

## *The Judiciary, State of Hawai‘i*

**Testimony to the Thirty-First Legislature, Regular Session of 2022**

**House Committee on Finance**  
Representative Sylvia Luke, Chair  
Representative Kyle T. Yamashita, Vice Chair

Monday, February 28, 2022, 12:30 p.m.  
Via Videoconference

by  
Brook M. Mamizuka  
Probation Administrator, First Circuit Court

### **WRITTEN TESTIMONY ONLY**

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**Bill No. and Title:** House Bill No. 1653, H.D. 2, Relating to Aquatic Resources.

**Purpose:** Establishes a tiered administrative fine system for each specimen of aquatic life taken, killed, or injured. Establishes a criminal fine structure on a per-specimen basis for violations involving aquatic life. Authorizes the department of land and natural resources to recommend community service that benefits the resource damaged when a person is ordered to perform community service in lieu of a fine. Authorizes the department of land and natural resources to recommend to the certain probationary terms and conditions to the court. Effective 7/1/2050. (HD2)

### **Judiciary's Position:**

The Judiciary supports the tiered administrative fine system for aquatic life taken, killed, or injured. However, we have significant concerns as to whether the Department of Land and Natural Resources (DLNR) should have the authority to recommend to the court an order of community service worksites.

The Community Service Sentencing Program has predetermined worksites that have been vetted. The worksite protocols are necessary to ensure a safe and healthy work environment for defendants and worksite personnel. The establishment of these protocols reduce agency and program liability while providing restorative justice.

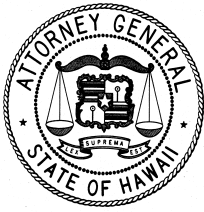


House Bill No. 1653, H.D. 2, Relating to Aquatic Resources  
House Committee on Finance  
Monday, February 28, 2022  
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Further, the probation office is unable to provide monitoring for entry and access into aquatic resources, estuaries, rivers and ocean waters. The probation office does not have staffing nor the ability to police the handling and operating of fishing nor the ability to monitor gear or boating equipment.

The Judiciary would be open to working with DLNR to identify and vet aquatic-based community worksites and programs that DLNR would like to support.

Thank you for the opportunity to testify on House Bill No. 1653, H.D. 2.



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
THIRTY-FIRST LEGISLATURE, 2022**

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**ON THE FOLLOWING MEASURE:**

H.B. NO. 1653, H.D.2, RELATING TO AQUATIC RESOURCES.

**BEFORE THE:**

HOUSE COMMITTEE ON FINANCE

**DATE:** Monday, February 28, 2022      **TIME:** 12:30 p.m.

**LOCATION:** State Capitol, Room 308, Via Videoconference

**TESTIFIER(S):** Holly T. Shikada, Attorney General,  
Melissa D. Goldman, Deputy Attorney General.

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Chair Luke and Members of the Committee:

The Department of the Attorney General (Department) provides the following comments.

This bill establishes a tiered administrative fine system for certain aquatic resource violations, authorizes the Department of Land and Natural Resources (DLNR) to recommend community service that benefits the resource damaged when community service is ordered in lieu of a fine, and also to recommend to the court restrictions to be imposed on the defendant as conditions of probation. The Department has identified legal issues regarding two of the enumerated restrictions.

First, amendments made in section 3 of the bill to section 187A-13(e)(1), Hawaii Revised Statutes (HRS), on page 5, lines 7-9; in section 4 of the bill to section 188-70(f)(2), HRS, on page 7, lines 19-21; in section 5 of the bill to section 189-4(e)(2), HRS, on page 9, lines 18-20; and in section 6 of the bill to section 190-5(f)(2), HRS, on page 12, lines 1-3, allow DLNR to recommend to a court that the defendant be restricted from entering specific geographical areas where aquatic resources are found. The Department advises that this Committee clarify the wording by specifying that DLNR is authorized to recommend that a defendant be restricted from entering specific geographical areas within the "waters of the State" on page 5, line 7; page 7, line 19; page 9, line 18; and page 12, line 1. Without the clarification, the recommendation could include areas where the state courts may not have jurisdiction.

