

DAVID Y. IGE  
Governor

JOSH GREEN  
Lt. Governor



PHYLLIS SHIMABUKURO-GEISER  
Chairperson, Board of Agriculture

MORRIS M. ATTA  
Deputy to the Chairperson

State of Hawaii  
**DEPARTMENT OF AGRICULTURE**  
1428 South King Street  
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Phone: (808) 973-9600 FAX: (808) 973-9613

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

**BEFORE THE SENATE COMMITTEE ON AGRICULTURE AND ENVIRONMENT**

**FRIDAY, FEBRUARY 11, 2022  
1:30 PM**

**VIA CONFERENCE ROOM 224 & VIDEOCONFERENCE**

**SENATE BILL NO. 2950  
RELATING TO AGRICULTURAL INSPECTION FEES**

Chairperson Gabbard and Members of the Committee:

Thank you for the opportunity to testify on Senate Bill 2950, relating to agricultural inspection fees. The bill seeks to impose an inspection fee on certain imported agricultural products to be deposited into a special fund and expended by the Department.

The Department appreciates the intent of the measure and defers to the Office of the Attorney General regarding the Federal Airline Deregulation Act (ADA), Anti-Head Tax Act (AHTA), and the Commerce Clause. It is well documented that preventing the entry of invasive species, as opposed to control or management, is an excellent investment of resources. Programs such as the Department's Brown Tree Snake Interdiction program have been successful in this regard.

Based on previous experience, it is highly likely that the U.S. Department of Transportation (USDOT) will not allow the proposed fee collection for air freight. The Department 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 ADA. The order finds that the ADA preempts HRS 150A-5.3 because it 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 AHTA because the state was applying a direct charge on the sale of "air transportation," for which the federal definition includes transportation of "property." Additionally, it is the Department's understanding that the Commerce Clause within the U.S. Constitution prevents States from creating legislation that would burden interstate commerce and the proposed legislation would likely meet that criterion.

The Department also respectfully refers to the testimony from the Department of the Attorney General to this bill.

Thank you for the opportunity to testify on this measure.



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
THIRTY-FIRST LEGISLATURE, 2022**

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 2950, RELATING TO AGRICULTURAL INSPECTION FEES.

**BEFORE THE:**

SENATE COMMITTEE ON AGRICULTURE AND ENVIRONMENT

**DATE:** Friday, February 11, 2022 **TIME:** 1:30 p.m.

**LOCATION:** State Capitol, Room 224, Via Videoconference

**TESTIFIER(S):** Holly T. Shikada, Attorney General, or  
Jodi K. Yi or Bryan C. Yee, Deputy Attorneys General

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Chair Gabbard and Members of the Committee:

The Department of the Attorney General (Department) provides the following comments regarding this bill.

This bill adds a new section in chapter 150A, Hawaii Revised Statutes (HRS), which imposes an inspection, quarantine, and eradication of invasive species fee on maritime, air freight, and other freight imported into the State. Page 1, lines 4-11. It would only apply to agriculture product types that are currently grown or produced in the State. Page 1, lines 12-15. The fee is five cents for every one pound of freight, or part thereof, brought into the State. Page 2, lines 11-14. The fees would be deposited into a special fund and expended by the Department of Agriculture "to support agricultural production in the State." Page 2, line 17.

We have the following concerns about this bill, which seeks to impose a fee that is substantially similar to the fees imposed on imported freight under section 150A-5.3, HRS. Under section 150A-5.3, HRS, fees for inspection, quarantine, and eradication services (seventy-five cents for every one thousand pounds of freight, or part thereof) go into the pest inspection, quarantine, and eradication fund established by section 150A-4.5, HRS.

First, the bill seeks to impose a fee on air freight that the United States Department of Transportation (DOT) has already determined is preempted by the Airline Deregulation Act of 1978, 49 U.S.C. section 41713 (ADA), and the Anti-Head Tax Act, 49 U.S.C. section 40116 (AHTA). DOT is the agency charged with interpreting the ADA

and AHTA. On January 23, 2012, the DOT issued a Declaratory Order ruling that the State's inspection fee statute under section 150A-5.3, HRS, was preempted by the ADA and AHTA. <https://www.regulations.gov/document?D=DOT-OST-2010-0243-0029>. Specifically, the DOT found that the fee was preempted by the ADA because it was related to air carrier services, air carrier prices, and possibly impacted air carrier routes. In addition, the fee was preempted by the AHTA because it levied a tax, fee, head charge or other charge on the sale of "air transportation". As a result, fees on air freight are currently not collected. This bill, which seeks to impose a fee under substantially similar wording, would also likely have similar preemption problems.

