

**DEPARTMENT OF BUSINESS,
ECONOMIC DEVELOPMENT & TOURISM**

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AMENDED

Statement of
MARY LOU KOBAYASHI
Planning Program Administrator, Office of Planning
Department of Business, Economic Development, and Tourism
before the
HOUSE COMMITTEE ON JUDICIARY
Thursday, February 24, 2011
2:15 PM
State Capitol, Conference Room 325

in consideration of
HB 117, HD1
RELATING TO SPECIAL MANAGEMENT AREAS.

Chair Keith-Agaran, Vice Chair Rhoads, and Members of the House Committee on Judiciary.

HB 117, HD1 repeals the valuation threshold for the review of developments within special management areas (SMA). The original bill, HB 117, increased the cost threshold for the review of projects within the SMA.

The Office of Planning proposed and supported the amendments in HD1 in its prior testimony on HB 117. However, while some counties support and prefer to repeal the cost criterion for SMA permitting, other counties are concerned that a permitting process based solely on discretionary considerations without cost thresholds would require far greater effort and expense in evaluating SMA permit applications. If this measure is enacted, OP will work with the counties to ensure that the measure is

implemented consistently and help them develop uniform guidelines and criteria to aid efficient processing.

In lieu of this, we would also support an increase in the cost criterion. OP submitted an Administration bill in previous years to increase the cost criterion to \$250,000.

Thank you for the opportunity to offer these comments.



HB 117 HD 1
RELATING TO SPECIAL MANAGEMENT AREAS
House Committee on Judiciary

February 24, 2011

2:15 p.m.

Room 325

The Office of Hawaiian Affairs (OHA) **OPPOSES** HB117 HD1, which would repeal the valuation threshold for a Special Management Area (SMA) minor permit, currently set at \$125,000. The removal of the valuation threshold will result in an increase in the amount of minor SMA permit applications, which will lack the depth of information compiled for an SMA use permit through public hearings and the completion of environmental review under Chapter 343, Hawaii Revised Statutes (HRS). By not requiring any of these key procedural steps, which are meant to inform decision-making, project proponents and county staff will be alone in considering the range of impacts and mitigation measures for projects located in SMAs, as required under Hawai'i law. (HRS § 205A-26)

Through the Coastal Zone Management Act of 1972 (CZMA), Congress found, that "[t]he habitat areas of the coastal zone, and the fish, shellfish, other living marine resources, and wildlife therein, are ecologically fragile and consequently extremely vulnerable to destruction by man's alterations." (15 U.S.C. § 1451(d)) Congress declared a national policy to "preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations." (15 U.S.C. § 1452(1))

The State of Hawai'i's Coastal Zone Management Program (CZMP) was approved for CZMA purposes in 1978, following the adoption of Chapter 205A, HRS. By enacting Chapter 205A, the Legislature made it clear that in implementing the objectives of the CZMA, state and county agencies shall give full consideration to coastal hazards, ecological, cultural, historic, aesthetic, recreational, scenic, and open space values, in addition to the need for economic development. SMAs are a regulatory creation recognizing that these sensitive areas need more consideration and protection.

OHA respectfully reminds the Committee of our responsibilities and integral concerns for our beneficiaries' cultural and natural resources. Our statutory mandates include the following requirements: "[t]o advise and inform federal, state, and county officials about native Hawaiian and Hawaiian programs, and coordinate federal, state, and county activities relating to native Hawaiians and Hawaiians" (HRS, § 10-6(a)(4)), and "[a]ssessing the policies and practices of other

agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians.” (HRS, § 10-3(4)) HB117 HD1 would limit OHA’s abilities to fulfill our statutory mandates within the SMAs and the abilities of our beneficiaries to have a legitimate opportunity to provide their knowledge, expertise, and wisdom on issues that may seem minor, but often, through appropriate analysis, are found to have major public access, environmental, or cultural implications.

