APPLICABILITY OF THE EIS SYSTEM TO AGENCY RULES
Statement for Environmental Council Meeting
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Introduction

The EQC Bulletin for May 23, 1984 indicates that a petition for a declaratory ruling concerning the applicability of the State EIS System under HRS 343 to certain classes of agency rules and to certain actions of the Department of Land and Natural Resources will be considered at this meeting. Specifically, five questions are raised, relating respectively to the applicability of the system to:

1. Amendment of Land Use Commission District Regulations.
2. Adoption of Department of Health rules for underground injection control.
3. Adoption of Department of Land and Natural Resources rules regarding geothermal resource subzones.
4. Adoption or amendment of any state or county agency rules regarding use of State or county lands or funds or Conservation District lands.
5. Designation of geothermal resource subzones by the Department of Land and Natural Resources.

Question 4

Of the four questions relating to agency rules, the most general is the fourth. HRS 343 provides that it is "actions" that are subject to assessment in the EIS system. Hence this question may be phrased:

May a set of agency rules be regarded as an "action" that may be subject to assessment?

An "action" is defined as "any program or project to be initiated by agency or applicant" (HRS 343-2(2)). Because agency rules are clearly initiated by an agency, the question may be rephrased:

May a set of rules be regarded as a "program or project" that may be subject to assessment?

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The development and promulgation of a proposed set of rules might be regarded as a project, and the enforcement of the rules may be regarded as a program. It seems very questionable, however, that the set of rules itself can be regarded as either a program or project subject to assessment in the EIS system.

It is pertinent to note that "feasibility or planning studies for possible future programs or projects which an agency has not approved, adopted, or funded" are exempt from assessment (HRS 343-5(b)), although the projects or programs resulting from the studies may be subject to assessment when they are proposed. We suggest that, remit only, a set of rules that may limit the kinds of projects or programs may be undertaken should be regarded as exempt from assessment, although the projects or programs governed by the rules may be subject to assessment when they are proposed. So far as we are aware there is nothing in the legislative history of HRS 343 that would suggest that rules that may govern a number of projects should be treated in a way different from planning studies. We suggest, therefore, that the answer to question 4 is should be negative.

It is possible that a set of rules applying exclusively to projects in a particular area that triggers the assessment requirement in HRS 343, for example the Conservation District, might be regarded as an "action" subject to assessment. However, to require assessment even of such restricted rules would seem to stretch underly the definition of "action."

Questions 1 to 3

None of the first three questions on which the Council has been asked to make a declaratory ruling relate to rules governing exclusively projects in an area such as the Conservation District. Hence, even with the possible exception to the negative answer to question 4, the answers to questions 1 to 3 must probably be negative.

Question 5

It has been our opinion that the designation of a geothermal resource subzone should have been made subject to the provisions of the EIS system. However, Act 296, 1983, which called for the establishment of geothermal resource subzones, specifically indicates that their establishment is not subject to the provisions of the system. Hence the answer to question 5 must be negative.

We note, however, that the undertaking of a geothermal resource exploration or development project is subject to EIS-system requirements if the proposed project is in the Conservation District or any other area or site identified in HRS 343.