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**TESTIMONY OF THE STATE ATTORNEY GENERAL
SECOND SPECIAL SESSION OF 2007
TWENTY-FOURTH LEGISLATURE**

ON THE FOLLOWING MEASURE:

H.B. NO. 1, RELATING TO TRANSPORTATION.

BEFORE THE:

HOUSE COMMITTEES ON TRANSPORTATION AND FINANCE

DATE: Thursday, October 25, 2007 **TIME:** 9:00 AM

LOCATION: State Capitol, Auditorium

Deliver to: Committee Clerk, Room 027, 1 copy

TESTIFIER(S): Mark J. Bennett, Attorney General

Dear Chairs Souki, Oshiro and Members of the Committees:

I testify in support of H.B. No. 1. H.B. No. 1 represents a reasonable compromise, that both allows the Hawaii Superferry to operate and helps protect Hawaii's environment. Among the provisions in the law are those that require the immediate imposition of conditions on the operations of the Superferry, while reserving to the Legislature the right to impose additional conditions. The bill also requires a complete Environmental Impact Statement, not just an Environmental Assessment, immediately establishes a Task Force to study and report on operations, and has a sunset provision in mid-2009.

The Legislature acting to amend the law in light of a court decision is neither unprecedented nor unusual, and it is fully in line with the role of the Legislature to enact our laws. The Hawaii Supreme Court has interpreted the law as it now reads, but it is the constitutional responsibility of the Legislature to decide if that is how the law should remain for the future.

While some have stated publicly that the bill is unconstitutional, I wholly disagree. A seminal case in point is Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992). In Robertson, a unanimous United States Supreme Court upheld a

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Congressional enactment that had the effect of changing the result of a federal court environmental case involving the spotted owl, logging, and the Endangered Species Act. The Court found that even if a Congressional enactment had the effect of changing a result in a case, it was within the Congress's power to effect such a change by changing the law and changing applicable standards. That is precisely what this bill does. It is wholly forward looking, and thus constitutional.

Moreover, there are many other examples of legislative bodies acting to exempt specific projects or categories from the environmental review process. In 1998, the Legislature passed a law, Haw. Rev. Stat. § 343-6.5, that very simply stated: "The purchase of the assets of the Waiahole water system shall be specifically exempt from the requirements of chapter 343." In 1995, the Legislature adopted Haw. Rev. Stat. § 183B-2 that exempted from Chapter 343 the "reconstruction, restoration, repair, or use of any Hawaiian fishpond" in certain circumstances. There are no doubt other examples in Hawaii's laws.

An example that directly affects Hawaii is Congress's exemption of H3 construction from federal environmental laws. Court decisions had stopped construction of the H3. At the request of Senator Inouye and others, Congress exempted H3 from a number of provisions of law. As hawaiihistory.org describes it: "Hawaii's Senator Inouye removed the last obstacles by winning the project legal exemption from all federal environmental laws."

<http://www.hawaiihistory.com/index.cfm?fuseaction=ig.page&PageID=354>

This law terminated the lawsuits and the project was able to proceed. There are many other examples of similar actions by legislative bodies.

Nor is passing legislation in response to a specific court decision in any way unusual in Hawaii or anywhere else.

Act 58, Session Laws of Hawaii 2007, for example, adopted over the Governor's veto, specifically reversed the decision of the

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Hawaii Supreme Court in United Public Workers, AFSCME, Local 646, AFL-CIO v. Hanneman, 106 Hawaii 359, 105 P.3d 236 (2005) regarding management rights. And in Act 112, Session Laws of Hawaii 2006, the Legislature overruled the decision of the Hawaii Supreme Court in Kienker v. Bauer, 110 Hawaii 97, 129 P.3d 1125 (2006), relating to joint and several liability. This is a common occurrence, and part of the normal constitutional process of the courts interpreting the law as it is written, and the Legislature then determining whether that is the law as it ought to be.

While there is no doubt that opponents of this bill will challenge it, challenges to the Legislature's authority to enact this bill should not succeed.

