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STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAI'I
DEPARTMENT OF LAND AND NATURAL RESOURCES
KA 'OIHANA KUMUWAIWAI 'ĀINA

P.O. BOX 621
HONOLULU, HAWAII 96809

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Testimony of
DAWN N. S. CHANG
Chairperson

Before the House Committee on
JUDICIARY & HAWAIIAN AFFAIRS

Thursday, March 2, 2023
2:00 PM

State Capitol, Conference Room 325 & 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 clarify 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.**

Hawai'i Revised Statutes (HRS) Section 174C-62 did not contemplate the existence of a water shortage and/or emergency due to an immediate degradation of water quality or other emergencies such as wildfires. As the Red Hill crisis has revealed, such shortages and emergencies can come into existence in an instant. All waters of the state are regulated by the Commission as provided in HRS Section 174C-4 (a), additionally the Commission regulates all holders of water use permits (WUP) in water management areas,¹ for example on O'ahu, this includes the Honolulu Board of Water Supply (HBWS) and others such as the Navy. The Commission is proposing amendments in order to implement water shortage and emergency declarations to be able to react to crises in a swift and comprehensive manner to protect public trust resources. Unlike emergency declarations issued by the Governor that might suspend entire laws as provided for in HRS Section 127A-13 (3), emergency declarations issued by the Commission can be tailored to specifically address orders and permits issued by the Commission without suspending sections of the State Water Code. For instance, the Commission can suspend an interim instream flow standard to allow water uses for emergency firefighting purposes.

¹ The following are groundwater management areas in the State, the entire island of O'ahu (except for the Wai'anae Aquifer Sector), the entire island of Moloka'i, the Lahaina Aquifer Sector Area and 'Īao aquifer on Maui. Surface water management areas are on the island of Maui in Nā Wai 'Ehā and the Lahaina Aquifer Sector Area.

Currently, HRS Section 174C-62(g) is already applicable outside of water management areas, but its reference to subsection (c) requires that a water shortage has to be declared by rule, through rule-making process under HRS Chapter 91, which may take up to over one year, in accordance with a water shortage plan before the Commission can declare an emergency. This has resulted in overly burdensome and unnecessary constraints to the emergency declarations process in instances where the emergency is due to an instant degradation in water quality or a wildfire, unlike a slower processing decline in water quantity, which can be anticipated and planned for. This bill would allow the Commission to declare a water emergency without a prior water shortage declaration by rule. Such an emergency declaration by the Commission would be made at an agendaized “sunshine” meeting where the public has the opportunity to provide testimony.

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 WUP holders to protect the health of ground and surface water resources for as long as water shortage conditions exist. Certain counties, including the HBWS, have their own water shortage plans. Their ability to respond to emergencies are not affected by the amendments proposed in this bill. This bill serves to clearly define the Commission’s authority to declare water shortages and emergencies and the Commission’s measures pertaining to all water users and not just WUP holders. Water shortage declarations are a temporary measure and this bill will allow the Commission to provide a tailored response to fulfill its constitutional public trust duties outside of water management areas without taking over administrative control as provided for in the designation process of HRS Section 174C-41 (a).²

Additionally, 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.

Finally, the bill clarifies the Commission’s authority to modify, suspend, and revoke water use permits in the case of a long term or permanent reduction of the available water source due to a water shortage or emergency.³

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

² Notably, HBWS is only tangentially affected by this amendment as almost all aquifers of O’ahu are already water management areas since 1992 except for the Wai’anae Aquifer Sector.

³ Since 2003, the Commission has included a standard condition to WUP that provides for the Commission’s authority to modify permits.

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HONOLULU, HI 96843
www.boardofwatersupply.com



March 2, 2023

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The Honorable David A. Tarnas, Chair
and Members
House Committee on Judiciary and Hawaiian Affairs
Hawaii State Capitol, Room 325
Honolulu, Hawaii 96813

Dear Chair Tarnas and Members:

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

The Honolulu Board of Water Supply (BWS) offers comments on House Bill (HB) 1088, House Draft (HD) 1, for your consideration. This bill amends the State Water Code §174C-62, Hawaii Revised Statutes (HRS), which requires that a water shortage has to be declared by rule in accordance with the water shortage plan before the Commission on Water Resource Management (CWRM) can declare an emergency. This bill would allow the CWRM to declare a water emergency without a prior water shortage declaration by rule.

