

JOSH GREEN, M.D.  
GOVERNOR | KE KIA'ĀINA

SYLVIA LUKE  
LIEUTENANT GOVERNOR | KA HOPE KIA'ĀINA



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

DAWN N.S. CHANG  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE  
MANAGEMENT  
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FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

Testimony of  
DAWN N. S. CHANG  
Chairperson

Before the Senate Committee on  
WATER AND LAND

Friday, February 9, 2024  
1:10 PM

State Capitol, Conference Room 229 & Videoconference

In consideration of  
SENATE BILL 2658  
RELATING TO STATE WATER CODE PENALTIES

Senate Bill 2658 proposes to add a minimum penalty of \$50 and a maximum penalty of \$60,000 per violation of the State Water Code and makes each day that a violation exists or continues to exist a separate offense. This bill also requires the Commission on Water Resource Management (Commission) to determine the amount of the penalty based on the circumstances of the violation. **The Department of Land and Natural Resources (Department) highly appreciates the intent of this measure and offers comments and amendments.**

The Hawai'i Supreme Court held that the Hawai'i State Constitution in Article XI Section 7 designated the Commission as the "*primary guardian*" of the public trust resource - water.<sup>1</sup> To be consistent with the Department of Health's (DOH) authority to issue penalties for violations that affect water, arguably the state's most precious public trust resource, and to increase deterrence, the Department appreciates the raising of the penalty ceiling from \$5,000 to \$60,000 per violation. The Department believes that violations of the State Water Code and the Commission's rules and orders regarding water quantity are as detrimental to the resource as violations of DOH's statutes and rules regarding water quality and thus the same deterrent maximum fine is necessary and justified.

Furthermore, this proposal aligns with Act 233, Session Laws of Hawai'i (SLH) 2023, which increased DOH's maximum penalty to \$60,000 to conform with federal inflation adjusted civil penalty amounts

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<sup>1</sup> *In re Water Use Permit Applications*, 94 Hawai'i, 97, 141, 9 Pd.3, 409, 453 (2000). (*Waiāhole I*)

pursuant to the Clean Water Act.<sup>2</sup> In the initial draft of House Bill 1079<sup>3</sup>, which was signed into law by Governor on July 6, 2023, and became Act 233, DOH asked for an increase of the maximum penalty in Hawai'i Revised Statutes (HRS) § 342D-30 to \$59,973. This amount was proposed to match the federal inflation adjusted penalty amount. The federal penalty amount for violations of the Clean Water Act is provided for in the Federal Regulation 33 C.F.R. § 326.6. This federal regulation is adjusted *annually to improve its effectiveness and maintain its deterrent effect*, as required by the Federal Civil Penalties Adjustment Act Improvements Act of 2015, Public Law 114–74, sec. 701, November 2, 2015. The current maximum federal penalty is \$64,619.<sup>4</sup>

These tables show the history of the federal and state maximum fine:

**Federal Regulation 33 C.F.R. § 326.6 - Class I administrative penalties.**

<b>Regulation</b>	<b>Year</b>	<b>Max. Penalty</b>
54 FR 50709	1989	<b>\$ 25,000</b>
69 FR 35518*	2004	<b>\$ 27,500</b>
78 FR 5726	2013	<b>\$ 32,500</b>
82 FR 47628	2017	<b>\$ 52,414</b>
83 FR 19184	2018	<b>\$ 53,484</b>
84 FR 18982	2019	<b>\$ 54,833</b>
85 FR 35005	2020	<b>\$ 55,801</b>
86 FR 37249	2021	<b>\$ 56,461</b>
87 FR 62989	2022	<b>\$ 59,974</b>
88 FR 51236	2023	<b>\$ 64,619</b>

\*The Federal Civil Penalties Inflation Adjustment Act of 1990 restricted initial increases to 10%.

