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

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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, March 14, 2025
1:00 PM

State Capitol, Conference Room 229 & Videoconference

In consideration of
HOUSE BILL 306, House Draft 2
RELATING TO STATE WATER CODE PENALTIES

House Bill 306, House Draft 2 proposes to: add a minimum penalty and a maximum penalty per violation of the State Water Code; expand the types of potential violations of the State Water Code; and make 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 consider certain factors when imposing penalties and makes the setting, charging, and collecting of administrative fines by the Commission mandatory, rather than discretionary. **The Department of Land and Natural Resources (Department) supports this measure and offers the following amendments.**

As the “primary guardian” of the critical public trust resource, fresh water,¹ this bill will support 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. The Commission places great importance on deterring violations of the State Water Code but has found that the current maximum penalty of \$5,000 per violation² does not have a sufficient deterrent effect in certain cases.

In its 1994 Report to the State Legislature, the Review Commission on the State Water Code, pursuant to Section 5 of Act 45, proposed a maximum fine of \$25,000 for reckless, knowing, or intentional violations of the State Water Code. This bill proposes to increase the maximum penalty from \$5,000 to \$25,000 to match the recommendations of the Review Commission and bring penalties under the Hawai‘i Water Code up to a level comparable to those imposed by other states such as Arizona, Texas, California, and North Carolina.

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

² Hawai‘i Revised Statutes (HRS) Section 174C-15

The Department takes note of testimony in opposition to this bill submitted by the Land Use Research Foundation (LURF) and comments from the Hawai'i Farm Bureau (HFB) at the February 24, 2025 hearing before the House Committee on Finance.

In response, the Department suggests amendments to:

- Establish two tiers of violations with different maximum fines based on whether the violation has caused harm to other water users, the water resource, or the environment, and whether the violator has been assessed a fine by the Commission in the last five years. These tiers will ensure that large fines with a high deterrent effect are targeted to the most severe violations or repeat violations.
- Give the Commission discretion to consider each day of a continuing offense a separate violation, as appropriate based on the specific circumstances.
- Add as factors to be considered in assessing penalties (i) the volume of water affected by the violation and (ii) the actual or potential harm caused by the violation.
- Increase the amount of penalties for more severe violations every 5 years until 2045, based on a 3% rate of inflation. The Department believes that continued increases to penalties over time will account for inflation and ensure that penalties remain an effective deterrent while providing ample advance notice to those who may be affected by the increased penalties.

The highlighted text shown below are the Department's suggested amendments to this bill.

"§174C-15 Penalties and common law remedies. (a) The commission may enforce its rules and orders adopted pursuant to this chapter by suit for injunction or for damages or both.

(b) Any person who [~~violates any~~]:

(1) Violates any provision of this chapter[~~, or any~~];

(2) Violates any rule adopted pursuant to this chapter[~~, or~~
~~may~~];

(3) Violates any order of the commission concerning the enforcement or application of any provision of this chapter or any rule adopted under this chapter;

(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,

shall be subject to a fine imposed by the commission [Such fine shall not exceed \$5,000 per violation. For a continuing offense, each day during which the offense is committed is a separate violation.] as provided under subsection (c). Each day that a violation exists or continues to exist may be considered 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.

(c) The fine shall be no less than \$50 and shall not exceed:

(1) \$5,000 per violation, if the violator has been fined by the commission within the five years preceding the violation, and the violation does not cause harm to other water users, the environment, or the water resource; or

(2) \$25,000 per violation, if the violator has been fined by the commission within the five years preceding the violation, or if the violation causes harm to other water users, the environment, or the water resource.

(d) When imposing a penalty fine, the commission shall 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) The violator's good faith efforts to comply;

(5) The violator's degree of culpability; ~~and~~

(6) The volume of water affected by the violation, including the quantity unlawfully diverted, wasted, or contaminated;

(7) The actual or potential harm to other water users, the environment, or the water resource resulting from the violation; and

(8) Any Such other matters as justice may require.

~~[(e)]~~ (e) No provision of this chapter shall bar the right of any injured person to seek other legal or equitable relief against a violator of this chapter.

~~[(d)]~~ (f) Except as otherwise provided by law, the commission or its authorized representative by proper delegation may set, charge, and collect administrative fines [or]; may bring legal action to recover administrative fees and costs as documented by receipts or affidavit, including [attorneys'] attorney's fees and costs; [or] and may bring legal action to recover administrative fines, fees, and costs, including [attorneys'] attorney's fees and costs, or payment for damages resulting from a violation of this chapter or any rule adopted pursuant to this chapter.

