

JOSH GREEN, M.D.
GOVERNOR | KE KIA'ĀINA

SYLVIA LUKE
LIEUTENANT GOVERNOR | KA HOPE KIA'ĀINA



STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAII'
DEPARTMENT OF LAND AND NATURAL RESOURCES
KA 'OIHANA KUMUWAIWAI 'ĀINA

P.O. BOX 621
HONOLULU, HAWAII 96809

DAWN N.S. CHANG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE
MANAGEMENT

RYAN K.P. KANAKA'OLE
FIRST DEPUTY

DEAN D. UYENO
ACTING 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

Testimony of
DAWN N. S. CHANG
Chairperson

Before the House Committee on
JUDICIARY & HAWAIIAN AFFAIRS

Tuesday, February 13, 2024
2:00 PM

State Capitol, Conference Room 325 & Videoconference

In consideration of
HOUSE BILL 1544 HOUSE DRAFT 1
RELATING TO STATE WATER CODE PENALTIES

House Bill 1544, House Draft 1, proposes to: add a minimum penalty and a maximum penalty per violation of the State Water Code; expand the types of potential violations of the State Water Code; and make each day that a violation exists or continues to exist a separate offense. This bill also requires the Commission on Water Resource Management (Commission) to consider certain factors when imposing penalties and makes the setting, charging, and collecting of administrative fines by the Commission mandatory, rather than discretionary. **The Department of Land and Natural Resources (Department) strongly supports this measure.**

The Department has found that the current maximum penalty of \$5000 per violation in Hawai'i Revised Statutes (HRS) Section 174C-15 does not have a sufficient deterrent effect anymore. For example, even a one-time violation of an interim instream flow standard can lead to the diversion of millions of gallons of water and if the violating entity is charging end-users for the delivery of this stream water, \$5000 will simply be the cost of doing business. Such violations have extreme detrimental effects on public trust uses, which are water in its natural state, i.e. the stream itself and native aquatic life, domestic uses dependent on the stream, and traditional and customary Native Hawaiian practices.

HRS Section 174C-15 has only been amended once since its adoption by Act 45, Session Laws of Hawai'i (SLH) 1987 (Act 45). In 2004, Act 142 raised the maximum penalty from \$1,000 to \$5,000 and added subsection (d). However, in its 1994 Report to the State Legislature, the Review Commission on the State Water Code, pursuant to Section 5 of Act 45, had already proposed a maximum fine of \$25,000 for reckless, knowing, or intentional violations.

The Hawai‘i Supreme Court held that the Hawai‘i State Constitution in Article XI Section 7 designated the Commission as the “*primary guardian*” of the public trust resource - water.¹ To be consistent with the Department of Health’s (DOH) authority to issue penalties for violations that affect water, arguably the state’s most precious public trust resource, and to increase deterrence, the Department appreciates the raising of the penalty ceiling from \$5,000 to \$60,000 per violation. The Department believes that violations of the State Water Code and the Commission’s rules and orders regarding water quantity are as detrimental to the resource as violations of DOH’s statutes and rules regarding water quality and thus the same deterrent maximum fine is necessary and justified.

Furthermore, this proposal aligns with Act 233, SLH 2023, which increased DOH’s maximum penalty to \$60,000 to conform with federal inflation adjusted civil penalty amounts pursuant to the Clean Water Act.² In the initial draft of House Bill 1079³, which was signed into law by Governor on July 6, 2023, and became Act 233, DOH asked for an increase of the maximum penalty in Hawai‘i Revised Statutes (HRS) § 342D-30 to \$59,973. This amount was proposed to match the federal inflation adjusted penalty amount. The federal penalty amount for violations of the Clean Water Act is provided for in the Federal Regulation 33 C.F.R. § 326.6. This federal regulation is adjusted *annually to improve its effectiveness and maintain its deterrent effect*, as required by the Federal Civil Penalties Adjustment Act Improvements Act of 2015, Public Law 114–74, sec. 701, November 2, 2015 (Inflation Adjustment Act). The current maximum federal penalty is \$64,619.

