



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2010**

ON THE FOLLOWING MEASURE:

S.B. NO. 2818, S.D. 2, H.D. 1, RELATING TO ENVIRONMENTAL PROTECTION.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, March 16, 2010 **TIME:** 2:15 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Mark J. Bennett, Attorney General, or
Edward G. Bohlen, Deputy Attorney General

Chair Karamatsu and Members of the Committee:

The Department of the Attorney General provides the following comments on this bill as amended.

This bill has attempted to implement changes to the environmental review processes. The Attorney General appreciates that this version of the bill excludes the sweeping proposed changes to chapter 343, Hawaii Revised Statutes (HRS), that the Attorney General has opposed.

The bill as amended, however, still has some legal problems. It would amend section 341-4(b), HRS, to require that the Director of the Office of Environmental Quality Control (OEQC) perform various functions through the Environmental Council. The bill describes the Director's functions in language that is both vague and very broad, e.g., the Director is required to "direct the attention" of State agencies to "environmental problems," and obtain advice from the Environmental Council on "any matters concerning environmental quality." These broad and vague terms will generate confusion and are likely to interfere with the operations of the OEQC.

The bill also would require the OEQC Director to organize workshops and prepare an annual guidebook, in the amendment to

section 341-4(b), HRS, and in the new section 341-A. The bill also requires the Environmental Council to continue preparing an annual report in section 341-6(b). Now is not the time to spend limited State funds continuing and adding to requirements for reports that few read and that are of questionable value to the public.

As the three House Committees noted in Standing Committee Report No. 713-10, a working group has been assembled to address concerns regarding changes to Hawaii's environmental review policy. That working group has not yet finished its work. It would be unwise to pass revisions of law before the working group has had an opportunity to complete its work, and without extensive input from, and discussion among, various interested parties.

We respectfully ask the Committee to hold this bill.



SB 2818, SD 2, HD 1, RELATING TO ENVIRONMENTAL PROTECTION
House Committee on Judiciary

March 16, 2010

2:15 p.m.

Room: 325

The Office of Hawaiian Affairs (OHA) SUPPORTS, with amendments, SB 2818, SD 2, HD 1, which would reduce the membership of the Environmental Council from 15 to 9 and establish an environmental review special fund. OHA would much prefer, however, that this bill resume its original intent and amend Hawai'i's environmental review process, per the recommendations of a study conducted pursuant to Act 1, Session Laws of Hawaii 2008, and OHA's specific concerns, described below.

OHA has always been a strong advocate for, and defender of, Hawaii Revised Statutes (HRS), Chapter 343, the Environmental Impact Statement Law. Chapter 343 is a critical tool that OHA uses to fulfill our constitutional mandates to protect and perpetuate Native Hawaiian rights and our statutory mandates to assess the actions of other agencies, and to educate those agencies and advocate for the betterment of conditions of Native Hawaiians. Hawai'i's environmental review process currently, and correctly, includes examination of potential impacts upon both natural and cultural resources, recognizing that natural resources are cultural resources.

Pursuant to Act 1, Session Laws of Hawaii 2008, a report was submitted to the Legislature on January 1, 2010, from the University of Hawai'i (reporting on a study in which OHA participated) that examines Hawai'i's environmental review system and proposes comprehensive changes to that process. OHA urges that the Legislature follow the recommendations made in this report and continue to assure that the environmental review process continue to for many perspectives and assure that the Hawai'i State Constitution's environmental and Native Hawaiian protections will be maintained.

OHA notes that the Legislature convened a new task force on February 2, 2010, in response to this SB 2818, and we urge that the task force be allowed to continue its work in creating a comprehensive approach to making any changes to Chapter 343.

We further urge that the requirement for a Cultural Impact Assessment in both Environmental Assessments and Environmental Impact Statements be clearly added to the statute so that Native Hawaiian organizations and individuals do not have to constantly refer to Act 50, Session Laws of Hawai'i (2000), for the intent of that requirement. Act 50

clearly states that "The legislature finds that there is a need to clarify that the preparation of environmental assessments or environmental impact statements should identify and address effects on Hawai'i's culture, and traditional and customary rights," but this intent is not spelled out in the statute. We understand that §343-6 states that the Hawaii Administrative Rules shall describe the contents of an Environmental Assessment and Environmental Impact Statement, but the intent of Act 50 should be clearly spelled out in Chapter 343 as well.

