

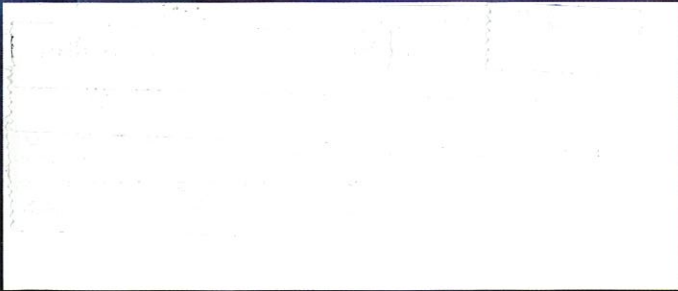
H A W A I I

# BAR JOURNAL

AN OFFICIAL PUBLICATION OF THE HAWAII STATE BAR ASSOCIATION  
MAY, 2008 \$5.00

**In This Issue**

**Act 234: Hawaii's  
Climate Change  
Law**



# Table of Contents

EDITOR IN CHIEF  
Carol K. Muranaka

BOARD OF EDITORS  
Christine Daleiden  
David Farmer  
Susan Gochros  
Cynthia Johiro  
Edward Kemper  
Laurel Loo  
Melvin M.M. Masuda  
G. Richard Morry  
Lennes Omuro  
Suzanne Terada  
Jodi Kimura Yi  
Jennifer Young

HSBA OFFICERS  
President  
Jeffrey H.K. Sia  
Vice President/President-Elect  
Rai Saint Chu  
Secretary  
Carolyn M. Yu  
Treasurer  
Douglas T. Moore

YLD OFFICERS  
President  
Jill Hasegawa  
Vice President/President-Elect  
Damien A. Elefante  
Secretary  
Lisa Nakahara  
Treasurer  
Sat Freedman

EXECUTIVE DIRECTOR  
Lyn Flanigan

GRASS SHACK PRODUCTIONS  
Publisher  
Brett Pruitt

Assistant to Publisher  
Maria Karpenko

Art Direction  
Beryl Bloom

Hawaii Bar Journal is published monthly with an additional issue in the second quarter of each year for the Hawaii State Bar Association by Grass Shack Productions, 1111 Nuuanu Ave., Suite 212, Honolulu, Hawaii 96817. Annual subscription rate is \$50. Periodical postage paid at Honolulu, Hawaii and additional mailing offices.

POSTMASTER: Send address changes to the Hawaii Bar Journal (ISSN 1063-1585), 1132 Bishop St., Ste. 906, Honolulu, Hawaii 96813.

Advertising inquiries should be directed to:  
Grass Shack Productions  
(808)521-1929 FAX: (808)521-6931  
Printed in Hawaii by Hagadone Printing

## FEATURES

- 6 Act 234: Hawaii's Climate Change Law  
*by Douglas A. Codiga*
- 26 Bar Directory Errata

## DEPARTMENTS

- 16 HSBA Happenings
- 18 Perspectives
- 20 Court Briefs
- 22 Case Notes
- 24 Ethics & Issues
- 30 Off the Record
- 31 Classifieds

On the cover: *Obake Antherum* by Fanny Bilodeau. Bilodeau has always loved detail and literally spent much of her time on her hands and knees as a young child examining nature close-up. Bilodeau will be the first to say that nature itself has taught her many more lessons in art than any formal teaching, and that's where she still prefers to receive most of her training. Bilodeau work can be found at Island Art Galleries. 76 S. Hotel Street in Honolulu's art district.

Notices and articles should be mailed to the *Hawaii Bar Journal*, c/o HSBA, 1132 Bishop Street, Suite 906, Honolulu, HI 96813 (Phone: 537-1868, Fax: 521-7936; URL: <http://HSBA.org>) six weeks before publication. The *Hawaii Bar Journal* reserves the right to edit or not publish submitted material. Statements or expressions of opinion appearing herein are those of the authors and not necessarily the views of the publisher, editorial staff, or officials of the Hawaii State Bar Association. Publication of advertising herein does not imply endorsement of any product, service, or opinion advertised. The HSBA and the publisher disclaim any liability arising from reliance upon information contained herein. ©2008 Hawaii State Bar Association. All Rights Reserved.

Climate change is emerging as one of the most significant environmental and economic issues of our time. Widespread scientific agreement that human activities contribute to climate change and increased public awareness about its impacts – from the plight of polar bears on melting Arctic ice to tropical atolls submerged by rising sea levels – have spurred the adoption of international treaties, regional agreements, and federal, state, county and municipal laws. These laws

typically seek to regulate the greenhouse gas emissions which contribute to climate change. Because greenhouse gas emissions result from a wide variety of economic activities, the laws that regulate them are often correspondingly broad and inclusive. Such laws necessarily affect all major sectors of the economy in the effort to protect the environment from global warming.<sup>1</sup>

In 2007, declaring that “climate change poses a serious threat to the economic well-being, public health, natural resources, and the environment of Hawaii,” the Hawaii Legislature passed major climate change legislation known as Act 234.<sup>2</sup> The potential adverse environmental effects of climate change, as identified by the Legislature, may include rising sea levels resulting in the displacement of businesses and residences and inundation of freshwater aquifers, damage to marine ecosystems and the natural environment, extended drought and loss of soil moisture, an increase in the spread of infectious diseases, and an increase in the severity of storms and extreme weather events.<sup>3</sup> The economic impacts may be equally serious. Climate change is expected to have detrimental effects on some of Hawaii’s largest industries, including

# ACT 234: Hawaii’s climate change Law

tourism, agriculture, recreation, commercial fishing, and forestry. It is also expected to increase the strain on electricity supplies necessary to meet the demand for air conditioning during the hottest times of the year.<sup>4</sup>

To address these challenges, the Hawaii climate change law is among the first in the nation to require statewide reduction of greenhouse gas (“GHG”) emissions to 1990 levels by the year 2020. Although Act 234 establishes this basic GHG emissions limit, it does not specify enforceable limits on particular emitters of green-

house gases. The Act instead grants a broad mandate to the State of Hawaii Department of Health to adopt administrative rules to achieve the emissions limit. These administrative rules may regulate emissions from “sources or categories of sources” to achieve the emissions limit.<sup>5</sup> The rules are expected to regulate GHG emissions from electrical utilities, petroleum refineries, the ground transportation industry, the maritime industry, and possibly other sectors of Hawaii’s economy.

This article provides a detailed summary of the chief requirements of Act 234 and briefly discusses related climate change law and policy issues in Hawaii. Because regulations are not yet in place, the purpose of this article is to foster general knowl-

edge about the Act’s little known but potentially far-reaching requirements. Although Act 234 is intended to address the challenges of global warming, it may also create economic opportunities by stimulating demand for a broad range of products and services that increase energy efficiency, reduce GHG emissions, and promote environmental sustainability in Hawaii. Informed participation in future rulemaking and legislative action, by all interested and affected parties, will be necessary to implement the Act and help achieve its mandate of reducing Hawaii’s emissions to 1990 levels by the year 2020.

