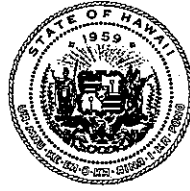


LINDA LINGLE
GOVERNOR



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

BRENNON T. MORIOKA
INTERIM
DIRECTOR

Deputy Directors
FRANCIS PAUL KEENO
BRIAN H. SEKIGUCHI

IN REPLY REFER TO:

February 28, 2008

TESTIMONY OF THE DEPARTMENT OF TRANSPORTATION

SENATE BILL NO. 2808, SD 1

COMMITTEE ON JUDICIARY AND LABOR

The Department of Transportation supports the intent of this bill. Legislation is needed this session to address the growing confusion and controversy over Environmental Assessment (EA) requirements for actions, which involve both development of private property and improvements within the right-of-way (ROW) of a public highway. We request that you pass SB 2808, SD 1 out of committee, as this will provide time for continued discussion with interested parties and allow us to propose appropriate amendments if necessary.

We have met once already with the appropriate parties, which resulted in good, open, and diverse opinions. We are planning to meet again next week prior to the State Environmental Council meeting scheduled on March 12, 2008.

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU

650 SOUTH KING STREET, 7TH FLOOR • HONOLULU, HAWAII 96813
TELEPHONE: (808) 768-8000 • FAX: (808) 527-6743
INTERNET: www.honolulu.gov • DEPT. WEB SITE: www.honoluluapp.org

MUFI HANNEMANN
MAYOR



HENRY ENG, FAICP
DIRECTOR

DAVID K. TANOUE
DEPUTY DIRECTOR

February 28, 2008

The Honorable Brian t. Taniguchi, Chair
and Members of the Committee on Judiciary
and Labor
Senate
State Capitol
Honolulu, Hawaii 96813

Dear Chair Taniguchi and Members:

**Subject: SENATE BILL 2808 SD1
Relating to the Environmental
Impact Statements**

The Department of Planning and Permitting supports further discussion on this bill.

Although we are in support of the original version of this bill, the additional language of Senate Bill 2808 SD1 requires refinement.

In as much as the July 1, 2050 effective date should provide ample time to address this issue, we do not object should your Committee pass the measure.

Thank you for this opportunity to comment.

Very truly yours,

A handwritten signature in black ink, appearing to read "Henry Eng", is written over a horizontal line.

Henry Eng, FAICP Director
Department of Planning and Permitting

HE: jmf
sb2808sd1-mh.doc

ASCE American Society of Civil Engineers

Hawaii Section

PO Box 917

Honolulu, HI 96808-0917

2008 Hawaii Section Officers

PRESIDENT

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e-mail: lfong@ascehawaii.org

YOUNGER MEMBER FORUM

PRESIDENT

Lisa Takushi

Community Planning and Engineering, Inc.
1100 Alakea, Sixth Floor
Honolulu, Hawaii 96813
(808) 531-4252 ext.14, FAX: (808) 526-2476
e-mail: ltakushi@ascehawaii.org

February 28, 2008

Honorable Brian T. Taniguchi, Chair,
Honorable Clayton Hee, Vice Chair, and
Honorable Members of the Senate Committee on Judiciary and Labor,

I writing to you in support for your passage of Senate Bill 2808 SD 1 Relating to Environmental Impace Statements, on behalf of the members of the Hawaii Section of the American Society of Civil Engineers.

The American Society of Civil Engineers was established in 1852 and is the oldest professional engineering organization in the United States. The Hawaii Section of ASCE was established in 1937 and is comprised of nearly 1,000 civil engineers from both the public and private sectors of our state.

We agree with and support the position of the State Department of Transportation and the Office of Environmental Quality Control for the amendment of Chapter 343 to exclude certain types of work within the state's highway rights of way. It is clear that the installation of residential driveways and other minor improvements should not be subject to the lengthy and costly requirement for an environmental assessment.

We recommend your passage of Senate Bill 2808, SD1. Thank you for your consideration of our comments.

Sincerely yours,



Owen Miyamoto
Local Legislative Affairs Liaison



testimony

From: Sherry Menor-McNamara [sherrym@COCHawaii.org]
Sent: Wednesday, February 27, 2008 8:55 AM
To: testimony
Subject: Testimony on SB 2808 SD 1 Relating to Environmental Impact Statements (JDL Hearing on 2/28 at 10:00 a.m.)



Senator Brian Taniguchi Chair and Members
 Hawaii State Senate
 Committee on the Judiciary and Labor
 Conference Room 016
 Thursday, February 28, 2008
 10:00 am

Senator Taniguchi and Members of the Committee on the Judiciary and Labor,

My name is Christine H. H. Camp, Chair of the Chamber of Commerce of Hawaii, Land Use and Transportation Committee. The Chamber of Commerce of Hawaii works on behalf of its members and the entire business community to:

- Improve the state's economic climate
- Help businesses thrive

Chamber strongly supports S.B. No. 2808 SD 1, to provide an immediate and short-term fix to clarify when an Environmental Assessment (EA) is required. We understand that this bill provides a legislative option if the Environmental Council is unable to address the situation administratively. We strongly encourage the Senate to preserve a legislative option by keeping S.B. 2808 SD 1 alive.

S.B. No. 2808 S.D. 1 proposes to clarify that environmental assessments do not apply to state or county lands that include the use of existing streets, roads, highways, or trails or bikeways for limited purposes.

Our concern is the "unintended consequences" of the recent court decisions. The courts relied on past decisions where any action that involved the use of a state or county road right of way was a "trigger" for the EA/EIS. Because an access improvement, easement, drainage, waterline, etc., is now viewed as a use of state or county lands when it touches (over, under, across) a state or county road right of way, the entire project is then required to prepare and environmental assessment for the entire project.

This legislation is necessary because:


1. The only projects that are excluded from this new requirement are:
 - a. One single family residence;
 - b. Projects that already have an approved EA or EIS.
2. Projects without an EA or EIS will be required to prepare one which will result in:

- a. Increased costs, and
 - b. Delays to the project;
3. Confusion exists right now on who the accepting authority will be if and EA/EIS is required for a project (i.e. neither State DOT nor County Planning Departments have the staff to process the potential number of EA/EIS.)
 4. The current interpretation makes a mockery of the EA/EIS process, requiring 343 documents for in-fill and projects with insignificant environmental impacts;
 5. If the legislative intent was that an EA/EIS would be required any time the project touches a public road, then the law should be changed to require an EA/EIS for all projects because all projects, at some point, connect to a public road.

We understand that the 2006 legislature passed Act 294 which appropriating money to the University of Hawaii environmental center to perform a comprehensive review of the State's current environmental impact statement process under chapter 343, Hawaii Revised Statutes. The study was initiated but never completed due to, as we understand, internal errors in procurement of the contract by the department of health.

The Chamber, along with a number of other organizations, has become aware of the need for a comprehensive review of Chapter 343, HRS based on the "unintended consequences" of recent court decisions. The Chamber is advocating legislation to address the immediate problems created by the recent court decisions, while working on the comprehensive review of Chapter 343. The legislation to address the immediate problems should have a sunset to coincide with the comprehensive review.

