SB 2818

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STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

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Testimony of
LAURA H. THIELEN
Chairperson

Before the Senate Committees on
ENERGY AND ENVIRONMENT
and
WATER, LAND, AGRICULTURE, AND HAWAIIAN AFFAIRS

Tuesday, February 2, 2010
2:45 P.M.
State Capitol, Conference Room 225

In consideration of
SENATE BILL 2818
RELATING TO ENVRIONMENTAL PROTECTION

Senate Bill 2818 transfers the Office of Environmental Quality Control (OEQC) and the Environmental Council from the Department of Health (DOH) to the Department of Land and Natural Resources (Department). The Department strenuously opposes this measure and objects to any added distraction from our core public natural resource management mission.

The Department's General Fund appropriation has been cut 32% in less than three years, Special Fund revenues have dropped over 35% in less than three years, and the Department has lost over 80 positions this past year. The Department does not have the staff or resources to support a new mandate created by transferring the program functions of OEQC and the Environmental Council from DOH to the Department of Land and Natural Resources.

WRITTEN ONLY

TESTIMONY BY GEORGINA K. KAWAMURA
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE
STATE OF HAWAII
TO THE SENATE COMMITTEES ON ENERGY AND ENVIRONMENT
AND WATER, LAND, AGRICULTURE AND HAWAIIAN AFFAIRS
ON
SENATE BILL NO. 2818

February 2, 2010

RELATING TO ENVIRONMENTAL PROTECTION

Senate Bill No. 2818 transfers the Office of Environmental Quality Control and the Environmental Council from the Department of Health to the Department of Land and Natural Resources; changes the composition of the Environmental Council from 15 to 7 members; establishes the Environmental Review Special Fund, and revises the Environmental Assessment and Environmental Impact Statement process to create a more streamlined, transparent, and consistent process.

As a matter of general policy, this department does not support the creation of any special or revolving fund which does not meet the requirements of Sections 37-52.3 and 37-53.4 of the Hawaii Revised Statutes. Special or revolving funds should: 1) reflect a clear nexus between the benefits sought and charges made upon the users or beneficiaries of the program; 2) provide an appropriate means of financing for the program or activity; and 3) demonstrate the capacity to be financially self-sustaining. It is difficult to determine whether the fund will be self-sustaining.

LINDA LINGLE
GOVERNOR OF HAWAII

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In reply, please refer to:
File:

COMMITTEE ON ENERGY AND ENVIRONMENT

COMMITTEE ON WATER, LAND, AGRICULTURE, AND HAWAIIAN AFFAIRS

SB2818, RELATING TO ENVIRONMENTAL PROTECTION

Testimony of Katherine Puana Kealoha
Director of the Office of Environmental Quality Control

February 2, 2010

Department's Position: The Office of Environmental Quality Control opposes SB2818 but offers recommendations below.

Fiscal Implications: SB2818 establishes the environmental review special fund and requires the director of OEQC, pursuant to chapter 91, to adopt rules and establish fees for administering the environmental requirements pursuant to chapter 343. The money collected for the environmental review special fund is supplemental to, and not a replacement for the OEQC budget.

Purpose and Justification: SB2818 amends Chapter 341 and Chapter 343, to transfer the Office of Environmental Quality Control and the Environmental Council to the Department of Land and Natural Resources; reduces Environmental Council membership from 15 to 7; establishes the Environmental Review Special Fund; and revises the environmental assessment and environmental impact statement process to create a more streamlined, transparent, and consistent process.

The Office of Environmental Quality Control agrees with some of the amendments proposed in SB2818 but recommends a few changes to the current version.

The Legislature funded an evaluation of the Office of Environmental Quality Control by the University of Hawaii through the Legislative Reference Bureau, pursuant to Act 1, Session Laws of Hawaii 2008. The draft evaluation has been submitted and this document is now pending review, comments and feedback, with hopes of finalizing the study by the summer of 2010.

The overall evaluation identified a broad spectrum of issues and proposes comprehensive changes which include some of the amendments proposed in SB2818.

Therefore, our office respectfully requests that your committees defer this matter and allow OEQC to submit changes to the proposed amendments, once the final version of the university study has been submitted.

Thank you for the opportunity to testify.

Testimony for SB 2818
to the Committee on Energy and Environment
Senator Mike Gabbard, Chair
Senator J. Kalani English, Vice Chair

Testimony submitted by Gail Grabowsky, current Environmental Council Chair
February 1, 2010

Dear Senators Gabbard, English and members of the Senate Committee on Energy and the Environment:

On January 27th, 2010, six of the current twelve members of the Environmental Council representing our Ad Hoc Investigatory Committee on the Future of the Environmental Council met to review SB2818 with the aim of developing recommendations for this and future hearings pertaining to the bill. The recommendations presented here represent the consensus of the Investigatory Committee and would have been brought to the Environmental Council for formal approval if the Council was able to meet. The Council has been unable to meet since July, 2009, because the conditions for a successful meeting: an adequate room for public comment, properly functioning audiovisual support, sufficient OEQC staffing to conduct mandated council business and someone to take minutes of our meetings have been and continue to be lacking. This testimony therefore represents, at this time, perhaps the nearest thing the legislature can obtain to testimony from the Environmental Council.

The Environmental Council Investigatory Committee, upon review of SB2818 found *in general* that:

1. All of the operational difficulties and challenges currently faced by the Environmental Council would be corrected through the cumulative actions proposed in SB2818. The Investigatory Committee is very grateful and pleased for the Bill's effort to remedy and improve upon the Council's and OEQC's situation and duties.

The Environmental Council Investigatory Committee, upon review of SB2818 found *specifically* that:

1. [SB2818 pp.1, lines 9-13] The Council committee finds that the Bill's statement: "The legislature further finds that the determination of an optimum balance between economic development and environmental quality deserves the most thoughtful consideration, and the maintenance of the optimum quality of the environment deserves the most intensive care" needs to be taken very, very seriously. The Council committee members feel that the state needs to make a way possible for this to occur. The committee members feel that this bill will help in that effort by improving Hawaii's environmental review process and it does so in a way that is financially feasible, even in these difficult economic times.

2. [SB2818, pp.2, lines 15-18] The Council committee strongly agrees that OEQC and the Environmental Council need to be moved out of the DOH, but feel that DLNR or any other existing agency, such as DBEDT, would not be optimal or even adequate, as well. The Council committee discussed this issue at length and feel that the time has come to create a new cabinet level office for OEQC and the Environmental Council. The issues the Council and OEQC deal with now and into the future are so important to the well-being of the future of this State that the Council committee members feel this move warrants a holistic approach that would place OEQC and the Environmental Council in their own new "Office of the Environment." The Council has not been prone to making idealistic or grandiose proposals for itself in the past, but in this instance the members feel that we have the opportunity to do the best thing for Hawaii by strongly supporting the creation of a new

separate office. If OEQC and the Council are funded through the state (as they are now) and supplemented by a pay-as-you-go environmental review special fund, why not move OEQC and the Council out from under some other agency and avoid the kind of problems the Council currently faces which are largely due to its being imbedded in a reluctant host agency whose mission is not congruent with OEQC and the Council. OEQC's and the Council's duties are and will be far too important to risk facing these difficulties and impediments to mandated actions again.

3. [SB2818, pp. 3, lines 3-6, 9-12] The Council committee felt that the Council membership should total nine, not seven members. It was argued that it is more difficult to achieve quorum with seven members than with nine. The Council committee felt that there should be one member from each county and five at-large members. Members should be appointed by the governor provided that three members are appointed from a list of persons nominated by the senate president and three members appointed from a list of persons nominated by the speaker of the house.

4. [SB2818, pp. 3, lines 6-7] The Council committee was in support of removing the director from the Council.

5. [SB2818, pp. 3, lines 15-18] If the Council were composed of nine members, of the nine members initially appointed, three should serve for four years, three for three years, and three for two years.

6. [SB2818, pp. 5, lines 1-22, pp. 6, lines 1-14] The Council committee was in support and pleased with the changes to the Council's duties.

7. [SB2818, pp. 6, line 15] The Council committee feels that the words "the Council" should be inserted after "With the cooperation of...."

8. [SB2818, pp. 7, line 19] The Council committee is very supportive of the improvements to the OEQC website. We wanted to emphasize however that ongoing efforts will need to be made to ensure that the users of the website find that it uses software and formats that are accessible to as many users as possible. To this end, this language addition was suggested: After: "...to meet best practices of environmental review," we added: "in a format that is accessible to the public at large...."

9. [SB2818, pp. 8, lines 19-20] The Council committee recommends that this be rewritten: "Meet at the call of the council chairperson or by a quorum of council members."

10. [SB2818, pp. 10, lines10-12] The Council committee felt that the language should be amended to reflect that the moneys in the environmental review special fund can *only* be used as supplemental funds for the duties described for the functioning of OEQC and the Council.

11. [SB2818, pp. 10, line 19] The Council committee recommends adding "with Council concurrence" after "The director ...."

12. [SB2818, §343-6 Rules] The Council committee was in full and enthusiastic support of this subsection with the single exception that we feel that under (14)(B) [pp.45, line 19] the word "seven" should be replaced with the word "five." The Council committee felt seven years from the date of acceptance was too long and should be shortened to five years.

The members of the Environmental Council's Investigatory Committee on the Future of the Environmental Council would like to thank you for this opportunity to testify and look forward to the improvements in the environmental review process that this bill, if passed, will create.

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MUFI HANNEMANN
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DEPUTY DIRECTOR

February 2, 2010

The Honorable, Mike Gabbard, Chair
and Members of the Committee on Energy and Environment

The Honorable Clayton Hee, Chair
and Members of the Committee on Water, Land, Agriculture,
and Hawaiian Affairs
The Senate
State Capitol
Honolulu, Hawaii 96813

Dear Chairs Gabbard, Hee, and Members:

Subject: SENATE BILL 2818
Relating to Environmental Protection

The Department of Planning and Permitting (DPP) **opposes** two of the proposals contained in Senate Bill 2818, in particular that lead agencies include conditions established in an environmental impact statement (EIS), and that an EIS or environmental assessment (EA) shall have a duration of not more than seven years.

