STAND. COM. REP. NO. 2

Honolulu, Hawaii
October 25, 2007
RE: H.B. No. 1

Honorable Calvin K.Y. Say
Speaker, House of Representatives
Twenty-Fourth State Legislature
Second Special Session of 2007
State of Hawaii

Sir:

Your Committees on Transportation and Finance, to which was referred H.B. No. 1 entitled:

"A BILL FOR AN ACT RELATING TO TRANSPORTATION,"

beg leave to report as follows:

The purpose of this bill is to facilitate a new, alternative form of transportation between the islands of Hawaii and at the same time to provide measures to mitigate significant environmental effects by, among other things:

(1) Allowing large capacity ferry vessels to operate and use harbor facilities, upon meeting certain conditions;

(2) Requiring the Governor to impose conditions and protocols on the operation of large capacity ferry vessels to mitigate significant environmental effects likely to be caused by inter-island operations;

(3) Requiring any large capacity ferry vessel company authorized to operate under this measure to abide by the conditions and protocols imposed by the Governor prior to beginning its operations;

(4) Clarifying the Legislature's authority to review the adequacy of the conditions and protocols established by the Governor and impose additional conditions and protocols it deems necessary to further protect the State's environment and communities;

(5) Allowing the completion of harbor improvements for use by large capacity ferry vessels;

(6) Requiring the Department of Transportation (DOT) to prepare or contract for the preparation of an environmental impact statement (EIS) for the improvements made or to be made to commercial harbors statewide to accommodate use by large capacity ferry vessels and the secondary environmental effects of those operations;

(7) Designating the Office of Environmental Quality Control (OEQC) as the agency authorized to review and accept a final EIS;

(8) Setting forth the scope and guidelines by which the EIS is to be prepared and processed with the OEQC; and

(9) Establishing a Temporary Hawaii Inter-island Ferry Oversight Task Force (Task Force) within DOT to study the State's actions regarding the establishment of operations of a large capacity ferry vessel company and their impact on various factors such as ocean and water resources, harbor infrastructure, vehicular traffic, public safety and security, the potential to spread invasive species, cultural resources, the economy, and community concerns.

This bill also:

(1) Requires the Auditor to conduct a performance audit on the State Administration's actions in exempting certain harbor improvements to facilitate large capacity ferry vessels from an environmental assessment (EA) or EIS requirements under Chapter 343, Hawaii Revised Statutes (HRS), including the reasons why potential secondary environmental impacts were not considered;

(2) Ensures that previously authorized expenditures, use of land or facilities, certificates of public convenience and necessity, tariffs, and agreements remain in effect;

(3) Protects the State of Hawaii from claims that may presently exist relating to judicial actions involving

the establishment and operation of a large capacity ferry vessel service; and

(4) Repeals the Act on the earlier of the 45th day following adjournment sine die of the Regular Session of 2009 or upon acceptance of the final EIS, except that the final EIS and the indemnification of the State of Hawaii are to remain effective.

The Attorney General, DOT, Board of Agriculture, Department of Business, Economic Development & Tourism, Seafarers International Union, Hawaii Motorcycle Dealers Association, Hawaii Farm Bureau Federation, Tropical Parking Inc., and numerous concerned individuals testified in support of this bill.

Hawaii Superferry, Inc. (HSF) supported this measure with amendments. The Office of Hawaiian Affairs (OHA) supported this bill with reservations.

The Sierra Club - Hawaii Chapter, Maui Tomorrow, Inc., and many concerned individuals opposed this measure.

Hawaiian Dredging Construction Company, Life of the Land, The Chamber of Commerce of Hawaii, Friends of Haleakala National Park, Democratic Party of Maui, Conservation Council for Hawaii, 1000 Friends of Kauai, and numerous concerned individuals provided comments.

A multitude of individuals and organizations submitted written testimony in support of or opposition to the bill, or written comments related to the measure.

Currently, the primary mode of personal transportation between the Hawaiian Islands is by air travel. While this type of transportation service has been provided to the people of Hawaii for decades, an alternative form of transportation between islands to carry people, motor vehicles, and cargo would be beneficial. The operation of a ferry will not only offer the public a new transportation option, but businesses that currently use other forms of shipping will also be given the opportunity to use this alternative means of travel to get their goods to market. Thus, your Committees find that allowing the establishment of a different method of travel between the Hawaiian Islands is in the public interest.

