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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

Testimony of
DAWN N. S. CHANG
Chairperson

Before the Senate Committee on
JUDICIARY

Wednesday, April 5, 2023
09:45 AM

State Capitol, Conference Room 016 & Videoconference

In consideration of
HOUSE BILL 1088, HOUSE DRAFT 1
RELATING TO DECLARATION OF WATER SHORTAGE AND EMERGENCY

House Bill 1088, House Draft 1 proposes to amend the conditions, manner, and areas in which the Commission on Water Resource Management (Commission) of the Department of Land and Natural Resources (Department) can declare water shortages and emergencies. **The Department strongly supports this measure and offers amendments.**

After consulting with the Honolulu Board of Water Supply and the Departments of Water Supply of the Hawai'i, Kaua'i, and Maui County, the Department wants to clarify the intent of the bill to separate water shortage from water emergency by adding the Commission's authority to declare an emergency after consultation with the County and the Department of Health in new subsection of Hawai'i Revised Statutes (HRS) Section 174C-5, by providing for a proceeding for challenges of an emergency declaration in a new subsection of HRS Section 174C-9, and by repealing subsection (g) of HRS Section 174C-62. All other amendments to HRS Section 174C-62 remain the same as in House Draft 1. Thus, the Department offers the following amendments by replacing House Draft 1 in its entirety with the following language:

SECTION 1. Section 174C-5, Hawaii Revised Statutes, is amended to read as follows:

"§174C-5 **General powers and duties.** The general administration of the state water code shall rest with the commission on water resource management. In addition to its other powers and duties, the commission:

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

- (1) Shall carry out topographic surveys, research, and investigations into all aspects of water use and water quality;
- (2) Shall designate water management areas for regulation under this chapter where the commission, after the research and investigations mentioned in paragraph (1), shall consult with the appropriate county council and county water agency, and after public hearing and published notice, finds that the water resources of the areas are being threatened by existing or proposed withdrawals of water;
- (3) Shall establish an instream use protection program designed to protect, enhance, and reestablish, where practicable, beneficial instream uses of water in the State;
- (4) May contract and cooperate with the various agencies of the federal government and with state and local administrative and governmental agencies or private persons;
- (5) May enter, after obtaining the consent of the property owner, at all reasonable times upon any property other than dwelling places for the purposes of conducting investigations and studies, or enforcing any of the provisions of this code, being liable, however, for actual damage done. If consent cannot be obtained, reasonable notice shall be given prior to entry;
- (6) Shall cooperate with federal agencies, other state agencies, county or other local governmental organizations, and all other public and private agencies created for the purpose of utilizing and conserving the waters of the State, and assist these organizations and agencies in coordinating the use of their facilities and participate in the exchange of ideas, knowledge, and data with these organizations and agencies. For this purpose the commission shall maintain an advisory staff of experts;
- (7) Shall prepare, publish, and issue printed pamphlets and bulletins as the commission deems necessary for the dissemination of information to the public concerning its activities;
- (8) May appoint and remove agents, including hearings officers and consultants necessary to carry out the purposes of this chapter, who may be engaged by the commission without regard to the requirements of chapter 76 and section 78-1;
- (9) May hire employees in accordance with chapter 76;
- (10) May acquire, lease, and dispose of real and personal property as may be necessary in the performance of its functions, including the acquisition of real property for the purpose of conserving and protecting water and water related resources as provided in section 174C-14;
- (11) Shall identify, by continuing study, those areas of the State where salt water intrusion is a threat to fresh water resources and report its findings to the appropriate county mayor and council and the public;

