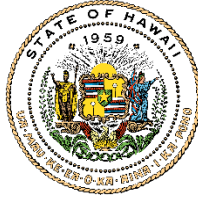


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Testimony of  
DAWN N. S. CHANG  
Chairperson

Before the House Committees on  
WATER & LAND  
and  
ENERGY & ENVIRONMENTAL PROTECTION

Thursday, February 9, 2023  
8:30 AM

State Capitol, VIA VIDEOCONFERENCE, Conference Room 325

In consideration of  
HOUSE BILL 755  
RELATING TO AQUATIC NUISANCE SPECIES

House Bill 755 proposes to authorize the Department of Land and Natural Resources (Department) to adopt rules to prevent and respond to the introduction of aquatic invasive and nuisance species from discharges incidental to the normal operation of a vessel, and to reflect the relationship between the federal Vessel Incidental Discharge Act of 2018, as amended, and state law. **The Department supports this measure.**

Pursuant to Section 26-15(b), Hawaii Revised Statutes (HRS), the Department is responsible for managing and administering the aquatic and terrestrial wildlife resources of the State. The State of Hawai'i has approximately 549 known aquatic nuisance species, more than any other U.S. state or territory, with an estimated 80% arriving in state waters via vessel traffic. Aquatic nuisance species can have significant adverse impacts on Hawai'i's economy, culture, public health, and ecosystem. Hawai'i's native aquatic species are particularly vulnerable to the impacts of aquatic nuisance species due to a high rate of endemism, meaning many are without natural predators or natural competition. Nuisance species prey upon Hawai'i's native species, outcompete them for food, light, and space, and even infect them with disease. Examples of harmful aquatic nuisance species that have arrived via vessel discharges include prickly seaweed (*Acanthophora spicifera*) which now covers reefs on all main Hawaiian Islands and orange keyhole sponge (*Mycale armata*) that outcompetes native sponges and corals.

DAWN N. S. CHANG  
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KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

Section 187A-32, HRS, designates the Department as “the lead state agency for preventing the introduction and carrying out the destruction of alien aquatic organisms through the regulation of ballast water discharges and hull fouling organisms.” While ballast water and hull fouling are often the focus of discussions surrounding aquatic nuisance species prevention, many studies have shown that other vessel discharges, such as bilge water, anchor chain locker effluent discharge, or runoff from rinsing decks can carry bacteria, larvae, and macroorganisms. Although many aquatic nuisance species have already become established in Hawaiian waters, we can take measures to prevent new species of concern from arriving such as the highly deadly Stony Coral Tissue Loss Disease (SCTLD) that has been devastating reefs in the Caribbean and has been shown to be transmitted through vessel discharges.

There are two separate and important reasons that the Department needs the authority to regulate discharges incidental to the normal operation of a vessel other than ballast water and hull fouling. The first, as noted above, is the need to immediately adopt administrative rules that will prevent the introduction of SCTLD into state waters. Discharges other than ballast water and hull fouling are potential vectors for SCTLD. The amendments made by House Bill 755 will allow the Department to regulate those other critical vectors.

The second reason is for state enforcement to protect state waters after the final federal regulations take effect under the Vessel Incidental Discharge Act of 2018 (VIDA). The federal VIDA regulations are currently projected to take effect in 2025. Once adopted, they will preempt the State of Hawai‘i from adopting or enforcing any state law or regulation with respect to any discharge incidental to the normal operation of a vessel that is subject to regulation under VIDA *unless* the state requirement is identical to, or less protective than, the federal VIDA regulations. Providing the Department with authority to regulate all discharges incidental to the normal operation of a vessel will allow the State to mirror VIDA regulations. This will enable Hawai‘i to conduct its own enforcement actions and collect any fines imposed on violators under state procedures and in state courts.

