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Testimony of
SCOTT GLENN, Director

before the
HOUSE COMMITTEE ON ENERGY AND ENVIRONMENTAL PROTECTION

Wednesday, April 5, 2017
11:29 AM
State Capitol, Conference Room 325

in consideration of
HOUSE CONCURRENT RESOLUTION 120 HD 1

REQUESTING THE OFFICE OF ENVIRONMENTAL QUALITY CONTROL APPLY CONSISTENT STANDARDS TO ALL APPLICANTS AND AGENCIES, FOLLOW STATUTORY INTENT OF THE LEGISLATURE, UPDATE LEGISLATORS ON GUIDANCE DOCUMENTS AND INTERPRETATIONS AND SUPPORT THE ENVIRONMENTAL COUNCIL'S EFFORTS TO UPDATE HAWAII ADMINISTRATIVE RULES CHAPTER 11-200

Chair Lee, Vice Chair Lowen, and Members of the House Committee on Energy and Environmental Protection,

The Office of Environmental Quality Control (OEQC) administers Hawai'i's environmental review process.

House Concurrent Resolution 120 House Draft (HD) 1 resolves to request the OEQC to do what it already does: apply consistent standards to all applicants and agencies, follow statutory intent, and brief legislators on guidance and interpretations of law. As such, much of the resolution title, many of the whereas statements, and the first portion of the first resolution paragraph are superfluous. The OEQC requests that the Committee consider removing these superfluous statements should the resolution pass out of the Committee.

HD 1 further requests for the OEQC to support the Environmental Council in its efforts to update Hawai'i Administrative Rules Title 11 Chapter 200 and for the OEQC to submit findings and recommendations, including proposed legislation, to the Legislature for the Regular Session of 2018. The OEQC acknowledges that many ambiguities exist in the EIS process. The root cause of these ambiguities is that the administrative rules have not been updated comprehensively for 20 years. Since the rules were last promulgated and compiled in 1996, the Legislature has made several major amendments to the EIS process. During this same period, practice has evolved and the world has moved to electronic documents and processes. These changes are not reflected in the rules. The Environmental Council, a separate agency from the OEQC, is the rulemaking body for the EIS process. Past lack of legislative and administrative support for the Environmental Council has limited its ability to keep the rules current with statute and practice. The OEQC is willingly and proactively supporting the Environmental Council in its endeavor.

Thank you for the opportunity to testify on this resolution.



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HOUSE COMMITTEE ON ENERGY & ENVIRONMENTAL PROTECTION
Thursday, April 5, 2017 — 11:29 a.m. — Room 325

Ulupono Initiative Supports HCR 120 HD 1, Requesting the Office of Environmental Quality Control Apply Consistent Standards to All Applicants and Agencies, Follow Statutory Intent of the Legislature, Update Legislators on Guidance Documents and Interpretations and Support the Environmental Council's Efforts to Update Hawaii Administrative Rules Chapter 11-200

Dear Chair Lee, Vice Chair Lowen, and Members of the Committee:

My name is Kyle Datta and I am General Partner of Ulupono Initiative, a Hawai'i-based impact investment firm that strives to improve the quality of life for the people of Hawai'i by working toward solutions that create more locally produced food; increase affordable, clean, renewable energy; and reduce waste. Ulupono believes that self-sufficiency is essential to our future prosperity and will help shape a future where economic progress and mission-focused impact can work hand in hand.

Ulupono supports HCR 120 HD 1, which applies consistent standards to all applicants for environmental reviews, because it aligns with our goal of creating more locally produced food, and more importantly, preserves the intent of the act for public disclosure in regulatory decision making while ensuring that responsible economic development can still move forward.

The purpose of the environmental review statute itself is set forth in the law: the “environmental review process will integrate the review of environmental concerns with existing state and county planning processes and alert decision makers to significant environmental effects which may result from the implementation of certain actions ... the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.” (HRS § 343-1)

Why this resolution is needed and how it will help both the Office of Environmental Quality Control (OEQC) and the broader community it serves can be highlighted by recent events.

The application of the statute recently shifted, perhaps to address litigation concerns for

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state agencies, creating an ambiguous standard of compliance. When the current regulations have ambiguity, the Environmental Council and the current director have a fiduciary duty to update Hawai'i Administrative Rules (HAR) Title 11 Chapter 200 to ensure consistency and brief the Legislature to ensure that this effort meets the legislative intent.

The following recent event underscores this need.

OEQC has dramatically changed how it interprets the rules governing environmental impact statements ("EIS") in a way that raises the bar for their acceptance under HRS § 343. The effect of this new interpretation would be to significantly increase the time and expense for what is already a lengthy and expensive process. Most importantly, it would put many projects beyond the reach of those who would otherwise want to develop them. In brief, the OEQC will now require a point-by-point response to non-substantive comments as to why they are not substantive. This is contrary to guidance issued by OEQC in 2012 and opens the door to "comment bombing," which enhances the ability of small groups of individuals to effectively slow or block new development through a deluge of comments.

HAR § 11-200-18 states that the final EIS shall incorporate the "substantive" comments and the responses to the "substantive" comments. HAR § 11-200-22 also states that the final EIS shall contain a "point-by-point discussion of the validity, significance, and relevance of the comments" that were received.

While HAR § 11-200-22 does not use the word "substantive," the two rules must be read together because otherwise the language in HAR § 11-200-18 requiring only a response to "substantive" comments is written out of the OEQC rules and rendered void. A rule on the interpretation of statutes and rules is that provisions on the same topic must be harmonized and read together so no particular rule is rendered void.

Based both on common sense and the rules on the interpretation of statutes and rules, OEQC has long interpreted the rules to require project applicants to respond only to "substantive" comments. This is shown by *The Guide to the Implementation and Practice of the Hawai'i Environmental Policy Act* (the "Guide") issued by the OEQC in 2012. The Guide lists one of the "Content Requirements" for an EIS as "[t]he point-by-point responses of the applicant to each substantive question, comment, or recommendation received in the review and consultation process." The prior director of OEQC has confirmed that OEQC previously interpreted the rules to require applicants to include responses only to "substantive" comments in final EISs.

Notwithstanding HAR § 11-200-18 and its own Guide, OEQC, which has a new director as of October 2015, has now taken the position that an applicant must respond on a point-by-point basis to every single specific point contained in the written comments received from the public. The new director recently issued a letter recommending that an EIS not be

accepted relying only on HAR 11-200-22. The letter makes no mention of HAR § 11-200-18 or the language in the Guide requiring a response only to “substantive” comments. The letter from the new director requires a point-by-point response to every comment whether substantive or not.

The new interpretation would play directly into the hands of opponents of any project requiring an EIS because they would be strongly motivated to have each person opposing the project submit as many lengthy and convoluted written comments as possible. It is likely that written comments from many individuals opposing a project would run hundreds of pages in an effort to overwhelm the project applicants and thereby to stop the project. This would be true for both private projects and government projects. The project applicant, whether a private applicant or a state or county agency, would have to respond to each point in each written comment. The result would be a subversion of the reason for involving the public in the EIS process – the benefit to all the parties involved and society as a whole.

One of the most important concepts for a fair business market is consistency, and consistency in the application of rules is key. Fundamentally, the lack of consistency raises the issue of fairness.

Perversely, this decision will eliminate development in animal husbandry from agriculture except for the largest corporate farms or for the smallest that do not require any permitting. Similarly, it will severely curtail local companies from developing new projects that require an EIS due to the cost and complexity. This process would create a fairness issue where less resourced farmers and ranchers could not move forward with anything requiring an EIS. This would be applicable to other industries whereby certain well-resourced developers might be the only people to successfully complete an EIS.

We urge this committee to pass this resolution in its current form.

We believe that by collaborating, we can help produce more local food and support an economically robust homegrown agriculture industry, which strengthens our community with fresh, healthy food. Thank you for this opportunity to testify.

Respectfully,

Kyle Datta
General Partner

HOUSE COMMITTEE ON ENERGY & ENVIRONMENTAL PROTECTION

Thursday, April 5, 2017 — 11:29 a.m. — Room 325

RE: Testimony in Support of HCR 120, HD1

REQUESTING THE OFFICE OF ENVIRONMENTAL QUALITY CONTROL APPLY CONSISTENT STANDARDS TO ALL APPLICANTS AND AGENCIES, FOLLOW STATUTORY INTENT OF THE LEGISLATURE, UPDATE LEGISLATORS ON GUIDANCE DOCUMENTS AND INTERPRETATIONS AND SUPPORT THE ENVIRONMENTAL COUNCIL'S EFFORTS TO UPDATE HAWAII ADMINISTRATIVE RULES CHAPTER 11-200.

Dear Chair Lee, Vice Chair Lowen and Committee Members:

Mahalo for providing the opportunity to testify in strong support of this resolution.

As a former director for the Office of Environmental Quality Control (OEQC), I have serious concerns about how recent litigation, a lack of updated rules, interpretations of the rules and failure by Department of Health (DOH) and the Environmental Health Administration (EHA) to comply with State Audit and Environmental Council directives to update exemption lists are all now having serious, negative consequences on the environmental review process and potential proposed actions subject to such review. Ambiguity and inconsistency invite litigation and delay for all kinds of beneficial projects that drive our economy, protect our environment, serve the public and promote food security, for example.

The State's environmental review laws under HRS Chapter 343 provide the fundamental mechanism for public disclosure and review of potential actions that may have an impact on the environment, before the actions can move forward. If environmental review is triggered, as specified by the statute, actions can be approved three ways, after going through an Exemption List (documented by a letter to file), an Environmental Assessment or an Environmental Impact Statement process.

This review process under HRS Chapter 343 is exactly that, a process. It was never intended to be a tool for the disgruntled (and likely well heeled) to halt actions that should move forward. Litigation and new interpretations of the rules appear to do exactly that, creating the opportunity for potentially infinite loops of challenges and litigation on non-substantive issues (unrelated to any potential environmental concerns).

The review process is now at risk of becoming unhelpful to the public as well. Over the years, litigation, a lack of updated rules and exemptions lists as well as guidance that has not kept up with changing practices or interpretations have decreased predictability for the regulated community and increased the level of detail that must be provided to be considered acceptable for EAs and EISs. It appears the latest interpretation of the rules will require every FEIS include a point-by-point response to even non-substantive, irrelevant comments, creating a level detail at a magnitude never seen before.

This level of detail will discourage public participation as the relevance of the document becomes buried in tomes of legalese and technicalities, not to mention looming litigation. This is a concern for actions that promote food security in particular as small farmers and small businesses will not be able to afford the ever more complex and risky environmental review process. Changes in the expected level of detail should be clarified for all parties as soon as possible to ensure consistency and avoid surprises or “gotcha” moments that will prevent beneficial actions from moving forward.

This resolution will help ensure agencies and applicants are able to better categorize actions that need, or don't need to go through a full environmental review process. For food security and traditional agricultural activities in particular, current interpretations of the environmental review law and rules will preclude many small businesses efforts from ever getting started, especially if there are no exemption list provisions. To address this, guidance, exemptions lists and the rules should be updated as soon as possible. Given that these all changes take awhile, this Resolution will help to move forward the necessary updates and clarifications as soon as possible while keeping the legislature informed of the progress.

For these reasons and more, I support this resolution and all efforts by OEQC and the Environmental Council to receive funding to update rules.

Mahalo for your consideration.

Jessica Wooley