Pursuant to proposed Section 343-C(b), agencies will be required to establish and record in their decisions conditions regarding an EIS; such conditions later to be included as conditions on grants, permits, or other approvals to ensure mitigation. Such a requirement essentially renders an EIS a discretionary permit. This is not the purpose or intent of the EIS. In cases where projected impact or recommended mitigations would not be addressed by subsequent established regulation and procedure, decision makers already have the option of including appropriate conditions of approval to their actions to ensure that the impacts and mitigation are addressed. Decision makers may rely on an EIS to identify those potential impacts, but they must be able to exercise their proper discretionary authority to determine whether and what conditions are appropriate to ensure mitigation.

Further, an agency accepting an EIS is not necessarily the decision maker for purposes of any subsequent discretionary actions associated with the statement. For

instance, the Department of Planning and Permitting may accept an EA or EIS for an action which will be decided on by the Planning Commission of the City Council. It is inappropriate and potentially challengeable by the Courts for an administrative accepting agency to impose conditions on a future discretionary action which will be made by another, separate decision making authority.

The result of this proposal would be to fundamentally alter the environmental review process such that it would be used to create entitlements out of the acceptance of an EIS or EA, which can be revoked without a vote by the decision makers, which is an unworkable idea, legally and financially, and could lead to regulatory chaos. We, therefore, recommend that the proposed Section 343-C(b) be amended by removing any references to the establishment of conditions on decisions relating to an EIS.

Proposed Section 343-6(a)(14) prescribes a seven year limitation on the validity of an EIS or EA. This will fundamentally change the nature of what an EIS and EA is supposed to do.

- The EA or EIS is supposed to provide decision makers with the best possible information about projected impacts and possible mitigations **available at the time of decision** so that they make the best informed decision. After the decision, there is no need to update the EIS or EA, since the decision has been made. Once made, an owner or operator is legally vested.

- Revocation of an entitlement requires due process as a matter of law. Typically, revocation of an entitlement requires a vote by the decision makers, at which time a new or supplemental EIS/EA can be required.

The idea that an entitlement should have an expiration date of seven years is a dubious legal idea. It is a disguised taking of property which the courts have not allowed without compensation. It is an unworkable idea for developers who use other people's money to build their projects. Why would a financier lend money to support a project development if any returns from the project beyond seven years out from the time of the EIS or EA may later be held up or evaporate because a new or supplemental EA or EIS had to be prepared and approved?

A land use decision is a long-term decision. Decision makers should not approve permits for the use of land if they may only support if it happens immediately. A land use approval should only be approved if it makes sense for the long range development of the community, whether it happens immediately or later. Therefore, a specified duration for the validity of an EIS or EA is unjustified; and we recommend that proposed Section 343-6(a)(14) be amended, accordingly.

We strongly recommend that Senate Bill 2818 be amended as suggested, herein, to address our stated concerns. Thank you for this opportunity to comment.

Very truly yours,

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

DKT: jmf
sb2818-jp.doc

The Chamber of Commerce of Hawaii
The Voice of Business in Hawaii

February 2, 2010

The Honorable Mike Gabbard, Chair and Member
Committee on Energy and Environment
The Honorable Clayton Hee, Chair and Member
Committee on Water, Land, Agriculture and Hawaiian Affairs
State Senate
State Capitol, Room 225
Honolulu, Hawaii 96813

Dear Chairs Gabbard and Hee, and Members of the Committee:

Subject: Senate Bill No. SB 2818 Relating to Environmental Protection

My name is Jim Tollefson, President of the Chamber of Commerce of Hawaii. 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

The Chamber strongly opposes S.B. No. 2818 as presently drafted.

We understand that the bill is the result of a Report to the Legislature on Hawaii's Environmental Review System, Prepared pursuant to Act 1, 2008 SLH for the LRB. The LRB contracted the University of Hawaii to prepare the report and draft legislation.

We understand that the purpose of the study was to:

1. Examine the effectiveness of the current environmental review system created by Chapters 341, 343, and 344, Hawaii Revised Statutes;
2. Assess the unique environmental, economic, social, and cultural issues in Hawaii that should be incorporated into an environmental review system;
3. Address larger concerns and interests related to sustainable development, global environmental change, and disaster-risk reduction; and
4. Develop a strategy, including legislative recommendations, for modernizing Hawaii's environmental review system so that it meets international and national best-practice standards.

We have been involved in the effort by the University of Hawaii in the review of Chapter 343 HRS. We do agree with some of the findings such as those in Section 2.3 Intent of the Law and Goals of the EIS Process:

> "There is a common misconception that the environmental review process is regulatory in nature and that the final decision on whether to permit a proposed action is based on the final EA/EIS. This is not the purpose of the process. The determination of whether an action is permitted rests with the agency having discretionary authority over that action." Page 9

We also believe recent projects have drawn attention to the Chapter 343 HRS process. While we understand the need for a review of Chapter 343 HRS, we believe that the review should focus on fixing specific problems rather than assuming that the entire statute needs to be revised. For example, the following are some of the more recent projects that have drawn attention to Chapter 343 HRS:

1. Kuilima Resort—The discussion focused on the time that has lapsed from when Kuilima was originally permitted until today when no construction has occurred on some of the approved development. One of the concerns raised by the opposition was that the environment around the development has changed and therefore, a new or supplemental EIS should be done. Others say the the "environment" has not changed, rather attitudes have changed, and there has not been the investment in infrastructure that is needed for the project. Very different perspectives that should be resolved by the local decision-makers, not Chapter 343 HRS. The current EIS law only requires a supplemental EIS when the project itself has been changed or if new information within the project area has been discovered that was not previously disclosed. This case is presently before Hawaii Supreme Court.

2. Superferry—The Court held that the State Department of Transportation (DOT) erroneously applied its agency exemption list to declare exempt from Chapter 343 the state-financed harbor improvements that facilitated the Superferry project. The Court also found that the secondary impact must be considered: "in addition to the direct site of impact the agency must also consider other impacts that are 'incident to and a consequence of the primary impact.'" Finally, the Court found that DOT's exemption review process violated Chapter 343. {Note: Since the Supreme Court's decision on Superferry in 2007, the State DOT changed their prior position and began requiring an EA for any activity or use that touched a State owned road/highway right of way. This included driveways, and all utility connections. Conversely, the counties maintained their position of not requiring an EA for any activity or use that touched a County owned road/highway right of way.}

3. Kahana Sunset Owner's Association v. County of Maui, decided in 1997, the Court agreed with the citizen-plaintiff that the Maui County Planning Commission had erred in not requiring an EA for a proposal to build 312 multifamily units when a 36" drainage culvert would be tunneled under a street and then connect to a culvert under a public highway. The Court found that the proposed underpasses constituted "use of state lands," were "integral" parts of the larger development project, and therefore that the county had to initiate Chapter

343 review "at the earliest practicable time." The Court found that the agency's decision was not consistent with the larger intent and purpose of Chapter 343 to "exempt only very minor projects from the ambit of HEPA" and the "letter and intent of the administrative regulations." This was similar to the issues raise with the Koa Ridge development.

These and a few other cases represent the significant judicial decisions involving Chapter 343 since 1974. We would agree that in light of the judicial interpretations of Chapter 343, a review to clarify the original intent in the statutes (for the specific issues raised and not satisfactorily resolved) was in order.

The following changes proposed by the University to Chapter 343 attempt to address each of the three problems mentioned earlier:

1. Kuilima Resort—Section 343-6 Rules (a), (14), (B) was added which will require the Environmental Council to Prescribe procedures for limiting the duration of the validity of environmental assessments and environmental impact statements, or if an environmental assessment led to the preparation of an environmental impact statement, then of the later-prepared statement, to seven years or less from the date of acceptance of the document until all state and county discretionary approvals are fully completed for the action.

Establishing a time-limit on an EA/EIS would have a chilling effect on both government and private projects for different reasons. For example, in the case of government projects, sometimes because of budget priorities, there is a significant time period between the planning (EA/EIS) and the construction. Virtually all master planned communities of significant size require initial investments in the neighborhood of $100,000,000 or more and a planning, entitlements, infrastructure development and build-out period of twenty years or more. With the full backing of the City and the State, the second city of Kapolei has taken close to a half a century to pass the 50% build-out stage. Also, many large government projects, including rail transit, require a a planning, entitlements, infrastructure development and build-out period well in excess of 7 years.

For private projects, the government entitlement process in Hawaii is cumbersome and time consuming, and for large projects in some cases the planning and entitlement process alone exceeds 7 years. How would a developer secure financing for basic backbone infrastructure or construction of phases on a large project if the EA/EIS could possibly have to be redone in 7 years? Under the UH proposed amendments there would be no more master planned communities of any significant size.

The proposal seems to miss the point. The concern in Kuilima was not the EA/EIS but the timing of the construction. Perhaps a more reasonable approach would be for the decision-making agency to consider the need, if any, for a time requirement to start/initiate construction of a project as part of the discretionary entitlement process rather than attempting to use the public disclosure document as the means to set a time limit on the start construction. Other entitlement processes, such as the Land Use

Commission have adopted this position requiring projects approved for reclassification to be "substantially complete" within 10 years of approval. We do not believe that there is a "one size fits all" answer to this, and strongly recommend that any changes in this be held in abeyance until the Hawaii Supreme Court renders its opinion. This will enable the legislature to include the Court's reasoning in its deliberations on this area rather than passing something now and having to revisit it again next year for additional matters that the Court raises.

2. Superferry—Section 343-2 Definitions was amended to include the following:
    a. Primary effect or direct effect means effects that are caused by the action and occur at the same time and place.
    b. Secondary effects or indirect effect means effects that are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include changes in the pattern of land use, population density or growth rate, and related effects on air, water, and other natural systems, including ecosystems.
    c. Significant effect means the sum of effects on the quality of the environment.

