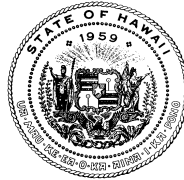


DAVID Y. IGE
GOVERNOR OF HAWAII



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ACTING DIRECTOR

ELIZABETH A. CHAR, Ph.D.
DIRECTOR OF HEALTH

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Testimony in SUPPORT of SB351
RELATING TO ENVIRONMENTAL IMPACT STATEMENTS
COMMITTEE ON AGRICULTURE AND ENVIRONMENT
SENATOR MIKE GABBARD, CHAIR
SENATOR CLARENCE K. NISHIHARA, VICE CHAIR

Testimony of Keith Kawaoka
Acting Director, Office of Environmental Quality Control
Attached Agency to the Department of Health

Hearing Date: February 3, 2021
1:00 p.m.

Room Number: Via Videoconference

1 **OEQC's Position:**

2 The Office of Environmental Quality Control (OEQC) is an attached agency to the Department of Health
3 that provides limited professional and administrative assistance to the Environmental Council. The
4 Environmental Council is a body of fifteen volunteer members whose duties include the the preparation
5 of an annual report under Chapter 341, Hawaii Revised Statutes and the hearing of appeals under
6 Chapters 91 and 343, Hawaii Revised Statutes, of applicant actions where an environmental impact
7 statement (EIS) was not accepted by the approving agency. OEQC supports this bill.

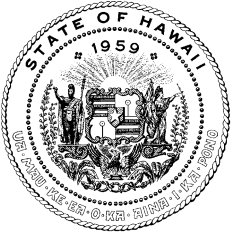
8 **Purpose and Justification:**

9 This bill would repeal the provision in the EIS law whereby an applicant can appeal a non-acceptance
10 determination on its final EIS directly to the environmental council. The current statutory language
11 mandates that such an appeal be done within sixty-days of the rendering of a determination of non-
12 acceptance by an accepting authority. The present law further requires the council to render an
13 administrative determination with thirty days of receipt of the appeal. Based on its experience in summer

1 2020, the Office believes that future rendering of such an administrative determination would be highly
2 improbable given the following: (1) the council chair needed to convoke the council to schedule a Chapter
3 91, Hawaii Revised Statutes meeting to discuss the appeal including the need for a hearings officer
4 (which is not a budgeted position); (2) the council needed to schedule meetings with the applicant and the
5 approving agency to set forth the parameters (including the potential recusal of members deemed to have
6 a conflict of interest) for conducting the appeal; (3) absent electronic filing rules, the office (acting for the
7 council) needed to distribute copies of the appeal (contain about 5,000 pages) to its members via postal
8 mail (as no electronic copies were submitted); and (4) the office staff, having never processed an appeal
9 in its recent history was unfamiliar with Chapter 91, Hawaii Revised Statutes administrative procedures
10 (such as the filing of stipulations, minute orders and decisions) and relied heavily on the deputy attorney
11 general and the volunteer legal expertise of the chair of the council who also served as an attorney in
12 private practice. In short, we believe that the Environmental Council is not equipped nor staffed to
13 function as a quasi-judicial body.

14 The Office believes that Section 343-7(c), Hawaii Revised Statutes sets forth the limitations on judicial
15 challenge to an environmental impact statement for both agencies and applicants allowing both to have
16 the full complement of judicial review, unlike that of Section 343-5(e), Hawaii Revised Statutes that only
17 permits a quasi-judicial appeal only for applicant actions for which an EIS was rejected.

18 Thank you for the opportunity to testify.



STATE ENVIRONMENTAL COUNCIL

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N. Mahina Tuteur

Testimony of
PUANANIONAONA P. THOENE, Chair
and
I. ROBIN KAYE, Member
on behalf of the Environmental Council

before the
SENATE COMMITTEE ON AGRICULTURE AND ENVIRONMENT
Wednesday, February 3, 2021
1:00 PM via Videoconference

in SUPPORT of
SENATE BILL 351
RELATING TO ENVIRONMENTAL IMPACT STATEMENTS

The Environmental Council voted at its meeting on January 5, 2021, to request two changes to HRS Chapters 341 and 343 related to certain roles that the Council currently holds: (1) the statutory requirement to prepare an annual report by January 31st of each year; and (2) hearing appeals from applicant actions where an environmental impact statement was not accepted by the accepting authority. SB 351 reflects both of those changes, and the Environmental Council offers its support of this bill.

The Council does not have a budget of its own. The annual report takes a great effort to complete. As you know, the Council members are volunteers. In past years, certain Council members funded the production of the annual report out of pocket. The Council has also been fortunate to have community members volunteer their time to complete the annual report. It is unknown how many people read the annual report and whether or not it is serving the function that it should and being helpful to the legislature, as it appears intended to be. Given the great effort put into producing the annual report each year, if it is not useful to those for whom it is produced, the Council believes that it should not be held to the requirement to produce one, as the Council's efforts could be better spent on its other roles, such as community outreach and developing guidance on the environmental impact statement rules. This is not to say that the Council would not produce an annual report or newsletter on its own, but eliminating the statutory requirement that an annual report be done by January 31st of each year would clearly alleviate this burden.

With respect to appeals to the Council, this role of the Council is actually not in HRS § 341-6, but instead originates from HRS § 343-5(e). Little is known about the legislative intent in enacting this provision; it is, however, rarely utilized by applicants. In fact, over the last 30 years, there has been only one instance this past summer where an applicant

appealed the nonacceptance of an EIS to the Council. (It is said that there was another appeal considered some years back, however, the parties settled the matter and the appeals process was never formally initiated.) HRS § 343-5(e) sets forth a 30-day deadline in which the Council must complete the appeal and decision-making with written findings of fact, conclusions of law, and decision and order. Through the Council's procedural rules, this must be done through a Chapter 91 contested case hearing. The 30-day deadline is an unrealistic time frame for the Council to complete this process, particularly given that the Council does not have its own dedicated staff (OEQC assists us) and has no budget. After going through this process last year, the Council began discussing whether appeals of this nature are properly a role for the Council to serve and we have concluded that it makes sense to delete the portion of HRS § 343-5(e) that provides for such appeals to the Council.

From a fairness standpoint, it is unclear what the legislature intended with this provision. It makes sense that an applicant contesting the nonacceptance of its EIS would have the same mechanism of challenge as someone contesting the acceptance of an EIS, which is provided for under HRS § 343-7(c) through an action to the Circuit Court. The court does not have a deadline in reviewing such matters. Because the Council's rules require that appeals be handled as Chapter 91 contested case hearings, it is unrealistic to complete that process in 30 days.

Furthermore, the makeup of the Council is set forth by HRS § 341-6 and is intended to include a broad demographic of folks, but particularly those who have experience with Chapter 343 documents as well as community and environmental groups that would likely have taken formal positions on matters that would be before the Council. For example, because of this, three Council members recused themselves in the last appeal, and there was a motion to recuse two additional members. The recusal issue will be present in any appeal to the Council simply by the nature of who sits on the Council.

Because the Council does not handle applicant appeals on a regular basis, the Council is not currently proficient in doing so, as a court would be. Even though there has only been one instance of applicant appeals to the Council, given the increased litigation the state has seen with respect to environmental matters, it is anticipated that more of these appeals could come to the Council. Dealing with such matters on a regular basis could subsume the Council's time at the expense of the Council's other roles set forth in HRS § 341-6.

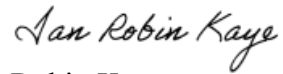
Finally, there is a question about whether or not the Council is in the best position to determine such appeals. While the Council is responsible for promulgating the administrative rules under HRS Chapter 343, the determination about the sufficiency of an EIS properly lies with the technical experts at the relevant agencies reviewing these documents. The Council is certainly poised on process questions, however, whether or not a specific scientific study, for example, is sufficient for purposes of granting a permit based on an EIS is properly within the accepting authority's wheelhouse.

One additional component of SB351 that the Council supports as well is a clean-up of language in HRS Chapters 341 and 343 that would result in deleting references to the

University of Hawaii Environmental Center. While the Center served a great role, it has not been funded for many years.



Puananiaona Thoene
Chair
Environmental Council



Robin Kaye
Chair
Legislative Committee

SB-351

Submitted on: 2/2/2021 2:08:10 PM

Testimony for AEN on 2/3/2021 1:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Barbara Kaaumoana	Individual	Oppose	No

Comments:

Aloha members, I have been a member of the Environmental Council since 2017. I have participated fully and felt my efforts worthwhile and valuable. One of my focus areas of interest and effort has been and continues to be engagement of State agencies, departments, leadership and the public in the environmental issues and work of the State of Hawaii via Chapter 343.

One of the key responsibilities of the Council codified in Hawaii Revised Statutes, has been the preparation and publication of an Annual Report on the accomplishments in the environmental kuleana of State agencies.

I understand and agree this work has been difficult and in tight budget times a burden on agencies to accomplish. This year however, it was done by "survey" which 49 agencies found the response task to be easy to accomplish and the EC found to be productive and appropriate reporting. I fully expect the legislature to find the report informative.

I strongly believe that such a process is useful and should continue.

If Hawaii State limits the publication of reports on the basis of the number of people who read them, very few would be produced. The preparation of this report provides a self review by agencies on their attention to important environmental matters and each report becomes a record for reference and future compilation of critical data for planning and fiscal management.

The Environmental Council Annual Report also provides very important information on agency activity for elected officials and the electorate.

I strongly oppose the removal of the Annual Report for the kuleana of the Hawaii State Environmental Council in HRS.

Me ka pono, Makaala Kaaumoana

SB-351

Submitted on: 2/2/2021 2:32:29 PM

Testimony for AEN on 2/3/2021 1:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Charles Prentiss	Individual	Support	No

Comments:

As a former, 12-year member, of the Environmental Council, I fully support the provision in this bill to repeal the requirement that allows for EC hearing appeals from applicant actions where an environmental impact statement was not accepted by the accepting authority. This corrects a long-standing inconsistency in the statute.