I also suggest that if amendments to this bill are proposed, section 16 should be amended as follows:

"SECTION 16. Every large capacity ferry vessel company that has the legal right to operate pursuant to section 3 of this Act during the time period this Act is effective, by exercising such right to operate at any time this Act is effective, by such operation releases and waives any and all claims that have accrued or arisen as of the effective date of this Act, for damages or other judicial relief it or any of its agents, successors, and assigns might otherwise have or assert against the State of Hawaii, its agencies, and its officers and employees, in both their official and individual capacities, that have or may have been caused by or are related in any way to:

(1) The need, requirement, preparation, non-preparation, acceptance, or lack of acceptance of or for any environmental assessments or environmental impact statements;
or

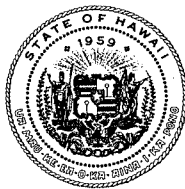
(2) Any judicial action regarding the establishment and operation of the large capacity ferry vessel in the state, and such large capacity ferry vessel company by such operation accepts the obligation to, and thus shall indemnify and defend the State of Hawaii, its agencies, and its officers and employees, in both their official and individual capacities, from

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such claims brought by, through, or under the large capacity ferry vessel company, or any of its agents, successors, and assigns."

This amendment makes clear that the waiver in this section is only as to past and not future claims, and is effective only if the bill works to allow the Superferry to actually operate.

It is the Legislature's role to decide policy in Hawaii. I respectfully suggest that H.B. No. 1 represents good policy and ought to be enacted into law.



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Deputy Directors
MICHAEL D. FORMBY
FRANCIS PAUL KEENO
BRENNON T. MORIOKA
BRIAN H. SEKIGUCHI

IN REPLY REFER TO:

STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

October 25, 2007

TESTIMONY OF THE DEPARTMENT OF TRANSPORTATION

COMMITTEE ON TRANSPORTATION

COMMITTEE ON FINANCE

BILL NUMBER: HOUSE BILL NO.1

TITLE: RELATING TO TRANSPORTATION

DESCRIPTION: Requires the Department of Transportation to perform an environmental impact statement (EIS) for certain improvements made to commercial harbors. Permits operation of large capacity ferry vessel prior to completion of EIS upon meeting certain minimum conditions. Establishes a temporary Hawaii Inter-island Ferry Oversight Task Force.

DEPARTMENT'S POSITION: We support this bill to permit operation of a large capacity ferry vessel while environmental studies are conducted, subject to mitigating conditions imposed on the large ferry vessel during operations.

COMMENTS: The Department of Transportation supports the proposed legislation, which encourages and advances viable ocean-based inter-island transportation alternatives in the State of Hawaii. Historically, inter-island ferry operations in Hawaii have proven unsuccessful due to technological restrictions (vessel/hull/engine design), ocean conditions and an inability to compete with air transportation costs. Large capacity ferry vessels, which accommodate passengers, cars and trucks, operate at high speeds and incorporate state of the art hull designs and engine technology, provide the only feasible alternative to our present air-only inter-island passenger transportation option and are, as such, in the public's interest.

The legislature acknowledged and recognized the viability and importance of this alternative mode of inter-island travel through unanimous support of the large capacity ferry vessel project in 2004 through Senate Resolution 79 and SCR 149.

The Department of Transportation believes it is critical for the Legislature

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to permit the operation of large capacity ferry vessels and the continued construction and use of State of Hawaii harbor infrastructure pending completion of the required environmental review process. Due to the length of time needed to complete an environmental study, there is the likelihood of the loss of the service if operation cannot be allowed to occur in the near future. Use of harbor infrastructure also generates the revenue necessary to support harbor construction and maintenance projects, including but not limited to those harbor infrastructure improvements made to accommodate large capacity ferry vessels.

The legislation proposed provides a basis for establishing reasonable operating conditions, protocols and mitigation measures for large capacity ferry operations pending completion of the formal environmental review and the Department commits to accomplishing the required Environmental Impact Statement consistent with HRS Chapter 343 and the proposed Legislation.

The Department of Transportation is prepared to work with the temporary task force established by the proposed legislation.

Ph# 587-2150

LINDA LINGLE
Governor

#3

SANDRA LEE KUNIMOTO
Chairperson, Board of Agriculture

DUANE K. OKAMOTO
Deputy to the Chairperson



State of Hawaii
DEPARTMENT OF AGRICULTURE
1428 South King Street
Honolulu, Hawaii 96814-2512
Phone: (808) 973-9600 Fax: (808) 973-9613

TESTIMONY OF SANDRA LEE KUNIMOTO
CHAIRPERSON, BOARD OF AGRICULTURE

BEFORE THE HOUSE COMMITTEES ON
TRANSPORTATION AND FINANCE
OCTOBER 25, 2007
9:00 A.M.

HOUSE BILL 1
RELATING TO TRANSPORTATION

Chairpersons Souki and Oshiro and Members of the Committees:

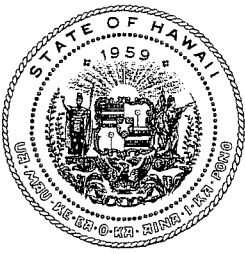
Thank you for the opportunity to testify on House Bill 1 to permit the operation of an inter-island ferry service in the State of Hawaii while an environmental impact statement is being conducted, while at the same time, ensuring that there is adequate protection of the environment. This bill will also establish an oversight task force for the purpose of examining the impact of inter-island ferry operations on the communities, environment, and harbor and other infrastructures. We strongly support this bill.

