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CONTROL

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COMMITTEE ON ENERGY AND ENVIRONMENT

HB 2611, RELATING TO ENVIRONMENTAL IMPACT STATEMENTS

**Testimony of Gary Hooser
Director of the Office of Environmental Quality Control**

February 14, 2012

1 **Office's Position:** Support intent however oppose existing language and offer amendments.

2 **Fiscal Implications:** None

3 **Purpose and Justification:** This measure proposes to permanently amend chapter 343, Hawaii
4 Revised Statutes to clarify and make permanent current exemptions for secondary actions that
5 occur within the highway or public right-of-way.

6 While the OEQC supports the intent of allowing the exemption of minor highway
7 improvements occurring within a highway or public right-of-way, we feel fundamentally that
8 this measure is not necessary as provisions for exempting minor and inconsequential actions
9 from Chapter 343 already exist.

10 Several testifiers including the DOT attest to situations where someone would have to do
11 an expensive environmental review to construct a "home driveway access" and that onerous and
12 expensive EA's and EIS's for "projects with insignificant environmental impacts" were required
13 under existing law. With all due respect to those testifying to that effect, these claims reflect not

1 a flaw in the law that needs correcting via the legislative process, but rather a lack of
2 understanding of the basic law itself.

3 Additional testimony claims that this legislation is needed because the courts have ruled
4 that using a public right-of-way “triggers” an EA/EIS. Again this statement indicates a clear
5 misunderstanding of the law. EA’s and EIS’s are not “triggered”. Chapter 343 may be triggered
6 but at that point the agency then chooses which of three paths to take next – either they can 1)
7 exempt the project (if it is deemed to be minor and have no or negligible impacts, or they can
8 order an2) EA or an 3) EIS. No minor driveway or right of way construction is required to
9 conduct an EA or an EIS unless the agency determines that one is necessary.

10 The primary purpose and focus of Chapter 343 is based on evaluating environmental
11 impacts. The existing law is clear that agencies already have the authority to quickly exempt any
12 project or action that is expected to have no or negligible environmental impacts. While most
13 minor driveway ingress and egress type highway improvements fall into this category, there is a
14 point somewhere however depending on the size, scope, location and possibly other factors –
15 where an exemption is not appropriate and a proper environmental review is needed. For this
16 reason, the OEQC opposes “one size fits all” exemptions and believes that each project/action
17 must be evaluated on the potential impacts and not exempted because it meets a certain legal
18 definition and therefore is exempt regardless of what those impacts might be. It is the OEQC’s
19 clear belief that this provision exempting actions based on the inter-relationships between
20 primary actions, secondary actions, ministerial permits and discretionary permits is not necessary
21 and in fact because of the convoluted nature of its language is actually problematic.

22 However, if the legislature deems that they would like to continue supporting this
23 approach we offer the following suggestions for amendments:

1 a) On page one line 11 amend to read “highway, agency may exempt that secondary
2 action from this chapter” and delete existing language that states “that secondary
3 action shall be exempt from this chapter”

4 The reason for this amendment is to make it clear this is not a one size fits all rubber
5 stamp exemption and the agency must first at least look at the proposed action and make a
6 conscious decision to exempt.

7 b) On page one line 12: Suggest deleting “provided that the applicant shall submit
8 documentation from the appropriate agency confirming that no further
9 discretionary approvals are required.” and replacing with language that states
10 “provided that the secondary actions environmental impacts are not significant”.

11 This provision will ensure that larger highway projects that may in fact have significant
12 environmental impacts are properly evaluated and not simply automatically exempted without
13 regards to their size, scope, location etc.

14 c) On page two line 10: Amend the definition of Secondary Action to - “Secondary
15 action refers to any infrastructure within the highway or public right-of-way that
16 is ancillary or incidental to the primary action.

17 This clarification ensures that there is no misunderstanding as to the intent of this
18 measure.

19 Thank you.



STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

IN REPLY REFER TO:

February 14, 2012

HB 2611
RELATING TO ENVIRONMENTAL IMPACT STATEMENTS

HOUSE COMMITTEE ON ENERGY & ENVIRONMENTAL PROTECTION

The Department of Transportation strongly supports Administration House Bill 2611 to permanently amend Chapter 343, Hawaii Revised Statutes, to clarify current exemptions for secondary actions and require that applicants prepare environmental assessments when required.

