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GOVERNOR OF HAWAII

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CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

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FIRST DEPUTY

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DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
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COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
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HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
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**Testimony of**
**WILLIAM J. AILA, JR.**
**Chairperson**

**Before the House Committee on**
**WATER, LAND, AND OCEAN RESOURCES**

**Friday, February 03, 2012**
**9:00 AM**
**State Capitol, Conference Room 325**

**In consideration of**
**HOUSE BILL 2462**
**RELATING TO PUBLIC LAND LIABILITY**

House Bill 2462 amends and clarifies the definition of "improved public lands" for the limitation of liability for public entities based on the duty to warn of dangers on public lands. The Department of Land and Natural Resources (Department) strongly supports this Administration measure and offers the following amendments. This clarification is critical due the vast amounts of wildland acreage under the Department's jurisdiction that is not promoted or managed for any public access.

While the term "voluntary" trails is appropriate, the "term of art" more commonly used to describe trails or pathways that are not designed or built but that have been created due to human passage over the landscape are typically referred to as "social trails". This is comparable to the term "game trails" that describes how a pathway is formed by the repeated passage of animals.

Line 12, page 1, would read as: ""Voluntary trails", also known as "social trails" means trails, paths or routes created by hikers or other users of public land that are not part of an official trail constructed, developed, or maintained for public use by the State or counties."

Again, the Department is in strong support of passage of this measure.

# TESTIMONY OF
# THE DEPARTMENT OF THE ATTORNEY GENERAL
# TWENTY-SIXTH LEGISLATURE, 2012

**ON THE FOLLOWING MEASURE:**
H.B. NO. 2462, RELATING TO PUBLIC LAND LIABILITY.

**BEFORE THE: House**
HOUSE COMMITTEE ON WATER, LAND, AND OCEAN RESOURCES

**DATE:** Friday, February 3, 2012 **TIME:** 9:00 a.m.

**LOCATION:** State Capitol, Room 325

**TESTIFIER(S):** David M. Louie, Attorney General, or
Robin Kishi, Deputy Attorney General

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Chair Chang and Members of the Committee:

The Department of the Attorney General strongly supports this bill.

The purpose of this bill is to clarify the definition of the term "improved public lands" in Act 82, Session Laws of Hawaii 2003, as amended, in order to ensure that the intent of the legislature to limit the liability of the State, as well as to preserve the natural beauty of the parks for the use and enjoyment of the public, is carried out.

For sites located on improved state, and county properties, Act 82 establishes a process by which those sites would be identified and evaluated for hazards and risks of injury or death. The Board of Land and Natural Resources would then decide whether to post warning signs at those sites and, if they choose to do so, then the Board would select site and hazard appropriate signs for posting, as well as locations for where those signs would be posted. Thereafter, the State would be afforded the legal presumption of having provided adequate warning to people who enter those sites.

For sites located on unimproved state or county property, Act 82 declared that a governmental entity has no duty to warn of dangerous natural conditions.

Section 184-6, Hawaii Revised Statutes (HRS), mandates the Department of Land and Natural Resources (DLNR) to preserve the parks and parkways in the state park system in their natural condition to retain their natural scenic, historic, and wildlife values for the use and enjoyment of the public. To that end, the vast majority of the park system is left in its scenic and natural condition, along with its multitude of inherent but natural hazards and risks of injury or death.

However, at present, "improved public lands" includes the entire state park system. The park system includes 33,857 acres of land, only a very small percentage (approximately 2 percent) of which is actually developed by or maintained by the State.

Unfortunately, when the public accesses state parks, they do not restrict their access only to those areas which are developed or maintained by the State, such as the official statewide trail system. In fact, more often than not, local residents as well as visitors stray far from those areas that can be effectively monitored and maintained by park staff, and many of them need to be extricated by county rescue personnel when they become lost or injured.

In addition, local residents and visitors continue to create "voluntary trails" (also known as "social trails") by continued use of a multitude of locations within the park system. The public continues to create new "voluntary trails" at too many locations to even discover and identify by park staff.

The decision in a recent lawsuit against the State brought to light the deficiency in the original definition of "improved public lands." In Brem, et al. v. State of Hawaii, Civil No. 07-1-0176, Fifth Circuit Court, State of Hawaii, the Court found the State 100 percent at fault for the deaths of two tourists who attempted to climb down to the waterfall at Opaekaa Falls on Kauai. At the site there is a well-worn "voluntary trail" that local residents and visitors have created and used for many years to climb to the bottom of the falls. The tourists went toward an area where park staff and other witnesses stated they themselves would not have ventured. The tourists went beyond the end of what had been described a "pig trail" or the beginning of a "voluntary trial" that ended at a steep slope that was open and obvious. That "trail" may have existed at the site for just a few months before the accident. Although the damages portion of the trial has not yet begun, plaintiffs' experts in this case place the damages over $50,000,000.00.

Since the accident described above, the Board approved closure of this site. Although signs have been posted notifying the public of the closure, local residents and visitors still access the site. The installation of fencing at this site is not feasible.