The State Water Code penalty in HRS Section 174C-15 has only been amended once since its adoption by Act 45, SLH 1987 (Act 45). Act 142, SLH 2004, raised the maximum penalty from \$1,000 to \$5,000 and added subsection (d). However, in its 1994 Report to the State Legislature, the Review Commission on the State Water Code, pursuant to Section 5 of Act 45, had already proposed a maximum fine of \$25,000 for reckless, knowing, or intentional violations. In consultation with the counties, the Department recommends a maximum fine of at least \$25,000 to match the recommendations of the Review Commission.

The Department appreciates the clarification of a continuing violation and the guidance for the determination of the penalty amount in the newly added subsection (c) to Section 174C-15, HRS. The

<sup>2</sup> The federal penalty amount for violations of the Clean Water Act is provided for in the federal regulation 33 C.F.R. § 326.6. This regulation is adjusted *annually to improve its effectiveness and maintain its deterrent effect*, as required by the Federal Civil Penalties Adjustment Act Improvements Act of 2015, Public Law 114–74, sec. 701, November 2, 2015. The current maximum federal penalty is \$64,619. See <https://www.federalregister.gov/documents/2023/08/03/2023-16025/civil-monetary-penalty-inflation-adjustment-rule>

<sup>3</sup>[https://www.capitol.hawaii.gov/session/archives/measure\\_indiv\\_Archives.aspx?billtype=HB&billnumber=1079&year=2023](https://www.capitol.hawaii.gov/session/archives/measure_indiv_Archives.aspx?billtype=HB&billnumber=1079&year=2023)

<sup>4</sup> *Id.*

guidance in subsection (c) corresponds with the Commission's Administrative and Civil Penalty Guideline (G14-01)<sup>5</sup> that the Commission adopted on October 1, 2014<sup>6</sup>. The Department notes that G14-01 provides for an initial administrative fee of \$500, if the Commission issued a written notice of alleged violation, in addition to any fine. To further clarify the guidance in assessing the maximum fine, to have parity with DOH in HRS Section 342D-31 (b), and to align with Senate Bill 2394<sup>7</sup>, the Department proposes the following amendments to the Subsection (c) (grey highlight):

(c) When imposing a penalty, [T]the commission shall [determine the penalty amount for each violation upon review of the circumstances of the violation, taking into account the nature, extent, and gravity of the violation and considering the history of the violations, degree of culpability, and other matters as justice may require.] consider the following factors, including but not limited to:

- (1) The nature, circumstances, extent, gravity, and history of the violation and of any prior violations;
- (2) The economic benefit to the violator, or anticipated by the violator, resulting from the violation;
- (3) The opportunity, difficulty, and history of corrective action;
- (4) Good faith efforts to comply;
- (5) Degree of culpability; and
- (6) Such other matters as justice may require.

Additionally, the Department would like to include failure to comply with its water audit program that the Legislature mandated in Act 169, SLH 2016, as a fineable offense. Thus, the Department proposes amendments to Subsection (b) as in Senate Bill 2394 (grey highlight):

(b) Any person who [violates any provision of this chapter, [or] violates any rule adopted pursuant to this chapter, [may] violates any order of the commission, fails to obtain a permit when a permit is required under this chapter, or fails to comply with permit conditions,]:

- (1) Violates any provision of this chapter[, or any];
- (2) Violates any rule adopted pursuant to this chapter[, may];
- (3) Violates any order of the commission;
- (4) Fails to obtain a permit when a permit is required under this chapter;
- (5) Fails to comply with permit conditions; or
- (6) Fails to comply with standardized water audit requirements pursuant to Act 169, Session Laws of Hawaii 2016,

<sup>5</sup> [https://files.hawaii.gov/dlnr/cwrm/planning/wrpp2019update/WRPP\\_AppP\\_201907.pdf](https://files.hawaii.gov/dlnr/cwrm/planning/wrpp2019update/WRPP_AppP_201907.pdf)

