LATE

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

In view of your decision to defer decision making on SB 2818 until Tuesday, February 9, 2010, for the purpose of considering the testimony you have received, I respectfully request that you and your committee allow me to supplement my previous testimony so that you may consider the following in your deliberations.

Page 18 of the UH Study Team's Report to the Legislature states:

"In New York, California, and Washington, the applicability of environmental review laws is tied to the definition of "action". This definition includes not only projects, but plans and programs. The law applies to all government action and to private actions requiring discretionary agency approval that are likely to have an effect on the environment." [emphasis added]

On page 38 of the Report, the Study Team concludes:

"The discretionary approval screen is a direct means to determine applicability. Particularly if, as in the New York system and as recommended by this study, agencies maintain clear lists of discretionary vs. ministerial approvals, applicants and agencies will be more certain than under the current system about when review is required."

The UH Team then goes on to recommend that any discretionary approval required for a project trigger an environmental review pursuant to Chapter 343.

Unfortunately, the UH Report fails to advise the Legislature that the New York system is not nearly so broad and far reaching in its reliance upon discretionary approvals, but rather, establishes clear thresholds for discretionary approvals.

At Section 617.2 of New York State's environmental rules [Environmental Conservation Law Sections 3-0301(1)(B), 3-0301(2)(M) and 8-0113], [see: http://www.dec.ny.gov/regs/4490.html#18106] the term "action" is defined as:

> *"As used in this Part, unless the context otherwise requires:*
> *(b) Actions include:*
>
> *(1) projects or physical activities, such as construction or other activities that may affect the environment by changing the use, appearance or condition of any natural resource or structure, that:*
>
> *(i) are directly undertaken by an agency; or*
>
> *(ii) involve funding by an agency; or*
>
> *(iii) require one or more new or modified approvals from an agency or agencies;"* [emphasis added]

New York State's rules then go on to describe which approvals constitute a Type action, which would trigger an EIS:

> ## *§617.4 Type I actions*
>
> *(a) The purpose of the list of Type I actions in this section is to identify, for agencies, project sponsors and the public, those actions and projects that are more likely to require the preparation of an EIS than Unlisted actions. All agencies are subject to this Type I list.*
>
> *(1) This Type I list is not exhaustive of those actions that an agency determines may have a significant adverse impact on the environment and require the preparation of an EIS. However, the fact that an action or project has been listed as a Type I action carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS. For all individual actions which are Type I or Unlisted, the determination of significance must be made by comparing the impacts which may be reasonably expected to result from the proposed action with the criteria listed in subdivision 617.7(c) of this Part.*

(2) Agencies may adopt their own lists of additional Type I actions, may adjust the thresholds to make them more inclusive, and may continue to use previously adopted lists of Type I actions to complement those contained in this section. Designation of a Type I action by one involved agency requires coordinated review by all involved agencies. An agency may not designate as Type I any action identified as Type II in section 617.5 of this Part.

(b) The following actions are Type I if they are to be directly undertaken, funded or approved by an agency:

(1) the adoption of a municipality's land use plan, the adoption by any agency of a comprehensive resource management plan or the initial adoption of a municipality's comprehensive zoning regulations;

(2) the adoption of changes in the allowable uses within any zoning district, affecting 25 or more acres of the district;

(3) the granting of a zoning change, at the request of an applicant, for an action that meets or exceeds one or more of the thresholds given elsewhere in this list;

(4) the acquisition, sale, lease, annexation or other transfer of 100 or more contiguous acres of land by a state or local agency;

(5) construction of new residential units that meet or exceed the following thresholds:

(i) 10 units in municipalities that have not adopted zoning or subdivision regulations;

(ii) 50 units not to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works;

(iii) in a city, town or village having a population of less than 150,000, 250 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works;

(iv) in a city, town or village having a population of greater than 150,000 but less than 1,000,000, 1,000 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works; or

(v) in a city or town having a population of greater than 1,000,000, 2,500 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works;

(6) activities, other than the construction of residential facilities, that meet or exceed any of the following thresholds; or the expansion of existing nonresidential facilities by more than 50 percent of any of the following thresholds:

(i) a project or action that involves the physical alteration of 10 acres;

(ii) a project or action that would use ground or surface water in excess of 2,000,000 gallons per day;

(iii) parking for 1,000 vehicles;

(iv) in a city, town or village having a population of 150,000 persons or less, a facility with more than 100,000 square feet of gross floor area;

(v) in a city, town or village having a population of more than 150,000 persons, a facility with more than 240,000 square feet of gross floor area;

(7) any structure exceeding 100 feet above original ground level in a locality without any zoning regulation pertaining to height;

(8) any Unlisted action that includes a nonagricultural use occurring wholly or partially within an agricultural district (certified pursuant to Agriculture and Markets Law, article 25-AA, sections 303 and 304) and exceeds 25 percent of any threshold established in this section;

(9) any Unlisted action (unless the action is designed for the preservation of the facility or site) occurring wholly or partially within, or substantially contiguous to, any historic building, structure, facility, site or district or prehistoric site that is listed on the National Register of Historic Places, or that

has been proposed by the New York State Board on Historic Preservation for a recommendation to the State Historic Preservation Officer for nomination for inclusion in the National Register, or that is listed on the State Register of Historic Places (The National Register of Historic Places is established by 36 Code of Federal Regulation (CFR) Parts 60 and 63, 1994 (see section 617.17 of this Part));

(10) any Unlisted action, that exceeds 25 percent of any threshold in this section, occurring wholly or partially within or substantially contiguous to any publicly owned or operated parkland, recreation area or designated open space, including any site on the Register of National Natural Landmarks pursuant to 36 CFR Part 62, 1994 (see section 617.17 of this Part); or

(11) any Unlisted action that exceeds a Type I threshold established by an involved agency pursuant to section 617.14 of this Part. [emphasis added]

As is evidenced by these rules, New York State establishes very clear and definitive thresholds for triggering an EIS, not unlike Hawaii's current trigger system. For example, the City and County of Honolulu requires a Chapter 343 review for any change of zone application affecting more than 25 acres.

However, the UH Report fails to advise the Legislature of this distinction, and in so doing, leaves the reader of the Report with the impression that New York State triggers an EIS for any discretionary permit.

Because SB 2818 relies upon the UH Report, and includes specific provisions that would eliminate the existing Chapter 343 trigger system in favor of a broad discretionary approval trigger, I urge you and your Committee to defer action on SB 2818 until the UH Team presents a final, complete, objective and detailed analysis in its Report. While we understand that there the Legislature may have imposed some guidelines upon the UH to limit the size of their Report, it is becoming clear to me, that in the absence of full and complete disclosure, many of the UH Report's recommendations cannot be properly evaluated.

Thank you for this opportunity to supplement my previous testimony.