Introduction

We must begin our comments on the revised "Rules of Practice and Procedure" and the "Environmental Impact Statement (EIS) Rules" proposed by the Environmental Quality Commission (EQC) by questioning the present authority of the EQC. Act 140 of the 1982 Legislature transferred, effective 1 January 1984, to the Office of Environmental Quality Control (OEQC) the authority to administer the State EIS system and to the Environmental Council (EC) the authority to make and repeal EIS system rules and thus, in effect abolished the EQC as of that date.

We consider it appropriate for any body to arrange for public discussion of rules such as those governing the EIS system, even a body that, as of the present date, has no legal authority to change them. However, we do not consider that this meeting convened for that purpose can appropriately be regarded as satisfying the legal requirements for a public hearing to consider changes in the rules.

In this consideration, we have not reviewed the proposed "Rules of Practice and Procedure" and comment only on the more substantive changes from the present EQC Regulations reflected in the proposed "EIS Rules," hoping that our comments will be taken into account when the Environmental Council makes its proposal for revisions.

General comments on EIS rules

A first general comment that is appropriate concerning the proposed revised EIS rules is that, regardless of the authority, the organization of material in them represents a substantial improvement over the organization in the present regulations.

A second general comment is that the rules would be better identified as "EIS-System Rules" than "EIS rules" because they deal with the entire system, including environmental
assessment and exemption from environmental assessment, and not merely EIS's. If an institutional identification is necessary in the title, it should be with the Environmental Council, and not the EQC.

We have compared the proposed revised rules with the present regulations in some detail to ascertain whether any important provisions in the present version have been omitted from the proposed version and to identify what important new provisions have been proposed. We consider that the proposed version will provide a good base from which the Council can work in the development of its own proposal. However, we consider that still further reorganization of the material covered will be advantageous, and that some changes in language will result in clearer presentation or better grammatical usage. As indicated initially, however, we will restrict our comments to the more important changes proposed and potential significant improvements that have not been proposed. We do not comment on the numerous places in the rules where the former EQC should be replaced by the Environmental Council.

In these comments, parenthetical citations to the present regulations and the proposed rules may easily be distinguished by the different forms of numbering systems used for sections and subsections.

Definitions

Omitted from the proposed revised rules are the probably unnecessary definitions of "agency action", "applicant action", and "regulations". Added are definitions of "accepting authority" and "exemption notice" that seem equally unnecessary, and a definition of "NEPA" that is useful because it permits abbreviation later. A definition of "environmental assessment" is substituted for the present definition "of assessment". However, because the term assessment is used later without the qualifying adjective, the definition should be of "environmental assessment or assessment".

The definition of "action" is revised so as to exclude continuing administrative activities that will have no significant environmental impacts. The revision is very appropriate because it eliminates the need for the specific exemptions of and actions for which provision is made in the present rules (133 a.6).

Bulletin

It would be useful to specify that the Bulletin include, in addition to the material identified in the proposal (3(a)), notices of new agency exemption lists and revisions of such lists. The exemptions now provided are generally appropriate except as to one class to be discussed later. However, inappropriately proposed exemptions have been a major problem in the past, and it would be wise to call attention in the Bulletin to proposed exemptions.

Exemptions

The first class of actions identified as appropriately exempt from assessment in the revised rules (8(a)) as well as in the present regulations is "(1) Existing facilities. Operations, repairs or maintenance of existing structures, facilities, equipment or topographical features involving negligible or no change of use beyond that previously existing." The maintenance of a naturally unstable topographic feature, such as a beach, may represent in itself a substantial environmental impact—and a proposal for such maintenance should definitely be subject at least to assessment, and ordinarily to discussion in an EIS. We recommend deletion of "topographical features" from the provision.
As noted earlier, a revision of the definition of "action" makes unnecessary the present provision for exemption of purely administrative actions (1:33a.6), and this provision has been deleted from the revised provision for exempt classes (8(a)).

The revised provisions regarding exemptions provide that agencies file notices of their exemptions of individual projects for publication in the Bulletin. To require Bulletin notice of each individual exemption would seem to diminish significantly the intent of the exemption provision. However, we strongly recommend that lists of types of actions proposed to be exempt by agencies, and proposed reviews of these lists, be published in the Bulletin. With such publication, persons who have concerns with a type of action proposed for exemption can make their concerns known to the Council for consideration when it determines whether or not to concur with the proposed list.

Assessment responsibilities

In the section in the proposed regulations on the "identification of accepting authority", a subsection applying to applicant actions provides that agencies have not only the authority to accept EIS's but the authority to require them (4(b)). Address in this section to the latter authority with respect to applicant actions is inconsistent with respect to both the title of the section and to the treatment in its subsection on agency actions, which does not mention the authority to require EIS's. Placement of the authority to require EIS's on applicant actions is, however, consistent with the provision in the present regulations relating to the issuance of EIS preparation notices (1:31c). Indeed agencies have the authority to issue negative declarations, in other words determinations that EIS's are not required, and that authority extends to agency actions as well as applicant actions.