This section raises significant issues that may hamper governments' ability to manage its programs. In the Superferry situation, DOT-Harbors constructed Harbor improvements to accommodate a new vessel. The Court decision states that DOT should have considered secondary impacts (i.e. Superferry's operations and Whales) in their environmental work. Given the court's decision and the proposed amendments by the University of Hawaii, would DOT-Airports need an EA/EIS if it wants to add new hangars or gates to accommodate larger planes? And if so, would the EA/EIS now need to address the direct impacts of the actual hangar/gate construction but also consider impacts that are 'incident to and a consequence of the primary impact (i.e. more people coming to Hawaii, impacts from the new/larger planes, etc.)?" The Superferry case speaks for itself and is now becoming settled law. The amendments proposed by the University of Hawaii review result in this case and all related settled law being thrown out the window, bringing uncertainty, delays and the opening for mischievious litigation that will delay job creating projects and clog the courts with unnecessary litigation.

3. Kahana Sunset Owner's Association—Section 343-B (b) was added which states: Notwithstanding any other provision, the use of land solely for connection to utilities or rights-of-way shall not require an environmental assessment or an environmental impact statement.

We generally support the attempt to exclude ancillary utility and access connections to government owned roadways from the 343 process.

In theory then, the proposed changes should have addressed, according to the University of Hawaii, the more recent problems with interpretations of Chapter 343. However, we believe that the University of Hawaii has gone far beyond addressing some of the known

problems with Chapter 343 and created more confusion by proposing massive, significant, fundamental changes throughout the statute.

We are concerned with the following proposed changes from the University of Hawaii to Chapter 343 in the following areas:

What "Triggers" Chapter 343 HRS?:

Currently, Chapter 343, HRS states any use or activity may trigger EA/EIS if it is one of the 9 listed in 343, unless the program or project is declared exempt. One of the nine triggers is the *use of state or county lands or the use of state or county funds*. The existing statute also provides two distinct processes, one for agency actions and another for applicant actions.

Chapter 343 HRS was created in 1974 under Act 246. The legislative history indicates that at the time, an executive order had been issued that directed all public actions to do an environmental impact statement/assessment which is reflected in item No. 1 of the EIS/EA triggers. The legislation was intended to identify specific areas where an EIS/EA would be required for private uses.

Currently, Chapter 343 HRS provides for a distinction between discretionary and ministerial consents (approvals). §343-2, Definitions provides the following:

> "Approval" means a discretionary consent required from an agency prior to actual implementation of an action.
>
> "Discretionary consent" means a consent, sanction, or recommendation from an agency for which judgment and free will may be exercised by the issuing agency, as distinguished from a ministerial consent.

The distinction is between discretionary and ministerial consents indicates that the Chapter 343 HRS was never intended to be applied to ministerial consents (approvals) such as subdivisions, building permits, meter hook-ups, etc. The disclosure process outlined in Chapter 343 HRS was intended to be done in general at the zoning stage or was limited over time to specific actions or activities.

That is why the appropriate place to trigger Chapter 343 for an EA is at the first "discretionary consent" such as zoning. Then the EA is done prior to the ministerial consents such as subdivision, building permit, meter hook-ups, etc. For lands which were zoned prior to 1974 (the enactment of Chapter 343 HRS) there would be no EA/EIS requirement unless the action proposed on the property was one of the identified "triggers" in Chapter 343 HRS.

In an attempt to "clarify" when an EA/EIS would be required, the University of Hawaii proposal would eliminate the distinction between agency and applicant actions, and

dramatically expand the actions that would trigger Chapter 343. Their proposal would amend Section 343-B Applicability to read as follows:

(a) Except as otherwise provided, an environmental assessment shall be required for actions that require discretionary approvals from an agency and that may have a probable, significant, and adverse environmental effect, including:

1. Any new county general or development plans or amendments to existing county general or development plans; or
2. Any reclassification of any land classified as a conservation district or important agricultural lands.

(b) Notwithstanding any other provision, the use of land solely for connection to utilities or rights-of-way shall not require an environmental assessment or an environmental impact statement.

They would also amend Section 343-2 Definitions by including the following:

"Action" means any program or project to be initiated by any agency or applicant that:

1. Is directly undertaken by any agency;
2. Is supported in whole or in part by contracts, grants, subsidies, or loans from one or more agencies; or
3. Involves the issuance to a person of a discretionary approval, such as a permit, by one or more agencies.

The new definition for:

> "Permit" means a determination, order, or other document of approval, including the issuance of a lease, license, permit, certificate, variance, approval, or other entitlement for use, granted to any person by an agency for an action.

Chapter 343 already had a definition for:

> "Discretionary approval" means an approval consent, sanction or recommendation from an agency for which judgment and free will may be exercised by issuing agency, as distinguished from ministerial approval.

The new definition for:

> "Ministerial approval" means a governmental decision involving little or no personal judgment by the public official and involving only the use of fixed standards or objective measurements.

As proposed, applicants who have historically received "ministerial consents/approvals" from county agencies for in-fill projects, subdivisions, and/or development of zoned properties would now be required to prepare an EA/EIS because their project would require some type of government "permit." The new definition for "permit" proposed by the University would appear to move current "ministerial" approvals (i.e. building permits, subdivision approvals, etc.) into a new "discretionary approval" category.

The attempt to "clarify" would in effect require many more, if not all, projects to undergo costly and largely duplicative Chapter 343 HRS EA/EIS studies. In keeping with the original intent of Chapter 343, we believe that "Discretionary Approvals" should be limited to land use approvals such as reclassification of lands at the State Land Use Commission and County zoning. This is the appropriate time to discuss impacts of the pending reclassification actions and zoning. Theoretically, the balancing of natural resource management issues and government infrastructure are done at these levels. If the environmental impacts are not assessed at these levels, what is the purpose of the agency's discretionary approval? Are the planning and zoning at these levels meaningless until individual projects or permits are proposed? If that is the desire, then the entire land use entitlement process needs to be revised to delete the EA/EIS at the earliest possible stages (land use and zoning) and defer it until individual projects or permits are proposed.

Furthermore, as we understand the proposal, the University of Hawaii also wanted to require agency master plans to comply with the Chapter 343 HRS process. However, as proposed, there is no "trigger" for an agency master plan to go thru the Chapter 343 HRS process. When the trigger for use of state or county lands or funds was removed, the only trigger is in Section 343-B which states that:

> ". . . an environmental assessment shall be required for actions that require discretionary approvals from an agency and that may have a probable, significant, and adverse environmental effect . . ."

A master plan for lands already under the control and management of a state or county agency would not trigger a 343 environmental review under this definition. We believe that more work is required in this area to insure that the proposed changes do not elevate the 343 HRS process into another layer of permitting and/or create unfunded mandates for already strapped agencies.

Finally, as proposed in 343-B, (a), 2, an EA/EIS would be triggered for reclassification of land to Important Agricultural Lands (IAL). It is our understanding that the IAL designation is a sub-category of the Agricultural District, and is dependent on the "agricultural viability" of the property. The IAL designation is not intended to keep agriculture for open space or preservation. That being the case, it would appear to be unreasonable to require an applicant to prepare an EA/EIS to simply remove the IAL designation for "Agricultural Zoned" lands due to economic conditions such as a drop in the crop price due to market conditions or an increase in the cost of providing agricultural irrigation water to the property. In these cases, we presume that the IAL designation will

be removed and the lands will simply be zoned agriculture, no change in the land use classification.

Tiering:

The Report to the Legislature recommends that EA/EIS should be done at the government land use planning stages (i.e. General Plans, Development Plans, Sustainable Community Plans). It finds that:

> "The environmental review system exists within a planning framework involving discretionary and ministerial permits, plans and other governmental activities. . . . However, an important reform would be to change parts of Hawaii's system from an 11th hour to a 1st hour approach to frontload the environmental review process to the earliest practicable state of the planning process rather than to the later stages when key decisions have already been made." Page 10

The Report by the University of Hawaii recommends adoption of a new concept called "Tiering" to address the environmental review at the planning and project level. Currently, there is no provision for "tiering" of EA/EIS in Hawaii. However, according to the report, tiering is a common feature of federal EAs and EISs.

As proposed, Tiering means:

> "The incorporation by reference in a project-specific environmental assessment or environmental impact statement to a previously conducted programmatic environmental assessment or environmental impact statement for the purposes of showing the connection between the project-specific document and the earlier programmatic review, avoiding unnecessary duplication, and concentrating the analysis on the project-specific issues that were not previously reviewed in detail at the programmatic level."

It appears that the proposed changes to Chapter 343 would require an EA/EIS for the government land use planning process, and another Chapter 343 document for each project within the planned area as more specific information becomes available. In effect, two or more EA/EIS study documents would be requied where only one is required now. Rather than add more steps to the process, we recommend that: a) either the parameters of what is being planned for are fully disclosed and planned for in the initial planning effort, or b) the process remain the same as it is currently where individual projects trigger the 343 document. We see no benefit in having a 343 document done at both the planning and the project levels to consider all of the conditions to be placed on projects to mitigate impacts (i.e. roadway infrastructure, water, sewer, drainage, schools, Traffic Impact Analysis Reports (TIAR), etc., etc.).

Furthermore, front loading the EA/EIS requirement at the land use planning stage would appear to be reasonable considering that these plans are used to plan growth, provide zoning and, most importantly, provide for government infrastructure in support of the

planned growth. In theory, this is the point at which public disclosure and input is most valuable. It would appear to be illogical if individual projects were later delayed or denied at the11th Hour if these projects were consistent with the government land use plans for the area. If the real intent is to allow for ad hoc approvals/denials on a project by project basis, then the entire land use planning process and environmental review process needs to be revised to reflect such an ad hoc, arbitrary and unpredictable system.

Exemptions and Rules:

The Report by the University of Hawaii recommends adding to the rules new classes of exemptions for actions that meet zoning and county general or development plans, and certain types of University research." Page 43

As proposed, Section 343-5 would be amended and titled Agency and Applicant Requirements. It would also include the following:

(a) Whenever an agency proposes an action in Section 343-B, the agency shall prepare an environmental assessment, or, based on its discretion, may choose to prepare for a program, a programmatic environmental assessment, for the action at the earliest practicable time to determine whether an environmental impact statement shall be required; provided that if the agency determines, through its judgment and experience, that an environmental impact statement is likely to be required, then the agency may choose not to prepare an environmental assessment and instead shall prepare an environmental impact statement following adequate notice to the public and all interested parties.