(g) The maximum fine per violation under subsection (c) (2) shall increase to:

- (1) \$30,000 beginning January 1, 2030;
- (2) \$35,000 beginning January 1, 2035;
- (3) \$40,000 beginning January 1, 2040; and
- (4) \$45,000 beginning January 1, 2045."

These suggested amendments emphasize the Commission's intent to target repeat violations and those that cause harm. In its 38-year history, the Commission has issued a total of 49 fines. Of those, the vast majority of fines assessed by the Commission (87% of violations) are under \$5,000, yet these fines constitute only 3% of the total dollar amount imposed. This illustrates that the Commission takes a measured approach to deterrence but highlights the need for stronger penalties for the most egregious violators with the financial means to absorb fines.

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



**TESTIMONY IN SUPPORT OF HOUSE BILL 306 HD2
RELATING TO STATE WATER CODE PENALTIES**

Senate Committee on Water and Land
Hawai'i State Capitol

March 13, 2025

1:05 PM

Conference Room 229

Dear Chair Inouye, Vice Chair Elefante, and members of the Senate Committee on Water and Land:

The Office of Hawaiian Affairs (OHA) **SUPPORTS HB306 HD2**, which adds a minimum penalty and increases the maximum penalty per violation of the State Water Code and makes each day a violation exists a separate offense.

OHA has a vested interest in protecting Hawai'i's natural and cultural resources, particularly water, which throughout Hawai'i's history, has always been considered a public trust resource to be managed and administered for the benefit of present and future generations. Effective management of precious resources requires effective enforcement.

Under our current law, no matter how egregious a Water Code violation may be, or how severe and/or permanent the damage caused, \$5,000 is the maximum penalty per violation.¹ Wai is our most precious resource, and the Commission on Water Resource Management (CWRM) needs the power to impose penalties that will effectively deter violations. As it stands, the penalty does not have a sufficient deterrent effect. Some bad actors with deep pockets persistently violate the State Water Code and penalties should be large enough to deter continued future violations that threaten our water resources.

While the bill in its current form leaves the maximum penalty unspecified, OHA supports the \$25,000 maximum penalty suggested in a 1994 Final Report to the Hawai'i State Legislature submitted by a Review Commission on the State Water Code,² and by

¹ Hawai'i Revised Statutes § 174C-15(b).

² Pursuant to Section 5 of Act 45.

the Commission in testimony submitted in earlier committee hearings. OHA also supports the incremental increases proposed on page 6, lines 6-11 of the bill, and would request that the Committee adopt the incremental increases recommended by the Commission in testimony before the House Finance Committee as follows:

- (1) \$30,000 beginning January 1, 2030;
- (2) \$40,000 beginning January 1, 2035;
- (3) \$55,000 beginning January 1, 2040; and
- (4) \$75,000 beginning January 1, 2045.

Mahalo for the opportunity to testify on this important measure. OHA urges the committee to pass this measure.

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

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March 14, 2025

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

Dear Chair Inouye and Members:

SUBJECT: House Bill 306, HD2: Relating to State Water Code Penalties

The Honolulu Board of Water Supply (BWS) supports House Bill (HB) 306, House Draft (HD) 2, which is similar to a bill introduced by Governor Green this 2025 Legislative Session, which provided an incremental increase in the maximum penalty amount every five years. This HB 306, HD2, enables the Department of Land and Natural Resources (DLNR) and Commission of Water Resource Management (Commission) to increase the water code's penalties and fines from a minimum of \$50 and leaving the maximum penalty unspecified. BWS supports the incremental increases proposed by DLNR and we strongly support the Commission adopt rules when implementing the new maximum penalties.

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 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.

Without a fixed procedure, respondents are left without due process protections provided by the civil natural resource violations system pursuant to HRS, section 174C-15.5, including, but not limited to, minimum notice requirements and response deadlines, the criteria used for calculating and assessing sanctions, procedures to

The Honorable Lorraine R. Inouye, Chair
and Members
March 14, 2025
Page 2

contest the notice or address mitigation requests, and a stay of enforcement pending judicial review of the case.