Thank you for the opportunity to comment on this bill.

 The Chamber of Commerce of Hawaii Sherry R. Menor-McNamara Vice President, Business Advocacy & Gov't. Affairs 1132 Bishop Street, Suite 402 Honolulu, Hawaii 96813 Ph. 808-545-4300 x 394 Fax 808-545-4369 www.cochawaii.org smenor@cochawaii.org
The Voice of Business in Hawaii

CONTRACTORS ASSOCIATION OF KAUAI

4231 Ahukini, Lihu'e, Kaua'i, Hawai'i 96766
Phone (808) 246 -2662 Fax (808) 246-8642



February 27, 2008

Senator Brian Taniguchi, Chair
Senate Judiciary and Labor Committee
Hawai'i State Senate, Room 219
415 South Beretania Street
Honolulu, HI 96813

Transmitted via facsimile: 1 page

Dear Senator Taniguchi:

RE: SB 2808, SD1, Relating to Environmental Impact Statements

The Contractors Association of Kaua'i's (CAK) Board of Directors who represents over a hundred members would like to strongly encourage the Judiciary Committee to pass out SB 2808, SD1, Relating to Environmental Impact Statements. This issue concerns our membership as both contractors and end-users.

The CAK board believes clarification of Chapter 343 by the legislature is needed so state and county agencies along with contractors can do the public's work in the most timely and economical way possible. In instances of private/public sector projects, this clarification goes a long way to contain costs that does not need to be passed on to potential home owners and/or businesses.

Thank you very much for your leadership in this very important issue.

Sincerely,
CONTRACTORS ASSOCIATION OF KAUAI

Maile Bryan
President



EARTHJUSTICE

Because the earth needs a good lawyer

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII
INTERNATIONAL JUNEAU, ALASKA OAKLAND, CALIFORNIA
SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.

SENATE COMMITTEE ON JUDICIARY & LABOR

ATTN: CHAIR BRIAN T. TANIGUCHI & VICE CHAIR CLAYTON HEE

**Testimony Strongly Opposing SB 2808 SD1:
Relating to Environmental Impact Statements**

February 28, 2008, 10:00 a.m.

Conference Room 016

Aloha Chair Taniguchi, Vice-Chair Hee, and Committee Members:

Earthjustice is a non-profit, public interest environmental law firm with many years of experience with environmental laws such as Haw. Rev. Stat. ch. 343, also known as the Hawai'i Environmental Policy Act or HEPA, as well as its federal counterpart, NEPA. Based on this extensive background, we **strongly oppose** SB 2808. This bill is unnecessary and unclear, and would severely undermine HEPA. The SD1 version does not remedy these flaws.

HEPA, as interpreted by the Hawai'i Supreme Court, is not overly broad, as SB 2808 suggests. As the Court's decisions make clear, the law already provides numerous exclusions for truly minor actions via duly promulgated **categorical exemptions**. This includes: "[o]perations, repairs, or maintenance of existing structures, facilities, equipment"; "[r]eplacement or reconstruction of existing structures and facilities"; "essential public utility services extensions" for "single, new, small facilities or structures"; and "construction or placement of minor structures accessory to existing facilities." Haw. Admin. R. § 11-200-8(a)(1), (2), (3), (6). **Thus, truly minor actions are already exempt from HEPA.** However, when the use of public land or funds is part of a larger project that is not minor, then HEPA applies -- as it should.

SB 2808 proposes to exempt use of public lands in "an existing public street, road, or highway." This amendment is **completely superfluous** given the already numerous categorical exemptions listed above.

SB 2808, however, goes much further and also attempts to exempt larger development projects that incorporate the use of public lands within public rights-of-way. **This subverts the environmental review and sustainability goals of HEPA.** The use of public lands is often the only trigger that applies to many development projects. The Sierra Club (Koa Ridge) and Kahana Sunset cases decided by the Hawai'i Supreme Court are prime examples of major

development projects that would not have had the benefit of HEPA review, but for the uses of public lands that SB 2808 seeks to exclude. While the state Department of Transportation ("DOT"), in reaction to its loss in the Superferry case, has been going to exaggerated lengths to distort the scope of HEPA and manufacture problems, proponents of SB 2808 cannot point to a single truly minor project that would not already be covered under the existing categorical exemptions.

On the other hand, many major projects escape HEPA review for lack of an applicable trigger, either by happenstance or because developers aggressively redesign their projects to avoid any triggers. In sum, SB 2808 would seriously diminish an important trigger in HEPA and reduce the already limited scope of the law.

SB 2808 proposed exceptions to the exemptions are unclear and poorly conceived. Notably, actions involving county approvals (as many major development projects do) should be included, but are not. Use of five or more acres would require an EA, but not if the land has been "disturbed by intensive human uses since 1840." Such ambiguous language renders the provision meaningless and will spawn litigation.

It is important to realize that NEPA, as well as CEQA, the California state review law, apply broadly to actions requiring discretionary approval, subject to categorical exemptions. This highlights that the scope of HEPA is already limited as is, and that categorical exemptions, not amendments like SB 2808, are the proper means to exempt minor projects. If anything, HEPA **should be amended to apply to more** -- not less -- actions, in line with its federal and state counterparts.

SB 2808 unnecessarily undermines HEPA and its declared overall purpose of encouraging environmental review so that "environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole." Haw. Rev. Stat. § 343-1. We strongly urge you to kill this bill.

Very truly yours,



Isaac H. Moriwake
Attorney
Earthjustice



**TESTIMONY BEFORE THE SENATE COMMITTEE ON
ON
JUDICIARY AND LABOR
SENATE BILL 2808 SD 1
BY
STEVEN GOLDEN**

THURSDAY, FEBRUARY 28, 2008

Chair Taniguchi and members of the Committee:

I am Steve Golden, Vice President of External Affairs for The Gas Company. Thank you for the opportunity to provide testimony on Senate Bill 2808 SD 1, relating to Environmental Impact Statements.

The Gas Company supports the passage of S.B. 2808 SD 1 which would amend Chapter 343, Hawaii Revised Statutes, to, among other things, exempt an action that proposes to use state or county lands as a utility right of way, from having to obtain an environmental assessment (EA).

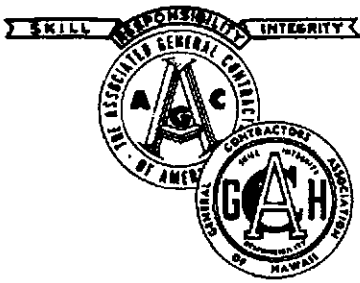
The language proposed in this bill also clarifies that an EA is not required for routine utility installations, including gas mains and services, under existing state and county roads or state or county rights of way that support a private development outside of that road or right of way.