(b) Whenever an applicant proposes an action specified by Section 343-B that requires approval of an agency and that is not a specific type of action declared exempt under that section or section 343-6, the agency initially receiving and agreeing to process the request for approval shall prepare an environmental assessment, or, based on its discretion, may choose to prepare for a program, a programmatic environmental assessment, for the action at the earliest practicable time to determine whether an environmental impact statement shall be required; provided that if the agency determines, through its judgment and experience, that an environmental impact statement is likely to be required, then the agency may choose not to prepare an environmental assessment and instead shall prepare an environmental impact statement following adequate notice to the public and all interested parties.

As proposed, the statutes do not include the provision that allows for exempt actions by agencies. Some type of exemption provision should be included in part (a) above or all agency actions will require an EA/EIS.

Under Section 10, Pages 103-108, Section 343-6 would be amended to allow for interim rules to be adopted upon filing with LG's office without the need to conform with Chapter 91 or Chapter 201M HRS until 2014 after which, any interim rules must be must

be adopted through the Chapter 91 and Chapter 201M processes. These interim rules shall include:

- Consolidation of actions into one EA/EIS
- Procedures for creating exempt actions
- Procedures for preparing EAs
- Procedures for content and page limits for EAs
- Procedures for public notices
- Procedures for content and page limits for EISs
- Procedures for processing EISs
- Procedures to establish criteria for acceptance/non-acceptance of EISs
- Procedures to appeal non-acceptance of EISs
- Procedures for electronic comments and response on EA/EIS
- Procedures for ROD, monitoring and mitigation
- Procedures for interpretation of significant criteria
- Procedures for programmatic EA/EIS and Tiering of project specific EA/EIS
- Procedures for when supplemental EA/EIS required
- Procedures for stale EISs (7 years from the date of acceptance of the document until all state and county discretionary approvals are fully completed for the action
- Procedures for determining when supplemental is not required after the 7 years have lapsed

(Requires one public hearing for interim rules)

Historically, the Administrative Rules have been used to implement the intent of Chapter 343. This is the most significant component of the revisions to Chapter 343 as it will provide the details of how "small projects" and insignificant actions will be exempt from the 343 process. It will essentially lay out the "how to" accomplish the reforms identified in the report. While we support the need for these revisions, we question the wisdom of implementing these rules outside of the normal Chapter 91 procedures. As proposed, after one public hearing, the rules could be implemented. This process seems to fly in the face of making the process open, objective and transparent. The Chapter 91 process is intended to protect the rights of all of the participants in the process. There is no provision for appeal or dissention if one disagrees with the proposed interim rules.

We believe that as proposed, that there needs to be more details provided on what the parameters will be for the procedures and criteria being developed in the Administrative Rules. These need to be considered in combination with the proposed changes to Chapter 343 HRS in order to understand the impact of the proposed changes.

We fully support the approach of having the Statutes set the broad public policy direction and allow the Administrative Rules do the implementation. In this case however, given the magnitude of the proposed changes we firmly believe that more discussion on the connection between the statutes and the rules is needed. There is always room for

improvement; however, with any change comes "unintended consequences." By fully understanding the Statutes and Rules, we hope to avoid or minimize significant unintended consequences.

Record of Decision (ROD):

The University of Hawaii proposes to add a new section in Chapter 343 (Section 343-C Record of Decision; Mitigation. The new section would read as follows:

(a) At the time of the acceptance or non-acceptance of a final statement, the accepting authority or agency shall prepare a concise public record of decision that:
    a. States its decision;
    b. Identifies all alternatives considered by the accepting authority or agency in reaching its decision, including:
        i. Alternatives that were considered to be environmentally preferable; and
        ii. Preferences among those alternatives based upon relevant factors, including economic and technical considerations and agency statutory mission; and
        iii. States whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted and, if not, why they were not adopted.

(b) Agencies shall provide for monitoring to ensure that their decisions are carried out and that any other conditions established in the environmental impact statement or during its review and committed to as part of the accepting authority or agency's decision are implemented by the lead agency or other appropriate agency. Where applicable, a lead agency shall:
    a. Include conditions on grants, permits, or other approvals to ensure mitigation;
    b. Condition the funding of actions on mitigation; and
    c. Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures that they proposed during the environmental review process and that were adopted by the accepting authority or agency in making its decision.

(c) Results of monitoring pursuant to this section shall be made available periodically to the public through the bulletin."

The proposal appears to confuse the Environmental Review process with the permitting process. The Report to the Legislature contained the following statement:

> "There is a common misconception that the environmental review process is regulatory in nature and that the final decision on whether to permit a proposed action is based on the final EA/EIS. This is not the purpose of the process. The

> determination of whether an action is permitted rests with the agency having discretionary authority over that action." Page 9

While there is probably justification to have the Accepting Authority on an EA/EIS provide more explanation on how the document met the requirements of Chapter 343, we do not believe it is appropriate for the accepting authority on the environmental review document to subjectively make judgments to select a preferable alternative. This judgment is more appropriate during the discretionary permitting stage where the agency or agencies could impose conditions on the applicant to mitigate impacts. Furthermore, the monitoring of the conditions is the responsibility of the permitting agency not the accepting authority on the EA/EIS.

We believe a Record of Decision may be appropriate if it is limited to whether or not the document met the requirements of Chapter 343 HRS as a public disclosure document. We do not support a ROD that goes beyond the requirements of Chapter 343 HRS. We support monitoring of the conditions by the responsible permitting agency, not the fragmented approach recommended by the UH review of having the accepting authority or agencies commenting on the EA/EIS be responsible for monitoring compliance with conditions. The UH proposal opens the door to legal and administrative mischief to delay projects (and the jobs they create), drive up costs to consumers, and to clog already over-filled court dockets.

Project Size Versus Land Use:

In the Executive Summary of the Report to the Legislature, the University of Hawaii identified one of the problems with Chapter 343 as follows:

> "Hawaii's system for environmental review has drifted from the original goal—to better inform agency decision making about potential impacts. The system has become inefficient, focusing too much on small projects, exemptions, and litigation, rather than on large projects, the quality of analysis, and early public participation."

We do not agree with how the problem was framed by the University of Hawaii. The underlying problem is that the since 1974 when Chapter 343 was created, amendments to the statutes and court decisions have moved the process away from its original objective of creating a "public disclosure process" for certain actions. These actions were initially focused on all government projects but included private actions involving reclassification of lands at the state and county level. The process, in broad terms, was intended to identify impacts and develop mitigation measures to be considered by agencies in rendering their "discretionary" decisions. There is no distinction between small and large projects in the statutes but rather discretionary versus ministerial.

The report states:

> "The inappropriate capture of small projects such as repaving an existing parking lot in a fully developed urban zone does not aid the quality of agency decision making, has resulted in increased administrative cost and delays, and contributes to a general sense that the environmental review system is broken. Similarly, the omission of some major projects has promoted a sense that the environmental review system is broken. These projects were omitted because their type of action was not defined in the statute clearly. An example raised was the Wal-Mart super block project near Ala Moana. This project greatly increased traffic in an area that is already prone to heavy traffic, a public road was closed and put into the superblock property, and burials were discovered on property once construction began. However, because it did not go through the environmental review process, the opportunity for identification of these impacts, exploration of alternatives, public review of the proposal, and development of mitigations to inform agency decision-making regarding the project did not occur." Page 25 and 26

It is unclear from the report how the proposed revisions to Chapter 343 would "clearly" address the Wal-Mart situation in the future. If the project site is already zoned, all discretionary permits would have been obtained. How would Wal-Mart be required to prepare an EA/EIS under the proposed revisions to Chapter 343? If it was required to prepare an EA/EIS under the proposed revisions to Chapter 343, how would small projects which have no significant environmental impact be exempted? Other than the Wal-Mart example, we did not see evidence of other major projects be omitted from the environmental review process. It appears to us that the Courts have remedied any other significant errors or omissions, and the system is not broken. Even in the cited Wal-Mart super block project, the City resolved traffic mitigation issues using existing ordinances and the dire predictions of gridlock were disproved. Likewise, state law and other conditions of prior approvals satisfactorily regulated and mitigated other matters to the public's general satisfaction, albeit not to everyone's unanimous satisfaction.

The approach being advocated by the University is significant in that it shifts the focus away from discretionary land use approvals to individual projects. Adding to the confusion is the attempt to single out "big" projects from "small" projects. This issue will present challenges for transit oriented development (TOD) in and around the rail transit stations. The underlying rational is that transit is a growth management tool used to increase density within the TOD areas. An approach for environmental review based on "big" and "small" projects would essentially trigger an EA/EIS for projects that increase density in the urban core rather than at the time the TOD ordinance is enacted (zoning). We will continue to advocate for an environmental review process that is primarily based on land use decisions rather than individual projects.

Significant Versus Non-Significant Criteria:

In Part II, Section 5 of the proposal, the University proposes to add a new section on Significant Criteria straight from the Administrative Rules. It also added two new conditions:

1. Added greenhouse gas emission to the significant criteria alongside the existing criteria on energy consumption. This amendment was based on prior legislation Act 234 (2007 SLH) which stated a state policy of 1990 level of greenhouse gas emission by 2020;

2. Added a new section addressing the potential amplification of project-created public hazards that are related to anticipate climate change impacts during the lifetime of the project. For example, with the prospect of sea-level rise from climate change, areas subject to likely future inundation would be considered potentially significant. A project proposing to locate vital infrastructure in such an area might be required to move to the EIS phase.