Should this bill pass this session, we expect the DLNR and Commission staff exercise its due diligence and outreach to the public for feedback when adopting rules for implementing the new state water code penalties. The maximum penalty should be reasonable in that it could negatively impact the agriculture industry, individuals, water utilities, etc. It is for the betterment of our State to be as transparent as possible to the people of our Island State.

Thank you for your consideration and the opportunity to testify sharing our concerns on HB 306, HD 2.

Very truly yours,



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





Email: communications@ulupono.com

SENATE COMMITTEE ON WATER AND LAND
Friday, March 14, 2025 — 1:00 p.m.

Ulupono Initiative strongly supports HB 306 HD 2, Relating to State Water Code Penalties.

Dear Chair Inouye and Members of the Committee:

My name is Mariah Yoshizu, and I am the Government Affairs Associate at Ulupono Initiative. We are a Hawai'i-focused impact investment firm that strives to improve the quality of life throughout the islands by helping our communities become more resilient and self-sufficient through locally produced food, renewable energy, clean transportation choices, and better management of freshwater resources.

Ulupono strongly supports HB 306 HD 2, which adds a minimum penalty and amends the maximum penalty per violation of the State Water Code, expands the types of potential violations of the State Water Code, and makes each day that a violation exists or continues to exist a separate offense. This bill also establishes factors the Commission on Water Resource Management (CWRM) must consider when determining the amount of the penalty and increases maximum fines in five-year increments from 2030 to 2045.

What value do we place on an irreplaceable resource? Currently, CWRM can only impose a maximum fine of \$5,000 per violation of the State Water Code. This stands in stark contrast to other jurisdictions like Arizona, California, and Texas that have the authority to issue fines of \$10,000 per day to water users who exceed their permitted allocations. Even within our own state, the Hawai'i Department of Health (DOH) can charge a maximum penalty of \$60,000 per water pollution violation.

We cannot issue a water pollution fine if there is no water left to pollute. The State Water Code was established to protect Hawai'i's water resources, but its effectiveness depends on compliance and meaningful enforcement. This bill sends a message that we value the health and wellbeing of water, and mistreatment of such a vital resource can have serious financial consequences.

We applaud the Legislature for underscoring the immeasurable value of *wai* by considering this measure for passage.

Thank you for the opportunity to testify.

Respectfully,

Mariah Yoshizu
Government Affairs Associate

Investing in a Sustainable Hawai'i



LATE

COMMITTEE ON WATER AND LAND

Senator Lorraine R. Inouye, Chair

Senator Brandon J.C. Elefante, Vice Chair

TESTIMONY IN OPPOSITION H.B. 306 HD2 and H.B. 510 HD1

March 14, 2025, 1:00 p.m.

Room 229

State Capitol

415 South Beretania Street

Dear Chair Inouye, Vice-Chair Elefante, and Members of the Senate Committee on Water:

Earthjustice strongly supports reforming the Commission on Water Resource Management to improve the stewardship of Hawai'i's public trust water resources. However, we **oppose H.B. 306 and H.B. 510** in their current forms because these two bills propose piecemeal "tweaks" to the commission that increase the risk of abuse of the commission's authority without improving its operations or accountability to the communities seeking its help. Earthjustice would support these bills, if they were being considered in the context of critical structural changes to the commission, such as those proposed in Senate Bill 3.

Our office has decades of experience in Hawai'i water law, including numerous Hawai'i Supreme Court cases interpreting and implementing the State Water Code, HRS chapter 174C. SB 3 implements long-standing and long-overdue recommendations to improve the Code, protect the Commission on Water Resource Management from political interference and ensure its independence, and restore public confidence in the commission and the rule of law. The persistent political assaults against the commission since the Lahaina wildfire disaster underscore the need for fundamental reforms. Senate Bill 3 introduced this session details all of reforms needed to this commission, including:

- Enabling the commission to retain independent legal counsel. This is essential to ensuring the commission's independence since, throughout its history, the commission has repeatedly been deprived of effective counsel or denied legal representation altogether at critical times.

- Creating the position of executive director instead of first deputy. This also protects the commission's autonomy by increasing the independence of its administrator.
- Clarifying that the Chair of DLNR will not be the chair of the commission. Likewise, this further uplifts the commission as an independent agency, rather than a subsidiary of DLNR.
- Adding an appointee of the Office of Hawaiian Affairs to the commission nominating committee. This amendment adds an important voice to the nomination process, which has also been subjected to undue political influence.
- Enhances the commission's enforcement and regulatory powers, including under emergency and shortage conditions. These amendments have been proposed for several years running and are important updates to the commission's water management kuleana.

