



## LIFE OF THE LAND

76 North King Street, Suite 203

Honolulu, Hawai'i 96817

Phone: 533-3454; E: [henry.lifeoftheland@gmail.com](mailto:henry.lifeoftheland@gmail.com)

### **ENERGY AND ENVIRONMENT COMMITTEE**

Senator Mike Gabbard, Chair

Senator Kalani English, Vice Chair

Thursday, October 1, 2009

1:00 p.m. – Room 016

Re: Environmental Council

Aloha Chair Gabbard, Vice Chair English and Members of the Committee:

My name is Henry Curtis and I am the Executive Director of Life of the Land, Hawai'i's own energy, environmental and community action group advocating for the people and `aina for almost four decades. Our mission is to preserve and protect the life of the land through sound energy and land use policies and to promote open government through research, education, advocacy and, when necessary, litigation.

The purpose of this informational briefing is to gather information related to the current operations of the Environmental Council, and the council's ability to perform its statutory functions pursuant to Chapter 341, Hawai'i Revised Statutes, in light of recent reductions in support provided by the Hawai'i State Department of Health. Presentations will be made by representatives from the following: The Environmental Council, University of Hawai'i William S. Richardson School of Law, Life of the Land, Office of Environmental Quality Control, Hawai'i State Department of Health.

The issue before the committee today is the current operations of the Environmental Council. The current melt-down occurred because of the Governor's reaction to legitimate actions by the Environmental Council. The tensions that exist today are rooted in the history of the Environmental Council.

Congress passed the National Environmental Policy Act (NEPA) in December 1969 and it was signed into law in 1970 by President Nixon. NEPA requires

Environmental Impact Statements (EISs) for any project, federal, state or local, that involves federal funding or work performed by the federal government. The President's Council on Environmental Quality (CEQ) has the kuleana of ensuring that Federal agencies meet their obligations under NEPA. The CEQ has published rules and guidance (NEPA's Forty Most Asked Questions. <http://www.nepa.gov/nepa/regs/40/40p3.htm>).

In 1970 the Hawaii Legislature passed SB 1132 which was approved by the Governor as Act 132. This bill established Chapter 341 of the Hawaii Revised Statutes (HRS) which in turn established the Office of Environmental Quality Control (OEQC), the University of Hawaii Environmental Center (UHEC), and the Environmental Council. OEQC was created to serve the governor on environmental issues. The Environmental Council was created as an interface between OEQC and the public. The UHEC was created to stimulate research and education and has the role of gathering input from professors and researchers and asking questions on most EISs. (analyzing)

In 1974 the Hawaii Legislature passed HB 2067 which was approved by the Governor as Act 246. This bill established the Hawaii version of NEPA, codified as Chapter 343 of the HRS, and established the Environmental Quality Commission (EQC) to make rules to implement the Chapter 343.

In 1983, Act 140 abolished the EQC and transferred its functions to OEQC and the Environmental Council. The Environmental Council was to keep the EQC rules until it could adopt new rules. Once these new rules were adopted, the Act would limit the Environmental Council's ability to issue declaratory rulings. The Environmental Council was charged with creating rules on how the EIS process might be implemented but other agencies were vested with implementing these rules. The Environmental Council was not specifically invested with the role of enforcing or making judgments about how other agencies implemented Chapter 343.

David Callies noted in 1984: "The [environmental] council's appellate function is potentially its most critical. Should an agency fail to accept an EIS, an applicant may (within sixty days) appeal that decision to the council. The council then holds a public hearing on the island where the proposed action is to take place. As noted previously, the council's decision is binding upon the agency. Apparently there has only been a single such appeal over the acceptability of an EIS, and it was dropped after an amended EIS was filed and subsequently accepted by the relevant agency. This lack of appeals is due in part to the relative few EISs that have been deemed unacceptable by the reviewing agencies."<sup>1</sup>

During the mid to late 1980s the Legislature passed bills clarifying the ability of the Environmental Council to issue declaratory rulings. These were uniformly vetoed by the Governor.

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<sup>1</sup> Regulating Paradise: Land Use Controls in Hawaii. David L. Callies. 1984. page 127

Between 1984 and 1987 about 3 dozen petitions were filed with the Environmental Council. In slightly less than half, the Environmental Council ruled in favor of the petitioner. For example, in 1985 the Sierra Club filed for a declaratory ruling on a proposed hydroelectric facility on Maui. The Environmental Council informed the agency that the project should not be implemented prior to completion of the EIS process. In 1986 Life of the Land filed two petitions. In the first, dealing with Queen's Beach, the Environmental Council ruled that the EIS process should be completed before a planning officer recommended rezoning land to designations other than preservation or agriculture. The second focused on water leases: the Environmental Council said that other agency comments should be considered by the accepting agency.

Deputy Attorneys General issued opinions that basically ended the issuance of declaratory rules in 1988. Life of the Land filed a petition on Instream Flow Standards in 1988. The Environmental Council stated that the Attorney General advised them that they do not have the jurisdiction to rule on that issue.

The Attorney General based their actions at least in part on *Fasi v. State Public Employment Relations Bd.*, 60 Haw. 436, 443, 591 P.2d 113, 117 (1979) in which the Hawaii Supreme Court ruled that a "declaratory petition involves a question relevant to some action which the [agency] might take in the exercise of the powers granted by statute". This action by the Attorney General handcuffed the Environmental Council.

On May 9, 1989 the Environmental Council issued a statement on this problem: "Strict application of this legal framework has resulted in the Council's declining to issue declaratory rulings where jurisdiction was at issue, irrespective of the Council's opinion of the factual contentions of the petition. The Council would like to remind petitioners that Council intervention in environmental disputes may take forms other than declaratory rulings including: Letters of Opinion; Publicizing the issue further within government channels and to the public; Publicizing the issue through the Annual Reports; and Becoming a party to legal proceedings. The Council would like to encourage Hawaii's citizens and environmental organizations to continue to bring matters of environmental concern to our attention, and hope with the means we have available, the Council can play a role in preserving and protecting Hawaii's environment."

**Ala Wai Boulevard (2004)**: "More than 50 residents attended the gathering at the Waikiki Community Center yesterday, just one day after the state Environmental Council voted to recommend to the city that the Ala Wai project undergo an environmental assessment. But the city is not obligated to follow the council's recommendation, and has ignored its advice in the past. The council never weighed in initially on whether an assessment was needed for the

Ala Wai work because the city exempted itself from the process, a common practice for small projects."<sup>2</sup>

**Turtle Bay (2006):** "Kuilima submitted an environmental impact statement for the project in 1985 ... In 2005 no major construction for the project had started. However, Kuilima submitted to the county's Department of Planning and Permitting an application for a subdivision for 744 acres of the 804-acre property. The State of Hawai'i Environmental Council took the position that a supplemental EIS should be prepared."<sup>3</sup> "The State of Hawai'i Environmental Council ... voted unanimously to ask the Department of Planning and Permitting why the proposed development did not have a supplemental EIS. The Council even identified specific rules that trigger the need for an SEIS."<sup>4</sup>

**Superferry (2007):** "So why did Superferry and the administration choose to skip this process three years ago? Why did they choose not to complete an environmental review after the community groups asked, after neighbor island lawmakers asked, after the Maui, Kauai and Big Island county councils asked, even after the state's own Environmental Council ruled that it was required?"<sup>5</sup> "The DOT decision to exempt the Superferry from completing an EIS has been reviewed (long after the fact) by the Environmental Council and the Council found the decision was flawed."<sup>6</sup>

**Kukui Gardens (2007):** "State Environmental Council to hear petition for rulemaking from Housing Finance and Development Corporation to exempt from an environmental assessment the acquisition of land and buildings for affordable housing (at Kukui Gardens) from an environmental assessment. After getting burned in the Superferry Supreme Court decision that portrayed her administration as being "pro-big business" the Lingle administration ... will ask the State Environmental Council ... to exempt the acquisition of land and buildings for affordable housing from the environmental assessment process. The Lingle administration is hoping that public perception of her 'pro-business at-any-cost' strategy will change as she asks the Council to pass the rule that she sees as 'pro-homeless and poor.'"<sup>7</sup>

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<sup>2</sup> Waikiki residents rally against project Hannemann and Bainum speak out against the roadwork on Ala Wai Boulevard By Mary Vorsino, Honolulu Star Bulletin. August 14, 2004  
<http://archives.starbulletin.com/2004/08/14/news/story10.html>

<sup>3</sup> <http://hawaiiopinions.blogspot.com/2009/05/no-substantive-change-in-proposed.html>

<sup>4</sup> Turtle Bay plans need a supplemental EIS By Gil Riviere Honolulu Advertiser October 10, 2006.  
<http://the.honoluluadvertiser.com/article/2006/Oct/10/op/FP610100313.html/?print=on>

<sup>5</sup> Failure to complete study set Superferry on doomed course Guest Editorial in the Star Bulletin By Jeff Mikulina, Judith Michaels & Jeffrey Parker Sept 3, 2007  
[www.savekahuluiharbor.com/editorial.php](http://www.savekahuluiharbor.com/editorial.php)

<sup>6</sup> Poinography, February 22, 2007. [http://poinography.com/wordpress/?page\\_id=139](http://poinography.com/wordpress/?page_id=139)

<sup>7</sup> Kauaielectic 2007 <http://kauaielectic.blogspot.com/2007/10/musings-rainy-days.html>; See also <http://disappearednews.com/2007/10/next-environmental-exemption-battle.html>

**Hawaii Administrative Rules (HAR)**: §11-201-2 states: "Proceeding" means the [environmental] council's elucidation and consideration of the relevant facts and applicable laws and its action thereupon with respect to a particular subject within its jurisdiction, initiated by a filing or submittal by petition, appeals, and applications by an interested person or agency or by a council notice or order, and shall include, but not be limited to:

Proceedings involving the adoption, amendment, or repeal of any rule of the council;

Proceedings involving declaratory rulings; and

Appeals instituted at the request of an applicant, involving the non-acceptance of the applicant's environmental impact statement by the agency responsible for accepting that statement”

**Conclusion**

The Environmental Council has and can again become an important voice in preserving and protecting the environment. It needs administrative support.

Mahalo,

Henry Curtis