OHA hopes that the Legislature remembers the many times when ground disturbances within the shoreline area for private or public development, road construction, and utility easements have unearthed burials of iwi kūpuna, when roads have been planned in areas that contain federally and state listed endangered species, and the many times when such activities involve ceded lands, historic properties, or cultural resources. Although SMA minor permits are published in the Office of Environmental Quality Control’s Environmental Notice, these public notices lack project details and do not provide an avenue for community members to identify overlooked impacts to the county. Through environmental review, as required for projects exceeding the current \$125,000 threshold, these issues are largely identified and either avoided or appropriately mitigated.

For the reasons provided above, OHA urges the committee to HOLD HB 117 HD1. Mahalo for the opportunity to testify on this measure.

Bernard P. Carvalho, Jr.
Mayor



Michael A. Dahilig
Director of Planning

Gary K. Heu
Managing Director

Dee M. Crowell
Deputy Director of Planning

PLANNING DEPARTMENT
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Testimony before the House Judiciary Committee
IN SUPPORT of House Bill 117, HD 1 Relating to Special Management Areas

February 24, 2011
2:15 p.m.
Conference Room 325

By Michael A. Dahilig
Director of Planning, County of Kauai

Honorable Members of the Committee:

On behalf of the County of Kaua'i Planning Department, I offer testimony IN SUPPORT of the intent enumerated in House Bill 117, HD1.

Overtime, the \$125,000.00 threshold set forth in Chapter 205A for minor permits has become antiquated as the cost of construction has gradually climbed with growth and inflation. The Department has encountered many projects that should be considered minor in nature, especially in light of past approvals years ago for similar types of actions, but must now undergo the more intense Use Permit process due to its valuation.

The increase in Use Permit process approvals is placing more and more of a strain on personnel resources for matters that were be subject to minor administrative approval not too far in the distant past. Although we will refrain from specifically addressing any amount set forth in the bill, we believe it is time for an adjustment, as in past actions by the Legislature to accommodate for the decades-long rise in the cost of construction.

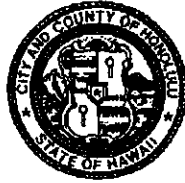
Furthermore, as HD 1 outlines, we support the additional changes that provide for administrative flexibility and county discretion in determining minor versus major activities in lieu of a fixed amount. When given a preference between a fixed cap versus county discretion, our choice would lie with those changes that provide enhanced flexibility.

Mahalo for your consideration.

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU

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DEPUTY DIRECTOR

February 24, 2011

The Honorable Gilbert S.C. Keith-Agaran, Chair
and Members of the Committee on Judiciary
House of Representatives
State Capitol
Honolulu, Hawaii 96813

Dear Chair Keith-Agaran and Members:

**Subject: House Bill 117, HD1
Relating to Special Management Areas**

We strongly support House Bill 117, HD1, which eliminates the monetary ("project valuation") threshold for development which may be processed under a Special Management Area (SMA) Minor Permit.

The current monetary threshold of \$125,000, established in 1991, is outdated, unnecessarily burdensome, and fundamentally meaningless. We have often seen small business owners and operators either forego or defer beneficial improvements because they would otherwise be subject to the more rigorous and costly SMA (Major) Use Permit process. More importantly, a threshold based primarily on the current market value of development costs is not meaningful from a regulatory perspective. The likelihood of significant adverse effects on coastal resources is a more appropriate determinate, and should be the only reason to impose an SMA Use Permit on development.

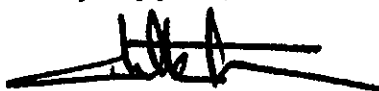
Those developments which may actually be beneficial to the coastal environment and/or pose no risk to coastal resources should not have to undergo the unnecessary cost and scrutiny of the lengthy regulatory process associated with an SMA Use Permit. Public works projects involving government land and/or money, and development involving shoreline areas will still have to go through the environmental disclosure process imposed by Chapter 343, Hawaii Revised Statutes. And all development, regardless of specific circumstances, will still be evaluated under the SMA Minor Permit process for the very purpose of determining whether there is any likelihood of adverse effects. Whenever such impacts are identified, the SMA Use Permit will be appropriately imposed; the sole purpose of which is to fully understand the impacts and impose adequate mitigative measures. Based on the above reasons, it is not necessary to retain a monetary threshold.