These tables show the history of the federal and state maximum fine:

Federal Regulation 33 C.F.R. § 326.6 - Class I administrative penalties.

Regulation	Year	Max. Penalty	Notes
54 FR 50709	1989	\$ 25,000	
69 FR 35518	2004	\$ 27,500	The Federal Civil Penalties Inflation Adjustment Act of 1990 restricted initial increases to 10%.
78 FR 5726	2013	\$ 32,500	
82 FR 47628	2017	\$ 52,414	The Inflation Adjustment Act required agencies to do adjust the level of civil monetary penalties with an initial “catch-up” adjustment, hence the increase from \$32,500 to \$52,414.
83 FR 19184	2018	\$ 53,484	
84 FR 18982	2019	\$ 54,833	
85 FR 35005	2020	\$ 55,801	
86 FR 37249	2021	\$ 56,461	
87 FR 62989	2022	\$ 59,974	
88 FR 51236	2023	\$ 64,619	

¹ *In re Water Use Permit Applications*, 94 Hawai‘i, 97, 141, 9 Pd.3, 409, 453 (2000). (*Waiāhole I*)

² The federal penalty amount for violations of the Clean Water Act is provided for in the federal regulation 33 C.F.R. § 326.6. This regulation is adjusted *annually to improve its effectiveness and maintain its deterrent effect*, as required by the Federal Civil Penalties Adjustment Act Improvements Act of 2015, Public Law 114–74, sec. 701, November 2, 2015. The current maximum federal penalty is \$64,619. See <https://www.federalregister.gov/documents/2023/08/03/2023-16025/civil-monetary-penalty-inflation-adjustment-rule>

³https://www.capitol.hawaii.gov/session/archives/measure_indiv_Archives.aspx?billtype=HB&billnumber=1079&year=2023

HRS § 342D-30 Civil penalties (Water Pollution)

Act	Year	Max. Penalty	Notes
212	1989	\$ 10,000	
147	1997	\$ 25,000	The amendment was made to match the federal maximum penalty at the time.
233	2023	\$ 60,000	

In consultation with the counties, the Department recommends a maximum fine of *at least \$25,000* to match the recommendations of the Review Commission.

The Department appreciates the clarification of a continuing violation and the addition of mandatory factors for the determination of the penalty amount in the newly added subsection (c) to HRS Section 174C-15, which are identical to the factors DOH considers in HRS Section 342D-31. The Department would like to propose the inclusion of the language of HRS Section 342D-31 (c) for further clarification (grey highlight):

(c) When imposing a penalty, the commission shall consider the following factors, including but not limited to:

(1) The nature, circumstances, extent, gravity, and history of the violation and of any prior violations;

(2) The economic benefit to the violator, or anticipated by the violator, resulting from the violation;

(3) The opportunity, difficulty, and history of corrective action;

(4) Good faith efforts to comply;

(5) Degree of culpability; and

(6) Such other matters as justice may require.

It is presumed that the violator's economic and financial conditions allow payment of the penalty, and the burden of proof to the contrary is on the violator.

Furthermore, these factors in subsection (c) correspond with the Commission's Administrative and Civil Penalty Guideline (G14-01)⁴ that the Commission adopted on October 1, 2014⁵. The Department notes that G14-01 provides for an initial administrative fee of \$500, if the Commission issued a written notice of alleged violation, in addition to any fine.

This bill will support the Commission in its affirmative duty "*to protect, control and regulate the use of Hawaii's water resources*" as articulated in Article XI Section 7 of the Constitution of the State of

⁴ https://files.hawaii.gov/dlnr/cwrm/planning/wrpp2019update/WRPP_AppP_201907.pdf

⁵ <https://files.hawaii.gov/dlnr/cwrm/submittal/2014/sb201410D1.pdf>

Hawai'i. Currently, the Commission is overseeing 5,334 groundwater wells, 1,226 surface water diversions, and 376 perennial streams, approximately 100 of which have a measurable interim instream flow standard that requires monitoring and enforcement. The Commission regulates the use of water in water management areas on the islands of O'ahu, Moloka'i and Maui with the total amount of 411 groundwater use permits and 176 surface water use permits.