Throughout the United States and other countries, ferry systems have operated for decades serving the needs of millions of people. Currently, ferry service exists in Hawaii as well. A passenger ferry already operates within Maui County, and the City and County of Honolulu recently began an intra-island commuter ferry service. While these systems operate intra-county or intra-island, as an island state, it is logical that Hawaii should also have an inter-island ferry system.

Your Committees find that the concept of an inter-island ferry is not new. During the 1970s, an attempt was made to start a passenger-only inter-island ferry service. However, a number of circumstances, including the size of the vessel, the lengthy travel time, and the fact that personal vehicles could not be carried on the ship led to the demise of this service.

Almost 30 years later, in 2003, HSF sought to revive the concept of inter-island maritime travel by offering a new type of inter-island ferry service. This service differed from other attempts to establish a ferry system in Hawaii in that it would use innovative and cutting-edge technology to provide a new means of travel between the Hawaiian islands. In 2004, HSF committed to offering this novel service by signing an agreement to purchase two large high-speed, state-of-the-art catamaran-type ferries capable of carrying passengers, vehicles, and cargo. After securing approximately $237 million of debt and equity financing to acquire these two vessels needed to begin inter-island ferry operations, HSF sought to gain approvals for operations and harbor infrastructure improvements in a timely manner with hopes of beginning operations in 2007.

Since Hawaii had never before had a car-carrying ferry that also carried passengers and cargo, it became necessary for the infrastructure at Hawaii's commercial harbors to be improved to accommodate this entirely new method of travel between the islands. In anticipation of the 2007 start date, DOT began developing plans to construct docking facilities to accommodate HSF. These facilities would ultimately require financing.

In 2005, Act 178, Session Laws of Hawaii 2005, authorized the issuance of $40 million in general obligation reimbursable bonds for harbor infrastructure improvements, including the construction of berthing facilities, parking, lighting, roadways, ramps, utilities, and other related improvements. While the debt service on the $40 million was to be paid out of general fund revenues, the Harbor Special Fund would be used to reimburse the general

fund. Additionally, HSF would be required to pay the standard fees charged for all harbor users under law and, through an operating agreement signed with the State in 2005, HSF would pay the greater of a percentage of their annual gross income or $2.3 million to reimburse the Harbor Special Fund for these improvements. According to HSF, these improvements were necessary to make its operations feasible.

Your Committees note that it was at this point that the plans proposed by DOT began to run into opposition, the outcome of which would ultimately determine the fate of HSF. Individuals, as well as environmentalists and local politicians, began questioning DOT's decision to exempt harbor improvements being constructed to assist HSF from an EA ostensibly required under the Hawaii Environmental Protection Act (HEPA) established in Chapter 343, HRS. Exemption from an EA would presumably preclude the necessity of an EIS. However, DOT contended that they were authorized to exempt the project from an EA because the improvements to commercial harbor infrastructure were minor projects such as adding barges to the end of already existing harbor structures that would probably have minimal or no significant effects on the harbor environment. HSF also opposed the preparation of an EA or EIS, stating that such a requirement would virtually kill the project since federal government loan approvals had a "drop dead date" that would not allow for the length of time it would take to conduct even an EA, let alone an EIS if necessary.

However, individuals, citizen groups, and local politicians continued to press the issue claiming that state commercial harbor improvements that require the expenditure of large amounts of governmental funds should comply with the environmental review process. Concerns were raised that new maritime activities that require substantial harbor improvements, such as HSF, could have serious effects on vehicular traffic, and the spread of non-native, invasive plant and animal species between the islands, and could increase the risk of collisions with whales, among other issues. Moreover, the community believed that the effects of increased traffic and related infrastructure improvements expected from ferry operations should be taken into consideration to prevent damage to Hawaii's fragile ecosystem and delicate environment. It was believed that all of these issues would have economic and environmental consequences that would have been reviewed had an EA or EIS been completed pursuant to HEPA.

Since it did not appear that DOT would address the concerns raised and would not require an environmental review, both

legislative and judicial remedies were sought. As the Legislature debated this issue, a lawsuit filed in the Circuit Court of the Second Judicial Circuit to require DOT to perform an EA on the impacts of the improvements to Kahului Harbor was dismissed, ruling that the groups filing the lawsuit had no standing to bring the lawsuit and that the State properly followed HEPA. Disagreeing with this ruling, various groups filed an appeal with the Hawaii Supreme Court, which ruled in August 2007 that the lower court's ruling was erroneous and that DOT erred in exempting the harbor improvements from an EA, incorrectly looking at only the primary impacts to the harbor environment and not the secondary impacts that could result from HSF's use of Kahului Harbor. The Supreme Court further ruled that HEPA required that an EA be performed with respect to certain improvements at Kahului Harbor intended for and to be used by HSF. In October 2007, the Circuit Court of the Second Judicial Circuit reconsidered previous action taken and determined that HSF could not operate in Kahului Harbor until an EA was completed. Thus, HSF was forced to cease all operations, putting the entire project in jeopardy. Your Committees find that the judicial system should not be blamed for this current situation, as it followed its integral function of interpreting and adjudicating the law.

As such, the Legislature, as a co-equal branch of government, must assert itself into the fray and attempt to resolve the dispute. While the immediate continuation of this new method of transportation service by HSF is in the public interest, the protection of Hawaii's ecosystem is also a high priority. Your Committees are also concerned that if a large capacity inter-island ferry system is ultimately barred from servicing the state, it may be several decades before such a service is once again proposed. The lack of a new transportation alternative for such a length of time may have a negative impact on the general public.

In this regard, your Committees note that this bill attempts to strike a balance between the issues of public interest and concerns for the environment by allowing a large capacity ferry vessel company to operate if the company agrees to abide by conditions and protocols established by the Governor to protect Hawaii's natural environment. Furthermore, this measure will allow the Legislature to monitor ferry operations and determine if environmental concerns are being addressed through the establishment of the Task Force.

The Task Force established under this bill will further assist in protecting the environment by examining the impact, if

any, the operations of a large capacity ferry vessel have on the environment. The Task Force will play a multi-faceted role in ensuring proper operations of HSF and will ensure that the Legislature is kept apprised of any environmental issues or concerns that may be raised by the operations of HSF. It will also note mitigating measures, as well as the efficacy of these measures, taken by HSF through monthly reports. The Legislature will review these monthly reports and monitor the actions of HSF and may consider if any corrective action is needed to formulate sound public policy on environmental protection. Your Committees respectfully encourage the Task Force members to embrace the law created under this measure and to follow its spirit and intent in fulfilling their oversight duties.

It is the intent of your Committees that the Task Force consult with OHA regarding all matters involving submerged lands. OHA stated in its testimony that all of the existing and potential harbor improvements are on State, ceded, public trust lands, and therefore, OHA should be involved in those matters.

Your Committees further note that, while this bill requires the Governor to establish conditions and protocols to be imposed on a large capacity ferry service, the Legislature will likewise be monitoring actions taken by the Administration and, if necessary, will take corrective actions to further protect Hawaii's environment and demand strict adherence to the new policies established under this measure.

Decisions by DOT to exempt new maritime activities from the preparation of an EA or EIS and the methodology used in making this determination are also of concern to your Committees. While it is true that DOT may have followed and used a similar methodology to exempt various harbor projects in the past for other harbor users, your Committees find that DOT failed to adequately consider the spirit and intent of the law as found in HEPA and the corresponding administrative rules, and articulated in previous court decisions. HEPA was enacted to ensure that environmental concerns are given appropriate considerations in decision-making along with economic and technical considerations. In addition, the Public Utilities Commission, when issuing a Certificate of Public Convenience and Necessity to HSF in 2004, specifically raised the issue of an environmental review and deferred to the authority of DOT to comply with applicable laws, including HEPA. Your Committees believe that the State and federal officials should have been more vigilant in the interests of protecting the environment while seeking to enhance the economy

of the State and that more due diligence is required when making decisions that may have significant environmental impacts for future generations.

The audit required under this measure will play a crucial role in ensuring that the State does not repeat this situation in the future. In addition to reporting on the State Administration's decision to exempt harbor improvements to accommodate large capacity ferry vessels from the completion of an EA or EIS, this measure requires the audit to also include the reasons why secondary environmental impacts were not considered prior to granting the exemption from these requirements.

Accordingly, this bill requests that the Auditor conduct an audit of the state administration's actions in exempting certain harbor improvements to facilitate an inter-island ferry vessel from environmental review under HEPA. It is essential that the Legislature understand the process used to determine the project's exemption, including the reasoning behind the lack of consideration of secondary impacts of the harbor improvements, so that mistakes like this will not be made in the future.

