



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

ON THE FOLLOWING MEASURE:

S.B. NO. 2650, RELATING TO WATER QUALITY.

BEFORE THE:

SENATE COMMITTEES ON HEALTH AND ON WATER AND LAND

DATE: Monday, February 14, 2022 **TIME:** 1:00 p.m.

LOCATION: State Capitol, Room 229, Via Videoconference

TESTIFIER(S): Holly T. Shikada, Attorney General, or
Colin J. Lau, Deputy Attorney General

Chairs Keohokalole and Inouye and Members of the Committees:

The Department of the Attorney General offers the following comments.

The purpose of the bill is to transfer water quality regulatory functions of the Department of Health (DOH) to the Commission on Water Resource Management (Commission). The bill extends jurisdiction under the State Water Code, chapter 174C, Hawaii Revised Statutes (HRS), to include coastal waters up to three miles seaward from shore. Appropriations and administrative support for the DOH functions are transferred to the Commission, and a second deputy director position is created to administer and implement statutory chapters in the the state Water Quality Control program. The additional deputy director would be equivalent in organizational structure to the existing deputy for Water Resource Management.

There is an inconsistency regarding the number of members in the Commission. Section 6, on page 14, line 14, of the bill, changes the composition of the Commission by amending section 174C-7(b), HRS, to provide that seven rather than five members are to be appointed by the Governor. That would bring the total membership of the Commission to nine, including *ex officio* members. Despite this change, section 174C-7(a), HRS, still states that the Commission shall consist of seven members. We recommend also amending section 174C-7(a) to provide that the Commission shall consist of nine members.

We also believe that section 6 may be found unconstitutional for violating the one title, one subject requirement of article III, section 14, of the Hawai'i Constitution.

Article III, section 14, of the Hawai'i Constitution provides that "[e]ach law shall embrace but one subject, which shall be expressed in its title." In *Schwab v. Ariyoshi*, the court stated that the purpose of article III, section 14, is "[f]irst to prevent hodge-podge or logrolling legislation, second, to prevent surprise or fraud upon the Legislature by means of provisions in bills which titles give no intimation; and third, to apprise the people of proposed matters of legislation." *Schwab v. Ariyoshi*, 58 Haw. 25, 30-31, 564 P.2d 135, 139 (1977) (quoting *Jensen v. Turner*, 40 Haw. 604, 607-08 (1954)).

In *Territory v. Dondero*, 21 Haw. 19 (1912), the court set forth a test to be used to construe a provision similar to article III, section 14. The court stated,

[i]t is sufficient if the title of an ordinance fairly indicates to the ordinary mind the general subject of the act, is comprehensive enough to reasonably cover all its provisions, and is not calculated to mislead; but an act which contains provisions neither suggested by the title, nor germane to the subject expressed therein, is, to that extent void.

21 Haw. at 29.

The court in *Schwab* noted that article III, section 14, of the Hawai'i Constitution is mandatory and any violation thereof would render an enactment invalid. *Schwab v. Ariyoshi*, 58 Haw. at 31, 564 P.2d at 139. The court found that, because every enactment of the legislature is presumptively constitutional, to find that an enactment violated the subject-title requirements of the State Constitution, the infraction should be "plain, clear, manifest, and unmistakable." *Id.* We believe that the possible violation of article III, section 14, contained in the current draft of the bill could be deemed to be plain, clear, manifest, and unmistakable.

Because the subject expressed in the title of the bill is "water quality", we believe that it is possible that a member of the public reading the title would not suspect both that the bill will add to the composition of the Commission, the Chairperson of the Hawaiian Homes Commission or Chairperson's designee, or eliminate the Director of Health or Director's designee from the Commission. There is no indication in the measure how these changes are germane to the subject of water quality. To address this issue, section 6 could be amended to remove reference to the Chairperson of the

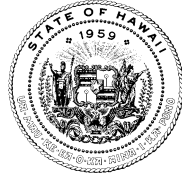
Hawaiian Homes Commission from the bill, and the deletion relating to the director of the Department of Health or director's designee should be reinstated.

As a minor clerical comment, we note that in section 13(1), on page 34, lines 12-13, the reference amending section 174C-84(c), HRS, should retain the words "to be reviewed" and should instead read "shall cause the application to be reviewed [~~by the department of health~~] for compliance with [~~their~~] its rules and standards".

Thank you for the opportunity to testify.

