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In reply, please refer to:
File:

**Testimony in OPPOSITION to HCR126
URGING THE DEPARTMENT OF HEALTH TO TAKE CERTAIN ACTIONS
REGARDING FUGITIVE DUST**

REPRESENTATIVE LINDA ICHIYAMA, CHAIR
HOUSE COMMITTEE ON WATER & LAND

Hearing Date: 3/28/2023

Room Number: 430

1 **Fiscal Implications:** This concurrent resolution may impact the priorities identified in the
2 Governor's Executive Budget Request for the Department of Health's (Department)
3 appropriations and personnel priorities.

4 **Department Testimony:** The Department respectfully opposes this concurrent resolution that
5 proposes amendments to the administrative rules on fugitive dust, primarily to address dust from
6 vacant, undeveloped land. The concurrent resolution requests that the Department create an
7 updated list of reasonable precautions, specify the best practical operations or treatments; require
8 Director-approved fugitive dust mitigation plans, and impose appropriate penalties for violations.
9 Nearly the entire concurrent resolution is duplicative and unnecessary because the essential
10 elements of the proposed rule revisions are already addressed by the Department. The proposed
11 amendment that does not already exist in our rules (i.e., the mandate for Director-approved dust
12 mitigation plans for every parcel of vacant undeveloped land) is both burdensome and
13 problematic.

14 The Department's existing rules, Hawaii Administrative Rules (HAR) Section 11-60.1-33,
15 established under Hawaii Revised Statutes (HRS), Subsection 342B-12(3), already contain
16 provisions to prevent airborne visible fugitive dust by requiring reasonable precautions and not
17 allowing the discharge of visible fugitive dust beyond the property lot line on which the fugitive
18 dust originates. These rules apply to all sources of fugitive dust including vacant undeveloped land.

19 The concurrent resolution states that the existing penalty structure does not consider the
20 scale of the dust emission, providing disincentive for owners of large areas of vacant land to

1 control fugitive dust. However, HRS Section 342B-48 considers both “scale” and “economic
2 benefit” of a violation when calculating a penalty. HRS Section 342B-48(b) identifies
3 significant additional factors considered when calculating penalties, including: 1) The nature
4 and history of the violation and of any prior violations; 2) The economic benefit to the violator;
5 3) The opportunity, difficulty and history of corrective action; 4) Good faith efforts to comply;
6 and 5) Such other matters as justice may require. Therefore, the HRS already imposes
7 appropriate higher penalties where violations are larger, more severe, repetitive, and/or would
8 economically benefit the violator.

9 Examples of reasonable precautions are contained in HAR Section 11-60.1-33 and a
10 more extensive list of reasonable precautions is also available on the Clean Air Branch website
11 and Fugitive Dust Fact Sheet¹. The U.S. Environmental Protection Agency (EPA) provides
12 examples of best practices on their website and in their Fugitive Dust Control Measures and Best
13 Practices guidance that was issued in 2022². Consistent with EPA’s guidance, these best
14 practices and reasonable control measures are not exhaustive and are intended to assist facilities
15 to comply with dust regulations and highlight several effective strategies that have been adopted
16 by facilities. The appropriateness and effectiveness of these strategies will vary for different
17 facilities based on many factors, including the operations, sources of fugitive dust, location, and
18 meteorological conditions. The proposed amendment requirement to list the reasonable
19 precautions and best practical operations and treatments implies an expectation of singular,
20 exhaustive sets of actions that can apply to every case. Our experience, which is consistent with
21 EPA’s guidance, has been that the broad variety of causes of fugitive dust necessitate having
22 guidance that allows for flexibility.

23 In addition, the request for Director-approved dust mitigation plans for every vacant,
24 undeveloped property is troublesome. The task of identifying every parcel of vacant land alone
25 would be a formidable undertaking. The burden expands by the demands of identifying all
26 landowners, ensuring that they have submitted their dust mitigation plans, and having the plans
27 reviewed by Department staff and approved by the Director. The time and effort required to
28 review each plan submitted by every vacant undeveloped land owner would be excessive and

¹ <https://health.hawaii.gov/cab/files/2019/04/Hawaii-Fugitive-Dust-Fact-Sheet-April-2019.pdf>

² <https://www.epa.gov/system/files/documents/2022-02/fugitive-dust-control-best-practices.pdf>

1 would take away resources and delay current compliance and enforcement work including the
2 need to address high priority violations, responding to and investigating complaints, inspecting
3 major air pollution sources for compliance, and pursuing enforcement actions and penalties.