We believe that the perceived uncertainty in the applicability of certain environmental laws and rules, in light of recent court precedent, has unnecessarily burdened the franchise rights of The Gas Company, which allows us to “lay pipes, mains, conduits,” etc. “in, on, above, along or under public rights of way throughout the State of Hawaii.”

For example, The Gas Company has been asked to furnish new gas service for Kaiser Hospital, which requires the installation of a 1600 foot utility gas line under Moanalua Road. The State Highways Division will not approve plans or issue a permit for the installation of this gas line until The Gas Company submits an EIS/EA or obtains an exemption for the proposed work. Unless this bill passes, and the gas line installation is determined to be exempt, gas service critically needed by the hospital will be delayed for several months.

The Gas Company appreciates your Committee's willingness to clarify the status of the law so that we as a utility can continue to carry on our business and serve Hawaii's homes and businesses with efficient gas energy.

Thank you for allowing The Gas Company to present these comments.



GENERAL CONTRACTORS ASSOCIATION OF HAWAII

1085 AHUA STREET • HONOLULU, HAWAII 96819-4493 • PHONE 808-833-1681 • FAX 808-839-4167

E-MAIL ADDRESS: gca@gcahawaii.org • WEBSITE: www.gcahawaii.org

February 27, 2008

TO: THE HONORABLE SENATOR BRIAN T. TANIGUCHI, CHAIR, AND
MEMBERS OF COMMITTEE ON JUDICIARY AND LABOR

SUBJECT: S. B. 2808, SD1 RELATING TO THE ENVIRONMENTAL IMPACT
STATEMENTS

DATE: Thursday, February 28, 2008
TIME: 10:00 a.m.
PLACE: Conference Room 016

Dear Chair Taniguchi and Committee Members:

The General Contractors Association (GCA), an organization comprised of over five hundred and forty (540) general contractors, subcontractors, and construction related firms, **strongly supports** the passage of S.B. 2808, SD1 to provide an immediate and short-term fix to clarify when an Environmental Assessment (EA) is required.

S.B. No. 2808, SD1 proposes to clarify that environmental assessments do not apply to state or county lands that include the use of existing streets, roads, highways, or trails or bikeways for limited purposes.

Our concern is the “unintended consequences” of the recent court decisions. The courts relied on past decisions where any action that involved the use of a state or county road right of way was a “trigger” for the EA/EIS. Because an access improvement, easement, drainage, waterline, etc., is now viewed as a use of state or county lands when it touches (over, under, across) a state or county road right of way, the entire project is then required to prepare and environmental assessment for the entire project.

This legislation is necessary because:

1. The only projects that are excluded from this new requirement are:
 - a. One single family residence;
 - b. Projects that already have an approved EA or EIS.
2. Projects without an EA or EIS will be required to prepare one which will result in:
 - a. Increased costs, and
 - b. Delays to the project;

SENATE BILL NO. SB 2808 SD1
RELATING TO THE ENVIRONMENTAL IMPACT STATEMENTS
FEBRUARY 26, 2008

3. Confusion exists right now on who the accepting authority will be if and EA/EIS is required for a project (i.e. neither State DOT nor County Planning Departments have the staff to process the potential number of EA/EIS.)
4. The current interpretation makes a mockery of the EA/EIS process, requiring 343 documents for in-fill and projects with insignificant environmental impacts;
5. If the legislative intent was that an EA/EIS would be required any time the project touches a public road, then the law should be changed to require an EA/EIS for all projects because all projects, at some point, connect to a public road.

We understand that the 2006 legislature passed Act 294 which appropriating money to the University of Hawaii environmental center to perform a comprehensive review of the State's current environmental impact statement process under chapter 343, Hawaii Revised Statutes. The study was initiated but never completed due to, as we understand, internal errors in procurement of the contract by the department of health.

The GCA along with a number of other organizations, has become aware of the need for a comprehensive review of Chapter 343, HRS based on the "unintended consequences" of recent court decisions. GCA advocates legislation to address the immediate problems created by the recent court decisions, while working on the comprehensive review of Chapter 343. The legislation to address the immediate problems should have a sunset to coincide with the comprehensive review.

Thank you for considering our concerns on the above bill.

testimony

From: Dean Y Uchida [DYUchida@drhorton.com]
Sent: Tuesday, February 26, 2008 1:34 PM
To: testimony
Subject: Testimony on SB 2808 SD 1 Relating to Environmental Impact Statements
Importance: High



Senator Brian Taniguchi Chair and Members
Hawaii State Senate
Committee on the Judiciary and Labor
Conference Room 016
Thursday, February 28, 2008
10:00 am

Senator Taniguchi and Members of the Committee on the Judiciary and Labor,

My name is Dean Uchida, Board Member and Legislative Chair of the Hawaii Developers' Council (HDC). We represent over 250 members and associates in real estate development-related businesses.

The mission of Hawaii Developers' Council (HDC) is to educate developers and the public regarding land, construction and development issues through public forums, seminars and publications. It is also the goal of HDC to promote high ethics and community responsibility in real estate development and related trades and professions.

HDC strongly supports the passage of SB2808, SD1. We understand that this bill provides a legislative option if the Environmental Council is unable to address the situation administratively. We strongly encourage the Senate to preserve a legislative option by keeping S.B. 2808 SD 1 alive.

Thank you for the opportunity to comment on this bill.

Dean Uchida--Ho'opili
828 Fort Street Mall, 4th Floor
Honolulu, Hawaii 96813
Phone: 808.521.5661, ext. 107
FAX: 808.536.1476
Mobile: 808.721.3106

testimony

From: Audrey Hidano [audrey@hidanoconstruction.com]

Sent: Tuesday, February 26, 2008 1:09 PM

To: testimony

Subject: RE: SB 2808, SD1-Committee on Judiciary & Labor, Feb 28, 2008 Decision making

To: testimony@capitol.hawaii.gov

Subject: SB 2808, SD1-Committee on Judiciary & Labor, Feb 28, 2008 Decision making

The Honorable Brian T. Taniguchi, Chair and Members of the Committee on Judiciary and Labor,

Submitting testimony in strong support of the passage of SB 2808, SD1.

Your kind consideration of this request to pass SB 2808, SD1, will be appreciated. Thank you for the opportunity to provide testimony on this measure.

Audrey Hidano
Hidano Construction, Inc.
1620 Hau Street, Honolulu, HI 96817
Phone: 808-847-5555, Fax: 808-847-5550

testimony

From: Fred Moore [discover@hsimechanical.com]
Sent: Tuesday, February 26, 2008 1:46 PM
To: testimony
Cc: Karen Iwamoto
Subject: SB 2808, SD1 . . .

Dear Chair Taniguchi and Members of the Committee on Judiciary and Labor. I am Fred Moore, President - HSI Mechanical Inc., a Hawai'i Small Business since 1979. HSI Mechanical, Inc. strongly supports the passage of SB2808, SD1. We request your passage of SB2808, SD1. Thank you for the opportunity to comment on this bill.

