

**LINDA LINGLE**  
Governor



**SANDRA LEE KUNIMOTO**  
Chairperson, Board of Agriculture

**DUANE K. OKAMOTO**  
Deputy to the Chairperson

State of Hawaii  
**DEPARTMENT OF AGRICULTURE**  
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**TESTIMONY OF SANDRA LEE KUNIMOTO  
CHAIRPERSON, BOARD OF AGRICULTURE**

**BEFORE THE HOUSE COMMITTEE ON AGRICULTURE  
WEDNESDAY, MARCH 17, 2010  
10:00 A.M.**

**SENATE BILL NO. 2523, S.D. 2  
RELATING TO AGRICULTURAL INSPECTIONS**

Chairperson Tsuji and Members of the Committee:

Thank you for the opportunity to testify on Senate Bill No. 2523, S.D. 2. The purpose of this bill is to exempt bulk freight of foreign origin from the inspection, quarantine, and eradication service fee and charge under section 150A-5.3, Hawaii Revised Statutes (HRS). The department understands the overall intent of this bill, but does not support this measure as proposed in Senate Bill No. 2523, S.D. 2. The department offers revised language and comments that, if accepted, would result in the department changing its position on this bill.

The department agrees with the proposed definitions under Section 2 of this measure for cement bulk freight, coal bulk freight, and liquid bulk freight, which the bill would exempt from the inspection fee under section 150A-5.3, HRS. However, as to aggregate bulk freight, the department believes that, to assure that the risk of pest transmission is kept low, the proposed definition for aggregate bulk freight should be tightened up to include requirements that aggregate material be man-made and inspected and certified. It is the department's understanding that the U.S. Department of Homeland Security, Customs and Border Protection requires this type of material to

be inspected and certified prior to departure from foreign ports, so such a requirement would not be an additional burden for the shipper. The department would like to take this opportunity to suggest the following language for the definition of "aggregate bulk freight" at Section 2, page 2, lines 4 thru 8:

"Aggregate bulk freight" means man-made, unpackaged, pre-processed, inspected and certified, homogenous particulate material used in construction, without mark or count and usually free-flowing, bought and sold by weight or volume, such as clean sand, gravel, crushed stone, slag, recycled concrete, and geosynthetic aggregates."

If this revised definition of aggregate bulk freight is accepted, the department would be supportive of the exemption from the fee for aggregate bulk freight, cement bulk freight, coal bulk freight, or liquid bulk freight. However, the department would like to state for the record that the surface vessel, itself, that transports these items could serve as a pathway for invasive species, such as mosquitoes, rodents, and other human-related disease pathogens.

The department would like to once again thank the Committee for this opportunity to testify on Senate Bill No. 2523, S.D. 2.



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-FIFTH LEGISLATURE, 2010**

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 2523, S.D. 2, RELATING TO AGRICULTURAL INSPECTIONS .

**BEFORE THE:**

HOUSE COMMITTEE ON AGRICULTURE .

**DATE:** Wednesday, March 17, 2010 **TIME:** 10:00 a.m.

**LOCATION:** State Capitol, Room 312

**TESTIFIER(S):** Mark J. Bennett, Attorney General, or  
Haunani Burns, Deputy Attorney General

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Chair Tsuji and Members of the Committee:

The Department of the Attorney General takes no position on the policy issues regarding exemption of certain bulk freight cargo from the agricultural inspection fee proposed in Senate Bill No. 2523. However, we have certain legal concerns with section 1 of this bill. In essence, we believe that section 1 of this bill contains an unnecessary and conclusory statement of the law regarding preemption which is subject to differing interpretations, as explained below.

Section 1, the bill's preamble, states that (1) bulk freight imports from foreign origins are inspected by the United States Department of Agriculture (USDA) and the United States Department of Homeland Security and that (2) the federal Agricultural Risk Protection Act of 2000 (ARPA) expressly preempts the states from regulating goods for invasive species when in foreign commerce. (Section 1, page 1, lines 5 - 10.) The bill's preamble also states, without citation, that inspection fees for certain bulk freight from foreign origins may be inconsistent with federal law. (Section 1, page 1, lines 1 - 3.) A plausible argument can be made that Hawaii's inspection for invasive species pursuant to chapter 150A, Hawaii

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Revised Statutes, is not preempted, but the question is ultimately one of interpretation of federal law.