The Honorable Gilbert S.C. Keith-Agaran, Chair
and Members of the Committee on Judiciary
House of Representatives
Re: House Bill No. 117, HD1
February 24, 2011
Page 2

We urge you to pass this bill, but with one further amendment to establish an effective date of July 1, 2011.

Thank you for this opportunity to comment on this important matter.

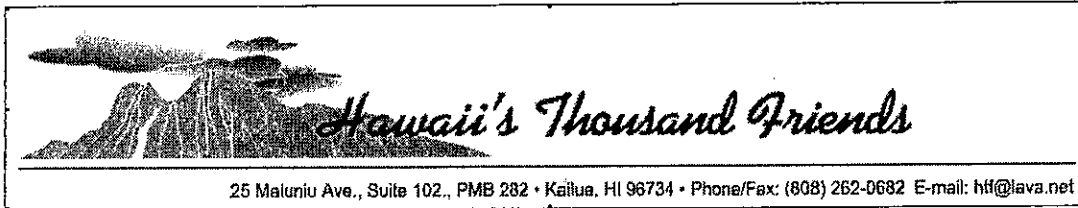
Very truly yours,

A handwritten signature in black ink, appearing to read 'D. Tanoue', is written over a horizontal line.

David K. Tanoue, Director
Department of Planning and Permitting

DKT:jmf

hb117hd1-SMA-jp.doc



February 24, 2011

COMMITTEE ON WATER, LAND, AND OCEAN RESOURCES

Rep. Gilbert Keith-Agaran, Chair

Rep. Karl Rhoads, Vice Chair

HB 117 HD1

RELATING TO SPECIAL MANAGEMENT AREAS

Committee Chair and members:

Hawaii's Thousand Friends, a statewide non-profit land and water use organization, opposes HB 117 HD1 that removes the valuation threshold for the review of minor projects within the special management areas.

HB 117 HD1 removes the public's opportunity to review proposed activities within the coastal zone and grants sole oversight, in cases where an EA is not required, to administrative review.

Currently an application with a value greater than \$125,000 triggers a public hearing and requires a SMA major permit that entails greater review of any significant adverse or cumulative impacts.

The need for a SMA permit is triggered by an action such as grading, removing materials or a structure, dredging, construction, demolition, or altering a structure within the special management area. Eliminating the dollar threshold assures that many projects that could have single or cumulative impacts on the coastal environment will be allowed without public review.

In establishing HRS 205A Coastal Zone Management the legislature found that "...special controls on developments within an area along the shoreline are necessary to avoid permanent loss of valuable resources and the foreclosure of management options, and to ensure that adequate access, by dedication or other means, to public owned or used beaches, recreation areas, and natural reserves is provided."

The Special Management Area (SMA) permit is part of the regulatory system that is the cornerstone of Hawaii's Coastal Zone Management Program. The SMA permit system provides overarching guidance and is a management tool.

A key objective of the Coastal Zone Management Program is to "Promote public involvement in coastal zone management processes." (§205A-2 (8))

HB 117 HD1 counteracts the intent of Hawaii's Coastal Zone Management Program and should be held in committee.

Testimony before the House Committee on Judiciary

**By Rouen Liu
Permit Engineer, Engineering Department
Hawaiian Electric Company, Inc.**

February 24, 2011

**House Bill 117 HD1
Relating to Special Management Areas**

Chair Keith-Agaran, Vice Chair Rhoads and Members of the Committee:

My name is Rouen Liu and I am testifying on behalf of the Hawaiian Electric Company and its subsidiaries, Hawaii Electric Light Company and Maui Electric Company.

Position:

We support HB117 HD1 which removes the valuation threshold for special management area minor permits for projects with no substantial adverse environmental or ecological effect.