<sup>6</sup> <https://files.hawaii.gov/dlnr/cwrm/submittal/2014/sb201410D1.pdf>

<sup>7</sup> [https://www.capitol.hawaii.gov/session/measure\\_indiv.aspx?billtype=SB&billnumber=2394&year=2024](https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=SB&billnumber=2394&year=2024)

shall be subject to a fine imposed by the commission. [Such] The fine shall be not less than \$50 and shall not exceed [\$5,000. For a continuing offense, each day during which the offense is committed is a separate violation.] \$60,000 per violation. Each day that a violation exists or continues to exist shall constitute a separate offense. Penalties for continuing violations shall be assessed from the earliest known date of the violation. The earliest known date of a violation shall be determined by the commission by a preponderance of the evidence; provided that if the earliest known date cannot be determined by a preponderance of the evidence, penalties for continuing violations shall be assessed from the earliest date the commission is made aware of the violation.

This bill will supports the Commission in its affirmative duty “*to protect, control and regulate the use of Hawaii’s water resources*” as articulated in Article XI Section 7 of the Constitution of the State of Hawai‘i. Currently, the Commission is overseeing 5,334 groundwater wells, 1,226 surface water diversions, and 376 perennial streams, approximately 100 of which have a measurable interim instream flow standard that requires monitoring and enforcement. The Commission regulates the use of water in water management areas on the islands of O‘ahu, Moloka‘i and Maui with the total amount of 411 groundwater use permits and 176 surface water use permits.

Thank you for the opportunity to testify in strong support of this measure.



DEPARTMENT OF WATER SUPPLY • COUNTY OF HAWAII

345 KEKŪANAŌ'A STREET, SUITE 20 • HILO, HAWAII 96720

TELEPHONE (808) 961-8050 • FAX (808) 961-8657

February 6, 2024

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

HEARING BEFORE THE SENATE COMMITTEE ON WATER AND LAND

DATE: Friday, February 9, 2024  
TIME: 1:10 p.m.  
PLACE: Conference Room 229 & Videoconference

**SB 2658 - RELATING TO STATE WATER CODE PENALTIES**

Honorable Chair Inouye, Vice-Chair Elefante, and committee members,

The County of Hawaii, Department of Water Supply (DWS) submits this letter to respectfully express its concerns regarding Senate Bill (SB) 2658.

The proposed language under Section 2 proposes to enable the Department of Land and Natural Resources (DLNR) and the Commission on Water Resource Management (Commission) to increase the water code's penalties, from a minimum of \$50 to a maximum of \$60,000, to serve as a deterrence to violators of the State Water Code in section 174C-15, HRS. The proposed language could be used capriciously to assess and impose penalties by the Commission. The lack of form and procedures to determine penalties could lead to arbitrary and inconsistent applications; and could result in disagreements, litigation, associated delays to resolve the imposed penalty, and divert resources away from the greater community benefit of providing safe drinking water.

We thank you for your attention to this matter, and for your dedication and commitment to serving our State.

Please feel free to contact me at (808) 961-8050 or via email at [dws@hawaiidws.org](mailto:dws@hawaiidws.org) with any questions you may have regarding DWS' comments. Thank you for your time and consideration of our testimony on SB 2658.

*...Water, Our Most Precious Resource...Ka Wai A Kāne...*

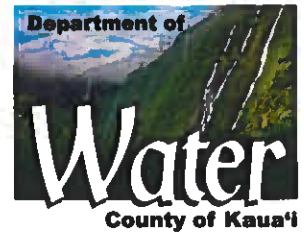
The Department of Water Supply is an Equal Opportunity provider and employer.