The last version of this bill (SB 2818, SD 2) proposed the deletion of "adversely affect . . . cultural practices" from the definition of "significant effect" and that language's replacement with the concept in §343-A that "significant effect on the environment" would be found if it "[i]nvolves an irrevocable commitment to the loss or destruction of any natural or cultural resource." That was a good suggestion, but it still did not meet or describe the full intent of Act 50.

Act 50 states that the definition of "significant effect" must include "adverse effects on cultural practices," not just cultural resources, and that EISs must "include the disclosure of the effects of a proposed action on the cultural practices of the community and State." The legislature also stated in Act 50 that "due consideration of the effects of human activities on native Hawaiian culture and the exercise thereof is necessary to ensure the continued existence, development, and exercise of native Hawaiian culture." The legislature also found in Act 50 that "the past failure to require native Hawaiian cultural impact assessments has resulted in the loss and destruction of many important cultural resources and has interfered with the exercise of native Hawaiian culture," which is constitutionally protected.

Therefore, OHA suggests that Act 50's intent clearly be included in Chapter 343 in the following ways, as applied to SB 2818, SD 2:

1. Under the SB 2818, SD 2, proposed §343-A(b)(1), please amend to state that "significant effect on the environment": "Involves an irrevocable commitment to the loss or destruction of any natural or native Hawaiian cultural resources, or native Hawaiian cultural rights or practices;" and
2. Under §343-1 "Findings and purpose," the second paragraph should be amended to read: "It is the purpose of this chapter to establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with native Hawaiian culture, traditional and customary rights, and economic and technical considerations."

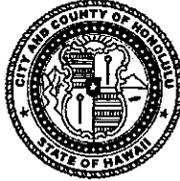
Therefore, OHA urges the Committees to PASS SB 2818, SD 2, HD 1, including the above amendments; to reinsert the sections of SB 2818, SD 2, that amended Chapter 343; and allow the current legislative task force to continue its work and discussion to continue to further amend

and improve Chapter 343. OHA looks forward to the opportunity to review forthcoming drafts. Thank you for the opportunity to testify.

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU

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MAYOR



DAVID K. TANOUE
DIRECTOR

ROBERT M. SUMITOMO
DEPUTY DIRECTOR

(EK)

March 16, 2010

The Honorable Jon Riki Karamatsu, Chair
and Members of the Committee on Judiciary
State House of Representatives
State Capitol
Honolulu, Hawaii 96813

Dear Chair Karamatsu and Members:

**Subject: Senate Bill No. SB2818, SD2, HD1
Relating to Environmental Protection**

The Department of Planning and Permitting (DPP) has **no objections** to Senate Bill No. 2818, SD2, HD1. The current bill is limited to issues related to the Environmental Council, and does not include amendments to the Environmental Impact Statement (EIS) regulations of Hawaii Revised Statutes (HRS) Chapter 343, which we had previously opposed with earlier versions of this legislative measure. We will continue to support the measure in its current form, provided it is limited to similar amendments to the organization and role of the Environmental Council and the Director of the Office of Environmental Quality Control; and, as long as the previous amendments to HRS Chapter 343 are not reintroduced.

Finally, we wish to express our appreciation to the House Committees on EEP/WLO/EBM for amending this bill with the HD1 to address concerns regarding dramatic changes to the EIS system. Thank you for this opportunity to comment.

Very truly yours,


for David K. Tanoue, Director
Department of Planning and Permitting

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sb2818sd2hd1-ek.doc



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MĀNOA

RL: 2270

SB 2818 SD 2 HD1
RELATING TO ENVIRONMENTAL PROTECTION

House Committee on Judiciary
March 16, 2010
2:15 p.m., State Capitol, Conference Room 325

By
Denise Antolini, William S. Richardson School of Law
Peter Rappa, Environmental Center
Karl Kim, Urban and Regional Planning
Nicole Lowen, Environmental Center
Scott Glenn, Urban and Regional Planning

Dear Chair Karamatsu, Vice Chair Ito, and members of the Committee:

Thank you for this opportunity to testify **in support** of SB2818 SD2 HD1. We ask that the Judiciary Committee pass this bill in order to maintain it as a vehicle for further discussion and improvements that will soon result from the SB2818 Working Group, which is scheduled to complete its work on the omnibus changes to Chapters 341 and 343 by March 22.

Our statement on this measure does not represent an institutional position of the University of Hawaii.

As you know, at the request of the Legislature, Act 1, 2008, the authors of this testimony undertook a comprehensive study of the state's environmental review system and submitted an in-depth report to the Legislature on January 1, 2010. Based on an extensive stakeholder process, the study assessed the system's effectiveness and proposed a comprehensive set of specific recommendations for statutory amendments to H.R.S. Chapters 341 and 343. The original version of SB 2818 was based on the recommendations of the study included in the team's report to the legislature. SD1 and SD2 included several important changes to the original bill. HD1 retains the proposed changes to Chapter 341 but removed, pending the results of a working group process described below, the proposed revisions to Chapter 343. HD1 should be passed to ensure the critical dialogue among legislators and key stakeholders on these issues continues in an expeditious manner,

After the initial hearing on SB 2818 on February 2, 2010, Senator Gabbard, Chair of the Committee of Energy and Environment, convened a stakeholder working group to discuss possible improvements to the bill. The working group consists of:

- the UH Study Team (Karl Kim, Peter Rappa, Denise Antolini),
- the Director of the Office of Environmental Quality Control (Katherine Kealoha),
- the Chair of the Environmental Council (Grail Grabowksy),
- a member of the Environmental Council and a planner (David Atkin, Parsons Brinkerhoff),
- a member of Business and Industry Association (Dean Uchida),
- a member of the Sierra Club (Robert Harris),
- a member of the Land Use Research Foundation (David Arakawa),
- a member of Earthjustice (David Henkin),
- a member of BeltCollins (Lee Sichter),
- a member of The Nature Conservancy (Mark Fox),
- and a facilitator (Lily Bloom Domingo).

In addition to a number of subgroup meetings, the whole working group has met for six three-hour meetings since February 16, and will meet again on Wednesday, March 17, and for the last time on March 22. The group has made significant positive progress at formulating amendments that have broad support or unanimous consensus. Although the group has not yet reached a final agreement, many members feel that the process is close to a comprehensive set of amendments that can achieve broad support among the environmental and development community, as well from the OEQC and Environmental Council.

Therefore, we ask the House Committees on Judiciary to allow this bill to move forward so that the Working Group can complete its recommendations and forward them to the Legislature as soon as possible for consideration this session.

Thank you for the opportunity to comment on this bill.

karamatsu1-Kenji

From: mailinglist@capitol.hawaii.gov
Sent: Monday, March 15, 2010 12:33 PM
To: JUDtestimony
Cc: nicoleel@hawaii.edu
Subject: Testimony for SB2818 on 3/16/2010 2:15:00 PM

Testimony for JUD 3/16/2010 2:15:00 PM SB2818

Conference room: 325
Testifier position: support
Testifier will be present: Yes
Submitted by: Nicole Lowen
Organization: UH Environmental Center
Address: 2500 Dole Street Honolulu, Hawaii
Phone: 956-3974
E-mail: nicoleel@hawaii.edu
Submitted on: 3/15/2010

Comments:



House Committee on Judiciary

Tuesday, March 16, 2010

2:15 p.m.

Conference Room 325

State Capitol

Subject: SB 2818, SD2, HD1 Relating to Environmental Protection

Dear Chair Karamatsu, Vice Chair Ito and members of the committee:

My name is Jim Tollefson and I am the President and CEO of The Chamber of Commerce of Hawaii ("The Chamber"). The Chamber strongly opposes Senate Bill 2818 SD2, HD1 relating to Environmental Protection, as presently drafted.

The Chamber is the largest business organization in Hawaii, representing more than 1,100 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 Chamber was not invited to participate on the Working Group convened by Senator Gabbard to see what, if any, proposed changes to Chapter 343 could be considered by the legislature this session. We respectfully believe that broader participation by the business community in such processes is valuable and that it is necessary for such groups to be as inclusive and balanced as possible in their composition.

The Chamber appreciates that the House Committees on Energy and Environmental Protection; Water, Land, and Ocean Resources; and Economic Revitalization, Business and Military Affairs have, in response to very broad opposition by most stakeholders, deleted the most dramatically detrimental sections of SB 2818, SD 2.