Under the Submerged Lands Act of 1953, 43 U.S.C. section 1301, *et seq.*, the federal government has recognized states' title to submerged lands within three

geographical miles of their coastlines, with a few minor exceptions. 43 U.S.C. section 1312; see *also, e.g.*, 16 U.S.C. section 1856(a)(2)(A) (explaining that states' boundaries are the same as the United States territorial sea, as established by the Geneva Convention on the Territorial Sea and Contiguous Zone—three nautical miles). Hawaii courts have likewise ruled that the State's waters extend three nautical miles from the low water mark on shore, *Detting v. United States*, 983 F. Supp. 2d 1184, 1201 (D. Haw. 2013) (citing *Civil Aeronautics Bd., et al. v. Island Airlines, Inc.*, 235 F. Supp. 990, 1007 (D. Haw. 1964), *aff'd, Island Airlines, Inc. v. Civil Aeronautics Bd.*, 352 F.2d 735 (9th Cir. 1965), with the possible exception of channels between the islands. *Compare, In re Application of Island Airways*, 47 Haw. 1, 89–91 (1963) (discussing whether the channels were within the boundaries of the State), *with Island Airways, Inc. v. Civil Aeronautics Bd.*, 363 F.2d 120 (9th Cir. 1966) (holding channels were not part of the Territory or the State). No matter the precise boundaries, it is clear that state courts do not exercise jurisdiction over *all* waters.

Second, the bill's wording authorizing the DLNR to recommend probationary terms restricting the defendant from "[e]ngaging in certain or all fishing activities" on page 5, line 10; page 8, line 1; page 9, line 21; and page 12, line 4, may be overly broad and could be found to violate the Hawaii State Constitution.

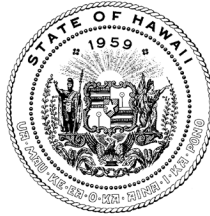
Article XI, section 6, of the Hawaii Constitution, states, in relevant part:

*All fisheries in the sea waters of the State not included in any fish pond, artificial enclosure or state-licensed mariculture operation shall be free to the public, subject to vested rights and the right of the State to regulate the same.*

(Emphasis added). The italicized wording above protects the public's general right to access Hawaii's fisheries. Although a court might restrict certain kinds of fishing activities that have a nexus to the underlying aquatic resources offense as part of the sentencing process, the courts should not preclude *all* fishing. We recommend that in section 3 of the bill, section 187A-13(e)(2), HRS; in section 4 of the bill, section 188-70(f)(2), HRS; in section 5 of the bill, section 189-4(e)(2), HRS; and in section 6 of the bill, section 190-5(f)(2), HRS, the words "or all" be deleted from "[e]ngaging in certain or all fishing activities".

Thank you for the opportunity to testify.

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 House Committee on  
FINANCE**

**Monday, February 28, 2022  
12:30 PM**

**State Capitol, Conference Room 308, Via Videoconference**

**In consideration of  
HOUSE BILL 1653, HOUSE DRAFT 2  
RELATING TO AQUATIC RESOURCES**

House Bill 1653, House Draft 2 proposes to establish a tiered administrative fine system for each specimen of aquatic life taken, killed, or injured; establish a criminal fine structure on a per-specimen basis for violations involving aquatic life; authorize the Department of Land and Natural Resources (Department) to recommend community service that benefits the resource damaged when a person is ordered to perform community service in lieu of a fine; and authorize the Department to recommend certain probationary terms and conditions to the court. **The Department supports this measure and offers the following comments.**

A critical component of effective resource management is ensuring that management agencies have the appropriate suite of enforcement tools and penalties to encourage compliance with aquatic resource laws and to ensure just and reasonable punishment for violations.

***SECTION 2 – Tiered administrative fines system for each specimen of aquatic life***

Section 187A-12.5, Hawaii Revised Statutes (HRS), authorizes tiered administrative fines for aquatic resource violations (i.e., higher fines for repeat violations)<sup>1</sup> and additional non-tiered

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<sup>1</sup> Section 187A-12.5, HRS, provides in relevant part:

(b) For violations involving threatened or endangered species, the administrative fines shall be as follows:

- (1) For a first violation, a fine of not more than \$5,000;
- (2) For a second violation within five years of a previous violation, a fine of not more than \$10,000; and
- (3) For a third or subsequent violation within five years of the last violation, a fine of not more than \$15,000.

**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

finer for each specimen of aquatic life unlawfully taken.<sup>2</sup> House Bill 1653, House Draft 2 proposes to establish tiered administrative fines for each specimen of aquatic life unlawfully taken. The Department does not have reason to believe that existing non-tiered per specimen fines are inadequate. However, having tiered per specimen fines provides greater flexibility to pursue higher per specimen penalties for repeat violations if warranted. Therefore, the Department supports SECTION 2 of the bill as written.