Comments:

- This would benefit our operations at our power plants located in special management areas. An example is the addition of a modular office trailer to increase office space for employees assigned to a generation unit overhaul. The office trailer would have no substantial adverse environmental or ecological effect. It would be placed within the existing power plant property which is zoned for that use. Not having to go through a "major" special management area use permit would be a savings in time and money.
- Substantial adverse environmental or ecological effects appears to be the more appropriate threshold "trigger".

Thank you for the opportunity to testify on this matter.



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February 24, 2011

The Honorable Gilbert S.C. Keith-Agaran, Chair
House Committee on Judiciary
State Capitol, Room 325
Honolulu, Hawaii 96813

RE: H.B. 117, H.D. 1, Relating to Special Management Areas

HEARING: Thursday, February 24, 2011 at 2:15 p.m.

Aloha Chair Keith-Agaran, Vice-Chair Rhoads, and Members of the Committee:

I am Myoung Oh, Government Affairs Director, here to testify on behalf of the Hawai'i Association of REALTORS® ("HAR"), the voice of real estate and its 8,500 members. HAR **supports** H.B. 117, H.D. 1, which removes the valuation threshold for the review of minor projects within the special management areas.

Since the Special Management Area ("SMA") threshold amount was last adjusted in 1991, the cost of materials and labor has increased significantly over the years. This adversely affects small construction projects that may no longer qualify for the SMA minor permit solely on the basis of cost, rather than any environmental impact. H.B. 117, H.D. 1 addresses this by removing the valuation threshold, but continues to allow the county planning and permitting process to protect SMAs through zoning, shoreline setback regulation, and building permit review.

As such, HAR believes that allowing a department to determine that a project may have a substantial adverse impact, rather than providing an actual amount, provides an appropriate balance to the current practice.

Mahalo for the opportunity to testify.





Sierra Club Hawai'i Chapter

PO Box 2577, Honolulu, HI 96803
808.538.6616 hawaii.chapter@sierraclub.org

HOUSE COMMITTEE ON JUDICIARY

February 24, 2011, 2:15 P.M.
(Testimony is 2 pages long)

TESTIMONY IN STRONG OPPOSITION TO HB 117, HD1

Aloha Chair Keith-Agaran and Committee Members -

The Hawai'i Chapter of the Sierra Club, with 8,000 dues-paying members and supporters, is **strongly opposed** to HB 117, HD1. This measure would eliminate the threshold amount for a special management area minor permit and instead rely upon agency discretion to determine whether a project has "no substantial adverse environmental or ecological effect, taking into account potential cumulative effects."

Existing law protecting Hawaii's fragile coastline should not be weakened. The special management area process works to protect Hawaii's coastal zone area by ensuring some level of public input and environmental oversight.

Approximately 7 million tourists visit Hawai'i annually to experience beautiful beaches, to fish and snorkel in clean coastal waters, and to hike in lush, unspoiled valleys. There is an intimate relationship between Hawaii's pristine natural beauty and tourist arrivals. A recent survey recently noted that respondents chose open spaces, natural beaches, and undeveloped coastlines as the primary reasons they visited the island of Hawai'i. Ninety-one percent of visitors surveyed indicated that the preservation of natural areas would be an important factor in their decision to return to the islands.

The business community frequently stresses the importance of certainty in the development process. This measure does anything but provide certainty. This measure leaves the decision on what projects need a SMA permit solely up to an agency and then possibly time-consuming and expensive judicial review. No one benefits from such a process.

For example, a \$25,000 utility installation could be required to undergo SMA permitting while a multimillion dollar gentlemen's estate could be exempt.

Further, agencies may not have the benefit of an environmental review -- intended to create informed decision making and allow public participation -- because the shoreline management act is frequently the "discretionary approval" that triggers Chapter 343. In other words, the cart would be put before the horse. An agency would be tasked with deciding whether a project has an adverse environmental or ecological impact without the benefit of an environmental review (designed to answer these types of questions).