This bill continues to contain a complete reorganization of the composition, authority and duties of the Environmental Council and the Office of Environmental Quality Control (including the Director). It is unclear as to how placing an appointed committee with periodic meetings in charge is going to "improve the environmental review process by making it more streamlined, open and consistent" which is the stated purpose of the measure.

The Chamber believes that this measure is more appropriate for a future legislative session, and that a broadened Working Group should be convened in the interim to more carefully examine and determine what changes are needed to achieve the stated purposes for amending HRS 341 and 343.

At this particular time it is very important to not create uncertainty that may jeopardize much needed capital investment in our State, and possibly exacerbate the shortage of work force housing or derail the Legislature's other efforts at economic revitalization and job creation. We remain opposed to the current language in SB 2818, SD2, HD1.

Thank you for this opportunity to express our views.

BIA-HAWAII
BUILDING INDUSTRY ASSOCIATION

March 16, 2010

The Honorable Jon Riki Karamatsu, Chair
Committee on Judiciary
State Capitol, Room 325
Honolulu, Hawaii 96813

RE: Senate Bill No. SB 2818, SD2, HD1 Relating to Environmental Protection

Dear Chair Karamatsu and Members of the Committee on Judiciary:

I am Karen Nakamura, Chief Executive Officer of 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 opposes S.B. No. 2818 SD 2, HD1 as presently drafted.

We are participating on a Working Group convened by both Senator Gabbard and Representative Morita to see what, if any, proposed changes to Chapter 343 could be considered by the legislature this session.

At this time, there is no agreement on what, if any, changes should be made to chapter 343. We have no objection to using S.B. 2818 as a "vehicle" if an agreement is reached by the working group before the end of session. We remain opposed to the current language in SB 2818, SD2, HD1.

Thank you for this opportunity to express our views.



Chief Executive Officer
BIA-Hawaii

**Testimony of
Bob Loy
Director of Environmental Programs
The Outdoor Circle
Committee on the Judiciary
March 16, 2010**

Testimony in Opposition to SB 2818 SD2 HD 1

I am Bob Loy testifying on behalf of The Outdoor Circle. We support the original intent of SB2818 but no longer support the legislation before us today.

Our original support of the measure was based upon SB2818's intent to amend Chapter 341 to fix the myriad of problems that currently plague the Environmental Council (EC) and the Office of Environmental Quality Control (OEQC) and to streamline and make more efficient and effective, Chapter 343.

The proposal before JUD today attempts to accomplish the Chapter 341-related tasks and we generally support the changes in HD 1 relating to the composition of the EC and how its members are selected. However, we do not support a continuation of allowing the OEQC to be under the purview of the Department of Health (DOH) where it and the EC have languished without proper support for several years. We are greatly concerned that keeping these entities under administrative control of the DOH will condemn the OEQC and the EC to more of the same.

We also generally support the proposed creation of an Environmental Review Special Fund to help provide funding to the OEQC's and EC's activities as well as enabling the EC and the director of OEQC to adopt rules under Chapter 91 to establish reasonable fees for services.

SB 2818 also was originally drafted to revise and improve the environmental review processes under Section 343. But instead of publicly confronting and dealing with these difficult issues in meaningful legislative hearings, a legislatively appointed "working group" is privately trying to resolve 343's problems behind closed doors. As yet, the "working group" has not made recommendations on how to best amend the legislation. We are concerned about the "working group's" lack of transparency and are fearful that any recommendations that arise from its efforts will not be properly, publicly vetted in legislative hearings.

Thus, we are left with no option except to wait and see if the "working group's" efforts result in proposals that will turn SB 2818 into a credible vehicle for improving Chapter 343 before the end of the session. If so, we will review it and provide substantive comments at the appropriate time. Until then, we cannot support this legislation.

Testimony of The Nature Conservancy of Hawai'i
Supporting the Intent of S.B. 2818, HD1 Relating to Environmental Protection
House Committee on Judiciary
Tuesday, March 16, 2010, 2:15PM, Room 325

The Nature Conservancy of Hawai'i is a private non-profit conservation organization dedicated to the preservation of Hawai'i's native plants, animals, and ecosystems. The Conservancy has helped to protect nearly 200,000 acres of natural lands for native species in Hawai'i. Today, we actively manage more than 32,000 acres in 11 nature preserves on O'ahu, Maui, Hawai'i, Moloka'i, Lāna'i, and Kaua'i. We also work closely with government agencies, private parties and communities on cooperative land and marine management projects.