SECTIONS 3, 4, 5, and 6 – per specimen criminal fine structure

Sections 187A-13, 188-70, 189-4, and 190-5, HRS, set forth criminal penalties for violations of these chapters and rules adopted thereunder. Criminal cases are prosecuted by City or County Prosecutors' Offices and adjudicated by the Judiciary, typically at the State District Court level. Prosecutors typically pursue one criminal count per violation, even if the violation involves the unlawful take of multiple specimens of aquatic life. This often results in penalties that are disproportionately low in relation to the value of aquatic life unlawfully taken. For example, a defendant who has unlawfully taken five specimens will often receive the same minimum penalty (\$100) as a defendant who has unlawfully taken a single specimen of the same species. Prosecutors do have the ability to charge separate counts for each specimen of aquatic life unlawfully taken, but this process is rarely utilized. Currently, when a case involves multiple specimens, some prosecutors will request a higher fine to reflect the take. However, the results vary widely, and resulting sentences remain inconsistent. Amending existing criminal penalty sections to expressly authorize per specimen criminal fines would make it easier for prosecutors to seek penalties proportionate to the violation.

SECTIONS 3, 4, and 6 – Authorize the Department to recommend community service that benefits the resource damaged

Three existing aquatic resource penalty sections (Sections 187A-13, 188-70, and 190-5, HRS) authorize the court to require a defendant to perform community service in lieu of paying a monetary fine. SECTIONS 3, 4, and 6 of the bill propose to add language to allow the Department to recommend to the court community service that benefits the resource that was damaged. While this language is okay, it may not achieve the intended result. The court is already authorized to use resource-based community service as a sentencing tool, and the Department already has the ability to make specific community service recommendations. However, the Judiciary has a list of approved community service work sites where Defendants may be referred. The issue is that there may not be an available community service location

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- (c) For all other violations the administrative fines shall be as follows:
- (1) For a first violation, a fine of not more than \$1,000;
  - (2) For a second violation within five years of a previous violation, a fine of not more than \$2,000; and
  - (3) For a third or subsequent violation within five years of the last violation, a fine of not more than \$3,000.

<sup>2</sup> Section 187A-12.5, HRS, provides in relevant part:

(d) In addition to subsection (b), a fine of up to \$5,000 may be levied for each specimen of threatened or endangered aquatic life taken, killed, or injured in violation of subtitle 5 of title 12 or any rule adopted thereunder.

(e) In addition to subsection (c), a fine of up to \$1,000 may be levied for each specimen of all other aquatic life taken, killed, or injured in violation of subtitle 5 of title 12 or any rule adopted thereunder.

where work performed would benefit the resource damaged. To achieve the goal of having defendants perform community service that benefits the resources damaged, more community service opportunities need to be identified and established. Legislation is not necessarily required for this.

SECTIONS 3, 4, 5, and 6 – Authorize the Department to recommend certain probationary terms and conditions to the court

The Courts have the existing discretionary authority to sentence a defendant to a term of probation pursuant to Chapter 706, HRS. Section 706-623 provides guidance on the period of probation for various levels of crimes. Section 706-624(2) sets forth a list of discretionary conditions that the Court may utilize in sentencing a defendant to probation. This list includes conditions that the defendant “refrain from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the crime,” “refrain from entering specified geographical areas without the court’s permission,” and “satisfy other reasonable conditions as the court may impose.”<sup>3</sup> Despite this existing authority, these types of probationary sentences are extremely rare for aquatic resource violations. The Department strongly supports the language in the bill that expressly authorizes the Department to recommend probationary terms and conditions consistent with existing authority. Including this language directly in aquatic resource penalty statutes will hopefully encourage prosecutors and courts to think outside the box when seeking and issuing sentences in order to more effectively deter aquatic resource violations.

Thank you for the opportunity to comment on this measure.

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<sup>3</sup> See HRS § 706-624(2)(f), -(m), and -(t).

**HB-1653-HD-2**

Submitted on: 2/27/2022 11:32:03 AM

Testimony for FIN on 2/28/2022 12:30:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Remote Testimony Requested</b>
David Sakoda	DLNR	Support	Yes

Comments:

I am available for questions to DLNR. Please allow me Zoom access.



