

Before the Senate Committee on Ways and Means
Senator Donovan M. Dela Cruz, Chair
Hawaii State Legislature

House Bill 2259, HD1, SD1 Relating to Marine Events
Tuesday, April 3, 2018, Conference Room 211

LATE

Written Statement of Douglas K. Johnson
Vice President, Technology Policy
Consumer Technology Association

My name is Doug Johnson, and I am submitting this testimony on behalf of the Consumer Technology Association (“CTA”) regarding House Bill No. 2259 (“HB 2259”). Although well-intentioned, CTA urges the Senate (i) to clarify HB 2259 to ensure that it could not be interpreted as requiring prior approval by the Hawaii Department of Land and Natural Resources (“DLNR”) before unmanned aircraft systems (“UAS”) could be operated over the ocean as part of a marine event and (ii) to strike that portion of the bill that would authorize the DLNR to adopt rules to ensure safe operations of drones during marine events. As discussed below, such requirements are preempted by federal law.

CTA is the trade association representing the \$351 billion U.S. consumer technology industry, which supports more than 15 million U.S. jobs. More than 2,200 companies – 80 percent are small businesses and startups; others are among the world’s best known brands – enjoy the benefits of CTA membership including policy advocacy, market research, technical education, industry promotion, standards development and the fostering of business and strategic relationships. CTA also owns and produces CES® – the world’s gathering place for all who thrive on the business of consumer technologies. Profits from CES are reinvested into CTA’s industry services.

As a champion of innovation, CTA is a long-time advocate of clear rules authorizing UAS in a safe manner within the national airspace. CTA has been continually involved in Federal Aviation Administration (“FAA”) rulemaking activities concerning the operation and certification of small UAS. We also are a partner with several other organizations and the FAA in the *Know Before You Fly* campaign which is educating prospective drone users about the safe and responsible operation of UAS.

The explosive growth of the UAS industry has prompted legislators in many states and localities to propose legislation regulating the industry or otherwise trying to address potential concerns related to UAS. Before considering new legislation, however, lawmakers should evaluate whether (i) proposed legislation is preempted, (ii) the conduct at issue may already be

addressed by existing laws, and (iii) UAS-specific legislation is warranted. HB 2259 should not be adopted as currently written because it would be preempted.

The Supremacy Clause of the U.S. Constitution states that “the Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land.”¹ As noted by the Supreme Court, this gives Congress the power to preempt state law.² There are three types of preemption: express preemption (when Congress specifically preempts a state law);³ field preemption (when a federal framework of regulation is “so pervasive . . . that Congress left no room for the States to supplement it” or where a “federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject”);⁴ and conflict preemption (when state laws “conflict with federal law, including when they stand ‘as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress’”).⁵ Congress has occupied the field with regard to air navigation and courts have determined that Congress has preempted state and local regulation regarding air navigation and aviation safety.⁶

Pursuant to federal statute, the FAA is charged with “prescrib[ing] air traffic regulations on the flight of aircraft . . . for —

- (A) navigating, protecting, and identifying aircraft;
- (B) protecting individuals and property on the ground;
- (C) using the navigable airspace efficiently; and
- (D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.” 49 U.S.C. § 40103(b)(2).

The FAA has issued numerous letters to localities cautioning against the adoption regulations – such as those establishing UAS no-fly zones – that run afoul of the FAA’s authority.⁷ In addition, the FAA has released a UAS Fact Sheet reminding state and local jurisdictions that they lack authority to regulate airspace.⁸ Through these letters and the UAS Fact Sheet, the FAA has

¹ U.S. Const., Art. VI, Cl. 2.

² See, e.g., *Arizona v. United States*, 567 U.S. 387 (2012).

³ *Id.*

⁴ *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

⁵ *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

⁶ See, e.g., *Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633-34 (1973).

⁷ See, e.g., Letter from Christopher R. Stevenson, FAA Office of the Chief Counsel, Enforcement Division, to Mark A. Winn, Assistant City Attorney, City of Petersburg (Sept. 16, 2016); Letter from Brandon C. Goldberg, FAA Office of the Regional Counsel, Southern Region to Alexander Karden, City Prosecutor, City of Orlando, Florida (Jan. 21, 2016); Brandon C. Goldberg, FAA Office of the Regional Counsel, Southern Region to Austin D. Roberson, Cobb County Attorney’s Office (Jun. 9, 2016); Brandon C. Goldberg, FAA Office of the Regional Counsel, Southern Region to David Wolpin, Esq., Counsel for the City of Aventura, Florida (May 26, 2016).

