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# **Performance Audit on the State Administration's Actions Exempting Certain Harbor Improvements to Facilitate Large Capacity Ferry Vessels from the Requirements of the Hawai'i Environmental Impact Statements Law: Phase II**

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A Report to the  
Governor  
and the  
Legislature of  
the State of  
Hawai'i

Report No. 08-11  
December 2008



**THE AUDITOR**  
STATE OF HAWAII

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## Office of the Auditor

The missions of the Office of the Auditor are assigned by the Hawai'i State Constitution (Article VII, Section 10). The primary mission is to conduct post audits of the transactions, accounts, programs, and performance of public agencies. A supplemental mission is to conduct such other investigations and prepare such additional reports as may be directed by the Legislature.

Under its assigned missions, the office conducts the following types of examinations:

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2. Management audits, which are also referred to as performance audits, examine the effectiveness of programs or the efficiency of agencies or both. These audits are also called program audits, when they focus on whether programs are attaining the objectives and results expected of them, and operations audits, when they examine how well agencies are organized and managed and how efficiently they acquire and utilize resources.
3. Sunset evaluations evaluate new professional and occupational licensing programs to determine whether the programs should be terminated, continued, or modified. These evaluations are conducted in accordance with criteria established by statute.
4. Sunrise analyses are similar to sunset evaluations, but they apply to proposed rather than existing regulatory programs. Before a new professional and occupational licensing program can be enacted, the statutes require that the measure be analyzed by the Office of the Auditor as to its probable effects.
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### THE AUDITOR

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# OVERVIEW

## ***Performance Audit on the State Administration's Actions Exempting Certain Harbor Improvements to Facilitate Large Capacity Ferry Vessels from the Requirements of the Hawai'i Environmental Impact Statements Law: Phase II*** Report No. 08-11, December 2008

### Summary

We conducted the second phase of this performance audit in response to Act 2, Second Special Session Laws of Hawai'i 2007. The audit examines the state administration's actions against the requirements of the Hawai'i Environmental Impact Statements (EIS) law, Chapter 343, Hawai'i Revised Statutes. The audit reviewed the State's actions in not considering potential secondary environmental impacts of the harbor improvements prior to granting the exemption from these requirements. The Phase I report, Report No. 08-09, was issued in April 2008.

We found that with the impending arrival of Hawai'i Superferry, Inc., the Department of Transportation (DOT) in 2004 and 2005 reversed a long-standing policy of not providing additional pier-side equipment for harbor users. State officials ignored the recommendations of their technical staff, setting off a chain of events that culminated in the selection of inadequate harbor improvement systems. Moreover, the DOT's passive approach to the issue of addressing secondary or cumulative effects was made possible by a combination of flawed or unclear EIS laws and rules.

Saddled with a deadline imposed by Hawai'i Superferry and supported by administration officials, DOT technical staff implemented the only harbor improvement system that could meet their time horizon, a combination of barges and ramps, which was not their preferred choice. The state-funded \$38.5 million harbor improvement system has proved to be problematic, best exemplified by Kahului Harbor's barge, which is continually battered by high winds and waves. Not only have the barge and pier incurred more than \$3 million in damages (the liability of which has yet to be determined), the barge also requires the services of a tug boat to secure it to the pier during ferry operations. Like the barge and pier damage, responsibility for this significant extra expense has yet to be determined.

But the State has a larger and more expensive challenge over the horizon. Last summer, Hawai'i Superferry officials announced that they will be outfitting their second ship with an onboard ramp, a feature that eliminates the need for the \$10 million barge-and-ramp system at Kawaihae Harbor and the \$2.5 million ramp at Nāwiliwili Harbor, both built to accommodate Hawai'i Superferry and no other users. If company officials choose to retrofit their first ship, the *Alakai*, with a loading ramp, the State's entire \$38.5 million barge-and-ramp system would quickly become unnecessary. Because the barges were designed specifically for Hawai'i Superferry use, they cannot be repurposed in their present configuration by other harbor users. In addition, since they were built in China and are therefore prohibited from transporting cargo within U.S. waters, the barges may have little



use for potential buyers. This situation would have been avoided if state officials had required Hawai'i Superferry to carry an onboard ramp in the first place.

We also found that the legislation on behalf of Hawai'i Superferry compromised the State's environmental laws and set a worrisome precedent for future government accommodation that puts the interests of a single business before the State's environmental, fiduciary, and public safety responsibilities.

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## Recommendations and Response

Our recommendations are designed to address the flawed or unclear EIS law and rules. The Office of Environmental Quality Control in the Department of Health should establish guidelines, including a checklist for agencies to ensure that all of the steps required by the rules have been properly addressed and documented before according an exemption.

The Environmental Council should establish a process to provide guidance to agencies in determining whether an action is projected to have a significant environmental impact which would make an exemption inapplicable; amend the EIS rules to ensure the OEQC provides training to state and county agencies; clarify the agency consultation process regarding proposed exempted actions; and establish clear definitions of cumulative and secondary impacts in regards to water carrier operations and the scope of their coverage.

Finally, we recommend the DOT Harbors Division investigate options for a new barge mooring and fender system for the Kahului pier, determine responsibility for barge maintenance, and resolve financial liability issues over damage and unplanned expenses such as tug services.

The DOT response sidesteps many of the issues and challenges some wording. But most of the language came from documents from the department.

The department disagreed that on-board loading ramps would render the State's \$38.5 million barge-and-ramp system unnecessary. Yet, the ferries' shipbuilder as well as ferry officials have declared that on-board ramps would avoid the use of the problematic barges.

After a careful review and consideration of the department's comments, we made minor changes and clarifications to our report, none of which affected our findings and conclusions.

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Submitted by

**THE AUDITOR**  
STATE OF HAWAI'I

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## Foreword

This second phase of a performance audit on the state administration's actions exempting certain harbor improvements to facilitate large capacity ferry vessels from the requirements of the Hawai'i Environmental Impact Statement Law was conducted in response to Act 2, Second Special Session Laws of Hawai'i 2007. Our audit focused on the state administration's actions that exempted certain harbor improvements from an environmental review, including why secondary impacts were not considered. It also focused on the effects of the State's decision to implement barges as an interim solution.

We wish to express our appreciation for the cooperation and assistance extended to us by officials and staff of the Department of Transportation and by others whom we contacted during the course of the audit.

Marion M. Higa  
State Auditor

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# Chapter 1

## Introduction

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In 2004, Hawai‘i Superferry Inc. entered into negotiations with the state Department of Transportation to establish an inter-island ferry service among the islands of O‘ahu, Maui, Kaua‘i, and Hawai‘i. A year later, to facilitate the start of this service, the department exempted from an environmental review harbor improvements related to ferry operations. Also exempt from review was an examination of Hawai‘i Superferry Inc.’s operations and their possible secondary impacts on the environment.

On August 26, 2007, Hawai‘i Superferry Inc. began service between Honolulu, Kahului, and Nāwiliwili Harbors on the islands of O‘ahu, Maui, and Kaua‘i, respectively. Five days later, the Hawai‘i Supreme Court ruled that the department had erroneously granted an exemption of the harbor improvements from the requirements of Chapter 343, Hawai‘i Revised Statutes. The court stated that the department erred in looking at harbor improvements for Kahului Harbor in isolation. The department had not considered the secondary environmental impact of Hawai‘i Superferry Inc.’s use of the harbor improvements. On remand, the Second Circuit Court halted Hawai‘i Superferry Inc.’s use of the barge at Kahului Harbor until the State had completed an environmental assessment.

In October 2007, the Legislature convened in a special session upon order of the governor. Senate Bill No. 1, Senate Draft 1, was passed and amended the law to permit operation of a large-capacity ferry vessel company while the State does an environmental review. Signed into law as Act 2, Second Special Session Laws of Hawai‘i (SSSLH) 2007, the act requests 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 the requirements of conducting an environmental assessment or environmental impact statement under the Hawai‘i Environmental Impact Statements (EIS) law, Chapter 343, HRS. The audit request includes a review of the State’s actions in not considering potential secondary environmental impacts of the harbor improvements prior to granting the exemption from these requirements.

Delays resulting from an extensive and intrusive review by the attorney general of our audit work compelled us to issue the report in two parts. The first report, *Performance Audit on the State Administration’s Actions Exempting Certain Harbor Improvements To Facilitate Large Capacity Ferry Vessels From the Requirements of the Hawai‘i Environmental*

*Impact Statements Law: Phase I*, Report No. 08-09, was issued in April 2008.

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## Background

### ***Department of Transportation***

The state Department of Transportation is the lead agency in establishing, maintaining and operating all transportation facilities within the State. The department is divided into three divisions—airports, highways, and harbors—which are supported by ten departmental staff offices. The Harbors Division has care and control over all state-owned or controlled commercial harbors, harbor facilities and lands, and all vessels and shipping within the harbors.

### ***Hawai‘i’s environmental review process***

The Hawai‘i EIS law was enacted in 1974, codified as Chapter 343, HRS, and entitled *Environmental Impact Statements*. The purpose of the Hawai‘i EIS law, as stated in Section 343-1, HRS, is to establish a system of environmental review, which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations. The EIS law is designed to integrate environmental review with state and county planning processes.

The Office of Environmental Quality Control (OEQC), administratively attached to the Department of Health, implements the EIS law. The OEQC serves in an advisory capacity to the governor and government agencies. The Environmental Council, also administratively attached to the Department of Health, serves as liaison between the OEQC director and the general public by soliciting information, opinions, complaints, recommendations and advice concerning ecology. The council is the rule-making body, whose rules are adopted as Title 11, Chapters 200 and 201, Hawai‘i Administrative Rules (HAR), entitled *Environmental Impact Statement Rules* and *Environmental Council Rules of Practice and Procedure*, respectively.

The EIS law requires an environmental review for any program or project that involves one or more land uses or administrative acts, known as “triggers.” If a triggering event occurs, an environmental review—an environmental assessment (EA) or an environmental impact statement (EIS)—must be prepared unless the program or project is declared exempt.

Section 343-6(7), HRS, allows an agency to declare an action exempt from the preparation of an environmental assessment if the action will probably have minimal or no significant effects on the environment.

The administrative rules provide for 11 classes of exempt actions. Agencies are also directed to develop their own lists of specific actions that fall within the exempt classes, which are reviewed by the Environmental Council. Agency lists must be consistent with both the letter and intent expressed in the exempt classes of the EIS law and rules. The exemption classes, however, do not apply when the cumulative impact of planned successive actions in the same place, over time, is significant, or when an action that is normally insignificant in its impact on the environment may be significant in a particularly sensitive environment, according to Section 11-200-8(b), HAR.