## DEPARTMENT OF WATER

### COUNTY OF KAUAI

4398 PUA LOKE STREET LIHUE, HAWAII 96766

WWW.KAUAIWATER.ORG (808) 245-5400 BUSINESS (808) 245-5813 FAX



JOSEPH E. TAIT  
MANAGER AND CHIEF ENGINEER

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

February 6, 2024

The Honorable Lorraine Inouye, Chair  
and Committee Members  
Senate Committee on Water and Land  
Hawaii State Capitol, Room 229  
415 S. Beretania Street  
Honolulu, Hawai'i 96813

Dear Chair Inouye, and Committee Members:

**Subject: SB 2658 – Relating to State Water Code Penalties**

The County of Kauai, Department of Water (DOW) submits this letter to respectfully express its deep concerns regarding Senate Bill (SB) 2658.

The DOW has reviewed the proposed amendments outlined in (SB) 2658 and is especially concerned with Section 2, which proposes to enable the Department of Land and Natural Resources (DLNR) and the Commission on Water Resource Management (CWRM or Commission) to increase the water code's penalties and fines, from a minimum of \$50 to a maximum of \$60,000, to serve as a deterrent to violators of the State Water Code in section 174C-15, Hawai'i Revised Statutes (HRS). Without established processes and procedures to determine penalties, its enforcement could lead to arbitrary and inconsistent application by the Commission; and could result in disagreements, litigation, and associated delays to resolve any imposed penalty, diverting already limited resources away from the greater community benefit of providing safe drinking water, affordable housing, medical and other services.

Thank you for your attention to this matter, and for your dedication and commitment you have shown in serving our State. We remain hopeful that you will carefully weigh the concerns raised by the DOW and others.

Please feel free to contact me at (808) 245-5403 or via email at [jtait@kauaiwater.org](mailto:jtait@kauaiwater.org) with any questions you may have regarding DOW's comments.

Sincerely,

A handwritten signature in black ink that reads "Joseph E. Tait". The signature is stylized and cursive.

Joseph E. Tait

Manager and Chief Engineer

**BOARD OF WATER SUPPLY  
KA 'OIHANA WAI  
CITY AND COUNTY OF HONOLULU**

630 SOUTH BERETANIA STREET • HONOLULU, HAWAII 96843  
Phone: (808) 748-5000 • [www.boardofwatersupply.com](http://www.boardofwatersupply.com)

RICK BLANGIARDI  
MAYOR  
MEIA

ERNEST Y. W. LAU, P.E.  
MANAGER AND CHIEF ENGINEER  
MANAKIA A ME KAHU WILIKI

ERWIN KAWATA  
DEPUTY MANAGER  
HOPE MANAKIA



NĀ'ĀLEHU ANTHONY, Chair  
KAPUA SPROAT, Vice Chair  
BRYAN P. ANDAYA  
JONATHAN KANESHIRO  
EDWIN H. SNIFFEN, Ex-Officio  
GENE C. ALBANO, P.E., Ex-Officio

February 9, 2024

The Honorable Lorraine R. Inouye, Chair  
and Members  
Committee on Water and Land  
Hawaii State Capitol, Room 225  
Honolulu, Hawaii 96813

Dear Chair Inouye and Members:

Subject: Senate Bill 2658: Relating to State Water Code Penalties

The Honolulu Board of Water Supply (BWS) has concerns regarding Senate Bill (SB) 2658, which increases the maximum penalty from \$5,000 to \$60,000 per violation of the State Water Code and makes each day that a violation exists or continues to exist a separate offense.

During the 2023 legislative session, the Chair of the Department of Land and Natural Resources (DLNR) testified before all three referred House Committees, requesting a maximum penalty of \$25,000. This amount changed when HB153, HD1, crossed to the Senate. The Senate Committee increased the maximum penalty to \$60,000 per violation, and each day that a violation exists or continues to exist. The Chair of DLNR's testimony merely noted the penalty should be consistent with the Department of Health, which is not sufficient justification for increasing the fine by 1,100 percent. The proposed \$60,000 penalty is far in excess of (1) DLNR's January 31, 2023 testimony requesting that the penalty be raised to \$25,000, and (2) the rate of inflation, as measured by the Consumer Price Index.

