

Honolulu, Hawaii

OCT 26 2007

RE: S.B. No. 1
S.D. 1

Honorable Colleen Hanabusa
President of the Senate
Twenty-Fourth State Legislature
Second Special Session of 2007
State of Hawaii

Madam:

Your Committees on Judiciary and Labor and Transportation and International Affairs and Energy and Environment, to which was referred S.B. No. 1 entitled:

"A BILL FOR AN ACT RELATING TO TRANSPORTATION,"

beg leave to report as follows:

The purpose of this measure is to facilitate the establishment of inter-island ferry service, and concurrently to protect Hawai'i's fragile environment by clarifying that neither the preparation of an environmental assessment nor a finding of no significant impact nor an acceptance of an environmental impact statement is required as a condition precedent to the operation of a large capacity ferry vessel and by providing strong measures to protect the environment from the operation of any large capacity ferry vessel.

Specifically, this measure would also:

- (1) Allow a large capacity ferry vessel company to operate and to utilize Kahului Harbor improvements and other improvements on other islands, pursuant to any operating agreement with the State;
- (2) Declare that the operation of large capacity ferry vessels between the islands of O'ahu, Maui, Kaua'i, and



Hawai'i, including harbor facilities on each island and specifically the improvements to Kahului Harbor is in the interest of required public convenience and necessity, and prohibiting the revoking or modification of any certificate of public convenience and necessity on the basis that environmental assessments or environmental impact statements have not been prepared or completed;

- (3) Clarify that the construction, use, or operation of any facilities or improvements authorized by any agreements between a large capacity ferry vessel company and the State is not subject to or require any county permit or approvals, and may continue while an environmental review under this measure is in progress;
- (4) Require the Governor to impose, by executive order, conditions and protocols on a large capacity ferry vessel company's inter-island operations to mitigate significant environmental effects that the Governor determines may be caused by such inter-island operations, and provide specific environmental protection factors that the Governor must consider accordingly;
- (5) Require the large capacity ferry vessel company to agree to abide by the conditions and protocols imposed by the Governor to protect the environment as a condition precedent to commencing operations;
- (6) Reserve to the Legislature the sole right to review the adequacy of any conditions or protocols imposed by the Governor, and to impose any other conditions or protocols it deems necessary and appropriate to protect the environment and communities to enable the limited operation of the large capacity ferry vessel while the environmental review under this measure is in process;
- (7) Establish an environmental review process for state actions in connection with a large capacity ferry vessel in lieu of but consistent with the requirements of chapter 343, Hawai'i Revised Statutes, relating to environmental impact statements;



- (8) Require the Department of Transportation to prepare or contract to prepare an environmental impact statement for the improvements made to commercial harbors throughout the State that require the expenditure of public funds to accommodate the use thereof by large capacity ferry vessel company and the secondary effects of those operations on the State's environment, including the operation of a large capacity ferry vessel company;
- (9) Provide for an environmental review process similar in substance to chapter 343, Hawai'i Revised Statutes, and its implementing Hawai'i Administrative Rules, with the draft and final environmental impact statements, and their acceptance by the Office of Environmental Quality Control;
- (10) Establish within the Department of Transportation a temporary Hawai'i inter-island ferry oversight task force to study the State's actions regarding the establishment of the operations of the large capacity ferry vessel and any impacts therefrom on ocean and marine animals and plants including whale avoidance; water resources and quality; harbor infrastructure; vehicular traffic; public safety and security; spread of invasive species; cultural resources, including hunting, fishing, and native Hawaiian resources; consequences to and impact upon the State's economy; and other natural resources and community concerns;
- (11) Require the ferry oversight task force to report monthly to the Legislature and the Governor at the end of each month, commencing December 31, 2007, and a final report on findings and recommendations no later than twenty days prior to the convening of the Regular Session of 2009;
- (12) Require the Auditor to conduct a performance audit of the state administration's actions in exempting harbor improvements relating to the operation of large capacity ferry vessels from chapter 343, Hawai'i Revised Statutes;



- (13) Clarifying that any previously made appropriation or previously authorized expenditure of funds for any inter-island ferry operations of a large capacity ferry vessel company, or improvements or operating expenses to accommodate its provision of inter-island ferry service shall be approved and authorized to the extent necessary to effectuate this measure; and
- (14) Provides for a release, waiver, indemnification, and defense in favor of the State by every large capacity ferry vessel company that operates pursuant to this measure from any action that may be caused by or relating to any judicial action arising from the establishment and operation of the large capacity ferry vessel.

Your Committees received testimony in support of this measure from the State Attorney General; Department of Transportation; Department of Business, Economic Development, and Tourism; Department of Agriculture; Hawai'i Superferry; Island Oil and Supply Co., Ltd.; Container Storage Co. of HI. Ltd.; MortgageSource, LLC; Masonry Institute of Hawaii; Hurricane Powerwash LLC.; R.W. Almonte Enterprises, Inc.; The Coffee Store KIHEI; Epoxy Restoration LLC; Scion Evolution Car Club Hawaii Chapter; Chucks Corvette Clinic; Shaka Gear.com; Carrier Hawaii; Carey Hawaii/Town & Country Limousines; Weatherguy.com; Seafarers International Union; KapohoKine Adventures, LLC; Paradise Found Realty; Island Grower Supplies; Hawai'i Food Industry Association; Hawaiian Dredging Construction Company; Garden & Valley Isle Seafood, Inc.; Fairway Navigation, Inc.; APC Voice & Data Communications; Point-of-Sale Management Solutions; Ohana Road TV ABC; Window Works LLC; Maui-Lana'i Ferry; Kaua'i Chamber of Commerce; Terra Mar Travel, Inc.; VR Business Brokers Hawai'i Island Office; Maui Chapter of the AARP; Island Controls, Inc.; Ali'i Court Reporting; Hamakua Macadamia Nut Company; Reid E. Choate & Associates, LLC; Hilo Art & Glass Supply; Paddle Surf Hawai'i LLC; Hawai'i Performance Warehouse; Ocean Marine Insurance Agency, Inc.; Aloha JDC Rentals; Kasprzycki Designs Inc.; DNC Contracting, Inc.; AAA Roofing and General Contractors Inc.; Noguchi & Associates, Inc.; 87Zero Industries; Arita-Poulson General Contracting; Aloha Land Realty; Women of Our World, Inc.; Golden Mart; Hawaiian Phototropic; South Pacific Insurance Agency; Big Island Brokers; Hawaiian Isle Inspections; Penmar Hawai'i Corporation; Eurotours



Hawaii, Inc.; Nanea Kai, Inc., dba Ocean Sports; Mandalay Properties Hawaii LLC; A&B Properties, Inc.; Alaka'i Mechanical Corp.; Dollar Rent A Car/Pacific Area; Dental Arts LLC; Convention Television (CTV); Pacific Sport Events and Timing; Walz Engineering, Inc.; Kohala Ranch; Kensco Homes LLC; Christ Church Episcopal; Gamma Knife Center of the Pacific; Hawai'i Farm Bureau; BIA-Hawai'i; Winners' Camp; and 1,655 individuals.

Testimony in opposition was received from United Natural Foods, Inc.; Pacific Whale Foundation; Na Kupuna Na Mo'opuna, Unlimited; Pukulani Plant Co. Inc; 1000 Friends of Kauai; Maui Tomorrow Foundation, Inc.; Maui Tomorrow, Inc.; Conservation Council for Hawai'i; Sierra Club Hawai'i Chapter; Life of the Land; Friends of Haleakala National Park; American Friends Service Committee; and 338 individuals. Comments were received from the University of Hawai'i at Manoa, Environmental Center and two individuals.

Your Committees find that this measure is intended to address a unique and critical situation that began with an administratively granted exemption from the environmental impact statement process that the Hawai'i Superferry relied on and culminated more than two years later with an adverse ruling by the Hawai'i Supreme Court. The court held that the administrative exemption was erroneously granted and remanded the case to the Second Circuit Court which then ordered environmental impact statement procedures be completed before commencement of operations, as a "condition precedent" to the operation of the Hawai'i Superferry.

The intent of your Committees is to observe the holding of *The Sierra Club, et al. vs. the Department of Transportation, et al.*; Hawai'i Supreme Court, Opinion No. 27407, August 31, 2007, while allowing the Hawai'i Superferry to commence operations, with due consideration given to the very legitimate issues concerning the environment such as the transportation of invasive species and whale avoidance protection. Other issues include the impact on traffic congestion, water quality, cultural resources, and the economy.

Your Committees find that the current situation is unique in that seldom, if ever, has a judicial determination overturned harbor improvements and business operations that were previously authorized by the government and approved by the lower court



more than two years earlier. As such, your Committees believe that the Legislature must reluctantly intercede to provide a remedy to rectify an otherwise paradoxical situation that literally stopped a project dead in the water after an ostensibly valid exemption had been granted from the required environmental review procedures.

