HB 3081
RELATING TO NATIVE HAWAIIAN CULTURAL IMPACT STATEMENTS

House Committee on
Hawaiian Affairs and Housing

Public Hearing - January 27, 1996
9:00 A.M., Room 329 State Capitol

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HB 3081 would require preparation of a native Hawaiian cultural impact statement as part of the decision making process for any development activity which requires approval or permit from a state agency, unless such a statement is included in an environmental assessment prepared pursuant to Chapter 343, HRS.

Our statement on this measure is compiled from voluntarily submitted opinions of the listed academic reviewers, and as such, does not constitute an institutional position of the University of Hawaii.

Overview

The intent and structure of the proposed cultural impact statement broadly recapitulate those of the environmental impact statement system on which it is modeled. Arguably, the intent of the EIS system includes assessment of the impacts of a proposed action on Native Hawaiian as well as other cultural communities. In practice, discretionary interpretation of the language of Chapter 343, HRS, and of the EIS Rules (Title 11, Chapter 200, Department of Health Administrative Rules) by implementing agencies has seldom engendered the rigorous cultural impact assessment this measure
seeks. Furthermore, the EIS system applies to a somewhat narrower range of geographic areas than those addressed in this measure.

However, in most respects, the EIS process is substantially more comprehensive than the proposed cultural impact statement system. For this reason, we suggest that a simpler and significantly more efficient means to achieve the goal of diligent Native Hawaiian cultural impact assessment by development applicants or agencies would be to broaden the applicability of Chapter 343 while including in that statute provisions for the assessment of Native Hawaiian cultural impacts. In principle, this may be accomplished by amending §343-5 HRS to add specific permit and approval criteria, with some limitations as noted subsequently, to the existing triggers. For clarity, statutory provisions for Native Hawaiian cultural impact assessment should be direct, but succinct; explicit description of form, content, and process requirements more appropriately should be provided through rulemaking.

Analysis of the proposed measure.

1. Applicability of the measure, as stated in § -2, is insufficient.

As written, only actions which require approval of a state agency invoke the CIS requirement. However, counties exert significant discretionary control over areas which have figured prominently in Native Hawaiian rights litigation, such as the Special Management Area (SMA). Hence, county permit systems should not be omitted from the proposed trigger. However, it would be unreasonable to require compliance with a CIS provision for all county permits; otherwise, minor building alterations or landscaping modifications would require preparation of prohibitively costly documentation. Here, existing elements of the EIS law, such as the exemption provision, would allow appropriate action using familiar, established practices. Similarly, the concerns regarding multiple agency approval are resolved by existing provisions of §343-5.

2. § -3 content requirements are descriptive only.

As proposed, contents of a CIS must include four elements of locational or physical description and one non-specific agency-discretionary category. Instead, we suggest that the substantive elements of the CIS content remain summarized as in the definition offered in § -1, and the explicit details of content be established by rulemaking as is presently the case for an EIS. This offers a mechanism for inclusion of both descriptive and analytic standards by which content and quality of the disclosure documents may be standardized and reviewed.

3. Procedural requirements as stated are overly vague.

Here again, it would seem that there is much to be gained by incorporating the proposed cultural impact assessment into existing procedural standards of Chapter 343. In particular, provisions in the existing law for public review, written comment, and
thoughtful agency response are crucial to a process intended to ensure comprehensive disclosure of project elements. Also, as written, there is very little discussion of what is required in the event that an impact is found. Are there opportunities for mitigation? In the event of differing interpretations of Native Hawaiian cultural traditions, whose opinions are authoritative? Who, ultimately, is responsible for preparation of the statement? All of these questions would be addressed in a system incorporating Native Hawaiian cultural impact assessment into Chapter 343.

Summary

Unquestionably, protection of Native Hawaiian cultural and traditional rights is an essential responsibility of both applicant and public agency developers. As the preamble to this measure notes, Constitutional protections are extended to the rights of Native Hawaiians, but they also are provided to the rights of all citizens to a clean and healthful environment (Article XII, Section 9). Hence, there is ample justification to build upon the demonstrated strengths and procedural rigor of the existing EIS system in implementing complementary provisions for Native Hawaiian cultural impact assessment. Thus, we urge that existing elements of Chapter 343 as identified in our testimony be broadened to encompass the wider applicability called for in this measure, and that the proposed requirements for cultural impact assessment be incorporated into the state’s EIS law.