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**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

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SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
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AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
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CONSERVATION AND COASTAL LANDS
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ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

**Testimony of
SUZANNE D. CASE
Chairperson**

**Before the Senate Committee on
WATER AND LAND**

**Friday, February 8, 2019
1:20 PM
State Capitol, Conference Room 229**

**In consideration of
SENATE BILL 554
RELATING TO STATE WATER CODE PENALTIES**

Senate Bill 554 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 comments and suggested amendments.**

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 (HAR) 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.

Senate Bill 554 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.

In an effort 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 proposes the following amendments at Lines 1 and 16 of SECTIONs 2(b) and 2(c), respectively (proposed revisions shown in gray highlight below) to ensure that all violators of Chapter 174-C, 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]~~ any rule adopted pursuant to this chapter, any order of the commission, or fails to obtain a permit where one is required under this chapter or 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[-] per [offense] violation. ~~[For a continuing offense, each day during which the offense is committed is a separate 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].

(c) 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 consider the [violator's ability to pay,] history of such violations, degree of culpability, and other matters as justice may require.

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

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TESTIMONY OF THE DEPARTMENT OF AGRICULTURE
BEFORE THE SENATE COMMITTEE ON WATER & LAND

FEBRUARY 8, 2019
1:20 P.M.
CONFERENCE ROOM 229

SENATE BILL NO. 554
RELATING TO STATE WATER CODE PENALTIES

Chairperson Kahele and Members of the Committee:

Thank you for the opportunity to testify on Senate Bill 554 relating to state water code penalties. This bill adds a minimum penalty of \$50 per violation of the state water code and makes each day that a violation exists or continues a separate offense. The Department of Agriculture has strong concerns with this measure and offers the following comments.

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:
“(f) Subsections (a), (b), (c), (d) and (e) shall not apply to State of Hawaii Executive Departments.”

Thank you for the opportunity to testify on this measure.



SB-554

Submitted on: 2/6/2019 2:10:07 PM

Testimony for WTL on 2/8/2019 1:20:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Karen Winslow	Individual	Support	No

Comments: