

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  
WATER AND LAND**

**Monday, March 21, 2022  
1:00 PM**

**State Capitol, Conference Room 229 & 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 and suggested amendments.**

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

**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

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- (3) For a third or subsequent violation within five years of the last violation, a fine of not more than \$15,000.
  - (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.

may be referred. The issue is that there may not be an available community service location 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.

To strengthen these sections even further, the Department recommends amending the language (SECTION 3: p.5, lines 3-12; SECTION 4: p.7, line 15 to p.8, line 3; SECTION 5: p.9, line 14 to p.10, line 2; and SECTION 6: p.11, line 18 to p.12, line 6) to read (changes highlighted):

The department may recommend to the court that the defendant be sentenced to probation with probationary terms and conditions consistent with sections 706-623 and 706-624, including but not limited to restrictions on:

- (1) Entering specific geographical areas **within waters of the State** where aquatic resources may be found, including ocean waters, estuaries, rivers, and streams;
- (2) Engaging in certain **[or all]** fishing activities; **[and]**
- (3) Handling, operating, or possessing certain fishing gear or boating equipment **[-]; and**
- (4) Taking or possessing certain species of aquatic life.**

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**

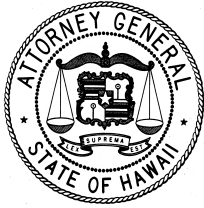
Submitted on: 3/19/2022 9:11:54 AM

Testimony for WTL on 3/21/2022 1:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
David Sakoda	Testifying for DLNR	Support	Remotely Via Zoom

Comments:

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



**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:**

SENATE COMMITTEE ON WATER AND LAND

**DATE:** Monday, March 21, 2022                      **TIME:** 1:00 p.m.

**LOCATION:** State Capitol, Room 229, Via Videoconference

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

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Chair Inouye 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, and it authorizes the Department of Land and Natural Resources (DLNR) to recommend community service that benefits the damaged resource 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 to be imposed on a defendant as conditions of probation.

First, amendments made in section 3 of the bill allow the DLNR to recommend that a defendant be restricted from entering specific geographical areas where aquatic resources are found, which includes ocean waters. We believe the restriction of access to "ocean waters" is overly broad and potentially beyond the jurisdiction of the state courts. 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 where aquatic resources may be found within the "waters of the State" (page 5, lines 8-9; page 7, lines 20-21; page 9, lines 19-20; and page 12, lines 2-3).

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, *Dettling v. United States*, 983 F. Supp. 2d 1184, 1201 (D. Haw. 2013) (citing *Civil Aeronautics Bd. 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* ocean waters.

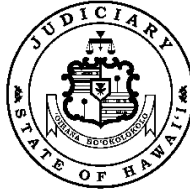
Second, the bill's wording authorizing the DLNR to recommend probationary terms restricting the defendant from "[e]ngaging in certain or all fishing activities" may be overly broad and could be found to violate the Hawaii State Constitution. Page 5, line 10; page 8, line 1; page 9, line 21; and page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

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 the words "or all" be deleted from the phrase "[e]ngaging in certain or all fishing activities." Page 5, line 10; page 8, line 1; page 9, line 21; and page 12, line 4.

Thank you for the opportunity to testify.



*The Judiciary, State of Hawaii*

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

**Senate Committee on Water and Land**  
Senator Lorraine R. Inouye, Chair  
Senator Gilbert S.C. Keith-Agaran, Vice Chair

Monday, March 21, 2022 at 1:00 p.m.  
Conference Room 229 & 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, House Draft 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



House Bill 1653, H.D. 2, Relating to Aquatic Resources  
Senate Committee on Water and Land  
March 21, 2022 at 1:00 p.m.  
Page 2

defendants and worksite personnel. The establishment of these protocols reduce agency and program liability while providing restorative justice.

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





THE SENATE

THE THIRTY-FIRST LEGISLATURE  
REGULAR SESSION OF 2022

COMMITTEE ON WATER AND LAND

Senator Lorraine R. Inouye, Chair  
Senator Gilbert S.C. Keith-Agaran, Vice Chair

AMENDED NOTICE OF HEARING

DATE: Monday, March 21, 2022  
TIME: 1:00 p.m.  
PLACE: Conference Room 229 & Videoconference

**TESTIMONY OF THE OCEAN TOURISM COALITION IN OPPOSITION TO  
HB1653 HD2 AS WRITTEN.**

Dear Chair Inouye and Vice Chair Keith-Agaran,

The Ocean Tourism Coalition (“OTC”) represents over 300 small ocean tourism businesses statewide. OTC opposes HB1653 HD2 (the “Bill”) in its current form because it may lead to harsh penalties for boat operators whose vessel runs aground through no fault of their own (e.g., Kona Storm, Hurricane, etc.). The OTC supports the greater protection of endangered species and the prevention of poaching, but would like clarification on how this Bill would apply in those unique situations where a vessel damages a coral colony during an adverse weather event.

If you pass the Bill, please ensure that there is some mechanism, such as an exception for acts of god to avoid punishing ocean users unnecessarily. Local businesses and people should not be the bycatch of overly broad laws.

Sincerely,

Denver S. Coon, Director

Ocean Tourism Coalition



March 19, 2022

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

Aloha Chair Inouye, Vice Chair Keith-Agaran, and Members of the Committee on Water and Land,

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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**Staff**

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

**Federal Nonprofit Organization**  
**501(c)(3) FEIN 27-0855937**  
**[www.pupukeawaiamea.org](http://www.pupukeawaiamea.org)**  
**[info@pupukeawaiamea.org](mailto:info@pupukeawaiamea.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: 3/18/2022 5:00:24 PM

Testimony for WTL on 3/21/2022 1:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Darrell Tanaka	Individual	Support	Written Testimony Only

Comments:

I'd like to make it so violators can be banned from possessing certain species of aquatic life...for instance, if someone was caught taking lobster out of season, which is a flagrant violation, much different than violating a simple minimum size restriction, the prosecution could ask the judge to ban the person from possessing lobster for a period of time.....so the judge could say, "you are fined \$500 for the offense, you are banned from this area for one year and on top of that you are on probation for two years during which time you are forbidden to possess lobster". And of course this would be species specific, meaning, if the guy goes to a restaurant and orders Maine lobster, that's ok, he's just banned from possessing Hawaiian species of lobsters...the point of this is to be creative in thinking and make the punishment fit the fisherman, whereas, the current punishment only fits the crime, the difference is sometimes a creative punishment such as this reaches the person much more intimately instead of just a fine.

And can we amend this bill so that if they commit three offenses that the dlnc can ask the judge to take away the suspects drivers license?? That would be anohter creative deterrent against repeat offenders.

**HB-1653-HD-2**

Submitted on: 3/19/2022 7:39:39 AM

Testimony for WTL on 3/21/2022 1:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Paul Hanada	Individual	Support	Written Testimony Only

Comments:

Aloha,

Please support HB1653HD2. I am a lifelong resident of Maui and a fisherman for as long as I can remember. My parents were fishermen as are my children and grandchildren. All of my children and grandchildren reside on Maui. I have witnessed the marine resources dwindle down to almost nothing in my lifetime. Please support this bill for the sake of my grandchildren and their grandchildren.

Mahalo,

Paul Hanada

Kula, Maui