DAVID Y. IGE
GOVERNOR
STATE OF HAWAII

JOSH GREEN
LT. GOVERNOR
STATE OF HAWAII



WILLIAM J. AILA, JR.
CHAIRMAN
HAWAIIAN HOMES COMMISSION

TYLER I. GOMES
DEPUTY TO THE CHAIRMAN

**STATE OF HAWAII
DEPARTMENT OF HAWAIIAN HOME LANDS**

P. O. BOX 1879
HONOLULU, HAWAII 96805

TESTIMONY OF WILLIAM J. AILA, JR, CHAIRMAN
HAWAIIAN HOMES COMMISSION
BEFORE THE SENATE COMMITTEES ON HEALTH AND WATER AND LAND
HEARING ON FEBRUARY 14, 2022 AT 1:00PM VIA VIDEOCONFERENCE

IN SUPPORT OF

SB 2650, RELATING TO WATER QUALITY

February 14, 2022

Aloha Chair Keohokaloke, Chair Inouye, and members of the Committees:

The Department of Hawaiian Home Lands (DHHL) supports this bill that would replace the Director of Health with the Chairperson of the Hawaiian Homes Commission (HHC) or the Chairperson's designee to serve as an ex officio, voting member on the Commission on Water Resource Management (CWRM).

The HHC approved a proposal to add the Chairman of the Hawaiian Homes Commission or the Chairman's designee to the CWRM. Additionally, the HHC approved a Water Policy Plan in 2014 which includes the goal to "aggressively, proactively, consistently and comprehensively advocate for the kuleana of the beneficiaries, the DHHL and the HHC to water before all relevant agencies and entities." While DHHL has been working closely with CWRM, this bill would allow for greater advocacy for beneficiaries.

We note that in the past the Department of Land and Natural Resources has consistently opposed similar measures, and have noted that "The Hawaii Supreme Court has made it clear that in the context of water, the entire Commission has a responsibility to respect and protect native Hawaiian rights, including those of DHHL, and to carry out the State's public trust duties. This responsibility does not rest on a single member." We note that the DLNR's testimony neglects to explain that the Court has made this clear in cases where the CWRM failed to fulfill its duties to DHHL, and that the presence of the Chairman or representative would help fulfill CWRM's duties.

Thank you for your consideration of our testimony.



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

Testimony in OPPOSITION to SB2650
RELATING TO WATER QUALITY

SENATOR JARRETT KEOHOKALOOLE, CHAIR
SENATE COMMITTEE ON HEALTH

SENATOR LORRAINE R. INOUYE, CHAIR
SENATE COMMITTEE ON WATER AND LAND

Hearing Date: 2/14/2022

Room Number: Via Videoconference

1 **Fiscal Implications:** This measure will have significant fiscal implications.

2 **Department Testimony:** The Department of Health (Department) strongly opposes this
3 measure. The Department does not understand why this measure is being proposed. Major
4 reorganizations that involve moving existing programs from one department to another should be
5 handled by the Executive Branch and not by legislation. The mission of the Department is to
6 protect and improve the health and environment for all people in Hawaii. The missions of the
7 Clean Water Branch (CWB), Safe Drinking Water Branch (SDWB) and Wastewater Branches
8 (WWB) are in alignment with the Department's mission. Protection of public health, safety and
9 the environment may be threatened if these three branches are moved to the Commission on
10 Water Resource Management (CWRM). The Department is concerned that water quality may be
11 compromised if moved to the CWRM if there is a competing interest with water quantity.

12 The measure could also have an impact on the State's primacy under the Federal Clean
13 Water Act and Safe Drinking Water Act (SDWA). An important component of primacy under
14 the SDWA is to provide water quality testing services for the regulated public water system and
15 to certify laboratories that test drinking water samples. This part of the core water primacy
16 program is a partnership within the Department with the State Laboratories Division (SLD),

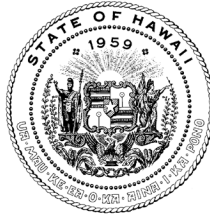
1 Environmental Health Analytical Services Branch. The Drinking Water Chemistry Section is
2 funded by general and federal funds. Moving the SDWB to CWRM without a clear
3 understanding of how to continue or decouple the program integration between SLD and SDWB
4 could result in loss of primacy of the SDWA for the State.

5 In lieu of pursuing this measure, we highly recommend that CWRM and the Department's
6 Environmental Management Division collaborate to develop shared strategies and policies to
7 protect our precious water resources.

8 **Offered Amendments:** None.