Thank you for the opportunity to testify in strong support of this measure.



DEPARTMENT OF WATER SUPPLY • COUNTY OF HAWAII

345 KEKŪANAŌ'A STREET, SUITE 20 • HILO, HAWAII 96720

TELEPHONE (808) 961-8050 • FAX (808) 961-8657

February 12, 2024

TESTIMONY OF KEITH K. OKAMOTO, MANAGER-CHIEF ENGINEER
DEPARTMENT OF WATER SUPPLY, COUNTY OF HAWAII

HEARING BEFORE THE HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

DATE: Tuesday, February 13, 2024

TIME: 2:00 p.m.

PLACE: Conference Room 325 & Videoconference

HB 1544 HD1 - RELATING TO STATE WATER CODE PENALTIES

Honorable Chair Tarnas, Vice-Chair Takayama, and committee members,

The County of Hawaii, Department of Water Supply (DWS) submits this letter to respectfully express its comments regarding House Bill (HB) 1544 HD 1.

This bill proposes to enable the Department of Land and Natural Resources (DLNR) and the Commission on Water Resource management (CWRM or Commission) to set the water code's penalties, at a "no less than" amount to a "shall not exceed" amount, to serve as a deterrence to violators of the State Water Code in section 174C-15, Hawaii Revised Statutes (HRS). The proposed language lists factors to be considered when the Commission is determining the penalty amounts. DWS requests to be included in the Rule making and/or evaluation process to determine the penalty amounts. It is DWS' belief that an open and transparent Rule making process would result in equitable and consistent application and enforcement of these penalties in the future. And thus, could avoid the potential for arbitrary and inconsistent applications.

We thank you for your attention to this matter, and for your dedication and commitment to serving our State.

Please feel free to contact me at (808) 961-8050 or via email at dws@hawaiidws.org with any questions you may have regarding DWS' comments. Thank you for your time and consideration of our testimony on HB 1544 HD1.

...Water, Our Most Precious Resource...Ka Wai A Kāne...

The Department of Water Supply is an Equal Opportunity provider and employer.

**BOARD OF WATER SUPPLY
KA 'OIHANA WAI
CITY AND COUNTY OF HONOLULU**

630 SOUTH BERETANIA STREET • HONOLULU, HAWAII 96843
Phone: (808) 748-5000 • www.boardofwatersupply.com

RICK BLANGIARDI
MAYOR
MEIA

ERNEST Y. W. LAU, P.E.
MANAGER AND CHIEF ENGINEER
MANAKIA A ME KAHU WILIKI

ERWIN KAWATA
DEPUTY MANAGER
HOPE MANAKIA



NĀ'ĀLEHU ANTHONY, Chair
KAPUA SPROAT, Vice Chair
BRYAN P. ANDAYA
JONATHAN KANESHIRO
EDWIN H. SNIFFEN, Ex-Officio
GENE C. ALBANO, P.E., Ex-Officio

February 13, 2024

The Honorable David A. Tarnas, Chair
and Members
Committee on Judiciary and Hawaiian Affairs
House of Representatives
Hawai'i State Capitol, Room 325
Honolulu, Hawai'i 96813

Dear Chair Tarnas and Members:

SUBJECT: House Bill 1544, HD1: Relating to State Water Code Penalties

The Honolulu Board of Water Supply (BWS) has concerns regarding House Bill (HB) 1544, House Draft (HD) 1, which mirrors a similar bill introduced and vetoed by Governor Green from the 2023 Legislative Session. The purpose of HB 1544, HD 1, proposes to do the same, it enables the Department of Land and Natural Resources (DLNR) and Commission of Water Resource Management (CWRM or Commission) to increase the water code's penalties and fines and adds several offenses, leading to penalties under the State Water Code in section 174C-15, Hawaii Revised Statutes (HRS).

While HD1 has removed the maximum amounts for further discussion of this measure, the BWS has concerns about the propriety of raising the penalty ceiling for violations of the State Water Code without notice or outreach to the public. The last time the Commission raised the maximum water code penalties and fines for damages resulting from a water code violation of HRS §174-15 was on June 6, 2004; and enacted into law 2004 Session Laws of Hawaii (SLH).

