LAND USE RESEARCH
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February 4, 2009

House Committee on Energy and Environmental Protection
Hearing Date: February 5, 2009 at 9:00 AM in CR 325

Testimony in Opposition to HB 545: Relating to
The Environmental Impact Statement Law
(Requires a supplemental EA/EIS after 15 years)

Honorable Chair Hermina M. Morita, Vice-Chair Denny Coffman
And Energy and environmental protection Committee Members:

Dear Chair Morita, Vice-Chair Coffman, and EEP Committee Members:

My name is Dave 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, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawai'i's significant natural and cultural resources and public health and safety.

LURF appreciates the opportunity to provide our testimony **in opposition** to HB 545, which would require a supplemental environmental assessment (EA) or supplemental environmental impact statement (EIS) after the passage of 15 years from the date of the acceptance of the statement or the determination of a finding of no significant impact, if the proposed action is not completed.

HB 545.

1. If an action has not been implemented or completed within fifteen years of the date of the determination of a finding of no significant impact, the agency that prepared the EA shall prepare a supplemental EA; and
2. If an action has not been implemented or completed within fifteen years of the date of the acceptance of an EIS, the accepting authority shall require the preparation of a supplemental EIS;
3. The EA or EIS shall comply with all the requirements of Chapter 343, including review and filing deadlines, and rules adopted pursuant to section 343-6 as of the date of the determination that a supplemental document is required;
4. The supplemental determination of a finding of non significant impact, acceptance of the supplemental EIS, or the declaration that the action is exempt

- **Infringement of vested rights of projects that have already been approved and do not require additional discretionary government approvals.** If the purpose of Bill 545 is to target certain projects which are fully entitled and do not require any further discretionary government approvals, the bill may infringe on vested rights. If such legislation passes, it can be expected that litigation alleging infringement of vested rights will cost the State and Counties millions of dollars in litigation expenses. Lengthy and costly litigation and administrative hearings regarding vested rights will divert government staff energies and public money from more productive planning efforts, deter development, slow the growth of the tax base, and interfere with the planning and development of public facilities.

For the above reasons, we respectfully request that HB 545 be **held.**

Thank you for the opportunity to express our opposition to HB 545.

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ROBERT M. SUMITOMO
DEPUTY DIRECTOR

February 5, 2009

The Honorable Hermina M. Morita, Chair
and Members of the Committee on Energy and
Environmental Protection
House of Representatives
State Capitol
Honolulu, Hawaii 96813

Dear Chair Morita and Members:

Subject: HOUSE BILL 545
Relating to Environmental Impact Statement Law

The Department of Planning and Permitting (DPP) **opposes** House Bill 545, which would require a Supplemental Environmental Assessment (EA) or Environmental Impact Statement (EIS) whenever an "action" has not been implemented or completed within 15 years of the original EA/EIS determination.

The proposal would lead to regulatory chaos. Hawaii Revised Statutes (HRS) Chapter 343 requirements are applicable to "discretionary approvals," only. If after 15 years, an approved discretionary permit or action has not been implemented, it is likely that an applicant would only have to secure ministerial approvals. Moreover, typically, an applicant who seeks approval of a discretionary permit and/or action, which is subject to HRS Chapter 343 (e.g., a land use permit or a zone change), usually proceeds in a timely manner after the acceptance of an EA/EIS. Therefore, typically, there would be no remaining discretionary actions related to the original Chapter 343 determination. Only ministerial actions would remain, e.g., building permits and construction approvals. Ministerial actions are not subject to HRS Chapter 343 requirements. Nevertheless, the proposed changes to the HRS Chapter 343 requirements would affect discretionary actions that would have already occurred, by as much as 15 years earlier. This could create a cloud over virtually every pending or future ministerial action, even though such actions are specifically not subject to HRS Chapter 343 requirements. This is a recipe for regulatory chaos.

Further, we are concerned that the requirements associated with House Bill 545 will involve a tremendous administrative burden for regulatory agencies, in order to adequately monitor every HRS Chapter 343 as they may relate to all future ministerial actions. To some degree, no action is ever entirely "completed," in that additional related ministerial actions invariably occur over time in order to maintain, repair and/or renovate improvements. Applicants

and agencies alike must be able to rely on the certainty of the original HRS Chapter 343 determination in order to function effectively over time with respect to ministerial matters.