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

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

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

Testimony of
SUZANNE D. CASE
Chairperson

Before the Senate Committees on
HEALTH
and
WATER AND LAND

Monday, February 14, 2022
1:00 PM

State Capitol, Conference Room 229 & Videoconference

In consideration of
SENATE BILL 2650
RELATING TO WATER QUALITY

Senate Bill 2650 proposes to 1) Amend the State Water Code, Chapter 174C, Hawai'i Revised Statutes (HRS), and Chapters 340B, 340E, 340F, 342D, and 342E, HRS, to transfer functions regarding water quality, including water pollution, nonpoint source pollution management and control, drinking water standards, mandatory certification of public water system operators, and wastewater, from the Department of Health to the Department of Land and Natural Resources' (Department) Commission on Water Resource Management; 2) Increase membership on the Commission on Water Resource Management from five members to seven members; and 3) Replace the Director of Health with the Chairperson of the Department of Hawaiian Home Lands Commission as an ex-officio voting member on the Commission on Water Resource Management (Commission). **The Department offers the following comments.**

Water quality and water quantity are clearly connected and should be managed together, which other States do in a single agency. However, the State Water Code (Chapter 174C, Hawai'i Revised Statutes) was carefully written to recognize the Department of Health's role in protecting environmental health and public health as a co-trustee of water resources in the State with the Commission on Water Resource Management. The proposed programs to be transferred to the Commission are Wastewater Treatment Personnel, Safe Drinking Water, Certification of Public Water System Operators, Water Pollution, and Nonpoint Source Pollution. It is important to note that the Commission staff currently works closely with the Department of Health on program

activities involving permitting, planning and other coordinated functions related to the programs named above – effectively protecting environmental and public health across the State of Hawai‘i. These programs are detailed in the Water Quality Plan, updated in 2019.

Notwithstanding the close cooperation between the Commission and the Department of Health, the Department acknowledges that there may be some Department of Health water quality programs, policies, and functions that could be better integrated through enhanced collaboration. There are also some gaps that could be addressed by improved regulatory functions. As such, the Commission continues to work closely with the Department of Health to improve the integration of water quantity and water quality management, and to ensure that public trust purposes of water are protected within the context of their permitting, planning, and response activities. Moreover, the Director of the Department of Health is an ex-officio voting member of the Commission, providing further guidance and dialogue related to the Commission’s water quality-related actions and policies. The Department believes that this flexible and practical working relationship between the Commission and the Department of Health achieves the goals and objectives of the State Water Code and Article XI, Section 7 of the Hawai‘i Constitution, and continues to protect Hawai‘i’s environmental and public health.

Thank you for the opportunity to comment on this measure.

DAVID Y. IGE
GOVERNOR OF
HAWAII



SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
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Testimony of
SUZANNE D. CASE
Chairperson

Before the Senate Committees on
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Monday, February 14, 2022
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Thank you for the opportunity to comment on this measure.

SB-2650

Submitted on: 2/11/2022 4:26:50 PM

Testimony for HTH on 2/14/2022 1:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Kathleen Mitchell	Testifying for Board of Water Supply	Comments	Yes

Comments:

Please refer to testimony submitted by Erwin Kawata from the Board of Water Supply and allow me as a participant of Board of Water Supply to respond to questions by the Committee.

SB-2650

Submitted on: 2/13/2022 10:41:57 AM

Testimony for HTH on 2/14/2022 1:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Ted Bohlen	Testifying for Hawai'i Reef and Ocean Coalition	Oppose	Yes

Comments:

To: The Honorable Senators Jarrett Keohokalole and Lorraine R. Inouye, Chairs, Rosalyn Baker and Gilbert S.C. Keith-Agaran, Vice Chairs, and members of the Senate Committees on Health and Water and Land

From: Hawai'i Reef and Ocean Coalition (by Ted Bohlen)

Aloha Senators Keohokalole, Inouye, Baker and Keith-Agaran and members of the Senate Committees on Health and Water and Land!

The Hawai'i Reef and Ocean Coalition (HIROC) is concerned with maintaining the quality of Hawaii's waters to protect coral reefs and other marine life. HIROC appreciates this bill's intent to improve water regulation. However, **HIROC respectfully but STRONGLY OPPOSES this bill.**

I served for 15 years as the attorney representing DOH on water quality matters. My experience has taught me that water quality and water quantity regulation are two very different things. It was very rare for me to have occasion to interact with the fine people at CWRM. **Consolidating the two areas that both involve water to manage "holistically" sounds like a good idea, but I believe it is not, and that it will cause significant disruption without identifiable benefits. I believe that it will cause inefficiency, not efficiency.**

Water quality is regulated by DOH with a program approved and significantly funded by the US Environmental Protection Agency (EPA) under the federal Clean Water Act, the State Water Pollution statute, HRS c. 342D, and rules thereunder. CWRM is not expert in water quality and to my knowledge lacks any staff expertise in that area.

