SUMMARY REPORT:

AN EVALUATION OF THE EIS PROCESS
AND AREAS OF CONCERN
Summary Report:
An Evaluation of the EIS Process and Areas of Concern

In 1978 the Environmental Center completed an evaluative study of the State Environmental Impact Statement (EIS) System. Recommendations made in the study formed the basis for a number of changes made to the system. Since that original study no other studies have been undertaken, however a number of major changes have been made to the state's EIS system including a revamping of the Environmental Impact Statement Rules. In 1989 the State Legislature recognized the need to update the 1978 study and allocated money to the Office of Environmental Quality Control (OEQC) to fund a study by the University of Hawaii's Environmental Center to evaluate the efficacy of the EIS system. The purpose of the study is to update the 1978 study and to report problem areas and potential solutions to the Legislature. The current evaluation study, as proposed by the Environmental Center, aims to parallel the 1978 study in methodology and coverage. In the earlier study the authors sought to cover a broad and comprehensive range of issues. The present investigators will strive to examine all aspects of the EIS process. In the earlier study the main technique for determining problem areas and uncovering potential solutions to the problems was through interviews with knowledgeable users of the system including: federal, state, and county agency personnel; leaders of environmental groups; and representatives of consulting firms and construction industry groups. The authors of this study will conduct interviews with a similar cross section of EIS system users. In order to facilitate user interviews the authors have prepared a preliminary list of issues that were developed to guide the initial stages of the study. This list of issues was drawn from past Environmental Center reviews of EIS legislation, current literature on the topic of EIS evaluation, a survey of EIS practices in other states, and the results of a meeting with a group which we refer to as the "Council of Elders". This council included the current and former Environmental Council chairperson, former OEQC staffers, and staff and former staff of the Environmental Center. Most of the members of this informal group had worked with the system for at least 10 years or more, thus the name "Council of Elders". This group helped articulate and define the issues that are dealt with in detail below. The list of issues is not intended to be exhaustive, and reviewers are asked to make additions, or deletions, or expand the topic areas according to their perspective. Each topic presented will include a brief background and the major issues related to the topic.

TOPICS

1. Management and Placement of the EIS System

Background

The management of the State EIS system is shared by the Office of Environmental Quality Control (OEQC) and the Environmental Council. OEQC is an executive branch government office established to advise the governor on environmental matters and to assist in the management of the EIS system. It is placed in the Department of Health (DOH) for administrative purposes. The Environmental Council is a citizen panel created to serve as a liaison between the OEQC Director and the general public and to make, amend, or repeal rules pertaining to the EIS system. OEQC was originally placed in the Office of the Governor but was moved to the DOH in 1980. The functions of the Environmental Council were originally carried out by two separate bodies, the Environmental Council created in Chapter 341 HRS and the Environmental Quality Commission (EQC) created in Chapter 343 HRS. The original Council was advisory to the Director of OEQC, while the EQC was commissioned to develop rules to implement and manage the EIS system. In 1983 the functions of the two were combined into the Environmental Council.

Issues

A concern of the EIS study team is whether the placement of the OEQC and the Environmental Council in the DOH has impaired their ability to carry out their duties under Chapter 343 HRS. The efficacy of moving both the
office and the council has been subject to some question. As early as 1982 suggestions to move the OEQC and the
council's predecessor bodies to another executive department surfaced. Questions have also been raised regarding
the qualifications and interests of the individuals appointed to serve as the Council.

2. Findings and Purpose

Background

A findings and purpose section was included in the Act that created Chapter 343 but was not included as part
of the law. This section was later added to Chapter 343 in 1980 based on a recommendation made in the 1978 EIS
Study. The reason for adding this section was to clarify the intent of the law.

Issue

The findings and purpose section predated the Constitutional Convention of 1978. An amendment to the
constitution guaranteeing the residents of Hawaii the right to a healthy environment was passed as a result of the
Constitutional Convention. One of the purposes of the state EIS system is to maintain and safeguard a healthful
environment. Thus, it could be argued that a clause alluding to the right to a healthful environment should be added
to the findings and purpose section.

3. Applicability of Chapter 343

Background

In the 1978 EIS study the authors discussed a multiple screen process that each project must go through to
determine whether an EIS is required. The “screens” included these questions:

1. Does the action fall within the categories set in Chapter 343-5?
2. Is the action exempt?
3. Does it have a significant impact?

A number of issues are associated with each of the screens. These are discussed in detail below.

The first screen deals with the applicability of the law to proposed actions. Section 343-5 sets the criteria for
an action’s inclusion in the EIS process. The principal criterion is whether a proposed action utilizes state or county
lands or monies. Private actions are included in the EIS process if they:

1. propose use within the conservation district
2. propose use within the shoreline area
3. propose use within any historic site designated in the National or Hawaii Register
4. propose use within the Waikiki area
5. propose amendment to existing county general plans except those initiated by the county
6. propose reclassification of any lands classified as conservation
7. propose the construction of a new or modification to an existing heliport under certain conditions

In the 1978 study, applicability criteria for private actions were classified as either geographical (1 through 4
above) or administrative (5 and 6 above). Another criterion was added in 1986 as a result of Act 325, which
requires an Environmental Assessment (EA) for the construction or modification of a heliport. This is defined as a
specific action criterion. Although heliports are the only category within this classification, several others have been
considered for inclusion into the section 343-5, including golf courses and aquaculture facilities.

Issues

The inclusion of heliports in section 343-5 signals the beginning of the use of specific actions as criteria to
determine the applicability of the EIS law. This development has been questioned by the Environmental Center on
the grounds that it set a precedence for creating a list of actions in the law that must undergo scrutiny under Chapter
343. This could prove unwieldy since there are potentially hundreds of actions that could be included in such a list.

Designating specific actions for inclusion raises the question of whether there would need to be a list of
specific actions that would be exempt from Chapter 343 scrutiny. There is a process for identifying exempt actions addressed in the Environmental Impact Statement Rules. However, if the law allows the listing of specific actions that must be included, then there seems to be little reason not to include a list of those specific actions that are exempt from Chapter 343 scrutiny. Then there could be two sets of specific action criteria to be drafted into the law, one including projects that must undergo consideration and another that includes exempt projects. Attempts have been made already to spell out specific action exemptions in the law, for example, the attempt to exempt some small scale aquaculture development projects.

Proponents of specific action criteria argue that the specificity is needed to include potentially damaging projects that might not be otherwise included in the geographic or administrative criteria. The use of these criteria would capture private actions that might be developed in permitted areas but might otherwise have a significant environmental impact.

Another issue is the exclusion of several geographic categories from section 343-5 including lands classified as agriculture, and lands within the Special Management Area (SMA) under Chapter 205A. If the state EIS law was established to protect areas of particular concern, then it would seem logical that land set aside for agricultural purposes, especially prime agricultural land, and land placed in the SMA by the counties would require scrutiny under Chapter 343 for actions (including boundary changes in the case of agricultural lands) proposed in those areas.

A final issue is whether the use of criteria is needed at all. If the state EIS law is meant to reduce significant environmental impacts caused by actions, then why not base the determination of the applicability of Chapter 343 on whether an action, public or private will have significant impact as defined. All actions would then require consideration under Chapter 343. Groups of actions that prove to have minimal or no significance could be exempted under existing provisions.

4. Exemptions

Background

The second screen in the EIS process is the determination of exempt versus non-exempt actions. The Environmental Council is given authority in section 343-6(a)(7) to adopt rules that "establish procedures whereby specific types of actions, because they will probably have minimal or no significant effects on the environment, are declared exempt from the preparation of an assessment." Each agency is responsible for submitting a list of exempt actions within designated classes to the Council for approval. The Council files each list separately and each agency is required to update its own list. Once an action has been declared exempt, each agency makes its own determination as to whether a particular activity being proposed will fall within the specific exempt action and class. There is no requirement to notify the Council or the public of activities it considers exempt.

Issues

A frequent complaint concerning exemptions is that the submission of individual agency lists causes a great deal of duplication. Frequently, several agencies will list the same action as exempt, making it appear that there are in fact many more actions exempted than is actually the case. A related issue is the lack of standardization; one agency may consider an action exempt and include it on its list while another agency carrying out the same action does not. One solution would be to create a master list of exempt actions to which all agencies contribute. Having a master list should reduce both instances of duplication and variation. It may also be appropriate to require agencies to file with the Council or OEQC a list of activities, which they have determined fall within their exempt actions. In this way the Council or OEQC may monitor the use of exemptions to safeguard against the possibility of abuse.

5. Significance Criteria

Background

The final screen is to determine whether an action may have significant environmental impacts. If an agency finds that an action may have a significant effect, then an EIS is required. Actions which constitute significant effects are defined in section 343-2 and further amplified in Title 11-200-12 of EIS rules.
The procedure for determining whether or not an EIS is necessary requires that an EA of the action be prepared at the earliest practical time by a "lead" agency. Based upon the agency's finding after the assessment has been reviewed, a determination is made and notice is sent to OEQC. The determination, either a Preparation Notice or a Negative Declaration, is published in the OEQC Bulletin.

Whether or not an EIS is required depends on how the concept of significance is interpreted. Agencies are given discretion in interpreting significance and very few negative declarations are challenged. The only appeal of an agency's decision is through the courts.

Attempts have been made in the past to establish an administrative appeals procedure to challenge Negative Declarations. In 1984 and again in 1987 legislation was passed but vetoed by the governor. The vetoes were based on the rationale that administrative appeals procedures already existed within each agency under Section 91-6 HRS.

Issues

Few determinations that an EIS is or is not required have been challenged through the judicial system. It is questionable that such a high degree of concurrence with agency determinations would exist if it were easier to challenge them by instituting an administrative appeals procedure. There are two related issues concerning appeals of the decision of whether an EIS is required: does each agency have an appeals procedure under Chapter 91 which can be used to challenge agency determinations, and if not should one be created? The authors of the 1978 report concluded that such an appeals process was needed. However, they did not explore the possibility of using existing procedures under Chapter 91. A survey of state agencies conducted by the Environmental Council found that only about half the agencies had appeals procedures under Chapter 91.

It is arguable whether a procedure under Chapter 91 would satisfy the perceived need for appeals of significance determinations. In many cases agencies are making determinations on actions that they themselves are proposing. It is difficult to believe that those challenging such determinations would feel they would get a fair hearing from an appeal to that agency. Thus there remains a strong argument for a neutral body to hear and decide appeals.

Another issue is the definition of "significance" itself. Participants of a 1982 OEQC sponsored workshop felt that the significance criteria in the rules should be re-examined with more specificity added. Few complaints have been expressed in the literature dealing with the state EIS system but some discussion is warranted for this key concept.

Another issue concerns the review of EAs on which Negative Declarations have been issued. The assessments are not widely available and usually not adequately reviewed. Many people familiar with the EIS system feel a better process for the distribution and review of EAs could be instituted to allow for an adequate review of these documents. A revised process might include a review period for assessments with no determination made until comments and replies to them are received.

6. Consultation

Background

The rationale behind the consultation process is that it is essential to develop a list of major issues to be examined in the EIS in order to make the draft EIS as complete as possible. The consultation process serves as a scoping session in that it allows agencies and interested parties to advise EIS preparers of the major issues concerning a proposed action.

Following notice of the issuance of an EIS Preparation Notice, anyone may request to be consulted in the preparation of an EIS. The proposer of the action is required to submit the assessment to consulted parties to request their comments. The consulted parties have 30 days in which to comment. Preparers must respond to all substantive comments in writing prior to filing a draft EIS.

Issues

The problems caused by late publication of the "OEQC Bulletin" were one issue raised. The consultation process begins on the publication date of the Bulletin, and several days can be lost in transit through the mail system. A possible solution would be to have the Bulletin accessible by computer through an online service.
Another issue deals with the use of a public hearing either as a substitute for or in conjunction with the present consultation process. NEPA regulations encourage the lead agency to bring together all the parties which may be involved or impacted to determine the scope and the significant issues to be analyzed in depth in the EIS. This may be done through a formal scoping meeting or a public hearing. Other states' EIS rules could be adopted to formalize a scoping process. Such a process may encourage more participation because it might be easier to express viewpoints verbally than to have to write them and submit them to preparers. It would also allow the preparer to question the consulting party to clear up any misunderstandings that may be caused by their comments.

7. Notification Provision

Background

All documents prepared for Chapter 343 must be made available to the public in a timely manner. OEQC is responsible for informing the “public of notices filed by the agencies of determinations that statements are required or not required, of the availability of statements for review and comments, and of the acceptance or nonacceptance of statements.” OEQC publishes a semi-monthly bulletin to meet the notification requirements of section 343-3.

Issue

Several states require public hearings as part of their public notification process. Informational hearings prior to the preparation of the EIS are thought to keep the public better informed of actions taking place in their immediate area and provide a forum for discussing the action so that opposing viewpoints may be expressed.

Other ways to notify the public may also be considered, including mailing notices to residents in close proximity to the project and publishing notices in the local media. While there seems to be no strong opinion favoring any one particular method, there is some feeling that improvement over the present form of notification can and should be made.

8. Determinations of Acceptability

Background

An EIS is subject to acceptance by the governor for state agency actions, the mayor for county agency actions, or the lead agency for private or applicant actions. EIS acceptance is required before the proposed action can proceed.

There are no time limits placed on acceptance by the governor or mayor. For applicant actions the lead agency must make its determination within 60 days of the receipt of the draft EIS or the EIS will be deemed acceptable provided that the applicant can ask for an extension not to exceed 30 days.

Section 11-200-23 of the EIS Rules outlines the criteria for the acceptance of the EIS. An applicant may appeal an agency’s decision of nonacceptance of an EIS to the Environmental Council within 60 days of the receipt of the agency’s determination. The Council has 30 days in which to respond to the appeal by either upholding or overturning the agencies determination. Section 11-200-24 of the Environmental Impact Rules outlines the procedure for appealing an agency’s determination that an EIS is not acceptable. A non-accepted EIS can be revised and resubmitted for consideration in the same manner as a draft EIS.

Issue

Applicants may appeal an agency’s determination that an EIS is not acceptable to the Environmental Council, but if agencies and/or the public believes that an EIS is inadequate, there is no way to appeal its acceptance, except through the courts. Because judicial appeals are potentially lengthy and costly, few of this type of determinations have been challenged.

The institution of a provision to allow agencies and/or the public to appeal the acceptance of an applicant EIS to the Environmental Council was one of the suggestion made by the Environmental Center in their 1978 study. The rationale for this suggestion was that if the applicant can appeal a non-acceptance ruling then aggrieved parties should be able to appeal an acceptance ruling. There is some agreement with this rationale among people familiar with the EIS system as evidenced by the continual support for this type of legislation.
The case for administrative appeal of acceptability determinations for agency actions has not been widely discussed. The accepting authority for an agency action EIS is the Governor or the Mayor depending on whether the action requires the use of state or county lands or funds. The difficulty in suggesting an appeals procedure for an agency action is that it would give the Environmental Council (or any other administrative body designated to hear the appeal) the authority to overturn the Governor’s or Mayor’s decision; a scenario not likely to be embraced by the state and county chief executives.

Another issue concerning EIS acceptability that has been discussed is the lack of a time limit between the acceptance of an EIS and the actual undertaking of an action. If the time period is too long between acceptance and project commencement, conditions outlined in the EIS may have changed making it necessary to re-examine the conclusions drawn in the EIS. However, any time limit would be subjective, since it would be difficult to objectively derive a meaningful time limit. The questions raised by this issue are:

1. Should there be a limit on the amount of time an EIS is considered valid?
2. What should that limit be?

9. Review

Background

Review of EISs by parties other than their preparers is essential to the preparation of adequate EISs. In the Hawaii EIS system all EISs are prepared by the proposers of the action. A thorough review by parties other than the proposer is necessary to prevent the statement from becoming a self-serving promotion of the proposed action. The original version of Chapter 343 set a 30 day public review period of the draft EIS. EIS preparers were given 14 days in which to respond to comments made during the review. The section on public review was amended in 1978 to allow for a 45 day review and response period.

