TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2014

ON THE FOLLOWING MEASURE:
S.B. NO. 2197, S.D.1, RELATING TO TAXATION

BEFORE THE:
SENATE COMMITTEE ON WAYS AND MEANS

DATE: Wednesday, February 19, 2014 **TIME:** 9:15 a.m.

LOCATION: State Capitol, Room 211

TESTIFIER(S): David M. Louie, Attorney General, or
Damien A. Elefante

Chair Ige and Members of the Committee:

The Department of the Attorney General offers the following comments on this bill. The bill may be challenged as violating the Commerce Clause of the United States Constitution because it could be found to discriminate against interstate commerce.

The stated purpose of this bill is to establish a credit for "renewable fuels." The bill defines "renewable fuels" to mean "fuels produced within the State from renewable feedstocks transported less than one thousand miles from point of origin to the production facility located within the State . . . ." (Page 3, lines 13-16) For this purpose, this bill creates an income tax credit requiring and favoring renewable feedstocks produced exclusively in the State.

A cardinal rule of Commerce Clause jurisprudence is that "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 268 (1984), *citing* Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 329 (1977).

In Bacchus, the United States Supreme Court found that an exemption similar to the exemption proposed in this bill violated the Commerce Clause. At issue in Bacchus was the Hawaii liquor tax, which was originally enacted in 1939 to defray the costs of police and other governmental services. Because the Legislature sought to encourage development of the Hawaiian liquor industry, it enacted an exemption from the liquor tax for okolehao (a brandy distilled from the root of the ti plant, an indigenous shrub of Hawaii) and for certain fruit wine manufactured in Hawaii. The United States Supreme Court concluded that the exemption violated the Commerce Clause because the exemption had both the purpose and effect of discriminating in favor of local products.

The income tax credit requiring the use of renewable feedstocks produced exclusively in the State, as created by this bill, appears to have similar purpose and effect as the exemption that violated the Commerce Clause in Bacchus. The severability clause that was added in Section 4 of S.D.1 does not change this discriminatory purpose and effect to favor local products (feedstock). We suggest removing the requirement that feedstocks be transported less than 1,000 miles from their point of origin.

NEIL ABERCROMBIE
GOVERNOR

SHAN TSUTSUI
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To: The Honorable David Y. Ige, Chair
and Members of the Senate Committee on Ways and Means

Date: Wednesday, February 19, 2014
Time: 9:15 A.M.
Place: Conference Room 211, State Capitol

From: Frederick D. Pablo, Director
Department of Taxation

Re: S.B. 2197, S.D.1, Relating to Taxation

The Department of Taxation (Department) appreciates the intent of S.B. 2197, S.D.1, and provides the following information and comments for your consideration.

S.B. 2197, S.D.1, repeals the existing income tax credit for ethanol facilities and adds a new tax credit for the production of renewable fuels. The tax credit would be certified by the Department of Business, Economic Development, and Tourism, and would have cap of $3,000,000 per year and an aggregate cap of $12,000,000 per year, per taxpayer.

S.D.1 adds a severability clause at Section 4 of this measure. The Department defers to the Department of the Attorney General regarding the effectiveness of this severability clause and for a more thorough analysis of the constitutionality of S.B. 2197, S.D.1; however, the Department notes that tax measures that discriminate against interstate commerce are generally held unconstitutional by the courts. For example, the holding in Bacchus Imports Ltd. v. Dias, 468 U.S. 263 (1984), indicates that provisions that result in taxation that is discriminatory against products imported from outside the State would violate the Commerce Clause of the United States Constitution.

The Department suggests changing or removing the requirements that feedstocks be transported less than 1,000 miles from their point of origin, which would exclude feedstocks from outside the State, as well as the requirement that fuel produced be distributed within the State.

The Department notes that in general, aggregate caps are very difficult to administer and lead to confusion among taxpayers regarding which taxpayers may be eligible for the tax credit during any particular taxable year. In addition, it is the Department's understanding that the amount of this tax credit would roughly correspond to 20 cents per gallon of fuel produced, meaning that there is a high likelihood that the caps would be reached with some frequency if large-scale production operations commence in the State.

Thank you for the opportunity to provide comments.

DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM

NEIL ABERCROMBIE
GOVERNOR

RICHARD C. LIM
DIRECTOR

MARY ALICE EVANS
DEPUTY DIRECTOR

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Statement of
Richard C. Lim
Director
Department of Business, Economic Development, and Tourism
before the
SENATE COMMITTEE ON WAYS AND MEANS

Wednesday, February 19, 2014
9:15 a.m.
State Capitol, Conference Room 211

in consideration of
SB 2197, SD 1,
RELATING TO TAXATION.

