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Governor

JOSH GREEN
Lt. Governor



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Chairperson, Board of Agriculture

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**TESTIMONY OF PHYLLIS SHIMABUKURO-GEISER
CHAIRPERSON, BOARD OF AGRICULTURE**

**BEFORE THE SENATE COMMITTEES ON AGRICULTURE AND ENVIRONMENT
AND ON TRANSPORTATION**

**FEBRUARY 10, 2020
1:15 P.M.
CONFERENCE ROOM 224**

**SENATE BILL NO. 3133
RELATING TO AIR FREIGHT**

Chairpersons Gabbard and Inouye and Members of the Committees:

Thank you for the opportunity to testify on Senate Bill 3133, relating to air freight. This Senate Bill 3133 amends Hawaii Revised Statutes (HRS) Section 261 to establish an air freight inspection, quarantine, and eradication service fund; establish fees and fines to be paid by the consignee which are then deposited into the fund, and transfers all employees of the Plant Quarantine Branch (PQB) of the Department of Agriculture (DOA) who are stationed at airports to the Department of Transportation (DOT). The Department opposes this measure and offers comments.

First, based on previous experience, it is highly likely that the U.S. Department of Transportation (USDOT) will not allow the proposed fee collection. The DOA already assesses a fee on cargo freight per HRS Chapter 150A-5.3, which includes a reference to air freight. While this fee has been collected on sea cargo, the fee has not been collected on air freight. This is due to a declaratory order issued by the USDOT on January 23, 2012, stating that the inspection fee statute as applied to air carriers is preempted by the federal Airline Deregulation Act (ADA). The order finds that the ADA preempts HRS 150A-5.3 because it directly regulates air carriers by commanding air



carriers to conform their service of shipping freight and is related to air carrier prices. The USDOT also declared that the HRS 150A-5.3 was preempted by the federal Anti-Head Tax Act because the state was applying a direct charge on the sale of “air transportation,” for which the federal definition includes transportation of “property.” Additionally, even if there was an ability to collect funds, there would be confusion on how to determine the difference in funds allocated to this fund or the Pest inspection, Quarantine, and Eradication fund, as both funds have identical language for “Federal funds received for biosecurity, pest inspection, control, management, quarantine, and eradication programs”.

Second, PQB inspectors are required to have specialized knowledge of agriculture and of intercepted organisms including plants, insects, plant diseases, non-domestic animals, and microorganisms. This knowledge base is more aligned with the mission of the DOA mission than with that of DOT. This bill would require that the air freight inspection fund be used for airport security and generally for permit issuance, which could lead to the use of funds for non-biosecurity functions. The bill would also allow for educating the agricultural industry about import requirements, which is clearly a DOA function. Additionally, this bill also does not define what the inspectors would be regulating, provide them authority to conduct inspections, or even define what permits they would be issuing.

Third, the PQB already performs a variety of biosecurity activities in addition to cargo and passenger inspections, such as: nursery inspection and certification; issuing phytosanitary certificates for exports; issuing and enforcing live plant and non-domestic animal import and possession permits; certifying plants for interisland movement; responding to invasive pests in the environment, including responding to reports of snakes and other exotic animals; conducting investigations regarding illegal animal ownership; and maintaining a robust trapping and inspection program to prevent brown tree snakes from entering the State, which includes inspections of commercial and military aircraft from Guam. PQB Inspectors are cross trained to perform these varied duties, which produces workload efficiencies by allowing inspectors to perform a variety of tasks as needed. All PQB inspectors have the capability and authority to conduct

inspections at airports, seaports, or any other area where cargo is first offloaded for entry into the State. To maintain these efficiencies, the entire PQB staff, all of the PQB's duties, and all of the PQB's Statutory and Administrative authority would have to be transferred to DOT.

Thank you for the opportunity to testify on this measure.

TAX FOUNDATION OF HAWAII

126 Queen Street, Suite 304

Honolulu, Hawaii 96813 Tel. 536-4587

SUBJECT: MISCELLANEOUS, Air Freight Pest Inspection Fee

BILL NUMBER: SB 3133

INTRODUCED BY: J. KEOHOKALOLE, Gabbard, Inouye, Ruderman, Shimabukuro, L. Thielen

EXECUTIVE SUMMARY: Establishes the air freight inspection, quarantine, and eradication service fee and charge and corresponding fund to finance inspection, quarantine, and eradication activities relating to air freight that arrives at the State's airports. Transfers plant quarantine branch employees stationed at airports from the department of agriculture to the department of transportation.

