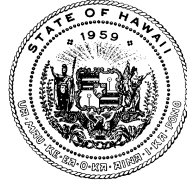


JOSH GREEN, M.D.
GOVERNOR OF HAWAII
KE KIA'AINA O KA MOKU'AINA 'O HAWAII



KENNETH S. FINK, MD, MGA, MPH
DIRECTOR OF HEALTH
KA LUNA HO'OKELE

STATE OF HAWAII
DEPARTMENT OF HEALTH
KA 'OIHANA OLAKINO
P. O. BOX 3378
HONOLULU, HI 96801-3378
doh.testimony@doh.hawaii.gov

In reply, please refer to:
File:

**Testimony COMMENTING on HB1201 HD1
RELATING TO NOISE POLLUTION**

SENATOR JOY A. SAN BUENAVENTURA & SENATOR CHRIS LEE, CHAIRS
SENATE COMMITTEE ON HEALTH AND HUMAN SERVICES & COMMITTEE ON
TRANSPORTATION AND CULTURE AND THE ARTS

Hearing Date: 3/21/2023

Room Number: 224

1 **Fiscal Implications:** This measure may impact the priorities identified in the Governor's
2 Executive Budget Request for the Department of Health's (Department) appropriations and
3 personnel priorities. Proposed requirements will require additional staff time and effort.
4 **Department Testimony:** The Department respectfully comments on this measure which
5 amends Chapter 342F, Hawaii Revised Statutes to address helicopters as a public nuisance due to
6 noise pollution. The Department understands that this measure may be preempted by the federal
7 government. The Department defers to testimony of the Department Attorney General.

8
9

10 Thank you for the opportunity to testify.

11 **Offered Amendments:** None

12

JOSH GREEN, M.D.
GOVERNOR



TESTIMONY BY:

EDWIN H. SNIFFEN
DIRECTOR

Deputy Directors
DREANALEE K. KALILI
TAMMY L. LEE
ROBIN K. SHISHIDO
JAMES KUNANE TOKIOKA

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

March 21, 2023
3:05 P.M.
State Capitol, Teleconference

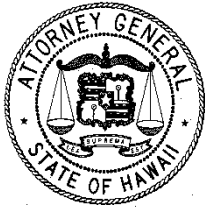
H.B. 1201 HD1
RELATING TO NOISE POLLUTION

Senate Committees on Health and Human Services
and Transportation and Culture and the Arts

The Department of Transportation (DOT) provides **comments** on this measure, which amends Chapter 342F, Hawaii Revised Statutes to address helicopters as a public nuisance due to noise pollution.

The DOT believes that this measure may be preempted by the federal government and as such we defer to the testimony of the Department of the Attorney General.

Thank you for the opportunity to provide testimony.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA 'OIHANA O KA LOIO KUHINA
THIRTY-SECOND LEGISLATURE, 2023**

ON THE FOLLOWING MEASURE:

H.B. NO. 1201, H.D. 1, RELATING TO NOISE POLLUTION.

BEFORE THE:

SENATE COMMITTEES ON HEALTH AND HUMAN SERVICES AND ON
TRANSPORTATION AND CULTURE AND THE ARTS

DATE: Tuesday, March 21, 2023

TIME: 3:05 p.m.

LOCATION: State Capitol, Room 224

TESTIFIER(S): Anne E. Lopez, Attorney General, or
Wade H. Hargrove III, Deputy Attorney General

Chairs San Buenaventura and Lee and Members of the Committees:

The Department of the Attorney General opposes this bill.

The purpose of this bill is to add a new section to chapter 342F, Hawaii Revised Statutes (HRS), to make the sound generated by helicopters above a certain decibel level measured on the dBC weighting system a public nuisance and a violation of that chapter. It would allow the Department of Health (DOH) to respond to complaints, take readings of helicopter noise, and collect a fine of no less than \$5,000 for a first offense and \$10,000 for each subsequent offense. It would also create a private cause of action for individuals to seek an injunction and recover damages for violations of this new section.

As we have discussed previously, the bill is subject to challenge under the Supremacy Clause of the U.S. Constitution, which provides that state law is subordinate to federal law. U.S. Const., Art. VI, Sec. 2. Section 1108(a) of the Federal Aviation Act, as amended, provides that "The United States Government has exclusive sovereignty of airspace of the United States," 49 U.S.C. § 40103(a)(1).

The responsibility of regulating air traffic, and the noise related to that air traffic, belongs exclusively to the federal government and any state or municipal effort to regulate in this area is subject to constitutional challenge and will be preempted by federal law. See City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973).

Congress granted to the Federal Aviation Administration (FAA) the obligation to regulate all things related to aircraft and expressly preempted any state or local efforts to do so. City of Burbank, at 628-29.

Additionally, the United States Supreme Court has declared: "The aircraft and its noise are indivisible; the noise of the aircraft extends outward from it with the same inseparability as its wings and tail assembly[.]" Id. at 629 (quoting American Airlines v. Hempstead, 272 F. Supp. 226, 230 (E.D.N.Y. 1967)). The Noise Control Act of 1972 requires the FAA to specifically coordinate its adoption of regulations with the recommendations of the United States Environmental Protection Agency, further establishing the federal government's paramount role in the regulation of noise related to air traffic not only as a flight-management issue but also as a matter of public health and safety (i.e., nuisance). Id. at 630-31. Consequently, the regulation of aircraft noise is the exclusive right of the federal government, and neither the State nor an individual may bring claims against helicopter operators for noise pursuant to the causes of action this bill seeks to create.

If challenged, a court will likely refuse to recognize both the DOH's authority to investigate helicopter noise and collect penalties and the private cause of action this measure attempts to create.

The Department respectfully opposes this bill for the preemption concern stated above and requests that it be held.



Senate Committee on Health & Human Services
Senate Committee on Transportation & Culture and the Arts
Hawaii State Legislature

Monday, March 20, 2023

RE: Opposition to House Bill 1201

As representative of the international vertical flight and general aviation industry, the Aircraft Owners and Pilots Association (AOPA) and the Helicopter Association International (HAI), would like to express our serious concerns regarding HB 1201. HAI represents more than 1,100 companies and over 16,000 industry professionals. Each year, HAI members safely operate more than 3,700 helicopters and remotely piloted aircraft approximately 2.9 million hours. HAI is dedicated to the promotion of vertical flight as a safe, effective method of commerce and to the advancement of the international vertical flight community. AOPA is the world's largest aviation membership organization and represents the general aviation interests of hundreds of thousands of aircraft owners and pilots across the country, including hundreds of members from Hawaii state alone.

HAI and AOPA strongly oppose HB 1201. The bill runs afoul of well-settled federal law and opens the door to frivolous lawsuits. The Federal Aviation Administration (FAA) and the federal Department of Transportation (DOT) have exclusive authority over aviation. The state of Hawaii has no legal grounds to set an acceptable or unacceptable noise threshold for helicopter operations, nor does the state have authority to set other requirements for where, when, or how noise violations could be issued. Below we provide a brief overview of several of the larger issues with the Act.

First, HB 1201 directly infringes federal law related to aircraft noise emissions. The FAA has been delegated exclusive responsibility by Congress to regulate aircraft noise, and has exercised that authority, PREEMPTING any state or local regulation. See, e.g., 49 U.S.C. § 44715; 14 C.F.R. Part 36; *Advisory Circular 36-1H* (Nov. 15, 2001); and *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973).

Second, the FAA has also been delegated (and further exercised) exclusive responsibility over the safe and efficient management of the U.S. navigable airspace system. See, e.g., *Blue Sky Entertainment, Inc. v. Town of Gardiner*, 711 F.Supp. 678, 692 (N.D.N.Y. 1989). The provisions for private injunctions, private damages, and state fines all would directly restrict how helicopters operate in Hawaii, and all of them are preempted by federal oversight.

Third, 49 U.S.C. § 41713, as enforced by DOT, expressly prohibits Hawaii from regulating the prices, routes, and services of air carriers. See, e.g., *Friends of the East Hampton Airport v. Town of East Hampton*, 841 F.3d 133, 139 (2d Cir. 2016). Likewise, many helicopter operations over Hawaii are conducted by air carriers, as federally defined, and this bill would restrict their routes, as well as impact their services and prices. Hawaii may not directly or indirectly implement requirements that re-regulate air carriers.

Fourth, Hawaii cannot circumvent the preemptive effect of federal statutes by using private litigation as a means of enforcement. If enacted, HB 1201 would allow any person who is "aggrieved by a violation" to



bring a civil action against the operator or owner of the helicopter. Preemption also applies if a state, rather than regulating directly, grants individuals a private right of action. *See, e.g., Whitten v. Vehicle Removal Corp.*, 56 S.W.3d 293, 310 (Tex. App. 2001). HAI and AOPA are also concerned that HB 1201 would allow Hawaii's Department of Transportation to rely on decibel readings collected by private residents, without any independent verification of their accuracy. In comparison, speed cameras for traffic enforcement must be carefully calibrated and are used only by trained law enforcement officers.

Fifth, the bill describes the noise that it prohibits as a "public nuisance." Yet courts previously have concluded that a nuisance claim cannot be premised on the operation of aircraft in compliance with federal law. For example, in *St. Lucie County v. Town of St. Lucie Village*, 603 So.2d 1289, 1293 (Fla. 4th Dist. Ct. 1992), the court held that noise from aircraft operating at an airport in compliance with FAA requirements could not constitute a nuisance. *See also Wells v. Kentucky Airmotive, Inc.*, 2014 WL 4049894, *4-5 (Ky. App. August 15, 2014) and *Friends of Merrymeeting Bay v. Central Maine Power Co.*, No. BCD-CV-2020-36, slip op. (Me. Super. Jan. 15, 2021), *aff'd* No. BCD-21-43, slip op. (Me. January 11, 2022).

Lastly, it is important to note that HB 1201 replicates the intent of New York SB7493-A; a bill that was vetoed on December 15, 2022, for being at odds with federal preemption. In a letter addressed to the NY Senate, Governor Hochul explained that "regulation of aircraft and airspace is primarily a federal responsibility, and federal law significantly constrains the State's ability to legislate in this area. Recent federal case law makes clear that non-federal actors must carefully consider how state and local restrictions interact with federal laws governing aviation." HAI and AOPA understand that the Hawaii Attorney General provided similar testimony regarding HB 1201 on February 8, 2023. Therefore, we urge the state of Hawaii to recognize the federal mandates and prohibitions for enacting policies within this realm.

The helicopter community strives to be good stewards of the environment and good neighbors to residents who live and work in the Aloha state. While we appreciate the issues that HB 1201 intends to address, the proposed bill presents many impractical, insurmountable, and unlawful legal and logistical problems. HAI and AOPA remain committed to working with other operators, legislators, leaders, and community members around the state to proactively address concerns and answer questions.

Sincerely,

Cade Clark
Vice President of Government Affairs, HAI

Jared Yoshiki
Western Pacific Regional Manager, AOPA

HB-1201-HD-1

Submitted on: 3/16/2023 6:07:26 PM

Testimony for HHS on 3/21/2023 3:05:00 PM

Submitted By	Organization	Testifier Position	Testify
B.A. McClintock	Individual	Support	Written Testimony Only

Comments:

Noise pollution is also a health problem. Please support this important bill. Mahalo.