- (12) Shall provide coordination, cooperation, or approval necessary to the effectuation of any plan or project of the federal government in connection with or concerning the waters of the State. The commission shall approve or disapprove any federal plans or projects on behalf of the State. No other agency or department of the State shall assume the duties delegated to the commission under this paragraph, except that the department of health shall continue to exercise the powers vested in it with respect to water quality, and except that the department of business, economic development, and tourism shall continue to carry out its duties and responsibilities under chapter 205A;
- (13) Shall plan and coordinate programs for the development, conservation, protection, control, and regulation of water resources based upon the best available information, and in cooperation with federal agencies, other state agencies, county or other local governmental organizations, and other public and private agencies created for the utilization and conservation of water;
- (14) Shall catalog and maintain an inventory of all water uses and water resources; [~~and~~]
- (15) Shall determine appurtenant water rights, including but not limited to the quantification of the amount of water and the specification of the water course or the means of access and delivery entitled to by that right, which determination shall be valid for purposes of this chapter[~~-~~]; and
- (16) May declare an emergency if the commission determines, in consultation with the appropriate county and the department of health, that there is an absence of sufficient quantity and quality of water in any area, whether within or outside of a water management area, which threatens the public health, safety, and welfare. The commission may issue orders reciting the existence of the emergency and requiring such actions as the commission deems necessary to address the emergency be taken, including but not limited to apportioning, rotating, limiting, or prohibiting the use of the water resources of the area."

SECTION 2. Section 174C-9, Hawaii Revised Statutes, is amended to read as follows:

"§174C-9 Proceedings before the commission concerning water resources. (a) All proceedings before the commission concerning the enforcement or application of any provision of this chapter or any rule adopted pursuant thereto, or the issuance, modification, or revocation of any permit or license under this code by the commission, shall be conducted in accordance with chapter 91. Hearings regarding particular water resources shall be conducted on the island where those water resources are located.

(b) Any party to whom an emergency order is directed may challenge such an order but shall immediately comply with the order, pending disposition of the party's challenge. The commission shall give precedence to a hearing on such challenge over all other pending matters."

SECTION 3. Section 174C-62, Hawaii Revised Statutes, is amended to read as follows:

"§174C-62 Declaration of water shortage. (a) The commission shall formulate a statewide plan for implementation during periods of water shortage. As a part of the plan, the commission shall adopt a reasonable system of permit classification according to source of water supply, method of extraction or diversion, use of water, or a combination thereof.

(b) The commission, by rule, may declare that a water shortage exists within all or part of an area, whether within or outside of a water management area, when insufficient water is available to meet the requirements of the permit system or when conditions are such as to require a temporary reduction in total water use within the area to protect water resources from serious harm. The commission shall publish a set of criteria for determining when a water shortage exists~~[-]~~, including but not limited to impacts and effects of the climate crisis.

(c) In accordance with the plan adopted under subsection(a), the commission may impose such restrictions on one or more classes of permits, and outside of management areas on well and stream diversion owners and operators as may be necessary to protect the water resources of the area from serious harm and to restore them to their previous water quantity or chloride level condition.

(d) A declaration of water shortage and any measures adopted pursuant thereto may be rescinded by rule by the commission.

(e) When a water shortage is declared, the commission shall cause a notice ~~[thereof]~~ of the water shortage to be published in a prominent place in a newspaper of general circulation throughout the area~~[-]~~ and the commission's website. The notice shall be published each day for the first week of the shortage and once a week ~~[thereafter]~~ for four months, followed by monthly publications until the declaration is rescinded. Publication of ~~[such]~~ the notice shall serve as notice to all water users in the area of the condition of water shortage.

(f) The commission shall cause each permittee in the area to be notified by regular and electronic mail of any change in the conditions of the permittee's permit, any suspension ~~[thereof,]~~ of the permittee's permit, or of any other restriction on the use of water for the duration of the water shortage.

~~[(g) If an emergency condition arises due to a water shortage within any area, whether within or outside of a water management area, and if the commission finds that the restrictions imposed under subsection (c) are not sufficient to protect the public health,~~

~~safety, or welfare, or the health of animals, fish, or aquatic life, or a public water supply, or recreational, municipal, agricultural, or other reasonable uses, the commission may issue orders reciting the existence of such an emergency and requiring that such actions as the commission deems necessary to meet the emergency be taken, including but not limited to apportioning, rotating, limiting, or prohibiting the use of the water resources of the area. Any party to whom an emergency order is directed may challenge such an order but shall immediately comply with the order, pending disposition of the party's challenge. The commission shall give precedence to a hearing on such challenge over all other pending matters.]”~~

SECTION 4. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 5. This Act shall take effect on June 30, 3000.