There is a critical need for more transportation options and improved transportation infrastructure. Unlike other states which have access to rail and trucks, Hawaii is dependent on only two means of moving products into the State and between islands. Hawaii's farmers and ranchers are geographically disadvantaged compared to mainland farmers and ranchers because of the costs and conditions involved in moving agricultural products across the ocean. An additional ferry vessel will provide more transportation capacity for our farmers and ranchers to reach their markets.

The Department has trained the Superferry staff and is confident that their staff will screen appropriately for agricultural commodities. Superferry has set a higher standard for invasive species mitigation measures which is over and above any other transportation carrier currently operating in Hawaii. Even so, we will continue to monitor their operations.

The Hawaii Department of Agriculture (HDOA) continues to work towards strengthening our biosecurity program to assess and mitigate risks of the introduction and spread of invasive species. The United States Department of Agriculture (USDA) and HDOA will collaborate to assess the movement of red imported fire ant and other invasive species from the continental United States to Hawaii. Together, we will be implementing an Agricultural Quarantine Inspection Monitoring (AQIM) pilot project on the maritime pathway. Due to the concerns about inter-island movement, the Department has requested and USDA has agreed to add on the inter-island segments as well. The long term goal is to facilitate risk-based decision-making by both HDOA and USDA using data that identifies risk factors associated with various entry pathways and commodities destined for Hawaii and between the islands. The pilot project will not be conducted on Superferry alone, but on the entire transportation system.

In summary, large capacity inter-island ferry service creates another important option for farmers to transport their products to market. This can open up opportunities for farmers to expand their customer base and explore different modes of distribution.



DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM

#4

LINDA LINGLE
GOVERNOR
THEODORE E. LIU
DIRECTOR
MARK K. ANDERSON
DEPUTY DIRECTOR

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Statement of
THEODORE E. LIU
Director
Department of Business, Economic Development and Tourism
before the

HOUSE COMMITTEE ON TRANSPORTATION and HOUSE COMMITTEE ON FINANCE

Thursday, October 25, 2007
9:00 a.m.
State Capitol Auditorium

in consideration of
HB 1
RELATING TO TRANSPORTATION.

Chair Souki, Chair Oshiro, Vice Chair Nishimoto, Vice Chair Lee and Committee

Members:

The Department of Business, Economic Development, and Tourism (DBEDT) supports the House Bill 1 (HB1) in which the Hawaii State Legislature adopts, clarifies and amends policies providing for continued operation of large capacity inter-island ferry service while any required environmental review and studies are conducted. We support the legislature's explicit finding that the operation of large capacity ferry vessels between Hawai'i's islands is in the public interest.

The department's testimony will focus on the public and private economic benefits that large capacity ferry operations will provide. We defer to other State agencies on specific provisions of the bill that relate to their responsibilities.

In general terms, a steadily growing economy leading to rising wages and a higher quality of life depends, in large part, on improving an economic system's efficiency. Hawaii's economy is unique in that it is comprised of a multitude of islands. Traditionally, there has been less-than-optimum economic integration among the markets of each island. The result is that Hawai'i is not one large market, but a series of small markets. This leads to higher costs, limited markets and lower sales and less income for businesses, service providers and farmers. Reliance on higher-cost air service and longer delivery-time barge service for shipment of goods and products among the islands represents a "friction", the elimination of which will lead to greater economic efficiency. I note that this lack of efficiency is what allows "big box" retailers to compete more effectively against Hawai'i's producers.

Increasing Hawai'i's economic efficiency requires, among other things, improving its infrastructure, including its inter-island transportation infrastructure. The advent of large capacity inter-island ferry service represents such an infrastructure improvement that will lead to the benefits of a steadily growing economy. As HB1 finds, large capacity ferry service "provides a real and innovative alternative to existing modes of transporting people, motor vehicles, and cargo between the islands of the state."

The overriding concern with the lack of large capacity inter-island ferry service as a result of judicial decisions is that several key segments of Hawai'i's economy will not be able to develop in a timely manner that benefits all of our residents. Indeed, for some of Hawai'i's businesses, such as in agriculture, this lack of an alternative mode of transportation may threaten their economic viability. As HB1 notes, rapid and convenient inter-island

transport of goods, vehicles and people will enhance the quality of life for all residents, on all islands.