4 Moreover, Director-approved plans can be problematic when the approving agency must
5 take enforcement action on a violation, even when landowners have followed their agency-
6 approved plan. While the Department works in assisting landowners/contractors to ensure they
7 are able to mitigate fugitive dust from their operations, the responsibility of compliance should
8 continue to be held by the landowner. For the same reason, the Department puts the onus on the
9 landowners to propose and apply reasonable precautions and best practical operations and
10 treatments.

11 Finally, the concurrent resolution follows very similar language that is proposed in House
12 Bill 703, relating to Fugitive Dust Control. The preamble of the measure suggests that its
13 impetus came from the very high wind event that occurred in August 2022 on former sugarcane
14 land on Maui, portions of which now have some agricultural activity. That wind event, which
15 occurred during the driest part of the year, in conjunction with the movement of farm workers
16 trying to secure their work and vacate the property, resulted in the generation of a large amount
17 of visible fugitive dust at this location. The Department has informed the landowners that a
18 Notice of Violation is forthcoming after an investigation determined that a violation of Hawaii's
19 fugitive dust rules had occurred. The penalty will be based on the factors identified above
20 including the "scale" of the violation. The Department is actively engaged in follow-up actions
21 to closely monitor this property for fugitive dust concerns, including performing periodic site
22 inspections, working with the landowner, and providing feedback on their dust mitigation plan,
23 to ensure that appropriate reasonable controls are implemented to mitigate the occurrence of
24 future dust events.

25 Thank you for the opportunity to testify.

26 **Offered Amendments:** None



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March 28, 2023

HEARING BEFORE THE
HOUSE COMMITTEE ON WATER & LAND

TESTIMONY ON HCR 126/HR 127
URGING THE DEPARTMENT OF HEALTH TO TAKE CERTAIN ACTIONS
REGARDING FUGITIVE DUST

Conference Room 430 & Videoconference
9:30 AM

Aloha Chair Ichiyama, Vice-Chair Poepoe, and Members of the Committee:

I am Brian Miyamoto, Executive Director of the Hawai'i Farm Bureau (HFB). Organized since 1948, the HFB is comprised of 1,800 farm family members statewide and serves as Hawai'i's voice of agriculture to protect, advocate and advance the social, economic, and educational interests of our diverse agricultural community.

The Hawai'i Farm Bureau respectfully opposes HCR 126/HR 127 and offers the following comments.

The resolutions are unnecessary and partially duplicate rules, procedures, and requirements already in place to regulate fugitive dust.

- Hawai'i Administrative Rules, 11-60.1 through 33 already regulate fugitive dust. These rules are enforceable by the Hawai'i Department of Health (HDOH) and prohibit *anyone* from causing or permitting fugitive dust to become airborne without taking reasonable precautions.
 - HDOH provides examples of reasonable precautions and under what circumstances they may be used. In fact, HDOH publicizes an informational fact sheet that includes examples of "reasonable precautions" that can be utilized during various activities, <https://health.hawaii.gov/cab/files/2019/04/Hawaii-Fugitive-Dust-Fact-Sheet-April-2019.pdf>.
 - Reasonable precautions to control fugitive dust are extremely site and circumstance-specific and are determined by HDOH on a case-by-case basis. All of these factors must be considered: the site topography and surroundings, soil conditions, meteorological conditions, site activities, site equipment, and types of material involved. Just because a particular example or even all of the examples are used does not necessarily mean

that HDOH will deem the operator to be in compliance with the fugitive dust requirements.

- Violation of these rules can result in civil and administrative fines of up to \$25,000 per day, per violation (these fines may currently be undergoing a substantial increase).

In addition to these HDOH rules, each county requires a grading permit for soil disturbance over a very small threshold amount. Exemptions are made for farmers who work with the Soil and Water Conservation Districts to develop and implement a conservation plan specific to their parcel and agricultural activities. Part of the conservation plan is to ensure that soil is not lost to air dispersal or runoff.

For these reasons, HFB does not believe that these resolutions are necessary. If this Committee disagrees, we respectfully suggest that the experts within the U.S. Department of Agriculture Natural Resource Conservation Service (NRCS) be requested to review calculations for dust impacts during fallow periods of crop production and recommend best practices to minimize impacts to downwind communities.

On behalf of Hawai'i's farmers and ranchers statewide, HFB asks that you do not add another layer of burdensome regulations that duplicate what is already required.

Thank you for the opportunity to provide testimony on these measures.

HCR-126

Submitted on: 3/28/2023 8:02:51 AM

Testimony for WAL on 3/28/2023 9:30:00 AM

Submitted By	Organization	Testifier Position	Testify
AdamP.Killermann	Individual	Oppose	Written Testimony Only

Comments:

This bill is to vague and would have negitive impacts on agriculture and agriculture production. With climate change and drier conditions state wide this bill would impact all types of agriculture such as cattle farming or land prepration for planting. This bill would be a huge burden for ranching and farming.

Thank You