This bill also proposes to require water shortage plans to be developed statewide and provides clarity that the Commission has authority to declare water shortages in any area, within and outside of a water management area. Currently, water shortage plans have only been developed in water management areas. These plans establish criteria for declaring water shortages and actions that must be undertaken by water use permit holders to protect the health of ground and surface water resources for as long as water shortage conditions exist.

Finally, the Commission would be required to consider the impacts of the climate crisis in its determination of criteria for water shortage declarations. The bill also proposes to modernize notice requirements by adding notification of water use permit holders per electronic mail and publication of a water shortage and emergency on the Commission’s website.

Mahalo for the opportunity to provide testimony in strong support of this measure and to offer amendments.

DEPARTMENT OF WATER

COUNTY OF KAUAI

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April 4, 2023

The Honorable Karl Rhoads, Chair
and Committee Members
Senate Committee on Judiciary
Hawaii State Capitol, Room 016
Honolulu, HI 96813

JOSEPH E. TAIT
MANAGER AND CHIEF ENGINEER

MICHAEL K. HINAZUMI, P.E.,
DEPUTY MANAGER-ENGINEER

Dear Chair Rhoads and Committee Members:

Subject: HB 1088, HD1 – Relating to Declaration of Water Shortage and Emergency

The County of Kauai, Department of Water (DOW) is appreciative and supportive of continued communication and efforts with the Commission on Water Resource Management (CWRM) and their explanation of the intent of the proposed revisions to HB1088, HD1 – to separate water emergencies from water shortages considering the recent challenges brought upon them by the Red Hill situation.

As a collaborative partner, CWRM has shared their proposed testimony and the DOW is more amenable to their revised proposal. However, it is the DOW's understanding that the comments being heard by the committee are those to address the proposed revisions contained in the published HB1088, HD1 bill. It is with that understanding that the DOW offers a repeat of the comments provided to the Senate Committee on Water and Land, for your consideration.

"The County of Kauai, Department of Water (DOW) offers comments on House Bill (HB) 1088, House Draft (HD) 1, for your consideration. This bill proposes to amend the State Water Code 174C-62, Hawaii Revised Statutes (HRS), which currently requires that a water shortage be declared by rule in accordance with the water shortage plan before the Commission on Water Resource Management (CWRM) can declare an emergency. This proposed bill would allow CWRM to declare a water emergency without a prior water shortage declaration by rule.

An allowance to declare a water emergency without an established water shortage plan, or established criteria for an emergency, would be arbitrary and could result in unintended adverse consequences that impact the public's health and safety.

The proposed amendment to subsection (g) should not be included, as it removes the requirement to make findings before implementation of restrictions on permittees.

The proposed amendments to subsection (h) should not be included unless deemed necessary by an approved water shortage plan.

Overall, this bill is unnecessary and would effectively bypass procedural and substantive due process considerations and protections currently in the State Water Code. The State Water Code, as developed, was done through a collaborative effort of stakeholders.

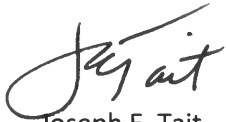
Proposed changes and/or amendments to it, should adhere to the collaborative approach.”

With the clarified intent of the proposed bill revision, it is the DOW’s opinion that provisions of HRS **127A, Emergency Management**, would be best suited for the declaration of an emergency related to a water resource, along with the additional federal resources it would be able to leverage.

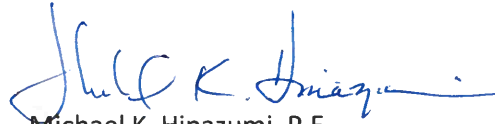
Kauai DOW respectfully, requests that HRS Section **174C-62, Declaration of Water Shortage**, remain unchanged from the existing statute.

Thank you for your time and opportunity to provide testimony for consideration on HB 1088, HD1.

