Revision of the Environmental Quality Commission regulations governing the Environmental Impact Statement (EIS) is required by:

a) Replacement of the Commission by the Environmental Council (EC).

b) Other changes in the statute governing the system (HRS 343);

c) The altered format required for all agency rules.

Most of the proposed revisions are appropriate, many of them are highly desirable, and the descriptions and rationale for the revisions presented in a request for preliminary approval (14 Aug 1984) are in conformity with the revisions themselves.

We consider that there are serious problems with only two of the proposed revisions, those numbered 5 and 24 in the request for preliminary approval. In the headings to our comments on these sections, we include the numbers of the sections of the proposed revised rules and citations of the pages on which they appear.

5. Exemption notice (subsec. 8, p. 12)

With its present wording, proposed subsec. 8e entitled "Exemption notice" seems unjustifiably extreme. An exemption notice would relate to an action or project of a type included in an exemption list as provided in subsec. d -- that is, one of a kind that will have no significant environmental impact. The purpose of the exemption provision is to make it unnecessary that projects of such kinds be subject to individual assessments. The present wording of subsec. e seems at variance with this intent.
The first sentence of the subsection would require that a notice be filed by an agency "when it has determined an action to be exempt". Subsec. d already requires that an agency submit a list of actions of kinds to be exempt. Hence, the first sentence in subsec. e would seem that an agency must, in addition, file a notice whenever it determines that a particular project falls within one of the types of action already listed as exempt. The second sentence, indeed, refers to the subject of an exemption notice as a "project". Lawn mowing might, for example, be an action of a type appropriately included in an exemption list. However, the mowing of the lawn on the Capitol grounds during the week of November 12 might be considered a project that would require an individual notice.

There have been problems in the past with the inclusion, in proposed exemption lists, of kinds of action defined so broadly that they would include actions that would have significant environmental impacts. To cope with such a problem it is necessary only that the exemption lists be published and subject to review. There may also be problems with determinations by an agency that a particular project falls within an exempt kind. However, to require that notice be filed of every individual action, even if it appears to be of an exempt kind, would defeat the purpose of the exemption process. We recommend that, in place of adding the proposed section e, the last sentence of subsec. d be revised to read:

Notice of such a list shall be submitted to the council for publication in the bulletin. The notice shall include: (1) a brief description of each type of action to be exempt, (2) citation of the exempt class of action within which it falls, and (3) a brief statement of reasons to support the exemption. Final adoption of the list shall be subject to the concurrence of the council. Any amendment to a previously adopted list shall be treated in the same manner as an original list.

24. Public review (subsec. 20c, p. 29)
26. EIS acceptance (applicant actions, subsec. 21(f), pp. 31-32)

With the proposed revisions in subsecs. 20(c) and 21(f) there are two problems that although closely related, we will discuss more or less separately and in reverse order.

Date of EIS filing

Subsec. 21(f) refers to the 60-day period within which an accepting agency must notify an applicant of the acceptability or non-acceptability of his EIS as beginning "within sixty days of the official receipt of the statement". This might easily be misconstrued as meaning that the 60-day begins with the applicant's submission of the final EIS. The governing statute does not impose the 60-day limitation on the case of the EIS on an agency action. In the case of an applicant action, the 60-day limitation is imposed by the following sentence of HRS 343-5(c): "The agency receiving the request, within sixty days of receipt of the statement, shall notify the applicant and the office of the acceptance or nonacceptance of the statement." This provision, also, might be misinterpreted as meaning that the 60-day period begins with the submission of the final EIS. Hitherto, however, it has always been interpreted as meaning that the 60-day period begins with the filing of the draft EIS, and for several reasons given below we believe this interpretation is still necessary.
1. In the statute, no distinction is made between draft and final EIS's. The word "statement" refers to an EIS either before or after review and revision.

2. There is no requirement in the statute that an applicant request acceptance of an EIS. The "request" referred to in the phrase "agency receiving the request" is the request for approval of an action that triggers the EIS system. It is the agency receiving this request that is responsible for the assessment of the action and for determining the acceptability of the EIS on it if one is required. The date of that "request" is therefore the date of the application for a permit.

3. The phrase "receipt of this statement" dates from the original statute which provided that the statement (draft EIS) be filed with the agency. The statute has been revised so as to provide now for its filing with OEQC. Although both the original version and the present version of the statute require the public review of the statement and allow for its revision prior to the acceptance decision, neither refers explicitly to the filing or submission of a revised version of the EIS (final EIS). Hence the date of "receipt of the statement" is the date of the original filing (of the draft EIS).

4. Three provisions were made in the regulations to assure as well as possible that the processes that must occur between the initial filing of the statement (draft EIS) and the acceptance of the revised version (final EIS) could be carried out satisfactorily within the 60-day period. These processes are:

   i) Publication of notice of filing in the Bulletin;

   ii) The 30-day public review period;

   iii) Response of the applicant to review comments, revision of the (draft) EIS, and submission of the revised version (final EIS);

   iv) Consideration by the agency of the revised version (final EIS) and determination of its acceptability or non-acceptability.

The three provisions intended to assure that these processes could be carried out were:

   a. The provision for a consultation period prior to the preparation of an EIS, introduced so as to minimize the defects that might be found in its review after filing (of the draft), and hence to minimize the extent of revision found necessary during the 60-day period;

   b. The establishment of two filing dates per month, each to precede the publication of the Bulletin by as short a period as possible;

   c. The establishment of a 14-day limit to the period for response of the applicant to review comments, for revision of the statement (draft EIS), and for submission of the revised version (final EIS).

If, for example, the Bulletin is published 3 days after the date on which a (draft) EIS is filed, and the applicant takes the full 14 days allowed for response, the agency still has 13 days for its consideration and determination.
We recommend that the provision regarding the 60-day period in revised rules subsec. 21(f) (p. 31) be changed to read: "...acceptance or non-acceptance of the final EIS within 60-days of the official filing of the draft EIS, ...."

For the same reason, we recommend that "official filing of the draft EIS" be substituted for "official receipt of the EIS" in subsec. 21(d) (twice).

The 14-day limitation

As noted above, the present regulations require that an applicant must respond within 14 days after the period of public review of his draft EIS to the comments received on the draft. With the revisions proposed in subsec. 20c, this 14-day limitation would be eliminated. We recognize that the present requirement puts an undue burden on the applicant or proposing agency. In the case of an EIS on an agency action, the limitation to a 14-day period would serve no useful purpose. However, in the case of an applicant action, as indicated above, the 14-day limitation was introduced so that the accepting agency would have time to make a satisfactory determination. We point out that in the time-table example given earlier, if the applicant took 20 days instead of 14 days to respond to the review comments and file the final EIS, the agency would have but one day for its consideration and determination of acceptability or non-acceptability. We believe that the agency must be allowed a period considerably longer than this.

We recommend restoration of the 14-day limit to the period of response to review comments in the case of applicant actions (but not agency actions). However, we suggest a means by which the intent of the proposed deletion of the limit may be met without impairment of the ability of the accepting agency to consider the final EIS and make its determination.

We note that both the statute and the revised rules provide for extension of the 60-day period allowed between the initial filing the acceptability determination for the EIS on an applicant action. The provision for such an extension, which must be requested by the applicant, was made to allow more time for the applicant's response, but it is of no value to the applicant unless the 14-day period also is extended.

To restore the 14-day limit but to allow for exception, we suggest insertion of the following at the end of subsec. 20(f): "An applicant must respond to the comments and submit the final EIS within fourteen days of the end of the review period except that, if the applicant requests an extension of the sixty-day limit for determination of the acceptability of the EIS as provided in section 21(f) of these rules, an equal extension of the fourteen-day period shall be allowed."

Effect of proposed statutory revision with both the 60-day period and the 14-day period

We understand that OEQC will propose an amendment of HRS 343 that will remove the problem. Further revision and simplification of the rules will be possible if the amendment is passed.
Minor comments

We will not comment on the many improvements that will result from other proposed revisions. However, we wish to call attention to editorial or minor substantive changes that would further improve some of the sections of the revised rules. These comments also will be keyed to the numbers in the request for preliminary approval.

1A. Accepting authority (p. 3)

The intent of the proposed definition of "accepting authority" (p. 3) is good. However, "authority" may be used in two ways: 1) as meaning "power" as in subsec. 4(a) and 4(b) (pp. 6-7) (with respect to EIS acceptance and in various other sections with respect to requirements of EIS's, etc.); and 2) as meaning an official or agency having a particular power. The latter meaning seems to be intended in the definition, and it issued with this meaning in the title to section 4 (p. 6) and sections 21(d) and 21(f) (p. 21, para. 1, Is. 4, 9-10), the only places in which we find "accepting authority" used.

If "official or agency" were substituted in the definition, it would read "accepting authority means the final official or agency that determines the acceptability of the EIS document". What is meant is actually the agency or official that has the (final) power to accept an EIS (as provided in sections 4a and 4b).

1B. Action (p. 3)

The intent of the revision of the definition of "action" (section 2) (p. 3) to exclude administrative activities is excellent. However, we suggest rewriting it to read: "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 or personnel-related actions.

1E. Exemption notice (p. 5)

If notice of exemptions is, as we recommend, restricted to notice of exemption lists, there will be no need for the proposed definition of "exemption notice" (p. 5). If a definition is needed, we suggest that the phrase "agency with the power of approval" be substituted for "accepting authority" because "accepting authority" relates to the acceptance of an EIS and there will be no EIS on an exempt action.

1I. Regulations

The definition of "regulation" has been deleted because what were called regulations are now called "rules". However, if a definition of "rules" was necessary, we wonder whether a definition of "rules" may be necessary.
4. Multiple or phased actions
(p. 9, section 7)

In the title to section 7 (p. 9), either:

1) the hyphen between "actions" and "agency, applicant actions" should be changed to a dash (—); or

2) "agency, applicant actions" should be deleted.

6. Early assessment—applicant actions (p. 13)

With the proposed revision, subsec. 9(b) (p. 13) would allow an agency more time than the 30-days now allowed to determine whether an EIS is required for an action. The revision is consistent with HRS 343, and it will be advantageous in the case of an agency that, although empowered to make the determination, may need to consult with other agencies in order to adequately judge the significance of some of the impacts of the project that may lie outside of their specific areas of expertise. However, with the revision, an applicant will not be protected from dilatory tactics by an agency.

11. Significance criteria (p. 16)

In addition to other changes proposed in subsec. 12(b) (p. 16), we recommend that the words "consequence" in the fourth line and "effect" in the sixth line be made plural.

The antecedent of the numbered phrases at the end of the subsection:

"(1) Involves an irrevocable commitment...;
(2) Curtails the range...
(3) Conflicts with...; etc.

is the "action". "Criteria" is not an appropriate antecedent to these phrases as is proposed in the revision. For consistency, the sentence including the numbered phrases should be begun: "In most instances, an action should be determined to have a significant effect if it:

(1) Involves...etc.

Other provisions

We will provide the Council and OEQC with a copy of the proposed revised rules marked up to call attention to some misprints, grammatical errors, and suggested rephrasing, principally in sections whose revision is not indicated in the preliminary request for approval.