House Bill 755 also significantly increases potential penalties for violations to reflect the severity of the economic impact the introduction of new aquatic nuisance species can have on the State. The maximum penalties proposed in House Bill 755 would provide a meaningful deterrent for large, multinational shipping companies and are similar to the penalties for a VIDA violation under section 309 of the Clean Water Act (CWA) (33 U.S.C. 1319). The Department notes that section 309 of the CWA does provide lower minimum penalties for violations, which are appropriate for unintentional recordkeeping and other paperwork violations that do not result in an unauthorized discharge in state waters.

Mahalo for the opportunity to submit testimony in support of this measure.



**Testimony of  
THE COORDINATING GROUP ON ALIEN PEST SPECIES (CGAPS)  
By Christy Martin and Andrew Porter**

**Before the House Committees on  
ENERGY AND ENVIRONMENTAL PROTECTION  
and  
WATER AND LAND**

**Thursday, February 9, 2023  
8:30 AM  
State Capitol, Conference Room 325**

**In consideration of  
HOUSE BILL 755  
RELATING TO AQUATIC NUISANCE SPECIES**

House Bill 755 proposes to grant the Department of Land and Natural Resources (DLNR) the authority to prevent and respond to the threat of aquatic nuisance species (ANS) from all discharges incidental to the normal operation of a vessel (incidental discharges) that relate to ANS. This Bill also seeks to clarify the relationship between state law and the federal Vessel Incidental Discharge Act of 2018 (VIDA) (title IX of P.L. 115-282) and provide for penalties sufficient to discourage future violations of ANS regulations. **The Coordinating Group on Alien Pest Species (CGAPS) supports this bill and offers the following comments.**

Hawaii Revised Statutes (HRS) section 187A-32 authorizes DLNR to regulate the introduction of ANS from ballast water and vessel hull fouling. This grant of authority has been crucial in protecting the state's harbors and near coastal waters; however, this section is out of date and the scientific understanding of shipborne vectors for the introduction of ANS has greatly expanded since the enactment of section 187A-32 HRS in the year 2000. For example, in 2000 the Environmental Protection Agency still exempted vessel incidental discharges from Clean Water Act regulation under the National Pollutant Discharge Elimination System. Since that time, the federal courts ordered the EPA to regulate incidental discharges from vessels and today the Vessel General Permit regulates general effluent levels and twenty-six specific incidental discharges from vessels.

There are two separate and important reasons to provide DLNR the authority to regulate incidental discharges other than ballast water and hull fouling. The first is the need to protect state waters from ANS that could hide in those other discharges, including a new and devastating coral disease known as stony coral tissue loss disease, prior to the effective date of the federal regulations to implement VIDA. The understanding of shipborne vectors for the introduction of

ANS has grown to include multiple discharges besides ballast water and biofouling. These discharges include ballast tank sediment, anchor chain sediment, anchor chain locker sediment, sea chests, raw water piping, and more. As an example of the obvious threat these discharges pose, when ship's retrieve their anchors both the anchor chain and the anchor itself can be covered with biofouling and muddy or silty deposits that can contain ANS or their spawn/propagules. Federal law requires vessels to wash down the anchor chain as it is being retrieved, but any leftover or missed deposits can fall off of the chain and accumulate in the bottom of the anchor chain locker where it is stored on voyages. If not done correctly, when this anchor chain locker is later flushed or cleaned out in a different location the sediment discharged can easily introduce ANS or pathogens to the receiving waters. Hawaii urgently needs the ability to regulate these other incidental discharges to adopt regulations to prevent the introduction of stony coral tissue loss disease into state waters. This is a devastating ANS that is known to affect more than 30 species of stony corals and is characterized by rapid onset of disease lesions in the coral tissue, leading to tissue loss and colony mortality over a period of weeks.