On the issue of inflation adjustments, the United States Environmental Protection Agency (EPA) amended its civil penalty policies to account for inflation by using the increase established by the Consumer Price Index for all Urban Consumers (CPI-U).<sup>1</sup>

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<sup>1</sup> <https://www.epa.gov/system/files/documents/2024-01/amendmentstotheepacivilpenaltypolicyinflation011524.pdf>



The Honorable Lorraine R. Inouye, Chair  
and Members  
February 9, 2024  
Page 2

Following EPA's methodology, the appropriate increase for updating the Commission's \$5,000 penalty pursuant to HRS 174C-15, effective since June 2004, to account for inflation, is an increase to \$8,016.00. Any amount exceeding \$8,016.00 must be supported by a cost analysis and evaluation, should be consistent with EPA's amended civil penalty policies and must be supported by a cost analysis and evaluation, similar to the Commission's Staff Submittal relating to the Commission Administrative and Civil Penalty Guidelines (G14-01), dated October 1, 2014.

Stakeholder input is needed to determine if the increase in fines could potentially impose a financial burden. Exercising all due diligence and outreach to the general public for feedback would determine if the compounded increase per day per violation is an effective deterrent and if the penalty could negatively impact the agricultural industry, water utilities, individuals, and affordable housing projects.

Section 2 of SB 2658 also proposes to add several offenses, leading to penalties against any person who "violates any order of the commission, fails to obtain a permit when a permit is required under this chapter, or fails to comply with permit conditions." BWS expresses its concern that these additions may overlap with each other and other HRS provisions and lead to redundancy, potentially resulting in multiple penalties for a single action or set of circumstances. Redundancy in legal provisions create confusion, increase the risk of inconsistent enforcement, and lead to unjust results.

Thank you for your consideration of our testimony expressing concerns to SB 2658.

Very truly yours,



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

Cc: Department of Water Supply, County of Hawaii  
Department of Water Supply, County of Kauai  
Department of Water Supply, County of Maui





# SIERRA CLUB OF HAWAI'I

## SENATE COMMITTEE ON WATER & LAND

February 9, 2024

1:10 PM

Conference Room 229

**In SUPPORT of SB2658: Relating to State Water Code Penalties**

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Aloha Chair Inouye, Vice Chair Elefante, and Members of the Committee,

On behalf of our 20,000 members and supporters, the Sierra Club of Hawai'i **SUPPORTS** SB2658, to allow the Commission on Water Resource Management (CWRM) to more meaningfully enforce laws concerning the management and allocation of our public trust water resources.

This measure would allow CWRM to impose meaningful fines against powerful entities who could otherwise over pump our aquifers and drain our streams dry with impunity, notwithstanding the law or the needs of our communities. CWRM's current \$5,000 maximum daily fine is wholly insufficient to hold multinational corporations or the Department of Defense accountable if and when their water code violations impact priority public needs – such as, but not limited to, affordable housing, or fire prevention.

**Without the increased fines authorized under this measure, millions of gallons of water per day could be illegally monopolized by deep pocket entities for a fraction of a cent per gallon in penalties, harming our precious water resources and the houses, schools, farms, small businesses, and others that rely on them.**

Notably, this measure requires CWRM to consider an explicit set of factors in setting and imposing fines, such as the gravity of a violation, any economic benefit realized by the violator, and degree of culpability. This will ensure that fines are appropriate to the circumstances of each case. **Concerns about automatic and excessive fines that ignore the realities of any given situation, including mitigating and extenuating circumstances and impacts to local residents, would therefore appear unfounded.**

Accordingly, the Sierra Club respectfully urges the Committee to **PASS** this measure.

Mahalo nui for the opportunity to testify.