Issue

Although the review of draft EIS’ s is an important part of the system, there seems to be little controversy concerning the time periods set in the law or the rules. The inclusion of the 45 day limitation in the law brought it in conformance with NEPA requirements, making it easier to prepare a single document to satisfy overlapping state and federal requirements. No other outstanding issue concerning time limits has been identified.

10. Mitigative Measures

Background

One of the more important results of the EIS review is identification of mitigative measures designed to lessen the environmental impacts of a proposed action. Consideration of mitigative measures is required by section 11-200-17(m) of the Content Requirements; Draft EIS Rules.

Issues

Although mitigative measures must be considered in the draft and final EISs, it is not clear whether their implementation is binding on the proposer. If they are not, how can the proposer be made to carry them out? One solution is to make the mitigative measures recommended in the EIS conditions for receiving a permit for the action.

A related issue deals with enforcement; are the activities recommended as mitigative measures being carried out? Mitigative measures for short-term impacts, especially those that occur during the facility’s construction, are easily enforceable since action can be halted and the proposer made to pay a penalty. Longer term mitigative measures are harder to enforce since the proposer, especially in the case of applicant actions, may no longer exist. A method to insure the implementation of mitigative measures which must be applied over a long term should be agreed upon prior to acceptance of the EIS or permit approval.

Another issue is whether the mitigation actually works. Measures designed to mitigate long term complex impacts may not be effective. However, without monitoring their effects, it is difficult to determine if mitigation has taken place thus validating the method. A way to monitor the efficacy of mitigative measures should be agreed upon prior to the acceptance of the EIS or permit approval.
11. EIS Preparers

Background

The state EIS system requires the proposing agency to prepare the EA for agency actions and the proposer of an action to prepare the EIS in all cases. In the case of applicant actions, agencies required to prepare EAs can and often do accept an assessment prepared by the applicant. The potential for bias in favor of the proposed action has been recognized in such a process. In other states different methods are used. Minnesota for example requires the applicants to pay the cost of the EIS preparation but uses “third parties” to prepare the EIS.

There are no special qualifications required of an EIS preparer. Anyone with knowledge of the requirements of the system and the ability to attract clients can become an EIS preparer. During the past several years legislation had been introduced to require some type of licensing or certification of EIS preparers. However, no legislation has been approved.

Issues

There are several related issues involving the preparation of documents required by the EIS system and those who prepare them. The first is the issue of bias. It is assumed that even if an EIS is biased in favor of the proposed action, a thorough review will counteract such bias. This may be true in the case of EISs which are subject to broad public review. The same is not true for EAs, most of which are not publically reviewed. A great majority of the actions for which an EA is prepared are found to have no significant impact and thus receive a Negative Declaration. There are concerns that some Negative Declarations are inappropriate. One suggestion to alleviate this concern was to have OEQC or some other neutral agency conduct an independent review of all assessments and to concur or dissent with the agency’s determination of whether or not an EIS shall be required.

Another suggestion along the same lines is to allow for a public review period similar to that of the draft EIS. No determination would be made until comments are received and answered or the time limit expires.

A second issue is that of cost, particularly who should pay for the preparation of EAs and/or EISs. Although various studies have shown that EIS cost is usually a small part of the total project cost it is still considerable for large projects. Typically construction costs for highway, resort, and mass transit development projects cost in the multimillions of dollars. An EA or EIS preparation that costs even one percent of these projects would cost many thousands of dollars.

In the state’s EIS system the proposer has the responsibility for preparing the EIS and with the exception of review, bears all the associated costs. Lead agencies have the responsibility for preparing EAs for actions proposed by them and those proposed by private developers, though in the latter case it is common practice for the private developer to conduct the assessment and submit the EA to the agency for determination. If the responsibility for preparing EAs and/or EISs were shifted to a designated government agency or neutral third party, who would be liable for the cost incurred? If it were the government’s liability, sufficient funds would have to be allocated to cover the cost though it might be difficult to predict how much would be needed in any fiscal year. If it were the proposers liability then EIS system costs could be built into the projects costs. In the case of private actions, developers could be charged for the cost, though the mechanism for assessing cost may be a difficult one to agree upon.

A third issue is competence. Environmental Impact Statement and to a lesser extent Environmental Assessment preparation requires knowledge in many subject areas. Few individuals are knowledgeable in enough subject areas to prepare an adequate document on their own. Most EA and EIS preparation requires integration among several different specialties. Preparation is usually a group effort with one person chosen as the principal author or editor. Critics frequently question whether preparers have the right mix of experienced knowledgeable people to reach the conclusions that are made in the EIS system documents.

Two solutions have been proposed to insure that preparers of Environmental Assessments and Environmental Impact Statements are competent. One would be to require certification or licensing of EIS/EA preparers either through an existing association or a government regulatory body. A difficulty with this solution would be the determination of requirements for certification or licensing. Another difficulty might arise in applying certification and licensing to agency personnel as well as consulting firms, since some agencies prepare EIS’s for their own projects.
The second proposal suggested to insure preparer competence would be to form inter-agency teams of specialists to prepare the EA/EIS. The teams would be made up of experienced, knowledgeable specialists drawn from existing agencies by a coordinating agency, with each EA/EIS team geared to meet its specific needs. The specialists would be relieved of their regular work load to participate and would return to their agency when the EA/EIS was completed.

The difficulty with this solution is that it may disrupt the normal function of agencies that release their workers to prepare the EA/EIS, especially if several EA/EISs were being prepared simultaneously for similar actions. Another difficulty may be that government agencies may lack competent specialists for a particular action.

The final issue is that of acceptability. Will the proposer adopt or agree with the conclusions reached by a third party? For the EIS system to work as it was intended, there must be a coupling between the results of the environmental analysis and the final design of an action. In cases dealing with applicants (and in some cases, agencies) that coupling might not take place if design changes are dictated from the outside.

CONCLUDING REMARKS

We have attempted to present the issues we hope to deal with in our EIS study. They are by no means exhaustive, as we have said before. We hope this will create a framework for discussing the many issues involved in the present EIS system. Discussion of the system during the interview will not be limited to these issues and we hope the reviewer will add to the list as he/she finds necessary. Written comments will be appreciated.
ENVIRONMENTAL CENTER EIS SYSTEM REVIEW:
INTERVIEW QUESTIONS
Environmental Center EIS System Review: Interview Questions

We have developed the following list of questions to help focus the interview session. Please feel free to raise questions or discuss issues not listed.

1. Management of the EIS system was placed with the Office of Environmental Quality Control (OEQC) and the Environmental Council (EnvC). The OEQC and the EnvC are placed within the Department of Health for administrative purposes. How has this affected OEQC's and EnvC's ability to manage the EIS system? Do you favor any other management arrangement?

2. Is there anything that should be added or deleted to the Findings and Purpose section (343-1) or does it accurately reflect what you feel is the intent of the system?

3. Should any of the definition section (343-2) be changed? Are there other concepts that should be defined?

4. Are the present public notification provisions adequate to keep the public informed? What other ways might be available to OEQC to keep the public abreast of the EIS process?

5. Are there types of actions that should be covered in the applicability requirements section? Are there types of actions that should be deleted from this section?

6. Are there too many or too few exemptions? Should agencies be required to report on the actions which they consider exempt? Should OEQC, EnvC, or any other agency review agency determinations that actions are exempt? In your opinion are exemptions misused to avoid the preparation of environmental assessments?

7. Determination that an EIS is required is made by the agency with jurisdiction over the area proposed for use. Often, this turns out to be the same agency that is proposing the action. Should this determination be made by the OEQC or some other third party? Have there been any actions which wrongfully received a Negative Declaration? Should there be a provision for an administrative appeal procedure for disagreement with this type of determination decision?

8. EIS's are prepared by the proponents of actions. Questions have been raised that this practice may lead to unobjective or biased EIS's. Should EIS's be prepared by an agency or other third party created for the purpose of conducting Environmental Assessments, or should the present method continue? Should EIS preparers be licensed or otherwise certified?

9. Is the consultation process an adequate means to determine the most relevant issues concerning an action? Would the institution of public hearings provide a better method of scoping a proposed action? Could both methods be used together to provide a more complete scoping? Are there other ways to determine the scope of coverage of an EIS? Is 30 days adequate for the consultation period?

10. Is the 45-day period adequate for the review of a draft EIS? Should there be a time period set aside for the review of a final EIS?

11. Administrative appeals to the EnvC are allowed for applicants whose EIS is not accepted. Should there be a procedure to allow those who disagree with a determination that an EIS is acceptable to appeal the decision?

12. Identification of mitigative measures to lessen the effects of unavoidable impacts is an important product of the EIS system. However, the action's proposer is not bound to implement the measures identified in the EIS. Should the proposer be required to implement mitigative measures listed in the EIS? A related issue is, do the mitigative measures actually work? Should the proposer or some other entity monitor the application of mitigative measures to ensure that they work? If they do not work should the proposer be liable for environmental damages caused by the action?

13. Should limitations on actions subject to Environmental Assessment be changed in any way?
ENVIRONMENTAL IMPACT STATEMENT SYSTEMS OF OTHER STATES

Prepared for the University of Hawaii Environmental Center’s Review of HRS Chapter 343

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August 1990
ENVIRONMENTAL IMPACT STATEMENT SYSTEMS OF OTHER STATES

1. Introduction

As part of its study of the Hawaii State EIS system, the Environmental Center examined legislation from 31 states and the territory of Puerto Rico as well as a proposed model state act and the National Environmental Policy Act (NEPA) to compare them with Hawaii EIS Statutes in terms of scope and responsibilities. In addition, the laws of other states were examined to search for any innovations that may be useful for environmental information gathering and planning in Hawaii.

The Federal Government, fourteen states and the territory of Puerto Rico have mandated the use of Environmental Impact Assessment as part of their comprehensive environmental management strategy. Many states have limited environmental planning laws that call for environmental evaluation of specific actions, such as mining or coastal zone development. Further Environmental planning not mentioned here does go on as a result of state agency regulations and Governor’s executive orders. The following section of the report summarizes important aspects of comprehensive EIS statutes. These statutes cover a wide variety of actions and usually require an EIS only for those actions that significantly effect the environment.

2. The National Environmental Policy Act (NEPA)

NEPA (42 USCL 4331) was the first EIS system in the United States and provided a model for the state systems that followed. The statute was created in 1969 because congress recognized (according to the preamble) the profound impact of humans on the environment. NEPA’s preamble declares it to be the policy of the United States to help “create and maintain conditions in which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans.” In order to achieve this end, NEPA directs federal agencies to consider the environmental effects of their actions. For every report or recommendation on proposals for legislation or other “major” federal actions “significantly” affecting the environment, responsible officials are to provide a detailed statement which includes:

1. The environmental impact of the proposed action
2. Any adverse environmental effects which cannot be avoided should the proposal be implemented
3. Alternatives to the proposed action
4. The relationship between local short term uses of man’s environment and the maintenance and enhancement of long-term productivity
5. Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented

The President’s Council on Environmental Quality is responsible for the promulgation of regulations governing the implementation of NEPA.

3. The Model Act

The Model State Environmental Policy Act was drafted in 1973 by participants at the Second National Symposium on State Environmental Legislation. The symposium was sponsored by the Council of State Governments. The act can be found at 33 Suggested State Legislation 3 (1974). This model act closely follows the simple format of NEPA preferring individual states to fill in the details in agency regulations. It declares the purpose of an EIS to be to provide detailed information on the environmental effects of a proposed action, to list ways to minimize the adverse effects of a proposed action, and to suggest alternatives to the action. In addition to the five NEPA requirements for the EIS, (see above), the model act calls for the following when agencies must approve or propose actions which may significantly affect the environment:

1. A description of the proposed action and its environmental setting
2. Mitigation measures proposed to minimize the environmental impact
3. The growth-inducing aspects of the proposed action

The responsible agencies are to prepare the EISs and may charge a fee to the applicant for the preparation. Agencies are also instructed that to “the maximum extent possible they shall take actions and choose alternatives
which, consistent with other essential considerations of state policy, minimize or avoid adverse environmental effects.” The act applies to both public and private actions.

4. The California Environmental Quality Act (CEQA)

CEQA, California Public Resources Code section 21000 (1970), applies to both public and private actions and is administered by the California Resources Agency. The act encompasses direct actions by agencies, actions monetarily supported by agencies, and activities involving a lease, permit license or certificate that is required by an agency. The lead agency is responsible for the preparation of the EIS (called environmental impact reports, EIR) but they may contract out the EIR or accept an EIR written by the applicant. Any person (including the applicant) may submit information to the preparer. Agencies are to prepare an EIR if after an “initial study” it is determined that the proposed project may have significant effect on the environment. “Significant effect” is defined as a substantial or potentially substantial effect on the environment. A scoping procedure is mandated in the regulations so that the involved agencies can determine the important factors to be discussed in the EIR.

Besides the five NEPA requirements (see NEPA above) a California EIR must contain a summary of the statement, a description of the project (including the purpose), the environmental setting, significant environmental effects of the project, proposed mitigation measures and the growth inducing aspects of the project. Economic and social effects may be discussed. A brief statement must be included explaining why various effects were determined to be non-significant.

CEQA mandates that a public agency should not approve a project if there are feasible alternatives available that will avoid or substantially lessen significant environmental effects. The statute also contains a clause that says a project may be approved if specific economic, social or other conditions make such alternatives or mitigative measures infeasible.

5. Connecticut Environmental Policy Act (CEPA)

CEPA, Connecticut General Statues section 22a-l (1970), applies only to State “actions affecting the environment”, which are defined as individual activities or a planned sequence of activities which could have “a major impact” on land, air, water or historic structures or landmarks. If an agency prepares an evaluation and makes a finding of no significant impact (FONS!), it must hold a public hearing if an organization or group of 25 or more people requests it within 10 days after publication of the FONS!

The statute requires the EIS to include a description of the action, consequences (direct and indirect) during and after the action, unavoidable adverse effects, alternatives to the action (including not proceeding with the action), proposed mitigative measures, analysis of short and long term costs and benefits of the project and the effects on energy use and conservation. The Office of Policy and Management reviews all evaluations made under the statute, and administration of the EIS system is carried out by the Department of Environmental Protection.

6. Indiana Environmental Policy Law (IEPL)

IEPL, Indiana Statutes Title 13 Article 10 (1972), is similar to NEPA. EISs are required only for pieces of legislation or other “major” state actions that significantly affect the environment. The air, water and solid waste control boards are to define which actions are significant effects. There is no provision regarding private actions (permits are not included) but state actions which clear the way for private actions are included. The Environmental Management Department is responsible for the administration of the EIS system.

7. Maryland Environmental Policy Act (MEPA)

MEPA, Annotated Code of Maryland Natural Resources Title 1, Subtitle 3 (1973), applies only to proposed State legislation significantly affecting the quality of the environment. The agency designated to do so by the legislature is responsible for the preparation of the EIS. The EIS must contain statements regarding both the benefits and adverse effects of the project, measures designed to mitigate adverse effects on the environment and increase beneficial aspects of the project, and recommended alternatives which might have less adverse and more beneficial aspects. The Department of Natural Resources is responsible for the administration of the EIS process.
8. Massachusetts Environmental Policy Act (MEPA)

MEPA, General Laws of Massachusetts chapter 30, section 61 to 62h (1972) applies to state agencies and applicants who make proposals that will cause "not insignificant" damage or impairment to resources. Applicants must pay for and prepare their EISs. The lead agency must approve the action and the secretary of the agency must make public a recommendation that "in his judgement" the EIS complies with the statute's requirements. The EIS must contain a statement of the nature and extent of the impacts of the project, mitigating measures, alternatives to the action and adverse short and long term effects of the project. A decision to go forward with a project may be overturned on appeal if the plaintiff can show that an agency or applicant knowingly submitted false information or concealed material facts. The Executive Office of Environmental Affairs is responsible for the administration of the EIS process.