These improvements were first suggested in the 1994 report of the Review Commission that was established in the Water Code to evaluate the effectiveness of the water commission after 5 years of operation. That report documented the conflicts of interest and opportunities for abuse inherent in the current structure of the water commission, and proposed these meaningful changes. The proposals outlined in H.B. 306 and H.B. 510 should not be adopted without enacting these more fundamental reforms as well.

H.B. 306 HD2 proposes increasing the limit on fines imposed by the commission for violations. Currently, the commission is authorized to impose \$5,000 maximum daily fine on violators, which has proven to be an insufficient amount to deter irresponsible actions by permit holders, especially those with access to immense financial resources such as corporations diverting streams and the Defense Department with polluting facilities affecting significant water resources. Unfortunately, without added layers of protection from political interference, there is a significant risk that the commission would misuse this authority. Sadly, that is what happened in 2016 when the commission attempted to fine a kalo farming family for watering their kalo fields, while it ignored repeated permit violations and documented water "banking" by

corporate diverters.¹ The ability to impose higher fines, without true independence from the politically well-connected is not an improvement to the commission at all.

H.B. 510 HD1 proposes a mechanism to authorize the commission to declare emergencies when there are sudden water shortages. In 2021, after the Red Hill Bulk Fuel Storage facility contaminated the primary drinking water aquifer for the island of O‘ahu, the Green Administration concluded that the commission did not have the legal authority to quickly declare a water shortage. A bill similar to H.B. 510 was proposed and passed in 2022, and then vetoed by Green Administration on the claim that the bill was not necessary. Then in the summer of 2022, wildfires ravaged Lahaina and the commission was once again confronting huge, unexpected water shortages without no ability to respond in a timely fashion. While it is clear that the commission needs authority to issue emergencies, it is also clear that the commission lacks the trust of key communities affected by its decisions. Structural reforms to the commission that address the causes for the community’s mistrust are critical to ensure that emergencies declared by the commission are properly heeded. Without these structural reforms, passing H.B. 510 would further undermine the public’s already-eroded trust in this institution.

Mahalo for the opportunity to testify.

¹ See, Maui Couple Plants a Taro Patch, Grows a Movement for Hawaiian Water Rights, September 9, 2016, <https://earthjustice.org/article/maui-couple-plants-a-taro-patch-grows-a-movement-for-hawaiian-water-rights>



SIERRA CLUB OF HAWAI'I

SENATE COMMITTEE ON WATER AND LAND

March 13, 2025

1:00 PM

Conference Room 229

In SUPPORT WITH AMENDMENTS of

HB306 HD2: Relating to State Water Code Penalties

HB510 HD1: Relating to Declaration of Water Shortage and Emergency

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 WITH AMENDMENTS** HB306 HD2 and HB510 HD1, which provide the Commission on Water Resource Management ("CWRM") greater authorities to manage our wai, but which fall short of addressing the much greater challenge to effective water management: undue political interference. **The Sierra Club accordingly urges the Committee to consider amending either of these measures to include much comprehensive solutions to enhance water management in our islands, such as those proposed in SB3 SD1 from earlier this session.**

HB306 HD2 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 and 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 access to wai.

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.

Meanwhile, **without HB510 HD1, the Water Commission must continue to undergo time consuming, months-long planning and rulemaking processes and exhaust its water shortage authorities before taking action to preserve our fresh drinking water supplies in**

an unanticipated water shortage or emergency. This bill would allow the Water Commission to instead take more timely action to deal with unexpected water shortages in real time.

While these proposals address longstanding water management “gaps,” the Sierra Club emphasizes that neither of these measures addresses the greatest barrier to the effective and fair management and protection of our most precious resource: the continual push by politically connected successors of the former plantation oligarchy, to maintain their control over our stream and groundwater resources.