The relevant portion of ARPA is the Plant Protection Act, 7 U.S.C. section 7701, et seq. (PPA), which consolidated a number of USDA Animal and Plant Health Inspection Service's (USDA-APHIS or APHIS) existing plant health laws and appears to have added express preemption language. (Prior to the PPA's enactment in 2000, the Commerce Clause, article I, section 8, clause 3 of the United States Constitution, appears to have been the underpinning for APHIS' power to regulate plant pest and plant movement in interstate and foreign commerce.) The PPA preemption section prohibits states from regulating "in foreign commerce any article, means of conveyance, plant, biological control organism, plant pest, noxious weed, or plant product in order- (1) to control a plant pest or noxious weed; (2) to eradicate a plant pest or noxious weed; or (3) prevent the introduction or dissemination of a biological control organism, plant pest, or noxious weed." 7 U.S.C. section 7756(a). In APHIS' view, "foreign commerce" includes any shipment from a foreign port or transiting through a foreign port. The PPA defines the term "article" as any material or tangible object that could harbor plant pests or noxious weeds. 7 U.S.C. section 7702. As to interstate commerce, the PPA provides an express exemption from its general preemption against state prohibition or restriction on movement of articles, if the state's regulation or action is consistent with APHIS' regulations. 7 U.S.C. section 7756 (b) (2) (A). There is no similar exemption for states as to movement of articles in foreign commerce. Thus, arguably, there is some degree of preemption because the Hawaii Department of Agriculture's (DOA) agricultural inspection under chapter 150A, HRS, is directed at preventing pest entry

Testimony of the Department of the Attorney General  
Twenty-Fifth Legislature, 2010  
Page 3 of 4

into the State, although not necessarily against the same pests that concern APHIS. As the PPA has been implemented in APHIS regulations and in practice, DOA's agricultural inspection of articles in foreign commerce has not been challenged or impeded.

APHIS regulations implementing the PPA set out quarantine restrictions for specific pests of federal concern or plants known to harbor those pests, and APHIS inspectors are authorized to inspect for and take action against those "actionable" pests or suspect plants. 7 C.F.R. § 301, et seq. To be actionable, a pest must be a plant pest injurious to U.S. agriculture. In making this determination, APHIS considers the economic importance of crops or plants that would be affected, and as Hawaii's crops and plants do not reach the threshold that nationally significant United States mainland crops do, for all practical purposes, APHIS has interpreted "U.S. agriculture" to mean United States mainland agriculture. That leaves a host of non-actionable pests or suspect plants that APHIS inspectors have no authority to inspect, reject, quarantine, treat, or destroy, but which Hawaii may consider to be, or to harbor, invasive species. For example, spiders not seen before in Hawaii that were detected by DOA inspectors on rocks from China would not have been actionable for APHIS inspectors, because spiders are not a plant pest and are not considered a pest under APHIS regulations. Arguably, DOA inspectors are not looking for pests of federal concern and, on that basis, DOA inspection for such pests would not seem to be preempted.

For many years prior to the PPA's enactment in 2000, DOA department inspectors have been conducting inspections on incoming cargo from foreign ports pursuant to chapter 150A, HRS, with APHIS' knowledge and, apparently, their acquiescence. In fact, DOA inspectors work in fairly close physical proximity

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Testimony of the Department of the Attorney General  
Twenty-Fifth Legislature, 2010  
Page 4 of 4

with APHIS. APHIS appears to have at least tolerated DOA's inspection activity, in practice.

The Department of the Attorney General consulted with a USDA-APHIS attorney as to whether APHIS considered the PPA's preemption regarding foreign commerce to preempt DOA inspections under chapter 150A, HRS. The attorney confirmed that APHIS has issued no formal ruling on this issue and has not been presented with the question before. He also said that, in practice, APHIS is aware that DOA department inspectors have been conducting inspections on incoming cargo in close proximity with APHIS inspectors. The APHIS attorney said that, if Hawaii wants a definitive answer to the question, the Legislature could write a detailed letter to the USDA-APHIS Office of General Counsel, laying out the facts, the circumstances, and the need to have the question definitively answered. He said that, as far as he was aware, no complaint had been filed on this issue by the United States Attorney and that no complaints had been received regarding shipments in foreign commerce being held up by the DOA's agricultural inspections.

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The Nature Conservancy  
Hawaii Program  
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Honolulu, HI 96817

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Testimony of The Nature Conservancy of Hawaii  
Commenting on S.B. 2523, SD2 Relating to Agricultural Inspections  
House Committee on Agriculture  
Wednesday, March 17, 2010, 10:00am, Rm. 312

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*The Nature Conservancy of Hawaii is a private non-profit conservation organization dedicated to the preservation of Hawaii's native plants, animals, and ecosystems. The Conservancy has helped to protect nearly 200,000 acres of natural lands for native species in Hawaii. Today, we actively manage more than 32,000 acres in 11 nature preserves on O'ahu, Maui, Hawaii, Moloka'i, Lāna'i, and Kaua'i. We also work closely with government agencies, private parties and communities on cooperative land and marine management projects.*

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Rather than S.B. 2523, SD2, The Nature Conservancy of Hawaii prefers the overall provisions H.B. 2294, HD2 regarding fines for failure to pay invasive species inspection fees and exemptions from those fees for certain types of bulk freight. We also submit the following comments:

- **We support reasonable service fees and meaningful fines for failure to pay such fees for the Hawaii Department of Agriculture's (HDOA) invasive species inspection activities.** This is an appropriate way to support the critical functions of the HDOA to protect our economy, environment, health, and lifestyle from the introduction of pests and diseases.
- **While we remain a bit concerned about creating a variety of exemptions to the service fees,** we understand that the Legislature may wish to provide limited exemptions for certain non-containerized bulk freight of great weight. We also appreciate the effort to craft these exemptions such that they apply only to certain processed bulk freight types that may have a reduced risk of pest introduction.

Thank you for the opportunity to comment.

BOARD OF TRUSTEES

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## Conservation Council for Hawai'i

Testimony Submitted to the House Committee on Agriculture

~~2523~~

SB ~~2736~~ Relating to Invasive Species

Hearing: Wednesday, March 17, 2010 10 am Room 312

### Opposition to SB 2523 SD 2

Aloha. Conservation Council for Hawai'i opposes SB 2523 SD 2, which exempts bulk freight of foreign origin from the inspection, quarantine, and eradication service fee and charge, effective 7/1/50. Bringing in these items from domestic and foreign sources could be pathways for invasive species. We understand that spiders were found in aggregate from China last year. What is going to be done to prevent this from happening again? We cannot rely on certification from the source that the material is clean. Other industries are watching this bill and lining up to request exemptions from the fee in the future. Exempting materials from the inspection fee is a bad idea, especially when we do not have enough agricultural inspectors, and will lead to further exemptions down the road. At some point, the legislature is going to find it difficult to say "no" to exemptions.

Charging an inspection fee to support the costs of inspecting these materials will help protect Hawai'i from invasive species. These materials should not be exempt from the existing inspection fee. We do not support any exemptions from the inspection fee, and particularly not for materials such as these that are known pathways for introduced species to enter Hawai'i.

We also ask you to increase the number of state agricultural inspectors at ports of entry to help enforce this law and maximize its effectiveness.

Please oppose SB 2523 SD 2. This bill is not in the public interest. Mahalo nui loa for the opportunity to testify.

*Marjorie Ziegler*

Marjorie Ziegler



Hawai'i's Voice for Wildlife – *Ko Leo Hawai'i no na holoholona lohiu*

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Directors: Madelyn D'Enbeau \* Maka'ala Ka'auomoana \* Hannah Springer  
Executive Director: Marjorie Ziegler



**HOUSE COMMITTEE ON  
AGRICULTURE**

March 17, 2010

Senate Bill 2523, SD 2 Relating to Agricultural Inspections

Chair Tsuji and members of the House Committee on Agriculture, I am Rick Tsujimura, representing AES Hawaii, Inc. ("AES").

AES supports Senate Bill 2523, SD 2 Relating to Agricultural Inspections to the extent that it exempts "coal bulk freight" as that term is defined in the bill from inspection under Chapter 150A, HRS. AES operates an electricity generating unit at Kalaeloa, Oahu, which is fueled by coal brought from foreign sources. Such shipments are governed by the United States Department of Agriculture (USDA) and inspected by the USDA. AES has maintained that such shipments are exempt under federal law and therefore supports the exemption contained in the instant bill. We request that the effective date be changed to "upon approval". We urge passage of the measure.

Thank you for the opportunity to present this testimony.



**Western States Petroleum Association**

**House Committee on Agriculture**

DATE: Wednesday, March 17, 2010  
TIME: 10:00 a.m.  
PLACE: Conference Room 312  
RE: SB 2523 SD2 Relating to Agricultural Inspections

**Re: SB 2523 SD2 Relating to Agricultural Inspections**

I am testifying on behalf of the Western States Petroleum Association (known as WSPA) with comments on SB 2523 SD2, relating to agricultural inspections.

WSPA is a non-profit trade association representing a broad spectrum of petroleum industry companies in Hawaii and five other western states.

WSPA supports the intent of this measure which is to exempt liquid bulk freight from the invasive species fee. The state Department of Agriculture has testified that the exemption is consistent with its understanding of the legislature's original intent when establishing the fee and that liquid bulk freight (e.g. fuel) has not been shown to be significant pest risk pathways. Low risk and legal precedent support retroactive application of the exemption and we therefore request that the bill be amended to retroactively apply the exemption back to the date of the enactment of the fee.

We appreciate the opportunity to comment on this measure.

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**Grace Pacific**  
CORPORATION  
P.O. Box 78 / Honolulu, Hawaii 96810

Administrative Office (808) 674-8383 fax (808) 674-1040  
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Representative Clift Tsuji, Chair  
House Committee on Agriculture

Wednesday, March 17, 2010; 10:00 a.m.  
Hawaii State Capitol, Conference Room 312

**RE: SB 2523 SD2 - Relating to Agricultural Inspections**

Chair Tsuji, Vice Chair Wooley and Members of the Committee:

I'm Robert Creps, Senior Vice President of Grace Pacific Corporation ("Grace Pacific")  
testifying in strong support of SB 2523 SD2 with a request to amend the effective date to  
"upon approval".

This bill exempts aggregate, cement, coal and liquid bulk freight of foreign origin from  
the inspection, quarantine and eradication service fee and charge. Section 436 of the  
federal Agricultural Risk Protection Act of 2000 preempts the States from regulating  
items in foreign commerce. SB 2523 SD2 will make state law consistent with federal  
law.

Grace Pacific has been importing crushed granite aggregate from British Columbia for  
use in hot-mix asphalt and manufactured C-33 sand from British Columbia for use in  
ready-mix concrete and hot-mix asphalt since 2007. The manufacturing process for the  
C-33 sand involves the excavation of glacial deposits of granite with large scrapers, and  
then crushing and washing to the finished product specifications. The manufacturing  
process for the crushed aggregate is similar, with the excavation conducted by drilling  
and blasting the hard rock granite. Both processes are subject to strict quality control  
standards of the American Society for Testing and Materials, designed to detect and  
prevent deleterious and organic material in the finished product.

The sand and aggregate are shipped on bulk freighters with the product being the sole  
cargo of the voyage. These ships are inspected for cleanliness at the load port by an  
independent inspector. The ship's cargos are subject to inspection and cleared by the  
United States Department of Agriculture prior to discharge in Hawaii.

We ask for your support in passing SB 2523 SD2 with an amendment to change the  
effective date to "upon approval". Thank you.



**HAWAIIAN  
CEMENT**

A subsidiary of Knife River Corporation

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Representative Clift Tsuji, Chair  
House Committee on Agriculture

Wednesday, March 17, 2010; 10:00 a.m.  
Hawaii State Capitol, Conference Room 312

**RE: SB 2523 SD2 Relating to Agricultural Inspections**

Chair Tsuji, Vice Chair Wooley and Members of the Committee:

My name is John DeLong, President of Hawaiian Cement, testifying in strong support of SB 2523 SD2 which exempts aggregate, cement, coal and liquid bulk freight of foreign origin from the inspection, quarantine and eradication service fee and charge.

This bill provides a narrow exemption from the fee for items imported from other countries, in order to make state law consistent with federal law. Section 436 of the federal Agricultural Risk Protection Act of 2000, preempts the states from regulating items in foreign commerce.