It is impossible for the park staff to monitor all 33,857 acres within its park system. Although DLNR has for many years made available to the public its official statewide trail maps and brochures that contain warnings regarding a variety of hazardous conditions, through

publication as well as through its website, it is impossible for the park staff to force the public to exercise reasonable care for their own safety.

It is not possible to identify, nor feasible to fence off from public access, each and every inherently dangerous natural conditions within the park system. Because it is not desirable to do so, the public will continue to gain access throughout the park system, and continue to create "voluntary trails" near waterfalls, ledges, and other natural sites that offer scenic or adventurous experiences, but which also present hazardous conditions. Because local residents and visitors will continue to access the park system, injuries, or worse, are inevitable.

The State will continue to be sued for injuries or deaths that occur at such sites. One-by-one, the Board will continue to post warnings signs at each site and close or fence off such sites where feasible. Eventually, there will be little left of the "natural scenic, historic and wildlife values (of the park system) for the use and enjoyment of the public" that the State was mandated to preserve under section 184-6, HRS.

This bill amends Act 82 in order to better achieve the legislative intent that the State be able to balance its interests in posting warnings at developed and maintained locations where it expects public access against the competing interest of preserving access to the natural beauty of the undeveloped areas of the park system by limiting the State's liability consistent therewith.

We respectfully request that this bill be passed.

DEPARTMENT OF THE CORPORATION COUNSEL
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PETER B. CARLISLE
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CORPORATION COUNSEL

KATHLEEN A. KELLY
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February 2, 2012

The Honorable Jerry L. Chang, Chair
The Honorable Sharon E. Har, Vice Chair
and Committee Members
Committee on Water, Land, & Ocean Resources
House of Representatives
State Capitol
Honolulu, Hawaii 96813

Dear Chair Chang, Vice-Chair Har, and Committee Members:

Re: H. B. 2462, Relating to Public Land Liability

The City and County of Honolulu ("City") strongly supports H.B. 2462 which seeks to amend and clarify the definition of "improved public lands" in Act 82, Session Laws of Hawaii 2003.

The purpose of Act 82 was to establish a risk management procedure for improved public lands, involving the design and placement of signs that warn of dangerous natural conditions, and that affords the State and counties protection from liability for injuries resulting from those dangerous conditions. The 2003 Legislature found that many dangerous conditions on unimproved and improved public lands pose a risk of injury to recreational users. In practice, current laws discouraged the State and counties from warning of risks, because to do so may impose additional responsibility and liability on the State and counties. Act 82 was a fair and balanced solution to this problem, otherwise many public recreational areas would be closed for use by the public. Sen. Conf. Comm. Rep. No 14, 2003 Sen. Journal at 951.

The definition of "improved public lands" in Act 82 does not distinguish between parks and trails which are improved and maintained by the State and counties from other public lands within the State and county park systems which are unimproved and not maintained. Passage of Bill 2462 would clarify that the State or counties do not have a duty to warn of dangerous natural conditions on public land that is part of

the park system, if the land is unimproved and not maintained by the State or county. Bill 2462 would further define and exclude "voluntary trails" from the definition of "improved public lands" covered by Act 82 since these unofficial trails and routes are created by the public without the knowledge or permission of the State or counties.

Passage of Bill 2462 would help by providing a more clear delineation of where warning signs should be placed which would allow the State and counties to make the best use of their limited financial resources.

Thank you for the opportunity to provide our comments on this bill.

Very truly yours,

Kathleen A Kelly

ROBERT CARSON GODBEY
Corporation Counsel

RCG:ey

HB2462 TESTIMONY

**TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO H.B. NO. 2462**

Date: Friday, February 3, 2012
Time: 9:00 am

To: Chairman Jerry Chang and Members of the House Committee on Water, Land, & Ocean Resources:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in OPPOSITION to H.B. No. 2462, relating to Public Land Liability.

Act 82 (2003) provides a comprehensive program of risk assessment and placement of warning signs for the protection of the public. Compliance with the procedure and placement of warning signs limits governmental liability for injuries and deaths that occur in our park system. This bill would take away the protections afforded to the public for trails used by hikers that were not originally constructed, developed, or maintained by State or counties. Hikers do not know if a trail was originally constructed, developed or maintained by government or if the trail exists because of regular use by the public, or non-profit groups such as the Sierra Club or others. The public is no less entitled to reasonable protection against dangerous conditions known to government based on how a trail was originally constructed.

Act 82 provides for a comprehensive risk assessment and warning sign program that should assess all hazardous conditions and warn of known hazards to minimize unnecessary injury and death within our parks system. There is no apparent problem of overwhelming proportions to justify abandoning risk assessment and warnings on heavily used hiking trails in our parks system just because government did not design, construct

or maintain the trial. According to the State, Act 82 is successfully working to protect the public by discovering hazards and providing warnings. The success of the Act should not be weakened and public safety compromised.

Thank you very much for allowing me to testify in OPPOSITION to this measure. Please feel free to contact me should you have any questions or desire additional information.