This measure would allow more development to escape the proper oversight and analysis called for in our coastal zone management act. Our fragile coastal zone deserves greater, not lesser protection. As such, we question the necessity of making it easier to allow grading, grubbing, or development without greater oversight. The Sierra Club, Hawai'i Chapter believes that the "minor permit" distinction should remain \$125,000.

Please hold HB 117, HD1. Thank you for the opportunity to testify.

February 24, 2011

The Honorable Gilbert S.C. Keith-Agaran, Chair
and Members of the Committee on Judiciary
House of Representatives
State Capitol
Honolulu, Hawaii, 96813

Dear Chair Keith-Agaran:

Subject: House Bill 117, HD1 relating to Special Management Areas

As Maui County's previous Coastal Resources and Shoreline Planner, I have intimate knowledge of the SMA and Hawaii Coastal Zone Management Act. All proposed actions within the Special Management Area (SMA) of the Islands of Molokai, Lanai, and Maui must undergo an assessment according to the SMA rules (12-203, 12-204, and 12-205 et. seq.). The assessment evaluates the proposed action's potential to have an adverse impact on ten (10) coastal resources regulated under HRS 205A, the Hawaii Coastal Zone Management Act. This assessment includes potentially adverse impacts to archaeological and historic resources, as well as negative impacts on public shoreline access and resources. The outcome of the assessment is that a proposed action is either exempt or requires a permit. In an exemption action, the burden of proof is on the applicant to show that no adverse impacts will occur on any of the ten regulated resource areas. In contrast, an SMA permit may have conditions attached to the approval to avoid, minimize or mitigate adverse impacts to these ten regulated resources.

For actions under \$125,000 the approval may be granted by the Director of Planning as a discretionary permit. Such approvals are reported to the delegating authority (i.e., the Commission) in the Director's Report. For actions more than \$125,000 the approval may be granted by the respective Island's Planning Commission. The latter provides public notification such that affected parties may testify or intervene on the proposed action.

There is no question that the \$125,000 threshold is arbitrary and has no relation to ecological or environmental gradients based on previous studies (Abbott & Lee, 2007). Furthermore, there is no question that construction costs have escalated since 1991 when the last monetary threshold for discretionary permits was established. As illustrated in the Figure 1, SMA assessments (SMX) and the resulting approval as an exemption (SM5) or Minor permit (SM2) have decreased substantially since 2004 (data posted on Maui County website, February, 2010). Yet staffing levels have increased from approximately 35 to 65 authorized positions in the Planning Department, including specialized positions such as the Small-Town Planner, Molokai Planner, and West Maui Planner. My personal experience over five years is that the primary reason for approvals being slow is that the SMA applications are incomplete and inadequate, often infused with misinformation relative to the process.