The administrative rules require an agency, when determining whether an action will have a significant effect, to consider every phase of a proposed action, the expected consequences, both primary and secondary, and the cumulative as well as the short-term and long-term effects of the action. The administrative rules define “secondary impacts” or “indirect effects” as effects which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth-inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

***Hawai‘i Superferry Inc.***

Hawai‘i Superferry Inc.’s *Alakai* is a 349-foot catamaran-style ferry capable of traveling between islands at speeds of up to 35 knots (40 mph). The high-speed ship, built by Austal USA, LLC, can carry up to 866 passengers and 282 cars, or a combination of 28 trucks or buses and 65 cars, which “roll on” and “roll off” through the ship’s open-ended stern. To load and unload its vehicles, ships like the *Alakai* must either carry their own loading ramp onboard or rely on pier-side facilities to aid in the effort.

**Exhibit 1.1**  
**Hawai'i Superferry in Honolulu Harbor**



Source: Photograph courtesy of the Office of the Auditor

Since Hawai'i Superferry Inc. officials decided not to equip their ship with such a ramp, the DOT provided barge-and-ramp systems at Honolulu and Kahului Harbors, which are moored alongside their respective piers. The barge and ramps at Honolulu Harbor are shown in Exhibit 1.2. A similar barge-and-ramp system was built for Kawaihae Harbor for ferry operations to begin in 2009. Nāwiliwili Harbor was provided with a fixed ramp on its dock. In 2005, the department exempted these harbor improvements from environmental review.

## Exhibit 1.2 Barge and Ramps at Honolulu Harbor



Source: Photograph courtesy of the Office of the Auditor

## Previous Audits

With the passage of Act 2, SSSLH 2007, in October 2007, Hawai'i Superferry Inc. prepared to resume service to Maui under conditions to protect the environment while the State conducts an EIS. The recommencement of service was delayed for a month due to extensive damage to the pier and barge in Kahului Harbor. Operations to Maui resumed on December 13, 2007. To date, service to Kaua'i has not resumed.

Our office has done several audits on the Department of Transportation, but only one of them focused on the department's decision to exempt harbor improvements from an environmental review. In our Phase I report, released in April 2008, we found a flaw in the EIS law that allowed the department to circumvent an environmental review. This flaw was in the exemption determination process, utilized by the department in exempting the harbor improvements intended for use by Hawai'i Superferry Inc. The EIS law's administrative rules establish an exemption determination process that is contrary to the law's principle of public participation and does not allow any realistic opportunity for

public input. We determined that this process, which allows departments to make autonomous exemption determinations, undermines the intent of the EIS law.

We also found that the department exempted the harbor improvements to meet a purported federal deadline date of June 30, 2005. This deadline “drove the process” and pushed the State to bypass an environmental review. We found that this date was not a federal deadline, but instead was a deadline established by Hawai‘i Superferry Inc.’s shipbuilder, Austal USA, LLC. This deadline called for Hawai‘i Superferry Inc. to secure financing by the June 2005 deadline in order to pay Austal to build its vessels. We determined that the State may have compromised its environmental policy in favor of a private company’s internal deadline.

The report also postulated that the costs and ramifications of these efforts on behalf of Hawai‘i Superferry Inc. may have been more than broken and discarded environmental rules and laws.

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## Objectives of the Audit

1. Assess the State’s proceedings in determining that harbor improvements related to the operation of Hawai‘i Superferry Inc. should receive an exemption from the need to conduct either an environmental assessment or environmental impact statement under Chapter 343, HRS, including why secondary impacts were not considered.
2. Evaluate the State’s statutes and rules regarding the exemption determination process.
3. Make recommendations as appropriate.

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## Scope and Methodology

In this second phase of our performance audit, we continue the work started in the first phase and extended the dates of our field work through October 2008. We continued to focus on the period of FY2004-05, as the exemption determination decision was made during this time. We assessed and evaluated the effects of the State’s decision to implement barges as an interim solution. We also looked at present day issues that were a direct result of the exemption determination.

Audit procedures for this second phase included follow up interviews with selected administrators, managers, and staff in the Department of Transportation (DOT), DOT Harbors Division, as well as the Office of the Governor, Department of Health, Office of Environmental Quality Control, and selected members of the Environmental Council.

Interviews were conducted with the Public Utilities Commission, former staff of the OEQC, and other organizations, companies, and community groups as required. Hawai'i Superferry Inc. did not respond to our request for an interview. As in Phase I of our audit, we refer to state officials by their titles and positions during the timeframe of our audit, which is focused on FY2004-05. Since that time, some officials have retired, left state service, or changed positions. In fact, one individual has filled many positions, including deputy director of harbors, director of transportation, and governor's chief of staff. We clarify his role during our audit timeframe by referring to him, for example, as the "then-deputy director of harbors."

We examined the various agencies' policies and procedures, letters, emails, reports, and other relevant documents and records to assess and evaluate the various agencies' decisions relating to exemption of harbor improvements for compliance with pertinent laws, rules and regulations, and policies and procedures. We also examined contracts, survey and damage reports, letters, emails, records, and other pertinent documents to evaluate the effects of the State's decision to utilize barges.

We conducted this performance audit in accordance with the Office of the Auditor's *Manual of Guides* and generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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# Chapter 2

## By Providing Unusual Accommodations to a Single Business, State Sets a Troubling Precedent

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### Introduction

In their haste to support Hawai‘i Superferry Inc., state officials ignored the recommendations of their technical staff, setting off a chain of events that culminated in the implementation of a \$38.5 million interim harbor improvement system that is costing the State millions in repairs, and may, in the end, sit idle. In addition, subsequent legislative action on behalf of Hawai‘i Superferry Inc. compromised the Islands’ environmental laws and set a precedent for future government intervention that puts the interests of a single business before the State’s environmental, fiduciary, and public safety responsibilities.

With additional information provided by the attorney general, Phase II of this report provides further details on the decision-making process, finding that state officials ignored the recommendations of state Department of Transportation (DOT) technical staff and pursued a policy based on economic development concerns and not harbor needs and program priorities. The report also quantifies some of the current and future costs of the barge-and-ramp systems that the department implemented in Honolulu, Kahului, Nāwiliwili, and Kawaihae Harbors to accommodate Hawai‘i Superferry Inc. operations. Moreover, Phase II assesses the potential legal ramifications of the subsequent legislative actions on behalf of the company.

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### Summary of Findings

1. In their haste to support Hawai‘i Superferry Inc., state officials ignored the recommendations of their technical staff, setting off a chain of events that culminated in the selection of inadequate harbor improvement systems.
2. Saddled with a deadline imposed by Hawai‘i Superferry Inc. and supported by administration officials, DOT technical staff implemented the only harbor improvement system that could meet their time horizon—a combination of barges and ramps, which was not their preferred choice. The system has proved problematic and costly at Kahului Harbor and would have likely experienced similar operational difficulties at Kawaihae Harbor, if implemented.

3. The State's legislative action on behalf of Hawai'i Superferry Inc. compromised the State's environmental laws and set a precedent for future government intervention that puts the interests of a single business before the State's environmental, fiduciary, and public safety responsibilities.

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## With the Arrival of Hawai'i Superferry, the DOT Reversed a Long-standing Policy of Not Providing Additional Pier-side Equipment for Harbor Users

Originally, DOT officials opposed providing Hawai'i Superferry Inc. with additional pier-side equipment to aid in the loading and unloading of vehicular cargo. Instead, the department required that the ship carry a loading ramp onboard, a feature that is commonly found on high-speed ferries as shown on another ferry in Exhibit 2.1. From the department's perspective at the time, requiring an onboard ramp addressed several of its concerns. First, DOT had not provided ramps or similar equipment to any of its current harbor users. If DOT made an exception for Hawai'i Superferry Inc., future and current users could make similar demands for equipment. Secondly, if the ship carried its own ramp, the department would be able to provide the necessary support facilities in time for the Hawai'i Superferry Inc.'s operational start date. Regulatory requirements for the equipment were expected to be less stringent, and department officials believed that ferry operations would be less intrusive to other harbor users.

### Exhibit 2.1 Stern-loading Ferry With Onboard Ramp



Photograph courtesy of Incat

However, from a ship owner's perspective, an onboard ramp means an additional expense and extra weight, which adversely affects the performance of the vessel. For a high-speed ferry such as the *Alakai*, that means slower cruising speeds and lower fuel efficiency. Throughout the decision-making process, Hawai'i Superferry Inc. officials adamantly refused to include an on-board loading ramp on the *Alakai*.

In May 2004, a month before construction began on the *Alakai*, DOT's policy regarding pier preparation for Hawai'i Superferry Inc. was consistent with its policy for all its harbor users: the department was responsible for the provision of piers, associated mooring devices, lighting, bull-rails and the dredging of pier-side submerged lands, but not loading ramps and other equipment. In a May 21, 2004, letter, DOT's then-director clearly outlined these responsibilities to a Hawai'i Superferry Inc. official, adding that "ramps, pipelines, risers, hoses, ticket kiosks, cranes and other similar equipment are considered operational devices and are thus the operator's responsibility." The director explained that the department had not provided this equipment to any of its other harbor users, who operate barges, automobile ships, container ships, excursion vessels or cruise ships. If the department started providing loading and unloading ramps for the Superferry, then other harbor users could similarly request and expect such equipment, equating "to a cost of millions of unbudgeted dollars for these ramps."

***Department officials were concerned about the financial feasibility of Hawai'i Superferry Inc.'s interisland service***

Not included in the May 21, 2004, letter from DOT to Hawai'i Superferry Inc. was an additional issue department officials had with providing major harbor improvements for the *Alakai*: Hawai'i Superferry Inc. was a startup business with no proven track record of success. A May 25, 2004, DOT analysis paper outlines this concern, stating that the department would not construct any major harbor improvements until after Hawai'i Superferry Inc. established itself as a viable operation: "At such time that the State is confident that Hawai'i Superferry is a proven operation, improvements will be inserted into the Division's financial plan." The paper defines financial viability as sustained operations for a minimum of two years. The analysis also reiterated that ramps, stairways, and gangways are tenant responsibilities, not the State's.

Five months later, on October 22, 2004, a DOT staff person again raised concerns about the company's financial viability, explaining that department officials continued to have difficulty getting infrastructure and operational plans from Hawai'i Superferry Inc. officials. With little information to assess, DOT staff contacted officials from the City of Rochester in upstate New York, whose own high-speed ferry, *Spirit of Ontario*, was struggling to stay in operation. (*The Spirit of Ontario* eventually went out of business in January 2006.) An October 28, 2004, email from DOT's then-director to the governor's then-chief

of staff recounts this communication with New York officials: “Based on comments [by Rochester officials], we are continuing to ask the tough questions to Superferry. Based on lessons learned, we have some definite concerns about Superferry’s operational plan or lack thereof.”

***Despite ongoing concerns, the department reversed its policy***

At a meeting on December 30, 2004, DOT officials informed their technical staff that the department would no longer require the *Alakai* to carry an onboard ramp. Instead, DOT would provide barges and other equipment at its harbors. The technical staff was not happy with the decision and continued to recommend that the ferry carry its own ramp, citing the reasons discussed earlier. However, at the December 30, 2004, meeting at the Office of the Governor, the decision was finalized: Hawai‘i Superferry Inc. would not be required to provide a ramp on its vessel, and the resulting harbor improvements provided by the department would need to be exempted from state environmental rules and laws.