The Nature Conservancy supports the intent of S.B. 2818 HD 1, particularly the original effort to streamline the environmental review process and including a discretionary approval screen. We have been participating in the working group established to review S.B. 2818 and support keeping the bill alive in the House to promote further discussion and hopeful passage of legislation this year.

We also share the following particular comments regarding the effect of the State environmental review process on certain conservation projects that we believe should be addressed via statutory or regulatory exemption.

Conservation work that protects, preserves, or enhances the environment, land, and natural resources is often caught up in the same time consuming and expensive environmental review process as development projects that have negative impacts on the environment. While it is appropriate that higher protection is afforded to lands with conservation value, e.g., lands in the State conservation district, it often comes at a stroke too broad that does not distinguish between building a home in the conservation district versus engaging in conservation work to care for native forests and control invasive species. Conservation actions have to go through the same expensive level of review for environmental impacts as development.

Environmental review for the TNC's conservation work has been a significant burden:

- Each EA takes 6-12 months;
- Each EA takes ~1 FTE (part of 2-4 people's time);
- Each EA costs \$100,000-\$200,000;
- TNC has done 15 EAs in last 15 years;
- Five of our preserves have had two EAs each;
- One preserve is getting its third EA for conservation work.

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Representative Jon Riki Karamatsu, Chair
Representative Ken Ito, Vice Chair

Committee on Judiciary

Wednesday, March 16, 2010, 2:15pm

Strong Opposition to SB2818

Dear Member of the Judiciary Committee,

My name is Dr. Trisha Kehaulani Watson. I have a law degree and a PhD, and I also have considerable expertise in HRS 341 and 343. The study done by the University was very poorly done, and by their admission on the testimony provided on other related bills, it is still incomplete. Therefore, I ask you to defer this bill.

To now reward the University with the creation of an Environmental Center would be to reward incompetence. Our state cannot afford additional fee increases simply to carry the University financially, and this bill does nothing more than that. The University must learn to be economically sustainable.

The University was tasked as follows:

SECTION 10. Notwithstanding chapter 103D, Hawaii Revised Statutes, the legislative reference bureau shall contract with the University of Hawaii to conduct a study of the State's environmental review process. The study shall:

- (1) Examine the effectiveness of the current environmental review system created by chapters 341, 343, and 344, Hawaii Revised Statutes;
- (2) Assess the unique environmental, economic, social, and cultural issues in Hawaii that should be incorporated into an environmental review system;
- (3) Address larger concerns and interests related to sustainable development, global environmental change, and disaster-risk reduction; and
- (4) Develop a strategy, including legislative recommendations, for modernizing Hawaii's environmental review system so that it meets international and national best-practices standards.

In addition, the study shall be conducted in accordance with the provisions of any other act that addresses the comprehensive study of the environmental review process described in this section.

The study shall be submitted to the legislature no later than twenty days prior to the convening of the regular session of 2010 or by an earlier date expressly set by any other relevant Act.

There is appropriated out of the general revenues of the State of Hawaii the sum of \$300,000, or so much thereof as may be necessary to the legislative reference bureau during fiscal year 2008-2009 to contract with the University of Hawaii to conduct the study required by this section.

The sum appropriated shall be expended by the legislative reference bureau for the purposes of this section.

How is this bill responding to this? It's not. Further, their efforts were a complete waste of \$300,000. How many services could have been spared for that? This amount would have been enough to spare taking money from the neighbor island school maintenance fund for the special election. This study, which amounted to nothing, was not more important than the school maintenance fund. This study and this center are not more important than the things we need as a State right now. The reality is that right now, every penny counts.

These laws need to be fixed, but they need to be fixed by people who understand their impact on the ground and can fix them in a manner that serves all of Hawai'i. The University is just trying to serve itself with this bill. Please don't let them do that.

We have already given them \$300,000 with nothing to show for it. Please do not give them a single cent more.

Thank you for the opportunity to testify on this important Resolution.

A handwritten signature in black ink, appearing to read 'Trisha', with a large, stylized flourish extending to the right.

Trisha Kehaulani Watson, JD, PhD