The amendment will save the Department of Transportation unnecessary work effort and man hours on the processing of minor work project reviews. Without the exemption, we're looking at a range of processing times and costs from several months and several thousands of dollars (for simple projects such as a home driveway access) to possibly a year or more and tens of thousands of dollars if a consultant needs to be retained to process an environmental review due to any opposition to the minor work project.

The Department of Transportation has been inundated with a large number of minor work project reviews that increases the processing time for applications affecting rights-of-way. Amending this chapter will relieve the DOT from conducting an environmental assessment (EA) when they are not the initiators of the EA process and will prevent unnecessary delays for actions that are clearly exempt from the EA requirements.

Thank you for the opportunity to provide testimony.





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MĀNOA

February 13, 2012
RL: 2281

HB 2611
RELATING TO ENVIRONMENTAL IMPACT STATEMENTS

House Committee on Energy and Environmental Protection
Public Hearing – Tuesday, February 14, 2012
9:00 a.m., State Capitol, Conference Room 325

By
David Penn, Environmental Center
COMMENTS ONLY

Dear Chair Coffman, Vice Chair Kawakami, and committee members,

The Environmental Center agrees that it would be useful to reduce application processing times, project delays, and costs associated with proposed secondary actions affecting state highways and other rights-of-way. However, we suggest that it may be more appropriate and transparent for the Department of Transportation (DOT) to address this issue through the existing exemption process provided under Hawaii Revised Statutes (HRS) Chapter 343, rather than by promoting a blanket legislative exemption for a potentially broad range of future actions and their unforeseen consequences.

The statutory role of the Environmental Council is to help agencies like DOT to clarify and institutionalize exemptions from certain requirements of Hawaii's environmental review process. DOT already has a comprehensive exemptions list, approved by the Environmental Council, of actions that are likely to have "minimal or no significant effects on the environment." HRS § 343-6(a)(2). It seems contrary to the purpose of Chapter 343, HRS—and to historic DOT administrative practice—to exempt an action without first determining that the action would have minimal or no significant environmental impacts.

HB2611 proposes that a secondary action "shall" be exempt from the environmental review process under chapter 343, HRS, "provided that the applicant shall submit documentation from the appropriate agency confirming that no further discretionary approvals are required." This language does not appear to support the purpose and intent of Chapter 343, HRS, because it substitutes the mere lack of a requirement for discretionary approval for the proper consideration of action-specific environmental impacts.

However, if the legislature decides to move forward with this measure, we suggest amending it to include a provision for public disclosure of the proposed secondary action and its "documentation from the appropriate agency confirming that no further discretionary approvals are required." Also, please note that the Environmental Center supports the housekeeping language proposed for Chapter 343-5(c) and 343-5(d).

RL: 2281

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Thank you for considering our testimony on this proposed legislation. Please note that our testimony is advisory only and should not be construed to represent an official institutional position of the University of Hawaii.

Testimony before the House Committee on Energy and Environmental Protection

By Kerstan Wong
Manager, Engineering Department
Hawaiian Electric Company, Inc.

February 14, 2012

House Bill 2611
Relating to Environmental Impact Statements

Chair Coffman, Vice Chair Kawakami and Members of the Committee:

My name is Kerstan Wong 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 the intent of HB2611. However, we have concerns on the language as written in one particular section of the bill and offer comments and an amendment.

Comments:

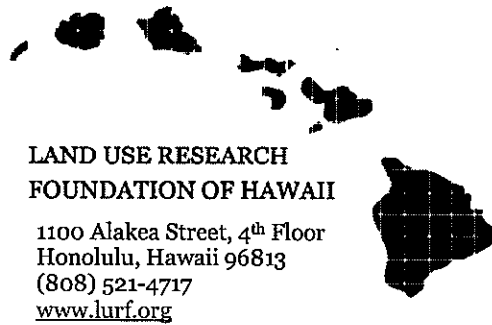
Current language in the bill requires the applicant to submit documentation from the appropriate agency confirming that no further discretionary approvals are required. In many cases, the applicant is the utility simply providing service as requested by an Owner or Developer of the primary action. Examples of a primary action could be a new residential development or improvements to an existing building.

Therefore, the utility is not the best entity to submit documentation from the appropriate agency as the utility would have minimum details about the primary action of the Owner or Developer. We suggest changing the language on page 1, line 12 to read:

12 ... provided that the applicant *for the primary action* shall submit
13 *documentation from the appropriate agency confirming that no*
14 *further discretionary approvals are required.*

With the suggested change, the Owner or Developer of the primary action would be responsible for submitting documentation confirming that no further discretionary approvals are required. We feel the Owner or Developer of the primary action is in the best position to comply with the requirements of the section since they are the entity that is causing the secondary action to occur.

Thank you for the opportunity to testify on this matter.



LAND USE RESEARCH
FOUNDATION OF HAWAII

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February 12, 2012

Representative Denny Coffman, Chair
Representative Derek S.K. Kawakami, Vice Chair
House Committee on Energy and Environmental Protection

Support of HB 2611, Relating to Environmental Impact Statements (“EIS”)
(Permanently amends HRS Chapter 343 to clarify current exemptions for secondary actions.)

Tuesday, February 14, 2012, 9:00 a.m., in CR 325

My name is Dave Arakawa, and I am the Executive Director of the Land Use Research Foundation of Hawaii (LURF), a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. One of LURF’s missions is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii’s significant natural and cultural resources and public health and safety.

LURF appreciates the opportunity to provide testimony **in strong support of HB 2611.**

HB 2611. This bill permanently amends Chapter 343, Hawaii Revised Statutes (“HRS”), to clarify current exemptions for secondary actions within the highway or public right-of-way and requires that applicants prepare Environmental Assessments (“EA”) when required.

LURF’s Position. LURF supports this bill, as it would allow the Department of Transportation (“DOT”) and the Department of Health’s Office of Environmental Quality Control (“OEQC”) to avoid unnecessary work effort on the processing of minor secondary actions which would clearly be exempt from EA requirements.

In the recent past, the DOT and the OEQC have been inundated with a large number of minor secondary action project reviews, which greatly increase the processing time and expense for applications affecting rights-of-way, including, in some cases, requiring EAs for telephone and cable telephone connections.

Sufficient oversight will continue to exist for “primary actions,” on private property which is outside of the highway or public right of way, as applicants for such actions will continue to be required to prepare an EA or and Environmental Impact Statement relating to the proposed action at the earliest practicable time.

For the reasons stated above, LURF is in **support of HB 2611**, and respectfully urges your favorable consideration of this bill.

Thank you for the opportunity to present testimony regarding this matter.



**Testimony to the House Committee on Energy & Environmental Protection
Tuesday, February 14, 2012
9:00 a.m.
State Capitol - Conference Room 325**

**RE: HOUSE BILL NO. 2611 RELATING TO ENVIRONMENTAL IMPACT
STATEMENTS**

Chair Coffman, Vice Chair Kawakami, and members of the committee:

The Chamber supports H.B. No. 2611 which proposes to permanently amend chapter 343, Hawaii Revised Statutes to clarify current exemptions for secondary actions and require that applicants prepare environmental assessments when required.

The Chamber is the largest business organization in Hawaii, representing more than 1,000 businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of its members, which employ more than 200,000 individuals, to improve the state's economic climate and to foster positive action on issues of common concern.

The legislation is needed because of the recent court decisions where any action that involved the use of a state or county road right of way was a "trigger" for the EA/EIS. Because an access improvement, easement, drainage, waterline, etc., is now viewed as a use of state or county lands when it touches (over, under, across) a state or county road right of way, the entire project is then required to prepare and environmental assessment for the entire project.

Requiring the preparation of a 343 HRS document for projects with insignificant environmental impacts makes a mockery of the EA/EIS process. If the legislative intent was that an EA/EIS would be required any time the project touches a public road, then the law should be changed to require an EA/EIS for all projects because all projects, at some point, connect to a public road.

The Chamber strongly supports H.B. No. 2611 which effectively excludes the installation and development of infrastructure and utilities within an existing public right-of-way or highway as the use of state or county lands for purposes of requiring an environmental assessment.

Thank you for this opportunity to express our views.



Testimony to the House Committee on Energy & Environmental Protection

February 14, 2012

9:00 a.m.

Capitol, Room 325

House Bill No. 2611, Relating to Environmental Impact Statements

Chair Coffman, Vice-Chair Kawakami, and members of the Committee:

My name is Gladys Quinto Marrone, Government Relations Director for 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 supports** H.B. No. 2611, which proposes to permanently amend chapter 343, Hawaii Revised Statutes to clarify current exemptions for secondary actions and require that applicants prepare environmental assessments when required.

The legislation is needed because of the recent court decisions where any action that involved the use of a state or county road right of way was a "trigger" for the EA/EIS. Because an access improvement, easement, drainage, waterline, etc., is now viewed as a use of state or county lands when it touches (over, under, across) a state or county road right of way, an environmental assessment is required for the entire project.

Requiring the preparation of a 343 HRS document for projects with insignificant environmental impacts makes a mockery of the EA/EIS process. If the legislative intent was that an EA/EIS would be required any time the project touches a public road, then the law should be changed to require an EA/EIS for all projects because all projects, at some point, connect to a public road.

BIA-Hawaii **strongly supports** H.B. No. 2611.

Thank you for this opportunity to express our views.



Sierra Club Hawai'i Chapter

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HOUSE COMMITTEE ON ENERGY & ENVIRONMENTAL PROTECTION

February 14, 2012, 9:00 A.M.
(Testimony is 2 pages long)

TESTIMONY OPPOSING HB 2611 WITH PROPOSED AMENDMENTS

Aloha Chair Coffman and members of the Committee:

The Sierra Club, Hawai'i Chapter, with 10,000 dues paying members and supporters statewide, **opposes** HB 2611. This bill continues an statutory exemption from the environmental review process because of the Department of Transportation's inability to follow the law like other agencies, developers, or the public.

The Department of Transportation openly acknowledges its projects are one of the largest causes of the spread of invasive species throughout Hawai'i. Accordingly, DOT should be held to a higher standard for the environment, not a lower one.

Approximately three years ago, perhaps as a result of the Superferry decision, DOT argued that it could not determine what projects -- normally subject to an exemption from Chapter 343 -- might have secondary impacts that impact the environment. As applied, normally an exemption, like an exemption for all fencing on conservation land, would have a catch-all, "unless this project is so large in scope and has the potential of adversely impacting the environment." DOT claimed it could not perform this analysis.

There is no logical basis for DOT's inability to determine whether a traffic connection or the like would impact the environment based on the cumulative impact or the unusual nature of the specific application. Accordingly, this Committee should hold this bill and not continue this farce of statutory language.

To the extent this Committee decides to continue this exemption, the carefully crafted language used in prior years should be used. DOT's amendments appear deliberate to expand the reach of the "secondary" exemption, perhaps so as to allow the tail to wag the dog.

Proposed Amendments (proposed amendments are bolded):

"§343- Exception to applicability of chapter. (a) Notwithstanding any other law to the contrary, ~~[if at the time an application for a secondary action is submitted, a]~~ any primary action that requires a permit or approval ~~{that}~~ is not subject to a discretionary consent, and that **involves a secondary action that** is ancillary and limited to the installation, improvement, renovation, construction, or development of infrastructure within an existing public right-of-way or highway, that secondary action shall be exempt from this chapter[.]; provided that the applicant shall submit documentation from the appropriate agency confirming that no further discretionary approvals are required.

(b) As used in this section:

"Discretionary consent" means:

- (1) An action as defined in section 343-2; or
- (2) An approval from a decision-making authority in an agency, which approval is subject to a public hearing.

"Infrastructure" includes waterlines and water facilities, wastewater lines and wastewater facilities, gas lines and gas facilities, drainage facilities, electrical, communications, telephone, and cable television utilities, and highway, roadway, and driveway improvements.

"Primary action" refers to any action outside of the highway or public right-of-way that is on private property.

"Secondary action" refers to any infrastructure within the highway or public right-of-way **that is ancillary to the primary action.**

Mahalo for the opportunity to testify.