The reasoning behind the department’s policy change is partially explained in a January 31, 2005, DOT document entitled, “House Finance Inquiry Regarding CIP Request FB05-07 Supplemental.” In response to an inquiry as to why ferry improvements cannot be funded through revenue bond funds, the department took the following position:

As the establishment of inter-island ferry service was viewed as furthering the administration’s goals to provide socio-economic benefits to its people and establish a transportation alternative to connect our islands, it was deemed an appropriate use of general obligation bonds to benefit the general public.

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**Department Technical Staff Implemented the Only Harbor Improvement System That Could Meet Their Time Horizon**

The department had considered various alternatives for pier improvements, including both permanent and interim solutions. In December 2004, the department’s ferry project team expressed a preference for constructing permanent harbor improvements and conducting an environmental review. This strategy was cited as being the most viable option, because not only was it more cost-effective than interim solutions, it would also reduce contracting and procurement time for the State as well. However, this strategy would have required Hawai‘i Superferry Inc. officials to prepare a statewide environmental assessment of their ferry operations, something they were not willing to do.

Therefore, the decision to build interim harbor improvements consisting of barge-and-ramp systems and pursue the environmental exemption route was not primarily based on technical staff assessments of individual harbor requirements. Instead, it was the result of Hawai‘i Superferry

Inc. officials' refusal to provide a loading ramp on the *Alakai*, their unwillingness to prepare a statewide environmental assessment, and their June 30, 2005 deadline to settle all environmental issues. Hawai'i Superferry Inc. officials claimed that the deadline was imposed by the U.S. Department of Transportation's Maritime Administration as a provision of its loan guarantees. However, Phase I of our report found that the deadline was not imposed by the federal agency. Rather, it was part of an agreement between Hawai'i Superferry Inc. and Austal, USA, LLC, the *Alakai*'s shipbuilder. Nevertheless, with the new deadline and exemption requirements in place, DOT officials were left with little choice but to plan and implement interim barge-and-ramp systems at Honolulu, Kahului, and Kawaihae Harbors. Because of the location of the berthing area designated for Hawai'i Superferry, Nāwiliwili Harbor required the addition of only a ramp.

***For nearly two months after the December 2004 decision, DOT technical staff continued to pursue plans for permanent harbor improvements***

Since July 2004, DOT technical staff had been working on plans for permanent harbor improvements to accommodate ferry service at Honolulu, Kahului, and Kawaihae Harbors. These permanent improvements, which consisted of building breasting dolphins (mooring structures) of varying sizes that would extend from existing piers, were the technical staff's preferred harbor improvement option. These considerations were especially important at Kahului and Kawaihae—smaller, unprotected harbors that often experience high wave surges during the winter months.

In fall 2004, DOT staff began planning for interim barge-and-ramp systems at all four of its harbors, but continued to explore a variety of permanent harbor improvements, including breasting dolphins and the construction of a “notch” in Kahului Harbor's Pier 2. Despite the December 2004 tacit consent by the governor's then-chief of staff to implement barge systems at Honolulu, Kahului, and Kawaihae Harbors, DOT technical staff continued to pursue plans for Kahului's notch and other permanent harbor systems until as late as February 2005. DOT technical staff believed that they could secure all the necessary environmental assessments for the permanent harbor improvements in time to meet Hawai'i Superferry Inc.'s deadline. However, administration officials felt otherwise, and the planning for permanent harbor improvements stopped by the end of February 2005.

***In pursuit of interim harbor improvements, the department failed to recognize its responsibility to conduct an environmental review of Hawai'i Superferry operations***

To implement the barge system by the Hawai'i Superferry Inc.'s deadline, the department needed to exempt the projects from environmental review. As discussed in Phase I of this report, current EIS rules direct agencies to develop their own lists of specific types of actions that fall within the rules' 11 exempt classes, which are reviewed by the Environmental Council and must be "consistent with both the letter and intent expressed in the exempt class [of the EIS rules] and Chapter 343."

After the agency develops its proposed exemption list, the list is submitted to the Environmental Council for concurrence and then published in the *Environmental Notice*, a periodic bulletin published by the Office of Environmental Quality Control (OEQC) to notify the public. Following a 30-day review period, the council considers public comment on the proposed exemption list before taking action. Thereafter, the council may concur with the agency's proposed list, recommend changes, or reject it. However, once the council approves the exemption list, the agency is free to determine *on its own* whether a particular project or action is exempt from an environmental assessment without the need for further review or concurrence. The rules do not require agencies or the OEQC to publish any public notice of projects or actions that agencies have determined to be exempt.

The rules do require that agencies obtain the advice of outside agencies regarding the propriety of the proposed exemption before an agency can issue a determination. But the law does not specify any requirements about the consulting agencies other than that they are "outside." So agency officials have the discretion to choose which and how many outside parties it needs to consult.

In the case of the ferry harbor improvement work, on February 8, 2005, DOT's Harbors Division sent consultation letters to county agencies in Honolulu, Hawai'i Island, Maui and Kaua'i describing the harbor improvement work it planned to perform at Honolulu, Kahului, Kawaihae, and Nāwiliwili Harbors. Letters were also sent to the state Department of Agriculture, the Office of Planning at the Department of Business, Economic Development and Tourism, and other divisions within the department.

The letter sent to Maui agencies stated that the department would build permanent pier improvements between Piers 1 and 3 that would be identified as "Pier 4." (A copy of the letter is shown in Appendix A.) The letter stated this new pier facility would also be subject to environmental review. The letter also stated that in the event that this permanent work could not be completed in time to meet with the scheduled commencement of ferry service, an interim, short-term arrangement using a barge would be implemented.

A February 11, 2005, email from the then-deputy director of harbors stated that the Hawai‘i Superferry Inc.’s CEO called him to say that he was worried that the inclusion of the permanent improvements in the consultation letters: “...and the alternative establishes a linkage and requires our doing the environmental reviews for everything.”

Four days after the Hawai‘i Superferry Inc.’s CEO’s phone call, a second consultation letter was sent out by DOT to the same county agencies in Honolulu and Kahului as well as the same departments. The permanent improvements, which the then-deputy director of harbors had described as “preferred,” were omitted in the follow-up letter, which now included only plans to use barges and ramps as a transition between the ferry and Pier 20 in Honolulu Harbor and Pier 2 in Kahului Harbor. (A copy of the letter is shown in Appendix B.) The letter provided the following reasoning to the agencies as to why a second consultation letter was sent: “Our earlier description characterized the on-going effort of a separate project, which is unrelated to current improvements planned for Hawai‘i Superferry.”

Only three of the 12 county agencies and state departments consulted submitted a response. However, the department considered the non-response/silence by the outside agencies it consulted as concurrence for its planned exemption determination. The Hawai‘i Administrative Rules allow an agency to declare an action exempt if the agency obtains the advice of other outside agencies or individuals having jurisdiction or expertise as to the propriety of the exemption. It is unclear that a consulted agency’s non-reply should be considered advice to the propriety of the exemption.

Documents and emails suggest that the department ignored the calls for an environmental assessment from county officials and public interest groups in making its exemption determination. The then-deputy director of harbors acknowledged the department was aware of the concerns raised by Kaua‘i County and the public about the operational impact of Hawai‘i Superferry before making its exemption determination. Additional concerns were raised by other counties after the exemption determination was announced and before the expiration of the challenge period. While department officials can make the claim that they followed the letter of the weakly written rule by soliciting outside advice, they did not adhere to its intent and spirit, since they kept the scope of their inquiry relatively narrow and, in the end, obtained very little outside advice.

### **The environmental exemption process was invalidated by an erroneous opinion by the Office of Environmental Quality Control**

Although not bound by statute or regulations, DOT chose to consult with the OEQC director on the exemption for harbor improvements related to the Hawai‘i Superferry project. On November 15, 2004, the Harbors Division sent a consultation letter to the OEQC seeking concurrence that the department’s proposed harbor improvements to accommodate the Superferry qualified for exemption. (A copy of the letter is shown in Appendix C.) The consultation letter provided a general description of the planned harbor improvements at Honolulu, Kawaihae, and Kahului Harbors. In regards to Kahului Harbor, the letter described plans to create a notch in Pier 2 that was to accommodate the ferry.

In her November 23, 2004 response to the Harbors Division, the then-OEQC director stated that the department had the authority to exempt the proposed actions as requested. (A copy of the letter is shown in Appendix D.) However, unlike county agency and department officials, the then-OEQC director never received a copy of the second consultation letter, which changed the proposed harbor improvements at Kahului from a notched pier to the barge-and-ramp system that was eventually implemented. On February 15, 2005, the department sent to its major harbor users the notice of its decision to use OEQC-exempt barges with ramps. The letter did not inform users that the OEQC had concurred with the exemption of a notched pier at Kahului and *not* the barge-and-ramp system. More importantly, the department did not inform the OEQC of its change in plans.

The then-deputy director of harbors said the opinion of the OEQC director carried “significant weight” on his decision to exempt the proposed harbor improvements. However, her opinion was based on incorrect information. Therefore, the OEQC’s November 23, 2004 response letter should not have been considered in the department’s exemption decision, let alone been given “significant weight.”

***Once DOT determined that harbor improvements were exempted from an environmental assessment, department officials believed that they had fulfilled their environmental obligations***

Internal emails and documents show the State viewed its environmental review responsibilities in regards to the Hawai‘i Superferry Inc. project as being limited to the harbor improvements. Therefore, they believed that Hawai‘i Superferry Inc. was responsible for conducting an environmental review of ferry operations, including possible secondary impacts and cumulative effects. In fact, despite knowing that Hawai‘i Superferry Inc.’s operations could have widespread impacts and that it had earlier refused to do an environmental assessment, the department took a passive role and allowed Hawai‘i Superferry Inc., to conduct an environmental study of its operations without department oversight.



The then-deputy director of harbors acknowledges that state officials did not require Hawai‘i Superferry Inc. to address secondary impacts or cumulative effects, that these were not imposed by the State as a condition. He also said the State and the Hawai‘i Superferry Inc. did not engage in any discussion as to what defines secondary impacts and cumulative effects. He said he considered raising concerns expressed by the counties in discussions with Hawai‘i Superferry Inc. but ultimately he decided not to. He added that, “We were aware of what they were planning on doing and what was done. They [Hawai‘i Superferry] gave us assurances that this would be addressed.”

When asked if the State was obligated to address the operational impacts since Hawai‘i Superferry Inc. was unwilling to address them, the department’s then-deputy director of administration replied he could not recall anyone framing the issue that plainly. He reported that “our focus was more on that Hawai‘i Superferry needed to do it and to pressure them to provide an operational plan. Their operational plan would describe what Hawai‘i Superferry was going to do and how they were going to address it [operational issues].”

