

THIRD DAY

Friday, October 26, 2007

The House of Representatives of the Twenty-Fourth Legislature of the State of Hawaii, Second Special Session of 2007, convened at 3:06 o'clock p.m., with Temporary Chair B. Oshiro presiding.

The invocation was delivered by Representative Karl Rhoads, after which the Roll was called showing all members present with the exception of Representatives Cabanilla, Chang, Marumoto, M. Oshiro, Saiki, Shimabukuro, Takai Takamine and Takumi, who were excused.

By unanimous consent, reading and approval of the Journal of the House of Representatives of the Second Day of the Second Special Session was deferred.

INTRODUCTIONS

The following introductions were made to the members of the House:

Representative Thielen introduced Ms. Kat Brady and Mr. Henry Curtis of Life of the Land, and Mr. Jeff Mikulina of the Sierra Club.

Representative Rhoads introduced Mr. Josh Cooper.

At 3:11 o'clock p.m., the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 3:58 o'clock p.m.

ORDER OF THE DAY

SUSPENSION OF RULES

On motion by Representative Caldwell seconded by Representative Thielen and carried, the rules were suspended for the purpose of considering certain bills on Third Reading on the basis of a modified consent calendar. (Representatives Cabanilla, Chang, Marumoto, Pine, Saiki, Takai and Takumi were excused.)

THIRD READING

H.B. No. 2:

Representative Caldwell moved that H.B. No. 2 pass Third Reading, seconded by Representative Say.

Representative McKelvey rose in support of the measure, stating:

"Mr. Speaker, I am in strong support."

Representative Har rose in support of the measure and asked that her written remarks be inserted in the Journal, and the Chair "so ordered."

Representative Har's written remarks are as follows:

"Mr. Speaker, I stand in strong support of HB 2, Relating to Sentencing.

"Mr. Speaker, I support this legislation because it will amend Hawaii's extended term sentencing statutes to ensure that the procedures used to impose extended terms of imprisonment comply with the requirements set forth by the United States Supreme Court and Hawaii Supreme Court.

"Mr. Speaker, I agree with the Office of the Attorney General in that there is a compelling need to amend Hawaii's extended sentencing statutes by making amendments to the procedures used to impose extended terms of imprisonment. I adamantly support extended sentencing because extended terms are necessary for the protection of the public by keeping those who commit monstrous and horrific crimes off the streets.

"Mr. Speaker, this measure will not only correct the enhanced sentencing law, but will ensure that criminals who commit heinous crimes stay off the streets of Hawaii's neighborhoods. This bill, therefore, provides protection to all of our citizens.

"Thank you, Mr. Speaker."

Representative Waters rose to speak in support of the measure, stating:

"Thank you, Mr. Speaker. In support. Special Session is an extraordinary undertaking. The problem presented to us as a result of a recent Hawaii Supreme Court decision is an extraordinary problem. Thankfully we have an opportunity to address the problem today.

"The Hawaii Supreme Court recently struck down, invalidated, found unconstitutional, our extended sentencing law. They struck it down because Hawaii law did not expressly provide that a jury determine the facts that enhance a convicted felon's sentence. As a result, no convicted felon can receive an enhanced sentence, and possibly all extended sentences imposed since 2001 can be set aside. That is the extraordinary problem.

"I want to remind you that this only applies to convicted felons. A jury, instead of a judge, will determine if an extended term is necessary for the protection of the public. It applies when a convicted felon has two or more felony convictions; or is dangerous; or makes a living as a criminal; or is a multiple offender; or commits crimes against elderly, children or the disabled. Usually this applies to the worst of the worst; the badest of the bad.

"All testifiers agreed that the Legislature must address this problem. This is a balanced measure and an important piece of legislation. Thank you."

Representative Souki rose to speak in support of the measure with reservations, stating:

"Yes, Mr. Speaker. I was going to vote no, but since the Chairman made such a great speech, I will vote with reservations. I would vote yes, but I feel compelled that on principal, I need to vote with reservations, Mr. Speaker.

"I would like to say something for the record. The previous Chairman mentioned two felonies, but you know that those two felonies could be the \$200 or \$300 felonies. If you steal something that is \$300, it becomes a Class C felony. If you steal something that is \$600, you may qualify for this then. Let's hope that some zealous judge who might look at something like this would then look to the more heinous crimes. But there is always the possibility with human nature being what it is, a vindictive judge may do these things. So that is my concern.

"We need to sometimes, temper ourselves relative to the crimes that go on here. Look around, and look at yourself introspectively, as to the sentencing. My recommendation to the Chair is that, if you could, this coming Session, look into possibly making some penal changes. Maybe a taskforce to look at the penal system and the crimes, and maybe re-do the whole thing. I think the time has really come for that. So, if you could Mr. Chairman. Thank you, Mr. Speaker."

Representative Yamane rose to speak in support of the measure, stating:

"Thank you, Mr. Speaker. I am standing in support. I was also moved by the comments made by the Judiciary Chair and I would like his words to be inserted as my own.

"On some of the comments, I would like to highlight that in the Attorney General's testimony, he gave examples of some of the people that the enhanced sentencing would pertain to. One of them is an individual known as the 'Mililani Rapist'. This perpetrator kidnapped five young girls in the Mililani area and subjected them to sexual touching and sexual penetration. These are the kinds of people that we need off our streets for the protection of our elderly and our young children and families. So, Mr. Speaker, again, I stand in strong support. Thank you."

Representative Evans rose to speak in support of the measure, stating:

"Thank you. I stand in support. I just want to say for the record, because being the Chair of Public Safety, that when we pass laws like this which I think is really protecting the public, that we are also saying that enhanced sentences is something we support. So it could be that we are sending a strong message. My good colleague from Maui pointed out that some of those felonies could be theft felonies, and what rises to a certain level of felony may cause it to be considered for an enhanced sentence. I just want to point out like I did last year that when we look at these bills, we have to look at the impact on our system and our facilities, and support the Department of Public Safety in providing appropriations. Thank you."

Representative Belatti rose to speak in support of the measure with reservations, stating:

"Thank you, Mr. Speaker. I rise in strong support of extended term sentencing and have just one reservation, and I would like to submit comments for the Journal. Thank you."

Representative Belatti's written remarks are as follows:

"I support House Bill No. 2, Relating to Sentencing, and our extended term sentencing laws insofar as this measure is not in violation of constitutional principles. Having been informed that the Office of the Public Defender objects to the retroactivity provision in this measure, I am concerned that by not amending the retroactivity provision, we may be enacting a law in contravention to the U.S. Constitutional provision that "no State shall pass any ex post facto law.""

Representative Ward rose to speak in support of the measure, stating:

"Mr. Speaker, I rise to say thank you to an alert Attorney General for bringing this to our attention, which just happens to be when we're in our Special Session number two. Yes, I am in support."

Representative Finnegan rose to speak in support of the measure, stating:

"Thank you, Mr. Speaker. I am in strong support and would like to give short comments on the floor. Thank you.

"This is an important issue, a very important issue, to our communities, and I just wanted to thank the Judiciary Chair for his hard work. It is very difficult to move legislation during a Special Session, and it took a lot of work to work with both the Administration, as well as the Senate."

Representative Sonson rose to speak in support of the measure, stating:

"Thank you very much. In strong support. Since we're giving kudos, I think the real kudos really belong to the Public Defender's Office. They found that since 2000, and they fought in trying to change the statute insisting that we have a flawed statute. Now finally in 2007, the Supreme Court of the United States agreed with the Public Defenders, and so we should actually thank them so much for their strong resolve that we needed to make this change. And of course, thank you to the Judiciary Chair for this legislation before us. Thank you."

At 4:07 o'clock p.m., the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 4:07 o'clock p.m.

The motion was put to vote by the Chair and carried, and H.B. No. 2, entitled: "A BILL FOR AN ACT RELATING TO SENTENCING," passed Third Reading by a vote of 44 ayes to 1 no, with Representative Bertram voting no, and with Representatives Cabanilla, Chang, Marumoto, Saiki, Takai and Takumi being excused.

At 4:07 o'clock p.m., the Chair noted that H.B. No. 1 passed Third Reading.

H.B. No. 1:

Representative Caldwell moved that H.B. No. 1 pass Third Reading, seconded by Representative Say.

At this time, Representative Morita offered Floor Amendment No. 1, amending H.B. No. 1, as follows:

SECTION 1. House Bill No. 1 is amended by amending section 1 as follows:

1. Page 1: By amending lines 2 through 10 to read as follows:

"SECTION 1. (a) The Hawaii supreme court has determined in *Sierra Club v. Department of Transportation*, No. 27407, (August 31, 2007) that chapter 343, Hawaii Revised Statutes, requires that an environmental assessment be performed with respect to certain improvements at Kahului harbor intended for and to be used by ~~[a large capacity ferry vessel company]~~ the Hawaii SuperFerry to provide inter-island ferry service between the islands of Oahu, Maui, Kauai, and Hawaii, using harbor facilities on each island, and that the environmental assessment must ~~[take into account]~~ consider the secondary ~~[effects]~~ impacts of the environment that may result from the use of the Hawaii SuperFerry in conjunction with the use of the Kahului harbor improvements."

2. Page 1: By deleting lines 11 through 18.

3. Page 2: By deleting lines 1 through 4.

4. Page 2, line 5: By deleting the word "further".

5. Page 2, line 8: By deleting the word "is" and inserting "may be".

6. Page 2, line 9: By deleting "a real and" and inserting "an".

7. Page 2: By deleting lines 11 through 21.

8. Page 3: By deleting lines 1 through 2.

9. Page 3, by amending lines 3 through 8 to read as follows:

"The legislature also finds that ~~[it is clearly in the public interest that]~~ a large capacity ferry vessel service ~~[should]~~ may commence [as soon as possible] without the benefit of full environmental disclosure as required by section 343-1, Hawaii Revised Statutes, et. seq., provided that it shall comply with all conditions contained in section 4, prior to the commencement of the operations of a large capacity ferry vessel, and that harbor improvements continue to be constructed and be allowed to be used, while any environmental studies, including any environmental assessments or environmental impact statements, are conducted."

10. Page 3: By deleting lines 9 through 18.

11. Page 3: By deleting the "." on line 20 and deleting lines 21 through 22.

12. Page 4: By deleting lines 1 through 4.

13. Page 4, line 5: By deleting "(2)" and the word "The" and inserting "the".

14. Page 4, lines 14 through 15: By deleting "new policy, and further clarifies and amends existing law," and inserting "permitting procedure".

15. Page 4, line 16: By deleting "to provide that,".

16. Page 4, lines 17 through 18: By deleting "any required environmental review and studies, including environmental assessments or" and inserting the word "an" following the word "which"; and by deleting "statements," and inserting the word "statement" following the word "impact".

17. Page 4, line 19: By deleting "are" and inserting "is"; and by deleting ", and also following their completion:" and inserting "and approved by an accepting agency to provide that:"

18. Page 5, line 2: By deleting ";" and inserting: "as contained in section 4;".

19. Page 5, line 16: By deleting "barred, delayed".

20. Page 5, line 17: By deleting ", or interfered with paragraphs (1) through (3)." and inserting "and barred the operation of a large capacity ferry vessel."

21. Page 5, line 18: By deleting "and amends existing law" and inserting "the conditions a large capacity ferry may operate".

22. Page 8, line 5: By deleting "governor by executive order." and inserting "legislature through the certificate of public convenience and necessity regulated by the public utilities commission."

23. Page 8, lines 6 through 9: By deleting "amend all relevant existing laws to" and "any environmental review and studies, including environmental assessments or environmental impact statements, are" and inserting "a process" following the word "provide" and "an environmental impact statement is" following the word "while".

24. Page 8, line 10: By deleting the word "their" and inserting "its".

SECTION 2. House Bill No. 1 is amended by amending section 3 as follows:

1. Page 9, line 21: By deleting ", 269, 271G,".

2. Page 10, line 14: By inserting "this Act and conditions stated herein including" following "subject to".

3. Page 10, line 18: By deleting ";" and inserting "that shall be consistent with section 4;" following the word "facilities".

4. Page 11, line 6: By deleting "," following "entities" and inserting "that are not inconsistent with this Act and conditions contained herein, regardless of".

5. Page 11, lines 15: By deleting the semicolon at the end of the sentence.

6. Page 11, line 16: By deleting "(5)" and "A" and inserting "as defined under chapters 269 and 271G, Hawaii Revised Statutes; provided that a".

7. Page 11, line 21: By deleting "(6)" and inserting "(5)".

8. Page 12, line 9: By deleting the period following "same" and inserting "; provided that the large capacity ferry vessel shall agree to and accept in writing the conditions stated herein".

SECTION 3. House Bill No. 1 is amended by amending section 4 as follows:

1. By amending subsections (a) and (b) to read as follows:

"(a) As a condition precedent to the rights conferred by section 3 of this Act, ~~[the governor shall impose,]~~ any large capacity ferry vessel company seeking to operate pursuant to this Act shall comply with the following conditions that shall be part of the certificate of public convenience and necessity:

(1) Regarding marine mammals:

(A) Apply with the National Oceanic and Atmospheric Administration for an incidental-take permit;

(B) Request an observer from the National Marine Fisheries Service, a division of the National Oceanic and Atmospheric Administration, on the deck of its vessels at all times when traveling through the Hawaiian Islands Humpback Whale National Marine Sanctuary; and

(C) When traveling in waters less than two hundred fathoms in depth, operate at speeds less than thirteen knots;

(2) Regarding invasive species:

(A) Post signage and notify passengers beforehand of all bans, inspections, and check-in procedures and deadlines;

(B) Post signage and notify passengers beforehand of all bans such as the ban on the transport of fishing gill nets and fishing nets for commercial use, or of rocks, soil, dirt, or sand without a permit from the appropriate government agency. For the purposes of this paragraph, "soil" or "dirt" shall exclude soil or dirt in potted plants inspected and cleared for transport by the department of agriculture;

(C) Require 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;

(D) Promptly notify the appropriate governmental agency regarding any violation or potential violation of invasive species, agricultural, conservation, or other laws; and

(E) Conduct thorough undercarriage cleaning of all vehicles during embarkation at all ports to help dislodge seeds, insects, and animals. Undercarriage cleaning systems may employ an air, vacuum, brush, or liquid cleaning mechanism and shall include appropriate debris traps and filters.

Prior to the commencement of operations by a large capacity ferry vessel company pursuant to the right to operate conferred by section 3 of this Act, the public utilities commission shall notify the legislature of all conditions or protocols established pursuant to this subsection, including the entities consulted in establishing the conditions or protocols.

(b) Any large capacity ferry vessel company authorized to operate pursuant to this Act shall execute an agreement with the State, in a form acceptable to the attorney general, by which the large capacity ferry vessel company shall expressly agree to abide by any conditions or protocols established pursuant to this section.

(c) The public utilities commission may add conditions and protocols established under this section on a large capacity ferry vessel company's inter-island operations prior to the completion of an environmental impact statement to ensure the reasonable, efficient, and expedient application of environmental protection measures set forth in this section.

The public utilities commission, by means of ~~an executive order,~~ conditions to the certificate of public convenience and necessity, and without regard to chapter 91, Hawaii Revised Statutes, or any other provision of law~~;~~ may impose additional conditions and protocols on a large capacity ferry vessel company's inter-island operations to mitigate significant environmental effects that the ~~[governor]~~ public utilities commission determines~~[in the governor's judgment,~~ are likely to be caused by such inter-island operations.

In making such determinations, the ~~[governor]~~ public utilities commission shall consider the effects such operations may have on:

- (1) Ocean life and marine animals and plants, including a whale avoidance policy and procedures;
- (2) Water resources and quality;
- (3) Harbor infrastructure;
- (4) Vehicular traffic;
- (5) Public safety and security;
- (6) Controlling the spread of invasive species;
- (7) Cultural resources, including hunting, fishing, and native Hawaiian resources;
- (8) Economic consequences and impact; and
- (9) Any other natural resource or community concern the ~~[governor]~~ public utilities commission deems appropriate.

The governor ~~[shall also]~~ by executive order, may consider establishing conditions and protocols such as requiring department of agriculture inspectors and department of land and natural resources conservation and resources enforcement personnel on each inter-island voyage conducted by a large capacity ferry vessel company, as the governor deems necessary and appropriate. The governor shall notify the legislature of any conditions or protocols established, including the entities consulted, within ten days of establishing the condition or protocol.

The governor shall also review and determine the efficacy and appropriateness of all conditions or protocols established pursuant to this section and report to the legislature at the end of each fiscal quarter of the State on the efficacy and appropriateness of all conditions or protocols established pursuant to this section and the costs incurred by the State in establishing and maintaining the enforcement activities required under this section.

~~[(b) Any large capacity ferry vessel company authorized to operate pursuant to this Act shall agree to abide by any conditions or protocols established by the governor pursuant to this Act as a condition precedent to commencing its operations authorized under this Act, in a form satisfactory to the attorney general.]~~

2. By amending subsection (c) to read as follows:

"~~(c)~~ (d) The legislature reserves the sole right to:

- (1) Review the adequacy of any conditions or protocols imposed by the ~~[governor]~~ public utilities commission under this Act; and
- (2) Impose, by law, any other conditions or protocols it deems necessary and appropriate to further protect the state's environment or communities, or both, in addition to any conditions or protocols imposed ~~[by the governor]~~ under this Act."

SECTION 4. House Bill No. 1 is amended by amending section 7 as follows:

1. Page 15, lines 11 through 12: By deleting "any program or project that is proposed or completed by the department and covered by this part." and inserting "the operations of a large capacity ferry vessel."

2. Page 15, lines 20 through 22: By deleting "any department, office, board, or commission of the state or county government which is a part of the executive branch of that government." and inserting "the public utilities commission."

3. Page 16: By deleting line 16.

SECTION 5. House Bill No. 1 is amended by amending section 8 as follows:

1. Page 19, line 6: By deleting "department of transportation" and inserting "operator of a large capacity ferry vessel".

2. Page 19, lines 7 through 13: By deleting "for the improvements made or to be made to commercial harbors throughout the state that require the expenditure of public funds to accommodate the use thereof by a large capacity ferry vessel company and the secondary effects of those operations on the state's environment, including the operation of the large capacity ferry vessel company." and inserting "." following the word "statement".

SECTION 6. House Bill No. 1 is amended by amending section 9 as follows:

1. Page 19, line 15: By deleting "department" and inserting "large capacity ferry vessel".

2. Page 20, line 12: By deleting "department" and inserting "large capacity ferry vessel".

3. Page 21, lines 20 and 22: By deleting "department" and inserting "large capacity ferry vessel".

4. Page 22, lines 5 and 8: By deleting "department" and inserting "large capacity ferry vessel".

SECTION 7. House Bill No. 1 is amended by amending section 10 at page 26, line 1, as follows: By deleting "department" and inserting "large capacity ferry vessel".

SECTION 8. House Bill No. 1 is amended by amending section 11 as follows:

1. Page 32, line 20: By deleting "department" and inserting "large capacity ferry vessel".

2. Page 33, lines 1 and 5: By deleting "department" and inserting "large capacity ferry vessel".

3. Page 34, lines 1 and 4: By deleting "department" and inserting "large capacity ferry vessel".

4. Page 35, lines 2, 3, 6, 7, 10, 14, and 19: By deleting "department" and inserting "large capacity ferry vessel".

5. Page 36, lines 8 and 12: By deleting "department" and inserting "large capacity ferry vessel".

6. Page 37, line 5: By deleting "department's" and inserting "large capacity ferry vessels".

SECTION 9. House Bill No. 1 is amended by amending section 12 as follows:

1. Page 37, line 17: By deleting "office" and inserting "agency".

2. Page 37, line 18: By deleting "office's" and inserting "agency's"; and by deleting "department" and inserting "large capacity ferry vessel".

3. Page 37, line 21: By deleting "department," and inserting "large capacity ferry vessel,".

4. Page 38, line 4: By deleting "department's" and inserting "large capacity ferry vessels".

5. Page 38, line 13: By deleting "office" and inserting "agency".

6. By amending subsection (e) to read as follows:

"(e) Upon ~~[acceptance or non-acceptance]~~:

(1) Acceptance of the environmental impact statement~~[-a]~~:

(A) A notice of the determination shall be filed by the ~~[office with the department]~~ agency;

(B) The office shall publish notice of the determination of acceptance in the periodic bulletin; and

(C) The agency shall open the docket for the certificate of public convenience and necessity to address additional conditions to be included in the certificate of public convenience and necessity to mitigate any negative impacts identified in the environmental impact statement; or

(2) Non-acceptance of the environmental impact statement:

(A) A notice of the determination shall be filed by the agency; and

(B) The office shall publish notice of the determination of non-acceptance in the periodic bulletin. For any non-accepted statement, the notice shall contain specific findings and reasons for non-acceptance. ~~[The office shall publish notice of the determination of acceptance or non-acceptance in the periodic bulletin.]~~

7. Page 39, line 12: By deleting "department" and inserting "large capacity ferry vessel"; and by deleting "office." and inserting "agency".

8. Page 40, line 3: By deleting "department" and inserting "large capacity ferry vessel".

9. Page 40, line 4: By deleting "office" and inserting "agency".

10. Page 40, line 5: By deleting "department's" and inserting "large capacity ferry vessels".

SECTION 10. House Bill No. 1 is amended by amending section 13 as follows: By deleting page 40, line 10 through page 44, line 3.

SECTION 11. House Bill No. 1 is amended by amending section 14 at page 44, line 4, as follows: By deleting "14" and inserting "13".

SECTION 12. House Bill No. 1 is amended by amending section 15 as follows:

1. Page 45, line 1: By deleting "15" and inserting "14".

2. Page 45, line 19: By deleting "." following "Act" and inserting "; provided that it is consistent with this Act and the conditions contained herein.".

SECTION 13. House Bill No. 1 is amended by amending section 16 at page 46, line 6, as follows: By deleting "16" and inserting "15".

SECTION 14. House Bill No. 1 is amended by amending section 17 at page 47, line 8, as follows: By deleting "17" and inserting "16".

SECTION 15. House Bill No. 1 is amended by amending section 18 as follows:

1. Page 47, line 14: By deleting "18" and inserting "17".

2. Page 48, line 2: By deleting "department of transportation" and inserting "operator of the large capacity ferry vessel".

3. Page 48, line 3: By deleting "office of environmental quality control" and inserting "agency".

4. Page 48, line 7: By deleting "16" and inserting "15".

Representative Morita moved that Floor Amendment No. 1 be adopted, seconded by Representative Hanohano.

Representative Morita rose to speak in support of the proposed floor amendment, stating:

"Thank you, Mr. Speaker. I rise in support of said floor amendment. Arrogance and speed were primary factors that led to the catastrophic disaster of the sinking of the Titanic. With the Hawaii Superferry situation we are headed in a fast ferry disaster towards a metaphoric iceberg, that this body may have a chance to sideswipe rather than face a full impact with this floor amendment.

"Let me make myself clear. I do not support this Special Session. I strongly support the rule of law. And I offer this Floor Amendment reluctantly, and only because I find so many shortcomings to the underlying bill if this body chooses this course to make a political fix to a political fix. Let me make it clear about the objective of this Special Session. We are not making policy. We are finding a way to circumvent the law to facilitate a permitting process.

"First of all, too much focus is wrongly being put on an Environmental Impact Statement being conducted by the Department of Transportation to address the secondary impacts to the environment that may result from the use of the Hawaii Superferry in conjunction with the Kahului Harbor improvements. The DOT exemption was the only avenue for a legal challenge in this debacle. The primary impact of the Hawaii Superferry operations should be associated with the granting of the Certificate of Public Convenience

and Necessity, the license for the Hawaii Superferry to operate as a water carrier within the State of Hawaii which is regulated by the Public Utilities Commission.

"In the parlance of Chapter 343, I strongly believe that the responsibility for the preparation of an Environmental Impact Statement is the responsibility of the Hawaii Superferry because the operations of the Hawaii Superferry is the proposed action which triggers the need for an environmental review.

"Again, in the parlance of Chapter 343, the Public Utilities Commission should be the reviewing and the accepting agency as the regulator of the license, the Certificate of Public Convenience and Necessity, that gives the Hawaii Superferry the privilege of operating as a water carrier within the Hawaiian Islands.

"What this floor amendment attempts to do is to allow the immediate operations of the Hawaii Superferry under certain conditions set forth by this Body through conditions to be incorporated as part of the Certificate of Public Convenience and Necessity. It requires the Hawaii Superferry to prepare an Environmental Impact Statement under the guidance of the Office of Environmental Quality Control; it establishes the Public Utilities Commission as the accepting agency; and it requires the Public Utilities Commission to open a docket upon completion and acceptance of an EIS to address conditions to be included in the Certificate of Public Convenience and Necessity to mitigate any negative impacts identified in the Environmental Impact Statement.

"This Floor Amendment eliminates the need for the taskforce as each interested party can participate through the EIS preparation and review process with greater transparency.

"As you all may know the proceedings within the Public Utilities Commission is a quasi-judicial process. There are processes to file both informal and formal complaints, as well as an appeal process. If we remove the political hamstrings, or even the appearance of it, upon this agency, I believe, this is the best avenue to protect all interests, be it the Hawaii Superferry, Hawaii's consumers or Hawaii's environment. Setting aside the issue of circumventing the law in the first place, this may be the best route to re-establish and retain the balance of power between the Administration, the Legislature and the Judiciary.

"I ask for your support for this Floor Amendment."

Representative McKelvey rose to speak in opposition to the proposed floor amendment, stating:

"Thank you, Mr. Speaker. In opposition. But I have to qualify this statement. I first want to publicly thank the Chair of Energy and Environmental Protection for putting this out there, because I think this is the essence of the Legislature; to bring new ideas to particularly thorny problems. They're thorny. They're difficult. Solutions aren't easy to come by, so I applaud the Chair.

"My objections are more procedural. We have a bill coming over from the Senate with many different conditions, and I think that this body should review that. But I hope my colleagues will keep in mind the suggestions of the Representative from Kauai that she has made to the bill as we move forward. I believe there are many very good ideas in this piece of legislation, and I think that all ideas should be included and looked at. Because in the end, *ho'oponopono* is about coming together in the spirit of compromise. Thank you very much."

Representative Caldwell rose to speak in opposition to the proposed floor amendment, stating:

"Mr. Speaker, I'm standing in opposition to the proposed amendment. I would also like to thank the Representative from Hanalei, one of the most beautiful places in the world, probably, for

all her hard work and for bringing this amendment to our attention. I'm sure that we'll be considering it, not only now, but in the future.

"I have a couple of points to make about the bill. One is regarding the taskforce. As the bill currently stands, there is a taskforce and that is given over to the PUC. We all know that the PUC is body that is swamped. Its docket is overflowing with cases. It's having great difficulty currently even processing the new gas cap procedures that we put in place in terms of reporting information to all of us. And so far the information that we've obtained is not very useful. That's just one example. I would hate to see them get bogged down in this very important issue of oversight to make sure that what conditions are implemented are being followed. And if there are new ones that need to be put in place, they report that back.

"Secondly, the taskforce that the PUC would be replacing would be comprised of environmentalists and Native Hawaiians. There's no such group of people on the PUC Commission and I think we need their voices at the table in the oversight committee. Without it, we run the risk of having bad things happening to our environment. These people would be vigilant and therefore we need the taskforce.

"Perhaps at the heart of it all, Mr. Speaker, is the fact that there are two conditions that I call 'deal killers' as far as anyone who is supporting allowing the Superferry to sail while an EA and EIS are being conducted. I think that's why we're all here. Our understanding is that we came back in Special Session because there is broad consensus among our Caucuses, both House and Senate, Majority and Minority, that we wanted to do something to allow the ferry to sail. We tried to come up with the best, balanced approach to protecting the environment and natural resources.

"This bill has a speed factor. It says, 'this ferry shall go no faster than 13 knots in 1,200 feet of water.' That is a broad area around all our Hawaiian Islands, at least where the ferry is going to go. It's pretty far out on Oahu, and it goes pretty far out from Molokai to the Penguin Banks. It would have a dramatic impact. We don't know, and we had a hearing on this, whether the ferry could operate under such conditions. I believe that they can't and we would be killing the ferry.

"The other one is the washing of the undercarriage. There was debate on that in the Senate. And it was clearly pointed out that the ferry operations could not exist with that requirement in there. So if we are wanting to allow the ferry to sail, then we can't support this amendment. We should have never come in. We came in on Wednesday and it is now Friday. It would all be over, so why would we want to do that? Those are the major points.

"Finally, as the good Representative from Lahaina mentioned, we do have a Senate bill that has been reported out; the Senate draft 1. Third Reading is on Monday and it is our understanding that those conditions are the same. Those conditions have had a hearing in the Senate and they will get a hearing here in the House on Monday afternoon at 1:30. That's the proper way to go.

"So this request is not only for the Majority members of the caucus, but of the Minority; that they vote no on this amendment, and consider some of these ideas. Let's revisit it on Monday, Tuesday and Wednesday. Thank you very much, Mr. Speaker."

Representative Souki rose to speak in opposition to the proposed floor amendment, stating:

"Yes, Mr. Speaker. Thank you very much. I had a long speech prepared, but the eloquence of the Majority Leader leads me to incorporate his remarks as my own. Yes, I am in opposition. Thank you."

Representative Ward rose to speak in opposition to the proposed floor amendment, stating:

"Mr. Speaker, I rise also in opposition. I would remind the Chamber of a bit of history. We are here after 40 years of this body, particularly the State Legislature, in the name of one Senator Hulten who served in the Senate from 1962 to 1978. He was known as 'Mr. Inter-island Ferry'. He had a vision that these islands would be connected. He had a vision that we would be able to go from island to island. After four decades, we are this close to having it happen.

"We've got HD 1, which it was just pointed out, it is not only a deal breaker, but it turns the Superferry into to carwash, and it turns it in to one that would be in effect, a slow boat to the Neighbor Islands.

"Mr. Speaker, we all came here to represent our constituents; to move forward with HB 1, and move forward with the Superferry. And contrary to what this State, as policymakers and those people in our State have wanted, this is now the idea whose time has come. It is time to move forward.

"We all respect the good Representative from Kauai, and I think we're learning a lot about our Neighbor Islands. We're learning a lot about our environment. This Special Session is teaching us a lot and I hope we will have learned the lesson. But we don't want to dismantle it. We don't want to turn this in to a munitions session where in effect instead of sailing the Superferry, we would be a torpedo manufacturer and shoot it down and shoot it out of the water. Thank you, Mr. Speaker."

Representative Luke rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker, just a short statement in support. One of the things that has moved me to speak in support is that looking at this amendment, one of the things that the Majority Leader, now I guess, slash Vice Speaker, I'm not sure what your title is now, but ... him. He said that the things that are contained in this amendment are pretty close to what's in the Senate amendment. And coming in to the Special Session, we initially thought there was an agreement between the House and the Senate, and if this amendment, by moving it forward, would bring the House and Senate closer, that would provide consensus between the two bodies and allow us to have a resolution on this issue, and have the ferry sail while the EIS is going on, as opposed to being so far apart. So because of those reasons, I do support this amendment.

"The other thing is that I am move by the argument that the PUC is the correct regulatory agency to take a look at this issue. I would also request a roll call vote the appropriate time. Thank you."

Representative Belatti rose to speak in support of the proposed floor amendment, stating:

"Thank you, Mr. Speaker. I also rise in support of this proposed floor amendment. I do concur with the Representative from Manoa and the Representative from Hawaii Kai that there are conditions that are deal breakers. But if we put the passage of this amendment into the context of the legislative process, what this allows us to do is move this bill forward so that deal breakers could be removed.

"We have to remember that when we pass this bill, it will cross over to the Senate, and what we will be allowed to do is at least present to the Senate this better governmental framework in which to regulate the Superferry and allow it to operate while the EIS is being conducted.

"I think this is a principled, thoughtful proposal that really understands the governmental agencies that come to bear and work on the Superferry and on this issue. So I thank the Representative from Hanalei for putting this thoughtfulness into this proposal."

Representative Berg rose to speak in support of the proposed floor amendment, stating:

"Thank you, Mr. Speaker. I rise in support of the floor amendment. I represent a business community that is deeply connected and deeply devoted to and concerned about the environment. Coming into this Session was a very difficult thought and choice for me. Like the Representative from Kauai, I support the rule of law.

"My concern and my request to my colleagues to support this Floor Amendment is because I believe, with all due respect to all of us, that we could provide the leadership, the House could provide the leadership for the State in resolving the dilemma that we're in at this particular moment by distinguishing ourselves by adding this Floor Amendment as the bill that we propose. What it really does is it establishes a higher bar for what we expect from our agencies and also ourselves.

"I'm a little bit troubled by the statement of our Majority Leader that we shouldn't have come in if we didn't support the Superferry. I don't believe, and I was not asked whether I wanted to come back for a Special Session, number one. Or whether or not I supported the Superferry. That is really not the issue of what the Special Session was supposed to be about. I came in with an open mind. I'd like to believe I still have an open mind.

"I'm concerned also, by the way we throw the word *pono* around. *Pono* does not mean just getting along. When we talk about the word *pono*, and the word *ho'oponopono*, the process of bringing together balance and peace, it really requires us to be willing to be fair in our thinking and also to forgive ourselves and one another for some judgments that we have made in the past.

"So I ask my colleagues to reconsider whatever they may be thinking at the moment and support the Floor Amendment as a statement of leadership on behalf of the House. Thank you."

Representative Meyer rose to speak in opposition to the proposed floor amendment, stating:

"Thank you, Mr. Speaker. I'm rising in opposition to this draft. I have a problem with the very first change which is changing Section 1. There was a lot of work that went into drafting House Bill 1. Lawyers on the Majority side, lawyers in LRB, people over on the Senate side. We are the lawmaking body and in this situation because of the last-minute decision coming down from the Supreme Court, that's why the Superferry was not able to run.

"We have to listen to the majority of people of the State of Hawaii, and they have spoken loud and clear. Our constituents, the majority of them very much want the Superferry. I personally have lived here my entire life and wanted a ferry of this kind for many, many years. Finally someone has come up and invested the money. They put the construction of the ferry on a fast track. When it arrived, it was a happy day, and then all of a sudden it stopped. We would not be in Special Session if we weren't trying to get this ferry in a position where it could operate. If we keep the ferry under this Chapter 343 which is what would happen with this bill, there's no assurance that the ferry could operate. We're here in Special Session to get the ferry out and operating. I feel that playing these games and bringing up these kinds of drafts creates a debacle in this body. We're here to solve the problem. This just muddies it up. I thought today we would be passing a straight bill, the original House Bill 1, and I certainly hope that this does not have the votes to pass. It would be really a tragedy. Thank you, Mr. Speaker."

Representative Green rose to speak in support of the proposed floor amendment, stating:

"Thank you, Mr. Speaker. Very briefly in support. One thing that I noticed when the Senate held their hearing on the Big Island was that although there may be a majority that support the ferry, and I'm not even sure exactly where the true majority lies, it has become an

extraordinarily divisive and contentious issue. I think we can all agree with that. No matter what the numbers, it has become divisive in Hawaii.

"I can't say that I support every piece of the amendment, but I do think that the more dialog that we do have in this very short Session, which is going to be six legislative days, and maybe ten days total, anything that adds to the dialog as the Senate brings over their draft, is a blessing. We really are going to have to explore a lot of different language because we are going to have to start bringing people together. I was not optimistic at all coming in to this Session, that we could reach consensus on environmental issues regarding the Superferry. I am becoming optimistic now actually, having seen now both the Senate's work and some of the work from the Representative from Kauai. So I commend her for helping bridge this divisive divide, and that's why I support this amendment. Thank you."

Representative Morita rose to respond, stating:

"Thank you. Just a point of clarification. I believe the Representative from Laie misreads the Floor Amendment. It does not put the EIS process for the Superferry under Chapter 343. That procedure is the same as the underlying bill except that the PUC becomes the accepting agency of the EIS, and the burden and responsibility of preparing the EIS is put on the Hawaii Superferry where it rightly belongs. Thank you."

The request a roll call vote was put to vote by the Chair and upon a show of hands, the roll call was approved.

Roll call having been approved, the motion that Floor Amendment No. 1, amending H.B. No. 1, entitled: "A BILL FOR AN ACT RELATING TO TRANSPORTATION," be adopted, was put to vote by the Chair and failed to carry on the following show of Noes and Ayes:

Noes, 35: Representatives Awana, Brower, Caldwell, Carroll, Ching, Chong, Evans, Finnegan, Har, Herkes, Ito, Karamatsu, Lee, Magaoay, Manahan, McKelvey, Meyer, Mizuno, Nakasone, Nishimoto, B. Oshiro, M. Oshiro, Pine, Rhoads, Sagum, Say, Sonson, Souki, Thielen, Tokioka, Tsuji, Ward, Waters, Yamane and Yamashita.

Ayes, 11: Representatives Belatti, Berg, Bertram, Green, Hanohano, Luke, Morita, Saiki, Shimabukuro, Takamine and Wakai.

Excused, 5: Representatives Cabanilla, Chang, Marumoto, Takai and Takumi.

(Main Motion)

At this time, the Chair announced:

"Thank you very much. We are now back on the main motion which is the passage of H.B. No. 1. Before we entertain further discussion, you need not reiterate anything that you have already stated in your prior speeches. Let's proceed. Any further discussion?"

Representative Morita rose and asked that the Clerk record a no vote for her, and the Chair "so ordered."

Representative M. Oshiro rose in support of the measure with reservations, and asked that his written remarks be inserted in the Journal, and the Chair "so ordered."

Representative M. Oshiro's written remarks are as follows:

"Mr. Speaker, I am in support of this bill, but with several reservations.

"Because it is highly unusual for a Chair of a Committee to cast a vote in this fashion, I feel my colleagues and the people of Hawaii deserve, and if not, should demand, an explanation for my reservations.

"Before I begin, however, I'd like it to be known by the founders, investors, operators, boards of directors, and employees of the Hawaii Superferry, and other similar carriers, that I have always supported the development of alternative means of transportation between the islands as, on balance, good for the people of Hawaii, and good for commerce. I recall that in the 80s there was the Sea Flight Hydrofoil that sailed between the islands, but due to operational difficulties and design issues was unable to provide reliable and comfortable travel. It too was heralded as a milestone for inter-island transportation and for promoting commerce and community among Oahu, Maui, Kauai and Hawaii island. But, in the end it left Hawaii due to financial reasons and is believed to have been sold or leased to a ferry company in Asia. Thus, apart from that short Sea Flight Hydrofoil experience, for as long as I can remember, Hawaii has been dependent upon two or three major inter-island airlines; be it Aloha, Hawaiian, Mahalo, or Go.

"An inter-island ferry system, that operates on the "H-4" between the islands is, on balance, a good option for the people of Hawaii, and has many good features that can enhance our quality of life. There is no doubt in my mind that an inter-island ferry system will provide more good for Hawaii's people than bad.

"Mr. Speaker, further evidence of my support for an inter-island ferry system was made crystal clear when we were planning our Neighbor Island site visits for the House Committee on Finance. I directed the House Finance staff to determine the feasibility of using the Hawaii Superferry to take the House Finance Committee to Maui and Kauai. I thought it would be a good opportunity for the Committee to accomplish several things:

1. Experience an alternative means of transport between Honolulu and Kauai and Maui;
2. Use time on board to be briefed by the Department of Transportation and the respective island's harbor, airport, and highway divisions; and
3. Observe the overall operations of the Hawaii Superferry.

Unfortunately, circumstance proved to be a challenge for those goals. And we now find ourselves here in a Special Session, presumably deciding the fate of a large capacity ferry vessel company.

"Mr. Speaker, with all due respect to you and my esteemed colleagues, I believe HB 1, Second Special Session of 2007, is the best possible bill for a bad policy decision. That is why I am voting with reservations.

Release and Indemnity Clause – Section 16

"In my opinion, this is the only redeeming aspect of the bill that causes me to cast a vote in support. The reason is simple and straightforward, as Section 16 may be the only means we have before us that gives the State of Hawaii and its citizens some measure of protection against being sued by a large capacity ferry vessel company that may operate in Hawaiian waters. Ironically, it is the same large capacity ferry vessel company that would sue the people of Hawaii to advance its own private interest that is now before us, seeking extraordinary assistance that would allow it to do so. This bill before us, in that regard, is the antithesis to the "Parable of the Good Samaritan" and our own Hawaii law based upon the same timeless principle, HRS §663-1.5 (exception to liability).

"Mr. Speaker, requiring any large capacity ferry vessel company to release and indemnify the State of Hawaii from any past, present, and future liabilities and lawsuits is the single most important concession that any large capacity ferry vessel company needs to warrant to the State of Hawaii. Section 16 reads as follows:

"SECTION 16. Every large capacity ferry vessel company that operates pursuant to the right to operate conferred by this Act, by such operation, releases and waives any and all claims 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 such claims brought by, through, or under the large capacity ferry vessel company, or any of its agents, successors, and assigns."

"After all, we are taking extraordinary actions to help any large capacity ferry vessel company to commence operations, concurrent with the same or similar requirements of HRS 343, but without the same or similar restrictions. As I have come to learn through House and Senate hearings, extensive review of public documents, news reports, government records, and interviews with various agents and agencies, the Hawaii Superferry, is just as responsible for this predicament as the Lingle/Aiona Administration. Even Mr. Garibaldi, Hawaii Superferry, CEO, appreciates the concept of concession. His understanding is unmistakable as he remarked at our Joint House Transportation and Finance Committee hearing, Thursday night, "I guess we look at that as the price of admission", in response to my questions regarding Section 16. As CEO for Hawaii Superferry he may not have liked it, but he certainly understood its importance and his written testimony wholeheartedly supports HB1, without any further amendments.

"Mr. Speaker, as I stated previously, the sole provision of this bill that garners my "aye" vote is Section 16 and the remainder of my remarks expound upon the basis for my opposition or reservation.

EA and EIS – To Be Or Not To Be?

"Under two hours of questioning by Members of your Committees on Transportation and Finance, on Thursday, October 25, 2007, the Director of Transportation, Mr. Barry Fukunaga, continually hid behind attorney-client privilege. His colloquy between Rep. Brower and me exemplifies the extent to which he raised it in refusing to answer some basic but important questions – "Did the Department of Transportation consult with the Attorney General?" Instead, Mr. Fukunaga states, "Attorney-Client privilege. When the DOT does projects they do not generally consult with the AG". Similarly, when I asked questions regarding the drafting of the February 23, 2005 letter from the State Department of Transportation's Deputy Director, Mr. Barry Fukunaga, to the Office of Environmental Quality Control ("OEQC"), headed at the time by Ms. Genevieve Salmonson, I got the similar response of "attorney-client privilege".

"The majority of questions asked dealt with the principle issue at hand – the process, consideration, and decision made by the Lingle/Aiona Administration with regards to an EA and EIS for the improvements made to State harbor facilities essential to the operations to the Hawaii Superferry.

"Mr. Speaker, knowing that Governor Lingle and her Administration decided that an EA and EIS were unnecessary, there can only be three (3) possible scenarios for this issue:

1. The Attorney General or Deputy Attorney General advised the Department of Transportation and Governor

Lingle that an EA / EIS was necessary, and the Governor and her Administration chose NOT to heed the AG's advice. This is clearly the worst possible scenario for the Governor, because the correct advice was ignored.

2. In the alternative, the Attorney General or Deputy Attorney General advised the Department of Transportation and Governor Lingle that an EA / EIS was NOT necessary. This is an equally bad scenario for the Governor, because the Attorney General, a key member of her Administration, clearly erred.
3. Finally, in the third scenario, the Attorney General or Deputy Attorney General were not consulted and therefore did not advise the Department of Transportation and Governor Lingle that an EA / EIS were or were NOT necessary. This too is a terrible scenario as the Director of the Department of Transportation is not an attorney and could not have rendered a legal opinion and if he did, as a key member of her Governor Lingle's Administration, he clearly erred.

No matter the scenario, Governor Lingle and her Administration got it wrong.

Mistakes of the Lingle-Aiona Administration

"The central issue that has brought us to this point is memorialized in a letter dated February 23, 2005 from the State Department of Transportation's Deputy Director, at the time, Mr. Barry Fukunaga, to the Office of Environmental Quality Control ("OEQC"), headed at the time by Ms. Genevieve Salmonson. In that letter, Mr. Fukunaga states that:

"Following discussions with Hawaii Superferry and consultation with State and County agencies regarding the intended use of the harbor facility and in consideration of the provisions of Chapter 343, Hawaii Revised Statutes, and Chapter 11-200, Hawaii Administrative Rules, we have determined that the operation of Hawaii Superferry at Honolulu Harbor conforms with the intended use and purpose of the harbor and meets conditions that permit exemption from environmental review at such location based on the method of operation planned. The ferry activity at Honolulu Harbor will use equipment appropriate for a harbor, include only minor facilities improvements and will be conducted at an existing pier facility that is consistent with the purpose for which it was originally developed." (emphasis provided)

"Identical declarations were made regarding Kahului Harbor, Nawiliwili Harbor, and Kawaihae Harbor. In a nutshell, this declaration to OEQC states that the harbor improvements that the State is contemplating making for the Hawaii Superferry loading and off-loading barges necessary for the Hawaii Superferry (HSF) to commence operations in Hawaii fall into the exempt categories allowed under Chapter 343, the Hawaii Environmental Protection Act (HEPA) and Hawaii Administrative Rules.

"In Sierra Club vs. Dept. of Transportation of the State of Hawaii (Civ. No. 05-1-0114), No. 27407 (Haw. S. Ct., Aug. 23, 2007), the Hawaii Supreme Court clearly decided that the Governor and her Administration and Hawaii Superferry were wrong.

"The Supreme Court opined that:

"Kahana Sunset Owners Ass'n and McGlone make clear that when an agency considers an exemption it must determine that the action will probably have minimal or no significant effects on the environment, and McGlone teaches that in addition to the direct site of impact the agency must also consider other impacts that are "incident to and a consequence of the primary impact." Considered together with these Hawaii precedents, Ocean

Advocates provides a concrete analogy to the legal error committed by DOT.

DOT's written exemption determination is restricted to the harbor improvements and does not consider the secondary impacts that may result from the use of Hawaii Superferry in conjunction with Kahului Harbor. Rather, DOT treats the physical improvements in isolation, fitting them into two exemption classes related to "security and safety equipment," (exemption class 3 item 3) and "alteration or addition of improvements with associated utilities, which are incidental to existing harbor and boat ramp operations, in accordance with master plans [that comply with HEPA]" (exemption class 6 item 8). Although DOT, in its exemption determination letter, does reference the Hawaii Superferry ("we have determined that the operation of Hawaii Superferry at Honolulu Harbor conforms with the intended use and purpose of the harbor and meets conditions that permit exemption from environmental review at such location based on the method of operation planned"), it restricts its analysis to the harbor equipment that will be employed in order to facilitate the Superferry's operation ("ferry activity at Kahului Harbor will use equipment appropriate for a harbor, include only minor facilities improvements and will be conducted at an existing pier facility that is consistent with the purpose and reason for which it was originally developed"). The exemption letter does not consider whether Superferry operation independent of the harbor will have any significant effect on the environment. Rather, DOT appears to studiously restrict its consideration of environmental impact to the physical harbor improvements themselves. Although DOT does say that "[t]he installation and result of the minor improvements noted will not produce or create any adverse air quality, noise or water quality impact, " which could imply a reference to the Superferry itself, as the "result" of the harbor improvements, this statement is oblique and does not indicate that secondary impacts were considered. Purposely or not, DOT ignores the more direct language suggested by OEEOC in its sample exemption memorandum, wherein an agency director would state that he or she 'ha[s] considered the potential effects of the above listed project as provided by Chapter 343, HRS and Chapter 11-200, HAR ... [and] declare[s] that th[e] project will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment. (emphasis provided)

The applicable standard of review requires that this court determine, as a matter of law. Whether or not DOT has followed the correct procedures and considered the appropriate factors in making its determination that the harbor improvements made to Kahului harbor to facilitate the Superferry project should be exempt from the requirements of HRS chapter 343. ...

Stated simply, the record in this case shows that DOT did not consider whether its facilitation of the Hawaii Superferry Project will probably have minimal or no significant impacts, both primary and secondary, on the environment. Therefore, based on this record, we can only conclude that DOT's determination that the improvements to Kahului Harbor are exempt from the requirements of HEPA was erroneous as a matter of law. The exemption being invalid, the EA requirements of HRS section 343-5 is applicable. ...

In enacting HEPA and establishing a system of environmental review, the legislature expressly emphasized the importance of public participation in the process:

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... (emphasis in the original).

Contrary to the expressly stated purpose and intent of HEPA, the public was prevented from participating in an environmental review process for the Superferry project by DOT's grant of an exemption to the requirements of HRS chapter 343. The exemption was erroneously granted as DOT considered only the physical improvements to Kahului harbor in isolation and did not consider the secondary impacts on the environment that may result from the use of the Hawaii Superferry in conjunction with the harbor improvements. 'All parties involved and society as a whole' would have benefited had the public been allowed to participate in the review process of the Superferry project, as was envisioned by the legislature when it enacted the Hawaii Environmental Protection Act."

"Mr. Speaker, the bottom line is that the Governor and her Administration erred, and the judicial system should not be blamed for this current situation, as it followed its integral function of interpreting and adjudicating the law. Again, the bill before us does not touch upon or amend or clarify the existing environmental law upon which the Supreme Court's decision was made. It remains the law of the land.

"Mr. Speaker, instead of assuming responsibility for her actions and the actions of her Administration, Governor Lingle has chosen to blame the Hawaii Supreme Court and the Judiciary for this debacle. This is irresponsible and disappointing. I can only imagine that many were shocked to read the Governor's remarks in the Saturday, October 13, 2007 edition of the *Honolulu Advertiser*:

'Asked whether she has any responsibility for what has happened to Superferry, Lingle responded: "No, I don't. I think we made a decision based on the law at the time. The Supreme Court, for whatever their reason was, decided to wait over a year-and-a-half to reach a decision and to do it two days before this service was set to begin."

"Even Mr. Barry Fukunaga's "News Release" issued on September 6, 2007, which stated, "It is unclear how the Hawai'i Supreme Court's new standard will apply to facilities and operations across the state" further demonstrates the administration's unwillingness to take responsibility for its actions.

"This is disappointing and demonstrates an alarming ignorance of the fundamental principles of separation of powers inherent in our democratic form of government.

"Governor Lingle's derogatory comments regarding the Judiciary and the Supreme Court have no basis in fact. The comments in response to Governor Lingle offered by the Administrative Director of the Courts, Mr. Thomas Keller easily settled the matter:

'GOVERNOR'S STATEMENT REGARDING THE TIMING OF SUPREME COURT'S SUPERFERRY DECISION REFUTED

In the Honolulu Advertiser's Oct. 13 article, "3-way Superferry remedy urged," and in other media reports, Governor Linda Lingle is quoted as saying, "The Supreme Court, for whatever their reason was, decided to wait over a year-and-a-half to reach a decision and to do it two days before this service was set to begin." The implication that the Hawai'i Supreme Court deliberately timed its decision to occur "two days before" the Superferry was scheduled to start is wrong and does a disservice to the people of Hawai'i by undermining their trust in the justice system.

The Superferry officials - and not the Supreme Court - shortened the time frame to the two days between the Supreme Court's decision and the commencement of service by advancing the start date. The Supreme Court issued its ruling on Aug. 23, five

days before the Superferry's original start date of Aug. 28. The day after the court's decision was issued, Superferry officials moved up the ferry's start date from Tuesday, Aug. 28 to Sunday, Aug. 26, and announced that \$5 per passenger and \$5 per car fares were available for purchase beginning Saturday, Aug. 25.