While your Committees take the extraordinary action of passing this measure in Special Session to balance the interests of economic development and alternative transportation with the interests of environmental protection, your Committees also believe that the Legislature must take extraordinary steps to stem the potential liabilities that the State may face in the future if nothing is done. A key operative provision of this measure establishes that, any large capacity ferry vessel company that operates pursuant to any of the rights conferred by this measure, by such operation, the company waives its rights to sue the State for any losses incurred due to any adverse judicial or administrative determinations. Accordingly, the intent of this measure should not be considered a template for relief in future situations involving the operations of a large capacity ferry vessel pursuant to the provisions of this measure.

Your Committees note that the measure itself iterates the potential benefits of the operation of a large capacity vessel company using a new class of large capacity ferry vessels. As such, your Committees believe that the Hawai'i Superferry should be provided with the opportunity to operate while environmental concerns are studied and catalogued. Additional consideration should be given to the fact that, due to Hawai'i's geographic location and proneness to hurricanes, as well as the harsh reality of the immediate aftermath of Hurricane Iniki which saw people waiting for days or even weeks to either leave the island or obtain emergency supplies or relief, alternative modes of inter-island transportation must be developed.

Specifically with regard to Kaua'i, your Committees note that the Hawai'i Superferry is under no obligation to suspend operation to the Garden Island. As a precautionary measure, the Hawai'i Superferry has chosen not to operate meanwhile between O'ahu and Kaua'i until the instant issue before the Legislature is finally resolved. Passage of this measure provides assurance that the environment of Kaua'i would be protected through the



imposition of interim conditions and protocols by the Governor as well as oversight by the task force.

Your Committees also note that, although there has been some concern raised over the Governor and the state administration being the branch of government charged with the responsibility of establishing and enforcing the protocols required under the measure, it is the Governor and the state administration that has the expertise, manpower, and constitutional responsibility to execute enactments of the Legislature.

Your Committees find that this measure is necessary to balance the need for alternative means of inter-island transportation with the need to protect the environment of the State and of the unique environment of each island, as well as each community's unique sense of place and values. Your Committees are cognizant of the testimony on this measure and of the opinions voiced by the public during informational briefings on the Neighbor Islands to the effect that the quality of life would be affected negatively by the operation of the Superferry prior to any environmental review.

Meanwhile, it is the duty of the Legislature to craft legislation that balances competing interests and benefits the population as a whole. Without diminishing the validity and respecting greatly the public input from the informational briefings on Kaua'i, Maui, and the Big Island, your Committees understand that there were a number of concerned citizens who chose not to voice their opinions in person, as evidenced by the overwhelming amount of testimony submitted for the hearing at the State Capitol. Nevertheless, your Committees heard from those on the neighbor islands who feel passionately about this issue, which was enlightening and informative.

Your Committees believe that the operation of the vessel and the protection of the environment are not mutually exclusive. Your Committees find that the operation of the Hawai'i Superferry vessel concurrently with the preparation of environmental studies, on balance, is in the best interests of citizens of Hawai'i as a whole.

Your Committees also considered whether Hawai'i Superferry should be allowed to operate at all. Your Committees conclude



in the affirmative. Your Committees find that Hawai'i's citizens deserve to have an alternative means of transportation as an island state to move people, cargo, and automobiles from one island to another in the same day. Your Committees find that an inter-island water transport system is a necessity in times of emergency and for civil defense purposes.

Your Committees have amended this measure as follows:

(1) Requiring the Hawai'i Superferry to comply with the following conditions:

(A) Regarding whale encounters:

- (i) Applying with the National Oceanic and Atmospheric Administration for an incidental-take permit; and
- (ii) Requesting an observer from the National Marine Fisheries Service, a division of the National Oceanic and Atmospheric Administration, to be onboard its vessels at all times when traveling through the Hawaiian Islands Humpback Whale National Marine Sanctuary;

(B) Regarding invasive species:

- (i) Posting signage and notifying passengers beforehand of all bans, inspections, and check-in procedures and deadlines;
- (ii) Posting signage and notifying passengers beforehand of all bans such as the ban on the transport of fishing gill nets and fishing nets for commercial use, or rocks, soil, or dirt or sand without a permit from the appropriate government agency;
- (iii) Requiring passengers to declare all plants, fruits, seeds, and any other biological medium and confiscate any agricultural pests or invasive species, as defined by the Department of Agriculture by rule;



