

LINDA LINGLE
Governor



SANDRA LEE KUNIMOTO
Chairperson, Board of Agriculture

DUANE K. OKAMOTO
Deputy to the Chairperson

State of Hawaii
DEPARTMENT OF AGRICULTURE
1428 South King Street
Honolulu, Hawaii 96814-2512
Phone: (808) 973-9600 Fax: (808) 973-9613

TESTIMONY OF SANDRA LEE KUNIMOTO
CHAIRPERSON, BOARD OF AGRICULTURE

BEFORE THE SENATE COMMITTEE ON WAYS AND MEANS
THURSDAY, FEBRUARY 18, 2010
ROOM 211
9:30 A.M.

SENATE BILL NO. 2523, S.D. 1
RELATING TO AGRICULTURAL INSPECTIONS

Chairperson Mercado Kim and Members of the Committee:

Thank you for the opportunity to testify on Senate Bill No. 2523, S.D. 1. The purpose of this bill is to exempt bulk freight of foreign origin from the inspection, quarantine, and eradication service fee and charge; effective July 1, 2050. The department understands the overall intent of this bill, but does not support this measure as proposed in Senate Bill No. 2523, S.D. 1, and would like to provide additional suggested language and comments that, if considered, may change the department's position on this measure.

The department agrees with majority of the proposed definitions under Section 2 of this measure as it relates to bulk freight that is unpackaged, homogenous materials, without mark or count, that are usually free-flowing and bought and sold by weight or volume, which are later identified as cement, coal and liquid. However, the department does not entirely agree with the proposed definition for "Aggregate bulk freight" and would like to take this opportunity to suggest the following definition:

“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.”

Should the aforementioned definition be considered, the department would be supportive of the exemption from the fee for any 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 transporting these items may serve as a vector of invasive species, such as mosquitoes, rodents, and other human-related disease pathogens.

In conjunction with the previous comments, the department would like to provide the following suggested language revisions as found on page 3, under Section 3:

- At Line 2 – delete the reference to a subsection (a);
- From Line 6 – insert the following to read as “ transporting freight, foreign or domestic, not including aggregate bulk freight, cement bulk freight, coal bulk freight, or liquid bulk freight, that is brought into”;
- Lines 7 thru 9 – delete, in its entirety, the suggested revisions, “[:] , except for liquid bulk freight, cement bulk freight, coal bulk freight, and aggregate bulk freight, as provided in subsection (c).”;
- At Line 18 – delete the reference to a subsection (b); and,
- From Lines 1 thru 5 – delete, in its entirety, the inserted language referenced as subsection (c) within those lines.



2343 Rose Street, Honolulu, HI 96819
Phone: (808) 848-2074; Neighbor Islands: 1-800-482-1272
Fax: (808) 848-1921; e-mail: info@hfbf.org

TESTIMONY

RE: SB 2523 SD1 RELATING TO INVASIVE SPECIES

Chair Kim and Members of the Committee:

HFBF on behalf of our member farm and ranch families and organizations **opposes SB2236** exempting certain goods from invasive species fees.

While the statutory language proposed in this measure is reasonable, HFBF strongly objects to the preamble accompanying the measure. The Bill begins stating that inspection of foreign imports is inconsistent with Federal Law. This preamble chooses to selectively interpret the intent of the Federal Law. HFBF strongly believes that the intent of the Federal Law was to prevent unfair tariffs and other trade barriers from being placed on goods involved in international trade. **IT DOES NOT MAKE SENSE THAT THE UNITED STATES WOULD PASS A MEASURE FORBIDDING A STATE FROM PROTECTING ITSELF FROM INVASIVE SPECIES AND OTHER KNOWN DETRIMENTS IN THE COURSE OF GLOBAL TRADE.** Many countries have phytosanitary certificate requirements. If the law were taken literally as is being done in this preamble that would be illegal.