9. Michigan EIS System

Michigan's EIS system was created by a 1974 Governor's executive order and applies only to all "major" state actions that have a significant impact on the environment, including the quality of human life, or proposed actions which create significant public controversy. This executive order is very limited and there has been no law review article written about it, probably because much attention has been focused on the more controversial "citizen's right to sue polluters" law, the Michigan Environmental Protection Act.

10. Minnesota Environmental Policy Act (MEPA)

MEPA, Minnesota Statutes Annotated volume 9, chapter 116-D (1973) departs from the NEPA model to a greater extent than most states. The EIS process is triggered when: 1) projects which are funded, conducted, assisted, permitted, regulated or approved by government (including federal government) have the potential to cause significant effects; 2) material evidence of potential significant effects accompanying a petition of 25 or more people is presented to the Environmental Quality Review Board; and 3) the Environmental Quality Review Board orders an agency to prepare an environmental assessment. Agencies are responsible for the preparation of EISs for their own projects and for those of private applicants. Agencies charge applicants a fee for EIS preparation; the regulations contain procedures for the settlement of fee disputes. The lead agency is responsible for the adequacy of the EIS unless the board chooses to accept the responsibility.

An "Environmental Assessment Worksheet" is used to assist in the evaluation of the nature and extent of the impacts. If an EIS is required, it must contain a description of the action, an analysis of the significant environmental impacts, alternatives and their impacts and mitigation measures. The act mandates that no action may be approved or permit granted where such action is likely to cause pollution, impairment or destruction of land and water resources if there is a feasible and prudent alternative that is more environmentally sound. "Economic considerations shall not justify such conduct." The statute calls for the EIS to be prepared as early and as openly as possible.

11. Montana Environmental Policy Act (MEPA)

MEPA, Montana Code Annotated Title 75 (1975) is nearly identical to NEPA. The only major difference between the two is that the Montana statute declares that every person has a right to a healthful environment. EISs are required for "major state actions affecting the quality of human environment." State agencies are allowed to charge fees to private applicants if a lease, permit, license or contract requires an agency to prepare an EIS.

12. New Mexico Environmental Quality Act (EQA)

In 1972 New Mexico repealed its EIS law, and is the only state to ever have done so. The EQA paralleled the 5 requirements in NEPA (see above). The legislature repealed the statute as a result of lobbying by businesses and state agencies who thought the system was ineffective and was a waste of time and money. Environmental groups also favored repeal of the statute rather than having a "watered down" or environmentally harmful EIS system. A thorough analysis of EQA demise can be found in McCash, "The Rise and Fall of the New Mexico Environmental Quality Act, 'Little NEPA'" in 14 Natural Resources Journal 401, 1974.
13. New York State Environmental Quality Review Act (SEQRA)

SEQRA New York Environmental Conservation Law, Article 8 (1972) applies to both public and private actions which may have a significant effect on the environment. The regulations contain a non-exhaustive list of "Type I" actions that are more likely to cause significant effects than other types of actions. Agencies are allowed to add to this list and unlisted actions may require an EIS if their effects are significant. The statute does not define significant effect, but does define environment.

The lead agency must prepare both draft and final EISs and may charge a fee to the applicant. An applicant may choose to prepare the draft, but the agency must prepare the final EIS. The lead agency must make an explicit finding that the requirements of the statute have been met and that "to the maximum extent" adverse effects revealed in the EIS process will be minimized or avoided.

A SEQRA EIS must contain a description of the action and its environmental setting, unavoidable adverse effects, alternatives, irreversible and irretrievable commitments of resources, mitigation measures, growth inducing aspects, effects on the use of energy and other information as may be prescribed by the Department of Environmental Conservation.

SEQRA requires agencies to choose alternatives that are the most environmentally favorable unless these alternatives are clearly outweighed by social and economic factors. A SEQRA EIS must also contain a statement of the analysis and judgement of an agency decision. The Department of Environmental Conservation is responsible for the administration of the EIS process.

14. North Carolina Environmental Policy Act (NCEPA)

NCEPA, Article I chapter 113A, General Statutes of North Carolina (1971), is only concerned with government actions, but local governments are empowered to pass ordinances that will require EISs for private actions. Agencies prepare EISs for legislation and projects "significantly affecting the quality of the environment." The statute defines significant effect to include projects that "may" cause significant effects. An EIS must contain the environmental impact of the project, significant unavoidable impacts, mitigation measures, alternatives, and the relationship between short and long term uses and productivity, and irreversible and irretrievable environmental effects. The regulations say that the purpose and need of the project must be discussed as well as how these will be satisfied by each of the alternatives. The regulations refer to alternatives as the "heart" of the EIS process. Administration of the EIS system is carried out by the Department of Administration.

15. Puerto Rico Public Policy Environmental Act (PRPPEA)

PRPPEA, Laws of Puerto Rico Annotated Title 12 section 11121 (1970) contains EIS requirements that are nearly identical to NEPA. The Environmental Quality Review Board is responsible for the administration of the EIS process.

16. South Dakota Environmental Policy Act (SDEPA)

SDEPA, South Dakota Codified Laws Title 34A- Environmental Protection, chapter 9 (1974) is also similar to NEPA. An EIS must contain a description of the action and its environmental setting, short and long term impacts, unavoidable adverse effects, alternatives, irreversible and irretrievable commitments of resources, mitigation measures, and the growth inducing aspects of the action. If an agency decides to go forward with an action it must make an explicit finding that the requirements of SDEPA have been met and that all feasible action will be taken to minimize or avoid environmental problems. The Department of Water and Natural Resources is responsible for the administration of the EIS process.

17. Texas

Texas does not have a statutory EIS system, but environmental evaluation is required by an administrative order from the Interagency Council for Natural Resources entitled "The Texas Response" (1973).
18. Utah
Utah requires environmental evaluation via an August 27, 1976 executive order.

19. Virginia Environmental Quality Act (VEQA)
VEQA, Code of Virginia, Title 10.1 chapter 12 (1973) requires an Environmental Impact report for all “major state projects” which are defined as the acquisition of any land for a state facility, the construction of a facility or the expansion of an existing facility. The EIR must contain the environmental impact of the project, unavoidable adverse effects, mitigation measures, alternatives, and any irreversible environmental changes. The EIR must state what alternatives were considered and why they were rejected. If the report does not contain alternatives the agency must explain why. VEQA is administered by the Council on the Environment.

20. Washington State Environmental Policy Act (SEPA)
SEPA, Revised code of Washington 43.21C (1971), has requirements similar to NEPA’s. An applicant or agency may discuss the beneficial aspects of the project if they desire to do so. The statute applies to both public and private actions that have a significant impact on the environment. Applicants can prepare the EIS, but a designated official from the lead agency is responsible for its content. The regulations contain an environmental checklist for the purpose of scoping potential significant impacts of a project. The Washington Department of Ecology is responsible for the administration of the EIS system.

21. Wisconsin Environmental Impact Law (WEIL)
WEIL, Wisconsin Statutes Annotated, Title 1 chapter 1.11(1971) applies to both public and private actions that significantly affect the environment. Applicants must pay for the EIS but may prepare any part of it. The lead agency is responsible for the content of the EIS no matter who prepares it. The EIS must contain the five NEPA requirements as well as the effect the project will have on energy conservation and usage. Agencies are also to consider short and long term beneficial aspects of the project and the economic advantages and disadvantages of the project. The Department of Natural Resources is responsible for the administration of the EIS process.

22. Environmental Evaluation in Other States
Some states do not have a comprehensive EIS system; environmental evaluation is limited to specific actions in these states. The following list is not comprehensive, other environmental evaluation may exist in various states as the result of agency regulations, administrative and executive orders, or on an informal basis.

22.1 Alabama
Alabama requires evaluation of solid waste, radioactive waste, mineral resources exploitation and service territories for utilities. Alabama has also called for an evaluation of the State’s energy consumption and its effect on the environment.

22.2 Arizona
The Radiation Regulatory Agency can conduct studies to obtain information on radiation for the legislature, or for those seeking a permit. The Power Plant and Transmission line Siting Committee must issue a certificate of environmental compatibility for new plant proposals.

22.3 Arkansas
Cutting timber on game and fish commission land and major utility plant siting require environmental evaluation. Utility plant siting requires environmental compatibility and public need.
22.4 Colorado

Regional service authorities must prepare impact statements to show how their planning activities will impact the environment. When an applicant for water diversion needs approval from the federal government it must inform the Water Conservation Board and the Wildlife Commission and must submit a "mitigation proposal".

22.5 Delaware

The Delaware Coastal Zone Act prohibits all "heavy" industrial use in the coastal zone and uses allowable by permit require an EIS. EISs must contain evaluation of the effect of the project on water pollution, flora and fauna, erosion and drainage, and the emission of heat, glare and noise. Delaware has similar EIS requirements for wetlands activities. The Department of Natural Resources and Environmental Control requires an EIS to be a detailed description of the effect of the proposal on the immediate and surrounding environment and natural resources such as the water quality, wildlife, and aesthetics of the region. The Department will also consider, when deciding to grant a permit, the economic effect of the project, the effect on neighboring land and the number of supporting facilities and their impact.

22.6 Florida

On notice of intent to build a new power plant, the Department of Environmental Regulation evaluates the site in question and includes "environmental impacts" as part of its evaluation.

22.7 Mississippi

The Mississippi Coastal Wetlands Protection Law requires any person proposing to carry out a regulated activity in the coastal wetlands area to file an application for a permit with the Department of Wild Life Conservation which must include an EIS. The EIS must contain a description of the project’s impacts on coastal wetlands and the life dependent on the wetlands.

22.8 Nebraska

Nebraska requires environmental evaluation of permits to use water in another state and for radioactive waste disposal.

22.9 New Jersey

An EIS is required for a piece of legislation if the majority of the legislative committee considering the bill orders it to be done. An EIS is also required for the construction of a solid waste management facility, for construction of a facility in the coastal zone or when the turnpike authority seeks to acquire or alter land. An EIS must contain a description of existing environmental conditions, unavoidable impacts, mitigative measures, and alternatives.

22.10 Oregon

An impact study is required for permission to build an electric generating facility.

22.11 Pennsylvania

Any project which may discharge industrial waste into streams requires a public hearing and the Bureau of Water Management may subpoena documents and investigate the area in question. Surface mining permits require a detailed plan for land reclamation, a public hearing and a statement on the environmental impact of the project.

22.12 Rhode Island

The Coastal Resources Management Law requires that any person desiring to do certain activities (including dredging, desalinization, sewage treatment etc.) in the coastal area must show that the use does not conflict with any
resources management plan, make the area unsuitable for other reasonable uses, or significantly damage the environment.

22.13 Vermont

Permit processes for development (10 acres or more, a more than 10 unit housing project, drilling oil or gas wells, construction on elevations above 2,500 feet) require environmental evaluation by the Environmental Board. Permits for wetlands will not allow a use if any party shows that the proposed project would destroy or significantly affect a necessary wildlife habitat and if the economic and social benefits do not outweigh the environmental concerns; or that all feasible mitigating measures have not been taken; or a reasonable alternative site for the project is available.

22.14 West Virginia

West Virginia requires environmental evaluation as part of the permitting process for waste management facilities, surface coal mining, road and highway construction and high voltage power line construction.

23. HRS 343 in Comparison With Other Comprehensive Systems

23.1 Overlap with NEPA

Situations arise in which an action may require both a review under NEPA and a number of state systems. In Hawaii, section 343-4 (I) and the regulations call for the joint preparation of Environmental Impact Statements. Wisconsin, New York, Michigan and Minnesota also call for joint preparation. California, Maryland, North Carolina, South Dakota, Washington and the Model Act allow a document prepared for NEPA to act as a substitute for the state EIS as long as the statute's requirements have been met.

23.2 Applicability

The comprehensive systems above are triggered when projects have significant “impacts” or “effects” except for Virginia which calls for environmental impact reports for all “major state projects.” Hawaii is the only state whose legislation limits the assessment of private actions to specific geographic areas or projects. The states vary in whether or not they define significant effects that trigger EISs and where and how they do so. California defines significant effects in a definition section of the statutes, while Connecticut defines “actions affecting the environment”. Minnesota and New York’s statutes do not define significant effect but New York’s statute defines “environment” as “the physical conditions that will be affected by a proposed action including aesthetic significance, existing patterns of population concentration, distribution or growth and existing community and neighborhood character.” North Carolina defines “environmental effect” rather than significant effect. Indiana leaves this definition to the appropriate boards and agencies. Washington’s law requires agencies to analyze only those impacts that are significant, but does not provide a definition of “significant”.

23.3 Preparation and Financing of Documents

In Hawaii and Massachusetts private applicants prepare and pay for the environmental studies of their actions. In California the agencies prepare applicant EISs, but may request the applicant to reimburse them for estimated preparation costs. Washington state agencies have the option of requiring the applicant to prepare the EIS. Minnesota, New York, South Dakota, Wisconsin and the Model Act call for the Agency to be responsible for the preparation of the EIS and the applicant to pay for it. Almost all states with comprehensive systems allow the person or agency responsible for the preparation of the EIS to contract with consultants to do the necessary studies.

23.4 EIS Preambles

The preambles of the various EIS acts vary in their scope and detail. Nearly all make some reference to the state being a trustee or guardian of the environment for this and future generations of citizens and encourage long term consideration of the environmental effects of actions. Washington, Indiana and Montana's preambles state that
every person has a right to a healthy environment. Virginia says that EISs are to be used to help in the wise use of the environment. New York mentions that the environment's resources are limited and that state agencies are to regulate in consideration of preventing environmental damage. The Maryland act specifies that a diverse environment is necessary for the maintenance of public health and the economy. Minnesota, in a particularly long preamble, mentions the effects of high-density urbanization, population growth and resource exploitation. The Minnesota statute's stated purpose is to encourage growth only in an environmentally acceptable manner. California and other states say that it is every citizen's responsibility to contribute to the enhancement and preservation of the environment.

23.5 Public Hearings

There are no requirements in chapter 343 H.R.S. for public hearings. Wisconsin requires a public hearing for every project that an EIS is prepared for prior to a final decision. In Washington the regulations encourage applicants to hold public hearings. In New York and California the lead agencies may hold public hearings on the impact of proposals if they deem it appropriate. Connecticut requires a public hearing after the department prepares an evaluation or declares a finding of no significant impact, if a group of 25 or more people requests a hearing.

23.6 Requirements

The five NEPA requirements form the backbone of most EISs. The summaries above contain the basic EIS requirements for each state with an EIS system.

23.7 Exempt and Excepted Actions

The actions that are exempt from the various statutes are too numerous and diverse to be discussed here, but nearly all, like Hawaii, specifically call for emergency actions to be exempt from the EIS process and for an agency or agencies to list other actions that because of their negligible effects are exempt from EIS consideration.

24. Analysis

24.1 The Role of the Judiciary

The courts have played an extremely important role in the scope and effectiveness of state EIS systems. For example, Montana and Washington have nearly identical EIS acts. However, Washington's system has been praised for being a "leader" in the area of environmental protection while Montana has been highly criticized. (See Rodgers, "The Environmental Policy Act": 60 Wash. L. Rev. 33 and Tobias and McLean, "Of Crabbed Interpretations and Frustrated Mandates: The Effect of Environmental Policy Acts on Pre-existing Agency Authority" 41 Mont. L. Rev. (1980).

