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Editorial | Our View

The morphing of state bills

By [Vicki Viotti](#)

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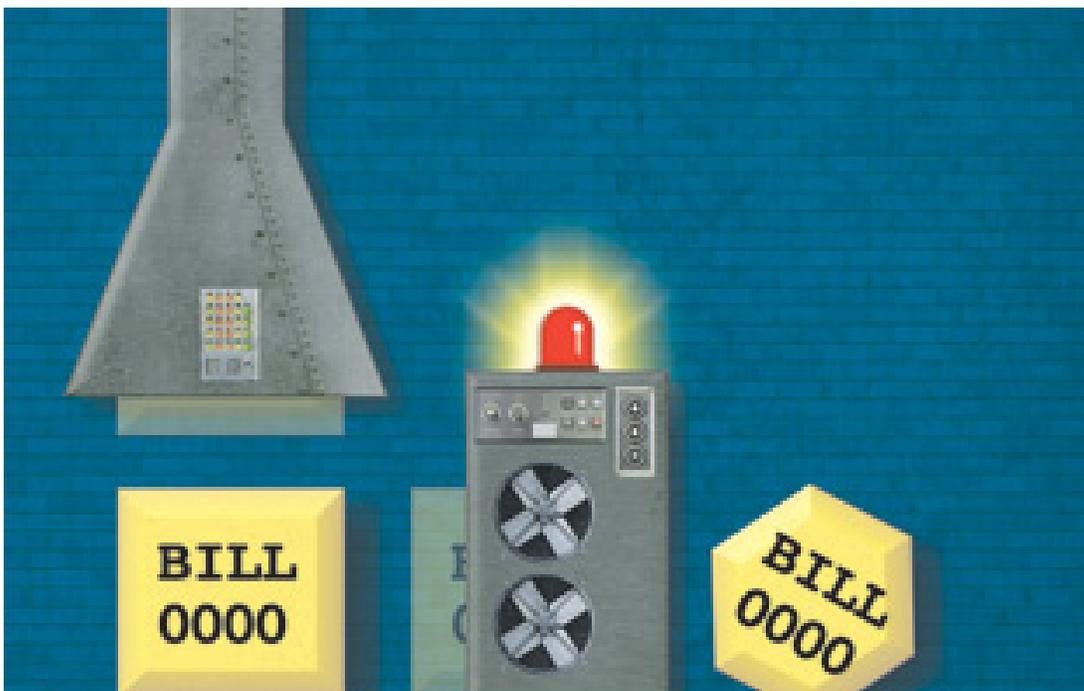


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A member of the public can keep track of a bill on the road to becoming a law, but it's akin to Hansel and Gretel following a trail of breadcrumbs through the dark forest.

And it gets worse during the last few weeks of any legislative session. The breadcrumbs suddenly stop and, in addition, a thick fog descends.

The end game of Legislature 2012, some people say, is going to be even more impenetrable than usual.

"What's really the bear in this session is the end game started at the very beginning," said Henry Curtis, executive director of Life of the Land. "I imagine this end of session will be really, really gnarly, worse than we've had it before."

Next week the surviving bills under consideration will move to conference committees. There, much of the negotiating to reconcile differences between the House and Senate will go on behind closed doors.

Often the bills are used as bargaining chips in horsetrading between chambers, one side offering to pass a bill the other wants in exchange for enactment of its own priority measures.

"During conference it's going to be even harder," said Nikki Love, executive director of Common Cause Hawaii, the nonprofit that advocates for good-governance interests. "It's hard for us to follow, things change so quickly."

In the weeks leading up to the conference stage, however, the use of a legislative strategy that's informally known by the colorful moniker "gut and replace" has made the task of following a bill from start to finish even more difficult, if not impossible.

The term refers to the practice of taking a bill, one that has moved through enough hearings to remain alive but is unlikely to pass, removing its contents and then replacing it with language from another legislative proposal. By law the title of the original bill, which can't be changed, must fit the replacement proposal, but many bill titles are written so broadly (even as unspecifically as, "Relating to the state of Hawaii") that this isn't very hard to do.

State Sen. Les Ihara is one of those within the system who has voiced concern about gut-and-replace legislating, which he is tracking and which he said is more commonplace this year than ever.

"People joke about it and everyone knows they're doing it," Ihara said. "The last couple of years it's been happening more, and this year, it's peaked."

Ihara cited *Taomae v. Lingle*, a 2005 ruling by the Hawaii Supreme Court. In that case, then-Senate President Colleen Hanabusa, had gutted and replaced a bill to put a constitutional amendment concerning sex assault crimes on the ballot. Because the original bill had not had enough readings, the court struck down the initiative.

However, other than holding the line on bills that have had insufficient readings, he said, there's very little control over the bill content being swapped out.

Ihara is keeping a running list of bills that have morphed. Here's just one example: Under the heading "Relating to transportation," House Bill 101 started out as an amendment of the term "bicycle" to include a bicycle powered by an electric motor, and specifying which kinds of bikes are allowed on buses.

That's been gutted, and replaced with language to create a credit for aviation fuel taxes that are passed on by distributors to interisland airlines.

But the one that has irritated the environmental community in particular is now called Senate Bill 755, which has moved through two separate gut-and-replace actions. Titled "Relating to economic development," it started life as a tax incentive for retailers who reduce the price on selected items, particularly books and other merchandise sold to students.

It then changed into a bill that authorized peer-to-peer poker tournaments, aiming to bolster the state's economy.



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Robert Harris
Executive director,
Sierra Club Hawaii



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Legislature website revamped

For anyone who saw that the official legislative Web portal had been redesigned and backed away rather than learn the ropes, webmaster Brent Lau is beckoning to bring them back. The revamping was done, he

said, to get the public more involved in the process, not scare them off.

Anyone can come by (www.capitol.hawaii.gov) and get the same functions as the old site had. The new design loads up the home page with links to most functions, which tended to be hidden in the old system.

But creating a free account, using the “register” link in the upper right corner, lets people use new features, too.

Getting hearing notices has been streamlined — you can get alerts for specific measures, and by committee. Registered users can create lists and add notes to each entry, to help them keep track.

Finally, there’s a built-in tool that remembers identities and uses them to create testimony for users who want to submit formal comments.

Lau is already thinking up improvements for next year, including a way to access conference committee reports online.

And people are already feeling free to tell him what needs work: They click the webmaster link (webmaster@capitol.hawaii.gov) and shoot him an email.

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Finally — and most controversially — that language was excised to make the bill a vehicle that now would temporarily ease environmental regulations in the interest of expediting state and county construction projects.

SB 755, now in its third House draft, last week passed the last pre-conference review in the House Finance Committee; it now is poised to enter the final conference-committee negotiations. That, said Ihara, was the House’s only means of keeping the proposal alive; the Senate had opposed the idea of environmental waivers.

In the arcane rules governing conference committees, committee chairpersons from the House and Senate do the dealmaking up until the deadline — set for April 26 for non-budgetary matters and April 27 for anything requiring appropriations, Ihara said. But two individuals, the Senate president and the House speaker, have the power to resuscitate bills that don’t make deadline, he added, and this is where the real horsetrading can take place.

Ihara said he decided this year to keep better track of the endgame bills; this way he can press for the ones he wants early in the conference negotiations, so they don’t become hostages for 11th-hour dealmaking. For example, he said, the Senate gutted House Bill 2483, which now contains the proposal for a fee on nonrecyclable plastic bags, an idea that stalled in the House but is favored both by the Senate leadership and Gov. Neil Abercrombie.

Many of the people who have been actively lobbying for specific measures but find themselves on the outside during the conference phase agree on one point: This has

been an especially frustrating legislative session to follow, even from its beginning.

Robert Harris, executive director of Sierra Club Hawaii, said that there are rules guiding conference-committee review, including the requirement that any substantive change has to have been included in one version of the bill that was already heard. That's a rule that sometimes gets bent, Harris said, and bills can be passed that haven't been adequately discussed in public.