Sincerely,



Joseph E. Tait
Manager and Chief Engineer



Michael K. Hinazumi, P.E.
Deputy Manager – Engineer

JT/crz



DEPARTMENT OF WATER SUPPLY • COUNTY OF HAWAII

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April 4, 2023

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

HEARING BEFORE THE SENATE COMMITTEE ON JUDICIARY

DATE: Wednesday, April 5, 2023
TIME: 9:45 a.m.
PLACE: Conference Room 016 & Videoconference

HB 1088, HD1 - RELATING TO DECLARATION OF WATER SHORTAGE AND EMERGENCY

Honorable Chair Karl Rhoads, Vice-Chair Mike Gabbard, and committee members of the Senate Committee on Judiciary.

Our understanding is that HB 1088 was introduced because the Commission on Water Resource Management (CWRM) was limited in its capacity to act in response to the Red Hill situation due to current language in the statute.

We are encouraged by the recent communication with CWRM and their explanation of the intent to separate a water emergency from a water shortage as well as acknowledging our concerns. While we find the proposed language in DLNR's latest testimony more acceptable, the County of Hawaii Department of Water Supply (DWS) is of the understanding that we must comment on the language of HB 1088, HD1.

As such, we repeat our comments in our testimony to the Senate Committee on Water and Land,

"The County of Hawaii Department of Water Supply (DWS) offers comments on House Bill (HB) 1088, House Draft (HD) 1, for your consideration. This bill proposes to amend the State Water Code 174C-62, Hawaii Revised Statutes (HRS), which currently requires that a water shortage be declared by rule in accordance with the water shortage plan before the Commission on Water Resource Management (CWRM) can declare an emergency. This proposed bill would allow CWRM to declare a water emergency without a prior water shortage declaration by rule. Without an established water shortage plan, or criteria for an emergency, any such declaration would be arbitrary and could likely result in unintended adverse consequences.

Subsection (g) should not be amended as proposed. If the intent is to allow CWRM to respond faster due to groundwater contamination or wildfires, HRS 127-14(c) could be utilized which would include input by other appropriate agencies and departments, i.e., Department of Health and Division of Forestry and Wildlife.

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Subsection (h) should not be added unless shown necessary by an approved water shortage plan.

Overall, this bill is unnecessary and would effectively bypass procedural and substantive due process currently in the State Water Code.

It is my understanding that the State Water Code was developed through a significant collaborative effort of stakeholders. Any changes or amendments to the statute should also be collaborative."

Additionally, a declaration of an emergency related to a water resource would likely impact the health, safety, and welfare of our communities, and should utilize the provisions of HRS **127A, Emergency Management**. The provisions and procedures related to HRS **127A** also affect qualifying for federal assistance.

In summary, we feel that HRS Section **174C-62, Declaration of water shortage**, should remain unchanged from existing statute.

Thank you for your time and consideration on our testimony on HB 1088, HD 1.

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BOARD OF WATER SUPPLY

CITY AND COUNTY OF HONOLULU
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April 5, 2023

RICK BLANGIARDI, MAYOR

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

ERWIN M. KAWATA
Deputy Manager

The Honorable Senator Karl Rhoads, Chair
and Members

Senate Committee on Judiciary
Hawaii State Capitol, Room 016
Honolulu, Hawaii 96813

Dear Chair Rhoads and Members:

Subject: House Bill 1088 HD1: Relating to Declaration of Water Shortage
and Emergency

The Honolulu Board of Water Supply (BWS) opposes House Bill (HB) 1088, House Draft (HD) 1. This measure proposes to amend the State Water Code to allow the Commission on Water Resource Management (CWRM) to address water shortages created by an emergency, however, the existing code provisions provide sufficient tools and checks and balances to protect the state's water resources.

The BWS understands this measure will broaden CWRM's discretion while loosening its statutory obligations under Hawaii Revised Statutes (HRS) §174C-62, in the event of an emergency condition. The statutory obligations are set forth in HRS § 174C-41(a), and require that CWRM conduct scientific investigations and research to reasonably determine that the water resources in an area may be threatened by existing or proposed withdrawals or diversions of water as a precondition to designating water management areas.