Water quantity is regulated by CWRM under the State Water Code. These two regulatory schemes have little in common.

Thank you to the bill sponsors for their concern about improving management of water in Hawai'i, but HIROC respectfully must OPPOSE this bill!

Hawai'i Reef and Ocean Coalition (by Ted Bohlen)

SB-2650

Submitted on: 2/12/2022 3:24:27 PM

Testimony for HTH on 2/14/2022 1:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Lisa Bishop	Individual	Oppose	No

Comments:

Aloha Chair Keohokalole, Vice Chair Baker, and Committe members,

Mahalo for the opportunity to testify in strong opposition to SB2650. This is an even more complicated way to manage critical water quality in our State, with an even greater dilution of accountability.

Please do not pass SB2650.

Mahalo,

Lisa Bishop

Resident, homeowner, tax payer, and voter

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

ELLEN E. KITAMURA, P.E.
Deputy Manager and Chief Engineer

February 14, 2022

LATE

The Honorable Jarrett Keohokalole, Chair
and Members
Senate Committee on Health
Conference Room 229 & Videoconference
Honolulu, Hawaii 96813

The Honorable Lorraine R. Inouye, Chair
and Members
Senate Committee on Water and Land
Conference Room 229 & Videoconference
Honolulu, Hawaii 96813

Dear Chair Keohokalole, Chair Inouye, and Members:

Subject: Senate Bill 2650: Relating to Water Quality

The Honolulu Board of Water Supply (BWS) submits the following comments on Senate Bill (SB) 2650. This bill proposes amending the State Water Code, Hawaii Revised Statutes Chapter 174C, to consolidate water quality and quantity decisions to a single agency and integrate the oversight of water quality and quantity within the Commission on Water Resource Management. The BWS appreciates the legislative intent behind this bill and supports revising the State Water Code to prevent any further harm to our drinking water by protecting, controlling, and regulating the use and quality of Hawaii's water resources for the benefit of its people.

However, adding water quality decisions to the responsibilities of the Commission on Water Resource Management could detract from the agency's obligation to set policies and establish priorities for water rights and uses. Consolidating water quality and quantity decisions to a single agency such as the Commission on Water Resource Management could also create the potential for intra-agency conflict if water quality and water use priorities do not align. The BWS believes that water quality and quantity decisions should remain separate. Instead, the BWS respectfully suggests water quality decisions and issues be vested in a department of environmental protection as proposed in SB 3273 and House Bill (HB) 2256. A state department of environmental protection would allow for centralization of the implementation and enforcement of environmental laws, including the restoration, protection, and enhancement of water quality under the State Water Code. As the agency charged with managing Oahu's

The Honorable Jarrett Keohokalole, Chair
The Honorable Lorraine R. Inouye, Chair
and Members
February 14, 2022
Page 2

municipal water resources and providing residents with safe and dependable water service, the BWS recommends amending SB 2650 to align with SB 3273 and HB 2256 to further protect Hawaii's drinking water now and into the future.

Thank you for your consideration of our testimony concerning SB 2650.

Very truly yours,



Digitally signed by Ernest
Y.W. Lau
Date: 2022.02.12
15:20:27 -10'00'

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

LATE

SB-2650

Submitted on: 2/13/2022 8:03:43 PM

Testimony for HTH on 2/14/2022 1:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Susan Pcola_Davis	Individual	Support	No

Comments:

STRONGLY SUPPORT

The Commission on Water Resources will strengthen the prevention of any harm by protecting, controlling, and regulating the use and quality of Hawai'i's water resources for the benefit of its people.

I agree that this will create greater government efficiency and offer the benefit of simplified permitting procedures. However, permitting procedures must be reviewed and if necessary, revised to ensure a catastrophic disaster doesn't recur.

The public will appreciate a wider forum for participation. As a member of the public, I did not feel that the public was afforded any input or comments to the Department of Health during the Red Hill disaster.

I appreciate being able to testify to the Legislature on this very important bill.

Integrating water quality policy within the responsibilities of the Commission transferred from the Department of is a huge improvement.