As we have seen most recently with actions taken against CWRM staff, and in the manipulation of the nominating committee process for water commissioners, undue political influence has long confounded CWRM’s ability to properly implement the State Water Code, and uphold the public trust in wai. Unfortunately, as currently written, there are numerous vulnerabilities in the statutory structure of CWRM that have helped to perpetuate such political interference. For example, the Commission’s Chair is a member of the Governor’s cabinet, as is its legal counsel, the attorney general. Both of these individuals have considerable power over the Water Commission, its staff, and the nominating committee process; both also answer directly to the Governor. Accordingly, special interests who have the Governor’s ear could interfere, and have interfered, with the Commission’s implementation of the Water Code and effectuation of the public trust, contrary to the Legislature’s intent and to the detriment of the public interest in our wai.¹

Accordingly, we respectfully but strongly urge the Committee to consider including in either of these measures much more comprehensive provisions to address this longstanding challenge, such as those found in SB3 SD1, which the Committee approved earlier this session. Such provisions could counteract the politicization of water management in our islands by: allowing CWRM commissioners to decide amongst themselves who among their volunteers should serve as their Chair; allowing the commissioners to collectively choose an “executive director” as the lead CWRM staff person; requiring transparent performance reviews that allow for an objective assessment of the CWRM executive director’s job performance; and allowing commissioners to hire independent legal counsel for CWRM, rather than rely on the attorney general. These provisions in addition to the existing proposals found in these bills will be critical to ensuring that CWRM and its staff are able to carry out their vitally important work to protect and manage our most islands’ precious resource.

¹ See, e.g. Editorial, *Water Commission: A Decade of Disappointment*, ENVIRONMENT HAWAII, February 2005, available at <https://www.environment-hawaii.org/?p=1499> (“First, there’s the fact that the governor has made no secret of her hostility to the very idea of a statewide body to manage water resources. Alan Murakami, managing attorney with the Native Hawaiian Legal Corporation and longtime water watcher, says he believes Governor Lingle is engaged ‘in a deliberate attempt to make the commission less effective than the Legislature intended.’”); Wayne Tanaka, *State-Aided Disaster Capitalism? Governor’s administration targets stream, groundwater protection in the wake of Maui wildfires as water protectors fight back*, KA WAI OLA NEWS, Oct. 1, 2023, available at <https://kawaiola.news/aina/state-aided-disaster-capitalism/>.

Accordingly, the Sierra Club respectfully urges the Committee to **PASS WITH AMENDMENTS** these measures. Mahalo nui for the opportunity to testify.



March 10, 2025

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

Comments and Concerns in Opposition to HB 306, H.D. 2, Relating to State Water Code Penalties (Adds a minimum penalty and maximum penalty per violation of the State Water Code [Code], and makes each day that a violation exists or continues to exist a separate offense. Establishes factors the Commission on Water Resource Management [Commission] must consider when determining the amount of the penalty. Increases maximum fines in five-year increments from 2030 to 2045. Effective 7/1/3000.)

**WTL Hearing: Friday, March 14 24, 2025, 1:00 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 Code and to afford the Commission the authority to assess the existence and length of time of the violation, and determine the amount of the penalty imposed based on the Commission's consideration of certain factors.

HB 306, H.D. 2. The stated purpose of this bill is to ensure that all violators of the Code are held accountable for their violations by 1) adding a minimum penalty and maximum penalty per violation of the Code and clarifying what constitutes a separate offense; and 2) requiring the Commission to consider certain factors when imposing penalties.

Because the measure fails to set forth a clear and warranted justification, as well as facts and information supporting the need for requiring the imposition and increase of penalties, a presumption could be made that the measure is intended to afford the Commission expanded authority to subjectively and unilaterally assess the existence and length of time of any violation, and to determine the amount of any mandatory penalty imposed for any violation of a 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 shall constitute a separate offense. Such authority would arguably afford the Commission unbridled power to subjectively and arbitrarily impose **mandatory** penalties upon water users and permittees which could potentially control and prohibit use of water resources throughout the State.

Such a presumption is plausible given at least two proposals similarly made in the recent past to expand the Commission's authority 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 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.

Consistent with those previous attempts to expand the powers of the Commission, LURF believes the authority now being sought to allow the Commission to assess violations and impose penalties **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 good 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 Adequately Protect and Manage Water Resources Should Not be Amended Without Facts and Information Necessary to Justify the Proposed Amendments.

HB 306, H.D. 2 now proposes amendments to HRS Section 174-C-15 to afford the Commission authority to unilaterally assess and impose penalties for violation of the Code and the Commission's orders, as well as the sole authority to determine the amount of the penalties based on the Commission's evaluation of the circumstances of the violation. As far as LURF is aware, proponents of this measure have not presented any findings or evidence to support a viable reason or justification for such a proposal to impose such mandatory penalties, nor has any information or findings been offered to support the imposition of mandatory penalties in the amounts as indicated in the bill.