## Hawaii’s Law Is Among First In Nation

The Hawaii

Legislature has concluded the requirements of Act 234 are based upon the current science of climate change.

The Act finds that climate change is caused, at least in part, by human activities, including the burning of fossil fuels. This conclusion is supported by the findings of the Intergovernmental Panel on Climate Change, a United Nations body, which in February 2007 released its fourth assessment of the predicted impacts of global climate change. The panel concluded that most of the observed increase in globally averaged temperatures since the mid-20th century is “very likely” due to the observed increase in anthropogenic (human) GHG concentrations.<sup>6</sup> The panel also



### ***Protect a Child***

*Whether you are a new, experienced or retired attorney, Legal Aid Society of Hawaii is looking for volunteers to act as Guardian Ad Litem.*

*We offer complete training, support, malpractice insurance and oversight, if needed. Please call Legal Aid Society of Hawaii's Pro Bono Coord. at: 808-527-8005, or e-mail:kicase@lashaw.org*

924 Bethel Street  
Honolulu, HI 96813  
808-536-4302  
legalaidhawaii.org



LEGAL AID  
SOCIETY OF  
HAWAII



predicted temperature rises of up to eleven and a half degrees Fahrenheit by 2100 and a sea level rise of up to twenty-three inches, with an additional 7.8 inches possible if current melting of the ice sheets in Greenland and Antarctica continues.<sup>7</sup>

Act 234 was passed in the context of a dynamic array of international, federal, regional, state, county and municipal laws addressing climate change. The foremost international agreement is the Kyoto Protocol, a binding 1997 addendum to the United Nations Framework Convention on Climate Change.<sup>8</sup> Upon having entered into force on February 16, 2005, the agreement requires industrialized countries to reduce their GHG emissions, between 2008 and 2012, by approximately 5% compared to 1990 levels.<sup>9</sup> Innovative "market-based mechanisms" under the agreement allow developed countries to earn and trade emissions credits through emission reduction projects.<sup>10</sup> The United Nations considers the Kyoto Protocol to be a far-reaching agreement on environment and sustainable development because it will affect "virtually all major sectors of the economy."<sup>11</sup> Although the U.S. government has signed the Kyoto Protocol, it has not been ratified by Congress. As a result, the United States is not bound by the Kyoto Protocol's requirements concerning reduction of GHG emissions.<sup>12</sup>

Nor has Congress passed major federal legislation designed to address climate change. In November 2007, the Lieberman-Warner Climate Security Act of 2007 was sent to the full Senate for a vote, marking the furthest progress to date of any proposed federal legisla-

tion.<sup>13</sup> The bill would establish a nationwide cap on GHG emissions with the objective of reducing such emissions to 15% below 2005 levels by the year 2020, and to 70% below 2005 levels by the year 2050. To achieve these goals, the bill would create an economy-wide emissions trading system similar to the one adopted by the European Union.<sup>14</sup>

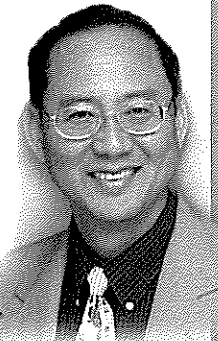
Similarly, in December 2007, Congress included a provision in a \$500 billion omnibus budget package requiring the U.S. Environmental Protection Agency to establish a mandatory program to require U.S. companies to report their GHG emissions by June 2009.<sup>15</sup> The law does not specify which industries must report, however, or how often reporting must occur. Nor does it specifically preempt state reporting laws.<sup>16</sup>

In the absence of federal legislation, states, counties and municipalities have driven the recent development of climate change law and policy in the United States. California led the way with adoption of the Global Warming Solutions Act of 2006, signed by Governor Arnold Schwarzenegger on September 27, 2006.<sup>17</sup> The California law was the first in the nation with an enforceable statewide program requiring a reduction in GHG emissions to 1990 levels by 2020.<sup>18</sup> The law authorizes the adoption of regulations for monitoring GHG emissions and requires annual reporting of GHG emissions.<sup>19</sup> It also requires market-based compliance mechanisms to achieve the emissions limit.<sup>20</sup> In May 2007, Washington passed similar legislation and in July 2007, New Jersey and Florida also passed laws controlling GHG emissions.

### **MEDIATION ARBITRATION NEUTRAL SERVICES**

**Mediation  
Arbitration  
Facilitation  
Neutral Fact Finding  
Neutral Evaluation  
Special Master  
Hearing Officer**

*Mediation, Arbitration and court appointed neutral services provided throughout Hawaii, the Pacific and Western United States.*



# Lou Chang, ALC

Information, articles and tips available at: [LOUCHANG.COM](http://LOUCHANG.COM)  
Tel: 384-2468  
Email: [louchang@hula.net](mailto:louchang@hula.net)

## Greenhouse Gas Emissions Limit

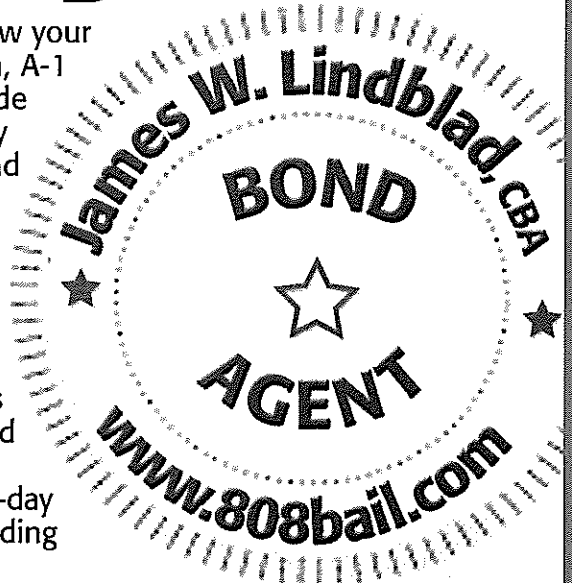
Governor Linda Lingle signed Act 234 on June 30, 2007 and the law became effective July 1, 2007, making Hawaii among the first states in the nation to pass a law with a GHG emissions reduction limit. Section 2, "Declaration of Policy," sets forth the Act's fundamental requirement: "By January 1, 2020, the State of Hawaii shall reduce statewide greenhouse gas emissions to levels at or below the best estimations and updates of the inventory of greenhouse gas emissions estimates for 1990."<sup>21</sup> This is referred to in the Act as the "greenhouse gas emissions limit."<sup>22</sup> It is consistent with the limit established by the Kyoto Protocol and climate change laws adopted by California, Washington, New Jersey and Florida.

The Act's emissions limit is codified in Hawaii's air pollution control law, Chapter 342B, Hawaii Revised Statutes ("Chapter 342B"), which sets forth the emissions limit but also exempts the regulation of GHG emissions from airplanes: "A statewide greenhouse gas emissions limit to be achieved by 2020 is hereby established that is equal to or below the level of statewide greenhouse gas emissions in 1990, as determined by section 3 of Act... provided that for purposes of this Act greenhouse gas emissions from airplanes shall not be included."<sup>23</sup> A member of the task force established to implement Act 234 has been quoted as saying aviation fuel was exempted to avoid burdening the tourism industry.<sup>24</sup>

Importantly, the Act amends Chapter 342B to authorize the adoption of administrative rules to achieve the emissions limit.<sup>25</sup> The Department of Health ("Department") shall adopt such rules before December 31, 2011 and they are to become operative January 1, 2012.<sup>26</sup> The rules have several interrelated purposes. First, the rules shall establish specific GHG emissions limits applicable to "sources or categories of sources" to be achieved by January 1, 2020.<sup>27</sup> The rules shall also establish emission reduction measures necessary

# Same-day Notary Bonds

If you need to renew your notary commission, A-1 Bonding can provide the required notary bond today. Fast and easy, our friendly specialists can do it right over the phone with a credit card. You no longer have to wait days or even weeks for your notary bond to arrive from the mainland. For same-day service call our bonding agents today.



**808-522-1960 • 800-701-2245**  
550 Halekauwila St., Suite 303 • Honolulu, HI 96813

## Overnight Copying

AT NO ADDITIONAL CHARGE!

- Copies of files, depositions, transcripts and color copies
- Blueprint & oversize copies (B&W/color) digital or hard copy originals
- Consecutive numbering of documents with up to two lines and 9 digit alphanumeric designations per line
- Courtroom Presentations — Enlargements of charts, graphs & illustrations (B&W/color) foamcore mounted
- Document Scanning to PDF files and TIFF images — burned to CD

**PROFESSIONAL IMAGE**



the copy and print service

**FREE PICK-UP AND DELIVERY**

1100 Alakea Street • Tel: (808) 532-6565  
125 Merchant Street • Tel: (808) 524-8585  
547 Halekauwila Street • Tel: (808) 524-5335  
841 Bishop Street • Tel: (808) 524-0233  
1600 Kapiolani Boulevard • Tel: (808) 973-4477

to achieve the “maximum practically and technically feasible and cost effective” reductions in GHG emissions in furtherance of achieving the Act’s emissions limit.<sup>28</sup> The Act includes the additional proviso that any rule adopted by the Department pursuant to section 342B-72 shall ensure that the greenhouse gas emission reductions achieved are “real, permanent, quantifiable, verifiable, and enforceable[.]”<sup>29</sup>

Finally, the Act requires the Department to also adopt rules requiring the reporting and verification of statewide GHG emissions.<sup>30</sup> The purpose of reporting GHG emissions is to facilitate monitoring and enforcement by the Department of the specific GHG emissions limits established for identified sources of emissions.<sup>31</sup> The Department is also tasked with periodically updating these reporting requirements to ensure that they are consistent with international, federal, and other states’ GHG emissions reporting programs.<sup>32</sup> These administrative rules, which are essential to implementation of the Act, are to be based upon the recommendations and findings of a work plan to be created by a task force, as further described in the Act.

### **Task Force**

The Act establishes a “greenhouse gas emissions reduction task force” within the State’s Department of Business, Economic Development and Tourism (“DBEDT”) for administrative purposes only (“Task Force”). The Task Force is required to have ten members from government, business, and environmental organizations.

The Task Force is to be co-chaired by the Deputy Director of the Department’s Environmental Health Administration and the Director of DBEDT, or their respective designees.<sup>33</sup> The Department’s representative is Laurence K. Lau, Deputy Director for Environmental Health, and DBEDT’s representative is Theodore E. Liu, Director.<sup>34</sup> The Task Force shall also include two members of the University of Hawaii at Manoa Climate Change Commission,<sup>35</sup> which are Lorenz

Magaard, Professor of Oceanography, and Makena Coffman, Assistant Professor of Urban and Regional Planning.<sup>36</sup>

The Act directs the President of the Senate and the Speaker of the House of Representatives to each appoint two members from “affected business sectors,”<sup>37</sup> defined by the Act as “electrical utilities, refinery operations, ground transportation industry, or maritime industry.”<sup>38</sup> The two Senate appointees are Robbie Alm, Executive Vice President for Public Affairs, Hawaiian Electric Company, Inc., and Gary North, Senior Vice President, Matson Navigation Co. and the two House of Representatives appointees are Frank Clouse, Vice President Refinery Operations, Tesoro Hawaii Corporation, and Gareth K. Sakakida, Managing Director, Hawaii Transportation Association.<sup>39</sup>

Finally, the Act directs the President of the Senate and Speaker of the House to each appoint one member from an environmental organization.<sup>40</sup> The Senate appointee is Jeff Mikulina, Director, Sierra Club, Hawaii Chapter and the House of Representatives’ appointee is Mark Fox, Director of External Affairs, The Nature Conservancy of Hawaii.<sup>41</sup> Each member of the Task Force is “encouraged to commit as much time, expertise, and information” as is available to the individual member.<sup>42</sup>

### **Emissions Inventory**

Establishing 1990 emissions levels is a critical first step in achieving the Act’s goal of reducing GHG emissions to 1990 levels by 2020. Under section 3 of the Act, by December 31, 2008, DBEDT and the Department are required to complete an updated inventory of emission sources or categories of sources. The updated inventory shall be based on the July 1997 report prepared by DBEDT and the Department entitled “Inventory of Hawaii Greenhouse Gas Emissions Estimates for 1990.”<sup>43</sup> The 1990 statewide inventory was not intended to serve as a basis for regulation. The updating process will involve

reviewing the existing data, identifying discrepancies, evaluating calculation methods, and developing new data.<sup>44</sup>

The Act requires at least one public hearing prior to the completion of the updated inventory.<sup>45</sup> Members of the public, as well as commercial businesses and other sources of GHG emissions which may be held to the emissions levels established by the updated inventory, will therefore have an opportunity to review and comment on the inventory before it is finalized.

### **Work Plan**

No later than December 1, 2009 — less than a year after emissions inventory is due — the Task Force shall prepare a “work plan” and “regulatory scheme.”<sup>46</sup> The purpose of the work plan and regulatory scheme, according to the Act, is to implement the “maximum practically and technically feasible and cost effective” reductions in GHG emissions, from sources or categories of sources, to achieve the Act’s emissions limit.<sup>47</sup> For purposes of the Act, the term “cost effective” is defined as the “cost per unit of reduction.”<sup>48</sup>

Act 234 acknowledges that GHG emitters may provide information to the Task Force which may be subject to public disclosure pursuant to Hawaii’s Uniform Information Practices Act, Chapter 92F, Hawaii Revised Statutes. The Act therefore requires confidential information provided to the Task Force that is exempt from public disclosure under section 92F-13(4), Hawaii Revised Statutes, to be held in confidence or aggregated to protect confidentiality.<sup>49</sup> The Act requires the work plan (“Work Plan”) to address thirteen specific objectives, as discussed below.<sup>50</sup>

