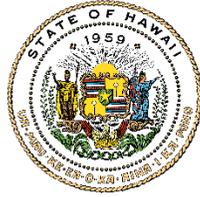


JOSH GREEN, M.D.
GOVERNOR | KE KIA'ĀINA

SYLVIA LUKE
LIEUTENANT GOVERNOR | KA HOPE KIA'ĀINA



**STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAII'
DEPARTMENT OF LAND AND NATURAL RESOURCES
KA 'OIHANA KUMUWAIWAI 'ĀINA**

P.O. BOX 621
HONOLULU, HAWAII 96809

**Testimony of
DAWN N.S. CHANG
Chairperson**

**Before the House Committee on
WATER & LAND**

**Tuesday, March 28, 2023
9:30 AM**

State Capitol, Conference Room 430 & Videoconference

**In consideration of
HOUSE CONCURRENT RESOLUTION 70/HOUSE RESOLUTION 71
RELATING TO REQUESTING THE ENVIRONMENTAL ADVISORY COUNCIL AND
OFFICE OF PLANNING AND SUSTAINABLE DEVELOPMENT TO COLLABORATE WITH
THE UNIVERSITY OF HAWAII TO UPDATE CHAPTER 343, HAWAII REVISED
STATUTES, TO REFLECT ALL FACTORS THAT SHALL BE CONSIDERED FOR THE
ENVIRONMENTAL IMPACT STATEMENT PROCESS, AND REQUESTING THE OFFICE
OF PLANNING AND SUSTAINABLE DEVELOPMENT AND THE DEPARTMENT OF LAND
AND NATURAL RESOURCES TO HOLD PUBLIC FORUMS ON THE FUTURE USE OF
STATE LANDS CURRENTLY LEASED TO THE MILITARY**

House Concurrent Resolution 70/House Resolution 71 request, in preparation for the forthcoming military state land lease expirations, that Chapter 343, Hawaii Revised Statutes (HRS), be updated to reflect all factors that shall be considered for the environmental impact statement (EIS) process and include provisions authorizing the Office of Planning and Sustainable Development (OPSD) or the Department of Land and Natural Resources (Department) to appoint an independent contractor or another neutral party to prepare an environmental assessment (EA) or EIS. Further, the resolutions request that OPSD and the Department hold public forums to solicit community input of the future use of those lands. **The Department provides the following comments on these measures.**

While we appreciate the intent of these resolutions which is to ensure that the proposed environmental documents prepared under Chapter 343, HRS, for the new military leases be neutral and objective taking into consideration Hawaiian culture, engineering, the environment, design, and other concerns, including those raised by the genuine community engagement processes gathered separate and independent from the United States Department of Defense (USDOD) process. If necessary, to ensure independent review, OPSD or the Department may appoint an independent contractor to prepare the environmental documents.

DAWN N.S. CHANG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE
MANAGEMENT

LAURA H.E. KAAKUA
FIRST DEPUTY

M. KALEO MANUEL
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE
MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES
ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

Notwithstanding the legislative intent, there may be unintended consequences to proposed amendments to Chapter 343, HRS, beyond the military leases.

First, Chapter 343, HRS and Chapter 11-200.1, Hawaii Administrative Rules (HAR), affect agencies and projects beyond OPSD and the Department and the anticipated new military leases. Any project/action which falls under one or more trigger as defined in Section 343-5, HRS, is subject to the provisions of Chapter 343, HRS, and subsequently Chapter 11-200.1, HAR. Therefore, any revisions to Chapter 343, HRS, should consider the impacts it will have on all other projects and agencies. Furthermore, any proposed amendments to Chapter 343, HRS, that add requirements to an EA or EIS may unreasonably restrain projects that have significant public benefits, including affordable housing, renewable energy, food sustainability and climate change mitigation. Furthermore, additional criteria could give rise to further challenges and increased litigation, imposing costs far beyond that of preparation of the EA and EIS.

Second, the Department is concerned that by having OPSD or the Department hire an independent contractor to prepare the USDOD environmental documents, the burden of compliance under Chapter 343, HRS, would be shifted to the state agency rather than USDOD. The Department is also concerned that state agencies may incur additional liability if the EA or EIS is challenged for being inadequate.

Third, any proposed rules amendments to Chapter 343, HRS, could possibly take several years, which leave insufficient time for USDOD or an independent contractor to actually prepare the Chapter 343, HRS, environmental documents, and all other regulatory processes, including conservation district use permit if applicable pursuant to Chapter 183C, HRS, and issuance of a state lease pursuant to Chapter 171, HRS, before military leases expire in 2029.

The Department also notes that these resolutions request that the Department, along with OPSD and the Environmental Advisory Council, gather public comments on the requested report to the Legislature and the proposed amendments to Chapter 343, HRS. In addition, the resolutions request that the Department post these documents on the Department's website and having the Department as the contact for accepting written comments by email or other electronic means. The Department asks that this paragraph of the resolutions to be amended to have OPSD take on this responsibility as they are the agency with jurisdiction of Chapter 343, HRS. The amendment could be effectuated by revising the language at page 3, lines 7-11 of the resolutions as follows:

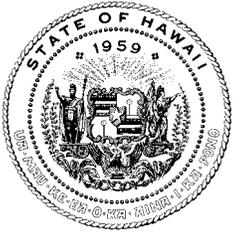
- (1) Posting the report and proposed amendments to Chapter 343, Hawaii Revised Statutes, on the [~~Department of Land and Natural Resource's~~] Office of Planning and Sustainable Development's website and accepting written comments by email or other electric means; and

The Department believes that at the heart of these resolutions are to ensure timely and appropriate community engagement, especially with those communities most impacted by the Unites States Military leases, to ensure informed decision making. The Department wholeheartedly concurs with the Legislature. However, the Department believes that it is the responsibility of the United States Military to timely engage with the community, especially those most impacted by the United States Military leases and the

Native Hawaiian communities who have been disproportionately impacted by the military leases. However, in addition to the outreach the United States Military may do, the Department intends to facilitate public forums on the future use of the lands currently leased to the military.

The Department would represent that it has already initiated discussions with USDOD on the Department's land disposition process, including environmental compliance, cultural impact statements, Ka Pa'akai Analysis, and expectations of proactive and extensive community engagement by USDOD. We also note that in addition to complying with Chapter 343, HRS, most of the military land leases fall within the State Land Use Conservation District which could potentially require a permit from the Department's Office of Conservation and Coastal Lands. Further, due their location, the military action may involve the inadvertent take of threatened or endangered species which could require the military to obtain an incidental take license and the development of a habitat conservation plan. All of these permits and approvals would allow for multiple public comment opportunities under the Department's jurisdiction. The USDOD leases will be one of the most important conversations that the Department anticipates facilitating with the community to ensure informed decision making.

Mahalo for the opportunity to comment on these measures.



STATE ENVIRONMENTAL ADVISORY COUNCIL

DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM,
OFFICE OF PLANNING & SUSTAINABLE DEVELOPMENT, STATE OF HAWAII
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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

Chairperson
Puananionaona Thoene

Vice Chair
Mary Begier

Members
Roy Abe
Stephanie Dunbar-Co
Dawn Hegger-Nordblom
Makaala Kaaumoana
Ian Robin Kaye
Theresita Kinnaman
Michele Lefebvre
Gordon Scruton, Jr.
Rachel Sprague
Ron Terry
Michael Tulang
N. Mahina Tuteur

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