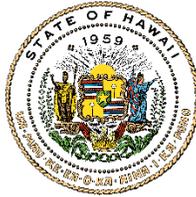


JOSH GREEN, M.D.  
GOVERNOR | KE KIA'ĀINA

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

Testimony of  
DAWN N. S. CHANG  
Chairperson

Before the Senate Committees on  
WATER AND LAND  
and  
TRANSPORTATION AND CULTURE AND ARTS

Tuesday, February 14, 2023  
3:00 PM

State Capitol, Conference Room 224 & Videoconference

In consideration of  
SENATE BILL 468  
RELATING TO AQUATIC NUISANCE SPECIES

Senate Bill 468 proposes to authorize the Department of Land and Natural Resources (Department) to adopt rules to prevent and respond to the introduction of aquatic nuisance species from discharges incidental to the normal operation of a vessel and reflect the relationship between the federal Vessel Incidental Discharge Act of 2018, as amended, and state law. **The Department supports this measure.**

Pursuant to Section 26-15(b), Hawaii Revised Statutes (HRS), the Department is responsible for managing and administering the aquatic and terrestrial wildlife resources of the State. The State of Hawai'i has approximately 549 known aquatic nuisance species, more than any other U.S. state or territory, with an estimated 80% arriving in state waters via vessel traffic. Aquatic nuisance species can have significant adverse impacts on Hawai'i's economy, culture, public health, and ecosystem. Hawai'i's native aquatic species are particularly vulnerable to the impacts of aquatic nuisance species due to a high rate of endemism, meaning many are without natural predators or natural competition. Nuisance species prey upon Hawai'i's native species, outcompete them for food, light, and space, and even infect them with disease. Examples of harmful aquatic nuisance species that have arrived via vessel discharges include prickly seaweed (*Acanthophora spicifera*) which now covers reefs on all main Hawaiian Islands and orange keyhole sponge (*Mycale armata*) that outcompetes native sponges and corals.

Section 187A-32, HRS, designates the Department as "the lead state agency for preventing the introduction and carrying out the destruction of alien aquatic organisms through the regulation of ballast water discharges and hull fouling organisms." While ballast water and hull fouling are

DAWN N. S. CHANG  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE  
MANAGEMENT

LAURA H. E. KAAKUA  
DEPUTY DIRECTOR - LAND

M. KALEO MANUEL  
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE  
MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES  
ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

often the focus of discussions surrounding aquatic nuisance species prevention, many studies have shown that other vessel discharges, such as bilge water, anchor chain locker effluent discharge, or runoff from rinsing decks can carry bacteria, larvae, and macroorganisms. Although many aquatic nuisance species have already become established in Hawaiian waters, we can take measures to prevent new species of concern from arriving such as the highly deadly Stony Coral Tissue Loss Disease (SCTLD) that has been devastating reefs in the Caribbean and has been shown to be transmitted through vessel discharges.

There are two separate and important reasons that the Department needs the authority to regulate discharges incidental to the normal operation of a vessel other than ballast water and hull fouling. The first, as noted above, is the need to immediately adopt administrative rules that will prevent the introduction of SCTLD into state waters. Discharges other than ballast water and hull fouling are potential vectors for SCTLD. The amendments made by Senate Bill 468 will allow the Department to regulate those other critical vectors.

The second reason is for state enforcement to protect state waters after the final federal regulations take effect under the Vessel Incidental Discharge Act of 2018 (VIDA). The federal VIDA regulations are currently projected to take effect in 2025. Once adopted, they will preempt the State of Hawai'i from adopting or enforcing any state law or regulation with respect to any discharge incidental to the normal operation of a vessel that is subject to regulation under VIDA *unless* the state requirement is identical to, or less protective than, the federal VIDA regulations. Providing the Department with authority to regulate all discharges incidental to the normal operation of a vessel will allow the State to mirror VIDA regulations. This will enable Hawai'i to conduct its own enforcement actions and collect any fines imposed on violators under state procedures and in state courts.

Senate Bill 468 also significantly increases potential penalties for violations to reflect the severity of the economic impact the introduction of new aquatic nuisance species can have on the State. The maximum penalties proposed in Senate Bill 468 would provide a meaningful deterrent for large, multinational shipping companies and are similar to the penalties for a VIDA violation under section 309 of the Clean Water Act (CWA) (33 U.S.C. 1319). The Department notes that section 309 of the CWA does provide lower minimum penalties for violations, which are appropriate for unintentional recordkeeping and other paperwork violations that do not result in an unauthorized discharge in state waters.

Mahalo for the opportunity to submit testimony in support of this measure.