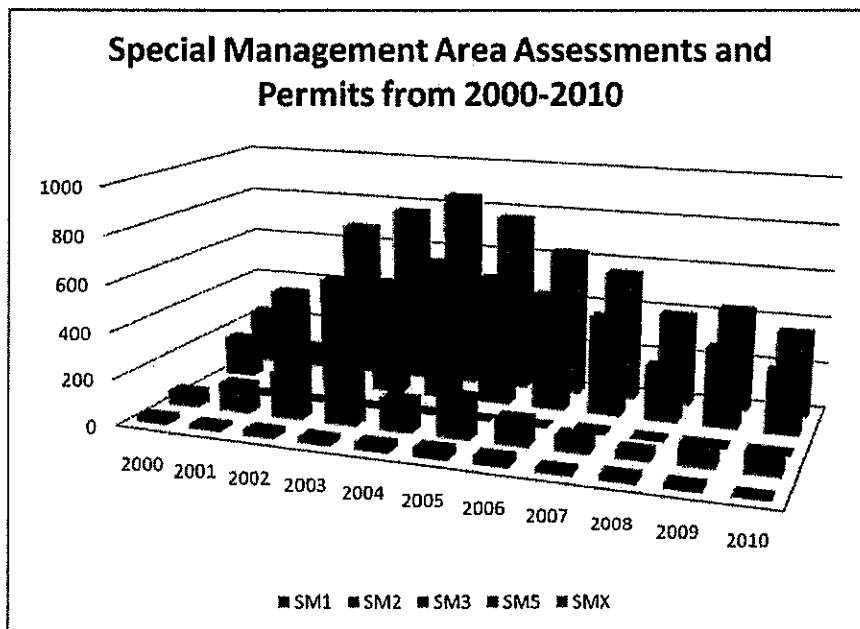


Figure 1: One decade of SMA authorizations in Maui County

- SMX: SMA assessment determines if an action is exempt or if a permit is required
- SM1: SMA Major permits approvals over \$125,000
- SM2: SMA Minor permits approvals under \$125,000
- SM3: SMA Emergency Permit approvals regardless of valuation
- SM5: SMA Exemptions authorized regardless of project valuation

Mindful that a \$½ million project in Molokai and Lanai is substantially different that one in Oahu relative to public input and transparency, as well as the legitimate right to intervene by affected parties, I recommend an alternative solution.

First, revise HRS 205A-22 Definitions for “Not-Development” to exclude the construction of new oceanfront single-family residences. Such residences have a disproportionately adverse impact on coastal resources, public shoreline access and historic and cultural resources. Furthermore, such residences are far more likely to be subject to coastal hazards during the buildings lifespan than those located on mauka lands. As such, new oceanfront residential construction should be transparent and undergo public review, discussion, and approval by the applicable authority, such as the Island’s Planning Commission. To accomplish this, the definition of Single Family Residence should exclude “oceanfront residences”. The individual counties can devise their own definition for an oceanfront residence.

Second, revise the definition of "Special management area use permit" to "Special management area major permit". The counties already differentiate between major and minor permits in their computer databases based on a required valuation in their SMA rules (e.g., 12-202-12(c)(2)(H)) of the Special Management Area Rules for the Maui Planning Commission). Note that Lanai and Molokai, as well as Kauai have similar valuation criteria and requirements in their rules. Furthermore, the amount of staff time expended on updating all previous SMA minor permits or deciphering which threshold was used when applicants propose improvements to the structure would offset any perceived permit streamlining gained by altering the arbitrary monetary threshold.

Third, introduce a third discretionary level permit entitled "Special management area delegated permit" into the HRS 205A-22 definitions. The delegated permit would be valued between \$125,000 and \$500,000. Furthermore, the applicant would be required to publicly notice the proposed improvement (in concert with the present SMA "major" use permit process) and place a large, visible sign in a publicly visible area at the site (as the Island of Hawaii present requires for SMA Major permit applications). While said permit would be issued by the Planning Department's Director, the final approval would be pursuant to acceptance of the Director's Report to the respective Planning Commission, thereby allowing affected parties to intervene if their rights are adversely affected or testify in the event that community members have concerns.

This system would allow for transparency, be sensitive to each Island's community interest, and would streamline those projects that are unlikely to have significant adverse impacts on coastal resources regulated under HRS 205A. Furthermore, the addition of a new permit category will help each county incorporate processing within their existing computer, paper, and database frameworks, would be in keeping with the goals, objectives, policies and intent of HRS 205A, and would not be in conflict with established case law and court decisions regarding minor and 'major' use permits and the respective approving authority.

Please feel free to contact me if I can be of further assistance. Thank you for your consideration.

Mahalo!

Thorne Abbott
Coastal Resources and Shoreline Planner for Maui County, including the islands of Maui, Molokai and Lanai, from 2004-2009.

TEC Inc., Suite 1550, Pauahi Tower, 1003 Bishop Street, Honolulu, HI 96813
Telephone: 808-528-1445
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§205A-22 Definitions. As used in this part, unless the context otherwise requires:

"Development" means any of the uses, activities, or operations on land or in or under water within a special management area that are included below:

- (1) Placement or erection of any solid material or any gaseous, liquid, solid, or thermal waste;
- (2) Grading, removing, dredging, mining, or extraction of any materials;
- (3) Change in the density or intensity of use of land, including but not limited to the division or subdivision of land;
- (4) Change in the intensity of use of water, ecology related thereto, or of access thereto; and
- (5) Construction, reconstruction, demolition, or alteration of the size of any structure.