Hawai‘i Superferry Inc. officials submitted their plan detailing their environmental commitments in February 2007, two years after the department exempted the harbor improvements. They submitted a document to the governor that, among other things, outlined what the company had done or planned to do to address the various environmental concerns. The document noted that Hawai‘i Superferry Inc. had undertaken and commissioned studies, sought public input, and crafted policies on issues relating to the operation of the ferry service between the four main Hawaiian Islands. The document also mentioned that this work was ongoing.

Hawai‘i Superferry Inc. worked with whale researchers and other experts to develop its whale avoidance policy and procedures, which were approved on May 12, 2005, by the Hawaiian Islands Humpback Whale National Marine Sanctuary Advisory Council. The company also developed policies and procedures to help control the movement of invasive species in collaboration with the state Department of Agriculture. Hawai‘i Superferry Inc. also completed a traffic impact study for each harbor. All of this work demonstrated that the company was aware of the impacts of the operation of its ferry and the issues raised by the public.

However, most of the policies and procedures described in the document were not finalized and were not developed in accordance with the EIS rules and laws. The document does not address areas such as cumulative, significant, or secondary impacts the Hawai‘i Superferry Inc. operations may have on the environment. The Hawai‘i Superferry Inc. document

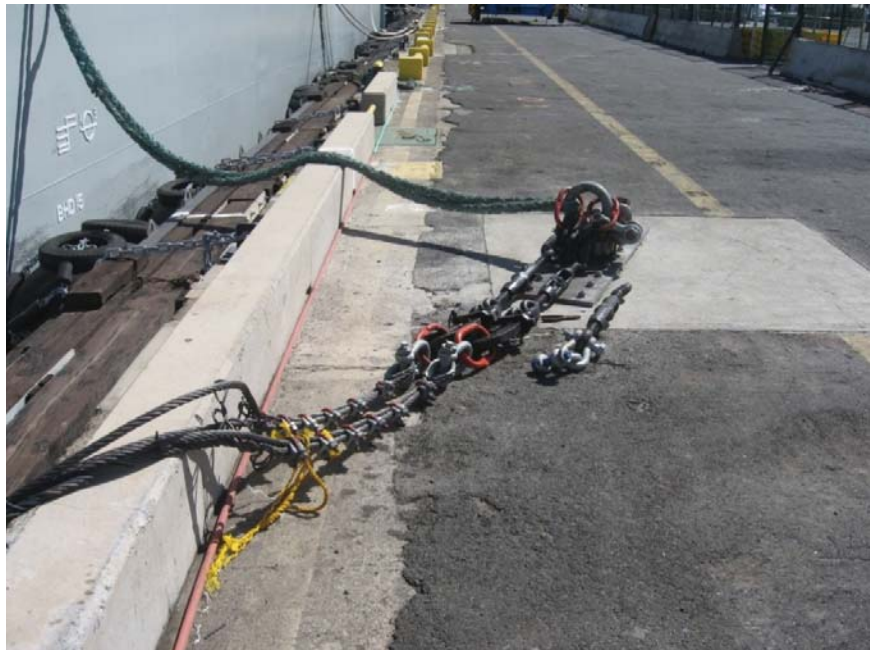
also noted that the company participated in several levels of community outreach activities and public consultation. However, the dates when the advisory boards were created and when the DOT public meetings were held all took place more than a year after the department exempted the harbor improvements in February 2005.

***Kahului Harbor's barge and pier have been repeatedly battered by high winds and waves***

On September 9, 2005, DOT awarded a \$38.5 million contract to design and build barges and vehicle ramp systems for the statewide inter-island ferry system to Healy Tibbitts Builders, Inc. (Healy Tibbitts). The department's contract required Healy Tibbitts to design, build, and install a barge system consisting of the barge, mooring system, and fenders. The contract also required that all of these systems be extremely reliable and operate through all kinds of weather conditions, including storm surge conditions, occasional high wave action, occasional high winds, and rain. The barges at Honolulu and Kahului are each 280.5 feet long and Kawaihae's barge is 201.8 feet long. Honolulu's and Kawaihae's barges are 75.5 feet wide while Kahului's is 105 feet wide.

A mooring system is used to secure the barge by means of cables, anchors, or lines to bollards on the piers in each harbor as shown in Exhibit 2.2. Fenders are required between the barge and pier to absorb energy from barge motions due to surge waves and high wind. Failure to do so can result in damage to the barge and the pier.

**Exhibit 2.2  
Mooring Lines and Bollard at Kahului Harbor**



Source: Photograph courtesy of Moffatt & Nichol

Since entering service in August 2007, Kahului's barge and pier have been repeatedly damaged by storm surges and high winds. In mid-September 2007, mooring lines broke and the pier fender was damaged. Additional mooring lines broke in mid-October 2007, mid-November 2007, early December 2007, mid-January 2008, and again in early April 2008. Damage resulting from storm surges and high wind is shown in Exhibit 2.3 through 2.7. Each time the mooring lines broke, the size and strength of the mooring lines were increased until ultimately the mooring lines became stronger than the bollard or the securing system for the bollard, resulting in the bollard being pulled out of the pier.

**Exhibit 2.3**  
**Damaged Mooring Bollard at Kahului Harbor**



Source: Photograph courtesy of Moffatt & Nichol

**Exhibit 2.4**  
**Fender System at Kahului Harbor**



Source: Photograph courtesy of Moffatt & Nichol

**Exhibit 2.5**  
**Damaged Fender System at Kahului Harbor**



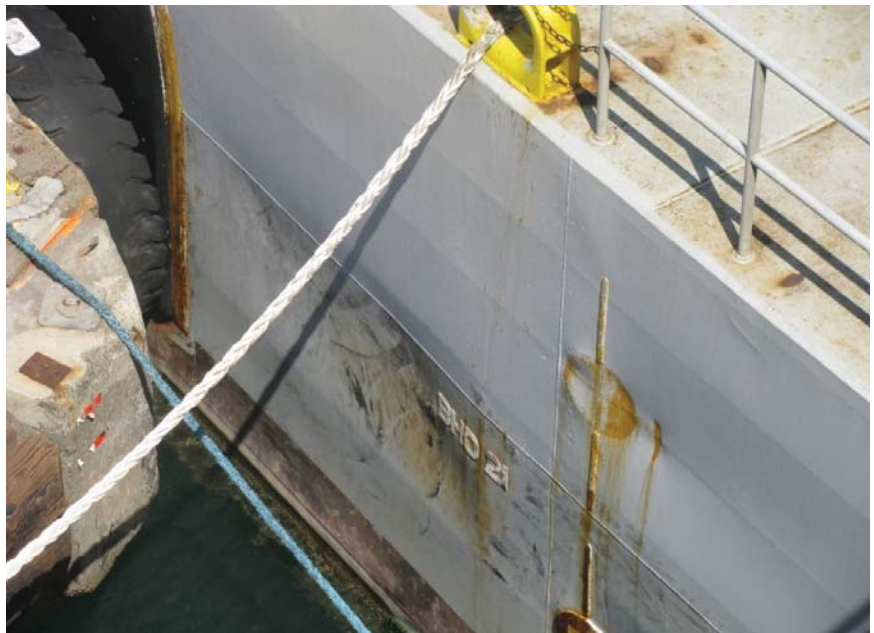
Source: Photograph courtesy of Moffatt & Nichol

**Exhibit 2.6**  
**Buckled and Twisted Internal Framing of Kahului Barge**



Source: Photograph courtesy of Moffatt & Nichol

**Exhibit 2.7**  
**Damaged Exterior Side Shell of Kahului Barge**



Source: Photograph courtesy of Office of the Auditor

After the November 2007 incident, the barge's internal framing was buckled and twisted, brackets were tripped and buckled, and the side shell plate was dented. Also, the fender system was extensively damaged. Following heavy surge conditions and high winds in December 2007, the barge's hand railings and stanchions were bent and fractured, and the access ladder was damaged. When asked about the barge damage, Healy Tibbitts responded that "the barge was damaged when weather conditions exceeded the mooring system operational limits" and "the barge was not moved away from the pier in time to prevent damage."

The State has since provided Healy Tibbitts with two change orders to provide labor, materials, and equipment to repair the barge damage: one for \$273,859 to address a portion of the damages incurred in mid-November 2007 and another for \$169,411 to address a portion of the damage incurred in early December. However, the repair work will not prevent future damage. According to the department, as long as the barge is moored at its present location at Pier 2C, it will continue to be susceptible to unfavorable conditions caused by high surge, swells, and wind.

In December 2007, the department estimated that the total cost to remove wreckage and fix the barge and pier damage incurred in mid-November and early December will be more than \$3.4 million. This included \$483,000 for barge hull repair and inspection, \$2.2 million for Pier 2C fender system repairs, \$680,000 for barge mooring system repairs, and \$75,000 for wreckage removal. Currently, the department, Hawai'i Superferry Inc. and Healy Tibbitts are engaged in a dispute over who is responsible for the problems encountered with the Kahului barge's mooring system.

### **The U.S. Coast Guard raised safety concerns about barge operations**

Safety concerns associated with the damage to the barge at Kahului Harbor prompted an inquiry by the U.S. Coast Guard, which is charged with protecting the public, the environment, and U.S. economic and security interests in any maritime region, including international waters and America's coasts, ports, and inland waterways.

Department officials responded to the U.S. Coast Guard's concerns about the instability of the barge with a plan to use soft lines for mooring the barge to the pier and tug service to keep the barge snug against the pier during Superferry operations to provide the safe loading and unloading of vehicles until a new permanent mooring system is installed. During periods of strong ocean surges, regardless of whether the ferry is in port or not, the tug boat is also needed to hold either the barge snug against the pier to minimize damage or to move the barge off Pier 2C. Exhibits 2.8 and 2.9 show a tugboat pushing the barge against the pier in Kahului Harbor during Superferry operations.

**Exhibit 2.8**  
**Tugboat Pushing Barge Against Pier in Kahului Harbor**



Source: Photograph courtesy of Office of the Auditor

**Exhibit 2.9**  
**Tugboat (in background) Holding Barge in Place During Ferry Operations**



Source: Photograph courtesy of Office of the Auditor

The Coast Guard approved the department's plan. As a result, DOT must continue with this arrangement until it either implements a permanent mooring system or submits an alternative plan.

Daily tug service of about two-and-a-half hours to three hours a day started with Hawai'i Superferry Inc.'s December 13, 2007 relaunch. Initially, DOT officials estimated tug service hourly rates at \$1,000 to \$1,200 per hour, with ten weeks of daily tugboat service costing \$350,000. The department is now issuing a bid request every two weeks to the two tug providers in Kahului Harbor, with bid amounts averaging approximately \$750 per hour. To date, the State has funded the tug service and some of the barge and pier repairs but not by agreement. The department, Hawai'i Superferry Inc. and Healy Tibbitts continue to disagree on responsibility for these unplanned expenses.