The Senate  
Committees on Transportation and Culture and the Arts  
And Water and Land  
February 14, 2023  
3:00 p.m. Conference Room 224  
State Capitol

### **Testimony in Support of SB 468**

Aloha Chairs Lee and Inouye, and Vice Chair Elefante, and Members of the Committees,

**The Coordinating Group on Alien Pest Species (CGAPS) is in strong support of SB 468, Relating to Aquatic Nuisance Species.**

Senate Bill 468 proposes to grant the Department of Land and Natural Resources (DLNR) the authority to prevent and respond to the threat of aquatic nuisance species (ANS) from all discharges incidental to the normal operation of a vessel (incidental discharges) that relate to ANS. Hawaii Revised Statutes (HRS) section 187A-32 authorizes DLNR to regulate the introduction of ANS from ballast water and vessel hull fouling. This grant of authority has been crucial in protecting the state's harbors and near coastal waters; however, this section is out of date and the scientific understanding of shipborne vectors for the introduction of ANS has greatly expanded since the enactment of section 187A-32 HRS in the year 2000. For example, in 2000 the Environmental Protection Agency still exempted vessel incidental discharges from Clean Water Act regulation under the National Pollutant Discharge Elimination System. Since that time, the federal courts ordered the EPA to regulate incidental discharges from vessels and today the Vessel General Permit regulates general effluent levels and twenty-six specific incidental discharges from vessels.

There are two separate and important reasons to provide DLNR the authority to regulate incidental discharges other than ballast water and hull fouling. The first is the need to protect state waters from ANS that could hide in those other discharges, including a new and devastating coral disease known as stony coral tissue loss disease, prior to the effective date of the federal regulations to implement VIDA. The understanding of shipborne vectors for the introduction of ANS has grown to include multiple discharges besides ballast water and biofouling. These discharges include ballast tank sediment, anchor chain sediment, anchor chain locker sediment, sea chests, raw water piping, and more. As an example of the obvious threat these discharges pose, when ship's retrieve their anchors both the anchor chain and the anchor itself can be covered with biofouling and muddy or silty deposits that can contain ANS or their spawn/propagules. Federal law requires vessels to wash down the anchor chain as it is being retrieved, but any leftover or missed deposits can fall off of the chain and accumulate in the bottom of the anchor chain locker where it is stored on voyages. If not done correctly, when this

anchor chain locker is later flushed or cleaned out in a different location the sediment discharged can easily introduce ANS or pathogens to the receiving waters. Hawaii urgently needs the ability to regulate these other incidental discharges to adopt regulations to prevent the introduction of stony coral tissue loss disease into state waters. This is a devastating ANS that is known to affect more than 30 species of stony corals and is characterized by rapid onset of disease lesions in the coral tissue, leading to tissue loss and colony mortality over a period of weeks.

In addition to authorizing DLNR to adopt regulations prior to the effective date of the federal VIDA regulations, this authority is also needed to facilitate an organized approach for Hawaii to co-enforce vessel discharge regulations with the United States Coast Guard (USCG) under VIDA. Federal VIDA regulations are currently projected to come into force in late 2025. When state-USCG co-enforcement of VIDA becomes a reality, it will be essential that the state can regulate *all* of the discharges for ANS that the USCG regulates to avoid a disjointed or piecemeal approach to this co-enforcement. This expanded authority also ties into HB 755's proposal to mirror federal regulations adopted under VIDA as state regulations. Under VIDA, both the EPA and the USCG are tasked with reviewing, revising, and updating their incidental discharge regulations every five years and could revise those regulations between five-year reviews, based on new information or for other reasons. Without the amendments made by HB 755, every time the VIDA regulations are updated DLNR will have to enter the chapter 91 rulemaking process to mirror the new federal regulations. This would result in at least one year in every five years where the state and federal regulators are working from a different set of regulations. This is clearly not ideal for cohesive co-enforcement and will cause confusion in the shipping industry as well as between regulators. Providing for the automatic update of state regulations to mirror the federal regulations will be crucial in the co-enforcement effort. The mirroring aspects of this proposed bill were modeled after §195D-4(a) HRS which provides for listings under the Hawaii Endangered Species Act to automatically update and match the federal Endangered Species Act.

An obvious question that comes up at this point is that, if the State will be preempted from passing incidental discharge regulations that are more stringent than the federal regulations and the state can enforce the federal regulations, then why does Hawaii need its own regulations at all? Under VIDA, the State can enforce the federal regulations, *but* any enforcement action by the State under the federal regulations must be brought in federal district court. While bringing a federal court complaint against a vessel is possible, there are procedural and evidentiary hurdles in the federal court system that disincentivize the State from bringing such an action for anything but the most egregious and high value incidents. On the other hand, there is nothing in VIDA stopping the State from enforcing its *own* regulations in state court or even through an administrative action. Giving the State the option to proceed in state court or set up an administrative process could clear out procedural hurdles and lower the evidentiary burden in bringing an enforcement action providing Hawaii the authority to protect its own state waters and the flexibility for the State to fit the enforcement action to the severity of the violation.

In discussions with the shipping industry and other stakeholders, there has been concern expressed that having state regulations that mirror federal regulations could result in double-jeopardy for vessel owners where they undergo two trials and receive two fines for the same violation. This is a valid concern, but VIDA requires that the USCG work with the states in drafting the regulations guiding this co-enforcement effort, a process which may begin in the

winter of this year. Judging from preliminary talks with the USCG, issues such as parallel enforcement actions will be addressed in detail during these sessions. It is also likely that during this time the USCG will conduct multiple stakeholder engagement sessions to gain input from the shipping industry and other concerned groups. The regulations developed by the USCG for co-enforcement and enforcement actions will also be part of federal rulemaking under the Administrative Procedure Act that includes a public comment period during which time stakeholders can voice their concerns about these issues.

Finally, when crafting penalties for incidental discharge regulations it is important to keep in mind the broad spectrum of contemplated regulations. Clearly, the penalties need to have a cap high enough that it would deter a multinational shipping company from violating the regulations or to compensate the State for remediation efforts following a massive discharge of untreated ballast water. However, it is also important to keep in mind that there are more simple infractions, such as failure to submit a ballast water reporting form in a timely manner, that need to fall within the parameters of the penalties section so that each of the regulations is properly enforceable and the State retains leverage to issue smaller penalties for smaller violations. In following the above cited importance of enforcement flexibility for the State to develop an administrative process for violations, it may be beneficial to give the adjudicating body broad discretion in their authority to match the penalty to the severity of the violation.

Therefore, CGAPS proposes amending the penalties section of SB 468 by removing page 4, lines 7 through 14, and inserting the following language:

§187A-\_\_ Penalties. In addition to any penalties authorized in section 187A-12.5(a), any person who violates this part or a rule adopted pursuant to this part, shall be subject to:

- (1) For a first violation, a fine of not more than \$50,000 per day of violation; and
- (2) For a second or subsequent violation, a fine of not more than \$100,000 per day of violation.

Thank you for the opportunity to comment on this measure.

Aloha,

Christy Martin  
Andrew Porter  
CGAPS

Testimony of the Hawaii Harbor Users Group  
Opposition to SB468  
Before the Committee on Water and Land  
February 14, 2023

Dear Chair Inouye, Vice Chair Elefante, and Members of the Committee:

The Hawaii Harbor Users Group (HHUG) is a non-profit maritime transportation industry group comprised of key commercial harbor users statewide. HHUG has significant concerns with SB468, especially with respect to the Department of Land and Natural Resources' role as the lead agency for preventing the introduction and carrying out the destruction of aquatic nuisance species.

As an island state, Hawaii is very dependent upon our commercial harbors to ensure the continued and unimpeded flow of cargo in and out of our State. It is estimated that over 90 percent Hawaii's imported goods pass through our commercial harbors, including consumer goods, motor vehicles, construction materials, and fuel.

The maritime industry is heavily regulated, including with respect to cargo vessels' discharges incidental to their normal operation, and should not be further burdened with unnecessary additional requirements on cargo operations. The federal government strictly regulates ocean cargo vessels, including through the Vessel Incidental Discharge Act of 2018 (VIDA). HHUG members comply with environmental regulations.

Accordingly, HHUG opposes this measure's apparent legislative grant of authority to DLNR to add a new layer of state regulatory oversight that is already provided by federal agencies. In this regard, there are important and unresolved questions about the resulting regulatory structure that would result if this measure were passed. For example, it appears that one result will be that DLNR regulations will duplicate federal regulations (provided under VIDA) and vessel owners would then be subject to vessel inspections by separate federal and state agencies and potentially separate enforcement actions, prosecutions, and penalties driven by separate federal and state agencies. We understand VIDA apparently requires the U.S. Coast Guard (USCG) to work with individual states in drafting regulations that would pertain to any co-enforcement regimes and the USCG will engage stakeholders to gain input. As far as we know, such discussions with states and engagement with stakeholders has not yet commenced. It is not clear to what extent the issues of parallel inspections, enforcement actions, prosecutions, and fines will be addressed by federal and state discussions, and what impact, if any, specific stakeholder input will have on the USCG's resulting regulations and guidelines for states. HHUG also opposes the high fine structure contained in this measure.

With the USCG's discussions with states and public hearings with stakeholders both still pending, without an understanding of the regulatory structure that this measure may drive, and without any language in this bill to address the concerns stated in the last paragraph, HHUG must respectfully submit that the concepts stated in this measure are not yet ready to be codified into Hawaii law.

Thank you for considering our testimony.

**SB-468**

Submitted on: 2/10/2023 11:25:44 AM

Testimony for WTL on 2/14/2023 3:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Luke Watkins	Individual	Oppose	Written Testimony Only

Comments:

I oppose any law that would prevent any citizen to be able to modify they vehicle, motorbikes, or crafts