"Development" does not include the following:

- (1) Construction of a single-family residence that is not part of a larger development, excluding the construction of a new oceanfront residence;
- (2) Repair or maintenance of roads and highways within existing rights-of-way;
- (3) Routine maintenance dredging of existing streams, channels, and drainage ways;
- (4) Repair and maintenance of underground utility lines, including but not limited to water, sewer, power, and telephone and minor appurtenant structures such as pad mounted transformers and sewer pump stations;
- (5) Zoning variances, except for height, density, parking, and shoreline setback;
- (6) Repair, maintenance, or interior alterations to existing structures;
- (7) Demolition or removal of structures, except those structures located on any historic site as designated in national or state registers;
- (8) Use of any land for the purpose of cultivating, planting, growing, and harvesting plants, crops, trees, and other agricultural, horticultural, or forestry products or animal husbandry, or aquaculture or mariculture of plants or animals, or other agricultural purposes;
- (9) Transfer of title to land;
- (10) Creation or termination of easements, covenants, or other rights in structures or land;
- (11) Subdivision of land into lots greater than twenty acres in size;

- (12) Subdivision of a parcel of land into four or fewer parcels when no associated construction activities are proposed; provided that any land which is so subdivided shall not thereafter qualify for this exception with respect to any subsequent subdivision of any of the resulting parcels;
- (13) Installation of underground utility lines and appurtenant aboveground fixtures less than four feet in height along existing corridors;
- (14) Structural and nonstructural improvements to existing single-family residences, where otherwise permissible;
- (15) Nonstructural improvements to existing commercial structures; and
- (16) Construction, installation, maintenance, repair, and replacement of civil defense warning or signal devices and sirens;

provided that whenever the authority finds that any excluded use, activity, or operation may have a cumulative impact, or a significant environmental or ecological effect on a special management area, that use, activity, or operation shall be defined as "development" for the purpose of this part.

"Special management area" means the land extending inland from the shoreline as delineated on the maps filed with the authority as of June 8, 1977, or as amended pursuant to section 205A-23.

"Special management area emergency permit" means an action by the authority authorizing development in cases of emergency requiring immediate action to prevent substantial physical harm to persons or property or to allow the reconstruction of structures damaged by natural hazards to their original form; provided that such structures were previously found to be in compliance with requirements of the Federal Flood Insurance Program.

"Special management area minor permit" means an action by the authority authorizing development the valuation of which is not in excess of \$125,000 and which has no substantial adverse environmental or ecological effect, taking into account potential cumulative effects.

"Special management area delegated permit" means an action by the authority authorizing development the valuation of which exceeds \$125,000 but is not in excess of \$500,000 ~~\$125,000~~ and which has no substantial adverse environmental or ecological effect, taking into account potential cumulative effects; provided that such action is publicly noticed pursuant to section 205A-29, and signage visible to the public indicating the proposed action and the decision-making authority, is posted

within 30 calendar days of the application and remains posted until the authority has made a decision.

"Special management area major use permit" means an action by the authority authorizing development the valuation of which exceeds ~~\$125,000~~ \$500,000 or which may have a substantial adverse environmental or ecological effect, taking into account potential cumulative effects.

JUDtestimony

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, February 23, 2011 10:46 AM
To: JUDtestimony
Cc: palmtree7@earthlink.net
Subject: Testimony for HB117 on 2/24/2011 2:15:00 PM

Testimony for JUD 2/24/2011 2:15:00 PM HB117

Conference room: 325
Testifier position: oppose
Testifier will be present: No
Submitted by: janice palma-glennie
Organization: Individual
Address:
Phone:
E-mail: palmtree7@earthlink.net
Submitted on: 2/23/2011

Comments:

This bill could create a litigious environment as well as uncertainty as to the fees a user should pay that are related to potentially environmentally damaging projects. Please vote "no" on it.
mahalo.