### **Work Plan Objectives**

One of the Work Plan’s key objectives is to identify and make recommendations on direct emission reduction measures, alternative compliance mechanisms, “market-based compliance mechanisms,” and monetary and non-monetary incentives to achieve the required reduction of greenhouse gases by 2020.<sup>51</sup> Cost/benefit analytical tools,

economic models, and scientific methods are to be investigated and developed.<sup>52</sup> With regard to market-based compliance mechanisms, consideration must be given to the potential impact of such mechanisms on communities already adversely impacted by air pollution, to the prevention of any increase in toxic air contaminants, and to maximizing the benefits of such mechanisms for Hawaii.<sup>53</sup> Suggested administrative rules for regulated entities using market-based compliance mechanisms are also required.<sup>54</sup>

The Work Plan shall also provide a schedule of fees to be paid by sources of greenhouse gas emissions regulated by the Act.<sup>55</sup> Chapter 342B similarly authorizes the Department to adopt rules that specify a schedule of fees to be paid by the regulated sources of greenhouse gas emissions.<sup>56</sup> Revenues collected from the payment of these fees are required to be deposited in the clean air special fund established pursuant to Chapter 342B.<sup>57</sup> Proceeds from the clean air special fund may be used to pay

costs associated with, among other things, permitting, enforcement, emissions inventories and monitoring, and the preparation of administrative rules.<sup>58</sup>

The Work Plan is to consider the relative contribution of each source to statewide greenhouse gas emissions and the potential for adverse impacts on small businesses. In that regard, the Task Force shall consider recommending a minimum threshold of emissions below which emission reduction requirements shall not apply.<sup>59</sup> The Act also calls for suggested regulations to control "mobile sources" of emissions.<sup>60</sup> In California, the regulation of greenhouse gas emissions from "mobile sources" includes emission standards for new passenger vehicles and light duty trucks beginning with the 2009 model year.<sup>61</sup>

Given the dynamic array of emerging climate change laws around the world, the Task Force is encouraged to consider "progressive efforts from other locations" and consult with other states, nongovernmental organizations, and nations to identify effective strategies

and facilitate the development of integrated and cost-effective regional, national and international emissions reduction programs.<sup>62</sup> In Hawaii, the Work Plan is to involve consultation with all state agencies having jurisdiction over greenhouse gases, including the Public Utilities Commission, on energy-related matters such as electrical generation and service, petroleum refining, and statewide fuel supplies. The purpose of such consultation is to ensure that greenhouse gas emission reduction activities are complementary, minimize duplication, and are implemented in an efficient and cost-effective manner.<sup>63</sup>

The Work Plan shall also consider voluntary actions to reduce emissions, such as carbon sequestration and best management practices.<sup>64</sup> Recommendations are sought for minimizing "leakage," which the Act defines as the reduction of greenhouse gases within Hawaii that is offset by an increase in emissions of greenhouse gases outside the State.<sup>65</sup> A series of public workshops, one in each County, must be conducted to give

## FOR YOUR FAMILY, YOUR BUSINESS, YOUR FUTURE.

Expert guidance and innovative solutions to help you reach your financial goals.

### Northwestern Mutual

Life insurance • Disability insurance  
Annuities • Employee benefits

### Northwestern Mutual Investment Services, LLC

Variable life insurance • Variable annuities  
Mutual funds • Unit investment trusts  
Money market funds • IRAs



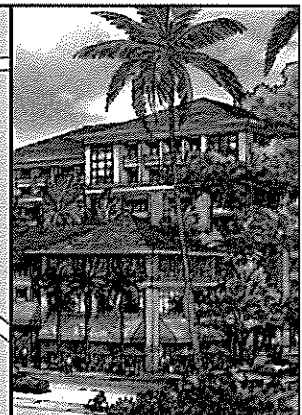
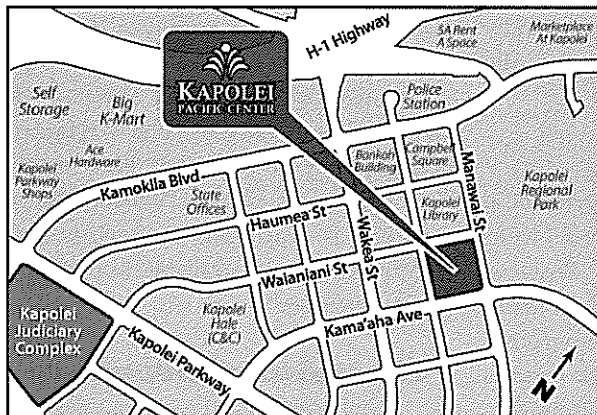
**David N. Bellino**  
Financial Representative  
The Hawaii Group  
900 Fort St. Mall, Ste. 400  
Honolulu, HI 96813  
(808) 566-5331  
david.bellino@nmfn.com



**Northwestern Mutual**  
FINANCIAL NETWORK®

insurance / investments / ideas™

05-2558 ©2007 Northwestern Mutual. Northwestern Mutual Financial Network is a marketing name for the sales and distribution arm of The Northwestern Mutual Life Insurance Company, Milwaukee, WI (NM), and its subsidiaries and affiliates. David Bellino is an Insurance Agent of NM (life insurance, annuities and disability income insurance). Registered Representative of Northwestern Mutual Investment Services, LLC, 600 West Broadway, Suite 600, San Diego, CA 92101, (619) 234-3111, a wholly-owned company of NM, broker-dealer and member NASD and SIPC. NM and The Hawaii Group are not broker-dealers. 7085-490



# OFFICE SPACE FOR LEASE

## Coming Summer 2008

Kapolei Pacific Center offers:

- Next Generation Office Space ■
- Close Proximity to Kapolei Judiciary Complex ■
- Ample Parking Options ■
- Beautiful Unobstructed Views ■
- Quick Egress & Ingress ■

**KAPOLEI PACIFIC CENTER**

*The Lifestyle Office Center of West O'ahu*

For Leasing Inquiries,  
**(808) 587-7770**  
or Visit Us Online at:  
[kapoleipacificcenter.com](http://kapoleipacificcenter.com)

**AVALON COMMERCIAL**  
Exclusive Listing Agent for  
Kapolei Pacific Center

interested parties an opportunity to comment on the Work Plan.<sup>66</sup>

The Task Force is required to submit a copy of the Work Plan and proposed regulatory scheme, along with any proposed legislation, to the Legislature not less than twenty days prior to the convening of the regular session in 2010 and shall provide updates every fifth regular session thereafter.<sup>67</sup> The Act appropriates \$500,000 for fiscal year 2007-08 and the same amount for fiscal year 2008-09 for carrying out the purposes of the Act, including the hiring of necessary staff.<sup>68</sup>

### Enforcement

Key provisions of Act 234 have been codified in Chapter 342B, Hawaii's air pollution control law. As a result, Chapter 342B now contains the statewide emissions limit requiring 1990 levels of emissions by 2020. It also authorizes the adoption of administrative rules before December 31, 2011 (to become operative on January 1, 2012) concerning specific GHG emissions lim-

its, reduction measures, emissions reporting, other recommendations of the Work Plan, and a schedule of "fees" to be paid by GHG emitters. These rules may also contain enforcement mechanisms.

The climate change-related amendments to Chapter 342B are subject to its existing enforcement provisions, including its citizen suit provision. Chapter 342B provides for civil and administrative penalties for violation of administrative rules.<sup>69</sup> Violators are subject to fines of not more than \$25,000 for each separate offense.<sup>70</sup> Each day of each violation constitutes a separate offense.<sup>71</sup> Criminal penalties may be imposed on any person who knowingly violates any rule. Such penalties include a fine not to exceed \$25,000 for each day of each violation, imprisonment not to exceed five years, or both.<sup>72</sup>

The citizen suit provision of Chapter 342B authorizes suits by citizens against "any person," including the State or the Department, alleged to be in violation of Chapter 342B or any emis-

sion standard or limit established under the law.<sup>73</sup> Citizens may also bring suit against the Department for its alleged failure to perform any act or duty under Chapter 342B which is not discretionary.<sup>74</sup> The Circuit Court shall have jurisdiction to enforce an emissions limit or order the Department to perform the act or duty at issue.<sup>75</sup> Finally, the court may award costs of litigation, including reasonable attorneys and expert witness fees, to any party, whenever the court determines such award is appropriate.<sup>76</sup>

### Cap and Trade or Carbon Fee?

A critical issue raised by the Act is the extent to which government regulation of greenhouse gas emissions in Hawaii will ultimately be accomplished by means of market-based mechanisms, the imposition of a fee or tax, or some combination of both. Consistent with the innovative market-based mechanisms found in the Kyoto Protocol, California's Global Warming Solutions Act, the proposed Lieberman-Warner

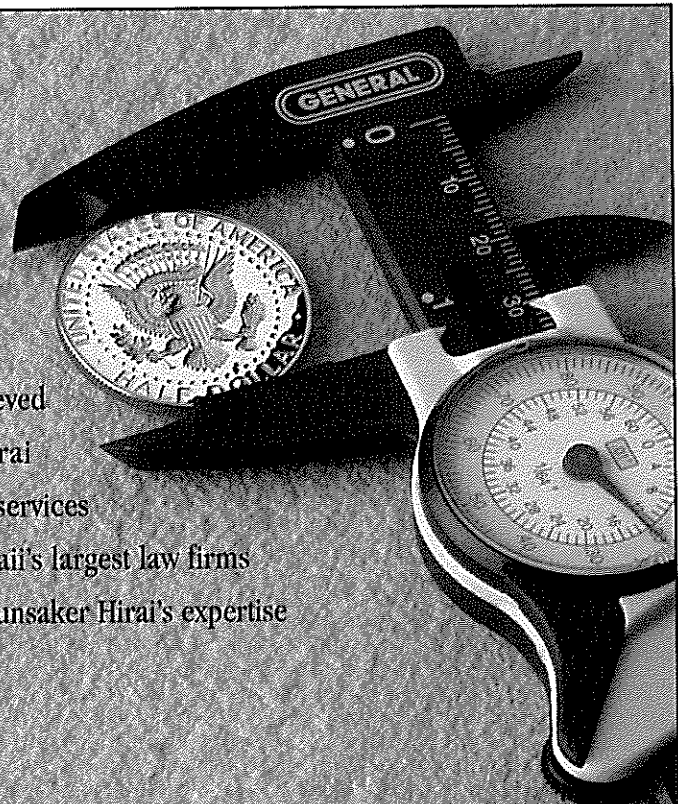
## Precise Measurement of Money.

Defensible calculations of damages are only achieved through precise analysis. Bowen Hunsaker Hirai provides forensic accounting and expert witness services in all aspects of litigation financial analysis. Hawaii's largest law firms and financial institutions have turned to Bowen Hunsaker Hirai's expertise for over 15 years.

**Bowen  
Hunsaker  
Hirai**

Certified Public  
Accountants & Consultants

733 Bishop St., Suite 2020 Honolulu, Hawaii Telephone: (808) 526-2020 Fax: (808) 526-2021 [www.bhhcpa.net](http://www.bhhcpa.net)





Climate Security Act, and a host of climate change laws from other locations around the world, the Act directs the Work Plan to identify and make recommendations on “market-based compliance mechanisms.”<sup>77</sup> The Work Plan must also suggest administrative rules for regulated entities using market-based compliance mechanisms.<sup>78</sup>

Market-based solutions under Act 234 may take the form of an emissions trading or so-called “cap and trade” program. Cap and trade programs rely upon the government to set a limit on total emissions for a particular sector of the economy. A company receives its emissions allowance cap, which it may comply with by reducing emissions to the level of its cap, by reducing emissions to below its cap, and then selling its excess allowances to other entities, or by buying allowances from other entities rather than reducing its own emissions. Such programs are favored or in use in other locations. For example, the European Union’s Greenhouse Gas Emission Trading Scheme, in effect since 2005, is the largest multi-national emissions trading scheme in the world, covering more than 12,000 facilities which are responsible for 50% of its total greenhouse gas emissions.<sup>79</sup> Commentators have suggested that in California the Governor and most private industry prefer the establishment of a market-based system of emissions trading in order to reduce greenhouse gas emissions.<sup>80</sup>

Although a detailed discussion of the debate over cap and trade systems versus a carbon tax is beyond the scope of this article, proponents of the former argue that a well-organized cap and trade system, in which caps are closely monitored and enforced, offers several benefits. A cap and trade program may meet emissions reduction goals, stimulate technological advances by rewarding companies that reduce emissions, and engender broader support for climate change initiatives. Critics have suggested cap and trade systems may fail to reduce emissions, place new enterprises at a disadvantage, and result in windfalls to large emission sources. Fees on greenhouse gas emissions are preferred,

proponents suggest, because they lend predictability to energy prices, are less cumbersome, and are less vulnerable to manipulation by special interests.

## Land Use and Development

Although independent of Act 234, the possible amendment of Hawaii’s environmental impact assessment law, Chapter 343, Hawaii Revised Statutes (“Chapter 343”), illustrates the potential for climate change regulation to affect land use and development in Hawaii. Chapter 343 requires preparation of an environmental assessment for certain types of programs or projects to be initiated by any agency or applicant.<sup>81</sup> If the State government agency accepting the environmental assessment determines the proposed action will have a “significant effect” on the environment, it shall require preparation of an environmental impact statement.<sup>82</sup>

In the 2008 legislative session, a bill was introduced to require environmental impact statements to address climate change.<sup>83</sup> House Bill 2103 cited a recent decision by the United States Court of Appeals for the Ninth Circuit, which held for the first time that federal agencies must assess carbon dioxide emissions and other climate change impacts in environmental review documents prepared under the National Environmental Policy Act.<sup>84</sup> In *Center for Biological Diversity v. National Highway Traffic Safety Administration*, the court stated, “The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.”<sup>85</sup> The bill sought to amend Chapter 343 to require disclosure in an environmental impact statement of the “effects of a proposed action as a contributor to climate change.”<sup>86</sup> The bill also sought to amend the definition of “significant effect” under Chapter 343 to include consideration of actions that “impact climate change.”<sup>87</sup>

Although House Bill 2103 was not passed, the effort to address climate change through Hawaii’s environmental

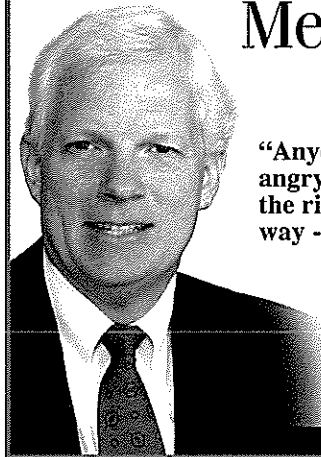
impact statement law is consistent with similar measures in California and Washington. For example, California’s Attorney General has interpreted the California Environmental Quality Act’s broad definition of “significant environmental effect” to require the consideration of climate change in environmental review documents.<sup>88</sup> On the local level, in August 2007, King County, Washington became the first in the nation to order county agencies to consider climate change impacts as part of their project review under Washington’s State Environmental Policy Act (“SEPA”).<sup>89</sup> In support of its order, King County cited the 2007 United States Supreme Court decision in *Massachusetts v. EPA*, in which the Court determined that greenhouse gases are an “air pollutant.”<sup>90</sup> Similarly, on December 3, 2007, the City of Seattle adopted an ordinance which requires developers to quantify greenhouse gas emissions for all projects subject to the City’s environmental review and permitting process under SEPA.<sup>91</sup>

In addition to environmental impact assessment, local governments are increasingly requiring “green building,” which utilizes design and construction strategies that seek to reduce a building’s environmental impact, to compel private developers and businesses to reduce emissions from commercial and residential buildings. The U.S. Green Building Council has developed a green rating system called LEED (Leadership in Energy and Environmental Design) that many cities have integrated into their building ordinances or green building programs. More than twenty-five U.S. cities have initiated green building programs which require new public buildings to meet LEED standards. In 2006, Mayor Mufi Hannemann signed into law a bill requiring all new City and County of Honolulu facilities larger than 5,000 square feet to meet a minimum LEED standard of environmentally sensitive design when feasible or appropriate, beginning in fiscal year 2008.<sup>92</sup>

## Endangered Species and Habitat Protection

Endangered species may play an important role in the development of climate change law and policy in Hawaii. Hawaii has more plants and animals listed as endangered or threatened under the federal Endangered Species Act ("ESA") than any other state in the nation.<sup>93</sup> Scientists expect climate change to bring Hawaii more storms and less cloud cover, both of which may adversely affect the recovery of Hawaii's endangered species.<sup>94</sup> This may prompt legal and regulatory action in Hawaii as it has elsewhere. For example, in 2004, the Center for Biological Diversity ("Center"), an environmental organization active in climate change issues, petitioned the U.S. Fish and Wildlife Service to list the polar bear as threatened under the ESA. The Center has also filed petitions seeking state and federal protection for two species of coral native to Florida and the Caribbean.<sup>95</sup> Listing of a species under the ESA triggers significant regulatory restrictions, including the prohibition of "taking" of listed species and designation of the species' critical habitat.

Similarly, ocean acidification caused by GHG emissions has raised concerns about marine habitat protection in ocean waters surrounding Hawaii. On August 17, 2007, the Center petitioned the Department to declare Hawaii's ocean waters to be impaired under the Clean Water Act due to ocean acidification, which is the changing of seawater chemistry through absorption of human-produced carbon dioxide from GHG emissions.<sup>96</sup> The federal Clean Water Act requires states to revise their list of "impaired" water bodies that fail to meet water quality standards on a periodic basis, which allows states to set limits on the discharge of pollutants that are contributing to impairment.<sup>97</sup> The Center submitted data to the Department contending Hawaii's ocean waters are being degraded by carbon dioxide absorption. Ocean acidification is alleged to harm marine ecosystems by changing seawater chemistry and



## Mediation & Arbitration

"Anyone can become angry - that is easy, but to be angry with the right person, to the right degree, at the right time, for the right purpose, and in the right way - that is not easy."

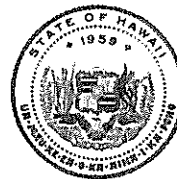
Aristotle

Dan Bent

Mediator & Arbitrator

Dispute Prevention and Resolution, Inc.  
1001 Bishop Street • Pauahi Tower  
Suite 1155 • Honolulu

[www.FairMediation.com](http://www.FairMediation.com) • 548-0080



### NOTICE TO ATTORNEYS INTERESTED IN PROVIDING LEGAL SERVICES TO THE STATE OF HAWAII

Licensed attorneys who wish to provide legal services to the State for the fiscal year commencing July 1, 2008, are invited to submit a Statement of Qualifications and Expression of Interest to the Attorney General. Attorneys will be considered for contract under Hawaii Revised Statutes §103D-304, as the need arises.

A new statement must be submitted pursuant to this Notice, even if you submitted a statement in the past. **Attorneys from the same firm must submit separate statements.**

The practice areas in which we anticipate we may need legal services are listed on our website at <http://hawaii.gov/ag>. Attorneys may list other areas of practice **but are limited to no more than three areas.**

Form statements are available at <http://hawaii.gov/ag> or may be requested by telephone at (808) 586-1287 or facsimile (808) 586-1239 (Attention: Cora Lum, Administrative Services Manager)

**Your completed statement must be postmarked or received by the State Department of the Attorney General by Friday, June 6, 2008 to be eligible for consideration for the entire fiscal year commencing July 1, 2008 and ending June 30, 2009.**

A statement received after June 6, 2008, will be considered a "late submittal" for the balance of the fiscal year as follows:

<u>A late submittal received between:</u>	<u>Will be considered beginning:</u>
June 7 - September 5, 2008	October 1, 2008
September 6 - December 5, 2008	January 1, 2009
December 6, 2008 - March 6, 2009	April 1, 2009

impeding the growth of coral.<sup>98</sup>

The Hawaii Legislature passed Act 234 to address the significant environmental and economic challenges posed by climate change in Hawaii. In addition to the challenges, however, the Legislature affirmed certain opportunities and benefits associated with the law's call to action. By embracing pioneering technologies to address climate change, Hawaii may position its economy, technology centers, financial institutions, and businesses to benefit from national and international efforts to address climate change.<sup>99</sup> Hawaii has the opportunity to lead the way in alternative renewable energy development and use.<sup>100</sup> And Act 234 may continue the State's tradition of environmental leadership by serving as "an example to other states, the federal government, and other countries to protect our fragile global environment."<sup>101</sup>

1 Climate change refers to any significant change in measures of climate (such as temperature, precipitation, or wind) lasting for an extended period (decades or longer). Global warming is an average increase in the temperature of the atmosphere near the Earth's surface and in the troposphere, which can contribute to changes in global climate patterns. The National Academy of Sciences has suggested the phrase 'climate change' is growing in preferred use to 'global warming' because it conveys that there are other changes in addition to rising temperatures. U.S. Environmental Protection Agency, Climate Change: Basic Information, <http://www.epa.gov/climatechange/basicinfo.html>.

2 2007 Haw. Sess. Laws, Act 234 §1(a); H.B. 226, 24th Leg. (Haw. 2007). The primary co-sponsors of House Bill 226 were State of Hawaii House of Representatives members Josh Green, John Mizuno, and Cynthia Thielen. House Bill 226 passed with broad bipartisan support; the votes were 48-2 in the House and 22-3 in the Senate.

3 2007 Haw. Sess. Laws, Act 234 §1(a).

4 *Id.*

5 2007 Haw. Sess. Laws, Act 234 § 5(a) (codified at Haw. Rev. Stat. § 342B-72(a)(1)).

6 2007 Haw. Sess. Laws, Act 234 §1(a). *See also* Intergovernmental Panel for Climate Change, Climate Change 2007: The Physical Science Basis (2007), <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf>.

7 *Id.*

8 Kyoto Protocol to the Framework Convention on Climate Change, Dec. 11, 1997, 37 I.L.M. 22.

9 *Id.*

10 *Id.*

11 United Nations Framework Convention on Climate Change: Kyoto Protocol, [http://unfccc.int/kyoto\\_protocol/items/2830.php](http://unfccc.int/kyoto_protocol/items/2830.php).

12 United Nations Framework Convention on Climate Change: United States of America <http://maindb.unfccc.int/public/country.pl?country=US>.

13 Lieberman-Warner Climate Security Act of 2007, S.2191, 110th Cong., § 1201 (2007).

14 *Id.*

15 Consolidated Appropriations Act, 2008, Pub. Law No. 110-161.

16 *Id.*

17 Cal. A.B. 32, 2006 Cal. Stat., ch. 488 (codified at California Health & Safety Code §§ 38500-38599).

18 Cal. Health & Saf. Code § 38550.

19 Cal. Health & Saf. Code § 38530(a).

20 Cal. Health & Saf. Code § 38570.

21 2007 Haw. Sess. Laws, Act 234 § 2. Act 234 does not define "greenhouse gases." California's climate change law regulates six greenhouse gases: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. Cal. H. & Saf. Code § 38505.

22 2007 Haw. Sess. Laws, Act 234 § 5(a).

23 Haw. Rev. Stat. § 342B-71.

24 *See* "Greenhouse Gas Emissions in Hawaii Grew 7.5% from 1992 to 2005," *Environment Hawaii*, Jan. 2008, at 6.

25 Haw. Rev. Stat. § 342B-72.

26 Haw. Rev. Stat. § 342B-72(a).

27 Haw. Rev. Stat. § 342B-72(a)(1).

28 *Id.*

29 Haw. Rev. Stat. § 342B-72(c)(1).

30 Haw. Rev. Stat. § 342B-72(a)(2).

31 *Id.*

32 Haw. Rev. Stat. § 342B-72(d).

33 2007 Haw. Sess. Laws, Act 234 § 4(3), (4).

34 State of Hawaii Department of Business, Economic Development and Tourism: Task Force Members, [http://hawaii.gov/dbedt/info/energy/greenhouse/task\\_force\\_members.html](http://hawaii.gov/dbedt/info/energy/greenhouse/task_force_members.html).

35 2007 Haw. Sess. Laws, Act 234 § 4(5).

36 State of Hawaii Department of Business, Economic Development and Tourism: Task Force Members, [http://hawaii.gov/dbedt/info/energy/greenhouse/task\\_force\\_members.htm](http://hawaii.gov/dbedt/info/energy/greenhouse/task_force_members.htm).

37 2007 Haw. Sess. Laws, Act 234 §§ 4(1), (2).

38 2007 Haw. Sess. Laws, Act 234 § 4.

39 State of Hawaii Department of Business, Economic Development and Tourism: Task Force Members, [http://hawaii.gov/dbedt/info/energy/greenhouse/task\\_force\\_members.htm](http://hawaii.gov/dbedt/info/energy/greenhouse/task_force_members.htm).

40 2007 Haw. Sess. Laws, Act 234 § 4(6), (7).

41 State of Hawaii Department of Business, Economic Development and Tourism: Task Force Members, [http://hawaii.gov/dbedt/info/energy/greenhouse/task\\_force\\_members.htm](http://hawaii.gov/dbedt/info/energy/greenhouse/task_force_members.htm).

42 2007 Haw. Sess. Laws, Act 234 § 5(b).

43 2007 Haw. Sess. Laws, Act 234 § 3.

44 *See* Laurence K. Lau, "Hawaii & Climate Change," address before the Hawaii State Bar Association Natural Resources Section (Oct. 16, 2007); *see also* "Greenhouse Gas Emissions in Hawaii Grew 7.5% from 1992 to 2005," *Environment Hawaii*, Jan. 2008, at 6.

45 2007 Haw. Sess. Laws, Act 234 § 3.

46 2007 Haw. Sess. Laws, Act 234 § 5.

47 2007 Haw. Sess. Laws, Act 234 § 5(a).

48 *Id.*

49 2007 Haw. Sess. Laws, Act 234 § 5(c).

50 2007 Haw. Sess. Laws, Act 234 § 6.

51 2007 Haw. Sess. Laws, Act 234 § 6(2).

52 2007 Haw. Sess. Laws, Act 234 § 6(4).

53 2007 Haw. Sess. Laws, Act 234 § 6(7).

54 2007 Haw. Sess. Laws, Act 234 § 6(8).

55 2007 Haw. Sess. Laws, Act 234 § 6(11).

56 Haw. Rev. Stat. § 342B-73.

57 *Id.*

58 Haw. Rev. Stat. § 342B-32.

59 2007 Haw. Sess. Laws, Act 234 § 6(5).

60 2007 Haw. Sess. Laws, Act 234 § 6(9).

61 California Environmental Protection Agency Air Resources Board, Climate Change Program for Mobile Sources, <http://www.arb.ca.gov/cc/ccms/ccms.htm>.

62 2007 Haw. Sess. Laws, Act 234 § 6(3).

63 2007 Haw. Sess. Laws, Act 234 § 6(1).

64 2007 Haw. Sess. Laws, Act 234 § 6(6).

65 2007 Haw. Sess. Laws, Act 234 § 6(10).

66 2007 Haw. Sess. Laws, Act 234 § 6(12).

67 2007 Haw. Sess. Laws, Act 234 § 7.

68 2007 Haw. Sess. Laws, Act 234 § 9.

69 Haw. Rev. Stat. § 342B-47, 48.

70 Haw. Rev. Stat. § 342B-47(c).

71 *Id.*

72 Haw. Rev. Stat. § 342B-49.

73 Haw. Rev. Stat. § 342B-56(a)(1).

74 Haw. Rev. Stat. § 342B-56(a)(2).

75 Haw. Rev. Stat. § 342B-56(b)(1), (2).

76 Haw. Rev. Stat. § 342B-56(f).

77 2007 Haw. Sess. Laws, Act 234 § 6(2)(c).