SYNOPSIS: Adds three new sections to chapter 261, HRS. They would establish the air freight pest inspection, quarantine, and eradication fund, to be used for airport security, biosecurity and pest inspection, and related functions. The fund would be fed by an air freight inspection, quarantine, and eradication service fee and charge in the amount of 75 cents per thousand pounds of air freight brought into the State. Penalties would be imposed for failure to pay the fee.

Makes conforming amendments.

EFFECTIVE DATE: Upon approval.

STAFF COMMENTS: The proposal in this bill appears to be responsive to an article the Foundation published on Nov. 18, 2019:

Invasive Species Inspection Fee for Air-flown Commodities

Hawaii is an island state that is home to a unique set of flora and fauna. It's vulnerable to invasive species not only from foreign countries but also from the mainland United States, and our Department of Agriculture has traditionally worked hard to keep the bad stuff out. Little fire ants? Brown tree snakes? We don't want them, but we do want tons and tons of goods from the mainland and from foreign lands. That's why DOA has had in place a rigorous inspection program to scrutinize those shipments and, hopefully, catch any undesirable hitchhikers before they have a chance to damage our island ecosystem.

In 2008, our lawmakers thought, sensibly enough, that the importers of freight should defray the costs of these inspections. They passed a bill imposing a fee of 50 cents per thousand pounds of freight (increased in 2011 to 75 cents) that goes into a special fund called the "Pest Inspection, Quarantine, and Eradication Fund." The fee is paid by the shipper, collected by the transportation company, and then paid over to the State. The fund pays for operating costs of pest inspection, quarantine, eradication, and monitoring programs and related purposes.

But the fee is collected only on shipments by water.

Why?

In mid-2010, the Air Transport Association sued in federal court and petitioned the U.S. Department of Transportation to rule that the inspection fee was preempted by federal law, specifically the Airline Deregulation Act of 1978, 49 U.S.C. §41713, and the Anti-Head Tax Act, 49 U.S.C. §40116. (Because of the latter act, the U.S. Supreme Court felled the Hawaii Public Service Company Tax in 1983 as it applied to income from air transportation of passengers and cargo.)

In 2012, the USDOT ruled that the inspection fee was indeed preempted. The State settled with the airline industry association and refunded the fees that had been collected. But then it looks like the State just gave up on the fees as they related to air freight.

The USDOT ruling, however, suggested that it might be possible to structure the fees to fix the problem. An article published in 2013 in the American Bar Association's Air and Space Lawyer, furthermore, outlined one possible fix. The fee would have to be (1) imposed by the airport operator, in this case the State; (2) wholly used for airport or aeronautical purposes; and (3) reasonable, nondiscriminatory, and not unreasonably burdensome to interstate commerce. Element (1) is already satisfied. Element (2) can be satisfied if a separate air cargo inspection program, different from the marine cargo inspection program, is established and paid for by the air carrier fees. DOA already has the air cargo inspection program in place, so establishing a separate fund to pay for it would seem to be an easy fix. Element (3) should be achievable if the DOA doesn't get too greedy and periodically adjusts its fee levels to match costs. The State Auditor's Report No. 18-15 (page 24) observed that the balance in its special fund for these operations has been slowly creeping upward, so some tweaks may be necessary to ensure that revenues and expenses are in balance.

Lawmakers should give serious consideration to performing the fixes and working with USDOT and the airlines to pass and implement a legitimate inspection fee. Invasive species need to be caught and eliminated regardless of the means by which the species hitchhikes to Hawaii. It doesn't seem fair that only one part of the transportation industry is paying to protect our islands while another part gets a free ride.

Some modifications to the current bill may be necessary to comply with federal law, such as ensuring that the new fund will only be used for airport or aeronautical purposes.

It is hoped that the air transportation industry can work together with state government to implement a fix that is reasonable and consistent with federal law.

Digested 1/31/2020

SB-3133

Submitted on: 1/30/2020 9:13:32 PM

Testimony for AEN on 2/10/2020 1:15:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Benton Kealii Pang, Ph.D.	Individual	Support	No

Comments:

As a native Hawaiian environmentalist, I support SB3133. Our air cargo system is a pathway for invasive species and funding for inspections is needed to keep Hawai'i's economy safe. Please pass SB3133

Aloha,

Benton Kealii Pang, Ph.D.

SB-3133

Submitted on: 2/5/2020 5:03:43 PM

Testimony for AEN on 2/10/2020 1:15:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Andrea Quinn	Individual	Support	No

Comments:

Dear Honorable Committee Members:

Please support SB3133, which will help protect Hawaii's fragile ecosystem from invasive species.

Thank you for the opportunity to present my testimony.

Andrea Quinn

Kihei

SB-3133

Submitted on: 2/8/2020 11:39:11 AM

Testimony for AEN on 2/10/2020 1:15:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Rynette Keen	Individual	Support	No

Comments: