



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

February 11, 2009

IN REPLY REFER TO:

TESTIMONY OF THE DEPARTMENT OF TRANSPORTATION

HOUSE BILL NO. 1163, RELATING TO HARBORS.

COMMITTEE ON TRANSPORTATION

The Department of Transportation (DOT) **strongly supports** this Administration Measure. 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.

Accordingly, we ask for your favorable consideration of this bill.

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

**HB 1163
RELATING TO HARBORS**

**GARY NORTH
CHAIRMAN
HAWAII HARBORS USERS GROUP**

FEBRUARY 11, 2009

Chair Souki, Vice Chair Awana, and Members of the House

Committee on Transportation:

I am Gary North, testifying on behalf of the Hawaii Harbors Users Group (HHUG), on HB 1163, "A BILL FOR AN ACT RELATING TO HARBORS."

The Hawaii Harbor Users Group (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 Cruse 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.

HHUG has serious reservations about this bill and, at a minimum, seeks to amend the legislation proposed to obtain indemnity from harbors users for all claims resulting from the use or

occupation of harbor land. HHUG does not question that harbor users should be responsible for damage or injuries arising out of their acts or negligence. However in situations in which the State has responsibilities, such as for the maintenance of the premises, HHUG believes that it is unfair and inappropriate for the State to obtain an indemnity if the State fails to perform the maintenance, or is otherwise negligent or responsible for the damage. We respectfully request that subsection (c) in Section 1 be amended as follows:

(c) The director may also adopt, amend, and repeal such rules as are necessary to require any person who uses or occupies 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, 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 if caused by the negligence or other fault, breach of contract, failure to comply with statutory or other legal duty of such person using or occupying the commercial harbors, ports, roadsteads, harbor buildings, and other harbor facilities of the State.

Thank you for this opportunity to testify.