"Conference committee is very much out of the public's eye," he said. "Most of the changes and amendments happen behind closed doors. They tend to be a little more kabuki theater."

Like many environmental lobbyists, Harris is especially disappointed by the wholesale changes to SB 755.

"There's significant amount of horsetrading that's going on," he said. "That's politics.

"It becomes very disillusioning for the public when you find out your bill got leveraged for something else," Harris added. "They're not looking at the issues, they're just looking to see what they can get."

Jeff Mikulina was Harris' predecessor at Sierra Club, and still keeps watch over environmental bills as executive director of Blue Planet Foundation. He's witnessed a lot of creative haggling over important legislation and agrees that the public has relatively little input at the end of session.

Technology has helped somewhat, and important documents are now more available online. For example, Mikulina said, it's more common now that proposed revisions to bills are posted in advance, enabling the public to testify on the most relevant, most recent version.

Further; the legislative website has been upgraded this session (see adjoining story). At Common Cause, Love has turned to social media where the public can more easily be notified to last-minute changes; Sierra Club has volunteer teams enlisted to follow specific categories of bills.

And, Mikulina said, at least the notice of each conference committee meeting is now posted online, whereas in the past "you kinda had to be there to hear when they're going to meet again.

"But that gives false comfort," he added, "because the hearings are just theater. The chairs all sit down before that and work things out."

All of this, of course, is not unique to Hawaii. Harris' colleagues in other Sierra Club chapters engage in similar end-of-session changes. In Florida, said the organization's David Cullen, and controversial bills have been known to slide through in the end.

"The general understanding is that substantive legislation should have been vetted in

the committee process, not introduced at the very end of the budget process and kept safe from amendment by tucking it into a conforming bill — but it happens," he said.

Look at bills that morphed

Here is a sampling of bills that underwent complete legislative surgery, with the entire substance changed in a "gut and replace" operation:

>> **SB 755**

Earlier version — Would offer an annual tax exemption on the sale of certain items during the back-to-school retail period.

Current version — Would temporarily ease environmental regulations in the interest of expediting state and county construction projects.

>> **HB 2145**

Earlier version — Would establish a state policy prioritizing the completion of 10 specific projects by the end of 2023.

Current version — Would include a \$500 million construction allotment as economic stimulus, among other economic development appropriations (formerly SB 2012).

>> **HB 2483**

Earlier version — Would amend the Hawaii State Planning Act to include climate change adaptation priority guidelines.

Current version — Would require businesses in the state to collect a fee for single-use checkout bags provided to a customer.

>>> **SB 3050**

Earlier version — Would assign to the Hawaii Tourism Authority the responsibilities for film, television, digital and new media development and repeal the film industry activities within the Department of Business, Economic Development and Tourism.

Current version — Would authorize the Department of Land and Natural Resources to lease public lands to develop creative media production and post-production facilities by negotiation, without public auction.

>> **SB 2438**

Earlier version — Would require the Hawaii Natural Energy Institute to provide the Public Utilities Commission with an analysis of the technology readiness of a renewable energy project.

Current version — Would permit the PUC to take certain economic considerations into account when making final determinations on renewable energy projects.

>> **HB 101**

Earlier version — Would amend the definition of “bicycle” to include a bicycle powered by an electric motor. Establishes maximum power and speed parameters for an electric bicycle. Specifies the types of bicycles allowed to be transported on buses used in public transportation.

Current version — Would create an aviation fuel tax credit for aviation fuel taxes passed on by distributors to interisland airplane carriers that transport people and goods between the islands.

>> **HB 341**

Earlier version — Would make it unlawful for an employer or a labor organization with 100 or more employees and a collective bargaining agreement to bar or discharge from employment, withhold pay from or demote an employee because the employee uses accrued and available sick leave.

Current version — Would require certain employers to provide a minimum amount of paid sick and safe leave to employees to be used to care for themselves or a family member who is ill or a victim of domestic violence, sexual assault, or stalking.

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