

DAVID Y. IGE  
GOVERNOR OF  
HAWAII



SUZANNE D. CASE  
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BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

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LAND  
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STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

Testimony of  
SUZANNE D. CASE  
Chairperson

Before the Senate Committees on  
JUDICIARY  
and  
WAYS AND MEANS

Tuesday, February 26, 2019  
10:00 AM  
State Capitol, Conference Room 221

In consideration of  
SENATE BILL 554, Senate Draft 1  
RELATING TO STATE WATER CODE PENALTIES

Senate Bill 554, Senate Draft 1 proposes to amend Section 174C-15, Hawai'i Revised Statutes (HRS), to deter violations of the State Water Code, Chapter 174C, HRS, by increasing minimum fines to no less than \$50 per violation and to clarify that each day a violation exists or continues to exist shall constitute a separate violation. **The Department of Land and Natural Resources (Department) supports this measure and offers the following comment and suggested amendment.**

Section 174C-15, HRS, provides the Department's Commission on Water Resource Management (Commission) with enforcement authority for penalties and common law remedies for any violation of the provisions of Chapter 174C, HRS, its rules, (Hawaii Administrative Rules, Title 13, Sub-title 7., Chapters 13-167 to 171), or Commission orders. This section was amended by Act 233, Session Laws of Hawai'i 2008, to increase the maximum fine amount from \$1,000 to \$5,000. Effective August 9, 2018, the Commission updated and clarified its rules to be consistent with the maximum daily fine of \$5,000 per violation allowed under Section 174C-15, HRS, to allow the implementation of the maximum enforcement fine limits for all violations. This measure attempts to further strengthen Commission enforcement by clarifying what constitutes "continuing offenses" and when "daily fines" may be imposed. The lack of having appropriate permits from the Commission for stream diversions, stream channel alterations, well constructions, pump installations, and water use in water management areas, and the Commission's ability to apply

daily fines for these infractions, has been a recent issue before the Commission. The current statutory language appears to limit the imposition of daily fine capabilities for unpermitted activities. Staff believes daily fines should also be applicable to unpermitted activities because continuing daily harm to public trust resources or uses may result. However, based on the Commission's experience in adjudicating over 145 enforcement cases to date, there also needs to be clear and equitable treatment of violators, as well as a degree of flexibility in applying daily fines on a case-by-case basis. Provisions are needed for the consideration of the nature, extent, gravity and history of the violation, as pointed out in the subject measure, as well as mitigative measures such as good faith efforts to remedy the violation once noticed, or self-reporting of the violation.

To deter violations, remove the economic benefit of violations, provide fair treatment of the regulated community, and offer the violator a chance to undertake a beneficial alternative in partial or total replacement of a cash penalty, the Commission adopted a penalty guideline in 1999. Since then, the guideline has been revised twice, in 2001 and most recently in 2014.

The Department additionally proposes the following amendment to line 10, page 2, SECTION 2 (proposed revision shown in gray highlight below) for consistency to ensure that all violators of Chapter 174C, HRS, are held accountable for their violations by creating a minimum penalty for every violation, while providing for consideration of gravity and mitigative measures and alternative settlements through the continued application of the Commission's Penalty Guideline:

(b) Any person who violates any provision of this chapter, ~~[or]~~ violates any rule adopted pursuant to this chapter, violates any order of the commission, fails to obtain a permit where one is required, or fails to comply with permit conditions, may be subject to a fine imposed by the commission. Such fine shall be no 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.]~~ per violation. Each day that a violation exists or continues to exist shall constitute a separate [offense] violation. Penalties for continuing violations shall be determined by the commission by a preponderance of the evidence.

Thank you for the opportunity to comment on this measure.

DAVID Y. IGE  
Governor

JOSH GREEN  
Lt. Governor



PHYLLIS SHIMABUKURO-GEISER  
Acting Chairperson  
Board of Agriculture

State of Hawaii  
**DEPARTMENT OF AGRICULTURE**  
1428 South King Street  
Honolulu, Hawaii 96814-2512  
Phone: (808) 973-9600 FAX: (808) 973-9613

TESTIMONY OF THE DEPARTMENT OF AGRICULTURE  
BEFORE THE SENATE COMMITTEES ON JUDICIARY AND WAYS & MEANS

FEBRUARY 26, 2019  
10:00 A.M.  
CONFERENCE ROOM 211

SENATE BILL NO. 554 SD1  
RELATING TO STATE WATER CODE PENALTIES

Chairpersons Rhoads and Dela Cruz and Members of the Committees:

Thank you for the opportunity to testify on Senate Bill 554 SD1 relating to state water code penalties. This Bill adds a minimum penalty of \$50 per violation of the state water code. The Bill also creates a new cause of action by making violations to any order of the commission a fineable offense. The Department respectfully opposes this measure and offers comments.

Adopting this new cause of action may provide the Commission with overly broad powers to legislate by creating offenses that are not based on violations of a specific statute or rule.

As water rights and use regulations change in the future the Department understands it will be required to comply with these changes. However, in most cases, the Department's ability to comply with these changes will be dependent on capital improvement funding. If sufficient funds are not appropriated the Department will be unable to comply with these changes which could take a year or more, during which time, the fines will accrue. The Department does not have the operating funds to support these fines and the costs will ultimately either be passed to the farmers or requested as additional general funds support.



We respectfully request that the following change be added to §174C-15:

1. Delete, "violates any order of the commission," from page 2, line 3.
2. Add a new subsection (f) that exempts the State of Hawaii Executive Departments from the application of the section.

Thank you for the opportunity to testify on this measure.

**LATE**

**SB-554-SD-1**

Submitted on: 2/26/2019 2:55:27 AM

Testimony for JDC on 2/26/2019 10:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Melodie Aduja	Testifying for O`ahu County Committee on Legislative Priorities of the Democratic Party of Hawai`i	Support	No

Comments: