PART 6: OTHER RELEVANT ISSUES

Introduction

In addition to discussing issues related to the management and procedural aspects of the EIS system, a number of other relevant issues were covered in the interview sessions. Four were of particular interest.

Issues from the original list of questions (see Appendix B):
1. limitations of judicial proceedings
2. use of mitigative measures identified in the EIS document

Issues suggested by participants:
3. discussion of cumulative impacts in the EIS
4. time limits on the acceptability of a Final EIS

Limitations of Judicial Proceedings

Introduction

The EIS statute sets limitations on three types of legal actions that may be brought by aggrieved parties. The limitations listed in chapter 343-7 HRS apply to the time frame for initiating judicial appeals and those of standing to bring suit under this chapter. The subjects of the limitations for judicial proceedings are:

1. Lack of assessment required under section 343-5 HRS for a proposed action or lack of a formal determination by an agency on whether a statement is required shall be initiated within 120 days of the agency’s decision to carry out or approve the action, or within 120 days after the proposed action is started.

2. The determination of whether an EIS statement is required shall be initiated within 60 days with the Council and the applicant being judged aggrieved and others by court action being judged aggrieved.

3. The acceptance of an EIS required under section 343-5 HRS shall be initiated within 60 days with the Council, agencies and persons who provided written comments during the designated review period being judged aggrieved.

This section has been revised twice since 1974. The revisions made by Act 197 in 1979 decreased the number of days from 180 to 120 for judicial proceedings to be initiated for lack of assessment or lack of a formal determination. It gave the Environmental Quality Commission automatic standing in all three types of actions; standing to agencies in the case of a lack of assessment; and standing to applicants in the determination of whether a statement is required. Act 140 (1983) subsequently changed all references to the Commission to the Council in order to reflect the dissolution of the Environmental Quality Commission.

Discussion: Limitations of Judicial Proceedings

The 1978 EIS study noted that legal actions brought under the provision of chapter 343 HRS have been very infrequent. This trend has continued to the present with few cases being brought to court. One possible explanation is that the limitation placed on judicial proceedings has made it difficult to initiate court actions. A part of each interview session was devoted to asking people's opinions on whether the prescribed limitations were too restrictive.

The surprising answer was that most people do not consider the limitations placed on standing and timing to be the major cause of the low number of court challenges. Most considered that cost and the difficulty in getting the courts to overturn agencies' decisions to be the major factors limiting the number of court cases. One respondent thought that if one could afford a law suit then time would not be a factor. When asked if time limits should be abolished an overwhelming majority favored no change. Most agency representatives and private consultants felt that the 120 and 60 day limits were reasonable, allowing time to initiate judicial proceedings but not creating any undue delay in getting a project underway.
Dissent from the majority opinion was expressed mainly by members of citizen groups who said that the time limits should, in most cases, be lengthened. However, several expressed the opinion that an increase in the time limit would be tactical, allowing more time for the private citizen or a non-governmental group to encourage and negotiate with an agency or developer to file the proper documentation.

**Discussion: Time Limits and Administrative Appeals**

Several suggestions were offered for administrative appeals of determinations on whether an EIS is required or is acceptable. These suggestions called for a limited time to initiate these appeals and a corresponding reduction in the number of days in which to initiate judicial proceedings, so as not to lengthen the overall time for legal action. These suggestions were based on the reasoning that an administrative appeals process would be sufficient to solve most disagreements with the determination decisions, with judicial appeals less likely to occur. If a judicial appeal is initiated, most of the information gathered for the administrative appeal would be useful for bringing legal proceedings.

Similar recommendations were made in the 1978 EIS study. In the case of an administrative appeal that required more than 30 days to complete, "the time limit for initiating a judicial appeal might appropriately be limited to 30 days following the decision on the [administrative] appeal" (Cox, et al., 1978, p. 97). By reducing the time limit for judicial appeals to 30 days and concomitantly instituting an administrative appeal process limited to 30 days, the time period for appeals would remain approximately the same as now set aside for judicial appeals. In some cases, if the administrative appeals body took more than 30 days to hear the appeal and render a decision, the total number of days from the time a determination is made until the time limit expired for judicial proceedings would be greater than the 60 days now set aside.

**Improvements to the Limitation of Actions**

Limits on standing and the time allowed to initiate judicial proceedings are not perceived as the primary reasons for the small number of lawsuits brought forth under chapter 343. Other factors such as cost and the difficulty in getting the courts to overturn agencies' decisions were seen as being more important reasons for the small number of appeals. Many thought that the time limits were reasonable. Several people pointed out that the time periods to initiate judicial proceedings are viewed as waiting periods by proposers and lengthening them would cause delays.