Both the present regulations and proposed rules prescribe that the determinations to require or not require EIS's are to be based on environmental assessments; and in the present regulations the assessment responsibility to assess either an agency action or an applicant action is placed in an agency (1:30a, b). The proposed rules are, however, inconsistent or at least unclear in this respect. One section provides that "agencies or applicants shall prepare an environmental assessment of each action" (10). However, another states that: "After preparing an environmental assessment, the agency shall file a notice of determination" (11(a)). No section provides that, after an applicant prepares an assessment, the agency shall make and file the notice of determination. In the case of an agency action there is no applicant who could make the assessment. In the case of an applicant action, it would clearly be inappropriate to allow the applicant to make the determination whether an EIS were required or not. However, it would not be inappropriate for the applicant to assess his own actions, and indeed it seems common practice for an agency to accept as its own, with or without revision, the assessment of an applicant.

We suggest that an agency should be allowed either to make the assessment on an applicant action or to require the applicant to make it. Although the agency must be free to judge the adequacy of an assessment made by an applicant, it would not be necessary for the agency to prepare its own assessment if it finds fault in prepared by the applicant because, as provided in the proposed rules, the agency must file not only its determination on the action but reasons supporting the determination (11(c)). These reasons might include the faults found in the applicant's assessment.
Contents of assessments and notices of assessments

In addition to subsections equivalent to those in the present regulations that prescribe matters to be considered in environmental assessment (1:30a; 1:30b; 9a; 9b), the proposed rules contain a section prescribing the contents of an assessment document (10). Only matters that have been considered can be presented in the document. Hence there is a good deal of unnecessary redundancy between the new sections and their present equivalents; and the distinction between matters considered and contents is not entirely rational.

The contents of notices of preparation notices and negative declarations prescribed in the proposed rules (11(b)) do not include all items required by the present regulations. Notably lacking is the "Identification and summary of major impacts and alternatives considered" (1:31c.g), although perhaps these are intended to be included in the "Reasons supporting determination" (11(c)(5)).

Types and contents of EIS's

The proposed revised rules refer to draft EIS's and final EIS's, making a distinction that is in accordance with federal EIS usage and would, if adopted, considerably reduce confusion. The content requirements for draft EIS's in the proposal are in essence those for EIS's in the present regulations. The final EIS, in the proposal, is to contain the draft or a revision of it plus certain other items.

The proposed revision wisely continues advice in the present regulations concerning the style to be used in preparing EIS's (17; 1:43), and the content specifications have been considerably revised in the proposal so that they imply consistency with the style advised much better than do the specifications in the present regulations. Irreversible and irretrievable commitments of resources (1:42j) are components of adverse environmental effects (1:42f). These effects and the relationship between short-term and long-term environmental uses (1:42b) are properly considered in the discussion of environmental impacts (1:42e). The present regulations call for address to these topics as if they are unrelated to each other, whereas the revision treats them as parts of a single major topic (16(b)(8)).

Although the reorganization would in general be advantageous, we question the placement of the requirement for discussion of alternatives of an action (16(b)(5)) before the requirement with respect to the environmental setting (10(b)(b)), the environmental impacts of the proposed action (10(b)(8), and proposed measures to mitigate its impacts (16(b)(9). As the revision appropriately, recognizes, the discussion of the alternatives must address their environmental impacts, but it seems more logical to place the requirement for such discussion after the requirement for discussion of the environmental setting and the impacts of the proposed action.

The deletion in the proposed rules of the present requirement of a list of necessary approvals (1:42o) is questionable. The revision appropriately calls for inclusion of a table of contents in an EIS (16(b)(2)). The proposed requirement of a statement of purpose (16(b)(3)) is, however, redundant to the requirement of a statement of objective (16(b)(4)(B).

In the proposal, a final EIS would contain, in addition to the draft or a revision of it, a record of the results of the review of the draft (16(c)). In the present practice, this record includes, verbatim, all comments in the draft and all responses to those comments. The proposal would, however, allow substitution of summaries, requiring detailed discussion only in the case of significant environmental issues. The summarization will greatly facilitate the determination of acceptability of an EIS. However, copies of a final EIS must be distributed to all who commented on the draft, so that they can notify the accepting authority of any substantive comments not addressed or misrepresented in the final revision.
The present regulations and proposed revisions require that the preparer of an EIS respond in writing to all written comments received during the consultation phase of the preparation (41c; 15(d)), and, further, that reproductions of comments and responses be incorporated in the EIS (42m; 16(b)(12)). The latter provision is inconsistent with the advice as to style and made it more difficult for accepting authorities and others to review the EIS's. In many cases there are significant inconsistencies between responses to comments and corresponding parts of the texts of the EIS's. In the proposed revision, the EIS content requirement is reduced to reproduction of substantive comments and responses and mere lists of other comments (16(b)(12). We suggest, however, that the treatment of comments received in the consultation phase should be that proposed in the revised rules with respect to comments received during the review phase. We stress that the purpose of the provision of the consultation phase was to facilitate the development of a consistent, well organized, and clear EIS, and this purpose has been defeated by the way in which comments received in consultation have been treated.

**EIS preparation responsibility**

The EIS requirements regarding actions of the types subject to agency approvals and agency acceptance of the related EIS's are related in the proposed rules to the persons preparing the actions (6a, b). However, the proposed general provision regarding the preparation of draft and final EIS's refers only to "the preparing party" in the case of both agency and applicant actions (14); the provision concerning consultation refers to "proposing agencies and applicants" (15); and the provisions regarding filing of EIS's refer to "the proposing agency or applicant" (18). We do not find in the proposal any equivalent of the provision in the present regulations that makes it clear that an applicant must prepare the EIS on an action he proposes (23b). We believe that the rules should make very clear both this responsibility and the responsibility of an agency to prepare the EIS on an action it proposes.

**EIS acceptance authority**

A problem that has arisen regarding the EIS accepting authority seems not adequately dealt with in either the present regulations or those proposed. This problem is associated with actions that are proposed by an applicant but that will nevertheless require use of state or county lands.

It is clear that, in the case of an action proposed by an agency, the governor has the acceptance authority if will use state lands (or funds) (1:72a; 11-200-4(a)(1)) and the mayor has the acceptance authority if the action will use county lands (or funds) but not state lands (or funds) (11:72a; 11-200-4(a)(2)). The present regulations and proposed rules provide, however, that in the case of an action proposed by an applicant, the acceptance authority rests with the agency that must provide its approval before the project can be initiated (1:72b; 11-200-4(b)). The primary criterion for determining the authority to accept an EIS is, thus, whether the action to which it relates is one proposed by an agency or one proposed by an applicant. The secondary criterion, determining whether the governor or the mayor has the accepting authority is applicable only to EIS's on actions proposed by agencies. Use of state or county lands in an applicant action is surely subject to the approval of an agency and such use is recognized in the proposed rules (6(b)(2)(B)). However, in the language of the rules, such use, if proposed to the agency, and not by it, does not seem to require that the EIS on the action be accepted by the governor or mayor.
The case in which the problem has risen is a complicated one involving a project, proposed by an applicant to a county agency, that would eventually require modification (and hence use) of a state-owned shore, although the only increment for which formal approval is now sought would be restricted to private lands. The present regulations and proposed rules provide that a multi-phase project be covered by a single EIS (1:22b; 11-200-7), and an original draft EIS was prepared and reviewed on the entire project in question. The EIS was handled, we understand, by the county agency under the rules governing applicant-proposed projects, and accepted by the agency (although in our opinion not all of the conditions for acceptance had been met.) Further details on the impacts of the increment for which approval is now sought have been provided in a supplement to the original EIS, but the appropriateness of the use of the supplement seems to us to depend on the proper acceptance of the original EIS.

Regardless of the appropriateness of use of the supplemental EIS, the question arises as to whether the authority to accept the original EIS rested with the county agency or whether, because State lands would be involved in the larger project to which that EIS related, the acceptance authority should have rested with the governor.

The language in HRS 343 provides essentially the same distinction between the primary and secondary criteria for acceptance authority as the present regulations. However, we question whether it was the intention of the Legislature to grant to a county agency, or even to a state agency, the power to accept an EIS on an action that will use state land, merely because the project is one that is proposed by an applicant.

There are two possible reasons for placing authority to accept EIS's with the governor or mayor. The first is simply to avoid allowing an agency to accept its own EIS's. The second, however, is to allow the governor (or mayor) to exercise his judgement of the adequacy of recognition and disclosure of the environmental impacts of a project that will use state (or county) land. We see no rationale for refusing to allow at least an appropriate state agency to exercise such judgement in the case of a project that will use state land. It seems inappropriate that a county agency determine the acceptability of the EIS on such a project.

If the present language of HRS 343 will allow, we suggest that the EIS system rules should provide that the governor has the power to accept the EIS on a project that will use state land, regardless of who proposes the project, and that the mayor has the power in the case of an EIS on a project that will use county land (but not state land). If the present language of HRS 343 will not allow this, we believe that the rules should provide, at least, that a state agency have the power to accept an EIS on a project that will use state land, regardless of the proposer.

**Filing and distribution of EIS's**

The provision in the proposal regarding the effective dates of filing (deposit) is appropriately identified as applying to an EIS in general (19(c)). The proposal also makes provisions for notice and distribution of EIS's in general (19). However, considering the importance of receipt of final EIS's by those who commented on the drafts (see above), it would be wise to provide explicitly for this. It would also be wise to call explicitly for the distribution of a draft EIS to all who have been engaged in the consultation process involved in its preparation. Notice of availability (for review) is pertinent only to draft EIS's.

The proposal would appropriately make provisions for refiling of an EIS initially found unacceptable (21(g)) and for withdrawal of an EIS (21(h)).