When the Supreme Court first notified the parties that oral argument will be held on Aug. 15, online Superferry reservations were being accepted for travel beginning Sept. 5. On Aug. 11, however, Superferry officials moved up the inaugural service from Sept. 5 to Aug. 28. Therefore, it was the Superferry officials who shortened the time frame between the date of oral argument and the Supreme Court's decision on Aug. 23 to the date the Superferry commenced travel by moving up the start date twice; first from Sept. 5 to Aug. 28 and, after the Supreme Court ruled, from Aug. 28 to Aug. 26.

Furthermore, the resultant decision in the Superferry case was delayed due to a request from the Superferry's attorneys to postpone oral argument. Their attorneys asked the Supreme Court to push back oral argument from Aug. 15, 13 days before the Superferry's Aug. 28 start date, to Aug. 28 or later, citing scheduled vacations to the mainland as the reason. Although the attorney for the Sierra Club objected to the Superferry's request to delay the hearing, the request was partially granted in that oral argument was postponed to Aug. 23. The Supreme Court issued its decision that same day.

As for why it took the Supreme Court a year-and-a-half to reach its decision, the Judiciary's Public Affairs Officer, Marsha Kitagawa, wrote a letter published in several newspapers explaining that there was ongoing activity throughout the Superferry appeal and, when court deadlines were extended, it was at the request of a party. Moreover, from the time the case was assigned until the decision on Aug. 23, the Supreme Court decided more than 300 other appeals, focusing first on cases involving children in the State's custody and incarcerated persons, as well as 90 original proceedings, 150 applications to review decisions of the intermediate appellate court, and 1,300 motions. In short, while the Superferry appeal was pending, the Supreme Court decided many cases. (emphasis provided)

"I hope that I'm not the only one who feels embarrassed and astounded when Governor Lingle blamed the Judiciary and Supreme Court for delays, when in truth, the lawyers for the Hawaii Superferry and her Administration wanted to go on a vacation instead of presenting their case to the Supreme Court in a timely manner. Likewise, it was the Hawaii Superferry officials that moved up the ferry's start date, promoted heavily discounted \$5 fares, and began taking online reservations prior to the date of oral arguments.

Did The Governor or Hawaii Superferry Read the Writing on the Wall?

"Numerous events that led up to the Supreme Court decision clearly indicated to Governor Lingle and her Administration and Hawaii Superferry officials that issues surrounding an environmental assessment and an environmental impact statement were central to the debate surrounding the Hawaii Superferry. Instead of addressing these issues head on, Governor Lingle and her Administration chose to skirt the law in an effort to get the Hawaii Superferry project done regardless of the law. The Governor and Hawaii Superferry officials failed to read the "writing on the wall" that was obvious to any reasonable person.

Notice in 2004

"The issue of an EA and an EIS came up in 2004 when:

- The Hawaii Superferry applied with the Maritime Administration (MarAd) for financing through a program established by Title XI of the Merchant Marine Act of 1936, on

June 4, 2004. This application required that Hawaii Superferry comply with all State and federal environmental laws;

- The Hawaii Superferry filed docket number 04-0180 with the Public Utilities Commission on July 22, 2004, to gain approval as a water carrier within the State of Hawaii. This filing was followed by several communications from the PUC to Hawaii Superferry and the Lingle/Aiona Administration seeking compliance with Chapter 343; and
- The State Public Utilities Commission held several public hearings in the month of November on each of the islands, and had public testifiers strongly point out the need for an environmental review. These hearings occurred on:
 1. Oahu – Wednesday, November 10, 2004, 6:00PM at the State Capitol Auditorium;
 2. Kauai – Tuesday, November 16, 2004, 6:00PM at the Wilcox Elementary School Cafeteria;
 3. Maui – Wednesday, November 17, 2004, 6:00PM at the Maui Waena Intermediate School Cafeteria; and
 4. Hawaii – Thursday, November 18, 2004, 6:00PM at the Waikoloa Elementary School.

Hawaii Superferry and the Lingle/Aiona Administration were put on notice that an EA and EIS were important considerations that should not be ignored. They chose to ignore these warnings back in 2004.

Notice in 2005

"The issue of an EA and an EIS came up in 2005 when:

- The Maui County Council unanimously passed Resolution No. 05-46 requesting an EIS;
- The Kauai County Council unanimously passed Resolution No. 2005-15 requesting an EIS;
- The County of Hawaii by a seven to one vote passed Resolution 68-05 requesting an EIS;
- The Legislature considered a bill (SB 1785, Relating to the Superferry) requiring an EIS; and further questioned whether approval of a \$40 million general obligation bond appropriation should be granted without concluding an EIS;
- Several community groups filed a request for an injunction on March 21, 2005, in the Maui Circuit Court challenging various exemptions given to Hawaii Superferry by the State Department of Transportation and the Lingle/Aiona Administration in Sierra Club v. Hawaii Dept. of Transportation 2nd Civ. Ct. No. 05-1-0114; and
- Several community groups filed a lawsuit in the Federal District Court in August 2005 challenging a categorical exclusion issued March 15, 2005 by the federal Maritime Administration that excluded the Hawaii Superferry project from federal environmental laws in The Sierra Club et. al. v. The Maritime Administration et.al. CV 05-00487 HG BMK.

"There is no doubt, that the Lingle/Aiona Administration, as well as the Hawaii Superferry, was put on notice that an EA and EIS were important considerations that should not be ignored. They chose to ignore these warnings back in 2005.

Notice in 2006

"The issue of an EA and an EIS came up in 2006 when:

- Several community groups on Maui filed a legal challenge in Maui Tomorrow v. Dept. of Transportation, 2nd Civ. Ct. No. 06-1-0027, against the State Department of Transportation and Hawaii Superferry claiming that no provisions were made to

control alien species, and little attention was paid to the uses of Kahului Harbor by the Hawaii Superferry;

- Legislators threatened to remove the second year funding for DOT harbor improvements associated with the Hawaii Superferry. As a compromise, a budget proviso was included that would require statewide meetings conducted by the DOT and Hawaii Superferry to discuss the environmental impacts of the Hawaii Superferry to each island;
- The Maui County Council adopted a resolution requesting Hawaii Superferry to postpone the start of operations at Kahului Harbor until an update of the Harbor Master Plan and EIS is completed; Maui County Council further requests county attorneys to join a lawsuit against the State DOT, questioning the adequacy of DOT's environmental review process;
- Community organizations from Kauai sought to present Governor Lingle with a petition requesting an EIS be conducted, but her staff refused to even accept the petition at her office in Honolulu; and
- The Hawaii County Council called for the Hawaii Superferry and the Lingle/Aiona Administration to address concerns about economic, social, and environmental impacts.

"Hawaii Superferry and the Lingle/Aiona Administration were put on notice that an EA and EIS were important considerations that should not be ignored. They chose to ignore these warnings back in 2006.

Notice in 2007

"The issue of an EA and an EIS came up in 2007 when:

- The Legislature proposed legislation (HB 702 and SB 1276) to require the Department of Transportation to conduct an EIS of the Hawaii Superferry, but both measures received strong opposition from both Governor Lingle and the Hawaii Superferry; and
- The State's Environmental Council ("Council") established under HRS §341-3 (c) and pursuant to HRS §341-6 held a special council meeting on February 22, 2007 and ruled 9 to 1 that they did not concur with the Department of Transportation's determination in granting an exemption from an environmental review.

The vote of the Council was as follows:

In favor (9): David Atkin; David Bylund; Michael Faye, Chair; Gail Grabowsky; Robert King; James Rodrigues; Mary Steiner; Paulette Ujimori; and Eileen O'Hora-Weir.

Abstained (1): Chester Saito. It was noted in the minutes that following the vote, Mr. Saito stated that he had not heard the motion clearly and that he actually did support the motion.

Opposed (1): Genevieve Salmonson, Director of the Office of Environmental Quality Control.

"There is no doubt that Hawaii Superferry and the Lingle/Aiona Administration were put on notice that an EA and EIS were important considerations that should not be ignored. They continued to ignore these warnings this year – 2007.

"The State's Environmental Council's decision is illustrative of how both the Lingle/Aiona Administration and Hawaii Superferry deliberately chose to "roll the dice" and seek final resolution in court. Minutes from the February 22, 2007 meeting disclosed the following:

- Members of the public present at the meeting included: Senator Gary Hooser, Lisa Bail, Lisa Munger, Bill Wynhoff,

Ron Sturtz, Isaac Hall, Dick Mayer, Kamaile Nichols, Isaac Moriwake, John Harrison, Zubin Menon, Rob Parsons, Henry Curtis, Richard Wada, and Kat Brady

- Lisa Munger, attorney who represented the Hawaii Superferry in the Maui Circuit Court, stated that the Environmental Council does not have the authority to issue a declaratory ruling regarding the possible abuse of discretionary authority by the State of Hawai'i DOT in the application of the EIS exemption process with regards to the Hawai'i Superferry. She also stated that OEQC concurs with DOT's exemption determination and that this matter should be resolved by the courts. She urged the council to deny this petition.
- It should be interesting to note that the date of the Council meeting was February 22, 2007 at 3:00 pm and that it included a discussion about the State of Hawai'i DOT's exemption determination letter dated, February 23, 2007. By the Council obtaining an advance copy of the State of Hawai'i DOT's exemption determination letter prior to the actual date contained in the letter, calls into question a number of issues, including how and under whose direction was the letter from the State of Hawai'i DOT drafted. It also questions whether it was prudent for State of Hawai'i DOT to proceed to release the exemption determination letter in light of the action by the Council. This clearly demonstrates that the State of Hawai'i DOT completely ignored the action of a council whose purpose is to serve as a liaison between the Director of the Office of Environmental Quality Control and the general public and whose members are appointed by the Governor.

"The Hawaii Superferry and the Lingle/Aiona Administration spent three and a half years ignoring the public and numerous State and county lawmakers. A typical EIS takes between twelve and eighteen months to complete. At most, that's about a year and a half. Instead, the Hawaii Superferry and the Lingle/Aiona Administration chose to squander three years in litigation and fighting lawmakers from enacting laws to require an EIS.

"The truth is, had Hawaii Superferry officials and the Lingle/Aiona Administration actually listened to the people of Hawaii and simply followed the law; all of this could have been avoided. The fact that the Hawaii Superferry commissioned a study from CH2MHill entitled, "Hawaii Superferry Commitments and Actions to Address Environmental Concerns", is laudable, but hardly impartial. I submit that if the time and money to conduct this study was available, surely an EIS could have been conducted instead.

Does this bill address the concerns raised by the Attorney General?

"No. In a public hearing for HB 1, the Attorney General claimed that:

"H.B. No. 1. represents a reasonable compromise, that both allows the Hawaii Superferry to operate and helps protect Hawaii's environment. ...

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."

"I submit that this bill does nothing to solve the real problem here. The decision by the Supreme Court basically said that secondary impacts to any improvements funded by taxpayer money must be considered under Chapter 343. The fact is despite the Attorney General's clever rhetoric, this bill does not address the Hawaii Supreme Court's decision at all. The Attorney General knows that the bill does nothing to change the law of the case, but instead seeks to enact a new policy outside the scope of Chapter 343. Even if this bill were to be adopted by the Legislature and enacted by the Governor,

the underlying issue still remains. The Legislature will have done nothing to, as the Attorney General put it, "decide if that is how the law should remain for the future." And, this is problematic as it may be argued that the Legislature deliberately and intentionally made the policy to not overturn the Sierra Club ruling and in effect endorsed it.

Bad vs. Good Policy on a Regular vs. Irregular Session

"At our public hearing on HB 1, the Attorney General claimed that:

"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 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' 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. ...

... 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. 5 183B-2 that exempted from Chapter 343 the "reconstruction, restoration, repair, or use of any Hawaiian fishpond" in certain circumstances. ...

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

"While I don't dispute that it is the prerogative of the Legislature to set policy, and even clarify laws that have been misinterpreted by the judicial branch of government; I submit that this case is extremely different.

"In all the cases cited by the Attorney General, whether Waiahole water system, fish ponds, management rights, or joint and several liability, every issue was either vetted through a lengthy legislative process, sometimes taking several years, or had the unanimous support of lawmakers. Most of them had both.

"This Hawaii Superferry case, and the subject of a "large capacity ferry vessel," has neither and the cases cited by the Attorney General are clearly distinguishable.

Hawaii Superferry and John F. Lehman & Company

"Mr. Speaker, the Hawaii Superferry story almost seems like "A Tale of Two Cities".

"Three people, Mr. John Garibaldi, Mr. Timothy Dick, and Mr. Robert White had a great vision that began no later than 2001. They did their due diligence. They did their market analysis. They conducted their feasibility research. They pulled together their own resources – their credit cards and personal savings – and embarked upon an ambitious plan to bring an inter-island ferry service to Hawaii.

"It appears, however, that lacking expertise, Hawaii Superferry entered into an agreement with the Argent Group Ltd. from San Francisco in 2002 to pursue financing with the federal government – specifically the Maritime Administration (MarAd). This agreement appears to have been critical to Hawaii Superferry's success as they are able to ultimately secure a \$140 million loan guarantee from MarAd in October of 2005.

"As I mentioned earlier, prior to securing the loan, MarAd required that Hawaii Superferry be compliant with all local and federal environmental laws.

"According to the Articles of Incorporation and annual reports filed with DCCA by Hawaii Superferry, Inc., the following were the officers and directors of the company in 2004:

1. Timothy Dick, President, Secretary Hawaii Superferry;
2. John Garibaldi, CEO Hawaii Superferry;
3. Robert White, Executive Vice President Hawaii Superferry;
4. Daniel Okimoto, professor Stanford University
5. John Dean, investor, Startup Capital Ventures; and
6. Brian Nishida, Maui Land and Pine.

"Somewhere along the way, Hawaii Superferry attracted the attention of J.F. Lehman & Company, a private equity firm owned by former Secretary of the Navy and member of the 9/11 Commission, John F. Lehman.

"According to an article published in the Pacific Business News, March 28, 2005, J.F. Lehman & Company invested about \$60 million in equity capital to Hawaii Superferry, and John F. Lehman would receive a seat on the Board of Directors in 2005.

"According to the Articles of Incorporation and annual reports filed with DCCA by Hawaii Superferry, Inc., the following were the officers and directors of the company as of 2006:

1. Timothy Dick, Vice Chair Hawaii Superferry;
2. John Garibaldi, CEO & President Hawaii Superferry;
3. Robert White, Executive Vice President Hawaii Superferry;
4. David Cole, Chairman and CEO of Maui Land & Pineapple Co.;
5. Warren Haruki, President and CEO of Grove Farm and Lihue Land Co.;
6. John Lehman, founding partner of J.F. Lehman and Co., an investment group, and Chairman of Hawaii Superferry and HSF Holding Inc.;
7. John Shirley, a consultant for J.F. Lehman;
8. George Sawyer, founding partner of J.F. Lehman;
9. Louis Mintz of J.F. Lehman;
10. Alex Harman of J.F. Lehman; and
11. Tig Krekel, Vice Chairman of J.F. Lehman.

"I would surmise that somewhere along the way, Mr. Garibaldi and his original associates may have lost control of their venture to a large, multi-national corporation. Mr. Speaker, I say this only because I find it hard to believe that Mr. Garibaldi and his original associates, who all have strong ties to these islands and know the sensitivities of its people, would make some of the drastic choices that appear to have been made. Unfortunately, full disclosure is something difficult to achieve in the process of an accelerated Special Session of a little more than one week.

"As such, I urge all of us to be vigilant as we move ahead, as I am sure that sub-plots in this story will continue to unfold.

Hawaii Superferry and the Military

"Another reason for my reservations is the lack of honesty and frankness from the Hawaii Superferry executives and in particular CEO, Mr. John Garibaldi regarding the Hawaii Superferry and

possible use by the military. During both House and Senate hearings on the respective bills, the Hawaii Superferry has repeatedly avoided any direct answer and "danced" around the question of whether it may be used to transport military vehicles for training or other military purposes. And, Mr. Garibaldi has denied such military use even when confronted with its own filings in the PUC docket No. 04-0180, and various attachments describing the ability of the Hawaii Superferry to transport such vehicles as the Stryker vehicles between Schofield Barracks, Wahiawa and Pohakuloa on Hawaii Island. I found it quite incomprehensible when Mr. Garibaldi refused to even acknowledge the comment made by John F. Lehman in a Pacific Business News article dated April 8, 2005, in which he states:

"As for the military itself using it, there's a great additional advantage to being able to travel between Oahu and the training ranges on the Big Island. There's going to be regular use by platoons of Stryker vehicles. Armored personnel carriers can travel as a unit and drive on to a ferry, the unit members can go into the passenger area that's set up so that it will be a conference or briefing area. These units can do training sessions on the way over. When they arrive at Kawaihae Harbor they can get into the Strykers and drive away."

"As you know Mr. Speaker, I have always supported the soldiers and their families one-hundred percent and also support the training of the Strykers here on Oahu in the areas of Wahiawa. In my review of the Stryker EIS, it appears the Hawaii Superferry would be a perfect match for transporting the vehicles between the islands as they do under the WESTPAC transport ships in Okinawa. The great reluctance of Mr. Garibaldi to admit these facts leaves me uncomfortable and very critical. Again, if there is nothing to hide, why the charade?"

Hawaii Superferry and its Financial Condition

"Mr. Speaker, the *Honolulu Advertiser* reported on October 11, 2007 that:

"Hawaii Superferry announced this afternoon that it will furlough 249 workers today because of uncertainty over the future of the project since it has been blocked in court."

The furlough involves 178 people on O'ahu, 36 on Maui and 35 on Kaua'i.

Fifty-nine workers would be kept to handle administrative and operational functions. John Garibaldi, Superferry president and chief executive officer, said the company had reached a point where it couldn't continue paying the more than \$300,000 in weekly salary to the employees."(emphasis provided)

"It appears that nearly everyone has simply accepted these statements as truth. I don't believe anyone has done a very simple analysis of this statement made by Mr. Garibaldi.

"If we were to assume that the Hawaii Superferry was telling the truth in the news and in their testimony in Circuit Court, they were paying 249 workers about \$300,000 a week. A very simple calculation reveals that they would be paying each of those employees \$62, 650 per year.

"\$62,650 per year, Mr. Speaker.

"That truly is extraordinary. For obvious reasons, the numbers simply don't make any sense. I find it extremely difficult to believe that the employees furloughed by the Hawaii Superferry, many of whom were part-time employees, were earning \$62,650 per year.

"In fact, it seems more likely that the employees are being used as pawns or a public relations ploy in the larger scheme to get the Hawaii Superferry up and running despite all the mistakes made by the Governor and the Hawaii Superferry.

"Data from numerous sources indicate that the Hawaii Superferry was able to raise about \$250 million dollars:

- \$140 million from the Maritime Administration as a loan financed through ABN-Amro Bank;
- \$17 million of subordinated notes from Austal, USA – the shipbuilder; and
- \$94 million in equity financing from JF Lehman & Company, Norwest, and other investors.

"If we assume that Hawaii Superferry has spent:

- \$178 million on the two ships;
- \$10 million in public relations, legal, and other consulting fees through August 2007; and
- \$20 million in all other expenditures through August 2007 – this would include some assumptions on payroll based on newspaper and television reports.

"To date, Hawaii Superferry would have spent about \$208 million. That means that Hawaii Superferry should currently have access to over \$40 million. This is hardly the sign of a poor company.

"This is why I find it difficult to believe that the Hawaii Superferry is currently in dire straits. Without full disclosure of its finances, I have an extremely difficult time believing the news reports thus far. The media simply believed everything Hawaii Superferry executives claimed without challenge. Just because they said so. Whoever their public relations consultant is has definitely earned their paycheck.

Final Comments

"As I have expressed in previous discussions, I believe this is a very good bill for a very bad public policy. But far too many questions remain unanswered. Far too many issues remained unaddressed. Perhaps the single greatest problem with this issue is the way it has divided our communities.

"The promise of the Hawaii Superferry was to help connect our islands through an idea conceived as "H-4". That's a nice slogan, but reality has proved otherwise because of the mistakes made by Governor Lingle and her Administration and the Hawaii Superferry. At the end of the day, this Legislature may, through extraordinary legislation, permit the Hawaii Superferry to operate, but they will fail in their endeavor if they don't get the support of all our communities. And no public relations campaign, nor political quid pro quo, can ever redeem a business venture that places itself over the laws and people of the land.

"Finally, I am hopeful that the naiveté expressed in the comments made by Mr. Tig Krekel, JF Lehman & Company Vice Chairman, who attended our marathon hearing on HB 1, is not shared by other Hawaii Superferry executives or the Lingle/Aiona Administration.

"According to reports in the *Honolulu Advertiser*, Friday, October 26, 2007, the day after our hearing:

"Asked how Superferry would approach potential resistance on the Neighbor Islands, particularly Kaua'i, Krekel said: "Do not confuse a very loud minority with speaking for all the people of Kaua'i. We have received countless communications from Kaua'i residents about how embarrassed they are and that the loud minority of activists, not environmentalists — but activists — do not speak for them."

"So we're hopeful that that situation will calm down." (emphasis provided)

"Mr. Speaker, my take on this statement is that it appears that Mr. Krekel just doesn't get it. He does not comprehend the extraordinary legislative and gubernatorial largess the Hawaii Superferry owners and investors are likely to receive. Perhaps in his circle of influence and politics, legislative actions like those contemplated by this body

are common place and unremarkable. Let these remarks herein provide him and others like him notice that such sentiments are misplaced and ill advised. Certainly, he should not mistake this momentary lapse of legislative independence for any degree of capitulation to and endorsement of the suspicious means used to achieve these ends.

"The Hawaii Superferry and the Lingle/Aiona Administration should not take the legitimate concerns of the people of Oahu, Hawaii, Maui, Molokai, and Kauai lightly. Simply assuming that mere platitudes and press conferences and staged forums will address all the damage done by the Hawaii Superferry and Lingle/Aiona Administration is a strategy doomed to failure. I would hope that executives from a company hoping to make millions of dollars from the people of Hawaii would show more consideration and respect for these islands and its citizenry. Rest not on your laurels for the people of Hawaii will be watching. This bill gives you an extraordinary opportunity to do what is right for all Hawaii.

"In closing, Mr. Speaker, thank you very much for allowing me to be a part of this extraordinary Second Special Session of 2007 and to chair the House Committee on Finance and alongside Chair Souki and the House Committee on Transportation hold a public hearing on HB 1 on October 25, 2007, State Capitol, Auditorium. It was a long, but important hearing and I am thankful for the scores of testimonials that were received and now are part of the legislative record. Similarly, I wish to thank the dozens of testifiers who took time from their daily lives to participate in their government and patiently wait their turn to provide oral testimony. I have assured each of them that their voices have been heard, commentary considered, and that their time was well spent on this important issue.

"In the end, we must all account for our tenure as State Representatives and I accept responsibility for my actions this day and accept the consequences to follow.

"Mr. Speaker, as you and I have discussed on many occasions, I still believe that we, the fortunate few, are merely caretakers of this institution that others before us have sacrificed and in some instances given of their own lives so we might be here now. In this regard I hope my comments herein have set forth the basis for my dissenting opinion and unusual disagreement with the House Leadership and the majority of the Democratic Caucus. As I have stated both in private and public conversations, my vote with reservations has nothing to do with my respect and esteem for you and your leadership, Mr. Speaker, but instead centers exclusively on my disagreement with this public policy choice and the affects thereof.

"For the reasons stated above, I cast my aye vote with reservations."

Representative Thielen rose in support of the measure and asked that her written remarks be inserted in the Journal, and the Chair "so ordered."

Representative Thielen's written remarks are as follows:

"Mr. Speaker, when I was in active practice as an environmental attorney, I represented the Stop H-3 Association and other plaintiffs in litigation to prevent H-3 from being built. After a twelve year plus, legal battle, we won in the courts. Senator Daniel Inouye, then introduced a bill in the U.S. Senate to exempt H-3 from all environmental laws. His legislation passed, and H-3 became the only major public works project in the United States to be exempt from all environmental protections.

"The bill before us is significantly different. Senator Inouye's legislation did not contain any provisions protecting the environment or cultural resources, while letting the highway construction proceed. His bill flatly exempted H-3 from all such laws. In contrast, H.B. No. 1 will establish specific protections for the environment, which Superferry must follow as a condition of it being allowed to operate.

"During my legal career, practicing environmental and land use law, I understood clearly the scope of Chapter 343, H.R.S. the Hawaii Environmental Protection Act (HAPA), and its federal counterpart. An Environmental Impact Statement (EIS), required by HAPA, simply requires that the project proponent *disclose* the actual and potential impacts to the environment. Once these impacts are disclosed, HAPA's requirements are satisfied and the decision-maker can approve the project going forward. An EIS does not require the project to be modified; an EIS does not impose mandatory protections for our natural and cultural resources. In other words, an EIS is only a "disclosure" document -- it has no teeth.

"In contrast, H.B. No. 1 goes much further than an EIS ever could go -- we will have actual protections mandated by law. Superferry must abide by those provisions. And if S.B. No. 1 is passed over to us from the Senate, that legislation contains even more protection for Humpback Whales in the National Marine Sanctuary. Because we gain more protection from the bill before us than an EIS could or would give to the environment, I can vote for this measure."

Representative Sonson rose and asked that the Clerk record an aye vote with reservations for him, and the Chair "so ordered."

Representative McKelvey rose and asked that the Clerk record an aye vote with reservations for him, and the Chair "so ordered."

Representative Ching rose in support of the measure with reservations, and asked that her written remarks be inserted in the Journal, and the Chair "so ordered."

Representative Ching's written remarks are as follows:

"Thank you, Mr. Speaker, I stand in support with reservations.

"My support is based on the feedback from my district which is overwhelmingly in support of allowing the Superferry to run while an environmental review is being conducted. My constituents have cited numerous benefits they believe they will receive including, but not limited to the testimony of various individuals and organizations during the past few days. The need for viable, rapid and convenient transportation alternatives is greatly supported as inter-island transportation of goods, vehicles and people will enhance the quality of all islands.

"(1) The operation of a large capacity ferry can support civil defense response and recovery under the unfortunate circumstance of a natural or man-made disaster. Also, large equipment and vehicles such as firefighting apparatus, hazardous materials handling equipment, electric pole and line restoration trucks, and other public safety vehicles could get where needed in hours instead of days it would take with present vessels.

"(2) A high capacity ferry could also transport significant numbers of injured or sick people including those not easily accommodated on an aircraft away from a disaster scene to appropriate medical facilities on another island.

"(3) Traditionally there has been less than optimum integration among the markets of each island. The result is that Hawaii is not one large market but a series of small markets which leads to higher costs, limited markets and lower sales and income for business, service providers and farmers. The Superferry could help lower prices and increase market access. The Hawaii Farm Bureau testified in support stating that 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 meet their markets. Farmers and food processors state-wide will benefit as produce and agricultural products only grown on one island will easily be shipped to restaurants and markets on other

islands in a timely way while preserving freshness. If the Superferry is forced to leave, the action will have a significant negative impact on future capital investment in Hawaii.

"(4) An inter-island ferry will produce fewer carbon emissions than the equivalent airlift carrying cargo and passengers between islands.

"However, in respect of all above, this is not an easy or comfortable piece of legislation to vote on, which is why I vote with reservations. My concern stems from respecting the separation of powers - the Judiciary, as well with conditions needed to protect whales as we have a responsibility to be mindful of their health and safety. It concerns me that this bill does not have many conditions. I also, have concerns regarding the spread of invasive species. We must be mindful and protective of our environment. The environment is important and we must take care of it.

"In summary, this is a unique case and we must make the best of a bad situation. My constituents and the people of Hawaii want the Superferry. I believe our local and global economy, especially Hawaii's farmers could benefit profoundly from this service."

Representative Pine rose in support of the measure and asked that her written remarks be inserted in the Journal, and the Chair "so ordered."

Representative Pine's written remarks are as follows:

"Mr. Speaker, I rise to speak in support of this measure.

"As someone who is an advocate for supporting the environment, I have listened attentively to those activists who are concerned about invasive species transfer and whale safety. However, I have not yet heard any compelling argument that clearly differentiates the Hawaii Superferry from other vessels that did not have produce an Environmental Assessment or Impact Statement. If we are to support environmentalism, it is my hope that we support fair environmentalism.

"An Environmental Impact Statement (EIS) simply requires that the project proponent disclose the actual and potential impacts to the environment. An EIS does not require the project to be modified; an EIS does not impose mandatory protections for our natural and cultural resources. In other words, an EIS is only a "disclosure" document, it has no teeth.

"In contrast, HB1 goes much further than an EIS could ever go – we will have actual protections mandated by law, and Superferry must abide by those provisions. Because we gain more protection from the bill before us than an EIS could or would give to the environment, I am supporting this measure."

Representative Sagum rose in support of the measure and asked that his written remarks be inserted in the Journal, and the Chair "so ordered."

Representative Sagum's written remarks are as follows:

"Mr. Speaker, I rise in support of the House Bill 1. I have met independently with many West Kauai business owners, residents and peers, and as their Representative, I am now compelled to express my support for HB 1 for the following reasons:

1. An alternate mode of transportation between the islands is needed.
2. An alternate mode of transportation supports our farmers and small business needs in getting their products out to the world market.
3. An alternate mode of transportation provides our residents with employment.

4. An alternate mode of transportation provides State Civil Defense and emergency responders with alternatives not currently available.

5. And finally, an alternate mode of transportation represents good long-range planning.

"While there are constituents on both sides of the issue, I must report that an overwhelming majority of the 5,000 emails, letters and West Kauai citizens have expressed or demanded that I come here to tell you that they support and desire a large capacity ferry system.

"In the EEP Committee this past Session, I voted 'yes with reservations' that an EIS be prepared. I still want it prepared, as do my constituents. Supporting the Superferry does not mean I do not support the environment. I am a diver, fisherman and surfer, and I am deeply concerned about the environment. There is a perception that if you support the Superferry, you are against the environment; a myth that is being perpetuated by irresponsible officials and certain citizens.

"Finally, the Legislature will convene in a couple of months and can re-examine the operation and set new regulations."

Representative Luke rose and asked that the Clerk record an aye vote with reservations for her, and the Chair "so ordered."

Representative Carroll rose and asked that the Clerk record a no vote for her, and the Chair "so ordered."

Representative Berg rose in opposition to the measure, and asked that her written remarks be inserted in the Journal, and the Chair "so ordered."

Representative Berg's written remarks are as follows:

"Mr. Speaker, I rise in opposition of HB 1 and wish to share some thoughts about why I am opposing this measure.

"It is apparent from what the Majority Leader has just said that from the perspective of the leadership, the purpose for convening this Special Session was to allow the Superferry to operate – at all cost. Mr. Speaker, it has become clear that the Legislature was convened to establish a process to circumvent the existing laws in order to facilitate the permitting process for the benefit of one company.

"I am voting against this bill, Mr. Speaker, because I believe that we had a great opportunity to demonstrate leadership, discernment, and commitment to the people of Hawaii by accepting the previously proposed Floor Amendment – and we blew it. We threw away the chance we had for the House to offer a more appropriate form of legislation to pass on to the Senate.

"Hawaii's environmental law (HRS Chapter 343) was passed into existence after long and detailed legislative deliberation and consideration. It has been challenged and reviewed many times, and it has stood the test of time and served our unique natural resources well. I believe that it is patently absurd that we are considering tinkering with this important body of law, in haste, during a brief Special Session of the Legislature. A Regular Legislative Session is two months away, and a Regular Session allows the time for adequate investigation of the issues, expert input and public deliberation.

"This bill, Mr. Speaker, is a special interest bill to benefit one company from the blunders of the Lingle Administration to avoid disclosure under an environmental review process. This type of action shows no respect for the rule of law by this company or this Administration and now, by the Legislature. We jeopardize the integrity of this institution by our participation in what the Representative from Hanalei calls "a tragic comedy of errors."

"I believe the Floor Amendment was the best alternative to protect all interests, be it the Hawaii Superferry, the consumer or Hawaii's environment. Setting aside the issue of circumventing the law in the first place, it might have been the best route to re-establish and retain the balance of power between the Administration, the Legislature and the Judiciary.

"I cannot support this legislation as it now reads, Mr. Speaker. The Governor claims that the majority of the people in Hawaii support the Superferry. As we all know, this Session and this legislation isn't really about the Superferry at all.

"The Governor claims that unless the Legislature addresses the current situation, a bad message is sent to businesses all over the world.

"The process that got us to where we are today regarding the Superferry is actually neither anti- or pro-business, Mr. Speaker. It is an affirmation of our system of checks and balances. We welcomed a new idea for a transportation alternative and tried to facilitate the process administratively. As is appropriate in our system of laws, the courts ruled that serious errors were made and now the Superferry needs to do an environmental review.

"One could argue that the real message is: "if you come to Hawaii with a large enough project and preconditions on whether you will abide by Hawaii law; when the courts rule against you, you can rely on the Legislature to bail you out."

"Is this the kind of reputation we want to foster?"

"Laws are made not just for the majority but also to protect the minority, Mr. Speaker. I hope that we are more forthright when the Senate bill comes over, and we are offered another opportunity to do what is "pono." Thank you."

Representative Green rose in support of the measure with reservations, and asked that his written remarks be inserted in the Journal, and the Chair "so ordered."

Representative Green's written remarks are as follows:

"I am gratified that we, the Senate and House, are fighting to include more environmental protection measures in the legislation at hand, which deals with the Superferry. I can only vote yes with reservations at this time.

"I am optimistic that the Senate draft will go further than this draft on behalf of the environment and the people of West Hawaii and I will consider more full support then."

Representative Ward rose to speak in support of the measure, stating:

"Mr. Speaker, I have comments for the Floor in support. First I'd like to say thank you to Pat Mau-Shimizu, the Clerk, for her expertise in calibrating 4,000 testimonies and 2,000 people to come into the Capitol without a glitch, and have a very smooth hearing yesterday. No one was denied a voice on this issue. It was civil. It was democratic. It was something we could be very proud of on this island. I hope it sets a precedent for future deliberations.

"I want to also thank the Chair of Transportation from Maui, and the Chair of Finance. The patience and the professionalism that they offered as the hearing ensued. Again, the stack of 4,000 testimonies was this high, and people were standing in the Auditorium from 9:00 a.m. to 9:00 p.m. I think kudos are more than deserving.

"However, because of the rush of yesterday, there are a couple of important things that I think that the Committee Report has left out, and I would like to go on record mentioning. In particular, the

Committee Report, as thorough as it is, on page 4, fails to mention that the Maritime Administration guaranteed \$140 million for the Superferry. That's a very important point. Some people get the impression that this was taxpayers' money. It's not an appropriation. Congress has nothing to do with it. It's just like an SBA loan. They guarantee it. They don't put any money out for this. I think that's a bit of an omission if could put it in.

"Secondly, I believe that the harbor improvements, which I know has been a big issue with the people of Hawaii. 'Hey, we spent \$40 million of our money, and are we going to get our money back?' What the Committee Report fails to mention is that the vast, vast majority of these monies is for three barges and three ramps. The harbor improvements are essentially for bollards which are basically things that you tie up the ship with, and some new electricity conduits, and maybe a couple of tents. So the people of Hawaii should know that that stuff can actually, if the Superferry did leave, you can sell barges and you can sell ramps. So it's not in the Report as clear as I would prefer that it could be.

"And lastly, in use of the term, 'politicians', I know there was a rush and sometimes that's the way people would look at us, but I think it's rather pejorative to refer to this body and its members as 'politicians'. Particularly, it mentions the context of those from the Neighbor Islands who were the politicians, kind of making things rough. So I would suggest that 'elected officials' might be substituted for the word, 'politicians', even though when your elected officials are doing what you want them to do, he or she is a statesman. When they're not doing what you want them to do, you call them a politician. So, Mr. Speaker, I just want to say that for the record that that might make this thing read better in the future.

"But overall, it's a fine bill. It's constitutionally valid. And I believe it will be able to counter any legal challenge in the future. It protects against invasive species. It protects the whales. In fact, with these jet engines we were told in the hearing yesterday that at full speed ahead with a stop is 350 feet. From the stern to the front of the bow, that Superferry can stop within that short period of time, and in that short distance. That's just phenomenal and fantastic in terms of a whale sighting and being able to navigate in and around it.

"Overall, the bill gives the people of Hawaii an option to unite their families. It allows small business, not only the produce people, but those who have hard goods, to move from island to island with an option of a 24-hour turnaround. It gives disaster preparedness new life. And lastly and more importantly, and from Francine and those who saw Francine who is deaf and partially mute, it gives the disabled citizens of this State the first option to travel in and around that islands that they've never had before. It was really a joyous thing to see Francine testifying yesterday.

"In conclusion, this Session, if it proceeds as we hope it will, will allow the Superferry to sail. It will be a win-win situation. As I said earlier, it will fulfill a dream of many people in Hawaii, including Senator Hulten way back in the '70s when this was conceived. And now we have the opportunity after Sine Die, seven to ten days to get the Superferry moving again. I hope as my constituents expect me to vote for this, that all those in other constituencies will also vote for the Superferry which is of, by and for the people of Hawaii. Thank you, Mr. Speaker."

Representative Takamine rose in opposition to the measure, and asked that his written remarks be inserted in the Journal, and the Chair "so ordered."

Representative Takamine's written remarks are as follows:

"Mr. Speaker, I rise to speak against H.B. 1

"As a Neighbor Island Representative, I believe that any additional options of travel for Neighbor Island residents should be seriously

considered. If it means greater affordability or accessibility, then we should fully explore the possible options.

"That's why I am disappointed that I cannot support the legislation before us today. However, there are fundamental concerns and a critical history of actions taken by the Superferry and others who support the Superferry, that make it difficult for me to cast a "yes" vote on this measure.

"Rather than detailing each of these concerns, Mr. Speaker, I would like to attach a piece by Larry Lee that appeared in the *Advertiser* editorial page on October 15, 2007. The piece is self-explanatory and includes many of the concerns that led me to my "no" vote today.

"In light of the foregoing, Mr. Speaker, I regret that I will be voting against the measure before us."

"Posted on: Monday, October 15, 2007

COMMENTARY

Laws shouldn't be changed to suit whims

By Larry Lee

I can live with or without the Superferry, but either way, I do not think that a special session for the Superferry is appropriate or right. We are a nation of laws and not of men. This means that the law should not be bent or changed just to suit the current whims or sentiment of some people, even if they are the majority of people.

The law is intended to apply to all people, the minority as well as the majority. The ranks of the majority and minority constantly shift with each new issue. If each time the majority feels justified to change the law to suit its purposes and wishes, we are reduced to a nation of men, not of law. The law then ceases to protect the minority.

On one issue or another and at one time or another, we will all find ourselves in the minority. It will be a terrible blow to our confidence in our system of government if, as a minority, we felt that the law will not protect our interests because the majority could whimsically change it to suit itself at any time.

Everyone needs to step away from the emotion of the issue for a while and look at the big picture. Putting the Superferry aside, our environmental law was enacted after considerable discussion, work, time and compromise by our Legislature. It has served us well for many, many years and has protected our environment. To change it for the Superferry is a mistake.

