



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

February 27, 2009

TESTIMONY OF THE DEPARTMENT OF TRANSPORTATION

HOUSE BILL NO. 1163, HD1, RELATING TO HARBORS.

COMMITTEE ON FINANCE

The Department of Transportation (DOT) **strongly supports** this Administration Measure with changes as described in our testimony. This bill will expressly authorize the DOT to impose upon private parties who use our commercial harbors, the duty to defend, indemnify and hold harmless the State against claims that arise from such use.

Section 19-41-7, Hawaii Administrative Rules (HAR), imposed a duty upon users of harbor facilities to defend and indemnify the State against all claims arising from such activities, except where the State was proven to be solely and legally negligent. However, the Hawaii Supreme Court's decision in William Haole v. State of Hawaii, 111 Haw. 144 (2006), rendered Section 19-41-7, unenforceable. The Court ruled, in pertinent part, that:

"DOT's governing statutes do not explicitly or implicitly authorize the DOT to issue administrative rules exonerating the State from the negligence of its employees (i.e., they do not allow the DOT to impose upon private parties a duty to defend or indemnify the State)."

As a result of the Haole decision, the State, as the landowner, has and will continue to bear considerable financial exposure in costly lawsuits filed against the State for injury caused to plaintiffs by the negligent acts of the users of our harbor facilities.

This bill will provide the DOT with the express authority to impose, via the Hawaii Administrative Rules, a duty to defend, hold harmless and indemnify the State. Users of commercial harbor piers and properties should be held responsible for the safe operation of maritime and maritime related activities on harbor lands. While the duty to defend, hold harmless and indemnify is already imposed upon tenants under written lease agreements; other commercial activities take place within our harbors, such as on our general purpose piers, for which written agreements are impracticable and/or do not exist. Because tariffs presently control the fees charged to most users of commercial harbor facilities and services, written agreements are not executed by all users as a matter of custom and practice. This Administration Measure will provide protection to the State in situations where such historical uses are not covered by a written agreement.

The Hawaii Harbors User Group (HHUG) had expressed their reservations on the proposal and the DOT made significant adjustments to the bill's amending language to accommodate the concerns. HHUG requested that a final change be made but upon review by the Attorney General's Office, we were advised that the desired change would not be in the State's best interests. The following amendment was provided to the Judiciary Committee to replace the existing language in Section 266-3(c):

"(c) The director may also adopt, amend, and repeal such rules as are necessary to require any person who uses or occupies State harbor property to defend, indemnify, and hold harmless, the State, and any of its agencies, officers, and employees, from and against all liability, loss, damage, cost and expense, including all attorneys' fees, and all claims, suits, and demands therefore, arising out of or resulting from such use or occupation, and to condition the use or occupation of State harbor property on the waiver of any statutory or other immunity from liability that may be asserted in any way to limit such person's obligation to so defend, indemnify and hold harmless, the State, and any of its agencies, officers, and employees. Nothing herein shall be construed to prevent the State from being held liable for any damages, costs and expenses to the extent caused by the State's negligence or other fault, breach of contract, or failure to comply with statutory or other legal duty relating to State harbor property and paying for such damages, costs and expenses provided there is an appropriation therefor.

(d) For purposes of this section, "State harbor property" refers to the commercial harbors, ports, roadsteads, harbor buildings, and other harbor facilities of the State, including, but not limited to, the docks, wharves, piers, quays, bulkheads, or landings therein."

DOT feels that a concerted effort was made to accommodate HHUG's concerns while protecting the State's best interests. We urge the Committee on Finance to do what is in the best interests of the State and move this bill out with the foregoing amendment and effective date restored.

Vic Angoco  
Matson Navigation Company,  
Inc.

Mar Labrador  
Horizon-Lines, LLC

Glenn Hong  
Young Brothers, Ltd./Hawaiian  
Tug and Barge

Grant Karamatsu  
NCL America, Inc.

Douglas Won  
Sause Bros., Inc.

Richard Maxwell  
Aloha Cargo Transport,  
Division of Northland Services,  
Inc.

Robert T. Guard  
McCabe, Hamilton & Renny Co.,  
Ltd.

Jeff Brennan  
Hawaii Stevedores, Inc.

John Garibaldi  
Hawaii Superferry, Inc.

Lance Tanaka  
Tesoro Hawaii Corporation

Stephanie Ackerman  
The Gas Company

Eric Yoshizawa  
Ameron Hawaii

Nate Lopez  
Hawaiian Cement

Gary North  
Chairman

## WRITTEN TESTIMONY ONLY

### HOUSE COMMITTEE ON FINANCE

**THE HONORABLE MARCUS R. OSHIRO, CHAIR**  
**THE HONORABLE MARILYN B. LEE, VICE CHAIR**

**HOUSE BILL NO. 1163, HD 1**  
**scheduled for hearing on February 27, 2009, 11:00 a.m.**

**TESTIMONY OF GARY NORTH**  
**Chairman, Hawaii Harbors Users Group**

Chair Oshiro, Vice Chair Lee, and Members of the House Committee  
on Transportation:

Thank you for this opportunity to present testimony on HB  
1163, HD 1 on behalf of the Hawaii Harbor Users Group (HHUG).

HHUG is a non-profit maritime transportation industry group  
comprised of the following key harbor users: Matson Navigation  
Company, Horizon Lines, LLC, Young Brothers/Hawaii Tug & Barge,  
Norwegian Cruise Line, Sause Brothers Inc., Aloha Cargo Transport  
(ACT), Hawaii Stevedores, McCabe Hamilton & Renny Stevedores,  
Hawaii Superferry, Tesoro Hawaii Corporation, The Gas Company,  
Ameron Hawaii, and Hawaiian Cement.

This bill seeks to give the Department of Transportation (DOT)  
authority to pass rules requiring users or occupiers of harbor property  
to indemnify the State under a broad array of situations. HHUG does  
not support this bill in its present form. HHUG has been working with  
DOT-Harbors on a mutually acceptable amendment; however we

have not yet reached agreement. HHUG members have known about this proposal for only two weeks (from the time that notice was issued for the initial House Transportation Committee hearing on February 18, 2009). This is a complex bill that may have ultimately have large impacts on the manner in which risk and liability are apportioned amongst those who own, lease and/or use State harbor space.

HHUG does not question that harbor users should be responsible for damage or injuries arising out of their acts or negligence. However, this bill needs much closer review with respect to at least two issues. First, in situations in which the State has responsibilities, such as for the maintenance of harbor premises, HHUG believes that it is unfair and inappropriate for the State to obtain indemnity if the State fails to perform such maintenance or is otherwise negligent or responsible for the damage. Second, this bill appears to give DOT-H an avenue to depart from rules regarding liability under federal law and, although it is unclear whether this would be enforceable from a legal standpoint (involving issues such federal preemption), this bill may also have implications for the exclusive remedy protection for an employer (who may also be a user or occupier of harbor property) under the federal Longshore and Harbor Workers' Compensation Act. In any case, these are complex issues that are not subject to quick analysis and we respectfully suggest that any legislation needs to be clear with respect to the issues and situations it will impact.

In order to allow and encourage continued discussion between DOT-H and industry representatives, including HHUG, the House Judiciary Committee amended HB 1163 (in HD1) "[c]hanging its effective date to July 1, 2046, to encourage further discussion" (as noted in Stand. Com. Rep No. 566). We respectfully request that this Committee retain this date to encourage this further discussion to continue.

Thank you for this opportunity to testify.