Enactment of the Water Code

The Water Code was the result of a comprehensive nine-year effort by the Advisory Study Commission on Water Resources, State of Hawaii¹ to create a state water resources agency to set overall water conservation, quality, and use policies, following the state Constitutional Convention of 1978. The drafters of the 1987 Water Code were

¹ The members of the Advisory Study Commission on Water Resources consisted of Chairman Gregory Gomes (President of WEBCO Hawaii, Inc.), Vice-chairman Reuben S. F. Wong, Esq., Mr. Kazu Hayashida (BWS Manager and Chief, 1978-1994), Kent Keith (Director, Department of Planning and Economic Development, State of Hawaii), Leslie Matsubara (Director, Department of Health, State of Hawaii), James Nakatani, Watercress Farmer and Member, Hawaii Farm Bureau Federation), William S. Haines (Director, Department of Water Supply, County of Maui), Susumu Ono (Chairman, Board of Land and Natural Resources, State of Hawaii), Georgiana Padeken, (Chairperson, Hawaiian Homes Commission, State of Hawaii), Charles Reppun (Taro Farmer), Raymond H. Sato, (Manager and Chief Engineer, Department of Water, County of Kauai), William Sewake (Managing Engineer, Department of Water Supply, County of Hawaii), Fred Trotter (Trustee, Campbell Estate), and former members Hideto Kono, Charles G. Clark and Dickey Nitta (former President, Hawaii Farm Bureau Federation).
<http://hdl.handle.net/10125/55333>.

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acutely aware of the threat of water shortages due to an emergency condition. Indeed, pesticide contamination² resulted in the contamination of 8 wells in Hawaii, and the Hawaii State Department of Health (DOH) had just closed 10 wells on Oahu in 1982 and 1983.³

CWRM Water Shortage Plan

One of the initial requirements of the 1987 Water Code was that CWRM “formulate a plan for implementation during periods of water shortage. See HRS § 174C-62(a). Indeed, CWRM’s formulation of a water shortage plan is long overdue, and its adoption would *obviate* the need for any substantive amendments to HRS § 174C-62.. Presumably, CWRM’s water shortage plan would also address the drought impacts from climate change and the impacts of water quality contamination reducing water quantity.

In November 2021, the Red Hill Bulk Fuel Storage Facility fuel release contaminated the underlying aquifer causing BWS to shut down the Halawa Shaft, Halawa Wells and Aiea Wells in early December 2021 as a precautionary measure to protect the water sources, and to slow the migration of the contaminant plume across Halawa Valley. In response, BWS revised its Water Shortage Response and Recovery Plan to provide strategic and tactical procedures to assess the need to declare a water shortage condition and control water demand during water shortages caused by low groundwater levels, contamination or infrastructure disruptions. The Plan establishes water shortage triggers for Alert and Critical conditions and progressively restrictive water conservation measures including voluntary and mandatory conservation, restrictions on building approvals, rate surcharges, exceptions, appeals and penalties. The Plan was adopted by the Board of Water Supply on December 12, 2022 and transmitted to CWRM on December 21, 2022.

The Plan can be viewed at the following link:

<https://www.boardofwatersupply.com/water-resources/bws-initiatives/water-shortage-plan>

BWS is standing by and willing to assist CWRM in developing the water shortage plan required under HRS § 174C-62(a).

Other Concerns

The bill’s proposed amendment to strike language in HRS §174C-62 (g) would relieve CWRM of its responsibilities to perform its due diligence and make findings,

² Pesticide contamination included the volatile organic chemicals -1,2-dibromo-3-chloropropane (DBCP), ethylene dibromide (EDB), and 1,2,3-trichloropropane (TCP) – that had been used with approval as pesticides (nematocides) for pineapple agriculture for up to 35 years. See <https://www.wrrc.hawaii.edu/publication/organic-contamination-of-groundwater-in-hawaii-a-learning-experience-revisited/>.