With Aloha, Fred Moore

Fred Moore
President / Principal RME
HSI Mechanical, Inc.
227 Puuhale Road
Honolulu, HI 96819
Cell: 808-478-8482

"There is only one corner
of the universe you can
be certain of improving...
and that's your own self."

-Aldous Huxley

testimony

From: Lance Inouye [lance@rsinouye.com]

Sent: Tuesday, February 26, 2008 12:57 PM

To: testimony

Subject: SB 2808, SD1-Committee on Judiciary & Labor, Feb 28, 2008 Decision making

The Honorable Brian T. Taniguchi, Chair and Members of the Committee on Judiciary and Labor,

Ralph S. Inouye Co., Ltd., General Contractor and member of the General Contractors Association of Hawaii (GCA) strongly supports the passage of SB2808, SD1. Your kind consideration of our request to pass SB2808, SD1, is greatly appreciated. Thank you for the opportunity to comment on this bill.

Lance M. Inouye, Pres. & CEO
Ralph S. Inouye Co., Ltd.
2831 Awaawaloa Street, Honolulu, HI 96819
Phone: 808-839-9002 Fax: 808-833-5971

testimony

From: Alfred Lardizabal [al@local368.org]
Sent: Wednesday, February 27, 2008 1:05 PM
To: testimony
Cc: khi@biahawaii.org
Subject: SB2808 SD1 Relating to EIS

Senate Judiciary and Labor Committee
Thursday, February 28, 2008, 10:00 a.m., Rm. 016

Dear Senator Brian Taniguchi, Chair; Vice Chair Clayton Hee and Members of the Committee:

We humbly request passage of the SB2808 SD1 Relating to EIS. Thank you very much.

Al Lardizabal
Government and Community Relations Director
Laborers Union Local 368

testimony

From: Jackie Haraguchi [jackie@mauicontractors.org]
Sent: Tuesday, February 26, 2008 1:21 PM
To: testimony
Subject: SB 2808, SD1 "Relating to Environmental Impact Statements" Decision Making on February 28, 2008 in Judiciary and Labor
Attachments: image001.jpg



*Dear Chair Taniguchi and Members of the Committee on
Judiciary and Labor,*

*Maui Contractors Association strongly supports SB 2808, SD1. relating to Environmental Impact
Statements.*

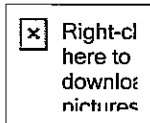
We request your passage of SB2808, SD1.

Thank you for the opportunity to comment on this bill.

*Jacqueline Haraguchi
Executive Director
Maui Contractors Association
319 Ano Street
Kahului, HI 96732
Phone:(808)871-5733
Fax:(808)871-5927
Website:www.mauicontractors.org*

testimony

From: Juno Comilang [juno@miyakeconcrete.com]
Sent: Wednesday, February 27, 2008 7:40 AM
To: testimony
Subject: SB2808, SD1



Miyake Concrete Accessories, Inc.

250 N Waiehu Beach Road

Wailuku, HI. 96793

Dear Chair Taniguchi and Members of the Committee on Judiciary and Labor. Miyake Concrete Accessories, Inc. strongly supports the passage of SB2808, SD1. We request your passage of SB2808, SD1. Thank you for the opportunity to comment on this bill.

Thank you,

Juno Comilang
V.P.Sales
Miyake Concrete Accessories, Inc.
250-N Waiehu Beach Road
Wailuku-Maui, Hawaii 96793
Ph.# 808-244-7988
Fax#808-244-1479
Email: juno@miyakeconcrete.com
website: www.miyakeconcrete.com

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2/27/2008



NAIOP Hawaii
P.O. Box 1601
Honolulu, Hawaii 96806

Telephone: (808) 845-4994 -- Fax: (808) 847-6575 -- E-mail: barbie@naiophawaii.org-- Web site:
www.naiophawaii.org

February 26, 2008

VIA EMAIL

The Honorable Brian T. Taniguchi, and
Members of the Senate Committee
on Judiciary and Labor
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Re: Testimony in Support of SB 2808, SD 1, "Relating to Environment Impact Statements"

Dear Chair Taniguchi and Members of the Committee:

I am submitting this testimony **in support** of the above referenced bill, on behalf of the Hawaii chapter of the National Association of Industrial and Office Properties ("NAIOP Hawaii"). NAIOP Hawaii is an association of property owners, managers, developers, financial institutions and real estate related professionals who are involved in the areas of commercial and industrial real estate in the State of Hawaii.

The *Superferry* case stated that even if exemption determinations from Chapter 343 are given by an agency for actions within its exemption list, such determinations are always subject to being second-guessed and overruled by the courts if a judge believes that, contrary to the administrative record, the project will have "significant secondary" or "cumulative" effects, even if those effects are not directly related to the action being considered by the agency. This means that ultimately an exemption determination has no value, because it is always subject to being second-guessed by judges—in the *Superferry* case, years later.

The specific problem here dates back to the *Kahana Sunset* decision in 1997. There, the Hawaii Supreme Court ruled that because a pipeline would run through a public right-of-way, it meant an environmental review had to be done for the entire project. Given *Superferry*, state and county agencies are now taking the position that any time an action involves public roads, they are not going to take the risk of giving an exemption that may be overturned by the courts, and

The Honorable Brian T. Tanichuchi, Chair, and
Members of the Senate Committee
on Judiciary and Labor

February 26, 2008

Page 2

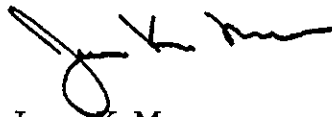
instead will require that at least an environmental assessment be prepared. (See, for example, Hawaii County Planning Director Chris Yuen's October 3, 2007 memo, stating that in light of *Superferry*, if there is any use of a state or county road, an environmental assessment will likely be required to be done for the entire project.)

Since almost all projects somehow involve public roads, they are all now potentially subject to having to go through the Chapter 343 process, even when it is obvious that there will be no adverse environmental effects. This is contrary to the original intent of Chapter 343, which provided that only actions undertaken in discrete categories trigger 343. This bill would clarify that if the only nexus between the project and 343 review is that it touches or involves a public road or trail, that does not trigger 343. Obviously, if Chapter 343 is otherwise triggered, this amendment would not affect that.

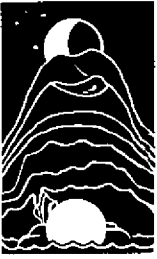
We believe that this is a fair and valid measure, which will preserve environmental review while exempting those projects to which the law was never intended to apply. We urge that the committee act favorably on this bill.

Thank you for the opportunity to testify on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'James K. Mee', written in a cursive style.

James K. Mee
Chair, Legislative Affairs Committee



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TESTIMONY IN OPPOSITION TO SB 2808 SD1 for 2/28/08 Hearing

Chair Taniguchi and members of the Senate Committee on Judiciary and Labor,

The Native Hawaiian Legal Corporation currently represents Puanani Rogers, who is challenging the decision of the Kaua'i Planning Commission to approve two time share projects (with a combined total of over 500 rooms) on the shoreline of Waipouli – without an environmental assessment. Ms. Rogers opposes SB 2808.