Second, there is no definition of "agriculture product types that are currently grown or produced in the State," page 1, lines 13-14, and this provision may be violative of the Commerce Clause. See U.S. Const. art. I, § 8, cl. 3. The Commerce Clause prohibits any state from imposing a tax or regulation that discriminates against interstate commerce by providing commercial advantages to local businesses. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).

Third, this bill requires the fees to be deposited into a special fund to be established by the department. Special funds, however, need to be established by the Legislature. See HRS § 37-52.3.

Should the Committee wish to move this bill forward, the Department respectfully suggests that any reference to air freight or air carriers be removed for the reasons discussed above. One option for doing so would be to withdraw the addition of a new section to chapter 150A and amend the existing fee statute as follows:

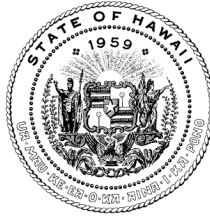
SECTION 1. Section 150A-5.3, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) The fee shall be assessed and collected on the net weight of the imported freight computed on the basis of ~~[75 cents for every one thousand pounds]~~ five cents for every one pound of freight, or part thereof, brought into the State."

The legislature may also wish to require a study to determine a reasonable fee amount and analyze alternative collection mechanisms that might comply with federal laws in this complicated area of federal regulation.

Thank you for the opportunity to present this testimony.

DAVID Y. IGE  
GOVERNOR OF  
HAWAII



SUZANNE D. CASE  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA  
FIRST DEPUTY

M. KALEO MANUEL  
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
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CONSERVATION AND COASTAL LANDS  
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HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

Testimony of  
SUZANNE D. CASE  
Chairperson

Before the Senate Committee on  
AGRICULTURE AND ENVIRONMENT

Friday, February 11, 2022

1:30 PM

State Capitol, Conference Room 224, Via Videoconference

In consideration of  
SENATE BILL 2950  
RELATING TO AGRICULTURAL INSPECTION FEES

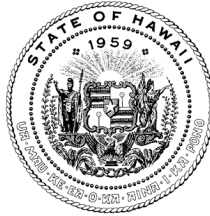
Senate Bill 2950 proposes to impose a fee on certain imported agricultural products to be deposited into a special fund and expended by the Hawai'i Department of Agriculture (HDOA). **The Department of Land and Natural Resources (Department) supports this measure.**

The Department manages invasive species in order to protect Hawaii's native species and natural resources. The Department and the HDOA work collaboratively to address invasive species issues through their respective mandates as co-chairs of the Hawai'i Invasive Species Council. The development and release of the Hawai'i Interagency Biosecurity Plan in 2017 was largely a response to the economic recession in 2008 that resulted in the loss of capacity at key agencies like HDOA. We are now facing another economic downturn due to the ongoing pandemic and vital programs that HDOA provides are at risk. The Biosecurity Plan is comprehensive in scope and identifies over 100 actions to improve biosecurity in Hawai'i that include building capacity at HDOA.

Staff shortages can hinder HDOA's ability to provide systematic inspections of high-risk pathways to prevent the introduction of harmful pests and additional needed actions such as interdiction programs for the brown tree snake. Adding state staff capacity is essential if HDOA is expected to fully meet its obligations to protect Hawai'i from invasive species. The Hawai'i Interagency Biosecurity Plan identifies needed increases in staffing to accomplish these responsibilities, as well as additional implementation tasks identified in this plan. See the link to the full Hawai'i Interagency Biosecurity Plan: <https://dlnr.hawaii.gov/hisc/files/2017/02/Hawaii-Interagency-Biosecurity-Plan.pdf>

Thank you for the opportunity to comment on this measure.

DAVID Y. IGE  
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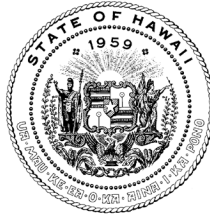
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Thank you for the opportunity to comment on this measure.

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Thank you for the opportunity to comment on this measure.



# TAX FOUNDATION OF HAWAII

126 Queen Street, Suite 305

Honolulu, Hawaii 96813 Tel. 536-4587

SUBJECT: MISCELLANEOUS, Invasive Species Inspection Fee

BILL NUMBER: SB 2950

INTRODUCED BY: GABBARD, ACASIO, CHANG, KANUHA, MISALUCHA

EXECUTIVE SUMMARY: Imposes an inspection fee on certain imported agricultural products to be deposited into a special fund and expended by the Department of Agriculture.

SYNOPSIS: Adds a new section to chapter 150A, HRS, to impose a fee for the inspection, quarantine, and eradication of invasive species contained in air freight. The basis of the fee will be 5 cents for every pound of freight, or part thereof, brought into the state. Provides that the fees shall be deposited into a special fund established by the department and expended to support agricultural production in the state.