A change in the law might suit the ferry now, but may fail our environmental needs in the future. Any change in this or any existing law should be made in regular session if at all possible, with ample opportunity for full input and deliberation and without any sense of immediate urgency. Only in this way can any law truly serve the public as a whole and protect the rights and interests of everyone. A special session, in this case, is very shortsighted.

The urgency surrounding the Superferry, while seeming real at the moment, is not urgent enough to violate our nation's legal principles. While millions of dollars and 308 jobs are important and not insignificant, they become insignificant in the big picture and in view of the damage a change in the law would inflict upon the integrity and public confidence in our system of government.

The money and the job loss will eventually be absorbed by our economy. As a nation, we have absorbed and adjusted to terrible natural and man-made events, which have cost billions of dollars and countless lives. As a state, we have absorbed and adjusted to terrible events as well — hurricanes, floods, strikes, recessions and scandals. These events have involved millions of lost dollars and touched many lives. Somehow, the people, the government and our economy have learned to adjust and move on. But, we survive and

move on because of our faith and respect for our system of government and laws.

The Superferry could well have avoided the current situation if the spirit and intent of the law had received the respect and attention that it deserved at the start. The environmental laws, locally and nationally, were not enacted to merely be an inconvenience. They are intended to address very important needs and to cure serious problems that will affect us, in the long run, much more than the success or failure of the Superferry.

The problem, as I see it, stems from the Superferry's decision to use a federal loan guarantee that was conditioned on having no environmental assessment/statement because of the time it took to do those studies. The next problem was that the Superferry expressed this condition to the state and the state, in its haste to satisfy and support the ferry, failed to apply the law and instead sought to justify its exemption. The state's downfall was to believe that the end justified the means and that the apparent popularity and need for the ferry would overwhelm the applicability of the law. In the end, the Superferry and state lost the gamble and the law prevailed.

Holding a special session now to change the law to accommodate the Superferry could be potentially more harmful than beneficial. Once a precedent of changing the law on the spur of the moment merely to accommodate a popular cause or business has begun, it becomes easier to do each subsequent time.

We often complain that our system is too slow to get anything done. Yet the framers of our government deliberately fashioned a system of checks and balances with the executive, legislative and judicial branches. Even the Legislature, with its bicameral system, is designed to promote slow and deliberate decisions. Wisdom should control, not emotions and transitory feelings of urgency. Each branch of government should respect the other and not try to blatantly circumvent each other.

If the Superferry can work things out and operate profitably within the requirements of our environmental law, then we all benefit. If it can't, someday there will be a ferry or other mode of transportation that can.

Larry Lee, a Kailua resident, is a former member of The Advertiser's Community Editorial Board and an attorney. He wrote this commentary for The Advertiser."

The Honolulu Advertiser

Representative Souki rose to speak in support of the measure, stating:

"Thank you very much, Mr. Speaker. I wish to speak in favor. I want to thank leadership for their very successful negotiation with the Senate in drafting H.B. 1. It was no easy task. They met for many hours and congratulations with that.

"I also want to congratulate the Clerk and her staff in devising a very creative method for indexing the testimony and making it much easier for all of us during that lengthy hearing that we had last night. I also want to thank the members of the respective House Committees, the Transportation and the Finance Committees, as well as the Vice Chair of Transportation and certainly the Vice Chair of Finance for being very supportive through all of this and working through this process.

"And I also want to thank the 70-plus percent of the public who support the ferry; the great silent majority out there who came out in the end, very strongly in favor of the ferry. I think that helped at this stage, in putting this bill through. And in one of the few times in the history in this Legislature, there is bipartisan support from both sides of the aisle for a particular bill. It is nice to see that on occasion, on

occasion we get together on a particular bill. We need to do this more often, of course on Democrat bills.

"Mr. Speaker and Members, I firmly believe that the ferry will be the glue that will bind this State and the counties together. As Kamehameha created one nation under him, this ferry with your help, your blessing, your hard work, will also bind the State together. Thank you, and aloha."

Representative Meyer rose to speak in support of the measure, stating:

"Thank you, Mr. Speaker. I would like permission to insert remarks. And I would like to respond to the Representative from Maui, but I'll just hold myself back. Yes, I am in support of the measure."

Representative Meyer's written remarks are as follows:

"Mr. Speaker, I rise in Support of HB1. Mr. Speaker, I would like to rebut the EEP Chair's contention that it is somehow the total fault of the Administration that the Superferry is now restricted from operating.

"The Hawaii State Legislature drafted legislation that is embodied in HRS 343 that the Hawaii Supreme Court, I believe interpreted too broadly. DOT has testified that they have never looked at secondary impacts when they received an exemption from an EA or EIS for a project. This Legislature asked for the DOT to expedite its harbor improvements in 2004 through a resolution and this State Legislature never told DOT to rethink its expedited process or consider having an EA or EIS. This could have been done through a resolution.

"Mr. Speaker, the Hawaii Supreme Court took two years to rule on the Superferry case and they ruled against the Superferry two days before the ship was going to begin sailing. Some will say, the Supreme Court has heard thousands of cases over the past few years and the Superferry case had to wait its turn. Mr. Speaker, I disagree. It is the duty of the Hawaii Supreme Court to know what cases should take priority over the others. The Supreme Court was in possession for two years of the extensive briefs filed with the court by both the plaintiff and defense attorneys. Even Judge Frank Padgett, who served on the Hawaii Supreme Court from 1982 to 1992, said that there is no excuse for a two-year delay.

"According to public record, the Hawaii Supreme Court first gave notice to the plaintiffs and defense attorneys on June 19, 2007 that they would be hearing oral arguments on August 15, 2007. The Superferry attorneys had less than two months to re-read and update their case and make sure that their arguments were still valid under current laws. Also, Lisa Munger promptly asked for an extension because she had a prior family commitment. The Supreme Court offered an extension from August 15, 2007 to August 23, 2007. The timing for oral arguments being so close to the Superferry sailing date makes one wonder.

"In looking at how the three branches of government performed in hindsight, it is clear that there were many opportunities where action could have ensured a different outcome. But we didn't Mr. Speaker and that is why we are here this Special Session. We are here at this Special Session to preserve this new type of transportation service for the majority of our constituents, while supporting conditions to minimize and mitigate any negative environmental effects. Thank you, Mr. Speaker."

Representative Waters rose and asked that the Clerk record an aye vote with reservations for him, and the Chair "so ordered."

Representative Belatti rose in opposition to the measure, and asked that her written remarks be inserted in the Journal, and the Chair "so ordered."

Representative Belatti's written remarks are as follows:

"I cannot support this unamended bill that is before this House. In the days preceding this Special Session, I believed that this House would conduct hearings and, in the spirit of democracy and compromise, truly be open to crafting the very best bill that we could to balance the many perspectives and desired outcomes expressed by the public.

"However, this has not happened in this first three days of this Special Session. This bill is unquestionably the product of an agreement between House leadership, and with this vote the majority of this House, the Administration and a business that has seriously miscalculated legal outcomes in its attempt to set up shop here in our State. By not joining our Senate counterparts to really listen to perspectives on the Neighbor Islands, by not allowing the Energy and Environmental Protection Committee to participate in the management of this bill, and by not taking on the difficult task of hammering out some conditions of our own based on the testimony we did hear, this House has abdicated its responsibility to legislate a truly balanced bill that acknowledges the many concerns felt throughout the State."

Representative Yamane rose and asked that the Clerk record an aye vote with reservations for him, and the Chair "so ordered."

Representative Bertram rose to speak in support of the measure with reservations, stating:

"Yes, I'm standing with reservations, and also to mention that I do support many of the things that were in the amendment submitted by the Representative from Kauai. I would also like to offer for people's consideration for the final vote as we deal with the Senate, the idea of not only supporting the new DLNR Chief and making sure that we do get a new Chief because it is going to be a very important position in dealing with the Superferry, but also that we enhance the DLNR with at least five new enforcement officers. It was very specific: five enforcement officers; two secretaries; and an office manager.

"But we do need to do this. It is something that is long overdue and the Superferry now is just pointing out the real need for this type of additional support for DLNR. So we might consider that when we deal with the Senate; that we actually put in a condition that will enhance the DLNR and allow them to be able to watch the Superferry. Thank you."

Representative Finnegan rose to speak in support of the measure, stating:

"Thank you, Mr. Speaker. Just short comments in support. I would just like to make one point. Being that I am the leader of the Minority Caucus, I realize how important the minority voice is. And that it takes a long time, it takes a lot of guts to be the minority voice. This exercise and this process that we do today is very important in the process; that the minority voice that comes from the different Representatives in offering an amendment, or seeking a different goal, that that is part of the process and it's okay.

"I guess I explain myself because it does make me feel uncomfortable at times because you're sought out, people may look and see that we might not be paying attention to the minority voice. But what it is, is that sometimes, there's just disagreement. And what do you do with that disagreement? Well, you move forward and you make a decision. I think that that's what we're doing here today. That there is disagreement and we're moving forward. We're not quelling a voice. We're not ignoring people. But this is a process that we participate in. I just wanted to make that point. I take it with all seriousness that this bill and all the different amendments that are being proposed, that I do appreciate the minority voice because I know what it's like to be the minority voice at times. Thank you."

Representative Har rose to speak in support of the measure, stating:

"Thank you, Mr. Speaker. In support. Yesterday, members of the Transportation and Finance Committees sat for about 12 hours listening to testimony. And the testimony we heard, regardless of which side of the issue you were on, was very, very passionate. The people that spoke to us yesterday, they spoke from the heart, and what they were saying was really what they believe to be in the best interest of the State.

"This bill, in its present form, to me, represents the best interest of the State. As members of the House of Representatives, I submit to this body that it is incumbent upon all of us, not only to represent the people, but to protect the people's interest. HB 1 does exactly that. It represents the majority of the voices of the people of the State of Hawaii by providing an alternative mode of transportation while protecting the people's interest, the people of this great State, the taxpayers of the State of Hawaii, from any lawsuits that could potentially be brought by the Superferry against the State of Hawaii. And who ultimately pays for those types of lawsuits? It's the taxpayers.

"I strongly support this measure because of the release and indemnity clause in this measure as it stands today. And I strongly support this measure because it will protect all of us, going forward, from any lawsuits, and potential claims the Superferry may have against the State of Hawaii and ultimately the taxpayers of the State of Hawaii. Thank you, Mr. Speaker."

Representative Tokioka rose in opposition to the measure, and asked that his written remarks be inserted in the Journal, and the Chair "so ordered."

Representative Tokioka's written remarks are as follows:

"Mr. Speaker, I am in opposition. I have always been a strong supporter of responsible businesses that support our community's desire to have a stable economy and which offer well paid secure jobs on our islands.

"In this case, however, I have serious concerns about the process utilized by the Lingle Administration in exempting the Superferry from an environmental review. Furthermore it is clear that the Administration ignored the counties' request for the Environmental Impact Statement when authorizing the Superferry to sail to Maui and Kauai.

"More than two and a half years ago the Neighbor Island County Councils asked the Governor to conduct an Environmental Review on the Superferry. I was on the Kauai County Council at the time and supported this request. If that had happened, I don't believe we would be in the predicament we are in today. Along with the environmental concerns, there are valid concerns about traffic, invasive species and the ability of our infrastructure to support this new source of visitors. What is the plan for 150 cars coming off the Superferry driving on to Nawiliwili Road? If say 75 cars turn left on to Nawiliwili what are the traffic mitigations for the amount of time it would take for those cars leaving an already congested area as well as the existing foot traffic from the visitors of the cruise ships. These concerns must be addressed.

"Mr. Speaker, as you are well aware, this has become a highly controversial issue, with both sides citing valid and bona fide concerns. Unfortunately, a few individuals have chosen to voice their dissent through acts of verbal intimidation and criminal property damage. This cannot be condoned for many reasons, but especially because it sends a negative message about Kauai's residents throughout our State that is not indicative of who we are as Kauaians.

"Thank you Mr. Speaker for the opportunity to speak on this issue, Although it seems that a bill to allow the Superferry to sail prior to an

EIS being completed will pass in some form, I would just like to ask the Governor, the Department of Transportation and the Superferry to heed the concerns of many, many of our people throughout the State of Hawaii and to be Pono and do what is RIGHT!"

At 4:46 o'clock p.m., Representative Yamashita requested a recess and the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 4:47 o'clock p.m.

The motion was put to vote by the Chair and carried, and H.B. No. 1, entitled: "A BILL FOR AN ACT RELATING TO TRANSPORTATION," passed Third Reading by a vote of 37 ayes, to 9 noes, with Representatives Berg, Belatti, Carroll, Hanohano, Morita, Saiki, Shimabukuro, Takamine and Tokioka voting no, and with Representatives Cabanilla, Chang, Marumoto, Takai and Takumi being excused.

At 4:48 o'clock p.m., the Chair noted that H.B. No. 1 passed Third Reading.

ADJOURNMENT

At 4:48 o'clock p.m. on motion by Representative Caldwell, seconded by Representative Meyer and carried, the House of Representatives adjourned until 12:00 o'clock noon, Monday, October 29, 2007. (Representatives Cabanilla, Chang, Marumoto, Takai and Takumi were excused.)