78 2007 Haw. Sess. Laws, Act 234 § 6(8).

79 Europa, European Commission, Climate Change Emissions Trading Scheme, <http://ec.europa.eu/environment/climat/emission.htm>.

80 Polly Towill and Olivier Theard, "The Global Warming Solutions Act (AB 32): Raising the Temperature of California Business," *California Environmental Insider*, Nov. 15, 2007, at 5.

81 Haw. Rev. Stat. §343-5(a)(1).

82 Haw. Rev. Stat. §343-5(b)-(c).

83 H.B. 2103.

84 *Id.*

85 508 F.3d 508, 550 (9th Cir. 2007).

86 H.B. 2103 at para. 1.

87 *Id.* at para. 2.

88 Pub. Res. Code § 21083(b); Polly Towill and Olivier Theard, "The Global Warming Solutions Act (AB 32): Raising the Temperature of California Business," *California Environmental Insider*, Nov. 15, 2007 at 5.

89 Steven Jones, "King County (WA) First in the Nation To Require Climate Change Impacts To Be Considered During Environmental Review of New Projects," *Marten Law Group Environmental News*, Aug. 1, 2007, <http://www.martenlaw.com/news/?20070801-climate-sepa-review>.

90 127 S. Ct. 1438, 1460; 167 L. Ed. 2d 248 (2007).

91 Linda Larson, "Local Governments Use Both Carrots and Sticks to Encourage Green Buildings," *Marten Law Group Environmental News*, Dec. 5, 2007, <http://www.martenlaw.com/news/?20071205-green-bldgs-encouraged>.

92 Rev. Ord. Honolulu § 2-9.3.

93 16 U.S.C. § 1531-1544 (2000); U.S. Fish and Wildlife Service, "Hawaii Leads Nation in Number of Candidate Species," May 16, 2005, <http://www.fws.gov/pacificislands/wnews/candatelisting.pdf>.

94 Lynda Arakawa, "Isle temperatures are rising" *Honolulu Advertiser*, March 25, 2008, <http://www.honoluluadvertiser.com/apps/pbcs.dll/article?AID=/20080325/NEWS11/803250342/-1/NEWS11>.

95 Center for Biological Diversity, "Petition To List Acropora Palmata (Elkhorn Coral), Acropora Cervicornis (Staghorn Coral), and Acropora Prolifera (Fused-Staghorn Coral) as Endangered Species Under the Endangered Species Act" (March 3, 2004).

96 Center for Biological Diversity, "Seven Coastal States Petitioned to Address Ocean Acidification: Clean Water Act Requires Regulation of Carbon Dioxide That Could Drive Ocean Species Extinct," August 15, 2007, [http://www.biologicaldiversity.org/news/press\\_releases/ocean-acidification-08-15-2007.html](http://www.biologicaldiversity.org/news/press_releases/ocean-acidification-08-15-2007.html).

97 See 33 U.S.C. § 1313(d).

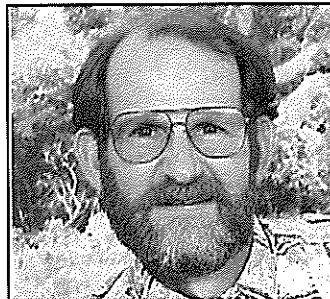
98 Center for Biological Diversity, "Seven Coastal States Petitioned to Address Ocean Acidification: Clean Water Act Requires Regulation of Carbon Dioxide That Could Drive Ocean Species Extinct," August 15, 2007, [http://www.biologicaldiversity.org/news/press\\_releases/ocean-acidification-08-15-2007.html](http://www.biologicaldiversity.org/news/press_releases/ocean-acidification-08-15-2007.html).

99 2007 Haw. Sess. Laws, Act 234 § 1(a).

100 *Id.*

101 *Id.*

*Douglas A. Codiga practices environmental and land use law with the law firm of Schlack Ito Lockwood Piper & Elkind, LLC, and is a member of the firm's Clean Technology and Climate Change Practice Group.*



**THE RETIREMENT  
COACH**

DERAND CAPITAL MANAGEMENT GROUP

**mel r. hertz MBA, CFP**

Wealth Management

Retirement Plans

Rollovers

**522-0100**

237 Kuumele Place Kailua, HI 96734  
[www.theretirementcoach.org](http://www.theretirementcoach.org)

securities and advisory services offered through *The Strategic Financial Alliance, Inc. (SFA)*, member FINRA and SIPC. mel r. hertz is a registered representative and an investment adviser representative of SFA, which is otherwise unaffiliated with derand capital.



**PATRICIA CHOI**  
PRESIDENT & PRINCIPAL BROKER  
CERTIFIED INTERNATIONAL PROPERTY SPECIALIST  
CERTIFIED COMMERCIAL INVESTMENT MEMBER  
BOARD OF REGENTS -  
WHO'S WHO IN LUXURY REAL ESTATE  
FOUNDING MEMBER -  
THE INSTITUTE FOR LUXURY HOME MARKETING

**Honolulu's #1  
Luxury Real  
Estate Broker  
for the 11th  
Successive Year!**

- Ranked #12 of Top 200 Brokers in the U.S. (*The Wall Street Journal*)
- #1 in Residential Sales Volume since 1996 (excluding project sales)
- One of 35 Most Influential People in Luxury Real Estate in the U.S. (*Unique Homes Magazine*)
- Leader in Luxury Real Estate Internet Marketing
- #1 Realtor in the State of Hawaii (*Hawaii Business Magazine*, 2007)

*The Wall Street Journal*, in November 2006, recognized Patricia Choi as the #3 Luxury Broker in the nation, based on sales volume. For 11 consecutive years, she has remained unmatched in luxury real estate sales for superior client representation, market savvy, and high-tech solutions. Patricia continues the leadership of Choi International in the luxury real estate market by serving on various boards, speaking for national organizations such as Who's Who in Luxury Real Estate, The Institute for Luxury Home Marketing and The Luxury Conclave and increasing our network of luxury brokers through new affiliations with Leading Real Estate Companies of the World and Luxury Portfolio.

Whether buying or selling, call Choi International at 734-7711 or visit our website at [www.ChoiRealty.com](http://www.ChoiRealty.com)



LUXURYREALESTATE.COM



LUXURY  
PORTFOLIO  
FINE PROPERTY COLLECTION



LEADING  
REAL ESTATE  
COMPANIES  
OF THE WORLD



THE INSTITUTE for  
LUXURY HOME  
MARKETING

**CHOI  
INTERNATIONAL**

EXTRAORDINARY PROPERTIES • UNRIVALLED EXPERTISE

TEL (808) 734-7711 • FAX (808) 735-8879 • [hawaii@choi-realty.com](mailto:hawaii@choi-realty.com) • [www.ChoiRealty.com](http://www.ChoiRealty.com)  
1215 Hunakai Street, Suite 200 • Honolulu, HI 96816