Allowing CWRM to declare a water emergency without a prior water shortage declaration by rule, would appear to preempt and usurp the executive authority provided under HRS §127A-14 (c), which states "The governor or mayor shall be the sole judge of the existence of the danger, threat, or circumstances giving rise to a declaration of a state of emergency in the State or a local state of emergency in the county, as applicable. This section shall not limit the power and authority of the governor under section 127A-13(a)(5)."

The proposed amendments to subsections (b) and (c) would allow CWRM to impose restrictions on permits outside of management areas on well and stream diversion owners and operators. These proposed amendments would effectively contravene the intent and purpose of HRS § 174C-41(a), which requires that -- as a precondition to designating water management areas -- 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. The purpose of this due diligence requirement is to ensure that the designation is in the public interest.

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The proposed amendments to subsection (g) further absolves CWRM of its due diligence responsibilities by inappropriately removing the requirement that CWRM make findings before imposing restrictions on permittees.

The proposed amendments to subsection (h) should be addressed in § 174C-57 and § 174C-58, and “long term or permanent reduction of the available water source” should be defined by specific scope or magnitude.

Overall, this bill is unnecessary and would effectively give CWRM authority over designated areas and non-designated areas by eliminating procedural and substantive due process protections currently in the State Water Code. CWRM should coordinate with each county emergency management agency. For Oahu, the sustainable yield is 393.5 million gallons a day (mgd) and BWS uses about half of that amount. Hawaii County the sustainable yield is 2,000 mgd and it uses approximately 10 percent.

Thank you for the opportunity to testify offering comments for your consideration on HB 1088, HD 1.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Ernest Y.W. Lau', with a stylized flourish extending to the left.

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



Thursday, March 2, 2023, 2:00 pm

House Committee on the Judiciary and Hawaiian Affairs

HOUSE BILL 1088 – RELATING TO DECLARATION OF WATER SHORTAGE AND EMERGENCY

Position: Support with Amendment

Me ke Aloha, Chair David Tarnas, Vice-Chair Takayama, and Members of the House Committee on the Judiciary and Hawaiian Affairs:

HB1088 amends the Water Code to provide for declaration of water shortage or emergency in unforeseen circumstances – such as contamination of a water source.

The Water Code has been known to possess “inartful drafting”, revealed as the complexities of resource management emerge, and this is another case. Sometimes the lawyerese gets the better of clarity and hems in the actions needed in such a way that the most creative managers are flabbergasted.

In this case, we have been surprised by the nearly unbelievable opaqueness of Navy stewardship of resources. Compounded error requires stepping back to revisit a section of the Code rarely needed, thanks to thoughtful anticipation of the Commission.

Unfortunately, the authors of the proposed amendments have still not made fully straightforward and complete changes. The following are offered in the alternative:

The opening Section 1 is amended to read as follows, using Ramseyer formatting:

§174C-62 Declaration of water shortage ~~[]~~ and emergency. (a) The commission shall formulate and adopt by rule a statewide plan, for implementation during periods of water shortage or emergency. 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 or emergency 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 or emergency exists, including but not limited to impacts and effects of the climate crisis.

(c) (no change)

(d) A declaration of of water shortage or emergency and any measures pursuant thereto may be rescinded ~~[by rule]~~ by the commission.

(e) When a water shortage or emergency is declared, the commission shall cause notice ~~(thereof)~~ of the water shortage or emergency to be published uin a a newspaper of general circulation throughout the area ~~[]~~ and the the commission’s website. ...

(no further change to HB1088 HD1 amended text)

Mahalo for the opportunity to address this issue,

/s/ Charley Ice, Hoa'āina; senior Hydrologist, Commission on Water Resource Management 25 years (retired)

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