DBEDT strongly believes that the better economic integration brought about by a high capacity inter-island ferry system will benefit all of the State's residents, but particularly benefit the residents and businesses of the Neighbor Islands. Farmers and food processors State-wide will benefit in many ways as produce and agricultural products only grown on one island will be easily be shipped to restaurants and markets on the other islands in a timely way, while preserving freshness. Similarly, those providing maintenance, repair and construction services can far more easily travel to and from all islands with their vehicles and equipment to provide reliable, cost-effective service to customers around the state. DBEDT believes this will lead to economic benefit for all Hawai'i residents and an improved quality of life as residents and their families enjoy all the parts of our state.

Recently there has been significant focus on issues relating to energy and global climate change. The State's policy is that Hawai'i must do what it can to reduce its dependence on non-renewable energy sources and reduce its greenhouse gas emissions. As HB1 notes, an inter-island ferry will produce fewer carbon emissions than the equivalent airlift carrying cargo and passengers between islands. It provides an efficient and energy conservative mode of travel.

DBEDT also supports the HB1's policy that the operation of a large capacity ferry can support civil defense response and recovery under the unfortunate circumstance of a natural or a man-made disaster, be it a major brush fire, earthquake, tsunami or any number of other possible unfortunate events. A high capacity ferry would allow quick deployment of

equipment, supplies, food, medical support and whatever else might be needed to the distressed area. Large equipment and vehicles such as fire fighting apparatus, hazardous materials handling equipment, electric pole and line restoration trucks and other public safety vehicles could get where needed in hours, instead of the days that it could take with present vessels. A high-capacity ferry could also transport significant numbers of injured or sick people, including those not easily accommodated on an aircraft, away from the disaster scene to appropriate medical facilities on another island.

DBEDT fully recognizes the importance of preserving and advancing Hawaii's natural resources – its unique and beautiful environment. DBEDT also recognizes the fragile nature of our eco-systems. These natural resources are the fundamental basis of Hawaii's quality of life and its economy. As such, DBEDT recognizes that certain requirements may be imposed on a high capacity ferry as a condition of operation. We believe that HB1 strikes the proper balance between allowing a public interest to be served while ensuring that the environment is protected. DBEDT believes that the mechanisms in HB1 – Governor's executive order and the task force's reporting requirements – are sufficient to achieve that proper balance.

Finally, DBEDT will be an active participant on the temporary inter-island ferry oversight task force. One of its goals is to examine the impact of ferry operations on the economy, an issue of great importance to the department. We will provide any support needed by the Department of Transportation in carrying out the responsibilities of the task force and reporting to the Legislature and the Governor.

Thank you for the opportunity to provide this testimony.



HB 1, RELATING TO TRANSPORTATION
House Committees on Transportation and Finance

October 24, 2007

9:00 am

Auditorium

The Office of Hawaiian Affairs (OHA) supports the environmental review process, pursuant to HRS Chapter 343; the Superferry; permitting it to operate while a statutorily prescribed Environmental Impact Statement (EIS) is completed; and ultimately subject to final acceptance by the accepting agency. OHA agrees that protective conditions must be established during the interim, and long term conditions also must be placed on the Superferry and established by the outcome of the EIS, pursuant to HRS Chapter 343. OHA further urges the Legislature, based on OHA's vested interest in State harbors, all of which are on ceded lands, to provide a seat for an OHA representative on the oversight advisory task force established by this measure. Therefore, OHA is supportive, with the above reservations, of HB 1, Relating to Transportation, Second Special Session of 2007.

OHA respectfully reminds the Committees of our responsibilities and integral concerns for our beneficiaries' cultural and natural resources. Our statutory mandates include the following requirements: "To advise and inform federal, state, and county officials about native Hawaiian and Hawaiian programs, and coordinate federal, state, and county activities relating to native Hawaiians and Hawaiians" (Hawaii Revised Statutes, § 10-6(a)(4)), and "Assessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians." (HRS, § 10-3(4)). This bill, as it now stands, would not allow OHA to fulfill its statutory mandates or our beneficiaries a legitimate opportunity to provide their knowledge, expertise and wisdom to any element of the ferry's continued existence.

Hawai'i's environmental review process strives to create a balanced decision-making arena for developers and managing agencies: balancing development/economic needs with environmental/health needs. This balanced approach, with ample public participation, provides government agencies with the ability to make informed decisions about a proposed project, and how to balance that project with environmental protection.