**HB-1653-HD-2**

Submitted on: 2/27/2022 11:57:10 AM

Testimony for FIN on 2/28/2022 12:30:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Remote Testimony Requested</b>
Suzanne D. Case	DLNR	Support	Yes

Comments:

I am available for questions to DLNR. Please allow me Zoom access.



February 25, 2022

Re: **STRONG SUPPORT** for **HB1653 HD2**: Relating to Aquatic Resources

Aloha Chair Luke, Vice Chair Yamashita, and Members of the House Committee on Finance,

Mālama Pūpūkea-Waimea (MPW) is a Hawai'i non-profit organization founded on the North Shore of O'ahu in 2005 that cares for, educates about, and protects the Pūpūkea Marine Life Conservation District (MLCD) one of only three on O'ahu and eleven statewide.

**Mālama Pūpūkea-Waimea**  
**Post Office Box 188**  
**Hale'iwa, HI 96712**

**Board of Directors**

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*Jenny Yagodich, Director of  
Educational Programs &  
Makai Watch Coordinator*

**Federal Nonprofit Organization**  
**501(c)(3) FEIN 27-0855937**  
**[www.pupukeawaimea.org](http://www.pupukeawaimea.org)**  
**[info@pupukeawaimea.org](mailto:info@pupukeawaimea.org)**

We are proud to have been the first (and are currently the only) State of Hawai'i Makai Watch program on O'ahu, a collaborative statewide program where citizens and NGOs become directly involved with the Department of Land and Natural Resources (DLNR) in the management of marine resources through promoting compliance to rules, education, and monitoring.

We collaborate closely with the Division of Conservation and Resources Enforcement (DOCARE) and rely on their ability to respond to violations and enforce the rules and regulations protecting our marine resources. We are in **support of HB1653 HD2** which would establish a much-needed tiered administrative fine system for each specimen of aquatic life taken, killed, or injured. It would also establish a criminal fine structure on a per-specimen basis for violations involving aquatic life, would authorize the Department of Land and Natural Resources to recommend community service that benefits the resource damaged when a person is ordered to perform community service in lieu of a fine, and would authorize the Department of Land and Natural Resources to recommend to the court that defendants be restricted from entering specific geographical areas where aquatic resources may be found.

Mahalo nui for your consideration of HB1653 HD2,

*Jenny Yagodich*

Jenny Yagodich  
Director of Educational Programs &  
Makai Watch Coordinator  
Mālama Pūpūkea-Waimea

**HB-1653-HD-2**

Submitted on: 2/28/2022 9:57:51 AM

Testimony for FIN on 2/28/2022 12:30:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Remote Testimony Requested</b>
Zachary LaPrade	Ocean Tourism Coalition	Oppose	No

Comments:

Dear Chair, Vice Chair and Members of the Committee

The Ocean Tourism Coalition (“OTC”) represents over 300 ocean tourism businesses statewide.

OTC’s greatest concern with HB1653 HD1 is that the term "intentional" was removed from the original version of HB1653 for the portions of the bill that imposes "criminal" penalties.

A violation that could result in criminal charges should include an "intentional" requirement. There should not be the same penalties for someone who intentionally takes marine life versus someone who loses their boat in a storm through no fault of their own.

Thank you for the opportunity to submit testimony and we look forward to testifying in person.

Ocean Tourism Coalitiion.

**HB-1653-HD-2**

Submitted on: 2/25/2022 6:32:30 PM

Testimony for FIN on 2/28/2022 12:30:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Remote Testimony Requested</b>
Darrell Tanaka	Individual	Support	No

Comments:

I'm a life long fisherman and I support this bill, its badly needed to help address repeat offenders and provide some structure to our out dated penalty system, than you.

**HB-1653-HD-2**

Submitted on: 2/25/2022 7:22:43 PM

Testimony for FIN on 2/28/2022 12:30:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Remote Testimony Requested</b>
Paul Hanada	Individual	Support	No

Comments:

Please support HB1653 HD2. I have been a resident and fisherman on Maui for almost 71 years and have seen our marine resources dwindle down to practically nothing in just my lifetime. If we do not protect what remains there will be nothing for my grandchildren and their grandchildren. Thank you.

**HB-1653-HD-2**

Submitted on: 2/25/2022 7:28:45 PM

Testimony for FIN on 2/28/2022 12:30:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Remote Testimony Requested</b>
Amy Stephens	Individual	Support	No

Comments:

Please protect our marine life and support this bill. Law enforcement needs stricter fines for repeat offenders