LAND USE RESEARCH  
FOUNDATION OF HAWAII

1100 Alakea Street, Suite 408  
Honolulu, Hawaii 96813  
(808) 521-4717  
[www.lurf.org](http://www.lurf.org)

February 7, 2024

Senator Lorraine R. Inouye, Chair  
Senator Brandon J.C. Elefante, Vice Chair  
Senate Committee on Water and Land

**Comments and Concerns in Opposition to SB 2658, Relating to State Water Code Penalties (Adds a minimum penalty of \$50 and a maximum penalty of \$60,000 per violation of the State Water Code and makes each day that a violation exists or continues to exist a separate offense. Requires the Commission on Water Resource Management [Commission] to determine the amount of the penalty based on the circumstances of the violation.)**

**Friday, February 9, 2024, 1:10 p.m.; State Capitol, Conference Room 229 & Videoconference**

The Land Use Research Foundation of Hawaii (LURF) is a private, non-profit research and trade association whose members include major Hawaii landowners, developers, and utility companies. LURF's mission is to advocate for reasonable, rational, and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii's significant natural and cultural resources, and public health and safety.

LURF appreciates the opportunity to submit comments **in opposition** to this measure proposing to add penalties for violation of the State Water Code (Code) and afford the Commission the authority to determine the amount of the penalty based on the circumstances of the violation.

### **SB 2658.**

This bill does not contain an express purpose clause setting forth a clear and warranted reason for the measure, therefore a presumption could well be made that the measure is intended as a "power grab" to afford the Commission expanded authority to subjectively and unilaterally determine the amount of **any** penalty imposed for **any** violation of any provision, rule, order, or permit condition adopted pursuant to the Code. Moreover, this measure proposes that each day such a violation exists or continues to exist to constitutes a separate offense. Such authority would arguably afford the Commission unbridled power to subjectively and arbitrarily impose penalties upon water users and permittees which could potentially control and prohibit use of water resources throughout the State. While

seemingly an outlandish proposition, such a presumption is certainly not be too implausible given at least two proposals similarly made by the Commission in the recent past to 1) unilaterally allow the Commission to designate an area as a water management area by disregarding appropriate procedural vehicles, circumventing existing laws, failing to properly collaborate with county water authorities, and neglecting potential negative impacts to affected stakeholders and community members in doing so; and 2) amend the Hawaii Revised Statutes (HRS) Section 174-C, to technically separate “water shortage” from “water emergency” issues to justify an expansion of the Commission’s authority to declare an emergency which would allow itself to take actions as it unilaterally deems necessary to address the emergency, including but not limited to apportioning, rotating, limiting or prohibiting the use of the water resources.

As with respect to those previous attempts by the Commission to expand its power, LURF believes that the authority now being sought by the Commission goes far beyond its statutory role as a policy-making body and will inappropriately overstep the counties’ administrative and operational jurisdiction over State and county water management issues. The proposed amendments to HRS Section 174-C-15 also appear to be unwarranted and inadvisable given that penalties are already adequately and appropriately addressed by existing provisions, making said amendments unnecessary.

### **LURF’s Position.**

Throughout the State, LURF members have continued to serve as stewards of Hawaii’s water resources and as active partners with the State and counties in the conservation of water resources, as well as the preservation and protection of existing and potential water sources. LURF, therefore, unquestionably supports the objectives of the Commission to preserve and protect the State’s precious water resources.

Based, however, on its understanding and review of the information presented relating to the proposed bill, LURF must respectfully **oppose** the proposed expansion of the Commission’s authority for the following reasons:

#### **A. Provisions of HRS Section 174-C-15 Which Currently Adequately Protect and Manage Water Resources Should Not be Amended Without Facts and Information Necessary to Justify the Proposed Amendments.**

SB 2658 now proposes amendments to HRS Section 174-C-15 to afford the Commission authority to unilaterally add and impose penalties for violation of the Code, as well as the sole authority to determine the amount of the penalties based on the circumstances of the violation. As far as LURF is aware, proponents of this measure have not stated any reason or justification for such a proposal to impose such penalties, let alone present any information or findings supporting the imposition of penalties in the amounts as indicated in the bill.