To the contrary, this bill would allow that both during and after the completion of the bill's tailored EIS, arguably in perpetuity, the ferry may run, any agreement may be made by the ferry and a State agency, and harbor improvements may be constructed and used, with no public or agency review. Thus, OHA would have no chance to analyze and assess the actions and impacts of these State agencies and the ferry on Native Hawaiians, Hawaiian culture, or our submerged, ceded lands.

This bill would create a free ride for the ferry and for the Administration. It is creating a new form of governmental exemption for this project and creating both legislative and administrative immunity. In so doing, it is also preventing OHA from fulfilling its Constitutional and statutory mandates.

Furthermore, because the bill allows its provisions and the Governor's conditions to apply both during the environmental review and after the review's completion, the Legislature is calling for an EIS that it tailors – which does not even include a Cultural Impact Assessment, and in the same document the Legislature is stating that it is irrelevant whether or not that EIS is completed or accepted as a legitimate document. Thus, the bill is nullifying, from the outset, the very document that it is ostensibly calling for.

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Instead, the ferry company simply must agree to comply with conditions set by a Governor's Executive Order, the contents of which are not even included in the proposed legislation. Thus, the public and OHA are asked to rely on the administration's environmental conditions for the ferry. This is the same administration that continues to state that no further environmental review or analysis is required by the Department of Transportation or the Superferry. Neither OHA nor the public would have a chance to analyze or review that Executive Order. The State's environmental law is completely bypassed.

Not only Chapter 343 is avoided, however. Per this bill, the Superferry and Department of Transportation's actions are exempt from any further public or OHA scrutiny, even at the county level, because "[t]he construction, use, or operation of any facilities or improvements authorized by any agreement between a large capacity ferry vessel company and a state department, board, commission or agency shall not be subject to or require any county permits or approvals." (Part II, Section 3, subsection 6). Also, the bill gives the governor full authority to bind the ferry without following standard Administrative Procedures, thus taking every decision out of the public domain. (See Part II, Section 4, subsection a:

As a condition precedent to the rights conferred by section 3 of this Act, the governor shall impose, by means of executive order, and without regard to chapter 92, Hawaii Revised Statutes, or any other provision of law, conditions and protocols on a large capacity ferry vessel company's inter-island operations to mitigate significant environmental effects that the governor determines, in the governor's judgment, are likely to be caused by such inter-island operations.

The governor, and only the governor "shall notify the legislature of any conditions or protocols established, including the entities consulted within ten days of establishing the conditions of the protocol." (Part II, Section 4, subsection a). Therefore, the public never has a chance for review or input on the only conditions that will ever apply to any inter-island ferries or the infrastructure that supports and enables them.

Please note that all of the existing and potential harbor improvements are on State, ceded, public trust lands. Thus, major impacts on those lands should require legitimate and complete environmental and cultural review review. Equally, any oversight task force must include an OHA representative.

OHA commends the Legislature's exceptional effort to hear public testimony on this measure on Kaua'i, Maui, and Hawai'i Island. We hope that the Legislature will agree that such public input is invaluable in the assessment of such large scale projects with such large scale impacts on our islands, as has been understood and expressed in Hawai'i's environmental and cultural review process.

Thus, while OHA supports the Superferry and permitting it to operate while an Environmental Impact Statement (EIS) is completed, we urge that the EIS be prepared and accepted pursuant to existing HRS Chapter 343, that protective conditions established during the interim should not just be provided by the Governor, with long term conditions to be placed on the Superferry that are established by the outcome of the EIS, again pursuant to HRS Chapter 343. OHA further finds that the Legislature, based on OHA's vested interest in the use of the State harbors, all of which are on ceded lands, should provide a seat for an OHA representative on the oversight advisory task force established by this measure.

Thank you for the opportunity to testify, and for taking our concerns into account.

Deputy Ronald
Mun
594-1756

October 24, 2007

Representative Joseph M. Souki
Chair, Committee on Transportation
Representative Marcus R. Oshiro
Chair, Committee on Finance
Hawaii State Capitol
415 S. Beretania Street
Honolulu, Hawaii 96813

Re: Second Special Session of 2007 H.B. 1 Relating to Transportation

Dear Chairs Souki and Oshiro and Members of the Committees on Transportation and Finance:

Hawaii Superferry, Inc. appreciates the extraordinary efforts of the State of Hawaii legislature to address the unique situation that we face today.

Over the past three years, the vision of a passenger and vehicle ferry service has garnered the strong support of state and federal officials, the investment community and most importantly the vast majority of people of this state. Alakai's arrival in Honolulu harbor on June 30, 2007 made the Hawaii Superferry vision a reality and signaled the beginning of a new era in interisland transportation for our state.