Turning then to the issue of inflation adjustments, we note that EPA amended its civil penalty policies to account for inflation by using the increase established by the Consumer Price Index for all Urban Consumers (CPI-U).¹ The appropriate increase for updating the Commission's \$5,000 penalty pursuant to HRS § 174C-15, effective since

¹ https://www.epa.gov/system/files/documents/2022-01/2022amendmentstopenaltypoliciesforinflation_0.pdf

The Honorable David A. Tarnas
and Members
February 13, 2024
Page 2

June 2004, to account for inflation, is an increase to \$8,016.00. Any amount exceeding \$8,016.00 must be supported by a cost analysis and evaluation, similar to the CWRM Staff Submittal relating to the Commission's Administrative and Civil Penalty Guidelines (G14-01) dated October 1, 2014.

Stakeholder input is needed to determine if the increase in fines could potentially impose a financial burden.

Section 2 of HB 1544, HD1, also proposes to add several offenses, leading to penalties against any person who "violates any order of the commission, fails to obtain a permit when a permit is required under this chapter, or fails to comply with permit conditions." BWS expresses its concern that these additions may overlap with each other and other HRS provisions and lead to redundancy, potentially resulting in multiple penalties for a single action or set of circumstances. Redundancy in legal provisions create confusion, increase the risk of inconsistent enforcement, and lead to unjust results.

Thank you for your consideration and the opportunity to testify on HB 1544, HD 1.

Very truly yours,



ERNEST Y.W. LAU, P.E.
Manager and Chief Engineer

Cc: Department of Water Supply, County of Hawaii
Department of Water Supply, County of Kauai
Department of Water Supply, County of Maui



LAND USE RESEARCH
FOUNDATION OF HAWAII

1100 Alakea Street, Suite 408
Honolulu, Hawaii 96813
(808) 521-4717
www.lurf.org

February 9, 2024

Representative David A. Tarnas, Chair
Representative Gregg Takayama, Vice Chair
House Committee on Judiciary & Hawaiian Affairs

Comments and Concerns in Opposition to HB 1544, H.D. 1, Relating to State Water Code Penalties (Adds a minimum penalty and amends the maximum penalty per violation of the State Water Code, expands the types of potential violations of the State Water Code, and makes each day that a violation exists or continues to exist a separate offense. Requires the Commission on Water Resource Management [Commission] to consider certain factors when imposing penalties. Makes the setting, charging, and collecting of administrative fines by the Commission on Water Resource Management mandatory, rather than discretionary. Effective 7/1/3000.)

Tuesday, February 13, 2024, 2:00 p.m.; State Capitol, Conference Room 325, Via Videoconference

The Land Use Research Foundation of Hawaii (LURF) is a private, non-profit research and trade association whose members include major Hawaii landowners, developers, and utility companies. LURF's mission is to advocate for reasonable, rational, and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii's significant natural and cultural resources, and public health and safety.

LURF appreciates the opportunity to submit comments **in opposition** to this measure proposing to add penalties for violation of the State Water Code (Code) and afford the Commission the authority to determine the amount of the penalty based on the circumstances of the violation.

HB 1544, H.D. 1.

The stated purpose of this bill is to ensure that all violators of the Code are held accountable for their violations by 1) adding a minimum penalty and amending the maximum penalty per violation of the Code and clarifying what constitutes a separate offense; and 2) requiring the Commission to consider certain factors when imposing penalties and to set, charge, and collect administrative fines. Because the measure fails to set forth a clear and warranted justification for requiring the imposition of penalties, a

presumption could well be made that the measure is intended as a “power grab” to afford the Commission expanded authority to subjectively and unilaterally determine the amount of **any mandatory** penalty imposed for **any** violation of any provision, rule, order, or permit condition adopted pursuant to the Code. Moreover, this measure proposes that each day such a violation exists or continues to exist constitutes a separate offense. Such authority would arguably afford the Commission unbridled power to subjectively and arbitrarily impose **mandatory** penalties upon water users and permittees which could potentially control and prohibit use of water resources throughout the State.

While seemingly implausible, such a presumption is certainly not out of the question given at least two proposals similarly made by the Commission in the recent past to 1) unilaterally allow the Commission to designate an area as a water management area by disregarding appropriate procedural vehicles, circumventing existing laws, failing to properly collaborate with county water authorities, and neglecting potential negative impacts to affected stakeholders and community members in doing so; and 2) amend the Hawaii Revised Statutes (HRS) Section 174-C, to technically separate “water shortage” from “water emergency” issues to justify an expansion of the Commission’s authority to declare an emergency which would allow itself to take actions as it unilaterally deems necessary to address the emergency, including but not limited to apportioning, rotating, limiting or prohibiting the use of the water resources.

As with respect to those previous attempts by the Commission to expand its power, LURF believes that the authority now being sought by the Commission **goes far beyond its statutory role as a policy-making body and will inappropriately overstep the counties’ administrative and operational jurisdiction over State and county water management issues.** The proposed amendments to HRS Section 174-C-15 also appear to be unwarranted and inadvisable given that penalties are already adequately and appropriately addressed by existing provisions, making said amendments unnecessary.

LURF’s Position.

Throughout the State, LURF members have continued to serve as stewards of Hawaii’s water resources and as active partners with the State and counties in the conservation of water resources, as well as the preservation and protection of existing and potential water sources. LURF, therefore, unquestionably supports the objectives of the Commission to preserve and protect the State’s precious water resources.

Based, however, on its understanding and review of the information presented relating to the proposed bill, LURF must respectfully **oppose** the proposed expansion of the Commission’s authority for the following reasons:

A. Provisions of HRS Section 174-C-15 Which Adequately Protect and Manage Water Resources Should Not be Amended Without Facts and Information Necessary to Justify the Proposed Amendments.

HB 1544, H.D. 1 now proposes amendments to HRS Section 174-C-15 to afford the Commission authority to unilaterally add and impose penalties for violation of the Code, as well as the sole authority to determine the amount of the penalties based on the

circumstances of the violation. As far as LURF is aware, proponents of this measure have not stated any reason or justification for such a proposal to impose such mandatory penalties, let alone presented any information or findings supporting the imposition of mandatory penalties in the amounts as indicated in the bill.

Proposed expansion of the Commission’s authority **without** critical safeguards (including, but not limited to established criteria for the implementation of different types of Code violations as well as the corresponding dollar amounts of penalties to be implemented), as well as **without sufficient information, facts, and findings** to support the need to **mandatorily** impose such penalties in subjective amounts upon water users and existing water permittees, would be to allow circumvention and disregard of important established protections contained in existing laws and the Code which were judiciously and **collaboratively** developed and vetted by all essential stakeholders.

LURF believes that this type of arbitrary, unregulated, and potentially unmonitored action is dangerous and may actually pose a threat to the health and safety of the public, as well as to the economy of the State.

1. Laws and Regulations Relating to Water Resources Should at the Very Least, be Properly Exercised in “Collaboration” With the Counties.

State and county laws and regulations regarding water resources that relate to land use and waterworks already exist and are properly administered by the counties via powers conferred upon it by the State Legislature through Hawaii Revised Statutes (HRS), Chapters 46 and 174C.¹ Section 174C-2(e) of the HRS, provides that the State Water Code shall be liberally interpreted and applied in a manner which conforms with intentions and plans of the counties in terms of land use planning.

Because the Commission’s mandatory imposition of penalties for Code violations would affect the statutory powers of the counties relating to land use and waterworks, as well as impact local land use planning determinations and policy decisions made by the counties, it is LURF’s position that the expanded authorization of the Commission currently being sought should rightfully be obtained in **full collaboration and agreement** with the counties and their respective water departments, and not unilaterally by the Commission.

¹ HRS Chapter 46 confers certain powers, including powers relating to land use and waterworks to the counties, and HRS Chapter 174C-31 grants unto the counties the power to establish, pursuant to the State Water Code, water use development plans which include, amongst other things, future land uses and related water needs (HRS 174C-31(f)(2)); and “regional plans for water developments and relationship to the water resource protection” (HRS 174C-31(f)(3)).

County Charter provisions (e.g., Article 8, Chapter 11 of the Maui County Charter) affords the counties’ water departments the authority to manage and operate all water systems owned by the counties.

2. The Delineated Role of the Commission is to Set Policies, Protect Resources, Define Uses and Establish Priorities Relating to the State's Water Resources.

Pursuant to HRS 174C, the Commission is the entity charged with the policy-making responsibilities of the State, as trustee of water resources, including setting policies, defining uses, establishing priorities while assuring rights and uses, and establishing regulatory procedures.

The various counties have already expressed their concern about, and LURF agrees that the Commission's intervention into the counties' administrative and operational jurisdiction over water issues via amendments to HRS Section 174-C-15 may result in inconsistencies between conclusions of the Commission, DOH, and respective county water departments; may **conflict** with the counties' decisions; and would lead to the **confusing and chaotic** situation wherein the Commission itself would then be required to administer penalties and fines imposed by the Commission for violation of laws, rules and regulations of the Code separate and apart from administration by the counties. Such action by the Commission would set **bad precedent** and lead to **further complicated issues** relating to the management of the State's water resources.

B. The Proposed Amendments May Result in Substantial Unnecessary Costs for Landowners, Water Users, Permittees, and the Counties.

Should this bill be passed, landowners, water users and permittees would be compelled to invest inordinate time, resources, and money to ensure strict compliance with provisions of the Code in order to avoid subjective noncompliance determinations and resulting subjective penalties unilaterally imposed by the Commission. County water departments and their respective staff would also need to invest substantial time reviewing Commission orders and monitoring actions required of and conditions imposed by water users and permittees. Even given the slightest infraction, all parties would be forced to incur **substantial time and expense for legal challenges** brought as a result of this proposed measure.

LURF believes the proposed bill is also unsound because it fails to include **specific cost information** regarding the need for any additional employees, equipment, and other expenses required in connection with the Commission's imposition of penalties which would overlap the efforts of State and county agencies. The proposal also fails to address the aforementioned cost of legal challenges relating to the subjective implementation and imposition of penalties. Approval of any expansion of the Commission's authority without determining or even identifying the potential resulting costs to the State and county taxpayers would be arguably imprudent and irresponsible.²

² (HAR) §11-200.1-24(b) requires at appropriate points, **cost-benefit analyses**.

C. The Proposed Expansion of Authority May Discourage Future Water Source Development Throughout the State.

The unjustified expansion of the Commission’s authority and arbitrary penalties that may be imposed pursuant to this measure will make future development of additional ground water supplies even **more expensive and cost prohibitive**. Private landowners will be less willing to provide land for new water well sites since the harsh and subjective imposition of mandatory penalties for subjective Code violations, as well as the potential for separate offenses will be unknown.

The proposed amendment could also create **unintended negative consequences** on the development of new water resources by the counties attempting to avoid arbitrary penalties. Such apprehension due to the subjective imposition of penalties will increase the costs of new water development.

D. The Proposed Measure May Negatively Impact Landowners Due to the Fear of Unknown, Unanticipated and Arbitrary Penalties Which May be Incurred in Connection With the Use of Water Resources on Their Lands.

As discussed above, the proposed authority of the Commission to impose discretionary penalties for violations of the Code could potentially impact current uses of existing water sources, requiring new State Water Use Permits, the application process for which would entail burdensome procedural requirements, and/or legal challenges such as **Contested Case Hearings**. These concerns are another strong **disincentive** for property owners to expand, reconstruct, or develop their property.

E. The Commission’s Proposed Expansion of Authority Could Violate the Spirit and Intent of the “Right to Farm” Law and May Negatively Impact Farmers and Agricultural Operations.