In addition to authorizing DLNR to adopt regulations prior to the effective date of the federal VIDA regulations, this authority is also needed to facilitate an organized approach for Hawaii to co-enforce vessel discharge regulations with the United States Coast Guard (USCG) under VIDA. Federal VIDA regulations are currently projected to come into force in late 2025. When state-USCG co-enforcement of VIDA becomes a reality, it will be essential that the state can regulate *all* of the discharges for ANS that the USCG regulates to avoid a disjointed or piecemeal approach to this co-enforcement. This expanded authority also ties into HB 755's proposal to mirror federal regulations adopted under VIDA as state regulations. Under VIDA, both the EPA and the USCG are tasked with reviewing, revising, and updating their incidental discharge regulations every five years and could revise those regulations between five-year reviews, based on new information or for other reasons. Without the amendments made by HB 755, every time the VIDA regulations are updated DLNR will have to enter the chapter 91 rulemaking process to mirror the new federal regulations. This would result in at least one year in every five years where the state and federal regulators are working from a different set of regulations. This is clearly not ideal for cohesive co-enforcement and will cause confusion in the shipping industry as well as between regulators. Providing for the automatic update of state regulations to mirror the federal regulations will be crucial in the co-enforcement effort. The mirroring aspects of this proposed bill were modeled after §195D-4(a) HRS which provides for listings under the Hawaii Endangered Species Act to automatically update and match the federal Endangered Species Act.

An obvious question that comes up at this point is that, if the State will be preempted from passing incidental discharge regulations that are more stringent than the federal regulations and the state can enforce the federal regulations, then why does Hawaii need its own regulations at all? Under VIDA, the State can enforce the federal regulations, *but* any enforcement action by the State under the federal regulations must be brought in federal district court. While bringing a federal court complaint against a vessel is possible, there are procedural and evidentiary hurdles in the federal court system that disincentivize the State from bringing such an action for anything but the most egregious and high value incidents. On the other hand, there is nothing in VIDA stopping the State from enforcing its *own* regulations in state court or even through an administrative action. Giving the State the option to proceed in state court or set up an administrative process could clear out procedural hurdles and lower the evidentiary burden in

bringing an enforcement action providing Hawaii the authority to protect its own state waters and the flexibility for the State to fit the enforcement action to the severity of the violation.

In discussions with the shipping industry and other stakeholders, there has been concern expressed that having state regulations that mirror federal regulations could result in double-jeopardy for vessel owners where they undergo two trials and receive two fines for the same violation. This is a valid concern, but VIDA requires that the USCG work with the states in drafting the regulations guiding this co-enforcement effort, a process which may begin in the winter of this year. Judging from preliminary talks with the USCG, issues such as parallel enforcement actions will be addressed in detail during these sessions. It is also likely that during this time the USCG will conduct multiple stakeholder engagement sessions to gain input from the shipping industry and other concerned groups. The regulations developed by the USCG for co-enforcement and enforcement actions will also be part of federal rulemaking under the Administrative Procedure Act that includes a public comment period during which time stakeholders can voice their concerns about these issues.

Finally, when crafting penalties for incidental discharge regulations it is important to keep in mind the broad spectrum of contemplated regulations. Clearly, the penalties need to have a cap high enough that it would deter a multinational shipping company from violating the regulations or to compensate the State for remediation efforts following a massive discharge of untreated ballast water. However, it is also important to keep in mind that there are more simple infractions, such as failure to submit a ballast water reporting form in a timely manner, that need to fall within the parameters of the penalties section so that each of the regulations is properly enforceable and the State retains leverage to issue smaller penalties for smaller violations. In following the above cited importance of enforcement flexibility for the State to develop an administrative process for violations, it may be beneficial to give the adjudicating body broad discretion in their authority to match the penalty to the severity of the violation.

Thank you for the opportunity to comment on this measure.

**HB-755**

Submitted on: 1/31/2023 7:02:53 PM

Testimony for WAL on 2/9/2023 8:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Douglas Perrine	Individual	Support	Written Testimony Only

Comments:

Hawaii has suffered significant ongoing environmental damage from the introduction of alien aquatic species. I support HB755 to reduce the probability of additional introductions which could cause even worse problems.