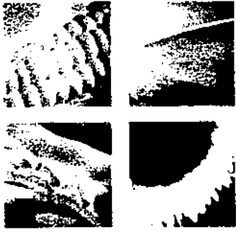

Hawaii Crop Improvement Association

Growing the Future of Worldwide Agriculture in Hawaii

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Testimony By: Alicia Maluafiti, Executive Director

HB 290 HD 1 - Relating to Agriculture
The House Committee on Finance
Thursday, Feb. 24, 2011
Room 308, 12:00 p.m.

LATE

Position: Strong Support

Aloha Chair Oshiro, Vice Chair Lee, and members of the Committee:

My name is Alicia Maluafiti, Executive Director of the Hawaii Crop Improvement Association, a nonprofit trade association representing the seed industry in Hawaii. HCIA strongly supports HB 290 HD 1 relating to the State Dept. of Agriculture's inspection and certification program.

HCIA believes that HB 290 HD 1 is an important and necessary initiative to mitigate further cutbacks to the Dept. of Agriculture as a result of Hawaii's fiscal crisis and the department's reliance on the general fund to support the ag inspector positions. The agricultural industry and especially the farmers whose commodities require inspection and certification by the HDOA risk their long term economic viability when they cannot get their products to market in a timely manner. The ability for the HDOA to utilize properly regulated third-party inspectors also provides the department with not only operational flexibility, but fiscal sustainability if that opportunity proves to be more affordable for the state.

We support any effort – including fee increases to the seed industry - to restore the Dept. of Agriculture positions, minimize the adverse impact of the budget crisis on their department, and ensure the HDOA's ability to support, promote and enhance Hawaii's agricultural industry. We believe HB 290 HD 1 is an important step in the right direction.

Mahalo for the opportunity to comment.

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October 24, 2006

MEMORANDUM

To: Mark Fox
Jeff Benz

From: Evan Cox
Elizabeth Brown

Re: Funding Agricultural Inspections Through Airport and Harbor Revenue and/or Inspection Fees

This memorandum discusses whether the State of Hawaii can fund agricultural inspections at its airports and harbors by using or transferring airport or harbor revenues or by charging fees. We conclude that there is no clear legal authority preventing Hawaii from charging inspection fees, within certain limits, although little case law expressly affirms the legitimacy of these fees. Nor is there any clear authority preventing Hawaii from using airport revenues or transferring airport and harbor revenues to fund such inspections, despite FAA's recent suggestions to the contrary. Our analysis is discussed in more detail below.

I. Airport Revenues Can Be Used to Fund Agricultural Inspections at Hawaii's Airports Under Certain Conditions.

A. The FAA Letter Suggests Restrictions on Airport Revenue Use.

By way of background, the FAA stated in a June 7, 2006 letter ("FAA letter") that it would be unlawful to use airport revenue to fund agricultural inspections at Hawaii's airports. We found little in FAA policy or regulations to support this statement. In fact, as explained below, the FAA's policy guidelines suggest that this use of airport revenue would be appropriate.

The FAA letter also noted that the FAA does "not consider HDoA inspection an airport function." This statement is also questionable. It appears to be inconsistent with the further suggestion in the same letter that HDoT "allocate the cost of the inspection facilities and operations to airport tenants as a common area cost or as a form of cost allocation." Assessing a common area cost would appear to generate "airport revenue." The FAA letter's suggestion that this revenue could be used to fund inspections suggests that the FAA does consider the inspections to be part of the operating costs of the airport or the "local airport system."

B. FAA Regulations Do Not Explicitly Prohibit Using Airport Revenue to Fund Inspections.

The FAA letter further claims that the "use of airport revenue to fund the HDoA inspector salaries would not represent a capital or operating cost of the airports. Restrictions on revenue use are explicit in the assurance, the law, and as more fully explained, the revenue use policy. Therefore, the use of airport revenue to fund inspectors would represent a prohibited use of airport revenue under US Code 47107(b) and 47133." While it is not clear what that middle sentence means, there is nothing in 49 USC § 47107(b), 49 USC § 47133, related code sections or the operative "revenue use policy" that clearly prohibits the use of airport revenue to fund agricultural inspections.

The limits on the use of airport revenue are set out in 49 USC § 47107(b) and (l). Section 47107(b) conditions approval of a "project grant application" on written assurances that public airport revenues "will be expended for the capital or operating costs of (a) the airport; (b) the local airport system; or (c) other local facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property." Similarly, under 49 USC § 47133, airport revenues cannot be "expended for any purpose other than the capital or operating costs of (1) the airport; (2) the local airport system; or (3) any other local facility that is owned or operated by the person or entity that owns or operates the airport that is directly and substantially related to the air transportation of passengers or property."

The purpose of revenue diversion regulations is to prohibit the use of revenues collected primarily from airlines or airport tenants (since the Anti-Head Tax Statute, discussed below, prohibits the direct taxation of passengers) from being used for purposes not directly related to airport operations. There does not appear to be any clear definition of the "capital or operating costs" of an airport or "a local airport system" under either of these statutes. Whether or not Hawaii's agricultural inspections qualify as "capital or operating costs" of the "airport" or "airport system," notwithstanding the FAA's assertion that they do not, is the key question.

C. FAA Policy Suggests Airport Revenue Can Be Used to Fund Inspections

The FAA letter refers to the "revenue use policy," by which the FAA presumably means the "Policy and Procedures Concerning the Use of Airport Revenue," 64 FR 7696 (February 16, 1999)(the "Policy"). While the Policy does not explicitly discuss agricultural inspections, it provides a strong basis from which to argue that those inspections are valid uses of airport revenue.

The Policy permits the use of airport revenue for capital or operating costs, and notes that "such costs may include reimbursements to a state or local agency for the costs of services actually received and documented, subject to the terms of this policy statement. Operating costs for an airport may be both direct and indirect and may include all of the expenses and costs that are recognized under the generally accepted accounting principles and practices that apply to the airport enterprise funds of state and local government entities." Id. at 7718. It's arguable that the state's agricultural inspections are just the kind of services for which reimbursements are contemplated in this section. The explicit recognition that an airport's

operating costs may be "both direct and indirect" weighs heavily in favor of flexibility in defining these costs.

The Policy also permits the use of airport revenue for certain expenses that may not fall as squarely within the definition of "capital and operating costs." According to the Policy, airport revenues can be spent on:

- "the salary and expenses of employees engaged in efforts to promote air service at the airport,"
- "advertising of general or specific airline services to the airport [*e.g.*,] a Superbowl hospitality tent for corporate aircraft crews at a sponsor-owned general aviation terminal intended to promote the use of that airport by corporate aircraft;"
- "[l]obbying fees and attorney fees to the extent these fees are for services in support of any activity or project for which airport revenues may be used under this Policy Statement;
- "costs incurred by government officials, such as city council members, to the extent that such costs are for services to the airport;" and
- "support of community activities, participation in community events, or support of community-purpose uses of airport property if such expenditures are directly and substantially related to the operation of the airport [*e.g.*,] contribution to a golf tournament sponsored by a "friends of the airport" committee."

In light of the Policy, it appears that agricultural inspections, especially those necessitated by a federal quarantine, are at least as valid a use of airport revenues as a Superbowl hospitality tent or contributions to a golf tournament. Allowing the airport to reimburse the Department of Agriculture for the cost of agricultural inspections is really no different from allowing reimbursement to a police department for the cost of providing law enforcement services to an airport, a use of airport revenues that the FAA's policy, at 7707, assumes would be permissible as long as the cost is properly apportioned to the airport.

Whether the agricultural inspection costs at issue have already been incurred should not be an issue. Under FAA policy, airport revenue may be used to reimburse a sponsor for past unreimbursed capital or operating costs when the claim is made within six years of the expenditure. *Id.* at 7704; 49 USC § 47107(l)(5).

II. Hawaii May Be Able To Charge Inspection Fees Directly.

A. The Anti-Head Tax Act Does Not Prohibit General Inspection Fees

The Anti-Head Tax Act ("AHTA"), 49 USC § 40116, prohibits the direct taxation of airline passengers. Specifically, it forbids the collection of a tax, fee or head charge on an individual traveler, the transportation of an individual, the sale of the air transportation, or the gross receipts from air commerce or transportation. 49 USC § 40116(b). The act does allow a

state or state subdivision to collect "reasonable rental charges, landing fees, and other service charges from aircraft operators for using airport facilities." 49 USC § 40116(e)(2).

Certain agricultural inspection fees were held not to violate the AHTA in *Alaska Airlines, Inc. v. Department of Food & Agriculture*, 33 Cal. App. 4th 506, 513-514 (Cal. Ct. App. 1995). "[T]he inspection fee is not a direct head tax. It bears no relation to the number of passengers or cargo on the aircraft, nor does it bear direct or indirect relation to persons or the carriage of persons traveling in air commerce, or the receipts derived therefrom. These facts also establish that the purpose and effect of the fee is to fund the inspection of foreign-sourced conveyances for pests, not to mask a charge otherwise prohibited by section 1513(a)[the prior code reference for the AHTA]." The fact that the fees in that case were for inspection of aircraft arriving from quarantined locations pursuant to California's Airport and Maritime Plant Quarantine, Inspection, and Plant Protection Act, not for the routine inspection of passengers' luggage, may have affected the court's ruling. "The fee at issue here does not have the required relation to the carriage of persons. Rather, it is a fee for the inspection of aircraft for pests, which is imposed by virtue of the fact that the aircraft arrive from designated quarantine areas." Id. at 514.

The inspection fee at issue in *Alaska Airlines* and the *Pacific Merchant* case discussed below was imposed in connection with the California Airport and Maritime Plant Quarantine, Inspection, and Plant Protection Act, enacted in 1990 as part of a state-sponsored effort to supplement the USDA's agricultural pest control efforts in California. The act was funded by "levy[ing] a fee on commercial marine carriers [...] for the use of marine terminal facilities for plant and animal pest inspection, quarantine, and eradication." Similarly, airport inspections were funded by "a service charge . . . based on the schedule established pursuant to Section 5353, on each air carrier or foreign air carrier engaged in foreign air commerce . . . for the use of airport facilities for plant and animal pest inspection, quarantine, and eradication."

Subsequent case law confirms that fees are permissible even if the airlines pass them on to individual passengers. "For a tax to be prohibited, it must bear some rational relation to persons or the carriage of persons traveling in air commerce. A fee which is based on other criteria is permitted, although passed on to passengers in the form of increased fares." *Burbank-Glendale-Pasadena Airport Authority v. City of Burbank*, 64 Cal. App. 4th 1217, 1223 (Cal. Ct. App. 1998)(cite omitted).

In short, whether a fee violates the AHTA depends on how that fee is calculated. The airport probably can charge fees to air transportation companies without violating the AHTA, as long as those fees are not based even indirectly on a head count. In light of the *Alaska Airlines* case, it would be best to avoid setting fees in a way that bears any relation either "to the number of passengers or cargo on the aircraft." 33 Cal. App. 4th at 513. Fees that are charged per vessel are more likely to pass legal review than those that are charged per passenger or even per pound of cargo. While charging an inspection fee to the passengers themselves is clearly prohibited by the AHTA, fees should not be struck down simply because an airline ultimately passed a permissible fee on to its customers in their fare.

B. Potential Bases for Structuring Inspection Fees Under the AHTA

As a larger issue, how a "reasonable ... service charge" may be structured is something of an open question. The AHTA does not define a method for charging air carriers, and the case law allows a fair amount of discretion. "Deference is given to the rates established by the state and administrative agencies as long as they act within a broad range of reasonableness." *Northwest Airlines, Inc. v. County of Kent*, 955 F.2d 1054, 1060 (6th Cir. 1992); *see also Indianapolis Airport Authority v. American Airlines Inc.,* 733 F.2d 1262, 1270 (7th Cir. 1983)("[U]nless there were a single valid method [of calculating airline landing fees], we could not tell the Authority what fees it must charge; and no one says there is." The *Northwest Airlines* court helpfully noted that "a fee assessed is reasonable as long as it is based on some fair approximation of the cost of providing the facilities and services, is relevant to the operation of the airport, and is not arbitrary and capricious, but is based on a uniform, fair and practical standard." Id. at 1060. According to the court in *Island Aviation Inc. v. Guam Airport Authority*, 562 F. Supp. 951, 959 (D. Guam 1982), "the airport operator may, and effectively must, levy and collect, by means of a nondiscriminatory formula, calculated by taking into account such factors as the volume of traffic using the facilities, reasonable rental charges, landing fees and other service charges, as may be necessary to make the airport of self-sustaining as possible." (statutory cites omitted).

The *Alaska Airlines* case is the most closely analogous discussion of inspection fees. In that case, California imposed a flat inspection fee or "service charge" of $85 for aircraft and $200 for ships "arriving from such locations and carrying animals, plants or other materials which are, or are likely to be, infested with any pest." *Alaska Airlines,* 33 Cal. App. 4th at 510. All such aircraft and ships were inspected upon their entry into the state at airports and marine terminals. *Id.*

The California Court of Appeal approved these agricultural inspection fees in part because they were

> based on criteria other than the number of passengers carried; that the fees are also imposed on nonpassenger flights; that the fees do not vary depending on the number of passengers or passenger receipts; that inspections are also performed on air cargo and air freight operations; that the fee is charged even if the airplane is empty; and that the amount of fee is subject to change or elimination by the director under an incentive program in which the airlines may participate, or pursuant to a request for exemption. ... These facts [...] establish that the purpose and effect of the fee is to fund the inspection of foreign-sourced conveyances for pests, not to mask a charge otherwise prohibited by [the AHTA].

Id. at 513-514. These guidelines may be helpful as a template in recommending a fee structure to the State of Hawaii, but a flat fee such as the one in *Alaska Airlines* is not the only option. Cases describing permissible and impermissible fee structures include *Northwest Airlines*, 955 F.2d 1054 (6th Cir. 1992) (approving service fee calculation method under AHTA); *Indianapolis Airport Authority,* 733 F.2d 1262 (7th Cir. 1983) (service fees unreasonable, in violation of AHTA and Commerce Clause, when "the result is an exaction that is wholly disproportionate to

the costs to the airport of serving the airlines and their passengers"); and *Island Aviation Inc.*, 562 F. Supp. 951 (D. Guam 1982) (approving service fee calculation method under AHTA). In addition, there is a lengthy discussion of the AHTA's development in *City and County of Denver v. Continental Airlines*, 712 F.Supp. 834 (D. Colo. 1989) (approving use of surplus fund from airport concession revenues but prohibiting increased usage fees at old airport to pay for new airport construction).

To whom can these fees be charged? There is no clear distinction between airlines and air cargo companies in the AHTA. The statute itself allows the collection of reasonable "service charges" from "aircraft operators," 49 USCS § 40116(e), which presumably includes both types of air carriers.

As for a fee on importers, the AHTA on its face does not apply to importers that are not themselves engaged in transportation, so it is not immediately apparent that such a fee would violate the AHTA. No case law was found addressing the issue of charging fees to companies that import goods by contracting with carriers; the only legal authority found concerns the carriers themselves. However, there is some language in the cases concerning carriers that gives cause for concern that a fee on importers might be regarded as similar to a prohibited tax on passengers if the amount of the fee were calculated in relation to the amount of cargo being imported. For example, in *Alaska Airlines*, the court reasoned: "[T]he inspection fee is not a direct head tax. It bears no relation to the number of passengers or cargo on the aircraft." 33 Cal. App. 4th at 513-514 (*emphasis added*).

To the extent charging fees to importers is permissible, calculating such a fee based on risk factors associated with the type of cargo or the cargo's point of origin is probably fine as long as there is a clear connection between the fee-determining criteria and the expense of the inspection. Such a fee schedule would be based on "some fair approximation of the cost of providing the facilities and services," and therefore squarely in line with authority like *Northwest Airlines*.

C. Inspection Fees Are Likely to Be Constitutional Within Certain Limits.

While the AHTA limits the extent to which a state may impose fees on air transportation, relatively little case law was found on whether a state may impose harbor fees on vessels entering its ports. The main restrictions on such a fee are constitutional, although constitutional restrictions apply to fees on air carriers as well. In order to pass muster, any such fee would have to be applied so that it did not discriminate against foreign or interstate commerce in violation of the Commerce Clause. It would also have to comport with the Constitution's Export-Import Clause and the Tonnage fee restrictions.

1. Commerce Clause

The Supreme Court of California has ruled that an agricultural inspection fee violated the Commerce Clause of the United States Constitution. *Pacific Merchant Shipping Assn. v. Voss*, 12 Cal. 4th 503 (Cal. 1995). The court's decision turned on the fact that the fees were charged to foreign commerce but not to domestic interstate commerce, effectively discriminating against foreign commerce. *Id.* at 521. The decision suggested, however, that

foreign commerce and domestic commerce need not pay the same regulatory fee as long as the fees are assessed "fairly." The U.S. Supreme Court had acknowledged in *Oregon Waste Systems vs. Department of Env. Quality,* (1994) 511 U.S. 93, that "a state could justifiably recover the increased cost [of inspections] through a differential charge on the disfavored class of commerce." The California Supreme Court pointed out, however, that "the high court's reasoning presumes that the favorite class of commerce will at least pay its own share of the costs, so the disfavored class would be burdened only by the differential." *Pacific Merchant,* 12 Cal. 4th at 528.

The U.S. Supreme Court also struck down California's effort to tax shipping companies' cargo containers as a violation of the Commerce Clause in *Japan Line Ltd. et al. vs. County of Los Angeles et al.*, (1979) 441 US 434. The sticking point in that case was the taxation of foreign commerce; had the shipping containers been instruments of interstate commerce only, the Court noted, the tax would have been fairly apportioned and the Commerce Clause requirements would have been satisfied. Id. at 445. The fact that the ships were Japanese raised another set of issues that, in the eyes of the Court, threatened federal uniformity on taxation, subjected the ships to multiple taxation (by both California and Japan), and was therefore unconstitutional. Id. at 453-454.

2. Export-Import Clause

Any harbor fee imposed by Hawaii must be consistent with the Import-Export Clause of the U.S. Constitution. The Import-Export Clause prohibits a state from "lay[ing] any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws." U.S. Const. art. I, § 10, cl. 2. The Supreme Court has interpreted the Import-Export Clause to permit states to impose "generally applicable, nondiscriminatory taxes even if those taxes fall on imports or exports." *United States v. Int'l Bus. Mach. Corp.*, 517 U.S. 843, 852, 116 S. Ct. 1793, 135 L. Ed. 2d 124 (1996) (citing *Department of Revenue of Washington v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978); *Michelin Tire Corp. v. W.L. Wages*, 423 U.S. 276, 46 L. Ed. 2d 495, 96 S. Ct. 535 (1976)).

Port fees designed to recoup some or all the cost of the state's agricultural inspections would not violate the Import-Export clause under the analysis laid out in *Michelin.* First, the fee would not affect foreign commercial relations, as it would "appl[y] only to business conducted at the Port and impose no burdens on foreign businesses." *Auto Cargo, Inc. v. Miami Dade County*, 237 F.3d 1289, 1293 (11th Cir. 2001) (citations omitted). Second, a port fee "deprives the Federal Government of no revenues to which it was entitled. The exaction merely pays for services . . . supplied by the local government." See *Washington Stevedoring,* 435 U.S. at 753 (summarizing the analysis in Michelin); *id.* at 754 (finding that a state tax on stevedoring companies merely compensates the state for services and protection).

3. Foreign Versus Domestic Cargo

There are some differences to consider between a state assessing a fee on inspections of foreign versus domestic cargo. One difference is that the foreign cargo fee raises the concern of whether the fee interferes with "federal uniformity in foreign commercial

relations," which could violate the Import-Export Clause. As discussed above, an assessment fee is presumptively valid unless it interferes with the three policy concerns that motivated the Framers in adopting the Import-Export Clause: 1) maintaining federal uniformity in foreign commercial relations; 2) preventing the diversion to the states revenue generated by imported goods; and 3) maintaining harmony among the states by preventing states from taxing goods flowing through seaboard states' ports to (or from) other states.. *Auto Cargo, Inc.*, 237 F.3d at 1292.

Another concern is whether a fee discriminates against foreign commerce, in violation of the Commerce Clause. It would be unconstitutional to charge an inspection fee for foreign cargo but not for domestic cargo, as the Supreme Court of California held in *Pacific Merchant*, 12 Cal. 4th 503 (Cal. 1995). Hawaii could, however, charge a higher inspection fee for foreign cargo compared with domestic cargo if the differential were justified, for example, by some higher expense associated with the foreign inspection. *Id.* at 528.

Fees assessed both on domestic and imported cargo do not interfere with the federal regulation of foreign commerce, nor do they violate the Commerce Clause. In *City of Los Angeles v. Marine Wholesale/Warehouse Co.*, 15 Cal. App. 4th 1834, 1844 (2d. App. 1993), for example, the court upheld a tax that did "not single out those businesses handling imported goods" as not interfering "with the government's right to regulate foreign commerce." The *Voss* case suggests that an equitably assessed inspection fee would not violate the Commerce Clause.

4. Tonnage

A port fee would not run afoul of the constitutional prohibition on "tonnage" fees. The United States Constitution provides that "no State shall, without the Consent of Congress, lay any Duty of Tonnage." Article I, § 10, ch. 3. Tonnage duties are taxes or tolls measured by tonnage and imposed on vessels that are instruments of commerce. *Cox v. Lott*, 79 U.S. 204, 20 L. Ed. 370 (1870).

The U.S. Supreme Court distinguishes tonnage duties from other fees charged by state authorities "for services rendered to and enjoyed by the vessel," such as pilotage, wharfage, charges for the use of locks on a navigable river, or fees for medical inspection. *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 265-66 (1935). "To determine whether a charge is a duty of tonnage within the meaning of the Constitution, one must consider the essence and the object of the charge. If the essence of the charge is a duty for the privilege of entering the port imposed by authority of the State, it is a constitutionally prohibited duty of tonnage. If it is a charge for services rendered or conveniences provided, it is not a duty of tonnage." *Indiana Port Com. v. Bethlehem Steel Corp.*, 653 F. Supp. 604, 609-610 (D. Ind. 1987)(internal citations omitted).

HDoA's port fees would fall into the category of permissible, service-based fees to the extent they would be used to pay for agricultural inspections that are a precondition of cargo entering Hawaii.

III. Existing Revenues Can Be Transferred From HDoT to HDoA

Based on limited research, there does not appear to be any obvious federal statutory restriction on transfers of harbor fee revenue by HDoT to HDoA to help cover the

reasonable costs of agricultural inspections as a precondition of cargo entering the state. In contrast to aviation, where there is substantial federal funding, the federal government does not appear to play a large role in funding port activities, and thus, presumably, there has been no equivalent pressure for something like the FAA's anti-diversion statute.[1] For example, the audited financial statements for the HDoT Harbors Division 2004 and 2005 (the "Audit Report") reflect no more than $700,000 in "government financing" for capital improvements (see page 14, unspecified whether this is federal or state financing), with the vast majority of capital funding being raised through approximately $190 million in state Harbor System Revenue Bonds. [2]

Nor has research identified any clear state level restriction on a transfer of funds from HDoT to HDoA to cover the cost of agricultural inspectors. The Audit Report shows that in 2005, the HDoT Harbors Division took in $52.9 million in wharfage, docking and fees revenue, and $27.3 million from rental fees to shipping companies. These funds go into the Harbors Special Fund established under Haw. Rev. Stat. §266-19 and are used primarily to pay operating expenses and debt service on the Harbor System Revenue Bonds. The statute states that such monies:

> each fiscal year shall be appropriated, applied, or expended by the department of transportation for the statewide system of harbors for *any purpose* within the jurisdiction, powers, duties, and functions of the department of transportation related to the statewide system of harbors (excluding properties principally used for recreation or the landing of fish, except the properties located at Kewalo Basin, ewa of Ala Moana Park, Honolulu), *including, without limitation, the costs of operation, maintenance and repair of the statewide system of harbors* and reserves therefor, and acquisitions (including real property and interests therein), constructions, additions, expansions, improvements, renewals, replacements, reconstruction, engineering, investigation, and planning, for the statewide system of harbors, *all or any of which in the judgment of the department of transportation are necessary to the performance of its duties or functions. (emphasis added)*

While this language is broad, and relies specifically on the "judgment" of the department about what "costs of operation" lie within its "duties or functions", it does not unequivocally comprehend invasive species inspections. Subsection (b) of the statute further states that:

> At any time the director of transportation may *transfer* from the harbor special fund created by paragraph (a) of this section, *all or any portion of available moneys on deposit in the harbor special fund determined by the director of transportation to be in excess of one hundred fifty per cent of the requirements for the ensuing twelve months* for the harbor special fund as permitted by and in

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[1] *See generally U.S. Port Development Expenditure Report - November 2005 [FYs 2003 & 2004-2008] and Report to Congress on the Performance of Ports and the Intermodal System, available at* http://www.marad.dot.gov/Publications/ports.htm.

[2] http://www.hawaii.gov/dot/administration/audit/index.htm

> accordance with section 37-53. For purposes of such determination, the director of transportation shall take into consideration the amount of federal funds and bond funds on deposit in, and budgeted to be expended from, the harbor special fund during such period, amounts on deposit in the harbor special fund which are encumbered or otherwise obligated, budgeted amounts payable from the harbor special fund during such period, and revenues anticipated to be received by and expenditures to be made from the harbor special fund during such period based on existing agreements and other information for the ensuing twelve months, and such other factors as the director of transportation shall deem appropriate.