Any attempt made by proponents of this measure to justify the proposed imposition of increased penalties by relying upon the Commission's alleged intent to **"create parity"** with its co-trustee, the Department of Health (DOH), to establish the same maximum penalties for "water quality violations" would not be appropriate in this case. LURF believes such a parity-based justification is misplaced since the DOH penalties apply to violations relating to the **quality** of water, as opposed to the **usage and allocation** of water in the context of protecting and managing water resources pursuant to the provisions of HRS Section 174-C-15. As there may likely be different attending concerns, issues, and factors relating to the imposition of penalties for the two distinctive types of violations, any assertion that parity may be required is arguably mitigated, if not invalidated as justification for this 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), together with the lack of **sufficient information, facts, and findings** to support the need to **mandatorily** impose such penalties in subjective amounts upon water users and existing water permittees, would be to allow circumvention and disregard of important established rights and 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.¹ 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 mandatory 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.

¹ 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)). For example, County Charter provisions (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.

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.

In the past, the various counties have expressed their concerns, and LURF agrees, 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 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 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.

Concerns regarding potential impacts to housing projects still exist, as described in Governor Green's veto message and statement of objections to H.B. 153 (2023). This measure could have unintended negative consequences and increase the costs and risks of existing and future state and private housing developments which unknowingly utilize water from county systems that may be in minor violation of water code provisions. Given even 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.²

² Hawaii Administrative Rules §11-200.1-24(b) requires at appropriate points, **cost-benefit analyses**.

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

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

D. The Proposed Measure May Negatively Impact Landowners Due to the Fear of Unknown, Unanticipated and Arbitrary Penalties Which May be Incurred in Connection With the Use of Water Resources on 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 for various uses, including providing housing.

E. 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.

HB 306, H.D. 2 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.

Aside from the procedural objection that this measure may be proposed and furthered primarily by the Commission itself, LURF must respectfully oppose this bill based on:

- 1) the inability of proponents and the Commission to justify the 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 mandatory 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 fact that any and all laws and regulations relating to water resources should be properly vetted with the counties which are conferred the authority to administer State and county laws and regulations regarding water resources that relate to land use and waterworks;
- 5) the lack of consideration of reasonable, well-collaborated, and more practical alternatives; and
- 6) 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, agricultural stakeholders, and State and private housing developments.

For the reasons set forth above, 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.



Testimony of **Lahaina Strong**
Before the Senate Committee on
Water and Land

In Consideration of House Bill No. 306 HD2
RELATING TO STATE WATER CODE PENALTIES

To Chair Inouye, Vice Chair Elefante and the honorable members of the committee,

We are writing on behalf of Lahaina Strong, an organization deeply rooted in our community's resilience and advocacy. Originally formed in 2018 following the Hurricane Lane fire in Lahaina and revitalized after the devastating fires of August 8, 2023, Lahaina Strong has become the largest grassroots, Lahaina-based community organization, with over 35,000 supporters. Our mission is to amplify local voices and champion community-driven solutions, which are more critical than ever as we continue rebuilding and recovering.

Lahaina Strong stands in **strong support of House Bill 306 HD2**, which seeks to bolster enforcement mechanisms for water violations by increasing penalties. As a community that has fought tirelessly for responsible water stewardship, we have seen firsthand how weak enforcement and insufficient fines have allowed the continued exploitation of our wai—threatening ecosystems, public health, and the resilience of our communities.

Water is not a commodity to be abused—it is a public trust resource that sustains our way of life, ecosystems, and future generations. For too long, over-extraction and illegal diversions have drained the lifelines of our 'āina, leaving streams dry, ecosystems struggling, and lo'i farmers in crisis. Existing penalties have been too low to deter violations, allowing corporations and bad actors to treat fines as the cost of doing business. This bill takes a necessary step in correcting that imbalance.

HB306 HD2 strengthens enforcement by ensuring penalties reflect the true impact of violations. While this bill takes an important step in holding violators accountable, without substantial penalty increases, it risks falling short of its intent. Lahaina Strong

urges you to consider adding a substantial minimum penalty per violation to prevent any violation from being dismissed as insignificant. A meaningful maximum fine, as proposed, should escalate over time with strong initial numbers that reflect the true cost of water mismanagement. Additionally, clearer definitions of repeat offenses and escalating penalties will ensure chronic violators face real consequences.

