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GOVERNOR OF HAWAII



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

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KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

**TESTIMONY OF THE CHAIRPERSON  
OF THE BOARD OF LAND AND NATURAL RESOURCES**

**on House Bill 2823, House Draft 2—Relating To Dam Safety**

**BEFORE THE HOUSE COMMITTEE ON  
FINANCE**

**February 22, 2008**

House Bill 2823, House Draft 2 amends Chapter 179D, Hawaii Revised Statutes (HRS), by adding a new part relating to Limitations on Liability which limits personal injury or property damage liability for any entity or person that owns, controls or operates a dam or reservoir and allows for immunity from liability for stockholders, directors and officers of a corporation that owns, operates or controls a dam or reservoir. The Department of Land and Natural Resources (Department) is strongly opposed to the limiting or waiving of liability for dams that are solely or corporately owned by an entity, stockholders or individuals that operate the dam for profit or other beneficial purposes as the Department believes that doing so will reduce the effectiveness of the Hawaii Dam Safety Program and decrease the importance and funding provided for improvements, repairs, and maintenance necessary for aging dams in the State.

The Department notes that this bill could affect 99 of the 136 state regulated dams that are operated by entities other than government or non-profit organizations. Of these 99 dams, 90 have a proposed high hazard classification and may affect over 21,000 persons and almost 120 critical facilities if they should fail.

By limiting liability, owners or operators may place a lower priority on maintenance and improvements necessary for the safe and efficient operation of their dams and reservoirs. Owners or operators may be willing to put up money for maintenance but not on capital improvements or substantial improvements for deferred maintenance expenses. Due to the age of the dams in the State, on-going maintenance, monitoring and repairs are needed to safeguard against typical embankment dam failures.

The Department believes this measure does not afford any protection for State and/or County owned dams. Currently, Section 179D-4, HRS (Liability for damages), provides relief and protection for the Department and its employees in carrying out their duties in administration of the Dam Safety Program. This protection does not extend to the State as a dam owner which

would pertain to such agencies as the Department, Department of Agriculture (DOA), DOA-Agribusiness Development Corporation, and Department of Hawaiian Home Lands. Additionally, the various Counties own dams and reservoirs for flood control and water supply and it appears this measure does not afford any relief to these agencies also.

The Department is not aware of any other State that has provided this type of blanket immunity or limitation of liability to dam owners or operators. The Department is concerned with the precedence that this measure proposes, and will unduly place the public at risk not only to dam failures but also in not providing adequate compensation to property owners downstream should there be a failure or partial failure of a dam.

The Department would like to note that Section 179D-4, HRS, does provide for some limitation of liability as follows: “an owner or operator of a dam or reservoir shall not be liable for damages as a result of only natural causes such as earthquakes of an average recurrence interval of one thousand years, hurricanes, or extraordinary rains of an average recurrence interval in excess of two hundred fifty years“.

House Bill 2823, House Draft 2 also provides for a limitation on liability of an “owner or operator (that) has been found liable by a court of competent jurisdiction if the owner or operator is insured by a valid liability insurance policy”. It suggests that loss of lives could be compensated by means of an insurance payment that may be capped by this measure. The Department is unclear what impact this will have on the recourse options available for downstream homeowners of a dam facility should there be an incident at the dam that causes flooding, damage to property, and/or loss of life beyond the provisions of the insurance coverage

In consultation with the Department of Accounting and General Services (DAGS) Risk Management Office, state-owned dams are currently covered as a rider on the State’s excess-insurance policy. DAGS is unclear how this measure would affect the state’s own insurance coverage and are concerned that if this measure passes the State will lose this coverage for dams. If the State loses this coverage for dams, the State would have to absorb the full costs for any damages from a failure or partial failure of a State owned dam. Also, there is concern that by removing the liability to owners and limiting their insurance requirements, residents that experience a loss due to a dam failure would target the State for compensation, and the State would not have any insurance protection.

Additionally, in consultation with DAGS, the Department believes that the “unspecified coverage” provided in this measure may be difficult to determine since dams or reservoirs vary in locality, size, and the existing condition of the facility. Insurance coverage should be tailored to address the value of the asset, reflect the danger posed by the facility, and risks involved.

After the dam break in 2006, the State and County of Kauai initially spent over \$4,500,000 to mitigate damages from the flooding. Additionally, the State and Federal government will be spending another \$5,000,000 to clean up the areas of Wailapa Stream and Kilauea River. These figures do not reflect any personal property damages and losses experienced by the downstream property owners. All these costs were experienced from a dam that is located above less than 50

parcels and only one critical facility. Failure of a dam located above urban areas should be expected to exceed these costs and casualties.

