Introduction

HB 286 would redefine both the rulemaking power of the Department of Transportation (DOT) concerning nearshore areas and the inland boundary of these areas that are defined in HRS Chapter 266. This statement on the bill does not reflect an institutional position of the University of Hawaii.

We wish to comment on two parts of Section 2 of the bill, which proposes amendment of HRS 266-3:

1) The part that relates to near-shore areas in which the public safety, health, and welfare is to be promoted by DOT rules and in which the rules are to be applied (pp. 1-2); and

2) The proposed definition (p. 3) of the "shoreline" that would be substituted for the mean "high water mark" as the inland boundary of DOT jurisdiction in the revision of HRS Section 266-1 proposed in Section 1 of the bill (p. 1).

Near-shore areas subject to DOT rules

In Section 2 of the Act, the areas in which the public safety, health and welfare is to be promoted by DOT rules, and the list of identical areas to which the rules are to relate, as provided in HRS Section 266-3, would be expanded by adding to the listed areas: "public beaches constructed seaward of an existing shoreline". The language used in the present section is such that it is inconsistent to introduce the word "on" before "public beaches" as is proposed in the second iteration of the area list in HB 286 (last word on p. 2, line 4).
The section would, however, be made much simpler and easier to read if, in addition to deleting the word "on" there, the part of HB 286 containing the first iteration of the areas (p. 1, line 14 to p. 2, line 2) were replaced by:

...the director, to promote public safety, health, and welfare in near-shore areas; may adopt rules...

Inland boundary of DOT jurisdiction

At present the inland boundary of DOT jurisdiction is a "high water mark" (HRS 266-1). HB 286 would substitute a "shoreline" for that "mark". Such a substitution represents a potential improvement. However, the definition of the "shoreline" proposed in the bill (p. 3, line 16-18) differs significantly from that at present provided in the Shoreline Setback Act (HRS 205-31(2)). A justification sheet attached to the bill indicates that the difference is deliberate and intended to remedy an ambiguity in the present definition. The proposed definition would indeed remedy an ambiguity resulting from an internal inconsistency in the present definition. Unfortunately, the proposed definition, also, is ambiguous, and its adoption would perpetuate the inconsistencies among several definitions of "shoreline" or similar boundaries in Hawaiian law.

We recommend strongly, either that:

1) The definition of "shoreline" (p. 3, lines 15-18) be deleted in favor of definition by citation of the Shoreline Setback Act (HRS 205-31(2);

or that:

2) The definition be reworded to read:

"Shoreline" means the normal annual wavewash limit as may be evidenced by the seaward edge of perennial land vegetation or the inland-most debris line.

With the first of these alternatives, the boundary of DOT jurisdiction would at least be consistent with the "shoreline" in the Shoreline Setback Act. The definition of "shoreline" proposed in the second alternative does not have the internal inconsistency that is present in the definition of the Shoreline Setback Act. The definition we propose should at some time be substituted for the present definition in that Act. We note that because the title of HB 286 is "Relating to the Shores and Shoreline", the substitution could be made in a section of the bill additional to the five sections it now contains. Alternative 1) could then make the proposed definition applicable to HRS 286.

The problem with inconsistencies among present definitions of shorelines and similar boundaries, and ambiguities and internal inconsistencies in them, is discussed more extensively below.

Definitions of shorelines and similar boundaries

The present definition of the "shoreline" in the Shoreline Setback Act is similar to that proposed in HB 286 except that the definition in the Shoreline Setback Act excludes storm and tidal waves from those whose wash determines the shoreline. The internal inconsistency in the definition in the Shoreline Setback Act results from the fact that
what is usually referred to as the vegetation line, that is the seaward limit of perennial vegetation of most land species, is at the landward limit of normal annual wave wash, and this limit is reached only by the storm waves that are normally expectable but would be excluded from consideration by the definition.

The vegetation whose edge constitutes the vegetation line marking the "shoreline" is not defined in either the shoreline definition in the Shoreline Setback Act or that proposed in HB 286. The vegetation intended is clearly comprised of land species of plants, not marine species, and the intended line might be described most exactly as the seaward limit of the perennial growth of grass and small shrubs, and of the main stems of higher shrubs, excluding plants that will grow continuously in salt water. However, description as the "seaward edge of perennial land vegetation" would probably be adequate in the statute, especially if the intent is now fully described in legislative committee reports.

There is ordinarily more than one noticeable debris line on a shore, and the definitions proposed in HB 286 and in this statement would remove an ambiguity in the Shoreline Setback Act, which does not specify which debris line is intended.

We should note that the definition of the inland boundary of the portion of the Conservation District lying along the coast provided in Land Use Commission rules is similar to the "shoreline" definitions discussed. In this definition, the concept of annual wave wash limit is recognized, as is a vegetation line and a debris line although neither of these is described unambiguously; and the boundary is also referred to as following the "crest of the sand or dune line, or the rocky shore". The normal annual wave-wash line, vegetation line, inland-most normal debris line, and crest of the inland-most beach berm, are ordinarily closely coincident. However, the line of dune crests is quite different, and the line of the "rocky shore" is quite ambiguous. Either the Land Use Commission should be advised to revise its definition of the boundary of the portion of the Conservation District lying along the coast, or an appropriate definition of the boundary should be provided in statute.

We note further that the concepts of the wave-wash limit, vegetation line, and debris line are reflected in the interpretation of ambiguous descriptions of makai boundaries of private shorefront property in the Hawaii Supreme Court decisions in Ashford (1988) and Sotomura (1973), and that the wave-wash limit reflected in the latter decision is the maximum annual wave-wash limit.