We would like to point out three things. First, the premise behind SB 2808 is incorrect. Second, the problem with HRS Chapter 343 is that it does not cover enough projects – not that it covers too many. And third, that SB 2808 will have cause great harm.

I. The Premise Behind SB 2808 is Flawed.

Section 1 of SB 2808 recites incorrect information and includes disturbing rhetoric about this Legislature's intent.

We now know, through documents grudgingly released by the State, that the Supreme Court's interpretation in the Superferry case was exactly the same as DOT's initial position. In other words, the Supreme Court's decision in *Superferry* was not a new or expansive interpretation of HRS Chapter 343. It was the same interpretation of DOT personnel – before they were given political instructions as to how to behave. The Superferry decision did not expand HRS Chapter 343. It reaffirmed prior precedent established decades earlier.

The Supreme Court has not decided that an environmental assessment is necessary “if any project abuts a public roadway.” Here is the way the law works:

First, one must define the scope of a project.

Second, one must determine whether the project involves the any of the 343-5 triggers – such as the use of state or county land (such as a road).

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If so, the third step is to determine if the project is exempt from having to prepare an environmental assessment.

The vast majority of projects involving roads are exempt from having to prepare an environmental assessment. HAR § 11-200-8 is very clear that most minor road work qualifies for an exemption. The vast majority of the projects that DOT is refusing to provide exemptions for clearly qualify for exemptions. DOT's refusal to provide exemptions can mean only one of two things: either DOT has been taken over by radical fringe environmentalists, taking positions more extreme than any of the mainstream environmental organizations, or DOT is intentionally manipulating the exemption process to create a climate of fear to justify gutting Chapter 343.

II. HRS Chapter 343 Fails to Cover Enough Projects.

The problem with HRS Chapter 343 is not that it does not cover enough projects. It is that it covers too few. An environmental assessment should be required for every project needing a Special Management Area permit as well as non-farming enterprises in the agricultural district.

Projects near our beaches and coastlines deserve special environmental review – particularly given the threat posed by global sea level rise. Yet, they do not automatically trigger the need for an environmental assessment.

The Legislature has recognized the importance of protecting agricultural lands. Yet, government agencies authorize far too many projects that have nothing to do with farming or ranching without any sort of environmental review.

III. SB 2808 Will Cause Great Harm.

If SB 2808 had been law, it would have meant that the following projects would have escaped environmental review:

The project involved in *Kahana Sunset Owners Ass'n v. County of Maui*, 86 Hawai'i 66, 947 P.2d 378 (1997) required the approval of the Maui Planning Commission (not the LUC or the BLNR). The project was a 312-unit multi-family residential development on previously disturbed land. These kinds of massive projects need environmental review.

The project involved in *Citizens for the Protection of the North Kohala Coastline v. County of Hawai'i*, 91 Hawai'i 94, 979 P.2d 1120 (1999), was a hotel, residential subdivision and golf course. This massive project did not require BLNR or LUC approval. It required county planning commission approval.

This particular bill would interfere with an on-going case. The current case challenges the lack of an environmental assessment for the development of over 500 time share units and nearly 1,000 parking stalls in a historic coconut grove (listed on the County's Exceptional Tree Ordinance). According to documents provided by the developer and admissions by county officials we know that:

- that there are burials on the property that will be uncovered;
- the Waipouli development will have a significant impact on regional traffic flow; and
- the existing capacity of the Wailua wastewater treatment plant is inadequate to accommodate the additional wastewater from the resort condominium developments.

SB 2808 SD 1 would be to prevent members of the public and government decisionmakers from fully understanding the impacts of a project like this prior to decisionmaking.

HRS Chapter 343 should not be gutted. Rather, DOT needs to act more professionally and less politically.

THE UNIVERSITY OF HAWAII ENVIRONMENTAL CENTER IS PLEASED TO SUBMIT THIS TESTIMONY IN ACCORDANCE WITH ACT 132 OF 1970 WHICH CREATED THE CENTER. AUTHORS ARE MEMBERS OF THE UNIVERSITY COMMUNITY.

RL: 2176

SB 2808 SD1
RELATING TO ENVIRONMENTAL IMPACT STATEMENTS

Senate Committee on Judiciary and Labor
Public Hearing – February 28, 2008
10:00 a.m., State Capitol, Conference Room 016

By
Peter Rappa, Environmental Center
Jacquelin Miller, Environmental Center

SB 2808 SD1 exempts state or county lands from chapter 343 HRS, the state's environmental impact statement law for specified uses of existing public streets, road, highway, trail, or bikeways. Our statement on this measure does not represent an institutional position of the University of Hawaii.

We disagree with the opening statement of this bill. Recent court cases have clarified language that have been in the state EIS law since it was first passed, they did not expand coverage to new areas. The requirement for conducting an environmental assessment for all actions using state/county lands or funds was a requirement under the EIS process first established by a Governor's Executive Order in August 1971.

The amendment to chapter 343 HRS in this bill would set up a distinct exemption for actions that propose "the use of state or county lands or the use of state or county funds, if the use of the state or county land or the expenditure of state or county funds is limited to an existing public street, road, or highway, as defined in section 291-1, for an easement, drainage, waterlines, access improvements, utility right of way, or the like". This amendment is overly broad. A number of proposed actions take place on existing streets and right-of-ways that may have a significant impact and require an environmental assessment. Redoing sewer lines, for example, may require closing down sections of existing streets for long periods of time creating an impact to local businesses, motorists, pedestrians and others. These types of projects are routinely scrutinized in environmental assessments and Environmental Impact Statements. For smaller scale projects which may only tangentially use state or county land, section 343-6 (7) allows for exemptions to the law. The Department of Transportation for example, already has an existing list for actions that are completely exempt from the EA/EIS process and they have the ability to add any number of additional small scale roadway projects that will have minimal or no environmental impact.

**THE UNIVERSITY OF HAWAII ENVIRONMENTAL CENTER IS
PLEASED TO SUBMIT THIS TESTIMONY IN ACCORDANCE WITH
ACT 132 OF 1970 WHICH CREATED THE CENTER. AUTHORS ARE
MEMBERS OF THE UNIVERSITY COMMUNITY.**

The Environmental Center will be participating in a study that would examine issues dealing with chapter 343 HRS, if it is funded by the Legislature. We will be dealing with the issue of exemptions as part of the study. We plan to have some preliminary results in early 2009. We ask that the Legislature make no changes to the law until we have a chance to complete the study and recommend comprehensive improvements to the environmental impact assessment/statement process.

Thank you for the opportunity to comment on this bill.



LAND USE RESEARCH
FOUNDATION OF HAWAII
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Honolulu, Hawaii 96813
Phone 521-4717
Fax 536-0132

February 28, 2008

The Honorable Brian Taniguchi, Chair, and Members
Committee on Judiciary and Labor
Hawaii State Senate
Conference Room 016
Honolulu, Hawaii 96813

Subject: Senate Bill No. 2808, SD1 Relating to Environmental Impact Statements (EA exemption for minor work touching public roadways)

Dear Chair Taniguchi and Committee Members:

My name is David Arakawa, and I am the Executive Director of the Land Use Research Foundation of Hawaii (LURF), a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. One of LURF's missions is to advocate for reasonable and rational land use planning, legislation and regulation.