The finding by the Supreme Court of the State of Hawaii on August 23, 2007 overturned an earlier decision by Maui Circuit Judge Cardoza which upheld the Department of Transportation's determination that an exemption from the need to do an EA was proper. These decisions were relied upon by Hawaii Superferry, its investors and state and federal officials in proceeding with this project. Hawaii Superferry has consistently complied with all requirements.

Hawaii Superferry accepts the decision of the Supreme Court. However, we cannot live with the uncertainties or the time-delay that it presents without the relief that is before you today for your consideration. Given the extensive process involved in doing an environmental impact statement, which is set out in detail in the bill, it is likely to take a year or more to complete the process. Hawaii Superferry has demonstrated a strong

Representative Joseph M. Souki
Representative Marcus R. Oshiro
October 24, 2007
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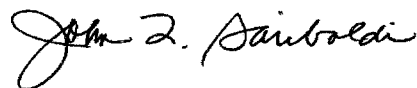
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commitment to Hawaii, but no business can stop operations for such a long time and survive.

As we have shown since the early days of the interisland ferry concept, Hawaii Superferry is committed to planning, implementing and executing operations that will address environment and community concerns such as whale avoidance, invasive species and traffic, among others. Our efforts were recognized by Judge Cardoza during the recent 22 day hearing as a "tremendous amount of work that has been done in this area." Although other carriers are having these impacts, no one else is doing now what we are prepared and committed to do.

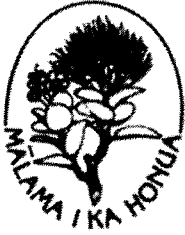
We believe that the bill before you is a reasonable and balanced solution that will give Hawaii Superferry and its 308 employees an opportunity to demonstrate the benefits we and many others believe it can provide. We are prepared to resume operations within 7 to 10 days following the passage of this bill, creating an opportunity for the people of Hawaii to enjoy and benefit from a proven transportation alternative. With clarifying language proposed by the Attorney General, Hawaii Superferry urges the committees to pass this bill. Thank you for this opportunity to testify.

Respectfully submitted,



John L. Garibaldi
President and Chief Executive Officer

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Sierra Club Hawai'i Chapter

PO Box 2577, Honolulu, HI 96803
808.538.6616 hawaii.chapter@sierraclub.org

**HOUSE COMMITTEE ON TRANSPORTATION
HOUSE COMMITTEE ON FINANCE**
October 25th, 2007, 9:00 A.M.

**TESTIMONY IN STRONG OPPOSITION TO DRAFT HOUSE MEASURE
ALLOWING OPERATION OF SUPERFERRY BEFORE COMPLETION OF COURT-
ORDERED ENVIRONMENTAL REVIEW**

Chairs Souki and Oshiro and members of the Committees:

The Sierra Club, Hawai'i Chapter, with over 5500 dues paying members statewide, is strongly opposed to the draft measure that would allow the Superferry to begin operations prior to completion of the required environmental review. The measure before you is unfair, sets a dangerous precedent, damages Hawaii's three-decade old environmental protection act, and may expose Hawaii's fragile environment to irreparable harms.

As was demonstrated at public hearings on the neighbor islands this week, Hawai'i residents have significant concerns not only about the environmental impact of the Superferry, but also the decision process—both by the Superferry and the Lingle Administration—involving this new transportation mode. The bill being considered today does nothing to address those concerns; rather, passage of the bill would likely further inflame the situation.

The driving force behind this special session is the threat that Superferry will leave the state unless they are given a special privilege to begin operation before complying with Hawaii's keystone environmental law. We hope this threat does not compel you. The Superferry venture is backed by significant wealth. They have threatened to leave before when confronted with the prospect of environmental review. In fact, approximately two years ago they testified before a Senate committee that they may leave if a bill to require an environmental impact statement were passed. We ask Committee members to remember that Superferry is not the "victim" in this case—Superferry, with the aid of the Lingle Administration, knowingly disregarded our environmental law. What is needed now is a little patience while the environmental review is completed and proper mitigation put into place.

While many support interisland ferry service, most want to be sure our environment and communities are properly protected—that's why your predecessors enacted our environmental review law. Hawaii's unique environment and deep community values demand that sustainability be put before mere expediency. Further discussion of these issues follow.

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State policy – particularly policies regarding sustainability – should be prospective and not reactive for a single beneficiary.

Hawaii's Environmental Protection Act was passed over three decades ago by legislators with the foresight to recognize the need for proactive planning to protect communities and increase sustainability. It has served Hawaii's environment and communities well – when it is followed. When a company chooses to ignore the environmental review law, they must go back and comply with its requirements before their proposed project can begin. Violators must change their actions to comport with our laws; we should not change our laws to comport with their behavior.