When HSF signed the agreement to purchase two vessels in 2004, it took a calculated business risk in deciding to begin operations before the completion of an EA or EIS by DOT, particularly when a number of agencies and citizen groups encouraged an environmental review. Your Committees find that HSF should have taken a more cautious approach in proceeding with its operations by having DOT prepare or contract to prepare an EA, and EIS if necessary. HSF cannot claim detrimental reliance when its own attorneys urged caution. As a result, the Legislature has been placed in the awkward position of rectifying a situation that could have been avoided. Additionally, the Aloha State has become a divided state, with residents of the different islands expressing bitterness toward each other because of HSF and its related issues. HSF is strongly urged to work toward rebuilding community support and to help encourage the healing process among residents of and visitors to all of the islands.

Your Committees note that the bill requires a large capacity ferry vessel company to release and waive certain claims, and indemnify the State from those claims, if they begin operations under the provisions of this Act. This release and indemnity covers and includes claims regarding the "establishment and operation" of the ferry vessel, which phrase is meant to refer to

claims that have arisen or accrued prior to the effective date of this Act, and not to claims that might result from future events.

Your Committees note that this measure, while it may help large capacity ferry vessel companies such as HSF operate in the immediate future, does not guarantee the success of HSF. Additionally, the Legislature may always revisit the provisions offered in this measure in the event that changes need to be made.

As affirmed by the record of votes of the members of your Committees on Transportation and Finance that are attached to this report, your Committees are in accord with the intent and purpose of H.B. No. 1 and recommend that it pass Second Reading and be placed on the calendar for Third Reading.

Respectfully submitted on behalf of the members of the Committees on Transportation and Finance,

MARCUS R. OSHIRO, Chair

JOSEPH M. SOUKI, Chair

HSCR 2

State of Hawaii
House of Representatives
The Twenty-fourth Legislature

Record of Votes of the Committee on Transportation

Bill/Resolution No.: HB 1	Date: 10/25/07
Committee Referral: TRN / FIN	☐ The committee is reconsidering its previous decision on the measure.

The recommendation is to: ☒ Pass, unamended ☐ Pass, with amendments ☐ Hold ☐ Pass, with amendments, for recommittal for further consideration

TRN Members	Ayes	Ayes (WR)	Nays	Excused
1. SOUKI, Joseph M. (C)	/			
2. NISHIMOTO, Scott Y. (VC)	/			
3. EVANS, Cindy	/			
4. HAR, Sharon E.	/			
5. LEE, Marilyn B.	/			
6. LUKE, Sylvia				/
7. McKELVEY, Angus L.K.		/		
8. NAKASONE, Bob	/			
9. SONSON, Alex M.		/		
10. TAKAMINE, Dwight Y.		/		
11. TAKUMI, Roy M.				/
12. MEYER, Colleen Rose	/			
13. PINE, Kymberly Marcos	/			
TOTAL	9	3		2

The recommendation is: ☒ Adopted ☐ Not Adopted

If joint referral, _____ did not support recommendation.
committee acronym(s)

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Vice Chair's or designee's signature:

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State of Hawaii
House of Representatives
The Twenty-fourth Legislature

Record of Votes of the Committee on Finance

Bill/Resolution No.: HB1	Date: 10-25-07
Committee Referral: TRN/FIN	❑ The committee is reconsidering its previous decision on the measure.

The recommendation is to: ☒ Pass, unamended ❑ Pass, with amendments ❑ Hold ❑ Pass, with amendments, for recommittal for further consideration

FIN Members	Ayes	Ayes (WR)	Nays	Excused
1. OSHIRO, Marcus R. (C)		✓		
2. LEE, Marilyn B. (VC)	✓			
3. BELATTI, Della Au				✓
4. BROWER, Tom	✓			
5. CARROLL, Mele			✓	
6. CHONG, Pono	✓			
7. HANOHANO, Faye P.			✓	
8. HAR, Sharon E.	✓			
9. MAGAOAY, Michael Y.	✓			
10. MANAHAN, Joey	✓			
11. MIZUNO, John	✓			
12. NAKASONE, Bob	✓			
13. RHOADS, Karl	✓			
14. SAGUM, Roland D., III	✓			
15. TOKIOKA, James Kunane			✓	
16. AWANA, Karen Leinani	✓			
17. MEYER, Colleen Rose	✓			
18. WARD, Gene, Ph.D.	✓			
TOTAL	13	1	3	1

The recommendation is: ☒ Adopted ❑ Not Adopted

If joint referral, _____ did not support recommendation.
committee acronym(s)

Vice Chair's or designee's signature: Marilyn B. Lee

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