The proposed expansion of the Commission’s authority may also arbitrarily restrict the agricultural use of reclaimed water for agricultural irrigation, continuance of animal feeding operations, and the use of fumigants and pesticides despite those practices having been conducted for years until present in a manner consistent with generally accepted agricultural and management practices. These concerns could create major issues for farmers and agricultural operators and violate the spirit and intent of the Hawaii State Planning Act and Hawaii’s “Right to Farm” law, HRS Chapter 165. Under the Hawaii State Planning Act, it is a declared policy of this State to "foster attitudes and activities conducive to maintaining agriculture as a major sector of Hawaii's economy." Accordingly, Hawaii’s “Right to Farm” law protects farmers from nuisance lawsuits “if the farming operation has been conducted in a manner consistent with generally accepted agricultural and management practices.” The “Right to Farm” law further creates a rebuttable presumption that a farming operation does not constitute a nuisance.

HB 1544, H.D. 1 is therefore arguably inconsistent with Hawaii’s “Right to Farm” law because its subjective aspects may allow the imposition of arbitrary penalties upon agricultural stakeholders, thereby impacting farming and agricultural operations even if

the farming operation has been conducted in a manner consistent with generally accepted agricultural and management practices.

Conclusion.

Aside from its procedural objection to this measure being proposed and furthered primarily by the Commission itself, LURF must respectfully oppose this bill based on:

- 1) the inability of the Commission to justify need for this measure and to present any undisputed material facts to conclusively prove that the proposed amendments to afford itself unilateral authority to expand and modify existing penalty provisions currently contained in the HRS and authorize itself to determine the amount of such mandatory penalties are clearly warranted;
- 2) the fact that adequate current State and county laws and regulations already exist to protect water resources;
- 3) the fact that the proposed authority sought exceeds the role of the Commission as delineated by statute;
- 4) the fact that any and all laws and regulations relating to water resources should be properly vetted with the counties which are conferred the authority to administer State and county laws and regulations regarding water resources that relate to land use and waterworks;
- 5) the lack of consideration of reasonable, well-collaborated, and more practical alternatives; and
- 6) the fact that this proposal could potentially result in significant negative practical and economic repercussions for the counties, the State, water users, water permittees, landowners, and agricultural stakeholders,

LURF must, despite its steadfast support of efforts to protect and preserve Hawaii's precious water resources, respectfully **oppose**, and request a **deferral** of the proposed measure.

Thank you for the opportunity to provide comments and concerns regarding this important matter.



SIERRA CLUB OF HAWAI'I

HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

February 13, 2024 2:00 PM Conference Room 325

In SUPPORT of HB1544 HD1: Relating to State Water Code Penalties

Aloha Chair Tarnas, Vice Chair Takayama, and Members of the Committee,

On behalf of our 20,000 members and supporters, the Sierra Club of Hawai'i **SUPPORTS** HB1544 HD1, to allow the Commission on Water Resource Management (“CWRM”) to more meaningfully enforce laws concerning the management and allocation of our public trust water resources.

HB1544 HD1 would allow CWRM to impose meaningful fines against powerful entities who could otherwise over pump our aquifers and drain our streams dry with impunity, notwithstanding the law or the needs of our communities. CWRM's current \$5,000 maximum daily fine is wholly insufficient to hold multinational corporations or the Department of Defense accountable if and when their water code violations impact priority public needs – such as, but not limited to, affordable housing, or fire prevention.

Without the increased fines authorized under this measure, millions of gallons of water per day could be illegally monopolized by deep pocket entities for a fraction of a cent per gallon in penalties, harming our precious water resources and the houses, schools, farms, small businesses, and others that rely on them.

Notably, this measure requires CWRM to consider an explicit set of factors in setting and imposing fines, such as the gravity of a violation, any economic benefit realized by the violator, and degree of culpability. This will ensure that fines are appropriate to the circumstances of each case. Concerns about automatic and excessive fines that ignore the realities of any given situation, including mitigating and extenuating circumstances and impacts to local residents, would therefore appear unfounded.

Accordingly, the Sierra Club respectfully urges the Committee to **PASS** this measure.

Mahalo nui for the opportunity to testify.

HB-1544-HD-1

Submitted on: 2/10/2024 12:27:11 AM

Testimony for JHA on 2/13/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Ted Bohlen	Individual	Support	Written Testimony Only

Comments:

Strong support!

As an attorney who represent DOH on water enforcement cases for 15 years, I believe that CWRM badly needs this penalty authority!

Please pass! Ted Bohlen