's beaches and coastal environments.

Thank you for considering our testimony on the bill.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew Wycklendt". The signature is fluid and cursive, with a prominent initial "A" and a stylized "W".

Andrew Wycklendt
President, Hawai'i Shore and Beach Preservation Association

SB-580

Submitted on: 2/2/2021 12:23:30 PM

Testimony for AEN on 2/3/2021 1:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Ted Bohlen	Testifying for Hawaii Reef and Ocean Coalition	Oppose	No

Comments:

To: The Honorable Michael Gabbard, Chair, The Honorable Clarence Nishihara, Vice Chair, and Members of the Senate Committee on Agriculture and Environment

From: Hawaii Reef and Ocean Coalition (by Ted Bohlen)

Re: Hearing SB 580–RELATING TO BEACHES.

Wednesday February 3, 2021, 1:00 p.m., by videoconference

Position: **OPPOSE SB502.**

The HAWAI'I REEF AND OCEAN COALITION – HIROC – was formed in 2017 by coral reef scientists, educators, local Hawaii environmental organizations, elected officials, and others to address the crisis facing Hawaii's coral reefs and other marine life. Coral reefs are already being severely harmed by ocean waters that are warming and becoming more acidic as a result of greenhouse gas emissions worldwide. Coral reefs are also being harmed in Hawaii by sediment and nutrient runoff from the land, by overfishing, especially of herbivores, and sunscreen chemicals.

This Bill proposes to exclude locally sourced beach sand from the definition of "water pollutant" within Hawaii's water pollution statutes. The bill raises both significant policy and legal concerns.

On the policy side, the bill proposes to allow relocating sand to adjacent beaches or littoral cells. It claims in Section 1 that such relocation can be performed "with no negative impacts to water quality or marine and benthic resources beyond those occurring naturally due to wave action, currents, and littoral transport." HIROC disagrees regarding the impact of relocating beaches on marine and benthic communities. Beaches are not lifeless sand, but ecosystems full of life. Digging or sucking them up and dumping them on a new location can have significant impacts on the ecosystem and life therein and adjacent, including corals. As was stated in a 2005 article in the Oxford Academic Journal BioScience of the American Institute of Biological Science (<https://academic.oup.com/bioscience/article/55/10/887/274435>):

"State resource agencies' preference for beach nourishment to combat shoreline retreat is motivated by a well-founded desire to avoid the negative impacts of hardened structures on the recreational and biological habitat values of ocean beaches; however, any presumption that nourishment projects are ecologically benign is derived from an incomplete and flawed body of science."

HIROC does not opine regarding the economic and social pressures to relocate sand, but rejects the notion that it is always benign from an ecosystem perspective, even if the sand is locally sourced and applied only to adjacent beaches or littoral cells.

On the legal side, the bill says it is not its intent to circumvent the provisions of the Clean Water Act or the State's water quality regulations, but rather to clarify that locally sourced beach sand is a naturally occurring material along Hawaii's beaches and does not constitute a water pollutant. However, the definition of "water pollutant" in Hawaii's Water Pollution statute, HRS 342D-1, is taken nearly verbatim from the federal Clean Water Act, which does not exclude sand as a water pollutant. If this bill passes, the Hawaii Water Pollution law would be less inclusive than the Clean Water Act. State water pollution law is not supposed to be less stringent than federal law. This proposed change to Hawaii law is overbroad and unnecessary, as sand has been relocated for many years without the need to revise the law.

Mahalo for the opportunity to testify!

HAWAII REEF AND OCEAN COALITION (by Ted Bohlen).