### **Responsibility for barge maintenance is unclear**

The contract to design and build the barge-and-ramp systems required that the barges meet American Bureau of Shipping (ABS) requirements for barges classed A1 and have an ABS loadline certificate for unmanned, unrestricted ocean service. ABS is a leading international classification society devoted to promoting the security of life, property, and the marine environment through the development and verification of standards for the design, construction, and operational maintenance of marine-related facilities. According to ABS requirements, the department's barges must be dry-docked (hailed out of the water for maintenance and inspections) twice in each five-year period, with three years being the longest time between dry-dockings.

According to the deputy director of harbors, at present, it is unclear who is responsible for dry-docking the barge and paying for this work—the State as the owner of the barges or Hawai'i Superferry Inc. as part of the company's responsibility for barge maintenance and repairs. Complicating matters is the size of Kahului's barge. At 105-feet wide, the barge is wider than the largest commercial dry dock available in Hawai'i. Therefore, to receive its required maintenance and inspections, it will have to be repaired at Pearl Harbor's naval shipyard or transported to a West Coast facility. Either of these options would significantly increase costs and repair time.

### **Kawaihae Harbor experiences winter wave surges that are much stronger than those found in Kahului Harbor**

The barge system planned for Kawaihae Harbor is similar in design to the one implemented in Kahului Harbor. According to an analysis prepared by a consulting marine engineering company for DOT, the surge in Kawaihae Harbor is much higher than the surge in Kahului. When



we interviewed him in May 2008, DOT's Hawai'i district manager, who is responsible for overseeing operations at Hilo and Kawaihae Harbors, was not aware of any plans to mitigate high wave and wind conditions at Kawaihae. He did know about the use of tugboats to secure the barge against the pier in Kahului Harbor, but he noted that such a service is unavailable at Kawaihae Harbor. When needed, a tugboat would have to transit from Hilo, Kahului, or Honolulu, another additional expense, which has not been settled. He explained:

I have been opposed to the use of a barge in Kawaihae from day one, as I have always felt that the ship needed to carry its own ramp, as the Incat-built versions do. If the weather is bad, the ferry can remain in Honolulu, but we would still have to be concerned about the barge, and I guess it has not yet been resolved as to who is responsible for the safety of the barge.

***The second ferry's onboard ramp eliminates the need for DOT pier improvements at Kawaihae and Nāwiliwili Harbors***

In summer 2008, Hawai'i Superferry Inc. announced that its second ship, under construction in Mobile, Alabama, and scheduled to enter service in the first half of 2009, would be equipped with a loading ramp. As discussed earlier in this report, the shipboard feature was originally required by the DOT more than four years earlier, but company officials refused to consider it. Echoing 2004 DOT technical staff assessments, a Hawai'i Superferry Inc. representative, in a August 2008 television news interview, cited increased flexibility during severe weather as the reason for carrying a ramp aboard the new ferry: "So we don't have to use the barges that are currently in place that have proven to be complicated to use at times with the severe weather, it causes limitations." The new ferry is planned to begin servicing Kawaihae Harbor in summer 2009, with the possibility of visiting Nāwiliwili Harbor in the future. Since it will be carrying an onboard ramp for loading and unloading its vehicles, the State's \$10 million barge-and-ramp system at Kawaihae Harbor and its \$2.5 million ramp at Nāwiliwili Harbor will be rendered obsolete. At the time that this report was drafted, Hawai'i Superferry Inc. officials had not decided whether to retrofit the *Alakai* with a loading ramp. If they choose to do so, the State's entire \$38.5 million barge-and-ramp system, built according to Hawai'i Superferry Inc. specifications, would quickly become unnecessary.

**Because of how and where the three state-owned barges were built, it will be difficult for DOT to repurpose or resell its \$38.5 million system**

The three State-owned barges used by Hawai'i Superferry Inc. were built in China and therefore are not part of what is termed as the "Jones Act Fleet." The Jones Merchant Marine Act of 1920, often referred to "The Jones Act," is a federal statute passed by Congress in 1920 to regulate

maritime commerce in U.S. waters and between U.S. ports and to protect the domestic shipping industry. The Jones Act requires vessels engaged in U.S. domestic shipping to be U.S.-flagged vessels built in the United States, owned by U.S. citizens, and documented under the laws of the United States. This requirement also applies to barges.

Not being part of the Jones Act Fleet would have little consequence if the State's barges were to spend their entire operational life as loading and unloading platforms for Hawai'i Superferry Inc. However, as this report has outlined, the use of the barges will likely change significantly in the near future. Therefore, since the State's barges do not comply with the Jones Act, they cannot be converted to cargo carriers, since they would be prohibited from carrying merchandise and cargo between U.S. ports. At present, it is unknown how this will affect the resale value of the barges.

In addition, in the opinion of the DOT's Hawai'i district manager, because the system was built to accommodate the stern-only configuration of the Hawai'i Superferry, the barges are probably unusable as loading and unloading platforms for other harbor users. Therefore, they cannot be repurposed by the State in their present configurations.

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## Recent Legal and Legislative Actions Blur the State's Environmental Obligations

In August 2007, the Hawai'i Supreme Court ruled unanimously that DOT did not consider whether the Hawai'i Superferry Inc. project will have minimal or no significant impact, both primary and secondary, on the environment. It held the department's decision to exempt the Hawai'i Superferry project at Kahului Harbor from an environmental review was erroneous. This decision halted ferry service and led to further court challenges and public protests.

In response to the court's decision, the Legislature passed and the governor signed Act 2 (SSSLH 2007), which allowed ferry service to resume while a statewide environmental review is completed. The act overcomes the effect of the court's opinion by setting aside the Hawai'i Environmental Policy Act and allowing the Hawai'i Superferry to operate in Hawaiian waters and utilize Hawai'i's harbor improvements and facilities. In effect, Act 2 bargained away Hawai'i's environmental policy process to benefit a single operator.

### ***Clarification of what constitutes cumulative and secondary impacts is needed***

Our audit found concerns among some current and former DOT managers and former officials with the Office of Environmental Quality Control (OEQC) about the department's ability to comply with the court's decision that the department be required to consider cumulative and secondary impacts as they apply to water carrier

operations. According to the rules, in order to determine whether there is a “significant effect,” an agency must assess several areas including cumulative effects as well as secondary impacts. In the past, the department addressed cumulative effects as well as secondary impacts only as they applied to facilities and surrounding buildings. It did not account for secondary impacts in regards to the operations of a water carrier and deferred that responsibility to the operator.

Interviews with current and former department managers show that there is confusion as to how to address the cumulative and secondary impacts of a water carrier’s operations and to what extent. For example, a former DOT deputy director said that the department employees who worked on the Superferry project were not aware of any legal requirements that secondary impacts needed to be addressed before an exemption determination could be made. However, it should be noted that the department failed to consider a requirement under Section 11-200-12, Hawai‘i Administrative Rules (HAR), which states that “in determining whether an action may have a significant effect on the environment, the agency shall consider every phase of a proposed action, the expected consequence, both primary and secondary. . . .”

Contrary to the department’s position, the then-director of the University of Hawai‘i Environmental Center, the then-director of the OEQC, and the then-OEQC lead planner said an agency is obligated to review and follow the provision of Section 11-200-12, HAR, as part of the exemption determination process. However, the then-deputy director of harbors said that during the exemption determination process, neither the counties nor the OEQC raised any concerns to the department about the need to address secondary impacts in regards to the harbor improvements for the Superferry project. He added that the department was not solely responsible for identifying the applicable rules of environmental requirements associated with the exemption determination. Rather, everyone involved in this process—including the affected counties and the OEQC—shared the responsibility.

The then-OEQC director and then-OEQC lead planner disagreed. They said the responsibility to identify and follow all applicable rules in regards to the exemption of the harbor improvements for the Superferry project rested with the department. They also pointed out that in the OEQC’s November 23, 2004 response to the department, the OEQC recommended that the department “review and follow the procedures stated in Section 11-200-8, HAR.” The then-OEQC lead planner said this line was included in the letter “to convey an attempt to tell DOT that it was DOT’s ‘kuleana’ [responsibility] to apply the rules and to warn them that it was their problem.”

The then-OEQC director and the then-OEQC lead planner said the department should have understood there are other areas in the rules that are linked with this rules provision, including a section that requires an agency to assess whether a project has any secondary impacts. The then-OEQC director said the OEQC November 23, 2004, response letter was not more specific because, “this isn’t their (Harbors Division) first project. They’ve done this before.” The then-OEQC planner agreed that the department had enough experience in this area to know which rules needed to be reviewed without being told by the OEQC.

In addition to these jurisdictional issues, some officials are concerned about water carriers that make stops at foreign ports on their way to Hawai‘i and whether those ports of call must be included in the agency’s assessment of secondary and cumulative impacts. Another concern raised was whether the State has the statutory authority to enforce environmental mitigation measures upon vessels once these ships venture outside Hawaiian waters.

We found that some of these concerns are valid. In order to comply with the court’s decision within practical means, we urge that a consensus be reached between all affected stakeholders as to the scope of what constitutes cumulative and secondary impacts in regards to a water carrier’s operations to enable agencies to conduct an assessment that is both clear in purpose and within their means. A consensus also must be reached as to whether water carriers currently conducting business in Hawai‘i will be subject to such a review or whether such changes will apply prospectively to future water carriers that plan to operate in the islands. We also urge that public participation be included in this decision-making process. The importance of public input is stated in both the state Environmental Impact Statements law and environmental policy.

***Act 2 sets aside  
Hawai‘i’s environmental  
safeguards and benefits  
a single operator***

Act 2 (SSSLH 2007) states that seldom, if ever, has a judicial determination overturned harbor improvements and business operations that were previously authorized by the government. In fact, the act provides, “Such an occurrence is not explicitly contemplated in Chapter 343, HRS, and is not consistent with the intent of the legislature. As such, the policy that applies under law should be amended and clarified.” Stating that the large-capacity ferry operation in the islands would be in the public interest, the bill promotes the commencement of the ferry service as soon as possible and the continued use and construction of the harbor improvements while an environmental review is conducted.

Notwithstanding the State’s environmental policy and its National Environmental Policy Act of 1969 foundation, Act 2 amends and clarifies the law by directing that the construction and use of harbor

improvements to facilitate the ferry service be governed by the act and not by the State's EIS law. It also directs that the environmental review process for state actions in connection with a large-capacity ferry vessel company be governed by the act and not by the State's EIS law.

As a result, Act 2 undermines the State's environmental policy and review process as it relates to large-capacity ferry services and ferry vessel companies and substitutes a negotiated environmental review process tailored to the Hawai'i Superferry Inc. It muffles the EIS law by insulating significant elements of the Hawai'i Superferry Inc. operation from any required environmental review under Chapter 343, HRS. In addition, Act 2 suppresses other environmental safeguards by allowing the ferry vessel to operate and utilize all state harbor improvements and facilities, declaring the ferry operation a required public convenience and necessity, providing that a certificate of public convenience and necessity issued to a large-capacity ferry vessel company cannot be revoked because an environmental review has not been completed; and not requiring county permits or approvals for the construction, use, or operation of any facilities or improvements. These laws include:

- Chapter 205A, HRS (the coastal zone management law that protects valuable coastal ecosystems, including reefs);
- Chapter 269, HRS (requires every public utility to have a certificate of public convenience and necessity [CPCN] to do business in Hawai'i); and
- Chapter 271G, HRS (requires every water carrier to have a certificate of public convenience and necessity [CPCN] to operate in the state).

In place of the State's environmental review process under its EIS law, the act does, however, require the ferry company to comply with various conditions and protocols established by the act and set by the governor, or established by the Legislature by law. These conditions and protocols address issues such as whale encounter and invasive species, ocean life, traffic, water resources and quality, among others. In addition, the department must prepare an EIS that complies with the act.

Although Act 2 speaks in general terms and does not specifically name Hawai'i Superferry Inc., it is presumed to relate to Hawai'i Superferry Inc. by its reference to Kahului Harbor improvements and its effective dates. It is no coincidence that the act, which took effect upon signature by the governor on November 2, 2007, will remain in effect for a finite period of time, either a short period after the adjournment of the 2009 legislative session or upon acceptance of the final EIS provided in the act. It is also no coincidence that the act protects the State from litigation

and requires the ferry company, should it choose to operate under Act 2, to waive claims that have arisen as of the effective date of the act and to indemnify and defend the State from claims brought by the large-capacity ferry vessel company. To date, Hawai‘i Superferry Inc. is the only private, inter-island, large-capacity ferry vessel company operating in the state. Because Hawai‘i Superferry Inc. is the only ferry vessel company able to take advantage of the small window of time created by Act 2, it appears that the legislation was designed to benefit a single operator.

While it is within the Legislature’s authority to amend laws in response to judicial decisions, it is questionable policy-making to suspend current environmental laws for a 15- to 16-month period to enable “large-capacity ferry vessels” to operate under a temporary law. Once the window is closed, Chapter 343, HRS, will go back into effect for ferry operators. In the end, Act 2 enabled the Hawai‘i Superferry Inc. to enter the market without having to meet the initial requirements of addressing its operational impacts on the environment set forth in Chapter 343, HRS, and reinforced by the state Supreme Court.

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## Conclusion

In a reversal of longstanding policy, the State provided harbor improvements for Hawai‘i Superferry Inc., which it selected and implemented based on company specifications and operational deadlines. Later, lawmakers crafted custom-made legislation to keep the business in operation.

The State’s \$38.5 million interim harbor improvement system has proved to be problematic, best exemplified by Kahului Harbor’s barge, which is continually battered by high winds and waves. Not only has the barge and pier incurred more than \$3 million in damages (the liability of which has yet to be determined), it also requires the services of a tug boat to secure it to the pier during ferry operations and periods of high waves and wind. Like the barge and pier damage, responsibility for this significant extra expense has yet to be determined. To date, department officials have no plans on how to prevent future damages at Kahului Harbor.

But the State has a larger and more expensive challenge over the horizon. Last summer, Hawai‘i Superferry Inc. officials announced that they will be outfitting their second ship with an onboard ramp, a feature which eliminates the need for a \$10 million barge-and-ramp system at Kawaihae Harbor and a \$2.5 million ramp at Nāwiliwili Harbor, both built to accommodate Hawai‘i Superferry Inc. and no other users. If company officials choose to retrofit their first ship, the *Alakai*, with a loading ramp, the State’s entire \$38.5 million barge-and-ramp system would quickly become unnecessary. Moreover, because the barges were

designed specifically for Hawai‘i Superferry Inc.’s use, they cannot be repurposed in their present configuration by other harbor users. And since they were built in China and are therefore prohibited from transporting cargo within U.S. waters, the barges may have little use for potential buyers.

This situation would have been avoided if state officials had followed the recommendations of DOT technical staff and required Hawai‘i Superferry Inc. to carry an onboard ramp in the first place. Collectively, these actions allowed Hawai‘i Superferry Inc. to enter the Hawai‘i market without paying the necessary start-up costs or adhering to the State’s environmental rules and laws. These unusual accommodations, extended to a single business, have set a worrisome and expensive precedent for how state government attracts, encourages, and assists new businesses to the islands.

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## Recommendations

1. The Office of Environmental Quality Control should establish guidelines, which include a checklist for use by agencies, to ensure that all of the steps required by Chapter 11-200, HAR, to protect the environment have been properly addressed and documented for a proposed action before making an exemption determination. For example, other agencies, including NEPA, have developed a compliance checklist that is used to show that all required steps were completed before a categorical exclusion is declared.
2. The Environmental Council should:
  - a. Establish a process to provide guidance to agencies in determining whether an action is projected to have a significant environmental impact under Section 11-200-8 (b), HAR, which would make an exemption inapplicable.
  - b. Amend the EIS rules to ensure the OEQC provides training to state and county agencies to clarify their roles and obligations in the exemption determination process.
  - c. Clarify the agency consultation process regarding proposed exempted actions in Section 11-200-8(a), HAR, to ensure that an outside agency’s or individual’s non-response to a consultation letter is not left open to interpretation by the requesting agency that it has met its responsibilities to consult with outside agencies before determining an action is exempt. Ensure that agencies

make clear in their consultation letter that the purpose of the letters is to comply with the administrative rules and that a response is vital towards fulfilling these regulatory requirements and that should an outside agency believe it does not have jurisdiction or expertise as to the propriety of the exemption as required in the rules, it should inform the requesting agency of this position.

- d. Establish clear definitions of cumulative and secondary impacts for water carrier operations and the scope of their coverage. The Environmental Council should work with all affected stakeholders to build consensus on these definitions and how they should be addressed to enable agencies to conduct an assessment that meets the requirements of the EIS laws and rules. A consensus should also be reached as to whether water carriers currently conducting business in Hawai‘i will be subject to such a review or whether such changes will apply only prospectively.

3. The Department of Transportation Harbors Division should:

- a. Investigate options for a new barge mooring and fender system for the pier in Kahului Harbor that can better withstand high surge and winter storms until a permanent facility is available or until Hawai‘i Superferry Inc. retrofits its first ferry with an onboard ramp.
- b. Determine responsibility for barge maintenance and resolve financial liability issue with Hawai‘i Superferry Inc. and Healy Tibbitts regarding barge damage and additional unplanned expenses such as tug services.
- c. Establish an exit strategy for its interim barge-and-ramp system, which will likely be rendered obsolete soon.



LINDA LINGLE  
GOVERNOR

Appendix A



STATE OF HAWAII  
DEPARTMENT OF TRANSPORTATION  
HARBORS DIVISION  
79 S. NIMITZ HIGHWAY  
HONOLULU, HAWAII 96813-4898

RODNEY K. HARAGA  
DIRECTOR

Deputy Directors  
BRUCE Y. MATSUI  
BARRY FUKUNAGA  
BRENNON T. MORIOKA  
BRIAN H. SEKIGUCHI

IN REPLY REFER TO:  
DEP-H 8539.05

February 8, 2005

Department of Public Works  
and Waste Management  
County of Maui  
200 S. High Street  
Wailuku, Hawaii 96793

Gentlemen:

The State of Hawaii Department of Transportation, Harbors Division is engaged in planning and discussion with the operators of the Hawaii Superferry regarding their interest and intent to establish inter-island fast ferry service in the State of Hawaii. The service proposed will introduce an alternative form of marine passenger transportation between the islands that is currently not available and in so doing will add to the general benefit of the public through the expansion of transportation and commerce.

Based on such considerations, the Department supports the introduction of the new ferry service and is prepared to provide access to its harbor facilities and undertake improvements and adjustments that will enable the new service to commence its operation. Hawaii Superferry has announced their plan to establish initial service in January 2007, between the Honolulu Harbor, island of Oahu and the islands of Maui and Kauai with subsequent expansion to the island of Hawaii in 2008. The vessel used by Hawaii Superferry will have the capacity to transport as many as 900 passengers and 290 vehicles and require special ramps in order to enable vehicle movement onto or off of the ferry vessel.

In order to accommodate the operation of the ferry system by the desired timetable, the Harbors Division will provide suitable pier sites and adjoining operational areas at each of the harbors where the service will be provided.

At the Kahului Harbor on the island of Maui, the Department will be constructing permanent pier improvements that will be established in the corner of the harbor between the existing pier 1 and 3 locations (refer to enclosed exhibit). Construction of the new pier is anticipated for completion in time to meet the commencement date schedule for the ferry service at Kahului Harbor. The new pier facility will be identified as "Pier 4" and environmental reviews will be undertaken as part of the development of this new pier facility. In the event the new pier is not completed or

Department of Public Works  
and Waste Management  
February 8, 2005  
Page Two

ready in time to meet the commencement date for the ferry operation, an interim, short term, arrangement using a barge intended for the later servicing of the ferry service at the Kawaihae Harbor, island of Hawaii will be employed. The barge will be docked at the existing pier 2 and used to provide a transition platform between the ferry vessel and the pier. The barge/ramp arrangement will include a ramp between the ferry and the barge, and a second ramp between the pier and the barge to enable vehicle loading and off-loading of the ferry vessel. The barge will be moored alongside the pier by lines and anchor and the ferry will dock alongside the barge, also employing existing dockside mooring arrangements. The interim operation of the barge arrangement will use existing pier facilities that have been developed following environmental review associated with the construction of pier 2 and conforms to the maritime purposes and uses intended for the Kahului Harbor.

The alternative arrangements that would employ use of existing pier facilities in the event completion of the desired permanent improvements are not completed in time to meet the commencement of the ferry service provides no change to the manner and method for the use of pier facilities and is, therefore, determined to fall within the exemption authority established for the Department of Transportation under file with the State Office of Environmental Quality Control as provided under their Administrative Rules and Hawaii Revised Statutes Chapter 343.

We will appreciate any input or comments that you may have regarding this matter by February 17, 2005. If additional information is needed on any aspect of the arrangements described, please contact Ms. Julia Tsumoto at the Department of Transportation, Central Planning Office, telephone number 587-2165.

Very truly yours,

  
BARRY FUKUNAGA  
Deputy Director of Harbors

Enclosure

c: Glenn Okimoto  
Julia Tsumoto  
Marshall Ando  
Scott Cunningham

LINDA LINGLE  
GOVERNOR

Appendix B



STATE OF HAWAII  
DEPARTMENT OF TRANSPORTATION  
HARBORS DIVISION  
79 S. NIMITZ HIGHWAY  
HONOLULU, HAWAII 96813-4898

RODNEY K. HARAGA  
DIRECTOR

Deputy Directors  
BRUCE Y. MATSUI  
BARRY FUKUNAGA  
BRENNON T. MORIOKA  
BRIAN H. SEKIGUCHI

IN REPLY REFER TO:  
DEP-H 8552.05

February 15, 2005

Department of Public Works  
and Waste Management  
County of Maui  
200 S. High Street  
Wailuku, Hawaii 96793

Gentlemen:

The Harbors Division is correcting the earlier correspondence sent regarding development of arrangements at the Kahului Harbor to support the operation of an inter-island ferry service and provide the following clarification on the approach that is being pursued. Our earlier description characterized the on-going effort of a separate project, which is unrelated to current improvements planned for Hawaii Superferry.

In order to meet the schedule that is planned for introduction of the ferry system, the use of a barge/ramp vessel will be employed as a transition between the ferry at the existing pier 2. This arrangement allows the ferry to berth at the dock adjoining the barge. Vehicular traffic to or from the ferry will employ a ramp situated on the barge and a second ramp that connects the barge to the pier. The barge will be moored alongside the pier, tied and anchored to such location. Since the arrangement continues to employ facilities that were developed to accommodate vessel berthing and requires no further changes, the application of this approach is consistent with permitted and designed uses of the existing pier for all classes of vessels and is determined to fall within the exemption authority under file with the State Office of Environmental Quality Control as provided under their Administrative Rules and Hawaii Revised Statutes Chapter 343.

The Harbors Division is updating the Kahului Master Plan that identifies future general harbor improvements. The completion of certain aspects involving areas for improvement are still subject to additional planning and there is recognition that changes may involve or affect a number of current and future users. Where required, these developments will include any required environmental review.

Department of Public Works  
and Waste Management  
February 15, 2005  
Page Two

We regret any confusion or misunderstanding resulting from our earlier correspondence on this matter. If additional information or further clarification is needed, please contact Ms. Julia Tsumoto at the Department of Transportation Central Planning Office in Honolulu at phone (808) 587-1845.

Very truly yours,



BARRY FUKUNAGA  
Deputy Director

c: Glenn Okimoto  
Julia Tsumoto  
Marshall Ando  
Scott Cunningham

LINDA LINGLE  
GOVERNOR



Appendix C

Har-5  
RODNEY K. HARAGA  
DIRECTOR  
Deputy Directors  
BRUCE Y. MATSUI  
BARRY FUKUNAGA  
BRIAN H. SEKIGUCHI

STATE OF HAWAII  
DEPARTMENT OF TRANSPORTATION  
HARBORS DIVISION  
79 S. NIMITZ HIGHWAY  
HONOLULU, HAWAII 96813-4898

IN REPLY REFER TO:  
DEP-H 8507.05

November 15, 2004

Ms. Genevieve K. Y. Salmonson  
Office of Environmental Quality Control  
235 S. Beretania Street, Suite 702  
Honolulu, Hawaii 96813

Dear Ms. Salmonson:

Based on our discussion regarding the proposed scope of improvements for the installation of equipment and ancillary changes needed to ready existing piers at the Honolulu, Kahului, Nawiliwili and Kawaihae harbors to accommodate the introduction of the Hawaii Superferry, semi-swath catamaran ferry operation, we request confirmation from the Office of Environmental Quality Control that the intended improvements fall within the approved Exemption Classes established for the State Department of Transportation.

As related in our conversation the changes will involve the improvements depicted in the drawings that you reviewed for each harbor and use of available and existing pier sites following the installation of removable vehicle boarding ramps and modifications to existing pier structures that do not include or involve any expansion of existing vessel berthing spaces. The anticipated changes will also involve adjustments to operational scheduling for pier use and access by current and future operators to coordinate activities that conform to the general maritime uses for the respective harbors.

At the Kahului Harbor, it is contemplated that a portion of one side of the tip of the existing pier 2 will be removed, creating a "notch" in the pier. At the Honolulu Harbor, a barge will be moored alongside pier 19 and used as a platform for the ramp that will mate with the ferry vessel. The barge will be secured by spud piles and connected to the shore by securing mooring lines to pierside bollards. The anchor piles will be dropped in place and used to stabilize the barge and permit its vertical movement with the tide. The Kawaihae harbor plan envisions the establishment of a ramp on the coral shore to mate with a ferry anchored against a mooring barge immediately adjoining the shoreline area.

Previous and on-going environmental assessments associated with harbor master plans have either identified or addressed traffic and operating conditions that are associated with the type of activity that will arise as a result of the introduction of the new ferry service. The Department of Transportation, Harbors Division will also confer and consult with agencies and interested

Ms. Genevieve K.Y. Salmonson


November 15, 2004

Page Two

parties in our planning and preparation effort as well as review all earlier environmental studies that have been undertaken or may be in progress. Our preliminary assessment indicates that the anticipated changes fall within existing exemption classes allowed for our Department and based on our discussion, your reconfirmation of this view is requested. We ask that you also reconfirm that an exemption declaration may be undertaken even though an on-going environmental assessment may not have been finalized, provided suitable information is available to substantiate and justify such finding.

We will be finalizing our review and making a final determination on whether the proposed changes fall within existing exemption classes following the completion of agency consultation. Your assistance in validating OEQC's view that the changes described and depicted in our discussion do fall within the existing exemption authority established for the Department of Transportation will therefore be appreciated.

Sincerely,



BARRY FUKUNAGA  
Deputy Director of Harbors

Enc: Diagrams of Harbor Pier layouts

c: Bruce Matsui  
Glenn Okimoto  
Jean Oshita  
Fred Pascua  
Allan Chock  
Julia Tsumoto

IDA LINGLE  
GOVERNOR OF HAWAII



Appendix D

GENEVIEVE SALMONSON  
DIRECTOR

STATE OF HAWAII  
OFFICE OF ENVIRONMENTAL QUALITY CONTROL

235 SOUTH BERETANIA STREET  
SUITE 702  
HONOLULU, HAWAII 96813  
TELEPHONE (808) 586-4185  
FACSIMILE (808) 586-4186  
E-mail: oeqc@health.state.hi.us

November 23, 2004

Mr. Barry Fukunaga, Deputy Director of Harbors  
Department of Transportation  
Harbors Division  
79 S. Nimitz Highway  
Honolulu, Hawaii 96813-4898

Dear Mr. Fukunaga:

Subject: Hawaii Superferry Improvements

This is in response to your letter of November 15, 2004 regarding the Hawaii Superferry project.

After reviewing the information you presented, OEQC believes that the proposed improvements fall within the scope of work described in the Department of Transportation's approved exemption list.

We understand that the Department of Transportation will take the following actions.

1. Honolulu Harbor - DOT will moor a barge alongside pier 19. The barge will be secured by spud piles and anchor piles. The barge will be used as a platform for the ramp that will mate with the ferry. A master plan EIS was completed for Honolulu Harbor.
2. Kawaihae Harbor - DOT will place a ramp on the coral shore to mate with the ferry anchored against a mooring barge immediately adjoining the shoreline area. A master plan EIS was completed for Kawaihae Harbor.
3. Kahului Harbor - DOT plans to demolish a portion of one side of the tip of pier 2 to create a notch in the pier. DOT has received comments on the master plan EA for Kahului Harbor.
4. General - DOT will operate removable vehicle boarding ramps and modify pier structures without expanding existing vessel berthing spaces.

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HAWAIIAN

DOT  
Page 2

The above actions generally fall under exemption class 6 number 8 and exemption class 8 number 1 of DOT's approved exemption list dated November 15, 2000.

**EXEMPTION CLASS 6:** Construction or placement of minor structures accessory to existing facilities.

# 8. Alteration or addition of improvements with associated utilities, which are incidental to existing harbor and boat ramp operations, in accordance with master plans that have met the requirements of Chapter 343, Hawaii Revised Statutes. Such improvements and associated utilities include concessions, comfort stations, pavilions, paving, rockwalls, fencings, walkways, loading docks, warehouses, piers, offices, container freight stations, cranes, fuel lines, lighting, sprinkler and drainage systems.


**EXEMPTION CLASS 8:** Demolition of structures, except those structures located on any historic site as designated in the National Register or Hawaii Register as provided for in the National Historic Preservation Act of 1966, Public Law 89-665, or Chapter 6E, Hawaii Revised Statutes.

# 1. Demolition of existing structures under Department of Transportation jurisdiction except seawalls and other coastal structures and those structures located on any historic site as designated in the National Historic Preservation Act of 1966, Public Law 89-655, or Chapter 6E, Hawaii Revised Statutes.

OEQC also believes that minor projects that have independent utility may be declared exempt even though an on-going environmental assessment may not have been finalized.

Accordingly, we believe that the Department of Transportation has authority to declare the actions described above as exempt from the requirement to prepare an environmental assessment. DOT should review and follow the procedures stated in HAR 11-200-8.

Sincerely,

  
Genevieve Salmonson  
Director

11/16/00 10:30 AM

04 NOV 30 P2:30



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## Responses of the Affected Agencies

### Comments on Agency Responses

We transmitted drafts of this report to the Department of Transportation and the Department of Health on November 26, 2008. A copy of the transmittal letter to the Department of Transportation is included as Attachment 1. The department's response is included as Attachment 2. The Department of Health declined to respond.

The Department of Transportation submitted a reply that sidesteps many of the issues presented in the report and challenges some of our report's specific wording, most of which was obtained from documents provided to us by the department. We question why the department challenges wording from its own documents.

The department disagreed more than once in its response that the installation of a vessel loading ramp on Hawai'i Superferry's second ferry and the retrofitting of a loading ramp on Superferry's first ship, the *Alakai*, would not render the State's entire \$38.5 million barge-and-ramp system as obsolete or unnecessary. The department indicated the design of the vessel loading ramp permits the vessel to use the Honolulu barge-and-ramp system, the Nāwiliwili shore-side ramp, and the Kahului barge-and-ramp system. However, press releases from Austal, the shipbuilder of the ferries for Hawai'i Superferry, and Hawai'i Superferry indicate otherwise. According to an Austal press release on September 30, 2008, the second "ferry is fitted with a stern quarter, bi-fold ramp, for use in austere ports without shore-side loading facilities. The hydraulically operated aluminum ramp has a clear width of 4.5 meters and is designed for 42 metric ton trucks." A Hawai'i Superferry, Inc. representative reported in an August 16, 2008 press release that the foldable ramp is "so we don't have to use the barges that are currently in place that have proven to be complicated to use at times with the severe weather, it causes limitations." It would be difficult to imagine why Hawai'i Superferry would want to continue to use barges that are difficult to use and have been damaged in severe weather after the ferries have been fitted with ramps.

In addition, the department identified what it believed was confusing or misleading statements. For example, we indicated that a similar barge-and-ramp system was built for Kawaihae Harbor for ferry operations to begin in 2009. The department indicates the barge was only partially built. However, our records indicate that Healy Tibbetts bid \$10,464,145 to build the barge and was paid \$10,397,279; therefore, we stand by our finding.

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The department also indicated we imply that the Office of Environmental Quality Control (OEQC) was not fully informed regarding the scope of DOT's proposed actions. Though our records show that the department did meet with OEQC to discuss the options being considered, it did not inform OEQC in writing of its change in plans from a notched pier to the barge-and-ramp system that was eventually implemented, did not send a second consultation letter to OEQC as it did to 12 county agencies and state departments, and continued to cite the OEQC director's original opinion regarding a notched pier as the basis for the department's decision to exempt the proposed harbor improvements. Here again, we stand by our finding.