The issue requiring EA/EIS to assess project impacts over the long-term based on global warming and sea-level rise was brought up when the Study was first initiated. The problem of making this a requirement of all new EA/EIS environmental review documents is one of context. Individual projects could probably disclose the projects greenhouse gas and sea-level rise impacts, but once that is done, how will the information be used? It is unreasonable to expect individual projects to take mitigation steps regarding green house gas and sea level rise if there is no consistently applied standard and/or criteria for all existing and new projects, both private and public. The science in these areas is relatively new and very difficult, if not impossible, to quantitatively or effectively evaluate. Also, time frame issues need to be resolved. For instance, how does a project with an economic life of 50 or 75 years relate to a phenomenon that may take thousands if not millions of years to play out. Are there agencies better equipped to evaluate and regulate sea-level rise impacts like FEMA does with its flood zone maps? It some respects, it is similar to applying impact fees to only new development without any attempt to address a minimum level of service that would apply to all existing users. We do not support the two additions to this section unless a more consistent and comprehensive approach to green house gases and sea level rise is developed.

Finally, this section should also include a section that discusses or lists non-significant actions such as development on already zoned property; or actions that do not intensify the planned and approved land uses for the property; or actions that are in effect down-zoning to decrease the intensity of use on the property. This would provide some clarity as to where the environmental review should be focused. It will also help avoid mis-interpretations of this section in the future.

Governance:

Under the proposal, the Environmental Council will be:

1. Reduced from 15 to 7 members;

2. Administratively attached to the Department of Land and Natural Resources;
3. Appointed by and serve the Governor in an advisory capacity on all matters relating to environmental quality;
4. Serve as a liaison between the governor and the general public . . .;
5. Make recommendations concerning environmental quality to the governor;
6. Adopt Rules pursuant to Chapter 91 HRS necessary for the purposes of implementing chapters 341 and 343 HRS.

The OEQC Director will be:

1. Appointed by the Governor;
2. Work through the Council to direct the attention of State agencies on environmental problems;
3. Responsible for providing assistance for the preparation, processing, and review of environmental review documents;
4. Reviewing relevant court decisions affecting Chapter 341, 343 and the administrative rules;
5. Reviewing amendments to Chapters 341 and 343 and other relevant laws and Administrative Rules;
6. Responsible for any other information that may facilitate the efficient implementation of Chapters 341 and 343, and their administrative rules.

Section 341-B creates an environmental review special fund and specifies use of the funds. It is basically intended to generate more revenues through fees collected through the environmental review process to be used to supplement the OEQC budget.

We support the effort to move the Environmental review process outside of the line departments. At times, the public policy decision has to come from the Governor's office in order to insure that all departments are implementing the laws consistently. We question the provision that allows OEQC to charge fees to supplement their budget. We would prefer to see these types of fees, which are more regulatory in nature, be tied to a more objective matrix than the cost of processing the environmental review documents. The applicant may have no control over the efficiency or effectiveness of how the documents are processed.

Analysis and Recommendations:

The original intent was to address "problems" in the environmental review process. The proposed legislation creates more problems and uncertainty than it resolves. The amendments proposed by the University of Hawaii review may well result in virtually all settled law being thrown out the window, bringing uncertainty, delays and the opening for mischievious litigation that will delay job creating projects and clog the already busy courts with unnecessary litigation.

The goal was to improve the environmental disclosure process established in Chapter 343 HRS and the Administrative Rules. The environmental review process is not regulatory, and should not be viewed as "another layer of permitting. The environmental review process is separate and distinct from the permitting of a project.

Agreement on Findings and Recommendations:

- Exclusion of the use of State land solely for connection to utilities or rights-of-way from the 343 process
- Adding new classes of exemptions for actions that meet zoning and county general or development plans
- Require that the Accepting Authority on an EA/EIS provide more explanation on how the document met the requirements of Chapter 343 as an public disclosure document
- Move the Environmental review process outside of the line agencies and into the Governor's Office
- Consolidation of actions into one EA/EIS
- Procedures for electronic comments and response on EA/EIS

Disagreement with Findings and Recommendations:

- Seven (7) year time limit on an EA/EIS
- Expanded definition for Secondary effects or indirect effect include changes in the pattern of land use, population density or growth rate, and related effects on air, water, and other natural systems, including ecosystems
- Elimination of use of public lands or funds as an automatic trigger
- Changes to actions that "trigger" environmental review
- Requiring an EA for actions that require discretionary approvals from an agency and that may have a probable, significant, and adverse environmental effect, including:
    - Any new county general or development plans or amendments to existing county general or development plans; or
    - Any reclassification of any land classified as a conservation district or important agricultural lands.
- Definition of "action" as any program or project to be initiated by any agency or applicant that:
    - Is directly undertaken by any agency;
    - Is supported in whole or in part by contracts, grants, subsidies, or loans from one or more agencies; or
    - Involves the issuance to a person of a discretionary approval, such as a permit, by one or more agencies.
- Definition of "Permit" as a determination, order, or other document of approval, including the issuance of a lease, license, permit, certificate, variance, approval, or other entitlement for use, granted to any person by an agency for an action.
- Requiring EA/EIS for reclassifying IAL to Agriculture

- Tiering—requiring both programmatic and project specific EA/EIS for land use planning efforts and individual proejcts
- Interim Rules exempt from Chapter 91 procedures, not enough details provided for the following proposed rules:
    - Consolidation of actions into one EA/EIS
    - Procedures for creating exempt actions
    - Procedures for preparing EAs
    - Procedures for content and page limits for EAs
    - Procedures for public notices
    - Procedures for content and page limits for EISs
    - Procedures for processing EISs
    - Procedures to establish criteria for acceptance/non-acceptance of EISs
    - Procedures to appeal non-acceptance of EISs
    - Procedures for electronic comments and response on EA/EIS
    - Procedures for ROD, monitoring and mitigation
    - Procedures for interpretation of significant criteria
    - Procedures for programmatic EA/EIS and Tiering of project specific EA/EIS
    - Procedures for when supplemental EA/EIS required
    - Procedures for stale EISs (7 years from the date of acceptance of the document until all state and county discretionary approvals are fully completed for the action
    - Procedures for determining when supplemental is not required after the 7 years have lapsed
- Requiring the accepting authority to prepare a Record of Decision and monitoring as a part of the environmental review process
- Shifting the focus away from discretionary land use approvals to individual projects by considering "large" and "small" projects in the environmental review process
- Adding "green house gas emission" and "sea level rise from climate change" to the list of significant criteria
- Allow OEQC to charge fees to supplement their budget

Modified Recommendations:

- Encourage approving agencies that have discretionary approval authority to consider establishing an appropriate time frame after all discretionary approvals have been received to initiate construction
- "Discretionary Approvals" should be limited to land use approvals such as reclassification of lands at the State Land Use Commission and County zoning.
- Require agency master plans to comply with the Chapter 343 HRS environmental review process
- Develop both the broad policy direction in Chapter 343 and the specific implementation in the Administrative Rules as a "complete package"

- Develop an environmental review process that is primarily based on land use decisions rather than individual projects
- Develop generally accepted scientific standards/guidelines for "green house gas emission" and "sea level rise from climate change" that will apply to existing and new public/private projects. Insure that he science in these areas can be quantitatively and cost-effectively evaluated, i.e. not the imposition of a condition that is impossible to comply with. Determine if there are other laws or agencies better equipped to evaluate and regulate these matters.
- Include a section that discusses or lists non-significant actions such as development on already zoned property; or actions that do not intensify the planned and approved land uses for the property; or actions that are in effect down-zoning to decrease the intensity of use on the property
- Develop a range or types of fees tied to an objective matrix rather than simply the cost of processing the environmental review documents. The applicant has no control over the efficiency or effectiveness of how the documents are processed
- It should be made clear that government sponsored financing where the government is not liable for repayment of the debt is not a "use of government funds and does not trigger any Chapter 343 action.

We believe that some of the proposed changes should be incorporated in a modification of Chapter 343 HRS. We have provided a draft of our suggested changes to Chapters 341 and 343 HRS along with a summary sheet for your respective Committee's consideration (see attached).

Thank you for this opportunity to express our views.

Summary of Proposed Changes to Chapter 341 and 343, Environmental Review Process

Chapter 341 Environmental Council

Summary:

Remove the University of Hawaii Environmental Center from this section of the statues. Removes appearance of conflict for University faculty and staff, who may participate in the Environmental Center comments, and may also have consulting businesses that prepare environmental assessments and environmental impact statements under chapter 343 HRS. Given this situation, there may be questions regarding the objectivity of the University of Hawaii Environmental Center.

§341-2 Definitions. As used in this chapter, unless the context otherwise requires:

~~"Center" means the University of Hawaii environmental center established in section [304A-1551].~~

"Director" means the director of *the office of* environmental quality control.

~~"University" means the University of Hawaii. [L 1970, c 132, pt of §1; am L 2006, c 75, §12]~~

Summary:

Relocates the Environmental Council and the Office of Environmental Quality Control from the Department of Health to the Office of the Governor. In order to ensure compliance, the guidance provided to state agencies by the Council and OEQC needs to be a policy directive from the Governor as opposed to being directed by another line agency.

§341-3 Office of environmental quality control; ~~environmental center;~~ environmental council. (a) There is created an office of environmental quality control that shall be headed by a single executive to be known as the director of *the office of* environmental quality control who shall be appointed by the governor as provided in section 26-34. This office shall implement this chapter and shall be placed within the ~~department of health~~ *Office of the Governor* for administrative purposes. The office shall perform its duties under chapter 343 and shall

serve the governor in an advisory capacity on all matters relating to environmental quality control.

~~(b) The environmental center within the University of Hawaii shall be as established under section [304A-1551].~~

(c) There is created an environmental council not to exceed fifteen members. Except for the director, members of the environmental council shall be appointed by the governor as provided in section 26-34. The council shall be attached to the ~~department of health~~ *Office of the Governor* for administrative purposes. Except for the director, the term of each member shall be four years; provided that, of the members initially appointed, five members shall serve for four years, five members shall serve for three years, and the remaining four members shall serve for two years. Vacancies shall be filled for the remainder of any unexpired term in the same manner as original appointments. The director shall be an ex officio voting member of the council. The council chairperson shall be elected by the council from among the appointed members of the council.