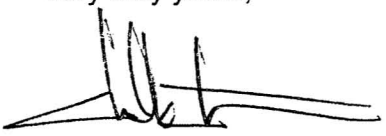
The discretionary actions themselves can and should include adequate drop-dead conditions for appropriate reconsideration over time by the proper authority. The HRS Chapter 343 determination is not the appropriate mechanism for reconsideration of a discretionary action that has already occurred. Further, once an entitlement has been vested, it would be problematic to subject a discretionary action to reconsideration for any reason other than "good cause," lest it be subjected to regulatory takings, particularly when the only remaining actions are ministerial in nature.

The proposed amendments are premature. Pursuant to legislation enacted just last year, the University of Hawaii at Manoa (UHM) is currently studying comprehensive revisions to the HRS Chapter 343 system. The issues addressed by House Bill 545 should be more properly evaluated as part of that effort, and should not precede the comprehensive proposals which may emerge from that study.

The proposal has not been justified. No justifications have been provided to support a "drop dead" provision for an accepted EA/EIS. Agencies already have adequate opportunities to consider whether a Supplemental EA/EIS is appropriate whenever significant changes occur involving an affected action. Typically, a Supplemental EA/EIS is only required when there are significant, i.e., "extraordinary," changes associated with the potential environmental circumstances related to an action, e.g., the introduction to the affected area of a new endangered species. The mere passage of time is not by itself indicative of any particular significant change to an action.

For these reasons, we urge you to file House Bill 545. Thank you for this opportunity to comment.

Very truly yours,



David K. Tanoue, Acting Director
Department of Planning and Permitting

DKT: jmf
hb545-jpt.doc

OFFICE OF HAWAIIAN AFFAIRS

Legislative Testimony

HB 545, RELATING TO THE ENVIRONMENTAL IMPACT STATEMENT LAW

House Committee on Energy & Environmental Protection

February 5, 2009 9:00 a.m. Room: 312

The Office of Hawaiian Affairs (OHA) **SUPPORTS** HB 545, which would require a Supplemental Environmental Assessment (SEA) or Supplemental Environmental Impact Statement (SEIS) if a determination of a Finding of No Significant Impact (FONSI) or an acceptance of a Final EIS, respectively, was made prior to the implementation or completion of a project. HB 545 would also require the Environmental Council to develop rules that specify the contents, requirements and process of preparing and reviewing an SEA and SEIS.

OHA agrees with the Legislature the Supplemental process needs to be explained at a statutory level and that the Council needs to clarify its rules for when an SEA or SEIS is required and what is expected of both.

Too many developers have looked at a FONSI determination or acceptance of a Final EIS as a vested right that then allows them to begin their development any time after acceptance that is economically viable for them. Acceptance of an EA or EIS is not a vested right, no matter how much it may have cost in time and money for its creation.

Hawai'i's environmental review process strives to create a balanced decision-making arena for developers and managing agencies: balancing development/economic needs with environmental/health needs. This balanced approach, with ample public participation, provides government agencies with enough information to make informed decisions on development proposals. OHA, the sole public agency responsible to assess the policies and practices of other agencies impacting on Native Hawaiians, supports this bill because it will have a positive effect on various state agencies' abilities to properly assess the environmental, cultural and aesthetic impacts of all proposed developments that trigger Chapter 343, HRS.

As was the case for the recently proposed expansion of the Turtle Bay Resort, the developer's outdated EIS failed to address several issues which exist at the present, and did not comply with current requirements for a cultural impact assessment. One of the key issues which was ignored through omission was the proposed project's impacts on the cultural resources of Kahuku and the broader Ko'olauloa district. Because an SEIS was not required for the proposed development, OHA's ability to make substantive comments regarding cultural impacts was greatly compromised. Had an SEIS been required for the proposed expansion, a Cultural Impact Assessment would have been necessary pursuant to Chapter 343, HRS, and would have allowed for prudent public and agency comment prior to cultural resources being potentially jeopardized on the subject parcels.

The environmental review process is designed to help decision-makers make informed decisions about whether or not a project should go forward, and, if so, how to balance that development or project with protection of natural and cultural resources. HB 545 would allow for this balanced process to occur, with current, applicable information that address the existing community's concerns, as properly identified and intended by the Legislature.

OHA urges the Committee to PASS HB 545. Thank you for the opportunity to testify.

RL:2221

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HB 545
RELATING TO THE ENVIRONMENTAL IMPACT STATEMENT LAW
House Committee on Energy and Environmental Protection

Public Hearing – February 5, 2009
9:00 a.m., State Capitol, Conference Room 325

By
Peter Rappa, Environmental Center
Karl Kim, Urban and Regional Planning
Denise Antolini, Environmental Law Program

HB545 requires a supplemental environmental assessment or supplemental environmental impact statement after the passage of 15 years from the date of the acceptance of the statement or the determination of a finding of no significant impact, if the proposed action is not completed. We emphasize that our testimony on this measure does not represent an official position of the University of Hawaii.