Hawaiian Cement imports dry bulk cargo including cement, pre-processed aggregate and sand that meet the stringent requirements of the American Society of Testing Materials. These dry bulk commodities typically take up an entire bulk freighter, a ship specially designed to transport unpackaged bulk cargo.

Before leaving for its destination, our pre-processed bulk cargo goes through a sampling and inspection process to ensure clearance by USDA Animal and Plant Health Inspection Service (APHIS) upon arriving into Hawaii.

Cement cargo is not a compatible environment to invasive species. When introduced to moisture, cement develops a high pH, which renders it incapable of sustaining most living organisms.

Thank you for the opportunity to testify. We urge you to pass this measure with an amendment to change the effective date to "upon approval" for the foregoing reasons.



**Hawai'i Ship Agents Association  
Pier 32, Honolulu Harbor  
Honolulu, Hawai'i, 96817-4558**

March 17, 2010

**COMMITTEE ON AGRICULTURE**

Rep. Clift Tsuji, Chair; Rep. Jessica Wooley, Vice Chair; and Committee Members  
Public Hearing, March 17, 2010; 10:00 a.m.; Conference Room 312

**Testimony of William Anonsen, President  
HAWAII SHIP AGENTS ASSOCIATION  
In Support of S.B. 2523, SD2  
Relating to Agriculture Inspections**


My name is William Anonsen and I am the President of the Hawaii Ship Agents Association and respectfully submit this testimony on behalf of the membership. We support S.B. 2523 SD2 which proposes to exempt dry bulk freight of foreign origin from the inspection, quarantine, and eradication services fees and charges on the basis that the inspection is under the authority and federal jurisdiction of the United States Department of Agriculture which currently performs this federally mandated process.

On behalf of our member companies, who represent global ship owners/charterers whose ships import dry bulk commodities, we feel these inspection fees are redundant and a duplication of the USDA's inspection program. The exemption of dry bulk freight of foreign origin as proposed in this measure would serve to clarify the role and responsibilities for the agricultural inspection of imported dry bulk cargoes, and is in keeping with the federal "Agricultural Risk Protection Act of 2000", which preempts states from controlling, eradicating, or preventing the introduction or dissemination of a plant pest from any foreign origin.

As a multi-island state that is largely dependant on waterborne transportation, the maritime industry has a fiduciary duty to ensure we do not impose a greater than necessary burden on imported items that possess an inherently low and insubstantial risk to our island ecosystem due to various safeguards in addition to federal inspection processes that are in place.

**We urge your favorable consideration of this proposed measure**

Sincerely,



William F. Anonsen

President

Hawai'i Ship Agents Association

**SB 2523 SD2  
RELATING TO THE AGRICULTURAL INSPECTIONS**

**PAUL T. OSHIRO  
MANAGER – GOVERNMENT RELATIONS  
ALEXANDER & BALDWIN, INC.**

**MARCH 17, 2010**

Chair Tsuji and Members of the House Committee on Agriculture:

I am Paul Oshiro, testifying on behalf of Alexander & Baldwin, Inc. (A&B) and Matson Navigation Company, Inc. (a subsidiary of A&B) on SB 2523 SD2, "A BILL FOR AN ACT RELATING TO AGRICULTURAL INSPECTIONS." We support this bill.

In 2008, amendments were enacted to broaden the scope of the invasive species user fee from one that assessed fees only on freight brought into Hawaii by maritime containers to one that assessed fees on all modes by which commercial freight is brought into the State, including air and maritime containerized and non-containerized freight. We understand that at present this invasive species user fee is utilized to fund the agricultural inspection and biosecurity programs, which includes invasive species inspection services for both maritime and air freight entering into the State. We support the present broad based application of the invasive species user fee that requires all shippers to pay for these inspection services through the payment of this fee.

Matson has dedicated a considerable amount of time, effort, and expense to implement the assessment, collection, and disbursement of this new fee by the effective date of August 1, 2008. We were successful in starting up the collection of this new fee by the effective date and have since been diligently proceeding with its implementation.

This bill authorizes exemptions from the assessment of the invasive species user fee for liquid, cement, coal, and aggregate bulk freight. We support these exemptions as we understand that these exemptions should not impair the State's ability to alleviate the entry of invasive species into our State.

Thank you for the opportunity to testify.