



STATE ENVIRONMENTAL ADVISORY COUNCIL

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Testimony of the Environmental Advisory Council on HCR 70 and HR 71

Before the House Committee on Water & Land
Conference Room 430 & Videoconference
March 28, 2023 at 9:30 am

Josh Green, M.D.
Governor

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Aloha Chair Ichiyama, Vice Chair Poepoe, and Members of the House Committee on Water and Land:

The State of Hawai'i Environmental Advisory Council (EAC) submits the following **COMMENTS** on House Concurrent Resolution (HCR) 70 and House Resolution (HR) 71:

HCR 70 and HR 71 request the EAC and the Office of Planning and Sustainable Development (OPSD) to:

1. Update Hawai'i Revised Statutes (HRS) Chapter 343 to reflect all factors that shall be considered for the environmental impact statement process;
2. Collaborate with the University of Hawai'i (UH), including all applicable departments, such as Hawai'i inuiākea School of Hawaiian Knowledge, College of Engineering, College of Tropical Agriculture and Human Resources, Department of Natural Resources and Environmental Management, and School of Architecture; and
3. Include in proposed legislation, provisions authorizing OPSD or the Department of Land and Natural Resources (DLNR) to, when necessary, appoint an independent contractor or another neutral party to prepare the environmental assessment (EA) and, if necessary, the (EIS);
4. Submit a draft report of the findings made, recommendations, and proposed legislation to the Legislature not later than twenty (20) days prior to the convening of the 2024 Regular Session;
5. With DLNR, gather public comments on the report and proposed amendments to HRS Chapter 343 by (i) posting the report and proposed amendments to DLNR's website and accepting written comments by email or other electric means; and (ii) holding at least one public forum in each of the counties;
6. By 2025, with DLNR, hold public forums in communities near state lands that are currently leased to the military to solicit community input on the future use of those lands; and
7. Consider the public comments regarding the report and proposed amendments and future use of the state lands that are leased to the military, and submit a final report of the findings and recommendations and proposed legislation to the Legislature no later than twenty (20) days prior to the convening of the 2025 Regular Session.

The EAC understands the intent of HCR 70 and HR 71 and is willing to work with OPSD, DLNR, and UH as directed by the Legislature, within the EAC's means. The EAC has testified before the Legislature in past sessions on the issue that the EAC does not have any budget (including travel budget) and no dedicated staff. Any funds required by the EAC to complete its statutory functions previously came out of the Office of Environmental Quality Control (OEQC) budget and now would be taken from OPSD's budget. The OPSD Environmental Review Program (ERP) staff support the EAC on top of their other duties. All EAC members are volunteers, with most holding full time jobs outside of their EAC work. Several years back, a bill was introduced requesting a modest budget for the EAC. That bill was never passed. The EAC mentions these points to note that the undertaking proposed by HCR 70 and HR 71 will be difficult and will require dedicated staff and funding.

The EAC offers the following specific comments:

As to item 1, in 2019, following a multi-year process that involved significant public outreach, meetings, and several drafts that were open to public comment, and public hearings on each island, the EAC updated Hawai'i Administrative Rules (HAR) Title 11, Chapter 200.1, the administrative rules that implement HRS Chapter 343, known as the "EIS Rules". The EIS Rules currently include all factors that must be considered in the EA and EIS processes.

As to item 3, the EAC understands that an applicant EA or EIS completed by an "independent contractor" is *perceived* by the public as being "neutral" compared to those completed by consultants paid for by the applicant. That perception is unsubstantiated and potentially insulting to the many qualified professionals preparing EAs and EISs in the State. HCR 70 and HR 71 appear to be based on a misconception that it is the applicant and/or its consultant who, for EAs, is making the determination that a Finding of No Significant Impact (FONSI) should be issued. While the studies prepared by the environmental consultant may recommend whether or not an Anticipated FONSI should be issued, ultimately, it is the approving agency (in the case of an EA) that makes the determination about whether or not a FONSI should be issued, and if not, that the applicant must prepare an EIS. The applicant or its consultant do not make these determinations. Thus, the approving agency or the accepting authority (in the case of an EIS) are the independent, neutral third-parties reviewing the EA or EIS and making the determination on whether a FONSI should issue, whether an applicant is required to prepare an EIS, and whether or not an EIS should be accepted. Those agencies are also responsible for processing the underlying permit or approval that triggered the need to complete HRS Chapter 343 review and have the expertise to determine whether or not the information contained in the EA or EIS is sufficient to support the permit/approval application. Additionally, HRS § 343-7 provides an avenue for those contesting the approving agency/accepting authority's decision on an EA or EIS to judicial review by allowing individuals and organizations to file a declaratory action in the Circuit Court.

To the extent the State would want to proceed with an additional requirement for an "independent contractor" to prepare EAs or EIS, those "independent contractors" would likely need to be funded either through the State or county approving agency/accepting authority budgets, which costs are thus passed on to the taxpayers, and if not, through funds from the applicant, which is essentially the current process.

Regarding item 5, the EAC requests further clarification on what is meant by the Legislature's use of "public forum". Are these meant to be "public hearings", which may have additional requirements under HRS Chapter 91 rulemaking (such as hiring a hearings officer, etc.), or informal "talk story" sessions? The Legislature's response to this question will further impact whether or not it is realistic for the EAC, OPSD, and DLNR to complete its report twenty days prior to the 2024 Legislative Session (item 4), which is compounded by the points raised above that the EAC has no dedicated staff or budget.

With respect to items 6 and 7, the EAC would be happy to participate in the discussions on the future of State lands currently leased to the military, but believes that such efforts would be better led by DLNR and/or the agencies who are the lessor(s) of such lands.

Lastly, the action items that the Legislature is requesting in HCR 70 and HR 71 are big asks of a volunteer board. Last week, the Governor's nominee for the Director of the OPSD was not confirmed by the Senate. The EAC's success in completing the multi-year overhaul of the EIS Rules, culminating in 2019, is largely attributed to Mr. Scott Glenn's leadership of OEQC and strong support of the EAC in the years leading up to and following the promulgation of the EIS Rules. The EAC is concerned that without a strong Director for the OPSD who has the knowledge, experience, and desire to support a process as comprehensive as the one that is desired by HCR 70 and HR 71, such a process may not be achievable, particularly in the timelines set forth above.

Thank you for the opportunity to testify on this measure.

Puananionaona Thoene
Chair
Environmental Advisory Council

Robin Kaye
Chair
EAC Legislative Committee