Review of the Plant Protection Act clearly relegates the responsibility of protecting the nation from invasive species to USDA. This carries a presumption that USDA services are available. Hawaii is an exception. USDA does not protect Hawaii from invasive species, leaving it to the State to carryout this task. Therefore it is unreasonable to use the PPA as the reason to prohibit HDOA from carrying out invasive species protection measures for the State. In theory, if Hawaii did nothing to protect itself and a serious pest is introduced, causing significant detriment to an endangered species, could the State be held negligent for not protecting the endangered species? Before measures are passed using the PPA, careful analysis of unintended consequences should be done.

We do not oppose the statutory measures proposed in this bill. However, there are other measures that contain similar measures duplicating this intent. Therefore, **HFBF, respectfully requests that this measure be held.** Thank you for this opportunity to voice our opinion on this matter.

**SENATE COMMITTEE ON
WAYS AND MEANS**

February 18, 2010

Senate Bill 2523, SD 1 Relating to Agricultural Inspections

Chair Kim and members of the Senate Committee on Ways and Means, I am Rick Tsujimura, representing AES Hawaii, Inc (“AES”).

AES supports Senate Bill 2523, SD 1 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 urge passage of the measure.

Thank you for the opportunity to present this testimony.

FEB 17 2010

822 Bishop Street
Honolulu, Hawaii 96813
P.O. Box 3440
Honolulu, HI 96801-3440
www.alexanderbaldwin.com
Tel (808) 525-6611
Fax (808) 525-6652

**SB 2523 SD1
RELATING TO THE AGRICULTURAL INSPECTIONS**

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

FEBRUARY 18, 2010

Chair Kim and Members of the Senate Committee on Ways & Means:

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 SD1, "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.



The Senate
Ways and Means
Thursday, February 18, 2010
9:30 a.m., Conference Room 211
State Capitol

Comments on SB 2523 SD1

Aloha Chair Kim, Vice Chair Tsutsui, and Members of the Committee,

The Coordinating Group on Alien Pest Species (CGAPS) **offers comments on SB 2523 SD1, Relating to Agricultural Inspections.**

The CGAPS partners including federal and state agencies and NGOs collaboratively produced a new CGAPS Vision and Action Plan which consists of 10 issues that must be resolved to best protect Hawaii from invasive species. One of the top issues is the federal preemption issue. During this process, CGAPS participants from agencies responsible for aspects of inspection (including federal Customs and Border Protection, USDA Animal and Plant Health Inspection Service, US Fish and Wildlife Service and Hawaii Department of Agriculture) AGREED that federal inspections focus on a list of pests that threaten the greater U.S. and do not afford adequate protection for Hawaii, while HDOA inspections focus on threats to Hawaii in particular. The CGAPS partnership has agreed that either the federal inspections must include HDOA's "actionable pests", or that HDOA be allowed access to inspect incoming foreign goods.

Case law provided in The Nature Conservancy's testimony documents the legality of state inspections, and one look at the "actionable pests" for federal and HDOA inspections provides ample reason to support the ability of HDOA to inspect cargo and conveyances entering the state, regardless of origin or commodity type.

In addition, exempting certain types of freight because it is viewed as less likely to carry pests ignores the other types of inspection and treatment that may be needed. If the vessels themselves are loaded in Guam, then they pose a risk of carrying brown tree snakes and must be inspected.

Thank you for your consideration.

CGAPS--Coordinating Group on Alien Pest Species
Ph: (808) 722-0995

Grace Pacific

C O R P O R A T I O N
P.O. Box 78 / Honolulu, Hawaii 96810

Administrative Office (808) 674-8383 fax (808) 674-1040
Paving Office (808) 845-3991 fax (808) 842-3206
Quarry Office (808) 672-3545 fax (808) 672-3998



Senator Donna Mercado Kim, Chair
Senate Committee on Ways and Means

Thursday, February 18, 2010; 9:30 a.m.
Hawaii State Capitol, Conference Room 211

RE: SB 2523 SD1 - Relating to Agricultural Inspections

Chair Kim, Vice Chair Tsutsui 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 SD1 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 SD1 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 SD1 with an amendment to change the effective date to "upon approval". Thank you.



HAWAIIAN CEMENT

A subsidiary of Knife River Corporation

Senator Donna Mercado Kim, Chair
Senate Committee on Ways and Means

Thursday, February 18, 2010; 9:30 a.m.
Hawaii State Capitol, Conference Room 211

RE: SB 2523 SD1 Relating to Agricultural Inspections

Chair Kim, Vice Chair Tsutsui and Members of the Committee:

My name is John DeLong, President of Hawaiian Cement, testifying in strong support of SB 2523 SD1 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 prior to shipment 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.



The Nature Conservancy
Hawai'i Program
923 Nu'uuanu Avenue
Honolulu, HI 96817

tel (808) 537-4508
fax (808) 545-2019
www.nature.org/hawaii

Testimony of The Nature Conservancy of Hawai'i
Opposing S.B. 2523, SD1 Relating to Agriculture Inspections
Senate Committee on Ways and Means
Thursday, February 18, 2010, 9:30am, Rm. 211

The Nature Conservancy of Hawai'i strongly opposes S.B. 2523, SD1. This bill is based on incorrect information and incorrect interpretation of federal law. We recommend that the Committee hold S.B. 2523, SD1 in favor of considering other measures like S.B. 2236, SD1.

We strongly support service fees and meaningful fines for failure to pay such fees for the Hawai'i 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 and spread of pests and diseases.

Contrary to Section 1 of S.B. 2523, SD1, the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (USDA-APHIS) and the U.S. Department of Homeland Security's Customs and Border Protection (DHS-CBP) are not generally inspecting foreign cargo for pests that are a risk to Hawaii's agriculture and environment. Rather, USDA-APHIS and DHS-CBP are primarily inspecting foreign cargo for threats to national security and a very narrow list of pests to U.S. mainland agriculture.

Also contrary to Section 1 of S.B. 2523, SD1, HDOA's inspection and inspection fee on foreign cargo do not rise to the level of impermissible or preempted "regulation" under the federal Plant Protection Act (7 U.S.C. §7756, attached). Nothing in the legislative history or language of the Act suggests that Congress intended this term to be interpreted any more broadly than under the Commerce Clause of the U.S. Constitution, which also restricts the regulation of foreign and interstate commerce by the states. See, U.S. Const. art. I, § 8. It is well settled that reasonable fees related to inspections do not constitute impermissible regulation under the Commerce Clause. In *Great Northern Ry. Co. v. State of Washington*, the U.S. Supreme Court considered whether the state of Washington could charge rail carriers a fee for the inspection and supervision of their activity in the state. The court found that when a reasonable amount was charged, the inspection and supervision fees were "not a burden upon, or regulation of, interstate commerce in violation of the commerce clause of the Constitution." 300 U.S. 154, 160 (1937). Similarly, the Ninth Circuit has concluded that "it is well settled that the States may impose burdens upon commerce entering their borders in connections with their inspection laws" as long as they are reasonable. *Anderson v. Mullaney* 19 F.2d 123, 133 (1951).

HDOA and the State of Hawai'i have a compelling interest in knowing what is coming into the State, and there are many actions the State can take to work with an importer or shipper that would be allowable under the Plant Protection Act should an inspection of foreign cargo reveal a pest. Like the fees at issue in *Great Northern Ry. Co.* and *Anderson*, the HDOA fee and the inspection do not "regulate" any article or means of conveyance in order to "control," "eradicate" or "prevent" the specified items, they merely impose a fee to cover the cost of inspection to detect them. The preemption provision in the Plant Protection Act may limit the action that can be taken in response to pest identification, but it does not prohibit the fee or the inspection themselves, any more than the U.S. Constitution does.

We are very concerned about creating a variety of precedent setting exemptions to the service fees collected by the HDOA for invasive species inspections. While the proposed exemptions as currently written in S.B. 2523, SD1 appear to attempt to cover cargo that are perceived as low-risk pathways for invasive species, HDOA's inspectors still may need to conduct inspections of this cargo or its means of conveyance depending on its point of origin to determine whether pests are present.

Rather than a blanket exemption to the service fees for certain bulk cargo, we suggest a significantly reduced fee (e.g., 10¢ per 1000lbs.) to account for the significant weight of this cargo and the fact that this non-containerized cargo is somewhat easier to inspect than containerized cargo.

BOARD OF TRUSTEES

S. Haunani Apoliona Christopher J. Benjamin Zadoc W. Brown, Jr. Anne Carter Samuel A. Cooke Peter H. Ehrman Kenton T. Eldridge
Thomas Gottlieb Peter Ho Stanley Hong Donald G. Horner J. Douglas Ing Mark L. Johnson Dr. Kenneth Kaneshiro Bert A. Kobayashi, Jr.
Faye Watanabe Kurren Eiichiro Kuwana Duncan MacNaughton Bonnie P. McCloskey Bill D. Mills Wayne Minami
Michael T. Pfeffer H. Monty Richards Jean E. Rolles Scott Rolles Crystal Rose Nathan E. Smith Eric Yeaman

UNITED STATES CODE
TITLE 7--AGRICULTURE
CHAPTER 104--PLANT PROTECTION
SUBCHAPTER III--MISCELLANEOUS PROVISIONS

Sec. 7756. Preemption

(a) Regulation of foreign commerce

No State or political subdivision of a State may regulate 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.

(b) Regulation of interstate commerce

(1) In general

Except as provided in paragraph (2), no State or political subdivision of a State may regulate the movement in interstate commerce of any article, means of conveyance, plant, biological control organism, plant pest, noxious weed, or plant product in order to control a plant pest or noxious weed, eradicate a plant pest or noxious weed, or prevent the introduction or dissemination of a biological control organism, plant pest, or noxious weed, if the Secretary has issued a regulation or order to prevent the dissemination of the biological control organism, plant pest, or noxious weed within the United States.

(2) Exceptions

(A) Regulations consistent with Federal regulations

A State or a political subdivision of a State may impose prohibitions or restrictions upon the movement in interstate commerce of articles, means of conveyance, plants, biological control organisms, plant pests, noxious weeds, or plant products that are consistent with and do not exceed the regulations or orders issued by the Secretary.

(B) Special need

A State or political subdivision of a State may impose prohibitions or restrictions upon the movement in interstate commerce of articles, means of conveyance, plants, plant products, biological control organisms, plant pests, or noxious weeds that are in addition to the prohibitions or restrictions imposed by the Secretary, if the State or political subdivision of a State demonstrates to the Secretary and the Secretary finds that there is a special need for additional prohibitions or restrictions based on sound scientific data or a thorough risk assessment.



PO Box 42
Waimanalo, HI 96795-0042
<http://waimanaloag.com>

Phone: (808) 282-4976
Fax: (808) 259-9813
E-mail: waa@hawaii.rr.com

Waimanalo Agricultural Association

February 16, 2010

Senate Committee on Ways and Means
Conference Room 211,
Thursday, Feb.18, 2010 (9:30 AM)
State Capitol
415 South Beretania Street
Honolulu, HI 96814

Dear Senators:

RE: Support for:

- SB 2236, SD1 (SSCR2241) Relating to invasive species.
- SB 2523, SD1 (SSCR2182) Relating to agricultural inspections.
- SB 2780, SD1 (SSCR 2171) Relating to agricultural lands.
- SB 2951, SD1 (SSCR2172) Relating to agriculture.

Waimanalo Agricultural Association is in support of all of these bills. Currently, Waimanalo has a problem with Coqui frogs. Because of the necessary cost cutting measures in effect this year, a lot of indispensable agricultural inspectors are being laid off. Our farmers are stepping up to the challenge of trying to control the spread of the frogs. Requiring fines assessed to the people who fail to live up to their responsibility would help to make the right people accountable for the removal and elimination of invasive species (**SB 2236, SD1**). We support **SB 2523, SD1** which clarifies that low risk bulk material was not meant to be included in the original intent.

Hawaii is very vulnerable to invasive species taking hold and by the time we have the necessary lines of defense set up, it will be too late. By eliminating funding, we are in danger of losing all control of our environment. The Coqui frog alone would seriously affect our tourism industry.

We are in agreement with the process to protect ag lands (**SB 2780, SD1**). We also agree on fair compensation for leased lands (**SB 2951, SD1**) when agricultural use is withdrawn, condemned or taken for public purposes.

Mahalo,

Clifford Migita
President WAA