Changing the rules of the game midstream is not only a poor basis for public policy, it is unfair to plaintiffs who successfully upheld Hawaii's law. The fact of the matter is the Sierra Club has been seeking resolution to this issue for years. It is unfortunate that Superferry and the Lingle Administration didn't complete an environmental review of Superferry years ago as required by law. It was three years ago (2004) that the Sierra Club asked Superferry and the Lingle Administration to complete an environmental review of the Superferry. Two years ago, the Sierra Club filed suit with co-plaintiffs Maui Tomorrow and Kahului Harbor Coalition, asking that they comply with the law. Unknown environmental and public safety risks, concerned neighbor island communities, and a clear reading of the law demanded it. The review would have occurred while other planning proceeded.

Amending state law for a single beneficiary is unfair and sets a dangerous precedent.

Hawai'i has had its environmental review law for nearly 30 years. It is a process that has been tested time and time again—and it works. Because of the law, Hawai'i is better planned, cleaner, and more beautiful. Opening up the statute to manipulate it for a particular outcome is bad policy. It sets a bad example of the malleability of our state laws. If the legislature carves out a unique exemption for Superferry, other businesses may also be inclined to "roll the dice" and flout Hawaii's laws, only to later seek a statutory exemption if they are taken to task. Similarly, other businesses or agencies may seek exemptions from other statutes with the precedent set through this bill. Such requests may place a greater burden on the legislature as they reexamine the merits of each statute as it applies to each unique business interest. Companies who wish to do business in Hawai'i need to conform their conduct to our laws; we shouldn't conform our laws to their conduct.

What type of message does this send to companies who played by the rules and satisfied the requirements of Hawaii's environmental law? That some businesses are more deserving of special treatment?

The intent of our environmental review law is quite clear—to ask tough questions and disclose impacts of actions using state land or money. Fear of losing a business interest because they are unwilling to comply with state environmental laws in a timely manner is poor basis for a policy decision.

The Superferry has significant environmental impacts that must be disclosed and addressed before operations begin.

The unintended consequences of not complying with our environmental review law could be great. The spread of certain invasive species – which Superferry may facilitate – may dramatically reduce the ability of some native species to survive. The recently retired Superintendent of Haleakala National Park, Donald Reese, wrote in a February 2005 letter: “Some current special concerns for interisland transport relevant to Haleakala National Park include little fire ant (*Wasmannia auropunctata*), nettle caterpillar (*Darnap pallivitta*), glassy-winged sharpshooter (*Homolodisca coagulata*), Himalayan raspberry (*Rubus ellipticus*), Malabar melastome (*Melastoma candidum*) and fountain grass (*Pennisetum setaceum*). These are just a few of many species already present on other islands that NPS is concerned about.” He went on: “Because the Superferry may have serious impacts to Haleakala National Park and numerous endangered species, the National Park Service requests that an Environmental Impact Statement be prepared for this project.”

The high-speed vessel operation itself may pose a threat to the marine mammals. Traveling at 25 knots through known whale calving areas may make riders sick in more ways than one. Chris Yates, head of NOAA's Protected Resources Division in the Islands, has said that it is the high-speed collisions that appear to cause the most damage. "There are studies that show that the speed of the vessel makes a big difference in the severity of the injury," Yates said. Environmental reviews are used to fix problems before they occur. They don't just look at wildlife but at social consequences such as unbearable traffic, curtailment of traditional Hawaiian activities, and costly freight increases to small businesses. What are the best ways to minimize harm to Hawaii's unique environment and communities? That's what we'll learn with an environmental review. Ultimately, the review process produces a better outcome for all involved, island-style.

Further, Superferry may add significantly to Hawaii's greenhouse gas emissions. Initial analyses of publicly available data suggests that due to the Superferry's design, propulsion choice, and high speed, the Superferry's fuel efficiency per passenger is approximately 14 passenger miles per gallon of fuel consumed – worse per passenger efficiency than a Hummer. Moving hundreds of vehicles inter-island this way is energy intensive. Additionally, if Superferry simply augments existing modes of inter-island transit—instead of supplanting them—overall greenhouse gas emissions will increase. With the recent urgent attention on global climate change and its effects on Hawai'i, legislators may want to think twice about whether this is the best technology option for Hawaii's future.

Our environmental review law provides a proper democratic forum for sound decision making on expending public funds when significant environmental impact may occur.