Chair Ige, Vice Chair Kidani, and Members of the Committee.

The Department of Business, Economic Development and Tourism (DBEDT) offers comments on SB 2197, SD1, which would establish a renewable fuels production tax credit and repeal the ethanol facility tax credit.

DBEDT is concerned that the financial (approximately $100,000) and human resources (.5 full time equivalent) required to administer the duties of this bill are not included in its current budget. Should the committee decide to proceed with this measure, we request that this additional funding requirement should not replace or adversely impact priorities indicated in the Executive Budget.

Additionally, DBEDT defers the Department of Taxation on the fiscal impact of the bill, and notes that the definition of “renewable fuels” may be in conflict with the commerce clause of the US Constitution. Moreover, DBEDT is concerned that the addition of a severability clause could have the unintended consequence of subsidizing out-of-state fuel or feedstock production.

Thank you for the opportunity to offer these comments.

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February 18, 2014
Testimony on Senate Bill 2197, Relating to Taxation
SUPPORT

Senate Committee on Ways and Means
Senator David Y. Ige, Chair
Senator Michelle N. Kidani, Vice Chair
Hearing February 19, 2014 at 9:15pm, Conference Room 211

Dear Chair Ige, Vice Chair Kidani and Committee Members,

The employees, management and investors of the Pacific Biodiesel ohana thank you for introducing Senate Bill 2197 for consideration by the Committee on Energy and Environmental. This bill is crucial to growing the biofuels industry in Hawaii, especially since our state is far behind in our transportation renewable energy goals. We wholeheartedly testify in favor of SB 2197.

This bill supports the State of Hawaii's interest in becoming more energy self-sufficient; however, we do ask you to consider reinstating the previous level of $0.30 per 115,000 BTUs and move the effective date to July 1, 2014 to bring maximum benefits to producers at this time of critical need. If SB 2197 is passed, it will be one of the most important actions the Legislature can take to incentivize renewable fuel production, support current and future local jobs as well as ensure the future energy security of our island communities.

Pacific Biodiesel employs over 75 people in a wide range of positions from chemists to engineers, office and sales personnel to biodiesel facility operators and farmers, as well as outside consultants. Employment represents $3 million in wages paid in 2013 and continued operations generate over $10 million in revenue for the State of Hawaii every year. When biodiesel is purchased from Pacific Biodiesel in Hawaii, over 85% of the money stays in the Hawaii economy, and 98% of the money stays in the US economy. This is truly an economic boost as opposed to the economic drain of foreign petroleum.

It is the goal of all those connected with Pacific Biodiesel to continue with our mission to promote a clean, sustainable energy future through the community-based production of renewable fuels, but we need your help as federal support for biofuel continues to be inconsistent and short-term. Meanwhile, the petroleum industry with whom we must compete enjoys on-going, statutory support at all levels of government (as detailed in page two of this testimony).

We ask you to consider our proposed changes and please pass SB 2197 to support the continued efforts of renewable fuel producers throughout the State of Hawaii so we can make real progress towards our transportation renewable fuel goals.

Mahalo,

Robert O. King

Robert King
President
bking@biodiesel.com

Why Renewables need Government Support to be competitive:

Petroleum Tax Incentives Vs. Renewable Energy Incentives

There are currently 12 tax provisions on the books that specifically support fossil fuel development. **The 12 existing tax provisions for fossil fuel production and extraction total approximately $41.4 billion over 10 years, or approximately $4 billion per year.** According to the non-partisan Congressional Budget Office (CBO), there are only **4 permanent energy tax preference provisions: Three of these are for fossil fuels, and one is for nuclear energy**.

History

Tax preferences for energy production were first established in 1916 and focused primarily on the domestic production of oil and natural gas. Two tax provisions existed and remain today in a modified form: expensing of intangible drilling costs and expensing of "dry hole" costs.

Meanwhile, tax incentives for renewable energy were not a feature of the tax code until the 1990's when the wind production credit was first established. Support for additional renewable energy sources including biofuels, solar, etc. were not established until the 2000s.

Traditionally, tax and other federal support for fossil fuels has vastly outweighed the financial support for renewable energy. This only shifted in the past few years.

While the amount of renewable support that the Federal Government provides is currently more in dollar terms than those for fossil fuels, the renewable industries are not as mature and many of the tax incentives on the books expire periodically. In contrast, oil and gas companies have had stable tax benefits and have not faced any serious competition in the marketplace. Consequently, they represent nearly 80 percent of all energy generated and consumed in the U.S.[1]

List of Expiring Tax Provisions, Joint Committee on Taxation:
https://www.jct.gov/publications.html?func=startdown&id=4540

Congressional Budget Office (CBO) Report on Federal Financial Support for Energy Production and Technologies: http://www.cbo.gov/publication/43040

Brookings Institution Paper on Eliminating Fossil Fuel Subsidies:
http://www.brookings.edu/~/media/research/files/papers/2013/02/thp%20budget%20papers/thp_15waysfedbudget_prop5.pdf

The White House 5 reasons to repeal oil company subsidies:
http://www.whitehouse.gov/blog/2012/03/29/five-reasons-repeal-subsidies-oil-companies

U.S. Energy Information Administration, Analysis of Federal Support for Energy 2007-2010:
http://www.eia.gov/analysis/requests/subsidy/

[1] Data taken from reports by the Congressional Research Center:

- Congressional Research Center. *Energy Tax Policy: Historical Perspective on and Current Status of Energy Tax Expenditures,* Molly F. Sherlock, May 2, 2011. www.crs.org
- Congressional Research Center. *Energy Tax incentives: Measuring Value Across Different Types of Energy Resources*, Molly F. Sherlock, Sept, 18, 2012. www.crs.org

TESTIMONY OF WARREN BOLLMEIER ON BEHALF OF THE HAWAII RENEWABLE ENERGY ALLIANCE BEFORE THE SENATE COMMITTEE ON WAYS AND MEANS

SB 2197 SD1, Relating to Taxation

February 19, 2014

Chair Ige, Vice-Chair Kidani and members of the Committee I am Warren Bollmeier, testifying on behalf of the Hawaii Renewable Energy Alliance (HREA). HREA is an industry-based, nonprofit corporation in Hawaii established in 1995. Our mission is to support, through education and advocacy, the use of renewables for a sustainable, energy-efficient, environmentally-friendly, economically- sound future for Hawaii. One of our goals is to support appropriate policy changes in state and local government, the Public Utilities Commission and the electric utilities to encourage increased use of renewables in Hawaii.

The purposes of SB 2197 SD1 are to: (i) establish a renewable fuels production tax credit to achieve greater energy security for Hawaii, and (ii) repeal the Ethanol Facility Tax Credit.

HREA **strongly supports** this measure with the following comments:

1) <u>Meeting Our Clean Energy</u>. This measure supports our clean energy goals by encouraging business opportunities in the production of renewable fuels in Hawaii.

2) <u>Merits of a Production Tax Credit ("PTC")</u>. We believe a PTC is the best way for the state to support biofuel production in <u>Hawaii</u>. With a PTC, a "producer" gets paid when the producer <u>actually</u> produces, not when he installs his production facility. This reduces the risk to the state significantly. The PTC has other features that we find attractive:

   a) we believe the PTC will be easy to administer, including the qualification of biofuel facilities, and documentation of the types and amounts of biofuels produced and sold in Hawaii; and

   b) the PTC will help encourage the production of local biofuels, through the facilitation of effective producer-ag grower relationships

3) <u>Recommendations</u>. We recommend that the payment rate per 115,000 BTU be increased to 30 cents (line 8, p.2), which was the amount included in previous versions of this bill. With that amendment we recommend that the committee pass out this measure, and help us recover from the "sluggish" start we have witnessed in the fuels part of the Hawaii Clean Energy Initiative.

Mahalo for this opportunity to testify.

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From:	mailinglist@capitol.hawaii.gov
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Subject:	*Submitted testimony for SB2197 on Feb 19, 2014 09:15AM*
Date:	Sunday, February 16, 2014 9:42:45 AM

SB2197

Submitted on: 2/16/2014

Testimony for WAM on Feb 19, 2014 09:15AM in Conference Room 211

Submitted By	Organization	Testifier Position	Present at Hearing
Javier Mendez-Alvarez	Individual	Support	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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Subject:	*Submitted testimony for SB2197 on Feb 19, 2014 09:15AM*
Date:	Tuesday, February 18, 2014 9:14:04 AM

SB2197

Submitted on: 2/18/2014

Testimony for WAM on Feb 19, 2014 09:15AM in Conference Room 211

Submitted By	Organization	Testifier Position	Present at Hearing
Erin Wooldridge	Individual	Support	No

Comments: