

Planning News – Update on Environmental Legislation

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On November 9, 2010, the University of Hawaii Study Team released its Final Report on Hawaii's Environmental Review System (dated October 2010). The report concludes a two-year study of Chapters 341, 343 and 344, Hawaii Revised Statutes, which together comprise Hawaii's environmental review system. It identifies issues and concerns with Hawaii's current system and contains a summary of the key findings of the study. It also recommends changes to relevant statutes, rules and guidance to address the identified issues.

Overview of 2010 Legislative History

The final report builds on the team's Interim Report which together with an omnibus bill had been presented to the 2010 legislative session. Four bills based on the Interim Study's recommendations were introduced in January 2010:

- Senate Bill (SB) 2185, introduced by Senate President Hanabusa;
- its companion, House Bill (HB) 2398 introduced by House Speaker Say;
- SB 2818, introduced by Senators Gabbard, Kidani, Kokubun, Espero, Hee, Nishihara, Sakamoto, and Takamine; and
- its companion, HB 2322, introduced by Representatives Morita, Belatti, Coffman, Hanohano, Ito, C. Lee, Luke, B. Oshiro, Thielen, Cabanilla, Carroll, Chong, Evans Keith-Agaran, M. Lee, McKelvey, Rhoads, Sagum, Say, Souki, Wakai, and Yamashita.

Three of the four bills did not make it out of their respective committees. SB 2818 was the only one of the four bills to pass third reading, albeit in a modified version that stripped out all language pertaining to Chapter 34 and reduced the scope of the bill to only Chapter 341. This stripped down version, SB 2818 (Senate Draft 2; House **Draft 2**), was referred to the Committee on Finance where it was the subject of a hearing on March 25, 2010. The Committee deferred the bill, ending its consideration for the session.

Following the initial hearing on SB 2818, Senator Mike Gabbard, chair of the Senate's Energy and Environment Committee, convened a Working Group consisting of twelve members representing various stakeholder groups to review and revise SB 2818. The Working Group met formally nine times from February through April 2010, in addition to several additional sub-

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group meetings. Its efforts culminated with its preparation of SB 2818 (Senate Draft 2; House **Draft 3**) to present the Working Group's recommendations for revisions to Chapter 341 and SB 2957 (Senate Draft 1; House Draft 2) to present the Working Group's recommendations for revisions to Chapter 343. Neither of the Working Group's bills was acted upon by committee.

As we approach the 2011 Legislative Session, it remains to be seen if any or all of the 2010 bills will be reintroduced. Presumably, the legislature will look to the UH Study Team's Final Report for further guidance.

Summary of UH Final Report

The UH Study Team's Final Report in many ways represents a substantial and significant change in direction from the Interim Report. The Final Report includes many of the recommendations of the Senate Working Group. It modifies some, and goes beyond others.

It is important to note here, however, that the Working Group was not unanimous in its recommendations. The Final Report summarizes the Working Group's agreements into four categories: unanimous, high level of consensus, majority level of consensus, and low level of consensus, and it is faithful in identifying how its own recommendations line up with the degree of consensus by the Working Group. The result is a relatively transparent (although at times tedious) accounting of how the UH Study Team's thinking evolved during the course of 2010.

While I continue to believe that the Study Team's original methodology for its study was flawed by certain built-in biases, I am impressed with the Team's resilience and adaptability in the face of sometimes stinging criticism. This is due, in large part I believe, to its collective participation in the Working Group's deliberative process.

As presented in its own summary, the Final Report proposes ways to change and improve our environmental system to better support decision making, environmental protection, public participation, good planning, and predictability in the process. It also identifies its own limitations which are worth noting here.

1. "Hawaii's environmental review system exists within a greater political system. Although steps can be taken to make the system as independent and objective as possible, it is difficult to create a process of environmental review that is divorced from the larger political context in which it exists. Thus, the system's effectiveness will always depend to an extent on political leadership..."

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2. "...[T]he question of how environmental review in Hawaii should best intersect with long-term planning and resource management remains unanswered...The environmental review system is not a substitute for good planning, and reform of other planning processes in Hawaii may be more effective for considering the incremental impacts of development over time than revisions to Chapter 343 alone."
3. "[E]nvironmental review and planning are not well connected. Environmental review should be part of an overall program of neighborhood, community, regional, and state planning. Encouraging early programmatic review will help address this gap. Environmental review cannot substitute for planning processes, which need to be ongoing, coordinated, interdisciplinary, and community-based. Environmental review and planning are interdependent systems, especially for managing cumulative impacts and for realizing established policy goals. Changes to both sides of the system need to be considered holistically."

Final Report Recommendations

The Final Reports divides its findings into five issues: Applicability, Governance, Participation, Content, and Process. Following is a summary of its recommendations. The numbering below matches that presented in the report. Some of the explanations for the recommendations are several pages long. For the purposes of expediency only the briefest of summaries are presented here. For particular recommendations of interest, I refer you to:

<http://hawaieisstudy.blogspot.com/>.

Applicability

5.2.1 Adopt a "discretionary approval" screen.

This would essentially replace the existing triggers with a process that would more resemble NEPA in that the EA or EIS would be the foundation for each discretionary approval, with narrower tiered documents or supplementation as required. The screen would classify discretionary approvals subject to an environmental assessment based on three Classes:

- Class 1: Discretionary approvals for which the action may have adverse environmental effects and therefore requires an environmental assessment or statement, unless determined to be exempt.
- Class 2: Discretionary approvals for which the action has no likely adverse environmental effects; and
- Class 3: Ministerial approvals.

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- 5.2.2 Streamline the exemption process, increase transparency, consolidate exemption lists, and required periodic updates of exemption lists.
- 5.2.3 Encourage early programmatic environmental review for large-scale programs and plans and narrower tiered review of later, site-specific projects.
- 5.2.4 Clarify that environmental review is not required for the use of land solely for connections to utilities or rights-of-way.
- 5.2.5 Move the significance criteria from the administrative rules to Chapter 343 to clarify the distinction between EAs and EISs.

Governance

- 6.2.1 Clarify the authority, organizational structure, responsibilities, and roles of OEQC, Environmental Council, Department of Health, and the Governor.

The Study Group departs from the Working Group on this issue. The Working Group recommended modeling the Environmental Council on the Board of Land and Natural Resources. The Study Team recommends modeling it on the federal Council of Environmental Quality (CEQ) or the State Land Use Commission. The Study Team recommends making the Council, instead of the Director, advisory to the Governor and recommends streamlining the Council from its 15 members down to 7 members. The Study Team also recommends removing the OEQC Director as an ex-officio member of the Council, authorizing the Council to appoint the Director, and moving OEQC from the Department of Health to the Governor's office

- 6.2.2 Modernize OEQC through a special funds and temporary fees.

The Study Team recommends the following temporary fee schedule as a means of generating new revenue with which to finance the office's modernization:

The Study Team recommends that for a five year period beginning July 1, 2011, an amount equal to 0.1 percent of all state appropriations for CIP supported by general obligation bonds be used to support the environmental review special fund. This fee would internalize the cost of the state environmental review process into the cost of CIP projects, and would be a minimal charge compared to the normal costs incurred by these proponent agencies in the EA or EIS process itself. To ensure, however, that the fees are not excessive, the total amount of transfers over the five-year period should not exceed \$1,250,000. On average, about \$250,000 would be collected each of the five years.

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The Study Team also proposes as a match for the CIP funds, a similar amount be raised from county and private applicants, based on publication in the OEQC Bulletin of certain environmental review documents, with fees capped at:

- \$1500 for a Draft EA
- \$1000 for a Final EA
- \$500 for an EIS Preparation Notice
- \$4000 for a Draft EIS
- \$3000 for a Final EIS
- \$500 for any Supplemental EA; and
- \$1000 for any Supplemental EIS.

The total amount of these temporary fees collected over a five year period is not to exceed \$1,250,000, with an estimate \$250,000 collected per year. Once this amount is reached, the temporary fee is discontinued.

Under these twin approaches, the anticipated additional support for the OEQC and the Council would be \$500,000 per year for a five-year period of rehabilitation and modernization.

6.2.3 Require OEQC and the Environmental Council to conduct regular outreach and training, annual workshops, publish an annual guidebook, and prepare an annual report on the effectiveness of the environmental review process.

6.2.4 Require regular updating of the administrative rules to maintain an effective state environmental review process.

6.2.5 Encourage the University of Hawaii to support the functioning of the Environmental Center.

Participation

7.2.1 Encourage broad, early, and effective public participation by adding supporting language to the statute and by allowing agencies to extend the period for public comment. In addition to strengthening the requirements for public notification, the Study Team proposes that 343 be amended to allow agencies, for good cause, to extend the public comment period for draft EAs and draft EIS (one-time 30 day extension for a Draft EA and a one-time 45 day extension for a Draft EIS).

7.2.2 Develop rules to address repetitious and voluminous comments.

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- 7.2.3 Improve the quality of review by clarifying agency duty to comment and providing guidance about comment and response specificity.
- 7.2.4 Integrate new communications technology into the system. The Study Team recommends creating a more electronic-based system by improving the OEQC website and making it more user friendly, including *pdf* searchable documents and an online comment and response system.
- 7.2.5 Integrate interagency and public scoping and consultation at the early stages of the planning process and provide more detail as to what constitutes adequate scoping.

Content

- 8.2.1 Implement maximum page limits and plain language requirements for environmental review documents. While not recommending a specific threshold, the Study Team directs this issue to rulemaking, but offers a caveat that projects determined to be of a substantial size and scope could have larger limits. It also notes that appendices could be archived electronically pursuant to recommendation 7.2.4 above.
- 8.2.2 Encourage objectivity in documents through rules and guidance.
- 8.2.3 Adopt a Record-of-Decision (ROD) requirement for EIS.
- 8.2.4 Allow for flexibility within the Record-of-Decision process. The Study Team believes that this would allow RODs to be more adaptive to changing technology and its effects on mitigation measures. As time passes and project details change, new and possibly better alternatives for mitigation measures may arise, and sometimes it is necessary to change mitigation measures to alternatives not preferred or explored in review documents. This recommendation would allow for that adaptation.
- 8.2.5 Prescribe procedures for implementing the ROD requirement, monitoring, and mitigation. The Study Team envisions a more active role by the Environmental Council in the ongoing review of completed projects to determine if mitigation measures have been implemented and if they have been effective.
- 8.2.6 Add a statutory definition of 'cumulative effects' and establish a database for cumulative effects assessment.
- 8.2.7 Define important terms related to cultural impact assessment, clarify the role of cultural experts, and establish clear rules and guidance to standardize the cultural impact

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assessment process. The Study Team recommends that OEQC continue its efforts at establishing an advisory review body to bring more cohesion to CIA.

8.2.8 Amend significance criteria to address climate change mitigation and adaptation.

Process

9.2.1 Allow agencies and applicants, at the lead agency's discretion, to proceed directly to an EIS.

9.2.2 Clarify rules regarding supplemental documents and 'shelf-life'. The Study Team recommends that supplemental documents focus only on those elements of the proposed action for which one or more discretionary approvals, modifications, or revocations remain, or to the extent that any agency has retained discretion to modify or revoke any prior approval.

9.2.3 Enhance public and interagency review and strengthen the role of governance to reduce perceptions of bias.