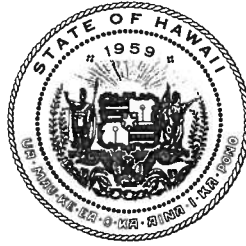
The department objected to our reference to its \$3.4 million repair estimate of December 2007 and argues that the inclusion of the \$2.2 million estimate for Pier 2C fender system repairs is "irrelevant" because it has not been spent. The department maintains instead that it is currently designing a new system. The department, however, misses the point: this was its own estimate in December 2007 and we so reported that; the fact that it is now designing a replacement system for the Kahului pier does not negate the purpose of the expenditure—to make Pier 2C reliably usable.

The department expressed concern that it believed that our office exceeded the parameters of the audit. On the contrary, our audit addressed both causes and their effects, which are elements of an audit finding.

Some of the comments raised by the department involve information that has changed subsequent to the end of our field work. For example, we mention that the department does not have a plan on how to prevent future barge damages at Kahului Harbor and we reference ferry service to Kawaihae. Both of our statements were true when we completed our field work in October 2008 and drafted our report. We do not re-open field work for more recent events but the department was welcome to provide updated information in its response.

After a careful review and consideration of the department's comments, we made minor changes and clarifications to our report, none of which affected our findings and conclusions.

STATE OF HAWAII  
OFFICE OF THE AUDITOR  
465 S. King Street, Room 500  
Honolulu, Hawai'i 96813-2917



MARION M. HIGA  
State Auditor

(808) 587-0800  
FAX: (808) 587-0830

November 26, 2008

*COPY*

The Honorable Brennon Morioka  
Director  
Department of Transportation  
Aliiimoku Hale  
869 Punchbowl Street  
Honolulu, Hawai'i 96813

Dear Mr. Morioka:

Enclosed for your information are three copies, numbered 6 to 8, of our confidential draft report, *Performance Audit on the State Administration's Actions Exempting Certain Harbor Improvements to Facilitate Large-Capacity Ferry Vessels from the Requirements of the Hawai'i Environmental Impact Statements Law: Phase II*. We ask that you telephone us by Monday, December 1, 2008, on whether or not you intend to comment on our recommendations. If you wish your comments to be included in the report, please submit them no later than Monday, December 8, 2008.

The Department of Health, Governor, and presiding officers of the two houses of the Legislature have also been provided copies of this confidential draft report.

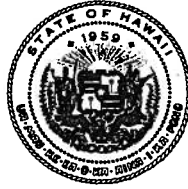
Since this report is not in final form and changes may be made to it, access to the report should be restricted to those assisting you in preparing your response. Public release of the report will be made solely by our office and only after the report is published in its final form.

Sincerely,

Marion M. Higa  
State Auditor

Enclosures

LINDA LINGLE  
GOVERNOR



BRENNON T. MORIOKA  
DIRECTOR

Deputy Directors  
MICHAEL D. FORMBY  
FRANCIS PAUL KEENO  
BRIAN H. SEKIGUCHI  
JIRO A. SUMADA

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

IN REPLY REFER TO:  
DEP-H 5174.09

December 8, 2008

RECEIVED

Ms. Marion M. Higa, State Auditor  
Office of the Auditor  
465 S. King Street, Room 500  
Honolulu, Hawaii 96813-2917

2008 DEC -8 PM 4:01

OFF. OF THE AUDITOR  
STATE OF HAWAII

Dear Ms. Higa:

Subject: DOT Comments to Phase II Audit Report

Thank you for the opportunity to provide comments on behalf of the State of Hawaii, Department of Transportation, to the *Performance Audit on the State Administration's Actions Exempting Certain Harbor Improvements to Facilitate Large-Capacity Ferry Vessels from the Requirements of the Hawai'i Environmental Impact Statements Law: Phase II*. We would appreciate the inclusion of this response letter in the released Phase II Audit Report. It is DOT's assessment that the Phase II Audit Report contains inaccuracies and incorrect conclusions, the most egregious of which are commented upon by page reference below. The decision not to comment on any particular portion of the Phase II Audit Report does not mean DOT agrees with the conclusions of the report contained therein.

**COMMENTS**

- Page 4: A similar barge-and-ramp system was designed for Kawaihae but was only partially built as the October 2006 Kawaihae earthquake inhibited DOT's ability to use the barge at Pier 1.
- Pages 10-11: The Phase II Audit Report overly simplifies the Hawai'i Superferry (HSF) design decision to not install ramps on their vessels. While other high-speed ferries utilize vessel ramps, HSF vessels were specifically designed to accommodate Hawaiian waters, particularly channel waters, meaning the vessels were designed to be larger and taller. As a result, vessel ramps are longer and heavier and the permissible slope-to-pier requires a 100 foot shore-side component. The limited pier space at Kahului and Kawaihae, as well as the necessity for a shore-side ramp akin to that at Nawiliwili, argued in favor of barges-and-ramps as extensions of piers. The final decision to go with barges-and-ramps was a compromise

recognizing the physical limitations of our harbors and a desire to forego more costly and space-consuming pier improvements due to the need to observe and maintain multi-user capability and maximum use of available spaces.

Although DOT has not provided “ramps” to other vessel operators, DOT routinely undertakes special improvements on behalf of vessel operators, such as pier-side sheds and hardening of cargo yards, all of which are used exclusively by an operator during their tenure at a specific harbor location to facilitate their commercial operation.

- Page 12: The Phase II Audit Report mischaracterizes the relationship between technical staff and DOT management as to the ultimate decision to construct barges-and-ramps.
- Page 16: With reference to the implication OEQC was not fully informed regarding the scope of DOT’s proposed action, DOT met with OEQC personnel to discuss the barge-and-ramp plans in more detail. The type of improvements and the issues DOT sought clarification on were discussed with the OEQC staff in the meetings. There was absolutely no attempt by DOT to seek an OEQC determination through the use of misinformation.
- Page 18: The Phase II Audit Report incorrectly states that Healy Tibbitts was required to design a system that could “operate through all kinds of weather conditions.” In fact, there were specific design parameters for the barge mooring systems, above which weather conditions required the barges be removed from the pier faces.
- Page 22: Your references to the \$3.4 million repair estimate of December 2007 are taken out of context and irrelevant because DOT has not undertaken repairs consistent with the December 2007 estimate. \$2.2 million was not spent on Pier 2C fender repairs. A new mooring system is being designed which holds the Kahului barge off Pier 2C at all times except during vessel operations.
- Tug assist is principally necessary only during vessel operations. When weather conditions require, a tug may be used to move the Kahului barge off Pier 2C.
- Page 24: Tug assists through September 30, 2008 for one-trip a day were funded by DOT. As of October 1, 2008, DOT transferred responsibility for tug assists to HSF. Healy Tibbitts is not involved in any disagreement between DOT and HSF as to the responsibility for the costs of tug assists.
- Under the Operating Agreement, HSF is responsible for equipment maintenance.

Page 25: Per HSF's announcement, ferry vessel service to Kawaihae is postponed until 2010 due to the delayed entry of the second vessel into Hawai'i service.

The Phase II Audit Report incorrectly states that if HSF retrofits the *Alakai* with a vessel ramp, "the State's entire \$38.5 million barge-and-ramp system... would quickly become unnecessary." The design of the ramp on HSF's second vessel permits the vessel to use the Honolulu barge-and-ramp system, the Nawiliwili shore-side ramp and the Kahului barge-and-ramp system. The same would be true for the retrofit of the *Alakai*. The ramp is intended for Kawaihae Harbor and provides additional operational flexibility to the vessel(s).

Page 26: Notwithstanding any legal determination to the contrary, Section 14 of Act 2 sets forth the parameters of the audit and the Office of the Auditor has exceeded those parameters in its discussion of Act 2.

Page 29: The Act 2 EIS process tracks Chapter 343, HRS, and supplants the Chapter 343 environmental review in its entirety for large capacity ferry vessels. Contrary to the Phase II Audit Report, the Act 2 EIS process does not "insulate significant elements" of the HSF operation from environmental review. Rather, it requires the review pursuant to Act 2 versus Chapter 343, HRS.

As previously noted by DOT, the August 2007 Hawai'i Supreme Court decision established a new standard for exempted environmental reviews. Prior to this decision, as a matter of policy and practice, DOT did not consider secondary and/or cumulative impacts of privately-owned vessel operations at sea when DOT made harbor improvements that furthered vessel operations. For example, DOT did not analyze the impact of NCLA's vessels on whales and marine aquatic life when it renovated Pier 2, Honolulu Harbor, to accommodate NCLA's fleet of three vessels. Nor did DOT conduct secondary or cumulative impact analyses when the Pier 19 Terminal construction project was exempted during the Cayetano administration, a terminal constructed specifically for ferry operations. Historically, other shore-side improvements to facilitate the introduction of new and larger vessels with increased cargo volumes on behalf of harbor operators were routinely exempted by DOT under a standard practice that had been accepted by the community and OEQC until the Hawai'i Supreme Court set forth its new legal requirement in its August 2007 HSF decision.

Page 30: The Kahului barge has not incurred "more than \$3 million in damages."

DOT has a plan to prevent future damage to the Kahului barge. A proposed replacement mooring system, which would hold the barge off Pier 2C except during vessel operations, is currently under review by the Army Corps of Engineers. Upon receipt of necessary permits, the plan is to have this new

mooring system installed which should minimize any contact between the barge and Pier 2C.

While Act 2 itself currently contains a repeal date, the Act 2 EIS covering the general purpose harbor ferry improvements survives the repeal date and applies to future ferry vessel operators which may desire to make use of the harbor ferry improvements.

HSF installation of vessel ramps does not render the Honolulu and Kahului barge-and-ramp systems, or the Nawiliwili shore-side ramp, obsolete. This is an inaccurate conclusion.

Page 32: Consistent with the Phase II Audit Report recommendation, DOT's proposed plans for a new Kahului mooring system are currently under review by the Army Corps of Engineers.

DOT is in the process of determining responsibility for operational issues that have financial repercussions.

DOT is reviewing options for use/disposal of the Kawaihae barge since it was rendered unworkable as a result of the October 2009 Kawaihae earthquake.

In closing, DOT reminds the State Auditor that Act 2 represented a bi-partisan effort by the Administration and the Legislature to strike a balance between the public interest need for an alternative form of inter-island transportation and concerns for the environment. While Act 2 permitted large capacity ferry vessels to operate while an EIS was being prepared, it also placed significant restrictions and conditions on operations through both Act 2 and Governor Lingle's Executive Order 07-10. In addition, an Inter-Island Ferry Oversight Task Force was established and a Rapid Risk Assessment was prepared by the EIS contractor to provide early input on vessel operations and their impact, if any.

Very truly yours,



BRENNON T. MORIOKA, Ph.D., P.E.  
Director of Transportation