

SB 107

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February 2, 2011

The Honorable Mike Gabbard, Chair
The Honorable J. Kalani English, Vice Chair
Senate Committee on Committee on Energy
and Environment
Hawaii State Senate
Hawaii State Capitol
Honolulu, Hawaii 96813

Dear Chair Gabbard, Vice Chair English and Members of the Committee:

Re: Senate Bill 107, Proposing an Amendment to Article XI,
Section 9, of the Constitution of the State of Hawaii to
Reaffirm and Strengthen the State's Commitment to
Environmental Rights

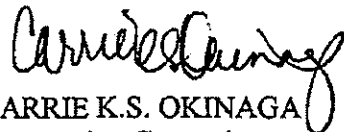
The City and County of Honolulu Department of the Corporation Counsel supports the intention of Senate Bill ("S.B.") 107, which proposes a constitutional amendment to reaffirm and strengthen the State's commitment to environmental rights. However, we oppose S.B. No. 107 in its present form because we are concerned with certain provisions of the Bill as currently drafted.

Article XI, Section 9, of the State Constitution currently ties the definition of a "clean and healthful environment" to existing laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. The proposed amendment deletes this legal definition and substitutes in its place an esoteric, overly broad and entirely subjective definition "based on mutual respect and justice for all peoples, free from any form of subconscious or institutional discrimination." Also, the proposed deletion of reasonable limitations and regulations as provided by law on enforcement actions effectively results in awarding legal standing to all citizens. This may result in an unintended consequence of potentially meritless lawsuits overwhelming our already overburdened judicial system.

The Honorable Mike Gabbard, Chair
The Honorable J. Kalani English, Vice Chair
Senate Committee on Committee on Energy
and Environment
February 2, 2011
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We appreciate the opportunity to come before you to submit our written
testimony on S.B. No. 107.

Very truly yours,



CARRIE K.S. OKINAGA
Corporation Counsel

CKSO:ml

IRON WORKERS STABILIZATION FUND

Fax No. – 586-6659

February 2, 2011

Hon. Mike Gabbard, Chair
Committee on Energy and Environment
Room 201 – State Capitol
Honolulu, HI 96813

Re: SB 107 – Proposing an amendment to Article XI, Section 9, of
the Constitution of the State of Hawaii to reaffirm and strengthen
the state's commitment to Environmental Rights

Dear Chair Gabbard & committee members:

As all of Hawaii experienced within the past month, massive, severe and crushing rain hammered many parts of our island chain, including the Waianae Coast. The environmental problems, especially the extensive spread of medical waste generated by the breach at the Waimanalo Gulch Landfill above Ko Olina had been receiving almost daily media coverage. WGL is the depository for all of Oahu's *household* o'pala. As prominently reported, medical waste was found as far down the coast in the waters off of Makaha, approximately 10 miles away from this household landfill.

Although not as widely reported, a severe breach at the PVT Landfill, that takes in all of Oahu's *construction, demolition and asbestos* o'pala, also caused significant environmental and health concerns because hazardous waste materials flowed freely onto Nanakuli Town which is adjacent to the landfill. As we have been informed, even a refrigerator, came tumbling down from at least 750 feet away, the required and designated "buffer zone." Needless to say, storm water also ran rampant through the neighborhood.

Despite the obvious environmental and health hazards created by the breach at these 2 landfills on the Waianae Coast, our present constitutional and statutory framework makes it difficult for anyone, especially private citizens, to bring judicial action to right the wrong that has been committed. Our constitutional and statutory framework should be amended to permit necessary judicial action without impediments blocking the way.

We believe that a constitutional amendment to Article XI, Section 9, would pave the way for the citizens of the Waianae Coast and others similarly situated, to gain access to our courts to bring necessary action. An extensive treatise written by Chasid M. Sapolu, a 2010 graduate of the William S. Richardson School of Law, and a product of

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the Waianae Coast, thoroughly and systematically discusses why there is a need for such an amendment to our constitution.

As Mr. Sapolu writes in the *Asian-Pacific Law & Policy Journal*, the Waianae Coast is home to many ethnic populations, including native Hawaiian, other Pacific islanders, and Asians. And, the coast is the home to 11 of 18 sewage treatment plants, active landfills, and power plants on Oahu. It can be safely said that the Waianae Coast is the "dumping ground" for o'pala within the City and County of Honolulu. Mr. Sapolu concludes that there is "*environmental injustice*" on the Waianae Coast.