Proposed expansion of the Commission’s authority **without** critical safeguards (including, but not limited to established criteria for the implementation of different types of Code violations as well as the corresponding dollar amounts of penalties to be implemented), as well as **without sufficient information, facts, and findings** to

support the need to impose such penalties in subjective amounts upon water users and existing water permittees, would be to allow circumvention and disregard of important established protections contained in existing laws and the Code which were judiciously and **collaboratively** developed and vetted by all essential stakeholders.

LURF believes that this type of arbitrary, unregulated, and potentially unmonitored action is dangerous and may actually pose a threat to the health and safety of the public, as well as to the economy of the State.

**1. Laws and Regulations Relating to Water Resources Should at the Very Least, be Properly Exercised in “Collaboration” With the Counties.**

State and county laws and regulations regarding water resources that relate to land use and waterworks already exist and are properly administered by the counties via powers conferred upon it by the State Legislature through Hawaii Revised Statutes (HRS), Chapters 46 and 174C.<sup>1</sup> Section 174C-2(e) of the HRS, provides that the State Water Code shall be liberally interpreted and applied in a manner which conforms with intentions and plans of the counties in terms of land use planning.

Because the Commission’s imposition of penalties for Code violations would affect the statutory powers of the counties relating to land use and waterworks, as well as impact local land use planning determinations and policy decisions made by the counties, it is LURF’s position that the expanded authorization of the Commission currently being sought should rightfully be obtained in **full collaboration and agreement** with the counties and their respective water departments, and not unilaterally by the Commission.

**2. The Delineated Role of the Commission is to Set Policies, Protect Resources, Define Uses and Establish Priorities Relating to the State’s Water Resources.**

Pursuant to HRS 174C, the Commission is the entity charged with the policy-making responsibilities of the State, as trustee of water resources, including setting policies, defining uses, establishing priorities while assuring rights and uses, and establishing regulatory procedures.

LURF believes that the Commission’s intervention into the counties’ administrative and operational jurisdiction over water issues via amendments to HRS Section 174-C-15 may result in inconsistencies between conclusions of the Commission, DOH, and respective county water departments; may **conflict** with the counties’ decisions; and would lead to the **confusing and chaotic** situation wherein the

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<sup>1</sup> HRS Chapter 46 confers certain powers, including powers relating to land use and waterworks to the counties, and HRS Chapter 174C-31 grants unto the counties the power to establish, pursuant to the State Water Code, water use development plans which include, amongst other things, future land uses and related water needs (HRS 174C-31(f)(2)); and “regional plans for water developments and relationship to the water resource protection” (HRS 174C-31(f)(3)).

County Charter provisions (e.g., Article 8, Chapter 11 of the Maui County Charter) affords the counties’ water departments the authority to manage and operate all water systems owned by the counties.

Commission itself would then be required to administer penalties and fines imposed by the Commission for violation of laws, rules and regulations of the Code separate and apart from administration by the counties. Such action by the Commission would set **bad precedent** and lead to **further complicated issues** relating to the management of the State's water resources.

**B. The Proposed Amendments May Result in Substantial Unnecessary Costs for Landowners, Water Users, Permittees, and the Counties.**

Should this bill be passed, landowners, water users and permittees would be compelled to invest inordinate time, resources, and money to ensure strict compliance with provisions of the Code in order to avoid subjective noncompliance determinations and resulting subjective penalties unilaterally imposed by the Commission. County water departments and their respective staff would also need to invest substantial time reviewing Commission orders and monitoring actions required of and conditions imposed by water users and permittees. Even given the slightest infraction, all parties would be forced to incur **substantial time and expense for legal challenges** brought as a result of this proposed measure.