§341-4 Powers and duties of the director. (a) The director shall have such powers delegated by the governor as are necessary to coordinate and, when requested by the governor, to direct pursuant to chapter 91 all state governmental agencies in matters concerning environmental quality.

(b) To further the objective of subsection (a), the director shall:

(1) Direct the attention of ~~the university~~ community and the residents of the State in general to ecological and environmental problems through ~~the center and~~ the council, respectively, and through public education programs;

(2) Conduct research or arrange for the conduct of research through contractual relations with ~~the center, state~~ government agencies, or other persons with competence in the field of ecology and environmental quality;

CHAPTER 343
ENVIRONMENTAL IMPACT STATEMENTS

Summary:

Establishes in the findings and purpose section of 343 that the environmental review process is intended to be a non-regulatory public disclosure process.

§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 non-regulatory public disclosure* system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations.

Summary:

Amends the definitions to read as follows:

§343-2 Definitions. As used in this chapter unless the context otherwise requires:

"Acceptance" means a formal determination that the document required to be filed pursuant to section 343-5 fulfills the definition of an environmental impact statement *as a public disclosure document*, adequately describes identifiable environmental impacts, and satisfactorily responds to comments received during the review of the statement.

~~"Action" means any program or project initiated by any agency or applicant.~~

"Agency *action*" means *program or project to be initiated by* any department, office, board, or commission of the state or

county government which is a part of the executive branch of that government.

"Applicant *action*" means any *program or project initiated by a* person who, pursuant to statute, ordinance, or rule, officially requests *discretionary* approval for a proposed action.

"Approval" means a discretionary *approval* ~~consent~~ required from an agency prior to actual implementation of an action.

"Director" means the director of the office of environmental quality control.

"Discretionary *approval* ~~consent~~" means a *land use related* consent, sanction, or recommendation from an agency for which judgment and free will may be exercised by the issuing agency, as distinguished from a ministerial *approval* ~~consent~~.

"Exempt" means any specific types of actions, because they will probably have minimal or no significant effects on the environment, are declared exempt from the preparation of an environmental assessment, including those actions that are consistent with existing zoning, county general and/or development plans.

~~"Helicopter facility" means any area of land or water which is used, or intended for use for the landing or takeoff of helicopters; and any appurtenant areas which are used, or intended for use for helicopter related activities or rights of way.~~

"Ministerial approval" means a governmental decision involving little or no judgment by the agency and involving the use of established standards, guidelines or objective measurements, usually reflected in rules, ordinances and/or other formally adopted agency procedures or policies.

~~"Power generating facility" means:~~

~~(1) A new, fossil fueled, electricity generating facility, where the electrical output rating of the new equipment exceeds 5.0 megawatts; or~~

~~(2) An expansion in generating capacity of an existing, fossil fueled, electricity generating facility, where the incremental electrical output rating of the new equipment exceeds 5.0 megawatts.~~

~~"Renewable energy facility" has the same meaning as defined in section 201N-1.~~

~~"Wastewater treatment unit" means any plant or facility used in the treatment of wastewater.~~

Summary:

Amends Section 343-5 Applicability and requires; excludes utility and access connections to government owned road rights of ways from Chapter 343; requires EA/EIS for reclassification of lands from Agriculture to urban; refocuses the 343 applicability and requirements on land uses and removes project specific triggers; clarifies that the EA/EIS trigger are based on discretionary permits for applicant actions, and that the applicants are responsible for preparation of the documents; Clarifies Agency and Applicant Actions; requires that accepting authority to make a finding that that document meets the requirements set forth in Chapter 343; allows for the preparation of an EIS without the need to prepare an EA if the proposed action is significant by both the agency and director, amendments are proposed to the appropriate sections as follows:

§343-5 Applicability and requirements. (a) Except as otherwise provided, an environmental assessment shall be required for actions that:

(1) Propose the use of state or county 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*; provided that the use of government owned road rights-of-ways solely for utility and access connections shall not require an environmental assessment or an environmental impact statement; provided further* that the agency shall consider environmental factors and available alternatives in its feasibility or planning studies; provided further that an environmental assessment for proposed uses under section 205-2(d)(11) or 205-4.5(a)(13) shall only be required pursuant to section 205-5(b);

(8) Propose reclassification of any land from agricultural to urban district by the state land use commission under chapter 205;

~~(8) Propose the construction of new or the expansion or modification of existing helicopter facilities within the State, that by way of their activities, may affect:~~

~~(A) Any land classified as a conservation district by the state land use commission under chapter 205;~~

~~(B) A shoreline area as defined in section 205A-41; or~~

~~(C) Any historic site as designated in the National Register or Hawaii Register, as provided for in~~

~~the Historic Preservation Act of 1966, Public Law 89-665, or chapter 6E; or until the statewide historic places inventory is completed, any historic site that is found by a field reconnaissance of the area affected by the helicopter facility and is under consideration for placement on the National Register or the Hawaii Register of Historic Places; and~~

~~(9) Propose any:~~

~~(A) Wastewater treatment unit, except an individual wastewater system or a wastewater treatment unit serving fewer than fifty single family dwellings or the equivalent;~~

~~(B) Waste-to-energy facility;~~

~~(C) Landfill;~~

~~(D) Oil refinery; or~~

~~(E) Power-generating facility.~~

(b) *Agency Action*--Whenever an agency proposes an action in subsection (a), other than feasibility or planning studies for possible future programs or projects that the agency has not approved, adopted, or funded, or other than the use of state or county funds for the acquisition of unimproved real property that is not a specific type of action declared exempt under section 343-6, the agency shall prepare an environmental assessment for such action at the earliest practicable time to determine whether an environmental impact statement shall be required.

(c) *Applicant Action*--Whenever an applicant proposes an action specified by subsection (a) that requires *discretionary* approval of an agency and that is not a specific type of action declared exempt under section 343-6, the agency initially receiving and agreeing to process the request for approval shall prepare *or require the applicant to prepare,* an environmental assessment of the proposed action at the earliest practicable time to determine whether an environmental impact statement shall be required; ~~provided that, for an action that proposes the establishment of a renewable energy facility, a draft environmental impact statement shall be prepared at the earliest practicable time~~. The final approving agency for the request for approval is not required to be the accepting authority.

For environmental assessments for which a finding of no significant impact is anticipated:

(3) The applicant shall respond in writing to comments received during the review, and ~~the agency shall~~

prepare a final environmental assessment to determine whether an environmental impact statement shall be required. A statement shall be required if the agency finds that the proposed action may have a significant effect on the environment. The agency shall file notice of the agency's determination with the office, which, in turn, shall publish the agency's determination for the public's information pursuant to section 343-3.

In any acceptance or nonacceptance, the agency shall provide the applicant with the specific findings and reasons for its determination. *In making its determination, the accepting authority shall provide an explanation on how the document met the requirements of Chapter 343 as a public disclosure document.* An applicant, within sixty days after nonacceptance of a final statement by an agency, may appeal the nonacceptance to the environmental council, which, within thirty days of receipt of the appeal, shall notify the applicant of the council's determination. In any affirmation or reversal of an appealed nonacceptance, the council shall provide the applicant and agency with specific findings and reasons for its determination. The agency shall abide by the council's decision.

(h) Whenever an action is determined to be significant by an agency or applicant prior to the preparation of an environmental assessment, and with the approval of the director, the agency or applicant may proceed directly to the environmental impact statement preparation process.

Summary:

Amends Section 343-6 Rules; allows for the preparation of an EIS without the need to prepare an EA if the proposed action is significant by both the agency and director; allows for the establishment of procedures for electronic comments and responses on EA/EIS, amendments are proposed to the appropriate sections as follows:

§343-6 Rules. (a) After consultation with the affected agencies, the council shall adopt, amend, or repeal necessary rules for the purposes of this chapter in accordance with chapter 91 including, but not limited to, rules that shall:

(1) Prescribe the procedures whereby a group of proposed actions may be treated by a single environmental

assessment or statement*, including the consolidation of actions into a single environmental assessment or environmental impact statement*;

(2) Establish procedures whereby specific types of actions, because they will probably have minimal or no significant effects on the environment, are declared exempt from the preparation of an environmental assessment;

(3) Prescribe procedures for the preparation of an environmental assessment;

(4) Prescribe the contents of an environmental assessment;

(5) Prescribe procedures for informing the public of determinations that a statement is either required or not required, for informing the public of the availability of draft environmental impact statements for review and comments, and for informing the public of the acceptance or nonacceptance of the final environmental statement;

(6) Prescribe the contents of an environmental impact statement;

(7) Prescribe procedures for the submission, distribution, review, acceptance or nonacceptance, and withdrawal of an environmental impact statement;

(8) Establish criteria to determine whether an environmental impact statement is acceptable or not; and

(9) Establish procedures for electronic comments and response on EA/EIS;

(10) Prescribe procedures to appeal the nonacceptance of an environmental impact statement to the environmental council.

(b) At least one public hearing shall be held in each county prior to the final adoption, amendment, or repeal of any rule.

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SB 2818
RELATING TO ENVIRONMENTAL PROTECTION

SEAN O'KEEFE
DIRECTOR – ENVIRONMENTAL AFFAIRS
ALEXANDER & BALDWIN, INC.

FEBRUARY 2, 2010

Chair Gabbard, Chair Hee, and Members of the Senate Committees on Energy & Environmental and Water, Land, Agriculture & Hawaiian Affairs:

I am Sean O'Keefe, testifying on behalf of Alexander & Baldwin, Inc. (A&B) on SB 2818, "A BILL FOR AN ACT RELATING TO ENVIRONMENTAL PROTECTION." We respectfully oppose this bill.

Under the existing Hawaii Revised Statutes (HRS) Chapter 343, Environmental Impact Statements, a proposed action which meets any of thirteen "triggers" requires an environmental assessment (EA), unless exempted, to determine whether the proposed action may have a significant effect on the environment such that an environmental impact statement must be prepared. Implementing regulations under Hawaii Administrative Rules (HAR) Chapter 11-200 establish the criteria to be used in determining whether impacts are "significant".