The Washington courts have interpreted their EIS Act to provide "maximum mitigation" according to Rodgers, who praises the willingness of the courts to use the "clearly erroneous" standard to overturn agency declarations of non-significance. "This skeptical oversight is sustained, no doubt, by the theoretical and empirical convictions that agencies doing what is best for them may not be doing what is best for the environment and its public constituency" (Rodgers 1980).

On the other hand, The Montana Supreme Court has ruled that their EIS act does not authorize agencies to consider the content of the EIS in their decision making process unless the legislature has specifically directed to do so, by the legislatures for the particular legislative bill under consideration. The court ruled that failure to comply with the EIS requirements was not a basis on which to deny a permit. See Montana Wilderness Association v. Board of Health and Environmental Sciences 171 Mont. 477 (1976).

The courts have played an important role in other jurisdictions as well. The only limiting factor on most courts is their lack of technical expertise. The lack of scientific background among judges makes them reluctant to overrule the decisions of state agencies who are perceived as experts in the area in question. There may also be constitutional problems (separation of powers) in the judicial branch substituting its decision over executive branch agencies (see Selmi "The Judicial Development of CEQA" 18 U.C. Davis L. Rev. 112, 1984).
commentators believe that judicial reluctance leads to a lack of substantive oversight of agencies and that an executive office environmental ombudsman agency be granted the power to evaluate agency decisions on appeal. This appeal process may cut down on court expenses and the ombudsman agency staff may have or do have access to the technical expertise that the courts lack. The decisions of watchdog agencies could be appealed in court (see Hoffinger, “EISs - Instruments of Environmental Protection or Endless Litigation?” 11, Fordham Urban L. Journal 527, 1982-83 and Andreen, “In Pursuit of NEPA’s promise: the Role of Executive Oversight in the Implementation of Environmental Policy” 64 Indiana L. Journal 205, 1989).

24.2 Readability

Nearly all EIS statutes and regulations including HRS 543 call for EISs to be clearly written and to be informative rather than encyclopedic in nature. However many EISs are both bulky and incomprehensible to the public (and possibly even to the agency head, who is supposed to be using the EIS documents to make decisions on projects). One solution offered is that all documents be run through a standard computerized “readability” test. Any document that would not be understood by half of the adult public would have to be edited. Opponents argue that highly educated experts are the only ones who read EISs and that EISs contain complex material that cannot be presented in a simple manner.

24.3 Substance Versus Procedure

The United States Supreme court as well as state courts have ruled that their EIS acts are procedural and not substantive. This means that an agency or applicant must comply with the procedures of the EIS system but that the end result of the EIS process is only to provide information to the decision makers and not to dictate what the decision will be. This is not true of Minnesota, New York and California systems whose acts specifically mandate that unless the other factors clearly dictate a different result, agencies are to use alternatives and mitigation measures that are the most environmentally sound. Thus the EIS process, in addition to being an environmental information providing process, is transformed into a decision mandating process. A New York court ruled that if an outside intervenor or agency suggests reasonable alternatives for design or technical aspects of a project that are superior to the applicant’s in meeting SEQRA’s goals, those alternatives must be incorporated into the project’s plans and be conditions for a permit (see Town of Henrietta versus DEC 430 N.Y.S. 2d 440, 1980). This goes far toward the goal of environmental protection but may cause resentment on the part of developers and agencies.

24.4 Public Hearings

Public hearings are seen as a positive way to encourage public participation in the EIS process by allowing interaction and information sharing among applicants, agencies and the public. There is some concern that the issues to be discussed related to the project in question may take a back seat to individuals who wish to use the forum as a “soapbox” for their own political agendas. This problem could be minimized by having persons who wish to present testimony or evidence provide that testimony to the agency prior to the hearing.
CHAPTER 343

HAWAII REVISED STATUTES

ENVIRONMENTAL IMPACT STATEMENTS
CHAPTER 343
ENVIRONMENTAL IMPACT STATEMENTS

SECTION
343-1 FINDINGS AND PURPOSE
343-2 DEFINITIONS
343-3 PUBLIC RECORDS AND NOTICE
343-4 REPEALED
343-5 APPLICABILITY AND REQUIREMENTS
343-6 RULES
343-7 LIMITATION OF ACTIONS
343-8 SEVERABILITY

Note

Effect of 1983 amendments, see L 1983, c 140, §§11 to 14.

§343-1 Findings and purpose. The legislature finds that the quality of humanity's environment is critical to humanity's well being, that human activities have broad and profound effects upon the interrelations of all components of the environment, and that an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions. The legislature further finds that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.

It is the purpose of this chapter to establish a system of environmental review which will ensure the environmental concerns are given appropriate consideration in decision making along with economic and technical considerations. [L 1979, c 197, § (1); am L 1983, c 140, §4]

§343-2 Definitions. As used in this chapter unless the context otherwise requires:

"Acceptance" means a formal determination that the document required to be filed pursuant to section 343-5 fulfills the definition of an environmental impact statement, adequately describes identifiable environmental impacts, and satisfactorily responds to comments received during the review of the statement.

"Action" means any program or project to be initiated by any agency or applicant.

"Agency" means any department, office, board, or commission of the state or county government which is a part of the executive branch of that government.

"Applicant" means any person who, pursuant to statute, ordinance, or rule, officially requests approval for a proposed action.

"Approval" means a discretionary consent required from an agency prior to actual implementation of an action.

"Council" means the environmental council.

"Discretionary consent" means a consent, sanction, or recommendation from an agency for which judgement and free will may be exercised by the issuing agency, as distinguished from a ministerial consent.

"Environmental assessment" means a written evaluation to determine whether an action may have a significant effect.

"Environmental impact statement" or "statement" means an informational document prepared in compliance with the rules adopted under section 343-6 and which discloses the environmental effects of a proposed action, effects of a proposed action on the economic and social welfare of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.

The initial statement filed for public review shall be referred to as the draft statement and shall be distinguished from the final statement which is the document that has incorporated the public's comments and the responses to those comments. The final statement is the document that shall be evaluated for acceptability by the respective accepting authority.

"Helicopter facility" means any area of land or water which is used, or intended for use for the landing or take-off of helicopters; and any appurtenant areas which are used, or intended for use for helicopter related activities or rights-of-way.
"Negative declaration" means a determination based on an environmental assessment that the subject action will not have a significant effect, therefore, will not require the preparation of an environmental impact statement.

"Office" means the office of environmental quality control.

"Person" includes any individual, partnership, firm, association, trust, estate, private corporation, or other legal entity other than an agency.

"Significant effect" means the sum of effects on the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the State's environmental policies or long term environmental goals as established by law, or adversely affect the economic or social welfare. [L 1974, c 246, pt of §1; am and ren L 1979, c 197, §1(2); am L 1983, c 140, §5]

Revision Note

Numeric designations deleted.

Attorney General Opinions


Case Notes

Sufficiency of an environmental impact statement. 59 H. 156, 577 P.2D 1116.

§343-3 Public records and notice. All statements and other documents prepared under this chapter shall be made available for inspection by the public during established office hours.

The office shall inform the public of notices filed by agencies of determinations that statements are required or not required, of the availability of statements for review and comments, and of the acceptance or nonacceptance of statements. The office shall inform the public by the publication of a periodic bulletin to be available to persons requesting this information. The bulletin shall be available through the office and public libraries. [L 1974, c 246, pt of §1; ren L 1979, c 197, §1(3); am L 1983, c 140, §6]

§343-4 REPEALED. L 1983, c 140, §7.

§343-5 Applicability and requirements. (a) Except as otherwise provided, an environmental assessment shall be required for actions which:

1. Propose the use of state or county lands or the use of state or county funds, other than funds to be used for feasibility or planning studies for possible future programs or projects which the agency has not approved, adopted or funded, or funds to be used for the acquisition of unimproved real property; provided that the agency shall consider environmental factors and available alternatives in its feasibility or planning studies

2. Propose any use within any land classified as conservation district by the state land use commission under chapter 205

3. Propose any use within the shoreline area as defined in section 205 A-41

4. Propose any use within any historic site as designated in the National Register or Hawaii Register as provided for in the Historic Preservation Act of 1966, Public Law 89-665, or chapter 6E

5. Propose any use within the Waikiki area of Oahu, the boundaries of which are delineated in the land use ordinance as amended, establishing the "Waikiki Special District"

6. Propose any amendments to existing county general plans where such amendment would result in designations other than agriculture, conservation, or preservation, except actions proposing any new county general plan or amendments to any existing county general plan initiated by a county

7. Propose any reclassification of any land classified as conservation district by the state land use commission under chapter 205

[(8)] Propose the construction of new, or the expansion or modification of existing helicopter facilities within the state which by way of their activities may affect any land classified as conservation district by the state land use commission under chapter 205; the shoreline area as defined in section 205 A - 41; or any historic site as designated in the National Register or Hawaii Register as provided for in the Historic
(b) Whenever an agency proposes an action in subsection (a), other than feasibility or planning studies for possible future programs or projects which the agency has not approved, adopted, or funded, or other than the use of state or county funds for the acquisition of unimproved real estate property, which is not a specific type of action declared exempt under section 343-6, that agency shall prepare an environmental assessment for such action at the earliest practicable time to determine whether an environmental impact statement shall be required. A statement shall be required if the agency finds that the proposed action may have a significant effect on the environment. The agency shall file notice of such determination with the office which, in turn, shall publish the agency determination for the public's information pursuant to section 343-3. The draft and final statements, if required, shall be prepared by the agency and submitted to the office. The draft statement shall be made available for public review and comment through the office for a period of forty-five days. The office shall inform the public of the availability of the draft statement for public review and comments pursuant to section 343-3. The agency shall respond in writing to comments received during the review and prepare a final statement. The office, when requested by the agency, may make a recommendation as to the acceptability of the final statement. The final authority to accept a final statement shall rest with:

(1) The governor, or the governor's authorized representative, whenever an action proposes the use of state lands or the use of state funds or, whenever a state agency proposes an action within the categories in subsection (a)

(2) The mayor, or the mayor's authorized representative, of the respective county whenever an action proposes only the use of county lands or county funds

Acceptance of a required final statement shall be a condition precedent to implementation of the proposed action. Upon acceptance or nonacceptance of the final statement, the governor or mayor, or the governor's or mayor's authorized representative, shall file notice of such determination with the office. The office, in turn, shall publish the determination of acceptance or nonacceptance pursuant to section 343-3.

(c) Whenever an applicant proposes an action specified by subsection (a) which requires approval of an agency, and which is not a specific type of action declared exempt under section 343-6, the agency receiving the request for approval shall prepare an environmental assessment of such proposed action at the earliest practicable time to determine whether an environmental impact statement shall be required. A statement shall be required if the agency finds that the proposed action may have a significant effect on the environment. The agency shall file notice of such determination with the office which, in turn, shall publish the agency's determination for the public's information pursuant to section 343-3. The draft and final statements, if required, shall be prepared by the applicant, who shall file these statements with the office. The draft statement shall be made available for public review and comments through the office for a period of forty-five days. The office shall inform the public of the availability of the draft statement for public review and comments pursuant to section 343-3. The applicant shall respond in writing to comments received during the review and prepare a final statement. The office, when requested by the applicant or agency, may make a recommendation as to the acceptability of the final statement. The authority to accept a final statement shall rest with the agency receiving the request for approval. Acceptance of a required final statement shall be a condition precedent to approval of the request and commencement of proposed action. Upon acceptance or nonacceptance of the final statement, the agency shall file notice of such determination with the office. The office, in turn, shall publish the determination of acceptance or nonacceptance of the final statement as pursuant to section 343-3. The agency receiving the request, within thirty days of receipt of the final statement, shall notify the applicant and the office of the acceptance or nonacceptance of the final statement. The final statement shall be deemed to be accepted if the agency fails to accept or not accept the final statement within thirty days after receipt of the final statement; provided that the thirty day period may be extended at the request of an applicant for a period not to exceed fifteen days.

In any acceptance or nonacceptance, the agency shall provide the applicant with the specific findings and reasons for its determination. An applicant, within sixty days after nonacceptance of a final statement by an agency, may appeal the nonacceptance to the environmental council, which, within thirty days of receipt of the appeal, shall notify the applicant of the council's determination. In any affirmation or reversal of an appealed nonacceptance, the council shall provide the applicant and agency with specific findings and reasons for its determination. The agency shall abide by the council's decision.
(d) Whenever an applicant simultaneously requests approval for a proposed action from two or more agencies and there is a question as to which agency has the responsibility of preparing the environmental assessment, the office, after consultation with the agencies involved, shall determine which agency shall prepare the assessment.

(e) In preparing an environmental assessment, an agency may consider, and where applicable and appropriate, incorporate by reference, in whole or in part, previous determinations of whether a statement is required and previously accepted statements. The council, by rules, shall establish criteria and procedures for the use of previous determinations and statements.

(f) Whenever an action is subject to both the National Environmental Policy Act of 1969 (Public Law 91-190) and the requirements of this chapter, the office and agencies shall cooperate with federal agencies to the fullest extent possible to reduce duplication between federal and state requirements. Such cooperation, to the fullest extent possible, shall include joint environmental impact statements with concurrent public review and processing at both levels of government. Where federal law has environmental impact statement requirements in addition to but not in conflict with this chapter, the office and agencies shall cooperate in fulfilling these requirements so that one document shall comply with all applicable laws.

(g) A statement that is accepted with respect to a particular action shall satisfy the requirements of this chapter and no other statement for that proposed action shall be required. [L 1974, c 246, pt of § 1; am and ren L 1979, c 197, §1(5) and (6); am L 1980, c 22, §1; am L 1983, c 140, §8; am imp L 1984, c 90, §1]

Case Notes

Law contemplates consideration of secondary and non-physical aspects of proposal, including socio-economic consequences. 63 H. 453, 629 P.2d 1134.

Requirements not applicable to project pending when law took effect unless agency requested statement. 63 H. 453, 629 P.2d 1134.

Construction and use of home and underground utilities near Paiko Lagoon wildlife sanctuary. 64 H.27, 636 P.2d 158.

Environmental assessment required before land use commission can reclassify conservation land to other uses. 65 H. 133, 648 P.2d 702.

Hawaii Legal Reporter Citations

Decision on Preparation of EIS. 79 HLR 790667.

Attorney General Opinions


§343-6 Rules. (a) After consultation with the affected agencies, the council shall adopt, amend, or repeal necessary rules for the purposes of this chapter in accordance with chapter 91 including, but not limited to, rules which shall:

(1) Prescribe the contents of an environmental impact statement
(2) Prescribe the procedures whereby a group of proposed actions may be treated by a single statement
(3) Prescribe procedures for the preparation and contents of an environmental assessment
(4) Prescribe procedures for the submission, distribution, review, acceptance or nonacceptance, and withdrawal of a statement
(5) Prescribe procedures to appeal the nonacceptance of a statement to the environmental council
(6) Establish criteria to determine whether a statement is acceptable or not
(7) Establish procedures whereby specific types of action, because they will probably have minimal or no significant effects on the environment, are declared exempt from the preparation of an assessment
(8) Prescribe procedures for informing the public of determinations that a statement is either required or not required, for informing the public of the availability of draft statements for review and comments, and for informing the public of the acceptance or nonacceptance of the final statement
(9) Prescribe the contents of an environmental assessment
(b) At least one public hearing shall be held in each county prior to the final adoption, amendment, or repeal of any rule. [L 1974, c 246, pt of §1; am and ren L 1979, c 197, §1(7); am L 1983, c 140, §9, am L 1986, c 186, §2; am L 1987, c 187, §3]

Case Notes

Court has no jurisdiction over actions initiated after time limit. 64 H. 126, 637 P.2d 776.

§343-7 Limitation of actions. (a) Any judicial proceeding, the subject of which is the lack of assessment required under section 343-5, shall be initiated within one hundred twenty days of the agency's decision to carry out or approve the action, or, if a proposed action is undertaken without a formal determination by the agency that a statement is or is not required, a judicial proceeding shall be instituted within one hundred twenty days after the proposed action is started. The council or office, any agency responsible for approval of the action, or the applicant shall be adjudged an aggrieved party for the purposes of bringing judicial action under this subsection. Others, by court action, may be adjudged aggrieved.

(b) Any judicial proceeding, the subject of which is the determination that a statement is or is not required for a proposed action, shall be initiated within sixty days after the public has been informed of such determination pursuant to section 343-3. The council or the applicant shall be adjudged an aggrieved party for the purposes of bringing judicial action under this subsection. Others, by court action, may be adjudged aggrieved.

(c) Any judicial proceeding, the subject of which is the acceptance of an environmental impact statement required under section 343-5, shall be initiated within sixty days after the public has been informed pursuant to section 343-3 of the acceptance of such statement. The council shall be adjudged an aggrieved party for the purpose of bringing judicial action under this subsection. Affected agencies and persons who provided written comment to such statement during the designated review period shall be adjudged aggrieved parties for the purpose of bringing judicial action under this subsection; provided that the contestable issues shall be limited to issues identified and discussed in the written comment. [L 1974, c 246, pt of §1; am and ren L 1979, c 197, §1(8); am L 1983, c 140, §10]

§343-8 Severability. If any provision of this chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application; and to this end, the provisions of this chapter are declared to be severable. [L 1974, c 246, pt of §1; ren L 1979, c 197, §1(9)]]
TITLE 11
DEPARTMENT OF HEALTH
CHAPTER 200
ENVIRONMENTAL IMPACT STATEMENT RULES
Subchapter 1 Purpose
§ 11-200-1 Purpose

Subchapter 2 Definitions
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Subchapter 3 Periodic Bulletin
§ 11-200-3 Periodic bulletin

Subchapter 4 Responsibilities
§ 11-200-4 Identification of accepting authority

Subchapter 5 Applicability
§ 11-200-5 Agency actions
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§ 11-200-7 Multiple or phased applicant or agency actions
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§ 11-200-14 General
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Subchapter 8 Appeals
§ 11-200-24 Appeals to the council

Subchapter 9 NEPA
§ 11-200-25 NEPA actions: applicability to chapter 343, Hawaii Revised Statutes
Subchapter 10 Supplemental Statements

§11-200-26 General
§11-200-27 Determination of applicability
§11-200-28 Contents
§11-200-29 Procedures

Subchapter 11 Severability

§11-200-30 Severability

Historical Note: Chapter 11-200, Administrative Rules, is based substantially on the Environmental Impact Statement Regulations of the Environmental Quality Commission. [Eff. 6/2/75; R 12/6/85]
SUBCHAPTER 1

Purpose

§11-200-1 Purpose. Chapter 343, Hawaii Revised Statutes, establishes a system of environmental review at the state and county levels which shall ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations. The purpose of this chapter is to provide agencies and persons with procedures, specifications of contents of environmental impact statements and criteria and definitions of statewide application. [Eff. 12/6/85] (Auth: HRS §§343-6) (Imp: HRS §§343-1, 343-6)

SUBCHAPTER 2

Definitions

§11-200-2 Definitions. As used in this chapter:

"Acceptance" means a formal determination that the document required to be filed pursuant to chapter 343, Hawaii Revised Statutes, fulfills the definitions and requirements of an environmental impact statement, adequately describes identifiable environmental impacts, and satisfactorily responds to comments received during the review of the statement. Acceptance does not mean that the action is environmentally sound or unsound, but only that the document complies with chapter 343, Hawaii Revised Statutes, and this chapter.

"Accepting authority" means the final official or agency that determines the acceptability of the EIS document.

"Action" means any program or project to be initiated by an agency or applicant, other than a continuing administrative activity such as the purchase of supplies and personnel-related actions.

"Agency" means any department, office, board, or commission of the state or county government which is part of the executive branch of that government.

"Applicant" means any person who, pursuant to statute, ordinance, or rule, officially requests approval from an agency for a proposed action.

"Approval" means a discretionary consent required from an agency prior to actual implementation of an action. Discretionary consent means a consent, sanction, or recommendation from an agency for which judgment and free will may be exercised by the issuing agency, as distinguished from a ministerial consent. Ministerial consent means a consent, sanction, or recommendation from an agency upon a given set of facts, as prescribed by law or rule without the use of judgment or discretion.

"Council" or "EC" means the environmental council.

"Emergency action" means a sudden unexpected occurrence demanding immediate action to prevent or mitigate loss or damage to life, health, property, or essential public services.

"Environment" means humanity's surroundings, inclusive of all the physical, economic and social conditions that exist within the area affected by a proposed action, including land, human and animal communities, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance.

"Environmental assessment" means a written evaluation to determine whether an action may have a significant environmental effect.

"Environmental impact" means an effect of any kind, whether immediate or delayed, on any component of the whole of the environment.

"Environmental impact statement" or "statement" or "EIS" means an informational document prepared in compliance with chapter 343, Hawaii Revised Statutes, and this chapter and which discloses the environmental effects of a proposed action, effects of a proposed action on the economic and social welfare of the community and state, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects and alternatives to the action and their environmental effects.

"Environmental impact statement preparation notice" or "EIS preparation notice" means a document informing the office of an agency determination, after an environmental assessment, that the preparation of an environmental impact statement is required.

"Exempt classes of action" means exceptions from the requirements of chapter 343, Hawaii Revised Statutes, for a class of actions, based on a determination that the class of actions will probably have a minimal or no significant effect on the environment.
"Exemption notice" means a brief notice filed by the proposing agency, in the case of a public action, or the agency with the power of approval, in the case of a private action, when it has determined that the proposed project is an exempt or emergency project.


"Negative declaration" means a determination by an agency that a given action not otherwise exempt does not have a significant effect on the environment and therefore does not require the preparation of an EIS.

"Office" means the office of environmental quality control.

"Person" includes any individual, partnership, firm, association, trust, estate, private corporation, or other legal entity other than an agency.

"Significant effect" or "significant impact" means the sum of effects on the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the state's environmental policies or long-term environmental goals and guidelines as established by law, or adversely affect the economic or social welfare, or are otherwise enumerated in section 11-200-9 of this chapter. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-2, 343-6)

**SUBCHAPTER 3**

**Periodic Bulletin**

§11-200-3 Periodic bulletin. (a) The office shall inform the public through the publication of a periodic bulletin of:

(1) Notices filed by agencies of determinations that statements are required or not required
(2) The availability of statements for review and comments
(3) The acceptance or non-acceptance of statements
(4) Other notices required by the rules of the council

(b) The bulletin shall be made available to any person upon request. Copies of the bulletin shall also be sent to the state library system and other depositories or clearinghouses. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-3, 343-6)

**SUBCHAPTER 4**

**Responsibilities**

§11-200-4 Identification of accepting authority. (a) Whenever an agency proposes an action, the final authority to accept a statement shall rest with:

(1) The governor, or an authorized representative, whenever an action proposes the use of state lands or the use of state funds or, whenever a state agency proposes an action within section 11-200-6(b); or
(2) The mayor, or an authorized representative, of the respective county whenever an action proposes only the use of county lands or county funds.

(b) The authority for requiring statements and for accepting any required statements that have been prepared shall rest with the agency initially receiving the request for an approval. In the event that an applicant simultaneously requests approval from two or more agencies and these agencies are unable to agree as to which agency has the responsibility for complying with section 343-5(c), Hawaii Revised Statutes, the office, after consultation with the agencies involved, shall determine which agency is responsible. In making the determination, the office shall take into consideration, including but not limited to, the following factors:

(1) The agency with the greatest responsibility for supervising or approving the action as a whole;
(2) The agency that can most adequately fulfill the requirements of chapter 343, Hawaii Revised Statutes, and this chapter;
(3) The agency that has special expertise or access to information; and
§11-200-5 Agency actions. (a) In determining which agency proposed actions are subject to chapter 343, Hawaii Revised Statutes, the agency shall assess at the earliest practicable time the significance of environmental impacts in its action, including the overall, cumulative impact; related actions in the region; and further actions contemplated.

(b) The applicability of chapter 343, Hawaii Revised Statutes, to specific agency proposed actions is conditioned by the agency's proposed use of state or county lands or funds. Therefore when an agency proposes to implement an action to use state or county lands or funds, it shall be subject to the provisions of chapter 343, Hawaii Revised Statutes, and this chapter.

(c) Use of state or county funds shall include any form of funding assistance flowing from the state or county, and use of state or county lands includes any use (title, lease, permit, easement, licenses, etc.) or entitlement to those lands.

(d) For agency actions, chapter 343, Hawaii Revised Statutes, exempts from applicability any feasibility or planning study for possible future programs or projects which the agency has not approved, adopted, or funded. Nevertheless, if an agency is studying the feasibility of a proposal, it shall consider environmental factors and available alternatives and disclose those considerations in any assessment and subsequent statement. If, however, the planning and feasibility studies involve testing or other actions which may have a significant physical impact on the environment, then an environmental assessment shall be prepared. [Eff. 12/6/85] (Auth: HRS §§343-6) (Imp: HRS §§343-5(b), 343-6)

§11-200-6 Applicant actions. (a) Chapter 343, Hawaii Revised Statutes, shall apply to persons who are:

(1) Proposing to implement actions which are either located in certain specified areas

(2) Proposing certain types of amendments to existing county general plans and which require approval of an agency prior to proceeding with its action.

(b) Chapter 343, Hawaii Revised Statutes, establishes certain classes of action which subject an applicant to an EIS requirement, provided that approval of an agency shall be required and that the agency finds that the proposed action may have significant environmental effects. Chapter 343, Hawaii Revised Statutes, refers to five geographical designations and two administrative categories.

(1) The five geographical designations are:

(A) The use of state or county lands

(B) Any use within any land classified as conservation district by the state land use commission under chapter 205, Hawaii Revised Statutes

(C) Any use within the shoreline area as defined in section 205-31, Hawaii Revised Statutes

(D) Any use within any historic site as designated in the national register or Hawaii register

(E) Any use within the Waikiki-Diamond Head area of Oahu, the boundaries of which are delineated on the development plan for the Kalia, Waikiki, and Diamond Head areas, as shown on the map designated as portion of the 1967 City and County of Honolulu General Plan Development Plan Waikiki-Diamond Head (Section A)

(2) The two administrative categories are:

(A) Any amendment to existing county general plans where the amendment would result in designations other than agriculture, conservation, or preservation (actions initiated by a county which proposes a new county general plan or amendments to any existing county general plan are excepted)

(B) The use of state or county funds, other than funds to be used for feasibility or planning studies for possible future programs or projects which the agency has not approved, adopted, or funded, or funds to be used for the acquisition of unimproved real property; provided that the agency shall consider environmental factors and available alternatives in its feasibility or planning studies.

§11-200-7 Multiple or phased applicant or agency actions. A group of actions proposed by an agency or an applicant shall be treated as a single action when:

1. The component actions are phases or increments of a larger total undertaking.
2. An individual project is a necessary precedent for a larger project.
3. An individual project represents a commitment to a larger project.
4. The actions in question are essentially identical and a single statement will adequately address the impacts of each individual action and those of the group of actions as a whole. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §343-6)

§11-200-8 Exempt classes of action. (a) Chapter 343, Hawaii Revised Statutes, states that a list of classes of actions shall be drawn up which, because they will probably have minimal or no significant effect on the environment, shall generally be exempted from the preparation of an environmental assessment. Actions exempt from the preparation of an environmental assessment under this section are not exempt from complying with any other applicable statute or rule. The following list represents exempt classes of action:

1. Operations, repairs or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing
2. Replacement or reconstruction of existing structures and facilities where the new structure will be located generally on the same site and will have substantially the same purpose, capacity, density, height, and dimensions as the structure replaced
3. Construction and location of single, new, small facilities or structures and the alteration and modification of same and installation of new, small, equipment and facilities and the alteration and modification of same including but not limited to:
   A. Single family residences not in conjunction with the building of two or more such units
   B. Multi-unit structures designed for not more than four dwelling units if not in conjunction with the building of two or more such structures
   C. Stores, offices and restaurants designed for total occupant load of twenty persons or less, if not in conjunction with the building of two or more such structures
   D. Water, sewage, electrical, gas, telephone, and other essential public utility services extensions to serve such structures or facilities; and accessory or appurtenant structures including garages, carpents, patios, swimming pools, and fences
4. Minor alterations in the conditions of land, water, or vegetation
5. Basic data collection, research, experimental management, and resource evaluation activities which do not result in a serious or major disturbance to an environmental resource
6. Construction or placement of minor structures accessory to existing facilities
7. Interior alterations involving things such as partitions, plumbing, and electrical conveyances
8. Demolition of structures, except those structures located on any historic site as designated in the national register or Hawaii register as provided for in the National Historic Preservation Act of 1966, Public Law 89-5655, 16 U.S.C. §§470, as amended, or chapter 6E, Hawaii Revised Statutes
9. Zoning variances except: use, density, height, parking requirements and shoreline set-back variances
   a. 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.
   b. Any agency, at any time, may request that a new exemption class be added, or an existing one amended or deleted. The request shall be submitted to the council, in writing, and contain detailed information to support the request.
   d. Each agency, through time and experience, shall develop its own list of specific types of actions which fall within the exempt classes, as long as these lists are consistent with both the letter and intent expressed in these exempt classes and chapter 343, Hawaii Revised Statutes. These lists and any amendments to the lists shall be submitted to the council for review and concurrence. The lists shall be reviewed periodically by the council.
   e. Each agency shall maintain records of actions which it has found to be exempt from Chapter 343, Hawaii Revised Statutes.
   f. In the event the governor declares a state of emergency, the governor may exempt any affected program or action from complying with this chapter, provided a state of emergency need not be declared to exempt emergency repairs for public service facilities from complying with chapter 343, Hawaii Revised Statutes. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §343-6)


**SUBCHAPTER 6**

**Determination of Significance**

§11-200-9 Early assessment: agency actions, applicant actions. (a) For agency actions, agencies shall assess proposed actions at the earliest practicable time in order to assure thoughtful and deliberate evaluation in determining the significance of various environmental impacts. Subsequent to the conception of an agency-proposed action, but prior to the adoption of a plan of action, the agency shall:

1. Identify potential impacts.
2. Evaluate the potential significance of each impact.
3. Provide for detailed study of major impacts.
4. Determine the need for a statement. In the assessment process, the agency shall consult with other agencies having jurisdiction or expertise as well as citizen groups and individuals.

(b) For applicant actions, the approving agency shall assess and determine the need for an EIS within thirty days from the submission of the request for approval. An informal assessment can occur prior to the official submission of the approval request. Chapter 343, Hawaii Revised Statutes, does not prohibit assessment prior to the submission of an official request for approval. In the assessment process, the agency shall:

1. Identify potential impacts.
2. Evaluate the potential significance of each impact.
3. Indicate areas which require further study.
4. Determine the need for a statement.
5. If a statement is required, prescribe the statement information necessary to assure adequate discussion and disclosure of environmental impacts. The applicant shall provide whatever information the approving agency deems necessary to facilitate the assessment process and shall include, but not be limited to, the following:
   (A) Identification of applicant
   (B) Description of proposed action and statement of objectives
   (C) Description of affected environment, including a detailed map (preferably the United States Geological Survey topographic map) and related regional map
   (D) General description of the action’s technical, economic, social, and environmental characteristics

(c) In either case, the agency shall document its assessment of a proposed action for future reference. The actual determination shall be filed with the office and published in the periodic bulletin, but if the agency desires, it may also publish the contents of its environmental assessment and solicit comments from other agencies and the general public. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-5, 343-6)

§11-200-10 Contents of environmental assessment. Agencies or applicants shall prepare an environmental assessment of each proposed action and determine whether the anticipated effects constitute a significant effect in the context of chapter 343, Hawaii Revised Statutes, and section 11-200-12. The environmental assessment shall contain the following information:

1. Identification of applicant or proposing agency
2. Identification of approving agency, if applicable
3. Identification of agencies consulted in making assessment
4. General description of the action’s technical, economic, social, and environmental characteristics
5. Summary description of the affected environment, including suitable and adequate location and site maps
6. Identification and summary of major impacts and alternatives considered, if any
7. Proposed mitigation measures, if any
8. Determination
9. Findings and reasons supporting determination
10. Agencies to be consulted in the preparation of the EIS, if applicable [Eff.12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-5(c), 343-6)
§11-200-11 Notice of determination. (a) After preparing an environmental assessment, the agency shall file a notice of determination and four copies of the supporting environmental assessment with the office.

(1) If the agency determines that an action requires the preparation of a statement, the notice will be considered to be an environmental impact statement preparation notice and shall be filed as early as possible after determination; or

(2) If the agency determines that an EIS is not required, the notice shall be considered to be a negative declaration and shall be filed as early as possible after determination.

(b) In addition to being filed with the office, all notices of determination for any applicant action shall be mailed to the requesting applicant by the approving agency. The office shall publish all notices of determinations in the periodic bulletin following the date of receipt by the office, provided that the notice is received by the office at least five working days prior to the date of publication of the bulletin; otherwise the notice shall be published in the next bulletin.

(c) The notice of determination shall indicate in a concise manner:

(1) Identification of applicant or proposing agency
(2) Identification of accepting authority
(3) Brief description of proposed action
(4) Determination
(5) Reasons supporting determination
(6) Name, address, and phone number of contact person for further information [Eff.12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-5(c), 343-6)

§11-200-12 Significance criteria. (a) In considering the significance of potential environmental effects, agencies shall consider the sum of effects on the quality of the environment, and shall evaluate the overall and cumulative effects of an action.

(b) In determining whether an action may have a significant effect on the environment, the agency shall consider every phase of a proposed action, the expected consequences, both primary and secondary, and the cumulative as well as the short and long-term effects of the action. In most instances, an action shall be determined to have a significant effect on the environment if it:

(1) Involves an irrevocable commitment to loss or destruction of any natural or cultural resource
(2) Curtails the range of beneficial uses of the environment
(3) Conflicts with the state's long-term environmental policies or goals and guidelines as expressed in chapter 344, Hawaii Revised Statutes, and any revisions thereof and amendments thereto, court decisions or executive orders
(4) Substantially affects the economic or social welfare of the community or State
(5) Substantially affects public health
(6) Involves substantial secondary impacts, such as population changes or effects on public facilities
(7) Involves a substantial degradation of environmental quality
(8) Is individually limited but cumulatively has considerable effect upon the environment or involves a commitment for larger actions
(9) Substantially affects a rare, endangered and threatened species and their habitats
(10) Detrimentally affects air or water quality or ambient noise levels
(11) Affects an environmentally sensitive area such as a flood plain, tsunami zone, erosion-prone area, geologically hazardous land, estuary, fresh water, or coastal waters [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-2, 343-6)

§11-200-13 Consideration or previous determinations and accepted EISs. (a) Chapter 343, Hawaii Revised Statutes, provides that whenever an agency proposes to implement an action or receives a request for approval, the agency may consider and, when applicable and appropriate, incorporate by reference, in whole or in part, previous determinations of whether a statement is required, and previously accepted EISs.

(b) Previous determinations and previously accepted EISs may be incorporated by applicants and agencies whenever the information contained therein is pertinent to the decision at hand and has logical relevancy and bearing to the action being considered.

(c) Agencies shall not, without considerable pre-examination and comparison, use past determinations and previous EISs to apply to the action at hand. The action for which a determination is sought shall be thoroughly reviewed prior to the use of previous determinations and previously accepted EISs. Further, when previous
determinations and previous EISs are considered or incorporated by reference, they shall be substantially similar to
and relevant to the action then being considered. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-5, 343-6)

SUBCHAPTER 7
Preparation of Draft and Final EIS

§11-200-14 General. Chapter 343, Hawaii Revised Statutes, directs that in both agency and applicant
actions where statements are required, the preparing party shall prepare the EIS, submit it for review and comments,
and revise it taking into account all critiques and responses. Consequently, the EIS involves more than the
preparation of a document; it involves the entire process of research, discussion, preparation of a statement and
review. The EIS process shall involve at a minimum: identifying environmental concerns, obtaining various
relevant data, conducting necessary studies, receiving public and agency input, evaluating alternatives, and
proposing measures for minimizing adverse impacts. An EIS is meaningless without the conscientious application
of the EIS process as a whole, and shall not be merely a self-serving recitation of benefits and a rationalization of the
proposed action. Agencies shall assure the preparation of EIS’s at the earliest opportunity in the planning and
decision-making process. This shall assure an early open forum for discussion of adverse effects and available
alternatives, and that the decision makers will be enlightened to any environmental consequences of the proposed

§11-200-15 Consultation prior to filing EIS. (a) In the preparation of an EIS, proposing agencies and
applicants shall assure that all appropriate agencies, noted in section 11-200-10(10) and other citizen groups and
concerned individuals as noted in section 11-200(b) are consulted. To this end, agencies and applicants shall
endeavor to develop a fully acceptable EIS prior to the time the EIS is filed with the office, through a full and
complete consultation process, and shall not rely solely upon the review process to expose environmental concerns;
provided the approving agency or accepting authority, at the request of the applicant or proposing agency, may
waive the entire consultation process, if the action involves minor environmental concerns.

(b) Upon publication of a preparation notice in the periodic bulletin, agencies, groups or individuals shall
have a period of thirty days in which to request to become a consulted party and to make written comments
regarding the environmental effects of the proposed action. Upon written request by the consulted party and upon
good cause shown, the approving agency or accepting authority may extend the period for comments for a period
not to exceed thirty days.

(c) Upon receipt of such request, the proposing agency or applicant shall make a written request to the
agencies, groups or individuals which it feels may provide pertinent additional information.

(d) Any substantive comments received by the proposing agency or applicant pursuant to this section shall
be responded to in writing by the proposing agency or applicant prior to the filing of the EIS with the approving

§11-200-16 Content requirements. The environmental impact statement shall contain an explanation of the
environmental consequences of the proposed action. The contents shall fully declare the environmental implications
of the proposed action and shall discuss all relevant and feasible consequences of the action. In order that the public
can be fully informed and that the agency can make a sound decision based upon the full range of responsible
opinion on environmental effects, this statement must include responsible opposing views, if any, on significant
environmental issues raised by the proposal. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-2, 343-5, 343-6)

§11-200-17 Content requirements; Draft EIS. (a) The draft EIS, at a minimum, shall contain the
information required in this section.

(b) The draft EIS shall contain a summary sheet which concisely discusses the following:
(1) Brief description of the action
(2) Significant beneficial and adverse impacts
(3) Proposed mitigation measures
(4) Alternatives considered
(5) Unresolved issues
(6) Compatibility with land use plans and policies, and listing of permits or approvals.
(c) The draft EIS shall contain a table of contents.
(d) The draft EIS shall contain a statement of purpose and need for action.
(e) The draft EIS shall contain a project description which shall include the following information, but need not supply extensive detail beyond that needed for evaluation and review of the environmental impact:
   (1) A detailed map (preferably United States Geological Survey topographic map) and related regional map
   (2) Statement of objectives
   (3) General description of the action's technical, economic, social, and environmental characteristics
   (4) Use of public funds or lands for the action
   (5) Phasing and timing of action
   (6) Summary technical data; diagrams; and other information necessary to permit an evaluation of potential environmental impact by commenting agencies and the public
   (7) Historic perspective
   (f) The draft EIS shall contain any known alternatives for the action. These alternatives which could feasibly attain the objectives of the action—even though more costly—shall be described and explained as to why they were rejected. For any agency actions, this discussion shall include, where relevant, those alternatives not within the existing authority of the agency. A rigorous exploration and objective evaluation of the environmental impacts of all reasonable alternative actions, particularly those that might enhance environmental quality or avoid or reduce some or all of the adverse environmental benefits, costs, and risks shall be included in the agency review process in order not to prematurely foreclose options which might enhance environmental quality or have less detrimental effects. Examples of the alternatives include:
      (1) The alternative of no action or of postponing action pending further study
      (2) Alternatives requiring actions of a significantly different nature which would provide similar benefits with different environmental impacts
      (3) Alternatives related to different designs or details of the proposed actions which would present different environmental impacts
      (4) Alternative measures to provide for compensation of fish and wildlife losses, including the acquisition of land, waters, and interests therein
   In each case, the analysis shall be sufficiently detailed to allow the comparative evaluation of the environmental benefits, costs, and risks of the proposed action and each reasonable alternative.
   (g) The draft EIS shall contain a description of environmental setting, including a description of the environment in the vicinity of the action, as it exists before commencement of the action, from both a local and regional perspective. Special emphasis shall be placed on environmental resources that are rare or unique to the region and the project site (including natural or man-made resources of historic, archaeological, or aesthetic significance); specific reference to related projects, public and private, existent or planned in the region shall be included for purposes of examining the possible overall cumulative impacts of such actions. Proposing agencies and applicants shall also identify, where appropriate, population and growth characteristics of the affected area and any population and growth assumptions used to justify the action and determine secondary population and growth impacts resulting from the proposed action and its alternatives. In any event, it is essential that the sources of data used to identify, qualify or evaluate any and all environmental consequences be expressly noted.
   (h) The draft EIS shall contain a statement of the relationship of the proposed action to land use plans, policies, and controls for the affected area. Discussion of how the proposed action may conform or conflict with objectives and specific terms of approved or proposed land use plans, policies, and controls, if any, for the area affected shall be included. Where a conflict or inconsistency exists, the statement shall describe the extent to which the agency or applicant has reconciled its proposed action with the plan, policy, or control, and the reasons why the agency or applicant has decided to proceed, notwithstanding the absence of full reconciliation. The draft EIS shall also contain a list of necessary approvals, required for the action, from governmental agencies, boards, or commissions or other similar groups having jurisdiction. The status of each identified approval shall also be described.
   (i) The draft EIS shall contain a statement of the probable impact of the proposed action on the environment, which shall include consideration of all phases of the action and consideration of all consequences on the environment; direct and indirect effects shall be included. The interrelationships and cumulative environmental
impacts of the proposed action and other related projects shall be discussed in the draft EIS. It should be realized that several actions, in particular those that involve the construction of public facilities or structures (e.g., highways, airports, sewer systems, water resource projects, etc.) may well stimulate or induce secondary effects. These secondary effects may be equally important as, or more important than, primary effects, and shall be thoroughly discussed to fully describe the probable impact of the proposed action on the environment. The population and growth impacts of an action shall be estimated if expected to be significant, and an evaluation made of the effects of any possible change in population patterns or growth upon the resource base, including land use, water, and public services, of the area in question. Also, if the proposed action constitutes a direct or indirect source of pollution as prescribed by any governmental agency, necessary data shall be incorporated in the draft EIS. The significance of the impacts shall be discussed in terms of subsections (i) to (m).

(j) The draft EIS shall address the relationship between local short term uses of humanity’s environment and the maintenance and enhancement of long-term productivity. A brief discussion of the extent to which the proposed action involves trade-offs between short term losses and long-term losses, or vice versa, and a discussion of the extent to which the proposed action forecloses future options, narrows the range of beneficial uses of the environment, or poses long-term risks to health or safety shall be included. In this context, short term and long-term do not necessarily refer to any fixed time periods, but shall be viewed in terms of the environmentally significant consequences of the proposed action.

(k) The draft EIS shall address all irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented. Identification of unavoidable impacts and the extent to which the action makes use of non-renewable resources during the phases of the action, or irreversibly curtails the range of potential uses of the environment shall also be included. The possibility of environmental accidents resulting from any phase of the action shall also be considered. Agencies shall avoid construing the term “resources” to mean only the labor and materials devoted to an action. “Resources” also means the natural and cultural resources committed to loss or destruction by the action.

(l) The draft EIS shall address all probable adverse environmental effects which cannot be avoided. Any adverse effects such as water or air pollution, urban congestion, threats to public health or other consequences adverse to environmental goals and guidelines established by chapters 342 and 344, Hawaii Revised Statutes, shall be included as a brief summary including those effects discussed in other actions of this paragraph which are adverse and unavoidable under the proposed action. Also, rationale for proceeding with a proposed action, notwithstanding unavoidable effects, shall be clearly set forth in this section. The draft EIS shall indicate what other interests and considerations of governmental policies are thought to offset the adverse environmental effects of the proposed action. The statement shall also indicate the extent to which these stated countervailing benefits could be realized by following reasonable alternatives to the proposed action that would avoid some or all of the adverse environmental effects.

(m) The draft EIS shall consider mitigation measures proposed to minimize impact. Description of any mitigation measures included in the action plan to reduce significant, unavoidable, adverse impacts to insignificant levels, and the basis for considering these levels acceptable shall be included. Where a particular mitigation measure has been chosen from among several alternatives, the measures shall be discussed and reasons given for the choice made.

(n) The draft EIS shall contain a summary of unresolved issues and either a discussion of how such issues will be resolved prior to commencement of the action, or what overriding reasons there are for proceeding without resolving the problems.

(o) The draft EIS shall contain a list identifying all governmental agencies, other organizations and private individuals consulted in preparing the statement, and the identity of the persons, firms, or agency preparing the statement, by contract or other authorization, shall be disclosed.

(p) The draft EIS shall contain reproductions of all substantive comments and responses made during the consultation process. A list of those who had no comment shall be included in the draft EIS. No written response is necessary. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-2, 343-5, 343-6)

§11-200-18 Content requirements; Final EIS. The final EIS shall consist of:

(1) The draft EIS or a revision of the draft.

(2) Comments and recommendations received on the draft EIS either verbatim or in summary.

(3) A list of persons, organizations and public agencies commenting on the draft EIS.

(4) The responses of the applicant or proposing agency to significant environmental points raised in the review and consultation process. The response of the applicant or proposing agency to comments
received may take the form of a revision of the draft EIS or may be an attachment to the draft EIS. The response shall describe the disposition of significant environmental issues raised (e.g., revisions to the proposed project to mitigate anticipated impacts or objections). In particular, the major issues raised when the applicant's or proposing agency's position is at variance with recommendations and objections raised in the comments shall be addressed in detail giving reasons why specific comments and suggestions were not accepted, and factors of overriding importance warranting an override of the suggestions. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-2, 343-5, 343-6)

§11-200-19 EIS style. In developing the EIS, preparers shall make every effort to convey the required information succinctly in a form easily understood, both by members of the public and by public decision makers, giving attention to the substance of the information conveyed rather than to the particular form, or length, or detail of the statement. The scope of the statement may vary with the scope of the proposed action and its impact. Data and analyses in a statement shall be commensurate with the importance of the impact, and less important material may be summarized, consolidated, or simply referenced. Statements shall indicate at appropriate points in the text any underlying studies, reports, and other information obtained and considered in preparing the statement, including cost benefit analyses and reports required under other legal authorities. Care shall be taken to concentrate on important issues and to ensure that the statement remains an essentially self-contained document, capable of being understood by the reader without the need for undue cross-reference. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §343-6)

§11-200-20 Filing of EIS. (a) The proposing agency or applicant shall file the original (signed) draft EIS with the accepting authority, along with a minimum number of copies determined by the accepting authority. Simultaneously, a minimum number of sixty copies of the draft EIS shall be filed with the office.

(b) The proposing agency or applicant shall file the original (signed) final EIS with the accepting authority, along with a minimum number of copies determined by the accepting authority. Simultaneously, twenty-five copies of the final EIS shall be filed with the office.

(c) An EIS may be deposited at any time by the proposing agency or applicant but the deadlines for bulletin notification of an EIS filing shall be the fifth and twentieth days of each and every month unless these days are weekends or state holidays, in which case the EIS shall be filed on the next working day following the weekend or state holiday. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-3, 343-6)

§11-200-21 Distribution. The office shall be responsible for the publication of the notice of availability of the EIS in its bulletin, and for distribution of the EIS for agency and public review. The office shall develop a list of reviewers (i.e., persons and agencies with jurisdiction or expertise in certain areas relevant to various actions) and a list of public depositories where copies of the EIS's shall be available, and to the extent possible, the office shall make copies of the EIS available to individuals requesting the EIS. The office's distribution list may be developed cooperatively among the applicant or proposing agency, the accepting authority, and the office; provided the office shall be responsible for determining the final list. The applicant or proposing agency may directly distribute any portion of the required copies to those on the list, provided that the office is informed at the time the EIS is filed. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-3, 343-5, 343-6)

§11-200-22 Public review. (a) Public review shall not substitute for early and open discussion with interested persons and agencies, concerning the environmental impacts of a proposed action. Review of the EIS shall serve to provide the public and other agencies an opportunity to discover the extent to which a proposing agency or applicant has examined environmental concerns and available alternatives.

(b) The period for public review and for submitting written comments shall commence as of the date notice of availability of the EIS is published in the periodic bulletin and shall continue for a period not to exceed thirty days. Written comments to the approving agency or accepting authority, whichever is applicable, with a copy of the comments to the applicant or proposing agency, shall be received or postmarked to the approving agency or accepting authority, within said thirty-day period. Any late comments need not be considered or responded to by the applicant or proposing agency, whichever is applicable.

(c) The proposing agency or applicant shall respond in writing to the comments received or postmarked during the thirty-day review period and incorporate or append the comments and responses in the final EIS within fourteen days from the end of the thirty-day review period. The response to comments shall include:

(1) Point-by-point discussion of the validity, significance, and relevance of comments

E-13
§11-200-23 Acceptability. (a) Acceptability of a statement shall be evaluated on the basis of whether the statement, in its completed form, represents an informational instrument which fulfills the definition of an EIS and adequately discloses and describes all identifiable environmental impacts and satisfactorily responds to review comments.

(b) A statement shall be deemed to be an acceptable document only if all of the following criteria are satisfied:

1. Procedures for assessment, consultation process, a review responsive to comments, and the preparation and submission of the statement, have all been completed satisfactorily as specified in this chapter.

2. Content requirements described in this chapter have been satisfied.

3. Comments submitted during the review process have received responses satisfactory to the accepting authority, and have been incorporated or appended, at the discretion of the applicant or proposing agency, to the statement.

(c) For actions proposed by agencies, the proposing agency shall prepare the EIS in accordance with chapter 343, Hawaii Revised Statutes, and this chapter. Following the official receipt of the EIS by the office, the proposing agency may request the council to make a recommendation regarding the acceptability or non-acceptability of the EIS. If the council decides to make a recommendation, the council may do so and submit the recommendation within thirty days after the end of the response period. The office shall inform the public of the council's recommendation in the periodic bulletin. In all cases involving state funds or lands, the governor or an authorized representative shall have final authority to accept the EIS. In cases involving only county funds or lands, the mayor of the respective county or an authorized representative shall have final authority to accept the EIS. In the event that the action involves both state and county lands or funds, the governor or an authorized representative shall have final authority to accept the EIS. Upon acceptance or non-acceptance of the EIS, a notice shall be filed by the appropriate accepting authority with both the proposing agency and the office. For any non-accepted EIS, the notice shall contain specific findings and reasons for non-acceptance. The office shall publish the determination of acceptance or non-acceptance in the bulletin. Acceptance of a required statement shall be a condition precedent to the use of state or county lands or funds in implementing the proposed action.

(d) For actions proposed by applicants requiring approval from an agency, the applicant shall prepare the EIS in accordance with chapter 343, Hawaii Revised Statutes, and this chapter. Following the official receipt of the draft EIS by the office, the applicant or accepting authority may request the council to make a recommendation regarding the acceptability or non-acceptability of the statement. If the council decides to make a recommendation, the council may do so and submit the recommendation within ten days after the end of the response period, provided however, that in no event shall the period of time exceed sixty days from the official receipt of the draft EIS. The office shall inform the public of the council’s recommendation in the periodic bulletin.

(e) Upon acceptance or non-acceptance by the approving agency, the agency shall file notice with a copy of the final EIS attached of its determination with the office, along with specific findings and reasons. The agency shall also notify the applicant determination of acceptance or non-acceptance in the periodic bulletin. Acceptance of the required EIS shall be a condition precedent to approval of the request and commencement of the proposed action.

(f) An approving agency shall take prompt measures to determine the acceptability or non-acceptability of the applicant’s statement. Chapter 343, Hawaii Revised Statutes, directs the agency to notify the applicant and the office of the acceptance or non-acceptance of the final EIS within sixty days of the official receipt of the draft EIS, provided that the sixty-day period may be extended at the request of the applicant for a period not to exceed thirty days. The request shall be made to the accepting authority in writing. Upon receipt of an applicant’s request for an extension of the sixty-day acceptance period, the accepting authority shall notify the office and applicant in writing of its decision to grant or deny the request. The notice shall be accompanied by a copy of the applicant’s request. An extension of the sixty-day acceptance period shall not be allowed merely for the convenience of the accepting authority. In the event that the agency fails to accept or not accept the statement within sixty days of the official receipt of the draft EIS, then the statement shall be deemed accepted.
(g) A non-accepted EIS may be revised by a proposing agency or applicant. The revision shall fully document the inadequacies of the non-accepted EIS and shall completely and thoroughly discuss the changes made. The requirements for filing, distribution, publication of availability for review, acceptance or non-acceptance, and notification and publication of acceptability, of a revised non-accepted EIS shall be the same as the requirements prescribed by sections 11-200-20, 11-200-21, 11-200-22, and 11-200-23 for an EIS submitted for acceptance. In addition, a revised non-accepted EIS shall be evaluated for acceptability on the basis of whether it satisfactorily addresses the findings and reasons for non-acceptance.

(h) A proposing agency or applicant may withdraw an EIS by sending a letter to the office. Subsequent resubmittal of the EIS shall meet all requirements for filing, distribution, publication, review, acceptance, and notification as the original EIS. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-5, 343-6)

SUBCHAPTER 8
Appeals

§11-200-24 Appeals to the council. Pursuant to section 343-5(c), Hawaii Revised Statutes, an approving agency which is considering the acceptance or non-acceptance of a statement submitted by an applicant shall render its determination within sixty days from official receipt of the draft EIS and explain the determination through specific findings and reasons. An applicant, within sixty days after non-acceptance of a statement by an agency, may appeal the non-acceptance to the council, which within thirty days of receipt of the appeal, shall notify the applicant of its determination. In any affirmation or reversal of an appealed non-acceptance, the council shall provide the applicant and the agency with specific findings and reasons for its determination. The agency shall abide by the council’s decision. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-5, 343-6)

SUBCHAPTER 9
NEPA

§11-200-25 NEPA actions: applicability to chapter 343, Hawaii Revised Statutes. When the situation occurs where a certain action will be subject both to the National Environmental Policy Act of 1969 (Public Law 91-190, as amended by Public Law 94-52 and Public Law 94-83; 42 U.S. Code 4321-4347) and chapter 343, Hawaii Revised Statutes, the following shall occur:

(1) The applicant or agency, upon discovery of its proposed action being subject to both chapter 343, Hawaii Revised Statutes, and NEPA shall notify the responsible federal agency, the office and any agency with a definite interest in the action (as prescribed by chapter 343, Hawaii Revised Statutes) of the situation.

(2) NEPA requires that draft statements be prepared by the responsible federal agency. When the responsibility of preparing an EIS is delegated to a state or county agency, this chapter shall apply in addition to federal requirements under NEPA. The office and agencies shall cooperate with federal agencies to the fullest extent possible to reduce duplication between federal and state requirements. This cooperation, to the fullest extent possible, shall include joint environmental impact statements with concurrent public review and processing at both levels of government. Where federal law has environmental impact statement requirements in addition to but not in conflict with this chapter, the office and agencies shall cooperate in fulfilling the requirements so that one document shall comply with all applicable laws.

(3) In all actions where the use of state land or funds is proposed, the final statement shall be submitted to the governor or an authorized representative. In all actions when the use of county land or funds is proposed, the final statement shall be submitted to the mayor, or an authorized representative. The final statement in these instances shall first be accepted by the governor or mayor (or an authorized representative), prior to the submission of the same to the Environmental Protection Agency.

(4) Any acceptance obtained pursuant to paragraphs (1) to (3) shall satisfy chapter 343, Hawaii Revised Statutes, and no other statement for the proposed action shall be required. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-5, 343-6)
SUBCHAPTER 10
Supplemental Statements

§11-200-26 General. A statement that is accepted with respect to a particular action is usually qualified by its size, scope, location and timing, among other things. If there is any major change in any of these characteristics, the original statement shall no longer be completely valid because an essentially different action would be under consideration. As long as there is no substantial change in a proposed action, the statement associated with that action shall be deemed to comply with this chapter. If there is any major change, a supplemental statement shall be prepared and reviewed as provided by this chapter. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-5, 343-6)

§11-200-27 Determination of applicability. The accepting authority shall be responsible for determining whether a supplemental statement is required. This determination will be submitted to the office for publication in the periodic bulletin. Proposing agencies or applicants shall prepare for public review supplemental statements whenever the proposed action for which a statement was accepted has been modified to the extent that new or different environmental impacts are anticipated. A supplemental statement shall be warranted when the scope of an action has been substantially increased, when the intensity of environmental impacts will be increased, when the mitigating measures originally planned are not to be implemented, or where new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-5, 343-6)

§11-200-28 Contents. The contents of the supplemental statement shall be the same as required by this chapter for the EIS and may incorporate by reference unchanged material from the same; however, in addition, it shall fully document the proposed changes from the original EIS and completely and thoroughly discuss the EIS process followed for these changes, the positive and negative aspects of these changes, and shall comply with the content requirements of section 11-200-16 as they relate to the changes. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §343-6)

§11-200-29 Procedures. The requirements of consultation, filing public notice, distribution, public review, comments and response, and acceptance procedures, shall be the same for the supplemental statement as is prescribed by this chapter for an EIS. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §343-6)

SUBCHAPTER 11
Severability

§11-200-30 Severability. If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application; and to this end, the provisions of this chapter are declared to be severable. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-6, 343-8)
STATUTORY REFERENCES
FOR STATE EIS SYSTEMS
# Statutory References for State EIS Systems

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NOTES ON CHAPTER 343 HRS APPEALS

by

J.W. Morrow
Former Chairman, Environmental Council
Director of Environmental Health, American Lung Association of Hawaii
Introduction

One of the most controversial issues pertaining to the Environmental Impact Statement (EIS) system is the subject of appeals of determinations. These determinations include whether an action is subject to Chapter 343; whether an action requires an EIS; and whether a final EIS is judged to be adequate. Appeals were discussed in the previous 1978 review. Subsequently, they have become even more of an issue. The following paragraphs present a chronology of events pursuant to appeals initiated or attempted under the existing provisions of Chapter 343 HRS.

1976

The American Lung Association of Hawaii (ALAH) challenged a negative declaration issued by the City and County of Honolulu Department of Land Utilization (DLU). The case involved a proposed shopping center and its parking area which the ALAH showed would have a "significant" impact on air quality, i.e., possible violation of state and federal air quality standards. The DLU had not addressed air quality in its Environmental Assessment (EA) and claimed that it did not have to because it was assessing the project under the provisions of the county's shoreline management ordinance No. 4529. The ALAH noted that Ordinance 4529 specifically cited Chapter 343 and was therefore tied to the "significance criteria" listed in the Environmental Impact Statement (EIS) Rules. DLU believed it had only to use the specific criteria of Ordinance 4529 in assessing significance. The matter went to circuit court where Judge Arthur Fong remanded the issue back to DLU in June 1978 with instructions to demonstrate that they had considered Chapter 343. DLU did so with an affidavit from one of its staff which simply stated that Chapter 343 had been considered. In a subsequent hearing, Judge Fong then ruled in favor of DLU, saying that the legal requirements had been met. The ALAH appealed to the State Supreme Court which in 1982 ruled against the ALAH saying that the complaint had not been filed within the 60 days specified in HRS 343-7(b).

NOTE: The City Council subsequent to this case also amended Ordinance 4529 to remove any reference to Chapter 343, HRS, thereby preventing any future appeals such as the aforementioned.

1984

One of the early legislative efforts to institute a formal administrative appeals process was Representative Tom Okamura's H.B. 2075 in the 1984 legislative session. This bill originally had three major elements:

- allow any person or agency to appeal an agency determination that an EIS is or is not required to the Environmental Council;
- directed the Environmental Council to establish procedures for such appeals; and
- defined the proposing agency and the person or agency appealing the determination as aggrieved parties for the purposes of bringing judicial action.

Subsequent revisions in the House and Senate added the following:

- the council was directed to also promulgate rules defining the circumstances under which an appeal could be filed;
- the appeal had to be filed within 30 days after publication of the agency determination; and the appellee to abide by the Council's decision.

On June 12, 1984, then Governor George Ariyoshi vetoed H.B. 2075 making the following points:

- judicial appeal is not the only option available;
- administrative appeals can be taken in accordance with each agency's administrative appeal procedures and then appealed judicially as provided in Chapter 91, HRS;
- the bill "engenders vagueness and ambiguity" since it is unclear whether the appeal would be in lieu of or in addition to the existing agency appeal procedures;
- Sec 343-7 is not a judicial appeal process per se, but rather simply a statute of limitations; and
- the appeal would give the Council unwarranted veto power over other agencies; and
- the appeal process would be time-consuming and prevent agencies from acting on permit applications within statutorily prescribed time limits.
The Governor's arguments appear somewhat unfounded upon closer examination. Following receipt of the veto message, the Environmental Council chairman directed the staff to conduct a telephone survey of key agencies which make EIS determinations and found that not one had an administrative appeals procedure for such determinations. This included the State DLNR and the C&C Honolulu DLU which make a large number of determinations. The Governor's comments about "vagueness" and "ambiguity" become irrelevant if there are no agency appeal procedures. While HRS 343-7 is simply a statute of limitations, it has been liberally interpreted by the courts, including the State Supreme Court, as authority to bring judicial action. The allegation of "unwarranted veto power" is itself unwarranted since HRS 343-5 already gives the Environmental Council veto power over agency decisions on EIS acceptability and this provision has not proven burdensome. Finally, the Governor's concern about "time-consuming appeals" was unnecessary since the Environmental Council's intention was to keep such appeals within the existing 60-day period specified in HRS 343-7.

1984 PETITIONS TO THE ENVIRONMENTAL COUNCIL

Three petitions for declaratory ruling were received and acted upon by the Environmental Council (EC). A summary of each may be found in Appendix A of the 1984 Annual Report of the EC.

1986

During the 1986 legislative session, Representative Mark Andrews introduced H.B. 2729 which again would have established an administrative appeal to the Environmental Council within 30 days of public notification of an agency determination.

1987

Representative Andrews introduced H.B. 380, a bill very similar to H.B. 2729, but which also attempted to respond to concerns about time and delays by requiring the Council to make its decision within 30 days of receipt of an appeal. This bill was passed by the legislature but once again was vetoed, this time by the new Governor, John Waihee, on June 22, 1987. The language of the veto message was almost identical to that of former Governor Ariyoshi and thus subject to the same deficiencies noted above.

RESPONSES TO THE ENVIRONMENTAL COUNCIL INQUIRY ABOUT AGENCY APPEAL PROCESSES

In a June 30, 1987 letter to state and county agencies involved in the EIS system, then chairman James Morrow asked those agencies to describe their administrative appeal processes and indicate how many such appeals had been filed in recent years. The responses, as indicated below, were somewhat disparate:

- No admin appeals process. LUC stated its belief that appeals must go to the Circuit Court pursuant to Chapter 91, HRS; in 1985-86, there were no such appeals.
- No admin appeals process. Kauai Planning Department stated that it follows HRS 343-5 and -6 in directing such appeals to the Environmental Council and courts; there were no appeals in 1985-86.
- No specific answer to the question was provided. DLNR stated that it allows any citizen the "specific appeal process on Chapter 343 action that which is expressly provided for in the law." No response was received on the number of such appeals during 1985-86.
- Petition for declaratory ruling. The C&C Honolulu DGP stated that it has an appeal process for declaratory rulings by which the department would encompass determinations made pursuant to HRS 343-5 and EIS Rules 11-200-9(b). It went on to explain how a person may petition for a declaratory order as to the applicability of any statute or ordinance relating to the Department, in accordance with HRS 91-8. During 1985-86, no such petitions were filed. COMMENT: One must wonder how the DGP claims authority to issue rulings on Chapter 343 or the EIS Rules which are promulgated by the State Environmental Council.
- Admin appeal procedures provided. The Maui County Planning Commission provides for appeals of any of its orders or decisions in its Rules of Practice and Procedure. During 1985-86, one such appeal was filed.
In summary, out of the five responses from key agencies involved in making EIS determinations, three had no administrative appeal procedures, one used a questionable declaratory ruling procedure, and only the County of Maui appeared to have a legitimate administrative appeal process. And of all five agencies, only one appeal of an EIS determination had been received in the 1985-86 period.

1986 PETITIONS TO THE ENVIRONMENTAL COUNCIL

Three petitions for declaratory ruling were received and acted upon by the Council in 1986. Summaries of each may be found in Appendix A of the 1986 Annual Report of the EC.

1987 PETITIONS TO THE ENVIRONMENTAL COUNCIL

On December 23, 1987, the ALAH submitted a petition for declaratory ruling to the Environmental Council regarding a negative declaration issued by the C&C Honolulu Department of Housing and Community Development for the proposed Chinatown Gateway project. The association’s chief argument was that the EA itself demonstrated potential violations of state and federal air and noise standards. This would appear to meet the statutory test of “...may have a significant effect on the environment,” and thus require an EIS. At its meeting of January 19, 1988, the Council refused to consider the petition on advice of its attorney who said the Council had no jurisdiction. On January 21, 1988 following meetings between ALAH and the City, the City agreed to do a full EIS for the project.

1987 PETITIONS TO THE ENVIRONMENTAL COUNCIL

One petition for declaratory ruling was acted upon by the Council in 1987 and its summary may be found in Appendix B of the 1987 Annual Report of the EC.

1988

In the 1988 legislative session, Representative Andrews introduced H.B. 2860 adding a new section to Chapter 343 which clearly stated the Environmental Council’s authority to issue declaratory rulings or advisory opinions regarding any provision of Chapter 343 or any rule or order adopted by the council pursuant to Chapter 343.

This bill would have seemed to have been unnecessary since HRS 91.8 already clearly provides authority for rulemaking agencies to issue declaratory rulings and the Environmental Council met the definition of “agency” [HRS 91.1(1)] and had rulemaking powers (HRS 343-6). Nevertheless, the bill was introduced and eventually passed out in hopes of putting to rest any further questioning of the Council’s powers.

On June 14, 1988, however, Governor John Waihee vetoed the bill. While the Governor recognized the Council’s authority to issue declaratory rulings under HRS 91-8, he also cited a Hawaii Supreme Court decision (Fasi v. HPERB, 1979) limiting such rulings to matters upon which the Council might act under its statutory powers.

The Governor went on to note that allowing the Council to issue rulings on Chapter 343 provisions or “any and all relevant rules or orders” would be authorizing the Council to issue rulings on matters over which the Council is “otherwise powerless to act.”

In the Fasi v. HPERB case, the Supreme Court rightfully noted that the language of HRS 91-8 regarding “any statutory provision” is too broad and is clearly limited by its context. An agency must restrict its rulings to those statutory provisions which pertain to the agency and its powers. For example, HPERB is granted powers under HRS Chapter 89, the Land Use Commission has powers granted by HRS Chapter 205, and the Environmental Council has powers granted by HRS Chapter 343. Obviously, the Council could not issue rulings on the applicability of Chapter 205 anymore than the LUC could issue rulings on Chapter 343.

The Fasi v. HPERB case was a specific case with specific issues. The justices ruled that HPERB had the right to issue a declaratory ruling because the issue upon which it ruled was relevant to its powers under Chapter 89. The general opinion of the court was that:

“an administrative agency may provide a declaratory ruling only with respect to a question which is relevant to some action it might take in the exercise of its powers.”
The high court used the Fasi v. HPERP case to clarify the obvious, i.e., that HRS 91-8’s broad language should not be interpreted to mean that an agency could issue declaratory rulings on statutory provision, but rather only on those that were relevant to that agency’s own authority and powers. It is difficult to imagine that the Supreme Court justices intended to deny a rulemaking agency the authority to issue declaratory rulings on the applicability of the agency’s own rules.

In addition to its power to act on appeals of non-accepted EIS’s (HRS 343-5), the Council’s principal authorized “actions” involve its essentially unlimited power to adopt rules to accomplish the purposes of the chapter (HRS 343-6). For example, it must “prescribe procedures for the preparation and contents of an environmental assessment” (HRS 343-6(a)(3)). Since that is an “action” authorized under Chapter 343, one must conclude that the Council can issue declaratory rulings on any question “relevant” to that action.

Since the Council has the clear authority pursuant to HRS 343-6 to adopt all necessary rules to accomplish the purposes of Chapter 343, it seems equally clear that the Council has the authority to issue declaratory rulings on the applicability of its own rules as well as the statutory provisions from which they arise.

Another indication of the uncertainty concerning Chapter 343 appeals shows up in the February 16, 1988 letter of Deputy AG Sonia Faust to EC Chairman George Krasnick, in which she states:

“...if a person believes that an agency should prepare an environmental assessment for an action and the agency does not do so, the recourse provided to the person under chapter 343 is to seek judicial review pursuant to section 343-7.”

This appears to contradict governors’ veto messages of June 12, 1984 and June 22, 1987, in which it was stated that section 343-7 is not a judicial appeal process per se, but simply a statute of limitations. Since such messages are often written or reviewed by Deputy AG’s, it makes for an interesting situation.

1988 PETITIONS TO THE ENVIRONMENTAL COUNCIL

On March 10, 1988, the ALAH filed a petition for declaratory ruling with the Environmental Council regarding a negative declaration issued by the C&C Honolulu DLU for the Halawa Center Project. The association’s key arguments were that the EA indicated significant increases in traffic (25%) and reduction in level of service (LOS) from Level C (stable flow) to Level E (unstable flow with long queues, yet included no air quality impact assessment whatsoever. DLU Director John Whalen required the developer to prepare an air quality impact assessment and the petition was withdrawn thereby obviating the need for action by the Environmental Council.

On June 2, 1988, the ALAH filed a petition for declaratory ruling with the Environmental Council regarding a negative declaration issued by the C&C Honolulu Building Department for the NBC Parking Structure. The ALAH cited HRS 343-5(b) regarding the absolute requirement for an EIS if a proposed action may have significant impact and HRS 343-6 regarding the Council’s authority to adopt rules. ALAH cited Sec 11-200-12(3), (8), and (10) from the significance criteria. It provided evidence that state and federal air quality standards might be violated in the vicinity of the project and that the project would clearly contribute to such violations. Projected violations of state and federal health standards would appear to meet the statutory test of “...may have significant effect on the environment,” and thereby require EIS preparation. The Council again refused to act on the petition based on their attorney’s advice of no jurisdiction.

In early 1988, the Council refused to act on a Life of the Land petition to issue a declaratory ruling answering the question of whether DLNR should prepare an EA prior to adoption of instream flow standards which “affect” streams on state lands or on lands within the Conservation District. This seemed like a perfectly legitimate question for the Council to answer, i.e., do the Council’s own rules apply to the adoption of other agency’s rules which “may have a significant effect on the environment” when they are implemented? The Council once again claimed no jurisdiction based on their attorney’s opinion. In this case, Deputy Attorney General Sonia Faust in her letter of February 16, 1988 to Council chairman George Krasnick, cited the Council’s “limited authority” but failed to recognize the essentially unlimited rulemaking powers of the Council (HRS 343-6) to implement Chapter 343.

On June 15, 1988, the Conservation Council for Hawaii and the ALAH petitioned the Council to issue a declaratory ruling on the following issues pertaining to a proposed Sand Island Shore Protection project:

- the authority of the Office of Environmental Quality Control (OEQC) to waive the EIS preparation notice requirement;
- the use of a 5-6 year old National Environmental Policy Act (NEPA) EIS as a Chapter 343 EIS; and
- an inherent conflict in EIS Rules Sec 11-200-15 which allows for a waiver of the consultation process if the proposed action involves "minor environmental concerns" if the requirement for an EIS is based on a finding of potential significant impact.

Again, these seemed like pertinent questions to pose to the agency that writes the rules. In fact, the answers to these questions seemed quite easy upon a simple reading of the statute and rules. Yet the Council once again declined to act on the basis of lack of jurisdiction.

1989

In late 1988, the Hawaii Bar Association's Natural Resources Section took an interest in the issue. Section Chairperson, Judy S. Givens, wrote a letter to fellow member Mr. Larry Gilbert, describing the dilemma:

"It is unclear, under present law, whether an aggrieved person's means of obtaining judicial review is Chapter 91 or Chapter 343. Chapter 343 does not appear to create a right of action, but the Hawaii Supreme Court has remanded some cases for judicial review under 343-7. The procedure for such review (under 343-7) is not at all clear. Chapter 91 provides a relatively clear procedure, however, it comes into play only after an agency has held a contested case hearing. That requirement has been stretched to the limit by the courts, but there comes a point at which the record on appeal is simply too sparse for intelligent review."

A bill was drafted with the following major provisions:
- provide a 30-day period after publication of a determination during which any aggrieved person might petition the agency for reconsideration;
- require the agency to consider all submitted evidence and issue a determination upon reconsideration which would be published by OEQC;
- establish standing to appeal under Chapter 91; and
- reduce the 60-day statutory limit to 30 days for judicial appeal.

On January 12, 1989, a meeting was held between Representative Wayne Metcalf (Chairman, House Judiciary Committee), Attorney General Warren Price, and James Morrow (ALAH Environmental Health Director). At that meeting, the following major points were made:

- Price: an administration appeal would require a contested case hearing to establish a record; administration appeal procedures would encourage many frivolous appeals on negative declarations and thus impede development; administration appeals would extend the process and delay projects; simpler appeals would not establish an adequate record; Fasi v. HPERB decision limits issuance of declaratory rulings;
- Morrow: "many frivolous appeals" is simply conjecture and not supported by historical evidence since hundreds of negative declarations go unquestioned every year; lengthy contested case hearings are not desired; simpler, third party reviewed is wanted within the 60 day period; want to clean up judicial uncertainty as well; want Environmental Council to issue declaratory rulings, if possible;
- Metcalf: Price and Morrow to work on "fixing" judicial appeal procedure; if possible, develop simpler, acceptable administrative appeal; to avoid numerous or frivolous appeals, try to develop criteria for limiting appeals, such as who, project size, etc.

The outcome of the meeting was that Price said he would have his deputy Leslie Chow contact Morrow to work on mutually acceptable language. A copy of the Bar Association's draft bill was subsequently provided to Price and Metcalf for their review. A memorandum was sent on January 13, 1989 from Morrow to Price explaining that Morrow would be out-of-state for several weeks and requesting that Chow contact Judy Givens in his absence. Since neither Chow nor anyone else from the AG's office made contact with either Givens or Morrow until shortly before the legislative deadline for submitting bills on February 2, Representative Metcalf introduced the Bar Association bill as drafted. It became H.B. 1685 and was eventually passed by the 1989 Legislature.

Once again, however, the Governor vetoed a bill designed, this time by a section of the State Bar Association, to clarify any uncertainty that existed about appeal procedures related to Chapter 343 determinations. This time the Governor's major points were:
uncertainty about whether the reconsideration was only on the prior proceedings or would allow introduction of new information (if the latter, it would double the entire process);

- if new information were allowed on reconsideration, it would encourage persons to withhold information from the original determination and submit it only if that first determination was adverse to their position;

- no notice to interested parties was required;

- no process for "interested parties" to rebut evidence submitted by a petitioner;

- "monumental" practical and legal problems in making the OEQC an "aggrieved" party; and

- the concept of permitting any person to ask for reconsideration could have "far-reaching ramifications" for the entire economy of the state.

With regard to the first point, the petitioner would likely be introducing new information or evidence to demonstrate that the agency’s determination was based on erroneous or incomplete information regarding the potential impacts of the proposed action. The statutory test which triggers the EIS requirement is simply a showing that a proposed action “may” have significant environmental impact (HRS 343-5). The expressed fear of a doubling of the entire process seems highly unrealistic since hundreds of agency determinations are made every year with only about 1 - 2% ever questioned or challenged.

The second point about encouraging persons to withhold information is certainly not a unique or inherent part of the proposed legislation. That could just as easily be occurring under the existing system as proponents and opponents wait to see how agencies make their decisions.

The third and fourth points about notification and participation of “interested” parties should probably have been more specific. Applicants and parties affected by a petition for reconsideration should be notified and permitted to submit evidence.

We are very curious as to the Governor’s concerns about the “monumental” practical and legal problems associated with making OEQC an aggrieved party since the OEQC already has such status under HRS 343-7(a). One must ask what makes this situation so different?

And finally, one must also wonder how an occasional petition for reconsideration of a questionable agency determination is going to have such a serious impact on the entire State’s economy. At best, it sounds like an unfounded fear and at worst, an unsubstantiated scare tactic.

1990

During the 1990 legislative session, H.B. 2217 was introduced in yet another attempt to address the problem of agency determinations. In addition to administrative appeal provisions, it took the innovative step of introducing a review of proposed negative declarations. Major provisions of the bill were:

- OEQC publishes availability of EAs for review and comment;

- EAs which result in proposed negative declarations would be subjected to a 30-day review and comment period; and

- statutory limit for filing of judicial appeals on negative declarations would be reduced from 60 to 30 days to offset the 30-day review period.

The bill passed the House but was held in the Senate by Chairman Donna Ikeda of the Agriculture Committee. Ikeda’s decision was apparently based on the expressed opposition of the City & County of Honolulu and the State’s DLNR as well as the legislatively mandated review of Chapter 343 being conducted by the UH Environmental Center.

CONCLUSIONS

Based on 15 years of wrestling with this issue, I believe that a review of proposed negative declarations offers the perfect compromise in that it is “preventive” oriented. Rather than debate the need for and the form of an administrative appeal process, the Environmental Council simply should be empowered to adopt rules prescribing procedures for review of proposed negative declarations. Furthermore, subtracting whatever number of days is required for the review from the 60-day statutory limit for judicial action would prevent extension of the system.
As for declaratory rulings, it remains my firm belief that under HRS 91-8, the Environmental Council, as a rulemaking agency, has every right to issue declaratory rulings regarding the applicability of Chapter 343 provisions and any rules or orders adopted by the Council pursuant to its statutory powers. The Council should not hesitate to exercise its authority if petitioned to rule on issues relevant to Chapter 343 and Chapter 11-200, EIS Rules. To my knowledge, no previously issued declaratory ruling by the Council has been overturned in the courts. If a future ruling is challenged and taken to the State Supreme Court, we shall find out if Fasi v. HPERB really was intended to prevent a rulemaking agency from issuing declaratory rulings on its own statute and rules.