In his treatise, the author points out that the percentage of residents on the Waianae Coast living below the poverty level is 21.9 percent, more than double that of all other residents that stands at 9.9 percent. He goes further to express that most landfills in the United States are situated near neighborhoods where the poor and minority, who do not have the means to initiate court action, reside.

Mr. Sapolu guides us through the development of the law in Hawaii expanding native Hawaiian rights, commencing from certain amendments that were established during the 1978 constitutional convention. Specifically, he refers to the amendment to Article XI, Section 9, which "guarantees every person the *right to a clean and healthful environment.*" Despite this language, our present constitutional and statutory scheme makes it extremely difficult for native Hawaiians who have suffered *environmental injustice* to have their grievances aired in court. While going through his thorough discussion, the author examines the Hawaii Supreme Court cases of Kalipi v. Hawaiian Trust Company, Ltd. decided in 1982, and, Ka Pa'akai o ka'aina v. State of Hawai'i Land Use Commission decided in 2002.

The author concludes that an amendment to Article XI, section 9 would reaffirm and strengthen the state's commitment to environmental justice for certain populations that are disproportionately impacted by harmful environmental actions. We believe that such an amendment is necessary to protect the environmental rights of native Hawaiians, ethnic minorities and low income residents on the Waianae Coast and throughout the State of Hawaii. This would insure that all residents of Hawaii will have a healthy environment. This constitutional amendment will provide the legal means by which we can fulfill our state motto - "*ua mau ke ea o ka aina ika pono*", the life of the land is perpetuated in righteousness.

Sincerely,



T. George Paris
Managing Director

Honorable Chair, Senator Gabbard, Honorable Vice-Chair, Senator English,
Members of the Senate Committee on Energy and Environment:

I oppose SB 107, which proposes to amend the current state constitutional right to a clean and healthful environment. I ask that the bill be held or modified.

The current constitutional right is very important and one that I care deeply about, even though I am retired, for now. Most of my career has involved environmental law. I practiced environmental law as a state deputy attorney general from about 1975-1981 and 1990-2003, and as a member of the public attended and wrote to the 1978 constitutional convention committee that drafted the current constitutional provision. (As a deputy AG I practiced personal injury law and eventually headed the AG's Litigation Division through most of the 80's) I also served as deputy director for environmental health from 2003-2010. In law school in the early 70s I studied environmental law under professor Joseph Sax, a leading proponent of the public trust theory, and I participated in the first Earth Day in 1970.

1. The bill surrenders legislative power to the courts by deleting the current language, "as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources." The committee should remove this proposed deletion.

The history of that phrase, affirmed last year by our Supreme Court, shows that the legislature, and administrative agencies to the extent that the legislature delegates power to them, adopt the laws and rules that set the content of the constitutional right. *County of Hawaii v. Ala Loop Homeowners*, S. Ct. # 27707 (July 9, 2010), http://www.courts.state.hi.us/docs/opin_ord/sct/2010/jul/27707ada.pdf, pp. 50-59 Without that phrase, the courts will define the content of the right through individual cases. Furthermore, since such court rulings will matter of constitutional law, the legislature will only be able to modify them by way of constitutional amendments.

Preserving the legislature's and departments' powers to establish the content of environmental rights means more predictability, and that should aid people and businesses in planning and complying with the right.

2. The meaning of the proposed new language is very vague. Does "environmental justice" mean that there should be a landfill in every neighborhood?

Having personally attended DOH public hearings on landfill permits on Oahu, I know this is not an idle question. If the legislature does not clarify the meaning, then the courts must. Litigation is a slow, expensive, and uncertain path, and again, there will be no way to modify their constitutional rulings except by further constitutional amendments. If the committee still wants to advance this concept, I recommend that it be done by way of statute, instead of constitutional amendment, and that the committee make its intent clear for likely scenarios.

Thank you for the opportunity to testify.

Respectfully submitted,
Laurence K. Lau

Testimony for ENE 2/3/2011 3:30:00 PM SB107

Conference room: 225

Testifier position: support

Testifier will be present: No

Submitted by: Deja Marie Ostrowski

Organization: Individual

Submitted on: 2/2/2011

Comments:

I strongly support amending the constitution to include our State's commitment to environmental justice for certain populations, such as Native Hawaiians, that are disproportionately impacted by harmful environmental actions in our state.

Testimony for ENE 2/3/2011 3:30:00 PM SB107

Conference room: 225

Testifier position: support

Testifier will be present: No

Submitted by: Laurie Lawrence

Organization: Individual

Submitted on: 2/2/2011