The environmental review process allows for comment periods where the public can give feedback on proposals and help guide the process. It also allows for contested case hearings when a citizen believes that impacts have not been adequately disclosed. Through the process, a determination is made as to whether or not significant adverse environmental impacts will occur, and if so, how they can be mitigated or avoided. The environmental review

process provides for an examination of alternatives to the proposed action. The public participation process benefits both the company or agency proposing a project and society as a whole because cooperation and coordination are encouraged and issues that may be of concern are articulated early—before it is too late and the project is underway.

The surprising level of protest on Kaua`i (in which the Sierra Club played no role) surely reflects the deep sense of injustice many neighbor islanders feel toward the Superferry – contempt that has been irresponsibly inflamed by their proceeding in open disregard of the law. This is why the public review process is so important in the first place: to involve the affected communities, to understand the environmental tradeoffs, to separate fact from fiction, and to protect the environment against unintended consequences.

Given Hawaii's fragile island environments and deep community values, compliance with our environmental laws is in everyone's best interest.

Hawaii's environmental review law has effectively served Hawaii's environment and its residents for over thirty years.

The intent behind HRS Chapter 343, Hawaii's Environmental Impact Statement statute ("HEPA"), is clear and broad:

*§343-1 Findings and purpose. The legislature finds that the quality of humanity's environment is critical to humanity's well being, that humanity's activities have broad and profound effects upon the interrelations of all components of the environment, and that an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions. **The legislature further finds that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.** It is the purpose of this chapter to establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations.* (emphasis added)

The lawmakers who enacted HEPA (which was a parallel to the National Environmental Policy Act) had the foresight to provide a mechanism to disclose environmental, economic, and social impacts of government actions. The purpose of the environmental review law was to ensure adequate disclosure of impacts from activities using state funds or land. The law provides for comments from the public and serves as a tool for decision makers to use in selecting the optimal choice for public resources. Public oversight of public resources is essential in a democracy. It provides for checks and balances between government and the public at large. HEPA ensures some form of accountability of our agencies—if they plan to take action that may diminish the quality of life or adversely impact the environment that everyone shares, HEPA discloses those impacts before they occur. Without such a disclosure, the state would blindly take actions without knowing what the future costs or

benefits would be. The Superferry and Department of Transportation, likewise, need to be accountable for their actions. The essence of our environmental review process is used to understand and fix problems *before they occur*.

The Hawaii Environmental Protection Act is clear; Superferry was not “singled out” for an environmental review.

Most airlines and interisland shipping traffic were operating prior to enactment of the Hawaii Environmental Protection Act in 1974. Still, many of the harbor and airport projects since then have triggered the state environmental review process. As the *Honolulu Advertiser's* Sunday, September 9, 2007, front page headline read, “Hawaii ferry not 'singled out' for review.” The *Advertiser* article examined dozens of recent harbor and airport projects and found that a number completed the environmental review process. They wrote: “state records also show a number of recent harbor projects for Matson, Young Brothers, American Hawaii Cruises and other users that did undergo environmental assessment. These include \$6.5 million in improvements to allow two cruise ships to dock at the same time at Nawiliwili Harbor, and Matson's installation of a mooring dolphin at Kahului Harbor's Pier 1C at a cost of \$980,000.”

Still, the Superferry is qualitatively different than existing modes of transportation. It travels at high-speed (up to 40 knots) and carries hundreds of private vehicles and trucks daily, creating challenges beyond what is currently operating. As the Supreme Court stated in their unanimous decision, “the Superferry presents particular risks that are not borne by the existing methods of transportation...” Judge Joseph Cardoza said that the Superferry is a new type of technology and a new chapter in interisland transportation.

The environmental review process is a routine procedure. Responsible companies and State and Federal agencies complete reviews all the time. The Department of Transportation (DOT) has completed numerous such reviews in the past year. New roads, harbor improvements, airport upgrades: they all go through the process. As University of Hawai'i law professor Jon Van Dyke, an expert on environmental and maritime law, stated in the September 16, 2007, *Honolulu Star-Bulletin*, “[The environmental review process] is a well-established procedure that's now done all over the world. So the idea that you would try to leapfrog over this logical and important requirement is to me a little bizarre.”

Yes, the review process can be messy because you have to deal with real science – not soundbites and promises – and real public input. Superferry would actually have to respond to questions in writing and publish the answers. Yes, it takes a few months to complete. But the resulting document provides clear answers on the adverse impacts to be expected – and how best to prepare for them.

Hawai'i enjoys the most beautiful environment in the world. The legislature would be wise not to manipulate Hawai'i's environmental review law to achieve a particular outcome for a single entity. Future generations are counting on your wisdom and patience in preserving our laws that protect our environment.

Mahalo for the opportunity to testify.