We appreciate the opportunity to provide our testimony **in support of S.B. No. 2808, SD1 and offer comments.**

S.B. No. 2808. This bill would amend Chapter 343, Hawaii Revised Statutes (HRS) by adding a new section to exempt from Environmental Assessments ("EA"), actions that propose the use of state or county lands or state or county funds if the use is limited to an existing public street, road, or highway for limited purposes such as an easement, drainage, water lines, access improvements, or utility right-of-way; or a modification or disposal of highway access rights or use, occupancy, or work within the public right-of-way to serve private development that does not involve any action by the State Land Use Commission or Board of Land and Natural Resources, the use of 5 or more acres that has not been disturbed by intensive human use since 1840, or any use of plants or animals that are not, but could potentially become established in Hawaii.

Background

- o **Traditionally, Environmental Assessments were never required for minor work touching public roadways.** It is our understanding that ever since Chapter 343 was implemented, one of the "triggers" for the preparation of an EA has been the "use of state or county lands." In the past, however, this term has been interpreted to mean that an EA is required for all government projects

or development projects on government lands. Thus, EAs had never been required for private applications to use or “touch” state or county roadways or rights-of-way (“ROW”) for easements, drainage, connection of waterlines and sewer lines, private driveways and access improvements, utility rights of way for overhead or underground connections, or the like (“minor work touching public roadways”).

- **New interpretations by government agencies have expanded the original intent of Chapter 343 and sometimes cause unintended consequences.** Government agency and legal interpretations of recent court decisions, have resulted in the requirement by some government agencies that an EA is required anytime there is such minor work touching public roadways or ROW. There have been unintended consequences of such interpretations, and as a result, private applicant proposals for minor work within the state or county ROW now “trigger” the preparation of an EA by the applicant. These interpretations go far beyond the original intent of chapter 343, and cause unnecessary requirements and delays for private parties engaged in such minor work. S.B. No. 2808 would address these situations and provide an exemption for such minor work touching public roadways.
- **EAs will still be required for state and county projects and major private developments.** We understand that S.B. 2808 will still require EAs for projects involving state and county funding or development projects on government-owned lands. The EA requirement will also still apply to the entire proposed action for major private developments which have significant environmental impact – as those projects will still be required to prepare EAs and environmental impact statements for proposed amendments to state land use classifications, conservation district use applications, county general plans or development plans, shoreline setback uses, etc.

Conclusion. We understand that there are bills at the legislature this session which would provide funding for a comprehensive review of Chapter 343. While LURF supports a comprehensive review of Chapter 343, it also recognizes that legislation is immediately needed to address the unintended consequences of recent court decisions which have expanded the situations under which an EA is required beyond those originally intended by the legislature. Under the current interpretation by some government agencies, an EA could be required for any and all minor access improvements, easements and utility projects which touch a state or county right of way. Several bills have been proposed this session, which address this issue by exempting existing public streets, roads, highways, trails or bikeways from the applicability of the EIS law under certain circumstances. We believe that the exemptions proposed in S.B. 2808, SD1 are immediately needed and would not jeopardize health, safety or environmental concerns.

LURF appreciates the opportunity to express our views on this matter and we urge you **to pass SB No. 2808, SD1.**



Sierra Club Hawai'i Chapter

PO Box 2577, Honolulu, HI 96803
808.537.9019 hawaii.chapter@sierraclub.org

LATE

SENATE COMMITTEE ON JUDICIARY AND LABOR

February 28th, 2008, 10:00 A.M.

(Testimony is 3 pages long)

TESTIMONY IN STRONG OPPOSITION TO SB 2808 SD1

Chair Taniguchi and members of the Committee:

The Sierra Club, Hawai'i Chapter, with 5500 dues paying members statewide, is strongly opposed to SB 2808 SD1. This measure would weaken our three-decade old Hawaii Environmental Protection Act, not only by eliminating the environmental review of potentially damaging projects, but upsetting the current process that is in place with the Environmental Council and the exemption requirements. Hawaii's sustainability is at risk if we provide sweeping exemptions to our environmental disclosure process. We also believe any changes to our environmental review law are premature until a thorough and objective analysis of the law is complete. The following testimony details our strong opposition to SB 2808 SD1.

Hawaii's Environmental Protection Act has served Hawai'i well

Hawai'i residents have benefited from our environmental review law for nearly 30 years. It is a process that has been tested time and time again—and it works. Because of the law, Hawai'i is better planned, offers a higher quality of life, and is more sustainable.

The eloquent mandate of Chapter 343 is simple: it requires agencies and developers to tell the truth. The intent of our environmental review law is quite clear—to ask tough questions and disclose impacts of actions using state land or money. Please remember: the environmental review law is not about permitting; it is about disclosure. The law requires that environmental, cultural, and socio-economic impacts are fully disclosed so that decision makers can make informed decisions about permitted activities.

The intent behind HRS Chapter 343, Hawaii's Environmental Impact Statement statute ("HEPA"), is clear and broad:

*§343-1 Findings and purpose. The legislature finds that the quality of humanity's environment is critical to humanity's well being, that humanity's activities have broad and profound effects upon the interrelations of all components of the environment, and that an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions. **The legislature further finds that the process of reviewing***

environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole. It is the purpose of this chapter 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.
(emphasis added)

The lawmakers who enacted HEPA (which was a parallel to the National Environmental Policy Act) had the foresight to provide a mechanism to disclose environmental, economic, and social impacts of government actions. The purpose of the environmental review law was to ensure adequate disclosure of impacts from activities using state funds or land. The law provides for comments from the public and serves as a tool for decision makers to use in selecting the optimal choice for public resources. Public oversight of public resources is essential in a democracy. It provides for checks and balances between government and the public at large. HEPA ensures some form of accountability of our agencies—if they plan to take action that may diminish the quality of life or adversely impact the environment that everyone shares, HEPA discloses those impacts before they occur. Without such a disclosure, the state would blindly take actions without knowing what the future costs or benefits would be. The essence of our environmental review process is used to understand and fix problems *before they occur*.

Senate Bill 2808 SD1 is unnecessary and undermines our existing review process

The amendment proposed to HRS 343 in SB 2808 SD1 is unnecessary, as a process exists to deal with minor projects. While the Sierra Club is sympathetic to those who are concerned about the potential for complete environmental reviews being required on projects with little real impact, the law already wisely provides for an exemption process. If a triggered project is truly minor, then it would be excluded via categorical exemption. The Hawai'i Supreme Court went through this analysis in the Maui Kahana Sunset case, but correctly ruled that a new subdivision didn't qualify as a "minor improvement" that was exempt.

By right, the Sierra Club believes that every development should be automatically subject to our environmental review law, subject to exemption. Notably, the California's equivalent of our law (California Environmental Quality Act) does not contain any triggers, but rather applies broadly, subject to exemptions.

Finally, if the "exempt classes of action" are outdated or the interpretation of the exemptions dramatically changed, the proper amendment process would be to request the Environmental Council to review and suggest changes to Hawaii Administrative Rules (11-200-8). This has been done repeatedly in the past.

Senate Bill 2808 would eliminate environmental review of potentially damaging projects

Despite the litany "horror" stories described by proponents of SB 2808 (some of which should be exempted through the existing process), the real effect of SB 2808 would be that some major projects avoid environmental scrutiny provided by HRS 343. Consider one of the frequently cited case law cases for this measure, Koa Ridge.

Castle & Cooke's massive Koa Ridge development was required by the Supreme Court (unanimous ruling) to complete an environmental review before they could seek their Land Use Commission reclassification. Koa Ridge was proposed as a master-planned community of 7500 housing units and a hospital on 1250 acres of land (most of it prime agricultural land) on either side of H2 freeway in Central O'ahu.

The development had significant environmental and social impacts. The development was outside of the county development plan when it was proposed. The project was to use an estimated 3.76 million gallons of freshwater daily while potentially reducing the groundwater recharge of the existing agricultural land on which it was to be built. The U.S. Department of Agriculture stated in their testimony on the development that "This project would consume a significant acreage of prime farm lands." Urban centers surrounding the project actually decreased in population during the decade prior to the Koa Ridge proposal. According to the developer's analysis, the traffic from the massive project would contribute to the deterioration in traffic flow around the project and increase commute time along the H2 and H1 freeways. At full build-out, the project would have required over 50 megawatts of new electricity. Koa Ridge would have completely altered the landscape of Central Oahu, converting over 1000 acres of high-quality agricultural land to urban uses permanently.

If any project should undergo an environmental review, Koa Ridge was it. Yet the ONLY trigger to require this review was the fact that their sewer trunk line was to go underneath Kamehameha Highway.

No changes should be made to the Hawaii Environmental Protection Act until a comprehensive study is complete

Any changes to HRS 343 are premature before a thorough analysis of the entire law is complete. Changes may do lasting damage if the consequences of such amendments are not fully analyzed at the outset. Further, it is not fair to developers or communities to continue to change the rules of the game. Measures to provide funding for to the Legislative Reference Bureau to contract with University of Hawai'i experts for such a study are currently pending. We support funding a comprehensive, objective study of Hawaii's environmental review law as a means to further improve planning for Hawaii's sustainable future.

We strongly urge you to hold SB 2808 SD1 in committee today.

Thank you for the opportunity to testify.

LATE

testimony

From: randy ching [oahurandy@yahoo.com]
Sent: Wednesday, February 27, 2008 4:07 PM
To: testimony
Subject: JDL: In opposition to SB 2808 SD 1 - relating to environmental impact statements

Senate Judiciary and Labor Committee
Chair Brian Taniguchi, Vice Chair Clayton Hee
In opposition to SB2808 SD1 - relating to environmental impact statements

Hearing on Thursday, February 28
at 10 a.m. in conference room 016

Chair Taniguchi, Vice Chair Hee, and members of the committee,

The Sierra Club, Oahu Group strongly opposes SB2808 SD1, relating to environmental impact statements. Chapter 343 provides reasonable conditions that trigger an EIS. There is no need to amend 343. Please hold this bill in committee. Mahalo.

Sincerely,

Randy Ching
Sierra Club, Oahu Group chair
oahurandy@yahoo.com

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testimony

From: c. diamond [kaimanacd22@yahoo.com]
Sent: Thursday, February 28, 2008 7:09 AM
To: testimony
Subject: Please vote NO on SB 2808 SD1
Attachments: 914625953-eis testomony.doc

Caren Diamond
Post Office Box 536
Hanalei, HI 96714
(808) 826-5150

Thursday, February 28, 2008
10:00 a.m.
Conference Room 016
State Capitol
415 South Beretania Street

Please vote NO on SB 2808 SD1.

COMMITTEE ON JUDICIARY AND LABOR
Senator Brian T. Taniguchi, Chair
Senator Clayton Hee, Vice Chair

Aloha Committee Chair Taniguchi , Chair Hee and Committee Members,

Please vote NO on SB 2808 SD1. No changes should be made to our environmental review law until the comprehensive review of the law is complete. In Hawaii, where our environment is our economy, it certainly is not in the public interest to undermine our three-decade old environmental review law by creating a new type of exemption. Projects are made stronger, better and more viable when the people and agencies are able to learn about and comment on the environmental impacts. I do hope the environment is important to our legislators. Please, no support for SB 2808 SD1

Mahalo, Caren Diamond

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2/28/2008

LATE

testimony

From: alohafloor@aol.com
Sent: Wednesday, February 27, 2008 4:06 PM
To: testimony
Subject: Decision Making February 28, 2008

Aloha Chair Taniguchi & Committee Members on Judiciary and Labor,

We are asking that the committee strongly reach in agreement for the passage of SB2808, SD1. This will enable us to continue to serve our community best. Thank you very much.

With Regards,

Greg Figueira
President

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John T Harrison, PhD
3232 Kaohinani Drive
Honolulu, HI 96817

LATE

SB 2808 SD 1
TESTIMONY before the Senate Committee on Judiciary and Labor
February 28, 2008; 10 AM; State Capitol, Room 016

Chair Taniguchi, Vice Chair Hee, and Members of the Committee:

Writing in my capacity as a private citizen with 30 years experience in analysis, evaluation, implementation, construction, amendment, and practical application of environmental management in general and the Hawai'i State EIS law in particular, I respectfully oppose amendments to Chapter 343, HRS as delineated in SB 2808, SD1. As written, the measure erroneously misstates legislative intent, drastically curtails the purview of Chapter 343 thereby subverting the intent of the legislature, and goes far beyond appropriate remedies for perceived unnecessary implementation of the EIS law. Existing provisions of law offer efficient, effective, and timely administrative redress to alleviate those instances of alleged excessive stringency of the law's application to minor proposed actions that are purported by this measure's proponents to require legislative intervention.

My earlier testimony on SB 2808, which is on the record, provided brief summaries of findings of the Hawai'i Supreme Court (HSC) compiled in the course of the Environmental Center's interrupted survey of Chapter 343 last year. As noted, these and other written rulings of the HSC repeatedly and consistently cite verbatim statutory and regulatory provisions of HRS 343 and Title 11, Chapter 200 HAR in support of findings. Thus, statements by the Court directly reflect legislative intent as expressly written in law. The persistent assertion in SB 2808 SD1 of legislative findings of an expanded application of environmental assessments beyond legislative intent is flatly wrong and reflects a troubling misstatement of the facts by the measure's drafters.