³ See <https://www.environment-hawaii.org/?p=3560> and <https://www.environment-hawaii.org/?p=3547>.

before imposing restrictions on permittees. By removing the criteria set forth in subsection (g), there is no basis to define the threat to public health, safety, and welfare, or the health of animals, fish or aquatic life . . . or reasonable-beneficial use as defined in § 174C-3. These definitions are intrinsically linked to the existing language in subsection (g), which establishes a basis or causal effect for CWRM to determine the impact a water shortage may have on the community. Removing these determinants or criteria would authorize CWRM to define a water shortage or even an emergency with no framework or guidelines; it would be open-ended. Stakeholders would have no say in the matter or ability to question CWRM's authority.

If another fuel release from the Red Hill Bulk Fuel Storage Facility were to occur in a more catastrophic event than in November 2021 and December 2022, then the Governor or Director of the State Department of Health would be the lead agency to determine that an imminent peril to human health and safety or the environment exist pursuant to HRS § 342L-9. BWS does not believe that amending HRS § 174C-62 is the appropriate approach, and is very concerned that it could result in unintended consequences. The declaration of an emergency is already contemplated and codified in HRS § 127A-14. HB1088, HD1 needs to address HRS §127A-14 in a further amendment of § 174C-62 if the intent is to give the CWRM the authority to declare an emergency. The duration of an emergency order must be limited, especially if DLNR proposes to eliminate the requirement that the commission make findings supporting the issuance of such orders. We recommend that any emergency order terminate automatically within 60 days, consistent with the duration of HRS § 127A-14 states of emergency.

We offer comments and recommend amendments to HB 1088, HD1, subsections (b), (c), (g), and (h) as follows:

We recommend most of the original language in §174C-62 subsection (b) remain intact and retain the minor amendment be made as underscored and bracketed:

(b) The commission, by rule, may declare that a water shortage exists within all or part of an area when insufficient water is available to meet the requirements of the permit system or when conditions are such as to require a temporary reduction in total water use within the area to protect water resources from serious harm. The commission shall publish a set of criteria for determining when a water shortage and emergency exists[-], including but not limited to impacts and effects of the climate crisis.

(c) In accordance with the plan adopted under subsection (a), the commission may impose such restrictions on one or more classes of permits as may be necessary to protect the water resources of the area from serious harm and to restore them to their previous water quantity or chloride level condition.

The declaration of an emergency is already codified in HRS §127A-14. BWS proposes that subsection (g) be revised to read as follows:

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and Members
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(g) Subject to HRS chapter 127A, if an emergency condition arises due to a water shortage within any area, whether within or outside of a water management area, and if the commission finds that the restrictions imposed under subsection (c) are not sufficient to protect the public health, safety, or welfare, or the health of animals, fish, or aquatic life, or a public water supply, or recreational, municipal, agricultural, or other reasonable uses, the commission may issue orders reciting the existence of such an emergency and requiring that such actions as the commission deems necessary to meet the emergency be taken, including but not limited to apportioning, rotating, limiting, or prohibiting the use of the water resources of the area. Any party to whom an emergency order is directed may challenge such an order but shall immediately comply with the order, pending disposition of the party's challenge. The commission shall give precedence to a hearing on such challenge over all other pending matters.

The bill's proposed amendment to HRS § 174C-62 (h) should be addressed through revisions to HRS § 174C-57 and § 174C-58.

We recommend deletion of subsection (h) in its entirety.

Hawaii's Water Code was the result of a decade-long collaborative effort lead by a 13-member commission representing stakeholders from throughout the State: four (4) heads of departments of the State of Hawaii government; the four (4) chief executives of the four county boards of water supply; and five (5) members appointed by the President of the Hawaii State Senate and the Speaker of the Hawaii State House of Representatives. In addition to the regular meetings of the Advisory Study Commission, public hearings were held on the islands of Oahu, Molokai, Maui, Lanai, Hawaii (East and West) and Kauai and reading files containing the major research findings, minutes of the Commission meetings, a periodic newsletter, and other pertinent materials of the Commission was set up in Lihue, Kaunakakai, Wailuku, Lanai City, Hilo, Kealahou, and Honolulu.

Respectfully, the vast efforts, deliberations and determinations of the 13-member commission should not simply be cast aside, at the request of an individual stakeholder.

Thank you for the opportunity to testify in opposition to HB 1088, HD 1.

Very truly yours,



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