⁸ State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet, Federal Aviation Administration Office of the Chief Counsel (Dec. 17, 2015) (“UAS Fact Sheet”)

https://www.faa.gov/uas/resources/uas_regulations_policy/media/UAS_Fact_Sheet_Final.pdf.

made clear that regulations imposing operational bans or otherwise regulating navigable airspace are problematic.⁹ According to the UAS Fact Sheet, “[s]ubstantial air safety issues are raised when state and local governments attempt to regulate the operation or flight of aircraft” and “[a] navigable airspace free from inconsistent state and local restrictions is essential to the maintenance of a safe and sound air transportation system.”¹⁰ As discussed below, HB 2259 would intrude into this purely federal regulatory system by limiting the airspace available for UAS operations without DLNR prior approval. Such action is preempted by federal law.

HB 2259 would require written DLNR approval before a marine event can be conducted. A fee would be required – including a \$250 nonrefundable deposit – as part of the permit application. As currently written, it is unclear whether UAS operations over the water would be deemed a “marine event” subject to this prior approval requirement. Such a prior approval and permitting/registration requirement is preempted by federal law. As the FAA has stated, “Federal registration is the exclusive means for registering UAS for purposes of operating an aircraft in navigable airspace, no state or local government may impose an additional registration requirement on the operation of UAS in navigable airspace without first obtaining FAA approval.”¹¹ Accordingly, CTA urges you to amend HB 2259 to clearly exclude UAS operations from the definition of a marine event.

This prior approval requirement effectively would create UAS no-fly zones over bodies of water absent DLNR approval. However, no-fly zones may only be established by the federal government. State and local laws purporting to establish such zones are preempted.

Finally, HB 2259 would give DLNR the authority to adopt regulations to ensure safe UAS operations. As previously discussed, the federal government has exclusive authority to adopt regulations governing aviation safety.

For these reasons, CTA opposes this proposed legislation.

⁹ *Id.* at 3.

¹⁰ *Id.* at 2; *accord* Letter from Reginald C. Govan, Chief Counsel, FAA, to Victoria Mendez, Esq., City Attorney, City of Miami (Dec. 9, 2015).

¹¹ State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet, Federal Aviation Administration Office of the Chief Counsel (Dec. 17, 2015) (“UAS Fact Sheet”) https://www.faa.gov/uas/resources/uas_regulations_policy/media/UAS_Fact_Sheet_Final.pdf.

LATE

HB-2259-SD-1

Submitted on: 4/3/2018 8:10:59 AM
Testimony for WAM on 4/3/2018 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Tom McMahon	Testifying for AUSVI	Oppose	No

Comments:

Sens. Dela Cruz and Keith-Agaran:

Attached is a letter from Brian Wynne, President and CEO of the Association of Unmanned Vehicle Systems International, on HB 2259, a bill related to the use of unmanned aircraft systems, also known as drones, at marine events in the state.

This legislation would require the Department of Land and Natural Resources to allow applications for marine event permits up to one year in advance and to adopt rules to mitigate hazards posed by vessels, thrill craft, drones, and other means used by spectators to observe or record marine events.

Mr. Wynne asks that you consider the impact the legislation would have on commercial operators of unmanned aircraft systems (UAS) in Hawaii.

Please include Mr. Wynne's letter in the record for today's hearing before your committee on this legislation.

Many thanks,
Tom McMahon
AUVSI

NetChoice *Promoting Convenience, Choice, and Commerce on The Net*

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LATE

April 2, 2018

Senator Donovan M. Dela Cruz, Chair
Committee on Ways and Means
Hawaii State Senate
Conference Room 211
State Capitol
415 South Beretania Street

RE: **Request to remove language related to “drones” from HB 2259**

Dear Chairperson Dela Cruz and members of the Committee,

We ask you remove language regarding the regulation of drones from HB 2259.

We agree with the intent to install reasonable regulations regarding the use of drones. However, HB 2259 is the wrong vehicle for regulation of drones.

Drones hold tremendous promise for businesses, professionals, and hobbyists. In areas like real estate, security, agriculture, architecture, engineering, and delivery, drones can provide significant commercial benefits to consumers and businesses in both rural and urban areas.

HB 2259 is about empowering the Department of Land and Natural Resources to regulate the “waters of the state.”

Drones, however, are not related to “waters of the state.” Nor should drones be regulated by the Department of Land and Natural Resources.

Drones, as we all know, are related to aviation – which is the prevue of the Hawaii Department of Aviation.

By empower the Department of Land and Natural Resources to regulate drones, HB 2259 is setting Hawaii up for Departmental overlap and conflict. Moreover, regulation of drones is a complicated issue best left to the local departments that regulate Hawaii’s airspace.

Finally, nowhere in HB 2259 is the word “drone” defined. Without proper definitions, HB 2259 would imbue the Department of Land and Natural Resources with a wide berth to regulate this innovate technology and Hawaii’s airspace.

To that end, we ask that you remove the term “drones” from page 5 lines 21.

Sincerely,

A handwritten signature in black ink, appearing to read "Carl Szabo".

Carl Szabo
Vice President and General Counsel, NetChoice
NetChoice is a trade association of e-Commerce and online businesses. www.netchoice.org