This bill would substantially overhaul the State's existing environmental review process, by, among other things, eliminating the existing two-tiered screening process and mandating that any action requiring discretionary approval from an agency that is deemed likely to meet any of the specified significance criteria would, unless specifically exempted by the agency, require an environmental assessment. By eliminating the

existing trigger screen, this revision will result in a huge and we believe unnecessary increase in the number of actions requiring environmental review – particularly while the new and greatly expanded exemption lists that will be required are being developed - and may exacerbate one of the perceived "problems" that the bill purports to address.

In establishing the original environmental review triggers contained in HRS Chapter 343, and in revising those triggers from time to time as it deemed necessary, the Legislature has sought to ensure that major projects with the potential for significant environmental impacts would be subject to the environmental review process. We believe that the proposed revision would cast an enormously larger net, resulting in significant "by-catch" of projects with relatively minor impacts that the existing trigger system, coupled with the judicious application of exemptions, has been largely successful in preventing. While we recognize that the proposed bill includes provisions for agency exemptions, we anticipate that the sheer number of exemptions that would become necessary to address the myriad of discretionary approvals with limited environmental impacts will dwarf the existing exemption lists and may prove to be unwieldy, increasing the likelihood of specific exemptions being subjected to legal challenges. We respectfully request that the existing "trigger" system under HRS Chapter 343 be retained and that the Legislature continue to review and revise these triggers as experience dictates (for example, to clarify the applicability of environmental review requirements to utility or right-of-way connections).

A&B would also like to express our concern regarding the proposal to allow the adoption of interim rules to implement the provisions of this bill. As proposed, implementing regulations would be adopted with no public notice, without opportunity for

public comment, and without the approval of the Governor, in direct contravention of HRS Chapter 91, Administrative Procedure. More importantly, we view this provision to be inconsistent with the spirit and purpose of HRS Chapter 343, which is intended to encourage transparency and public participation.

Lastly, A&B opposes the provisions requiring a Record of Decision for all environmental impact statements. HRS Chapter 343 is a public disclosure law, and environmental impact statements should not be remade as permit documents by the addition of the proposed Record of Decision provisions. Any mitigation measures which are deemed necessary as a result of environmental review are more correctly implemented by the accepting agency by incorporating conditions, where appropriate, into the relevant permit or approval.

A&B recognizes that there are issues with the State's existing environmental review process which can and should be addressed. However, we do not believe that these issues warrant the complete overhaul of the system as proposed in this bill. We believe that the major provisions of this bill may create confusion and uncertainty among both agencies and applicants, result in an immediate, enormous and unnecessary increase in the number of environmental assessments and environmental impact statements required to be prepared, and result in little if any environmental benefit.

Based on the aforementioned, we respectfully request that this bill be held in Committee. Thank you for the opportunity to testify.

Conservation Council for Hawai'i

Testimony Submitted to the Senate Committee on Energy and Environmental and
Senate Committee on Water, Land, Agriculture, and Hawaiian Affairs

SB S818 Relating to Environmental Protection
Hearing: Tuesday, February 2, 2010 2:45 pm Room 225

Concerns about SB 2818

Aloha. Conservation Council for Hawai'i has concerns about SB 2818, which transfers the office of environmental quality control and the environmental council from the department of health to the department of land and natural resources; reduces the membership of the environmental council from 15 to 7; establishes the environmental review special fund; revises the environmental assessment and environmental impact statement process to create a more streamlined, transparent, and consistent process. While some of these proposals have the potential to improve the environmental review process, others may significantly weaken it. For example, streamlining the process per se is not a concern when it is warranted. However, we are not convinced that adequate measures are in the bill to ensure that actions that may have a significant affect on the environment trigger the review process and do not fall through the cracks instead. A review of past significant projects and whether they require discretionary permits would be useful in determining the adequacy this trigger in SB 2818.

Mahalo nui loa for the opportunity to testify.

Marjorie Ziegler

Hawai'i's Voice for Wildlife – *Ko Leo Hawai'i no na holoholona lohlu*

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Hawaii Farm Bureau
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February 2, 2010

TESTIMONY
before the
COMMITTEE ON ENERGY AND ENVIRONMENT
Senator Mike Gabbard, Chair
Senator J. Kalani English, Vice Chair
COMMITTEE ON WATER, LAND, AGRICULTURE, AND HAWAIIAN AFFAIRS
Senator Clayton Hee, Chair
Senator Jill N. Tokuda, Vice Chair

SB 2818 Relating to Environmental Protection

Chairs Gabbard and Hee and Members of the Committees:

The Hawaii Farm Bureau Federation (HFBF) appreciates this opportunity to offer comments **in opposition** to SB 2818. We are the largest statewide non-profit general agriculture organization, representing approximately 1,600 farm and ranch family members.

HFBF recognizes that the existing environmental assessment and environmental impact statement laws may need revision. However, we do not believe that SB 2818 will make the process more streamlined, transparent, consistent, or efficient.

HFBF opposes this bill because it appears that under this proposal, any action requiring discretionary approval, including all permits, leases, licenses, and certificates from an agency could require an environmental assessment and possibly a full environmental impact statement. This could substantially delay and add significant costs to even the smallest and most minor of projects.

Because of the broad range of discretionary approvals that would otherwise trigger environmental assessments, agencies will need to greatly expand existing exemption lists in order to exclude from environmental review those projects unlikely to result in significant impacts. This will increase uncertainty in the regulated community and make the process even more difficult to administer than it is now. Will state agencies and invasive species committees be able to

react in a timely way to combat disease outbreaks and alien pest infestations that threaten not only agriculture, but public safety and well-being? Will farmers be subject to environmental review for their land and water use? At a time when Hawaii recognizes the importance of having adequate local food and energy sources, despite the increased costs of production, farmers need your support to protect them from unnecessary and crippling regulation.

HFBF finds it ironic that this bill to revise the Environmental Impact Statement law, a law which was enacted specifically to ensure that the public obtains information before activities are undertaken that may affect them, proposes the adoption of interim rules that are exempt from the public notice, public hearing, and gubernatorial approval requirements of chapter 91. We are opposed to that proposal.

HFBF supports efforts to revise the environmental review process but we believe that SB 2818, if passed, will unnecessarily increase the number of required environmental assessments and environmental impact statements rather than make the process more streamlined and efficient.

We respectfully request that this bill be held. Thank you for the opportunity to testify.

BIA-HAWAII

BUILDING INDUSTRY ASSOCIATION

94-487 Akoki Street
Waipahu, Hawaii 96797

February 2, 2010

The Honorable Mike Gabbard, Chair and Members
Committee on Energy and Environment
The Honorable Clayton Hee, Chair and Members
Committee on Water, Land, Agriculture and Hawaiian Affairs
State Senate
State Capitol, Room 225
Honolulu, Hawaii 96813

Dear Chairs Gabbard and Hee, and Members:

Subject: Senate Bill No. SB 2818 Relating to Environmental Protection

I am Karen Nakamura, Chief Executive Officer of the Building Industry Association of Hawaii (BIA-Hawaii). Chartered in 1955, the Building Industry Association of Hawaii is a professional trade organization affiliated with the National Association of Home Builders, representing the building industry and its associates. BIA-Hawaii takes a leadership role in unifying and promoting the interests of the industry to enhance the quality of life for the people of Hawaii.

BIA-HAWAII strongly opposes S.B. No. 2818 as presently drafted.

BIA-Hawaii generally concurs with the testimony submitted by the Chamber of Commerce of Hawaii. However,we prefer and support the language in SB 2830 Relating to Environmental Protection as that bill reflects our suggested revisions to SB 2818.

Thank you for the opportunity to share our views with you.

Karen I. Nakamura

Chief Executive Officer
BIA-Hawaii

Hanalei Watershed Hui

February 1, 2010
Testimony: SB2818
Senate Committees ENE/WTL

Testimony requesting deferral.

Aloha Chair Gabbard, Vice Chair English, Chair Hee, and Vice Chair Tokuda,

The Hanalei Watershed Hui testifies in support of a deferral of this bill to provide more time for thorough review of the bill's potential impact and to provide more clarity of language.

Respectfully submitted,

Makaala Kaaumoana
Executive Director

E malama kumu wai ~ Protect the source
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Testimony of
Bob Loy
Director of Environmental Programs
The Outdoor Circle
Committees on Energy and the Environment and
Water, Land, Agriculture and Hawaiian Affairs
February 2, 2010

I am Bob Loy testifying on behalf of The Outdoor Circle. We support SB2818 and consider it a major step that will help breathe new life into the Hawaii Environmental Council and the Office of Environmental Quality Control.

In recent years the Council and OEQC have been dying a death from a thousand cuts which culminated in the near collapse of the Council and have rendered the OEQC virtually impotent. Regardless of who is responsible and why this has occurred, if these two entities are left to further wither on the vine the loser will be Hawaii's most valuable resources, our fragile environment and the unique beauty of our islands.

We applaud the Herculean effort undertaken by the University of Hawaii to prepare the report that has led to the drafting of this legislation. In general we believe that SB2818 does a great job of addressing the shortcomings of the Council and the OEQC and we concur with most of what it proposes.
There are, however a few items we believe this committee should review and revise.

First is the recommendation in section 341-3 to remove OEQC and the Environmental Council from the Department of Health and place it under the Department of Land and Natural Resources. We have little faith that they will fare any better under DLNR than DOH. A better solution might be for these entities to be administratively placed under the Office of the Governor.

Still in that section, we further believe that there should be an adjustment in the number of members on the Council. The seven members called for in this legislation are too few. Council members have other obligations and some live on neighbor islands. There are always occasions when some members are not able to attend meetings. For this reason we recommend nine members which would enhance the prospects for a quorum at its meetings.

Regarding applicability in section 343-B, we are concerned that the use of the term "important agricultural lands" is not defined and might result in inappropriately exempting projects from environmental assessments on other types of agriculture lands not classified as "important."

In section 343-2 we question why the definition of "Significant Effect" has been deleted from the law. This seems to be an important term that classifies the sum of effects on the quality of the environment, the economy, communities and other important aspects of life in Hawaii.