The Department believes including limitations of liability for transmission systems or irrigation systems under the Dam and Reservoir Safety Act is inappropriate since the Department does not have any authority or jurisdiction to regulate, monitor, or inspect these types of facilities.

The Department again restates its strong opposition to this measure and is highly concerned with potential consequences should this measure pass. By limiting liability for certain owners or operators, will the injured public now file lawsuits against the State (being the deep pockets) to recover for damages to make up for any shortfalls?



## KAMEHAMEHA SCHOOLS

February 22, 2008

The Honorable Marcus R. Oshiro, Chair and Members  
Committee on Finance  
The House of Representatives  
Hawaii State Capitol  
415 South Beretania Street, Room 308  
Honolulu, Hawaii 96813

Hearing Date: Friday, February 22, 2008  
3:30 p.m., Conference Room 308

Dear Chair Oshiro and Members:

**Testimony in Support of House Bill No 2823 HD2 Relating to Dam Safety**

I am Kapu C. Smith, Senior Land Asset Manager for Kamehameha Schools' Kawailoa Plantation in Waialua, Oahu. I am here to testify in support of HB2823 HD2 because it recognizes that continued operation and maintenance of irrigation systems, dams and reservoirs that deliver water for agricultural use are essential to "important agricultural land" (IAL). In fact, you can't have one without the other. As such, landowners statewide need to be provided incentives which encourage the retention and expansion of these systems.

In previous testimony, The Department of Land and Natural Resources (DLNR) contends the opposite will occur and landowners will instead take the opportunity to leave their systems in a state of disrepair. This argument fails to recognize that HB2823 HD2 does not relieve the landowner of the requirement to repair and maintain irrigation systems in keeping with Chapter 179. More importantly they fail to acknowledge the alternative, if repair and maintenance is economically unfeasible, our choice is to decommission. As such, passage of HB2823 HD2 will instead improve the economic feasibility of retaining irrigation systems which are essential to the goal of protecting "important agricultural land".

Thank you for the opportunity to express our views on this matter.

HAWAII FARM BUREAU FEDERATION  
2343 ROSE STREET  
HONOLULU, HI 96819

FEBRUARY 21, 2008

HEARING BEFORE THE  
HOUSE COMMITTEE ON FINANCE

TESTIMONY  
HB 2823, HD 2  
RELATING TO DAM SAFETY

Chair Oshiro and Committee Members:

My name is Alan Takemoto, Executive Director, of the Hawaii Farm Bureau Federation, which is the largest non-profit general agriculture organization representing approximately 1,600 farm and ranch family members statewide.

Hawaii Farm Bureau Federation, on behalf of its member farmers, ranchers and agricultural organizations **strongly SUPPORTS HB 2823, HD 2**, providing indemnity protection to landowners and farmers who own and run dams and reservoirs including irrigation infrastructure using good management practices.

Affordable water supplies for agricultural use is largely dependent upon rainfall. The sporadic pattern of Hawaii's rainfall requires that water during heavy rainfall periods be stored in reservoirs (dams) for use during drier times. There are many existing reservoirs and as there is conflict for existing uses, new sources of agricultural water will probably need to be reservoir (dam) dependent. The tragedy at Kaloko has highlighted the risks associated with dams raising issue of liability with landowners. There are threats of closing existing reservoirs or raising lease rents to address liability costs. Either measure will be detrimental to agriculture.

The proposed bill recognizes that the State has put any and all liability on the shoulders of dam owners and operators. As such, because those owners and operators should only be liable of those factors within their control (i.e. exclusive of environmental disasters or the State's unreasonable control of dam operation), the bill requires negligence, willful malfeasance or the like in order to protect owners and operators from frivolous lawsuits that threaten to undermine dam usage. The bill asks that the Legislature balance the need for adequate access to water with the need to promulgate the proper process and remedy in the event of a disaster. Without such a bill, local farmers suffer the ramifications of statutes that suggest infinite liability upon owners and operators. In other words, the natural

consequences of such unlimited liability is limited access to existing water sources. That fault must be proven and not found by default is consistent with property and tort law.

HFBF believes that HRS 179D4(b) which states::

“provided that an owner or operator of a dam or reservoir shall not be liable for damages as a result of only natural causes such as earthquakes of an average recurrence interval of one thousand years, hurricanes, or extraordinary rains of an average recurrence interval in excess of two hundred fifty years.”

includes provisions that are of a magnitude that does not, on a practical basis, afford, liability protection for landowners and owners of irrigation systems that are practicing good faith efforts in dam safety compliance.

HFBF is willing to discuss the language for this bill to accomplish our goal to provide continued availability of water to our farmers and ranchers. We respectfully urge passage of this measure to facilitate further discussion.

Thank you.