EFFECTIVE DATE: Upon Approval

STAFF COMMENTS: 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 now 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 (<https://www.regulations.gov/document?D=DOT-OST-2010-0243-0029>) 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.

The bill here creates a section that largely duplicates section 150A-5.3. If 150A-5.3 doesn't work, how is this bill any better, and what happens to 150A-5.3?

Digested: 2/8/2022

**SB-2950**

Submitted on: 2/8/2022 3:14:44 PM

Testimony for AEN on 2/11/2022 1:30:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Remote Testimony Requested</b>
Gerard Silva	Individual	Oppose	No

Comments:

No Fees we are tired of being Riped off!!!

DAVID Y. IGE  
GOVERNOR



CRAIG K. HIRAI  
DIRECTOR

GLORIA CHANG  
DEPUTY DIRECTOR

**STATE OF HAWAII**  
**DEPARTMENT OF BUDGET AND FINANCE**  
P.O. BOX 150  
HONOLULU, HAWAII 96810-0150

EMPLOYEES' RETIREMENT SYSTEM  
HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND  
OFFICE OF THE PUBLIC DEFENDER

ADMINISTRATIVE AND RESEARCH OFFICE  
BUDGET, PROGRAM PLANNING AND  
MANAGEMENT DIVISION  
FINANCIAL ADMINISTRATION DIVISION  
OFFICE OF FEDERAL AWARDS MANAGEMENT (OFAM)

**WRITTEN ONLY**  
TESTIMONY BY CRAIG K. HIRAI  
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE  
TO THE SENATE COMMITTEE ON AGRICULTURE AND ENVIRONMENT  
ON  
SENATE BILL NO. 2950

**February 11, 2022**  
**1:30 p.m.**  
**Room 224 and Videoconference**

RELATING TO AGRICULTURAL INSPECTION FEES

The Department of Budget and Finance (B&F) offers comments on this bill.

Senate Bill No. 2950 adds a new section to Chapter 150A, HRS, to impose a new inspection fee on certain imported agricultural products and deposit the revenues generated into a special fund established by the Department of Agriculture (DOA) for the purposes of supporting agricultural production in the State.

B&F notes that it is unclear whether the special fund indicated in this bill is an existing special fund or a new special fund to be established by the DOA. If it is the former, the bill should clearly specify which special fund should receive the deposits and make corresponding amendments to the appropriate section(s) in the HRS related to that special fund. If it is the latter, it should be noted that departments do not have the authority to unilaterally create their own special funds as only the Legislature can establish special funds and appropriate funds out of them.

Thank you for your consideration of our comments.



1050 Bishop St. PMB 235 | Honolulu, HI 96813  
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#### **Executive Officers**

**Charlie Gustafson**, Tamura Super Market, *Chair*  
**Eddie Asato**, Pint Size Hawaii, *Vice Chair*  
**Gary Okimoto**, Safeway, *Secretary/Treas.*  
**Lauren Zirbel**, HFIA, *Executive Director*  
**John Schliff**, Rainbow Sales and Marketing, *Advisor*  
**Stan Brown**, Acosta Sales & Marketing, *Advisor*  
**Paul Kosasa**, ABC Stores, *Advisor*  
**Derek Kurisu**, KTA Superstores, *Advisor*  
**Toby Taniguchi**, KTA Superstores, *Advisor*  
**Joe Carter**, Coca-Cola Bottling of Hawaii, *Immediate Past Chair*

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TO: Committee on Agriculture and the Environment  
Senator Mike Gabbard, Chair  
Senator Clarence K. Nishihara, Vice Chair

FROM: HAWAII FOOD INDUSTRY ASSOCIATION  
Lauren Zirbel, Executive Director

DATE: February 11, 2022  
TIME: 1:30pm  
PLACE: Via Videoconference

RE: SB2950 Relating to Agriculture Inspection Fees

Position: Oppose

The Hawaii Food Industry Association is comprised of two hundred member companies representing retailers, suppliers, producers, and distributors of food and beverage related products in the State of Hawaii.

HFIA is in opposition to this measure to impose an inspection fee on certain imported agricultural products. Increasing local food production and protecting our local agricultural products are goals we all share. We believe that collaborative positive programs are the way to work towards these goals. Imposing an additional fee on food coming into our state is not the right answer. This bill seems to be attempting to target coffee but would also add a fee to many fresh fruits and vegetables. Additional taxes and fees that make healthy food more expensive is not the right choice for our state. We ask that this measure be held and we thank you for the opportunity to testify.