



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-EIGHTH LEGISLATURE, 2016**

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 2532, RELATING TO COMMERCIAL FOREST PRODUCTS.

**BEFORE THE:**

SENATE COMMITTEES ON WATER, LAND, AND AGRICULTURE AND ON  
COMMERCE, CONSUMER PROTECTION, AND HEALTH

**DATE:** Wednesday, February 10, 2016                      **TIME:** 3:15 p.m.

**LOCATION:** State Capitol, Room 224

**TESTIFIER(S):** Douglas S. Chin, Attorney General, or  
David D. Day, Deputy Attorney General

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Chairs Gabbard and Baker and Members of the Committees:

The Department of the Attorney General understands and appreciates the objectives of this bill. However, we oppose the bill as written due to potential constitutional concerns. Specifically, the bill may be subject to challenge as violative of the Takings Clauses of the United States and Hawai'i constitutions and the Commerce Clause of the United States Constitution.

This bill adds a new chapter to the Hawaii Revised Statutes (HRS) entitled "Commercial Forestry." Among other things, it provides that the new chapter "shall apply to owners of land that harvest any forest product for commercial purposes from their own land." Page 2, lines 8–10. The bill appears to create three new types of licenses to be promulgated and managed by the Department of Land and Natural Resources (DLNR): (1) a "commercial forestry license," which a person would need to obtain to harvest any forest product for commercial purposes from a forest reserve or private land in a conservation district; (2) a "commercial forest product dealer license," which DLNR may require a commercial forest product dealer to obtain in order to, among other things, sell or purchase forest products harvested in the State for commercial purposes; and (3) a license that DLNR may require of any person seeking to export any forest product taken within the State for a commercial purpose. The bill provides various obligations upon licensees, including reporting requirements, and imposes criminal and administrative penalties for violations.

First, because the bill restricts the use of private land by requiring a commercial forestry license to harvest forest products, there is a possibility that the State could be subject to court

challenges or lawsuits seeking compensation under the Takings Clause. To the extent the bill seeks to require private landowners to pay for licenses to harvest any forest products, where they were previously authorized to do so without a license, there is a potential that such landowners could bring regulatory-takings claims to recover compensation for the restriction in use.

Regulatory takings jurisprudence is a complex area of the law, and the validity of claims are frequently dependent on the specific factual circumstances of individual landowners. There is a possibility that this bill may lead to potential takings litigation, even in situations that are difficult to foresee. The possibility will continue to exist to the extent the bill changes existing law. To minimize the potential for litigation, we recommend that the Committees carefully consider exactly what “forest products” are at issue. For example, if the definition of “forest product” is clarified or narrowed so that it does not include fruits, vegetables, and other forms of agriculture, then the possible taking claim is likewise narrow. We also recommend clarifying the requirements for obtaining the licenses created by this bill.

Second, the license that the DLNR may require of any person seeking to export forest products potentially raises concerns under the Commerce Clause of the United States Constitution. The Commerce Clause provides Congress with the power to regulate foreign and interstate commerce. Courts have interpreted the Commerce Clause to likewise prevent states from burdening foreign and interstate commerce—the so-called dormant Commerce Clause. Individuals can challenge state laws regulating the export of natural resources under the Commerce Clause. Courts have held that state laws discriminating against foreign and interstate commerce on their face are virtually per se invalid. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 575 (1997). A license requirement imposed upon persons who specifically seek to export forest products from the State raises the potential for a legal challenge under the Commerce Clause. We recommend that this requirement be deleted.

The recommended changes herein may minimize any potential legal challenges. However, based on the foregoing, we respectfully request that the Committees defer the bill.