Similarly, construing the Court's several findings on Chapter 343 to assert that only cumulative effects from the portion of a proposed action that triggers the law (i.e., a public right of way) are of concern grossly misstates both the Court findings and established regulatory practice pertinent to environmental review under the law. The interpretation expressed on P 2, lines 2-5 amounts to project segmentation, which is expressly disallowed under the law (ref §11-200-7(1) HAR; §11-200-12(b) HAR.) Again, continued assertions of this erroneous nature in Legislative findings of the proposed measure are troubling, to say the least.

If, indeed, as stated on P 2, lines 10-16, it is the purpose of this measure to exclude use, modification, or disposal of public rights of way accessory to more extensive private development from environmental assessment, the effect is to remove the sole remaining trigger that applies to private actions other than those impinging on listed historic sites, conservation lands, shorelines, development in Waikiki, helicopter facilities, or large

scale industrial activities. This leaves an enormous expanse of Hawai'i completely excluded from provisions for environmental review, including assessment of both direct as well as indirect, secondary, and cumulative effects. Exclusion of such an amount of prospective development from environmental review directly contradicts legislative findings in §343-1 HRS. I find such a proposal particularly shortsighted at a time when overload of both natural and man-made systems is increasingly problematic, and in the face of impending environmental impacts related to long-term climate change.

Prior testimony on SB 2808 has noted that the existing EIS law provides administrative remedies to address the issues and concerns cited by proponents of this measure. Indeed, the Environmental Council's March 15, 2007 reply to the Department of Transportation's (DOT) February 27, 2007 request for revision of the EIS Rules to effect the exclusion of private urban lands contingent on a public right of way from the EA requirement very clearly says as much. The DOT subsequently submitted such a request to the Council on February 6, 2008 for which a Council hearing is scheduled on March 12th. Pending resolution of the proposed administrative amendment, the statutory amendment proposed in SB 2808 SD1 is premature and untimely, and this measure consequently should be deferred until the outcome of the pending Exemption List amendment decision.

This proposed measure raises additional concerns regarding broader aspects of the EIS system, particularly the exemption process. The concern is that, as with several other aspects of the EIS system, the exemption process lacks any provision for public participation in agency decision-making, or even any provision for the public to be informed of an exemption decision until it is an accomplished fact. Lacking a process for public involvement, there's no opportunity for discussion of issues, particularly for potentially controversial exemption decisions, and agencies are not accountable to their public constituency for their decisions. Without accountability and in the absence of a route of administrative appeal, the only recourse left to the public is to seek remedy through the courts via §343-7, which is expensive and cumbersome, to say the least. What aggravates this particular element is that the intersection of a private development with a public right of way often provides the *only* opportunity for public environmental scrutiny of a private development. Take that away, and what's left is a public perception of agency arrogance and special interest influence, both of which undermine public confidence in government.

In many ways, this is all reminiscent of the late-80s fight over the lack of transparency particular to agency decisions on Environmental Assessments (EAs). With the issuance of an AG opinion that the Environmental Council lacked authority under Chapter 91 to issue a Declaratory Ruling on a matter under their jurisdiction, that closed the only administrative remedy for public challenge of the adequacy or substantive veracity of an agency determination of significance, leaving only recourse to the Courts. (That AG opinion never was tested in court, by the way.) Out of the public uproar, and with the full support of a strong OEQC Director, what emerged was the compromise of a 30-day public review period for EAs, which provides at least some measure of agency

transparency and public participation.

The same lack of process transparency applies to agency decisions on exemptions. Although argument is offered to the effect that agency exemption lists or amendments thereto are subject to public review during Environmental Council review and approval processes, in fact, the more substantive questions, relating to application of a particular exemption to a specific project, are utterly removed from any possibility of public discourse unless the agency actively discloses its intent. Furthermore, the provision in the EIS Rules for agencies to consult with other agencies or experts on proposed exemptions has no attendant process or formal provision for public inspection, and even the regulatory requirement that agencies maintain a record of exemption decisions available for public inspection (*see* §11-200-8(e) HAR) receives only perfunctory agency compliance. When I wrote my report on the Exemption Process in 1997, I surveyed all State and County agencies, and none could or would produce such a record. The most common response was to say that I would have to review individual project files to find a record of agency decisions.

Although the lack of transparency and public oversight of agency exemption decisions received intense scrutiny as a result of the Hawai'i Superferry (HSF), this has been a long-standing problem, both in Hawai'i and in the analogous Categorical Exemption process as applied nationally under NEPA. It is certainly the case that the Legislature, under the guidance of those, including Dr Doak Cox, who drafted the statute, never intended that all human actions receive direct assessment, and it is also true that no exemption ever was intended to apply universally to any class of actions, hence the provision in §11-200-8(b) HAR. One of the major problems of the present proposal from DOT and others is that although the invalidation of exemptions is stated, no formal process for implementation of that exclusion exists. In addition, with agency decision on exemptions cloaked in secrecy (*see* "deliberative process" protections under Chapter 92F), the public only knows what's being exempted *ex post facto*. HSF shows the consequences of such a lack of transparency in the extreme.

No doubt, rigid application of the public right of way trigger captures proposed actions that are, in DOT's parlance, "trivial", and it is to such cases that an exemption process rightfully should be applied. However, I have no confidence that in the absence of action-specific review protocols that are publicly transparent, agencies won't abuse their decision making power, particularly in an environment that allows political or special interest influence on decision making. However, devising an appropriate process is non-trivial, and it requires exactly the comprehensive and inclusive review and recommendation process proposed under the soon to be resumed EIS System Review project at the University of Hawai'i.

Thank you for the opportunity to testify.

LATE**taniguchi1 - Clarice**

From: Lance Holter [holter@maui.net]
Sent: Thursday, February 28, 2008 9:40 AM
To: taniguchi1 - Clarice
Cc: Sen. Brian Taniguchi
Subject: NOT in support of SB2808,SD1
Importance: High

I am not in support of SB2808 due to be heard today 2/28 in the Judiciary Committee. It is not necessary to Legislate exemptions from the triggers for the EA and EIS process. The OEQC will do this, this is the proper channel and allows for a proper and fair hearing. Exemptions are not Legislated they are heard before the public in proper hearings with full review. Thank you with Aloha,

Lance Holter
Chairman, Maui Democratic Party
Tele 808-579-9442

2/28/2008

testimony

From: Robin Newbold [robin@mauirobin.com]
Sent: Thursday, February 28, 2008 3:40 PM
To: testimony
Cc: Sen. Brian Taniguchi; Sen. Clayton Hee; Sen. Mike Gabbard; Sen. Russell Kokubun; Sen. Clarence Nishihara
Subject: Opposed to SB 2808 SD1

Dear Senators:

Please do NOT pass SB2808 SD1. No changes should be made to our environmental law until the comprehensive review of the law is complete. Taking the teeth out of our environmental review process will put Hawaii's environment at risk. Our environment is our future; we must protect it with the strongest laws possible. SB 2808 undermines our 30 year old environmental review law by creating a new exemption.

Robin Newbold
Kihei, Maui, Hawaii
808-875-7661