LURF believes the proposed bill is also unsound because it fails to include **specific cost information** regarding the need for any additional employees, equipment, and other expenses required in connection with the Commission's imposition of penalties which would overlap the efforts of State and county agencies. The proposal also fails to address the aforementioned cost of legal challenges relating to the subjective implementation and imposition of penalties. Approval of any expansion of the Commission's authority without determining or even identifying the potential resulting costs to the State and county taxpayers would be arguably imprudent and irresponsible.<sup>2</sup>

**C. The Proposed Expansion of Authority May Discourage Future Water Source Development Throughout the State.**

The unjustified expansion of the Commission's authority and arbitrary penalties that may be imposed pursuant to this measure will make future development of additional ground water supplies even **more expensive and cost prohibitive**. Private landowners will be less willing to provide land for new water well sites since the harsh and subjective imposition of penalties for subjective Code violations, as well as the potential for separate offenses will be unknown.

The proposed amendment could also create **unintended negative consequences** on the development of new water resources by the counties attempting to avoid arbitrary penalties. Such apprehension due to the subjective imposition of penalties will increase the costs of new water development.

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<sup>2</sup> (HAR) §11-200.1-24(b) requires at appropriate points, **cost-benefit analyses**.

**D. The Proposed Measure May Negatively Impact Landowners Due to the Fear of Unknown and Unanticipated and Arbitrary Penalties Which May be Incurred in Connection With the Use of Their Lands.**

As discussed above, the proposed authority of the Commission to impose discretionary penalties for violations of the Code could potentially impact current uses of existing water sources, requiring new State Water Use Permits, the application process for which would entail burdensome procedural requirements, and/or legal challenges such as **Contested Case Hearings**. These concerns are another strong **disincentive** for property owners to expand, reconstruct, or develop their property.

**F. The Commission’s Proposed Expansion of Authority Could Violate the Spirit and Intent of the “Right to Farm” Law and May Negatively Impact Farmers and Agricultural Operations.**

The proposed expansion of the Commission’s authority may also arbitrarily restrict the agricultural use of reclaimed water for agricultural irrigation, continuance of animal feeding operations, and the use of fumigants and pesticides despite those practices having been conducted for years until present in a manner consistent with generally accepted agricultural and management practices. These concerns could create major issues for farmers and agricultural operators and violate the spirit and intent of the Hawaii State Planning Act and Hawaii’s “Right to Farm” law, HRS Chapter 165. Under the Hawaii State Planning Act, it is a declared policy of this State to "foster attitudes and activities conducive to maintaining agriculture as a major sector of Hawaii's economy." Accordingly, Hawaii’s “Right to Farm” law protects farmers from nuisance lawsuits “if the farming operation has been conducted in a manner consistent with generally accepted agricultural and management practices.” The “Right to Farm” law further creates a rebuttable presumption that a farming operation does not constitute a nuisance.

SB 2658 is therefore arguably inconsistent with Hawaii’s “Right to Farm” law because its subjective aspects may allow the imposition of arbitrary penalties upon agricultural stakeholders, thereby impacting farming and agricultural operations even if the farming operation has been conducted in a manner consistent with generally accepted agricultural and management practices.

**Conclusion.**

LURF’s procedural objection to this measure being promoted and furthered primarily by the Commission itself aside, based on:

- 1) the inability of the Commission to justify need for this measure and to present any undisputed material facts to conclusively prove that the proposed amendments to afford itself unilateral authority to expand and modify existing penalty provisions currently contained in the HRS and authorize itself to determine the amount of such penalties are clearly warranted;
- 2) the fact that adequate current State and county laws and regulations already exist to protect water resources;

- 3) the fact that the proposed authority sought exceeds the role of the Commission as delineated by statute;
- 4) the lack of consideration of reasonable, well-collaborated, and more practical alternatives; and
- 5) the fact that this proposal could potentially result in significant negative practical and economic repercussions for the counties, the State, water users, water permittees, landowners, and agricultural stakeholders,

LURF must, despite its steadfast support of efforts to protect and preserve Hawaii's precious water resources, respectfully **oppose**, and request a **deferral** of the proposed measure.

Thank you for the opportunity to provide comments and concerns regarding this important matter.