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SENATE COMMITTEE ON WATER, LAND, AGRICULTURE, AND HAWAIIAN AFFAIRS

TESTIMONY RE: SENATE BILL NO. 2818
RELATING TO ENVIRONMENTAL PROTECTION

February 2, 2010, 2:45 p.m.
Conference Room 225

Good afternoon Chairs Gabbard and Hee, Vice-Chairs English and Tokuda, and members of the committees:

My name is David Lane Henkin, and I am an attorney with Earthjustice. We appreciate the opportunity to offer this testimony regarding Senate Bill No. 2818, which proposes a comprehensive overhaul of Chapter 343. While Earthjustice has not yet completed its review of this lengthy bill, we have already noted several items of concern that suggest this proposal requires further vetting before being taken up by the Legislature. Chapter 343 plays a vital role in ensuring that the government does not take actions that threaten harm to Hawai'i's fragile environment and the island communities who depend on a healthy environment without first providing an honest appraisal of both the proposed action's potential impacts and alternate courses of action that might achieve similar benefits at less environmental cost. We should be cautious about jettisoning a law that, while not perfect, has served the state well for decades in promoting informed and transparent decision-making.

One of our most significant concerns involves the proposed trigger for requiring an environmental assessment ("EA"), which is set forth in new section 343-B. As proposed, an EA would not be required unless a proposed action "may have a probable, significant, and adverse environmental effect." This proposed trigger conflicts with the existing definition of "environmental assessment" in section 343-2 (which SB 2818 would retain), which states that an EA's purpose is to provide an "evaluation to determine whether an action may have a significant effect." It is nonsensical to state, as SB 2818 does, that an EA is not required unless it has first been established that there is the potential for a significant impact when the EA's whole purpose is to determine whether that potential exists. Adopting SB 2818 would doubtless spawn endless litigation over whether an EA is required, with one side invoking the definition in section 343-2 and the other the trigger language in section 343-B.

An additional problem with proposed section 343-B is that it would establish a more demanding trigger for preparation of an EA than for an environmental impact statement (EIS), which is meant to be the more thorough environmental review. As noted above, section 343-B

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would require a showing that potential significant adverse environmental effects are "probable," while the trigger for preparing an EIS – which SB 2818 retains – is merely whether such effects "may" occur. See H.R.S. § 343-5(b)(1)(D) (EIS "shall be required if the agency finds that the proposed action may have a significant effect on the environment"); SB 2818 sec. 9 (same language in proposed § 343-5(a)(1)(D)). It makes no sense to make the threshold for preparing an EA – whose purpose is to determine whether an EIS is required – higher than for preparing an EIS.

We are also concerned about SB 2818's proposal to mandate strict page limits on EAs and EISs, regardless of the complexity of the project at issue. See SB 2818 sec. 10 (limiting EAs to 15 pages and EISs for even "proposals of unusual scope or complexity" to 150 pages). There are no corresponding page limits in the federal National Environmental Policy Act, on which Chapter 343 is modeled, and for good reason. To serve the public interest, an EA or EIS must include adequate discussion of potential impacts and project alternatives to permit informed decision-making. Some projects require more discussion, others less. One simply cannot establish a "one size fits all" limit on the length of an environmental review.

The foregoing examples illustrate that SB 2818's proposed comprehensive overhaul of Chapter 343 has not yet been adequately thought through. The study on which SB 2818 is based was released to the public less than a month ago. There simply has not yet been adequate time or opportunity for those with day-to-day experience implementing Chapter 343 to raise concerns about the study's proposals and make suggestions for improvements.[1]

We respectfully submit that the hustle and bustle of the legislative session – especially one preoccupied with the current fiscal crisis – does not provide the ideal setting to evaluate far-reaching changes to one of our key environmental laws. Particularly in light of Chapter 343's broad reach, all stakeholders – agencies, developers and environmentalists alike – have a strong interest in ensuring that any fundamental changes to the law are done right the first time. Poorly drafted or conceptualized changes will only foster uncertainty and litigation.

For the foregoing reasons, we respectfully ask you to hold SB 2818 to allow for further discussion of this important issue before the Legislature takes it up. Thank you again for the opportunity to offer this testimony.

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[1] For example, any comprehensive review of Chapter 343 should evaluate revision of H.R.S. § 343-7's draconian time limits for citizens to challenge an agency's failure to comply with mandatory statutory duties. These deadlines currently preclude review after as little as thirty days. See H.R.S. § 343-7(b).