SB2818 proposes under section 343-5, (2) (a), Agency and Applicant Requirements, that "Final Authority" rests with the Governor, for actions on State land and the mayors for actions on county lands. There appears to be no "Final Authority" granted to anyone over actions on private lands.

Later in 343-5, (2) (f), regarding extensions for public review and comment, we can foresee circumstances when 15 days will not be long enough. 30 days would be more reasonable.

SB2818 proposes in section 343-6 (a) (6) that the Environmental Council will establish rules to become effective after June 2014 that prescribe the contents and page limits for an environmental impact statement. This appears to be potentially too limiting. We recognize the need to reduce these documents to a manageable size, but limiting the number of pages might result in shortcuts and a lack of information valuable to the council in its review.

The Outdoor Circle greatly appreciates this committee's dedication to reshaping and redefining the Office of Environmental Quality and the Environmental Council. With a few changes this legislation can set the stage for greater protection of our natural resources and a more efficient, user-friendly system for reviewing projects.

The Nature Conservancy
Protecting nature. Preserving life.

The Nature Conservancy
Hawai'i Program
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Testimony of The Nature Conservancy of Hawai'i
Commenting on S.B. 2818 Relating to Environmental Protection
(Testimony provided by Mark Fox, Director of External Affairs)
Committee on Energy and Environment
Committee on Water, Land, Agriculture, and Hawaiian Affairs
Tuesday, February 02, 2010, 2:45PM, Room 225

The Nature Conservancy of Hawai'i is a private non-profit conservation organization dedicated to the preservation of Hawaii's native plants, animals, and ecosystems. The Conservancy has helped to protect nearly 200,000 acres of natural lands for native species in Hawai'i. Today, we actively manage more than 32,000 acres in 11 nature preserves on O'ahu, Maui, Hawai'i, Moloka'i, Lāna'i, and Kaua'i. We also work closely with government agencies, private parties and communities on cooperative land and marine management projects.

The Nature Conservancy supports the intent of S.B. 2818, particularly the effort to streamline the environmental review process with a discretionary approval screen, and significance and applicability criteria.

Conservation work that protects, preserves, or enhances the environment, land, and natural resources is often caught up in the same time consuming and expensive environmental review process as projects that have negative impacts on the environment. While it is appropriate that higher protection is afforded to lands with conservation value, *e.g.*, lands in the State conservation district, it often comes at a stroke too broad that does not distinguish between constructing residential homes versus engaging in conservation work to protect native forests or control invasive species. Conservation actions have to go through the same expensive level of review for environmental impacts as development.

Environmental review for the TNC's conservation work has been a significant burden:

- Each EA takes 6-12 months;
- Each EA takes ~1 FTE (part of 2-4 people's time);
- Each EA costs $100,000-$200,000;
- TNC has done 15 EAs in last 15 years;
- Five of our preserves have had two EAs each;
- One preserve is getting its third EA for conservation work.

Sierra Club
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SENATE COMMITTEE ON ENERGY AND ENVIRONMENT
SENATE COMMITTEE ON WATER, LAND, AGRICULTURE, AND HAWAIIAN AFFAIRS
February 2, 2010, 2:45 P.M.

(Testimony is 2 pages long)

TESTIMONY IN OPPOSITION TO SB 2818

Aloha Chair Gabbard, Chair Hee, and Members of the Committee:

The Hawai`i Chapter of the Sierra Club opposes SB 2818, which proposes extensive revisions to our environmental review laws (Haw. Rev. Stat. Chapter 343). While well-intentioned, this measure creates tremendous uncertainty as to what projects are subject to environmental review, damages the careful balance struck by Hawaii's current three-decade old environmental protection act, and may expose Hawai`i's fragile environment to irreparable harm.

While the Sierra Club has a lot of aloha and respect for the University of Hawai`i team that prepared the Report on Hawaii's Environmental Review System pursuant to Act 1, SLH 2008,[1] there seems to be have been a slip between the lip and cup in the actual proposed statutory revisions. While we understand the intent behind many of the proposals, numerous unintended consequences are created as a result of the strategy or language employed.[2]

The eloquent mandate of Chapter 343 is simple: it requires a truthful and public examination of a proposed action before damage to the environment occurs.[3] It fundamentally requires a fair examination: no business or governmental agency should be disproportionately impacted or treated differently -- a balance the Sierra Club fought to protect in the Superferry fiasco. Moreover this examination should be done in balance with the size, scope, and relative impact of the proposed action.

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[1] Available at http://www.capitol.hawaii.gov/session2010/lists/measure_indiv.aspx?billtype=DC&billnumber=51.

[2] Detailed comments were sent to the University of Hawai`i team. As of yet, we have not received a specific response. We are happy to share these comments with the two Senate committees.

[3] One of the important legislative purposes of Hawaii's Environmental Impact Statement law 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." (HRS §343-1.)

The proposed revisions throw off this balance. The proposed revisions trigger an environmental review only when the proposed action "may have a probable, significant, and adverse environmental effect . . . ." How do we know if this standard is met?[4] We don't. It's an imprecise, subjective, and impossible standard to govern. The fate of each proposed action will be placed squarely on agency discretion and the court system. No one -- environmentalists or the development community -- wants this level of uncertainty and arbitrariness.

Sustainability, like it or not, takes patience. We have to get it right the first time, because we know how time consuming and expensive things get when we get it wrong. Think of how much time and money we've spent on fighting invasive species. Or trying to fix bad planning. Or recover species once they reach the brink of extinction. Or reversing climate change. In Hawai`i, with our fragile environment, it is best to measure twice and cut once.

To this end, we suggest passing only proposed sections 341-B and 341-C, and deferring the remaining sections. This would provide a funding mechanism to ensure OEQC and the Environmental Council are staffed and capable of taking on the extensive regulation and guidance drafting proposed by this measure. While this funding process occurs, the stakeholders and the UH team can continue discussions.

Thank you for this opportunity to provide testimony.

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[4] Under the federal system (NEPA), a preliminary environmental study (usually called an environmental assessment) would be required so as to give decision makers some information to determine whether further study is necessary. Under the proposed measure, no analysis would be required. How does one determine potential impacts in a vacuum?

Senator Mike Gabbard, Chair, Committee on Energy and Environment

Lee Sichter
45024-1 Malulani Street
Kaneohe, Hawaii 96744

Tuesday, February 2, 2010

Opposition to S.B. No. 2818, Relating to Environmental Protection

As a land use planner and EIS author with over 30 years of professional experience in Hawaii, I respectfully request that your committee defer SB 2818 and take no further action until the UH study upon which it is substantially based is completed and resubmitted to the legislature.

Act 1 (2008) directed the UH Study Team to do the following:

1. Examine effectiveness of current system…
2. Assess the unique environmental, social, and cultural issues in Hawaii that should be incorporated into the system…
3. Address larger concerns (sustainable development, global climate change, and disaster-risk reduction)
4. Develop legislative recommendations for modernizing the system to meet international and national best practice standards.

The Study Team's examination of the effectiveness of the system (item 1) is faulty and based upon erroneous assumptions and fundamental flaws in its methodology. The study failed to include any information related to item #2. The study fails to discuss sustainable development, conduct any rigorous analysis of global climate change or examine disaster risk management. Rather, it offers two minor band-aid solutions; essentially deferring the issue to development project applicants on a case-by-case basis. And finally, while the study (and your proposed bill) offers a full range of changes to Chapter 343, several directly conflict with best practice standards, especially in the area of public participation. For these reasons, your committee should defer action on any product that was produced by the Study Team until it fulfills its legislative mandate and presents you with a study and recommendations worthy of your consideration.

In addition, and for the record, I note that SB 2818 is, for the most part, similar in content to SB 2185 and HB 2398, which emulate the recommendations presented in the UH study. However, SB 2818 differs in at least one substantive area: it proposes specific page limits on environmental review documents. I have concems about the majority of the provisions in SB 2818, which I would be pleased to discuss with your committee at length. But, in the interest of brevity, I will limit myself to the matter of page limits.

The size of environmental review documents (EAs and EISs) are largely the result of the requirements imposed upon applicants by agencies and the legislature itself. We are obligated to include a Cultural Impact Assessment because the legislature amended Chapter 343 in 1999 to require it. We are obligated to discuss a project's relationship to coastal resources because the DLNR published its Ocean Resources Management Plan (ORMP) a few years ago and now requires all environmental review documents to address it. We are obligated to address the contents of the County's Community Development Plans because the Counties require it. We are obligated to provide a comprehensive Alternatives Analysis because the Courts demand it. In short, an environmental review document reflects the level of detailed demanded by the public sector, as well as critical observers in the private sector.

What would you have us cut from an Environmental Assessment? Which is less important, the Project Description; the description of the Environmental Setting; the description of endangered plants that were previously found near the site; the Impact Analysis and the measures proposed to mitigate impacts; the Alternatives Analysis, or the discussion of a project's compliance with Governmental Regulations?

How do you suggest I describe the design and operations of a new biodiesel energy facility; the land where it would be built; the impacts it will have upon traffic, water and air quality; the design and operational alternatives that were considered during its planning; and how it complies with all federal, state and county regulatory requirements...all in 15 pages or less? For the record, the EA for the Imperium Biodiesel facility which I authored in 2007 was 93 pages long. Was that too long? Not for the staff of the Department of Transportation (the applicant), the Department of Health, the Department of Land and Natural Resources, or the Department of Planning and Permitting. They all had specific content requirements which I had to comply with.

By limiting the size of documents, you would be undermining the very intent of the Hawaii Environmental Protection Act, which is "...to alert decision makers to significant environmental effects which may result from the implementation of certain actions." (Chapter 343-1, HRS)

Speed and brevity has its place, but not in the context of environmental analysis and decision making. Please don't impose the proclivities of 21st century communication upon a professional discipline.

For these reasons, as well as the ill-conceived recommendations upon which the bill is predicated, I oppose the approval of SB 2818 and urge you to defer further action on it until the UH Study Team fulfills its legislative mandate.

Thank you for this opportunity to testify.