A number of participants suggested that an administrative appeals process should be instituted to correct perceived deficiencies in the determination of some EAs and final EISs. This would provide an avenue to question agency decisions without the expense and time commitment needed to initiate judicial proceedings. To offset potential resistance caused by lengthening the EIS process, proponents of an administrative appeals have suggested a decrease in the time limits for judicial proceedings relative to the time frame for appeals.

We do not concur with the suggestion to institute a limited administrative appeals process at this time. However, if an administrative appeal is instituted, the time limit for any subsequent judicial appeal should not be less than 30 days, regardless of the length of time needed to hear the administrative appeal. Decreasing to 30 days the time allotted for judicial appeals of determination decisions should leave sufficient time to file a lawsuit since the information required for a judicial appeal would likely be similar to that used in the administrative appeal.

We recommend that the 120 day limit for appeals regarding the lack of an assessment remain.

**Mitigative Measures**

**Introduction**

The consideration of mitigative measures is not a procedural aspect of the EIS system but a content requirement of the EIS document. However, their identification and eventual implementation is an important outcome of the EIS process because mitigative measures can be used to eliminate or reduce potential environmental impacts. Identifying and discussing mitigative measures is a requirement of both the EA and EIS (Section 11-200-10(7) and 11-200-17(m)). The importance of attempting mitigation is that it may make an unacceptable
Mitigative measures are only useful if they are realistic and are eventually implemented. Both of these aspects are important. If the measures identified are not realistic they will not accomplish their purpose. If they are not implemented then it is certain they will not accomplish anything. We asked the interview participants to comment on both of these aspects.

Discussion: Mitigative Measures

Realistic Mitigative Measures

Many of the mitigative measures listed in EAs and EISs are required by statutes, regulations, or ordinances. For example, mitigative measures protecting historic sites are mandated by chapter 6E HRS and the appropriate administrative rules. The likelihood that these mitigative measures will be successful is thought to be very good, therefore their implementation is mandated. These measures are listed to confirm that the proposer recognizes the necessity of their implementation.

Yet another type of mitigative measure is one that has been shown by experience to be highly effective. For example, mitigation of traffic congestion might be addressed by expansion in the number of road lanes, a reconfiguration of access ramps, or special traffic control signal coordination. These measures are not mandated by law but have been demonstrated to be effective in eliminating or reducing negative impacts. Other mitigative measures are highly speculative. The use of van pools to reduce traffic congestion caused by residential development in high density areas, for example, has not proven to be significantly effective in Hawaii. Generally, the more speculative the method the less realistic is the likelihood that it will succeed. Unfortunately, unsuccessful mitigation measures do more than just fail to protect some aspect of the environment, they contribute to or cause the making of poor decisions. This defeats one of the underlying principals of the EIS system, the provision of better information for the purpose of making better decisions.

On the other hand, the institution of mitigative measures should not be rejected based on lack of thorough testing. New and innovative approaches to mitigation may work as well or better than established methods. A judgement must be made by reviewers as to how likely it will be that the proposed method will accomplish its intended task. If it is deemed likely to fail, then the proposer should substitute another method or admit that the impact cannot be mitigated.

Many participants were of the opinion that determining realism among proposed mitigative measures requires considerable judgement. Most did not want to deny the implementation of new or unfamiliar methods, unless they seemed inappropriate or inconceivable. They said that there should be no penalty for the institution of methods that proved to be unsuccessful. Most reasoned that it would be difficult to determine whether the proposer was to blame for any failures or other intervening factors over which the proposer had no control. Other participants disagreed, saying that the proposer should be held responsible for failed mitigative measures. In the actions proposed by agencies, the state or county government is responsible for dealing with the unmitigated impacts. Participants stated that private developers should have the same responsibility and should be made responsible by having to post a bond to cover the cost of mitigation.

Implementation of Mitigative Measures

Regardless of how effective a measure may be in mitigating a particular impact, it will have no effect if it is not implemented. Chapter 343 HRS and the EIS rules require only that possible mitigative measures be identified. No mention is made of a mechanism to require implementation of these mitigative measures. Each of the interview participants was asked if the EIS statute should contain language to make the implementation of mitigative measures mandatory.

The participants responses were mixed. Many people were of the opinion that because EAs and EISs were primarily disclosure documents that disclosing all possible mitigative measures should be required in the Draft EIS. The Final EIS should augment the Draft document by focusing on the specific measures that are to be pursued, taking into considered mitigation an evaluation of the comments received during the review period. The rationale
for the selection of the specific measures for implementation and the basis for rejection of others should be given. Finally, forcing implementation of the selected measures should be the responsibility of the permitting agency which has the authority to append conditions to a permit. The information contained in the EAs and EISs should be used by the permitting agency as the basis for requiring mitigation. The agency could also use the information to specify what actions must be taken if the mitigation measures fail. Another argument against using the EIS as a vehicle to mandate mitigation was that it would inhibit the discussion of more innovative mitigative measures since few would want to be responsible for implementing speculative methods at the risk of being liable for their failure.

A smaller number of participants argued that the discussion of mitigative measures should focus only on those methods that are at least possible and therefore implementable. Mandatory implementation of mitigative measures that appear in EAs and EISs would be a mechanism for weeding out more speculative and less realistic measures, which give the appearance of ameliorating the impact but really have little chance of working. Proponents of making implementation of mitigative measures mandatory said that the information gathered in the EIS process should be used in the decision making processes including the issuance of a permit. The mandatory implementation of mitigative measures identified in the EIS would be one way to force proposers to carry out their proposed mitigation plans.

Other participants suggested that mitigative measures might be considered to be of two types: those provided by the proposer of an action; and those that might be suggested by others or that were merely studied as possibilities. Mitigative measures of the first type should be considered as an essential part of the proposed action. Therefore, an accepted EIS incorporating mitigative measures of this first type should not be considered to satisfy the EIS system requirements if the action undertaken does not include these measures. This is concomitant to the rationale that an accepted EIS for an action planned in a certain way can not be considered to satisfy the system requirements for an action planned in an entirely different way.

These participants stated that it should be the responsibility of the proposing agency, in the case of an agency action, or the approving agency, in the case of a private action, to require that an action be undertaken in accordance with the plans as proposed in the EIS. It should also be their respective responsibilities to see that any mitigative measures of the first kind are actually undertaken. In the case of agency actions, it was suggested that the requirements should be built into the contracts for the action. In the case of private actions, the requirements should be made as conditions to the required permits.

Recommendations for the Use of Mitigative Measures

The opinion of the study team is that the EIS system documents are primarily to disclose environmental information. How that information is used should not be solely at the discretion of the proposing agency or private applicant. The discussion on mitigative measures should be frank, open, and realistic, and must have some provision for implementation. In the case of agency actions, the agency should adopt the mitigative measures identified in its EAs and/or EISs. In the case of applicant actions the applicant should be required by statute to come to agreement on the method(s), duration, and monitoring of mitigative measures and to present a plan to deal with possible failures. This agreement should be in the form of a mitigation plan submitted to the permitting agency for approval and should be subject to public review. The requirement to file a mitigation plan after the completion of the EIS process should force the discussion of mitigative measures to focus on the more realistic methods while assuring that mitigation is at least attempted.

Cumulative Impacts

Introduction

One of the most poorly defined issues relating to the EIS system is cumulative impacts. EIS rules require that "specific reference to related projects, public and private, existent or planned in the region shall be included [in the EIS] for purposes of examining the possible overall cumulative impacts of such actions" (Section 11 200-17(g) EIS rules). The intent of this requirement is to encourage proposers to examine how their action, along with other existing or planned actions in a region, will impact the environment. This language prevents the proposer from examining the environmental impacts of an action as if they existed in a vacuum. However, most EISs contain little
more than a listing of other projects planned for the area. Most fail to perform any analysis of the accumulation of impacts of all projects in a given region.

An appreciation of cumulative impacts is required at two other important decision points in the EIS process. First, in determining exempt actions, "All exemptions under the classes in this section are inapplicable when the cumulative impact of planned successive actions of the same type, in the same place, over time, is significant, or when an action that is normally insignificant in its impact on the environment may be significant in a particularly sensitive environment" (Section 11-200-8(b) EIS Rules). Second, in determining the significance of an action, actions that are individually limited but cumulatively have considerable effect should be judged to be significant (Section 11-200-12(b)(8)).

Although the requirement for addressing cumulative impacts in the EIS differs from the use of these impacts as threshold indicators in both the exemption and significance determinations, they have one thing in common: both are given minimal consideration.

Discussion: Application of Cumulative Impacts

The concept of cumulative impacts seems easy enough to understand. The more projects that are developed in an area (or that affect limited resources) the greater will be the total impact. One single residence built on a 5 acre lot may have little impact on the environment, but the impact would be far different if 20 single family residences were built on the same five acres. The problem comes in the application of the concept to real situations.

Cumulative impacts are more than just the addition of the impacts of individual actions, they are the sum of all the impacts judged against some criteria. For example, consider the impact of an action that affects population on traffic. The addition of a single family house may have little impact on traffic flow. Each additional house (i.e. increase in population) increases traffic slightly in that area. At some point the capacity of the road is exceeded and the level of service is reduced. Without knowing the threshold between fast flowing traffic and gridlock, it is difficult to judge the significance of each additional house/car/family.

In the absence of threshold values it is difficult to judge cumulative impacts. How many individually limited actions must take place before cumulative impacts are defined as significant? Neither guidelines nor explanations are offered in the statute or the rules to assist those who may be trying to make a determination as to whether a group of exempt actions is cumulatively significant; whether a group of individually limited actions is significant; or how great the magnitude of impacts of a group of actions is on an area. Lacking threshold values or any regulatory guidance, the treatment of cumulative impacts is left to individual interpretation and as many pointed out in the interviews, is not handled well.

Suggestions for Improving the Treatment of Cumulative Impacts

The most significant improvement would be to define the terms "cumulative" and "region" in the statute and the EIS rules. In our discussion on definitions in an early section of this report we suggested that the definition for "cumulative" found in NEPA regulations form the basis of the definition in the Hawaii State EIS system. In addition we believe that "cumulative" should be considered in reference to an action's effect on existing state or county plans or zoning for the area. For example, will the action, or the results of the action, exceed existing state or county plans for the area either in terms of structural characteristics, population, or infrastructure requirements? What portion/fraction of the limits presently placed on the area/region by zoning or state or county plans will be consumed by the proposed action? The definition of a region should include reference to some acceptable planning division such as a neighborhood, watershed, town, judicial district, county, or island.

The next improvement to the treatment of cumulative impacts would be to provide guidelines on how to judge the significance of cumulative actions within the context of the EIS system. These guidelines could be written into the EIS rules or in a companion publication that would expand on these and other concepts, such as mitigative measures and criteria for significance.

Finally, we suggest that more stringent attention to the adequacy of the description and discussion of cumulative impacts be encouraged during the EIS review process and that documents with inadequate attention to cumulative impacts be summarily rejected during the acceptance process.
Time Limit on the Acceptability of An EIS

Introduction

An accepted EIS is a necessary condition for the implementation or approval of an action. During the interview sessions, it was brought to our attention by several people that a number of EISs were accepted many years ago for actions that have not yet been implemented. Because many changes may occur in a community over a given period of time, issues will also change, especially cumulative impacts. Therefore, the question was raised as to how much time can elapse between the acceptance of an EIS and the beginning of work on a project before making it necessary to update the EIS. We refer to the issue as the “shelf life” of an EIS.

Discussion: EIS Shelf Life

There is nothing in the statute or the rules that puts a limit on the shelf life of an EIS. Yet, there is a recognition by most of the people who commented on this topic that the environmental setting is a dynamic process in which the physical as well as the social environment can change over a given period of time. Just as Conservation District Use Permits have a “lifetime” for implementation of the permitted use, it was probably not the intention of the framers of the EIS law to allow an accepted EIS to stand in perpetuity. The lawmakers and regulators may have reasonably assumed that if an agency or applicant spends the time, effort, and funds to prepare an EIS, then the project would most likely be implemented as soon as possible.

However, this has not always been the case. Expected funding for an agency action may not materialize and a project may sit on the shelf for a number of years before funding does become available. Even applicant actions may be delayed as the available financing is lost or as development rights change ownership. Clearly, long delays in the implementation of an action may call for a new or Supplemental EIS. The question we find difficult to answer is, what is an appropriate shelf life for an EIS?

We received a number of opinions on this issue. Most of the participants were quite emphatic in their responses and concluded that some shelf life should be set. Some suggested that after 5 years the EIS should no longer be valid. Others opted for 3 years. However, one participant called attention to large scale projects that have a 5, 10, or even 20 year construction schedule. Surely, he argued, there should be no limit on the shelf life of the EIS in those cases.

Perhaps the best solution to this issue was provided by one of our reviewers who suggested that the only test of the continued applicability of an EIS is whether conditions have changed in the intervening years. Hence, his suggestion was to establish procedures for determining the process to update or prepare a supplemental statement so as to take into consideration whether factors affecting the project have changed to a degree that warrants a new or supplemental statement.

Suggestions for EIS Shelf Life Limits

We suggest that language be added to the EIS rules governing the preparation of Supplemental Statements (11-200-26 EIS Rules ) to require the accepting authority or approving agency to examine EIS’s that are more than 5 years old if substantive implementation of the project has not yet been initiated and to make a determination whether a supplemental statement is required. The criteria for this determination would be the same as is presently provided in the EIS rules 11-200-26.