- (iv) Inspecting or cause to be inspected all vehicles prior to boarding, including the trunks of all cars, the beds of all pickup trucks and the undercarriage and interiors of all vehicles; and
 - (v) Promptly notifying the appropriate governmental agency regarding any violation or potential of invasive species, agricultural, conservation or other law; and
- (C) Any other conditions or protocols the Governor deems necessary and appropriate to protect the State's environment.
- (2) Requiring the Governor to notify the Legislature of all conditions or protocols established, including the entities consulted in establishing the conditions or protocols.
 - (3) Allowing the Governor to amend the conditions and protocols to ensure the reasonable, efficient, and expedient application of environmental protection measures;
 - (4) Requiring the Governor to review and determine the efficacy and appropriateness of all conditions or protocols established and report to the Legislature at the end of each fiscal quarter and the costs incurred by the State in establishing and maintaining the enforcement activities required under the measure;
 - (5) Modifying the oversight task force membership by deleting the Director of Business, Economic Development, and Tourism and inserting therefor the Director of Agriculture;
 - (6) Amending the indemnity and waiver of liability language to clarify that it applies to actions that occurred prior to the effective date of the measure and does not apply prospectively, as recommended by the Attorney General; and



- (7) Making technical, nonsubstantive amendments to conform the other provisions of the measure with the amendments made by your Committees.

With regard to the prospect of applying for an incidental take permit and requesting an observer from the National Marine Fisheries Service be onboard its vessels, your Committees note that the Hawai'i Superferry indicated that it was amenable to such actions.

Your Committees emphasize that, with regard to the amendment described in paragraph (1)(A)(i) of the listing of amendments above, the term "applying", or "apply", as it is used in the measure, are not intended to imply or require that the Hawai'i Superferry complete the application process to obtain an incidental take permit, but rather that the Hawai'i Superferry start the process to obtain the permit.

Furthermore, your Committees note that, with regard to the amendments described in paragraph (1)(B)(i)-(iv), of the listing of amendments above, the Hawai'i Superferry has testified that it will voluntarily institute these procedures to do its part to protect each island's unique environment. In addition, the Department of Agriculture has also initiated the process to inspect agricultural products prior to transport on the Superferry in a similar manner that it does for the shipment of goods or cargo by other inter-island modes of transportation.

Your Committees strongly recommend:

- (1) That Hawai'i Superferry, using trained employees, confiscate any natural resource, as defined in section 128D-1, Hawai'i Revised Statutes, of which the taking or transporting is prohibited by statute or administrative rule;
- (2) That the Hawai'i Superferry establish an education program, similar to what is provided at Hanauma Bay, that educates passengers and users of the Superferry on the potential detrimental environmental impacts that may be caused by irresponsible or negligent behavior or actions;



- (3) That the Departments of Land and Natural Resources and Agriculture dedicate sufficient resources to monitor the Hawai'i Superferry's activities and enforce invasive species, agricultural, conservation, and environmental laws: and
- (4) That the Governor establish, assess, and collect fees from the Hawai'i Superferry to offset the costs incurred by the State in implementing procedures to protect the State's and each island's environment.

Your Committees also emphasize that, with the enactment of this measure and throughout its term, the operations of the Hawai'i Superferry and the procedures followed for the environmental impact statement by the Department of Transportation shall be governed by this measure and not by any similar law in effect prior to this measure's effective date.

Your Committees believe that this amended measure reflects a prudent and reasoned approach to providing an alternative means of inter-island transportation while respecting and protecting the communities and environment of each island of our State.

Your Committees also believe that the unprecedented acrimony that has arisen from debates and actions on this issue stems from a fundamental lack of communication with the public regarding the actions taken by the Hawai'i Superferry and the state administration. Your Committees firmly support the public's right to be kept informed on this issue and that the Legislature should stand ready to provide the public, through the reporting requirements incorporated in this measure, with information on the operation of the Hawai'i Superferry.

Finally, your Committees are particularly concerned that this measure has caused a public rancor and division heretofore rarely seen in this land of Aloha. Sadly, the issue before your Committees has unearthed deeper concerns that reach beyond those of pitting the oversimplified and overused cliché of development versus environment. The operation of the Superferry and the ensuing process to find a resolution to this unique situation has resulted in a pained community. Segments of our population have been pitted against each other, with the divide drawn along the lines of neighbor island versus Oahu, urbanites versus rural



dwellers, locals versus newcomers, employed versus unemployed, conservation versus business, wealthy versus poor, and further. Your Committees believes that, regardless of how this issue is resolved, clearly, a time of healing must ensue where mutual respect, trust, and most of all, aloha, must be re-established and above all, prevail.

