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DEPARTMENT OF HEALTH
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**Testimony COMMENTING on HB1929
RELATING TO WATER**

REPRESENTATIVE LINDA ICHIYAMA, CHAIR
HOUSE COMMITTEE ON WATER & LAND

Hearing Date: 02/08/2024 9AM

Room Number: 430

1 **Fiscal Implications:** This measure may significantly impact the priorities identified in the
2 Governor's Executive Budget Request for the Department of Health's (Department)
3 appropriations and personnel priorities if the Department is required to delineate all wetlands
4 within the state and determine whether a wetland is an isolated wetland or included in Waters of
5 the United States (WOTUS), as well as changes to permitting requirements pursuant to
6 section 342D-50, Hawaii Revised Statutes (HRS).

7 **Department Testimony:** The Department shares the legislature's concerns regarding the impact
8 of the Supreme Court's May 25, 2023 decision in *Sackett v. Environmental Protection Agency*
9 (*Sackett Decision*), however, the Department believes that it is premature to make any statutory
10 revisions in response to the decision at this time.

11 The Department has been working with the United States Environmental Protection
12 Agency (EPA) to determine what statutory and programmatic changes are necessary to address
13 the impacts of the *Sackett Decision*. This work is currently ongoing and involves a
14 comprehensive analysis of existing protections, a comprehensive analysis of existing state
15 implementation resources, and consultation with stakeholders (e.g., other State and county
16 agencies) to determine how best to regulate activities in waterbodies impacted by the *Sackett*
17 *Decision*. Changes may include revisions to existing regulations and regulatory frameworks
18 (State law, county ordinances, etc.), development of new regulatory programs, and procurement
19 of necessary resources/funding. Should it be determined that statutory revisions are necessary,

1 the Department will work with the legislature and all stakeholders to ensure that the appropriate
2 revisions are made that best address and enhance protections for state water quality.

3 The bill proposes to add new definitions for “isolated wetland” and “wetland” and to
4 amend the definition of state waters. As proposed, the definition for “isolated wetland” means a
5 wetland that is not included in navigable waters of the United States as defined in title 33 United
6 States Code section 1362(7) [33 U.S.C. §1362(7)]. 33 U.S.C. §1362(7) defines the term
7 “navigable waters” to mean WOTUS, including the territorial seas. The Department believes
8 that this term to identify a certain type of wetland is not necessary, as the current definition of
9 State waters includes the term “wetlands” which encompasses the proposed “isolated wetland.”
10 As such, adding this new term is unnecessary as the proposed “isolated wetlands” are already
11 protected under the current definition of State waters and adding a specific definition for an
12 “isolated wetland” does not appear to add any additional statutory protections.

13 The proposed definition for wetland does not match the Department’s current definition
14 that is used for water pollution control matters pursuant to chapter 342D, HRS. The Department
15 currently uses the definition contained in Hawaii Administrative Rules chapter 11-54 (HAR
16 11-54) when considering whether a waterbody is a wetland. As defined in HAR 11-54, a
17 wetland must meet certain physical and hydrologic criteria such as the presence of hydrophytic
18 vegetation, the presence of hydric soils, or the substratum is nonsoil that is periodically saturated
19 with water or covered by shallow water. The Department also believes that the term “other
20 similar areas” in the list of wetland examples is a subjective term that is open to interpretation
21 and is unnecessary as the phrase “include but are not limited to” is already used at the beginning
22 of the list of examples.

23 The proposed revision to the definition of “State waters” adds “wetlands including but
24 not limited to isolated wetlands.” The term “wetlands” is already included in the existing “State
25 waters” definition and as previously discussed above, adding a definition for isolated wetlands is
26 unnecessary. Further, the bill proposes to also add navigable waters of the United States to the
27 definition of State waters. The Department believes that the current definition of “State waters”
28 is sufficient as it already specifies that **all** waters around and within the State are state waters.
29 Such waters are those that are within the claimed territory of the State consistent with Article XV

1 Section 1 of the State of Hawaii Constitution, which is the maximum boundary that can be
2 claimed under State jurisdiction.

3 The bill also proposes to require the Department to delineate all wetlands within the state
4 and to determine whether a wetland is an isolated wetland or WOTUS. No programs within the
5 Department currently carries out this delineation function, and as such, the Department does not
6 have any staff with the expertise necessary to carry out this delineation, or the resources to carry
7 out this delineation. Currently, delineations of WOTUS boundaries are carried out on a project-
8 by-project basis by the United States Army Corps of Engineers (USACE), who notifies the
9 Department of any WOTUS jurisdictional determinations. The Department believes that
10 USACE is the appropriate entity to make any WOTUS jurisdictional determinations, as they
11 have the staff and expertise to conduct the delineation and because WOTUS is a federal
12 definition. Further, because the definition of “isolated wetland” is dependent on knowing
13 whether a wetland is a WOTUS as delineated by USACE, the Department would not be able to
14 carry out even this limited set of delineations.

15 Lastly, the bill proposes to revise section 342D-50, HRS, to prohibit discharge into any
16 location that may cause or allow any water pollutant to enter into state waters. The Department
17 believes that the revision as written will cause regulatory uncertainty, due to the expansion of the
18 prohibition to include discharge into or at locations that **may** cause or allow any water pollutant
19 to enter state waters. The Department believes 342D-50, HRS, as currently written is sufficient
20 to ensure that the Department has the statutory authority to control and prohibit discharges of
21 water pollutants to state waters, therefore, the proposed revision is unnecessary.

22 **Offered Amendments:** None.

23 Thank you for the opportunity to testify.