While it can be argued that a transfer to HDoA would qualify as a direct expense of operating the harbor system, this language provides additional reassurance that "transfers" of money are contemplated and authorized, but it also indicates that the 150% threshold may come into play.

The Audit Report discloses at least two examples of transfers of funds that are of potential relevance to an argument that transfers to HDoA are within its authority. First, Note P indicates that HDoT transferred amounts of approximately $1.6 and $1.7 million in 2005 and 2004 respectively to reimburse "fireboat operation services provided by" the City and County of Honolulu. Such "fireboat operations" are designated as an "operating expense" in the accounts on Page 14. Second, HDoT routinely transfers 5% of its revenues to the State to reimburse "general services expenses." This latter transfer, however, is specifically provided for by statute under Haw. Rev. Stat. §36-29.

Finally, it would appear that the Legislature believes such transfers are permissible, because provision for "interdepartmental transfers" was identified as one source of funding for invasive pest control in Section 4 of the State Budget, Act 160 (2006):

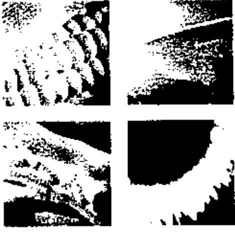
> SECTION 4. Part III, Act 178, Session Laws of Hawaii 2005, is amended: . . .
> (3) By adding a new section to read as follows:
>
> "SECTION 4.2. Provided that of the appropriations for plant, pest, and disease control (AGR 122), the sums of $293,088 in federal funds, *$430,000 in interdepartmental transfer funds,* and $2,230,412 in general funds for fiscal year 2006-2007 shall be expended by the department of agriculture for pest prevention, including response and control, research, and public outreach as necessary; provided further that the funds shall not be expended for any other purpose; provided further that any unexpended funds shall lapse to their respective funds; provided further that the department shall prepare a report that shall include, but not be limited to, how well Hawaii is doing in the fight against invasive species, including data, measures of effectiveness, and outcomes from its efforts to:
>
> (1) *Inspect and detect greater numbers and percentages of invasive species at airports and harbors*;
>
> (2) Jointly work with other agencies and the community;

(3) Control and eradicate alien species that have become established in Hawaii; and

(4) *Discuss user fees with airport and harbor users and managers,* and recommend user fee and other legislation to improve Hawaii's effectiveness against invasive species;

and provided further that the department shall submit the report to the legislature no later than twenty days prior to the convening of the 2007 regular session." *(emphasis added).*

If there is any further information we can provide, please let us know.



Hawaii Crop Improvement Association

Growing the Future of Worldwide Agriculture in Hawaii

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Executive Director
Alicia Maluafiti

Testimony By: Alicia Maluafiti, Executive Director

HB 1568 HD 1 - Relating to Agriculture
The House Committee on Finance
Thursday, Feb. 24, 2011
Room 308, 12:00 p.m.

LATE

Position: Strong Support

Aloha Chair Oshiro, Vice Chair Lee, and members of the Committee:

My name is Alicia Maluafiti, Executive Director of the Hawaii Crop Improvement Association, a nonprofit trade association representing the seed industry in Hawaii. HCIA strongly supports HB 1568 HD 1 establishing biosecurity and inspection facilities at Hawaii state airports and harbors.

If the greatest risk for invasive species to this state is through transportation by air and sea, then it seems not only logical but imperative that appropriate inspection facilities and consistent inspection activities need to be established at those points of entry. The implementation of biosecurity facilities as proposed in HB 1568 reduces the likelihood of economic loss associated with the introduction of additional invasive species and additional quarantine on Hawaii's exported goods.

The recent increase in the number of coqui frogs found on Oahu highlights the need for not only more agricultural inspectors to check on cargo coming into the state and moving from island to island, but the more efficient use of those inspectors through established facilities. Three coqui were caught on Oahu in three different neighborhoods during a recent three week span. One of them was found at the Waikiki Trade Center on Seaside Avenue in Waikiki. A second coqui was captured a few miles away on Diamond Head Circle. A third was caught in Ko Olina. This kind of find is unprecedented on Oahu. With the unprecedented budget cuts to the Dept. of Agriculture, we need to investigate reasonable alternatives to limit the introduction of invasive species to the state BEFORE they can wreak irreversible damage to our islands.

We ask you to please pass HB 1568 HD 1. Mahalo for the opportunity to comment.

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