Penalties should match the severity of the harm caused and ensure violators face lasting consequences. Meaningful fines are critical to protecting our wai, kahawai, and aquifers—especially as we work toward recovery after the August 8, 2023, wildfires.

Lahaina Strong urges you to **support HB306 HD2** with the strongest possible penalty increases to ensure Hawai‘i’s water resources are protected, equitably managed, and available for future generations. Upholding water stewardship requires real accountability—let’s make enforcement strong enough to deter exploitation once and for all.

Ola i ka wai.

Sincerely,

Lahaina Strong



LATE

Senate Committee on Water and Land

Hawai'i Alliance for Progressive Action (HAPA) Supports: HB306 HD2

March 14th, 2025 at 1:00pm; Conference Room 229

Aloha Chair Inouye, Vice Chair Elefante and members of the committees,

HAPA is testifying in support of HB306 HD2 which proposes to add a minimum penalty and maximum penalty per violation of the State Water Code and makes each day that a violation exists or continues to exist a separate offense. Establishes factors the Commission on Water Resource Management must consider when determining the amount of the penalty. Increases maximum fines in five-year increments from 2030 to 2045.

Enforcement of the Hawai'i's Water Code is essential to the health of traditional and customary practices by ensuring streamflows are sufficient for kalo cultivation, health of riparian species, and for overall conservation efforts to ensure abundant clean water resources for future generations.

The authority to set fines based on the severity of the violation provides the necessary power to dissuade private interests from repeatedly taking more water than allowed and overstressing aquifers. This is particularly critical in communities such as west Maui where water resources are already severely constrained.

HAPA supports the amendments that direct the Water Commission to consider the nature, circumstances, extent, gravity, and history of the violation and of any prior violations; the economic benefit to the violator, or anticipated by the violator, resulting from the violation; the opportunity, difficulty, and history of corrective action; good faith efforts to comply; the degree of culpability; and such other matters as justice may require. Given the extensive history of water code violations in Hawaii that have enriched large scale corporate diverters at the expense of small scale subsistence practices, it is vital that increased penalties are appropriately targeted to address and dissuade the truly egregious violations.

Please support HB 306 HD2. Mahalo for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Anne Frederick', is written over a light blue horizontal line.

Anne Frederick,
Executive Director

HB-306-HD-2

Submitted on: 3/13/2025 6:23:41 AM

Testimony for WTL on 3/14/2025 1:00:00 PM

Submitted By	Organization	Testifier Position	Testify
J. Kehau Lucas	Individual	Support	Written Testimony Only

Comments:

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

I am submitting testimony in **strong support** of House Bill 306 HD2, which seeks to strengthen penalties for violations of the Hawai‘i State Water Code. This legislation is essential for safeguarding Hawai‘i’s water resources and ensuring equitable access, particularly in communities like Lahaina, where longstanding struggles over water rights continue to impact local families and cultural practitioners.

For decades, West Maui’s water resources have been diverted and mismanaged, with corporate and private interests prioritized over the rights and needs of ‘ohana who have stewarded these lands for generations. Lahaina’s streams have been depleted while luxury developments—including resorts and golf courses—continue to benefit from weak enforcement and insufficient consequences for violations. Meanwhile, kalo farmers, local households, and the ecosystems that rely on these waters are forced to fight for the most basic access to this public trust resource.

Increasing penalties for water code violations is a necessary and long-overdue step toward accountability. Without robust enforcement mechanisms, bad actors will continue to exploit and deplete Hawai‘i’s wai with impunity. HB 306 HD2 represents a critical measure to uphold the integrity of our water management system and ensure that water remains a shared and protected resource for all people of Hawai‘i.

I respectfully urge the committee to pass HB 306 HD2 and take this meaningful step toward **restoring equity, justice, and responsible stewardship** of Hawai‘i’s water resources. Mahalo for your time and consideration.

Aloha ‘Āina,

J. Kēhau Lucas

No Wailuku, Maui

HB-306-HD-2

Submitted on: 3/13/2025 7:16:36 AM

Testimony for WTL on 3/14/2025 1:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Kazuo Flores	Individual	Support	Written Testimony Only

Comments:

Aloha,

I'm writing in full support of HB306 HD2.

Mahalo

Kazuo Flores