In accordance with Act 1 HB No. 2688 HD 1, Section 10, the Legislative Reference Bureau has contracted with the University of Hawaii to conduct a study of the State's environmental review process. The research is being carried out by lead investigator Karl Kim, Department of Urban and Regional Planning, associate investigators Denise Antolini, Environmental Law Program and Peter Rappa, Environmental Center. In conducting this research, we are interviewing those most involved in the state environmental impact statement process (EIS) including federal, state and county agencies personnel, consultants, nongovernmental organizations (NGO), University faculty and others.

Many suggestions for changes to chapter 343 HRS have been identified in our study including the changes called for in this bill. We recommend that a comprehensive revision to chapter 343 HRS take place after the results of the study are presented next year as required in Act 1 2008 and that the provisions of this bill be deferred until then. Any changes to the chapter 343 HRS passed during this legislative session will affect the completeness of the study. Our recommendations may suggest changes to the law that will necessitate the repeal of this bill at a later date should it become law.

Thank you for the opportunity to comment on this bill.

2/4 2339 B

Sierra Club
Hawai'i Chapter
PO Box 2577, Honolulu, HI 96803
808.537.9019 hawaii.chapter@sierraclub.org

HOUSE COMMITTEE ON ENERGY & ENVIRONMENTAL PROTECTION
February 5, 2008, 9:00 A.M.

(Testimony is 1 page long)

TESTIMONY COMMENTING ON HB 545

Chair Morita and members of the committee:

The Sierra Club, Hawai`i Chapter, with 5500 dues paying members statewide, supports the intent of HB 545, requiring a supplemental environmental assessment or supplemental environmental impact statement ("supplemental statement") if the proposed action is not completed in fifteen years.

The Sierra Club observes, however, that the legislature allocated funding for a comprehensive two-year review of Chapter 343. The Sierra Club, therefore, suggests no changes should be made to Chapter 343 until the results of this study are completed and the recommendations can be reviewed. This avoids piecemeal changes.

To the extent this Committee wishes to proceed with this bill, the Sierra Club suggests the current administrative rule addressing supplemental Environmental Assessments/ Environmental Impact Statements is adequate and should not be changed legislatively. Section (h) of this bill could be amended, however, to state on page 12:

> If an action has not been implemented or completed within fifteen years of the date of: (1) the determination of a finding of no significant impact, or (2) the acceptance of an environmental impact statement, there will be a presumed finding that there has been a substantive change necessitating a supplemental statement.

Thank you for the opportunity to testify.

2/5 0051 C

Testimony from:

Penny Levin
224 Ainahou Place
Wailuku, Maui 96793

TO: Committee on Energy and Environmental Protection Rm325 9:00am

RE: Testimony for HB545 ***Relating to the Environmental Impact Statement Law***

Aloha Honorable Committee members;

My name is Penny Levin and I am testifying as a conservation planner and a resident of Maui.

Regarding HB545 *Relating to the Environmental Impact Statement Law,* I am IN SUPPORT with the following recommended amendments (see below).

There are hundreds of infrastructure, facilities, use and management, master plan and subdivision development EA and EIS documents on the books in the State of Hawai'i that were submitted to and approved by State and County agencies and Councils over 15 years ago. We know much more now about the fragile ecology of our island resources and the finite limits of our soils, native species, land and water resources, local infrastructure, and major shifts in coastal zones (beach erosion and sealevel rise) than we did at the time of such approvals. Many of these documents were prepared and approved for private lands within Special Management Areas (SMA) or Conservation Districts, as well as public lands. In addition, the short and long-term goals and development boundaries of agencies, counties and communities have changed over time.

EA and EIS documents for infrastructure, facilities, use and management, master plan and subdivision developments older than 15 years, *no matter who owns such lands or who has proposed to develop, use, or manage said lands*, should be updated to reflect this improved understanding.

Amendments to HB545 are recommended as follows:

Page 1, line 6:

(1) Propose the use of state ~~or~~, county or private lands or the use of state or county funds, other than funds to be used for feasibility or planning studies for possible future programs or projects that the agency has not approved, adopted, or funded, or funds to be used for the acquisition of unimproved real property;

Page 7, insert between lines 4 and 5

(C) The Council of the respective county whenever an action proposes only the use of private lands, irrespective of funding sources.