Toward the objective of healing the rifts caused or enlarged by this issue, your Committees also believe that the convening and operation of the oversight task force could serve as a means by which these rifts can be closed, or at very least, minimized. With its diverse membership, it is the hope of your Committees that the representatives on the oversight task force will begin to understand each other's positions, empathize with one another's passions, and finally, that respect may grow from their mutual experiences in working together.

For all those involved in advocating their positions on this issue, as a starting point to heal the divisiveness, your Committees feel the need to restore the aloha that has made Hawai'i a unique as a place of welcome, tolerance, and friendliness. To this end, your Committees believe that, to date, most of the discussion on this issue has focused on the negative aspects and potential impacts associated with the operation of the Superferry. Your Committees would like the focus to shift to the positive aspects and consequences that will result from the Superferry's operation. As stated by Mr. Kauila Clark, a testifier who is a Native Hawaiian cultural practitioner, this measure is in keeping with the spirit of aloha, as it will eventually bring families together. Your Committees were moved by Mr. Clark's explanation of how the meaning of the word "aloha" was taught to him by noted kupuna, Pilani Paki, through the use of the word as an acronym for all it encompasses. In Pilani Paki's teachings, the following unuhi laula loa was used:

- "Akahai" Meaning kindness to be expressed with tenderness;
- "Lokahi" Meaning unity, to be expressed with harmony;
- "Olu'olu" Meaning agreeable, to be expressed with pleasantness;
- "Ha'aha'a" Meaning humility, to be expressed with modesty;
and
- "Ahonui" Meaning patience, to be expressed with perseverance.



Your Committees believe that these are the true traits of character that express the charm, warmth and sincerity of Hawai'i's people.

In exercising the power vested in the Legislature in fulfillment of their responsibilities, obligations, and service to the people, your Committees believe that the Legislature, Governor and the Governor's executive officers of each department, the justices and judges of the courts of the Judiciary, will strive to reaffirm their commitment to exercising their duties, and that the people of Hawai'i should also reaffirm their commitment to living their lives within the meaning of aloha. In doing so, Hawai'i as a whole will continue to evolve into a much greater place than one that is simply the sum of its parts.

As affirmed by the records of votes of the members of your Committees on Judiciary and Labor and Transportation and International Affairs and Energy and Environment that are attached to this report, your Committees are in accord with the intent and purpose of S.B. No. 1, as amended herein, and recommend that it pass Second Reading in the form attached hereto as S.B. No. 1, S.D. 1, and be placed on the calendar for Third Reading.

Respectfully submitted on
behalf of the members of the
Committees on Judiciary and
Labor and Transportation and
International Affairs and
Energy and Environment,



J. KALANI ENGLISH, Chair



BRIAN T. TANIGUCHI, Chair

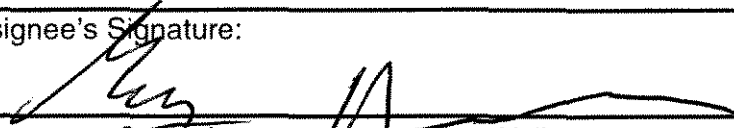


RON MENOR, Chair



The Senate
 Twenty-Fourth Legislature
 State of Hawaii

Record of Votes
Committee on Energy and Environment
ENE

Bill / Resolution No.:* SB1	Committee Referral: JDL/TIA/ENE	Date: 10/25/07		
<input type="checkbox"/> The committee is reconsidering its previous decision on this measure. If so, then the previous decision was to: _____				
The Recommendation is: <input type="checkbox"/> Pass, unamended 2312 <input checked="" type="checkbox"/> Pass, with amendments 2311 <input type="checkbox"/> Hold 2310 <input type="checkbox"/> Recommit 2313				
Members	Aye	Aye (WR)	Nay	Excused
MENOR, Ron (C)		✓		
HOOSER, Gary L. (VC)			✓	
IHARA, Jr., Les		✓		
KOKUBUN, Russell S.			✓	
TRIMBLE, Gordon		✓		
TOTAL		3	2	
Recommendation: <input checked="" type="checkbox"/> Adopted <input type="checkbox"/> Not Adopted				
Chair's or Designee's Signature:				
				
Distribution: Original Yellow Pink File with Committee Report Clerk's Office Drafting Agency				

*Only one measure per Record of Votes