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October 24, 1994
RG:0118

Ms. Muriel Roberts, Chairperson
Environmental Council
220 South King Street, Suite 400
Honolulu, Hawaii 96813

Dear Ms. Roberts:

**Amendments to Hawaii Administrative Rules
Title 11 Department of Health
Chapter 200 Environmental Impact Statement Rules**

The Office of Environmental Quality Control has proposed amendments to Chapter 200, Environmental Impact Statement Rules. The Rules last were revised in 1985, and in the intervening years, numerous amendments to Chapters 341 and 343, HRS, have been enacted. Thus, the present proposed revisions are welcome, in that they will serve to alleviate possible confusion in compliance with Hawaii's EIS law.

Our review was prepared with the assistance of Peter Rappa, Sea Grant; Casey Jarman, School of Law; Jacquelin Miller and Chris Welch of the Environmental Center.

Proposed amendments include addition to or modification of numerous sections of the existing rules. While we generally concur with most of the suggested amendments, we offer the following additional comments for your consideration:

11-200-2 Definitions

Addendum: This is a new category of documentation within the EIS system. However, unlike draft and final EA's and EIS's, an Addendum has no statutory reference in Chapter 343, HRS. Additionally, no guidance is given as to the relationship between the Addendum and its predecessor document(s). What standards of content and form are required to be included in an Addendum? How is an Addendum evaluated in any formal process of public review? We are concerned that the category of "Addendum" will allow for remediation of inadequate EA's or EIS's without providing for a self-contained, acceptable Final EA or EIS, "...capable of being understood by the reader without the need for undue cross-reference" (Section 11-200-19, HAR). The use of

the Supplemental EIS or Revised EA would seem more sound and appropriate for documents that need additions or changes.

Exempt Classes of Actions: As proposed, this definition fails to acknowledge the statutory requirement that proposed exceptions must be approved publicly by the Environmental Council (Section 343-6(7), HRS). As written, the agency has sole discretion in determining classes of actions which will be exempt from the EIS process. The definition should read, "...based on a determination by the agency, with the concurrence of the Environmental Council, that the class of actions...."

Supplemental Statement: The definition, "...but since has changed in size, scope, location, and timing, among other things" should read, "...which has since changed in size, scope, location, or timing, among other things." The use of "and" is inappropriate.

11-200-3 Periodic Bulletin

Proposed additions to this section itemize types of documents published in the Bulletin, provide guidelines for submission deadlines to applicants and agencies, and specify the form and content requirements to accompany each submittal. At present, this information routinely is published in the Bulletin. We suggest that the new rules should not supplant the publication of this material in the Bulletin. Since the Bulletin is much more widely distributed than the rules, it would be a disservice to discontinue the dissemination of this critical information.

Section (c): The statement, "In case the deadline falls on a state holiday or non-working day, the deadline shall be the close of business on the first available working day before the deadline," is confusing and open to a variety of interpretations. Does the deadline refer to the submission of notices to the office by agencies or applicants, or does it refer to the publication date of the Bulletin? Why is the deadline set to the day preceding the holiday instead of the following working day? This statement needs to be clarified.

Section (d): In parts 4, 5, 6, and 10, the word "indication" is not clear and seems inappropriate in the phrase, "A brief statement and indication describing...." Unless this wording is necessary, it should be omitted.

Section (e): A change in forms may cause substantial disruptions and delays if not communicated to agencies and applicants appropriately. This rule change should state that any form revisions be published before they are effective. It should also be a policy to publish them continually (not just "at least once"). As stated above, the Bulletin serves as the primary mode of information dissemination and should be used accordingly for such important matters.

Section (f): The statutory mandate of 341-3(a), HRS, states that the Office "shall serve the Governor in an advisory capacity on all matters relating to environmental quality control", as well as that of 341-4(b)(7), HRS, which requires the Director to "[o]ffer advice and assistance to private industry, governmental agencies, or other persons upon request." However, the proposed language, "The Office may provide recommendations to the agency..., "would provide the Office the option of

refusing to make a recommendation when so requested. The word, "may" should be replaced by "shall".

11-200-6 Applicant Actions

Section (a)(2): The wording of this rule change is not clear. Taken with the preamble to parts (1) and (2), this section reads: "Chapter 343, Hawaii Revised Statutes, shall apply to persons who are required to obtain an agency approval prior to proceeding with: [m]aking certain types of amendments to existing county general plans." This suggests that individuals in some way have power or authority to change county general plans. The word, "making", causes this confusion, and Section 11-200-6(a)(2) should be rephrased as follows: "Actions that require certain types of Amendments to existing County General Plans."

Section (b): The proposed usage of the word "classes" in this section is not suitable. The word "class" has already been defined in the context of exempted actions. This repetitious use of the word would serve only to confuse the EIS process. The original word, "category", which was used to refer to administrative actions, could well substitute for the word "classes".

11-200-8 Exempt Classes of Action

Section (b): How is this section enforced? Although the section states that exemption status will not be extended to actions which, because of a cumulative effect, have a significant impact, how can the cumulative impact of successive actions be judged when an agency only files reports semi-annually on such actions? We suggest that a more timely method, such as monthly reporting, be instituted.

Section (f): That the Governor may exempt all actions from chapter 343 during a state of emergency is very clear in this section. However, the following statement, which seems to be a proviso to the Governor's power, causes confusion: "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." The wording of this section is awkward and unclear and needs to be amended.

11-200-9 Determination of Significance

Section (d): Our reviewers question the requirement to file only four copies of the draft EA with the Office. It seems that this unnecessarily limits public access for review of the draft EA. The Environmental Center typically gets one copy, and OEQC keeps one. This only leaves two copies of the document for public review.

Section (e): There is one major point of contention in this section. According to the proposed rules, agencies and applicants are required to "respond in writing to comments received during the review period." Legally, the postmarked date on an envelope is the criterion determining

whether a comment is timely. This is reflected in 11-200-22(b) (Public Review). Language of this nature should be incorporated into the proposed changes in this section.

11-200-11 Notice of Determination

Section (e): This section discusses provisions for public review where, following agency withdrawal of a notice of determination, reconsideration of the withdrawn action is initiated. The document states "[e]arly consultation with agencies having jurisdiction as well as citizen groups and individuals as described in section 11-200-9 (a) and (c) need not be reduplicated where the reconsidered action has not changed significantly." First, who will determine if the project has changed significantly? Second, even though the action itself may not have changed significantly, agencies and individuals have the right to keep informed of the status of a project. Third, whether the project has changed or not, other developments in the region could. This could significantly alter the effects of the project. Thus, assessment of the significance of the reconsidered action should not be solely in the domain of the proposing party.

11-200-15 Consultation Prior to Filing [an] EIS

Section (a): The final sentence in this paragraph needs a slight revision. It states that "[a]t the agency's discretion, an optional informal public scoping meeting may be held." The agency's discretion extends only to the decision whether or not to hold the meeting; it is not up to the agency as to whether it should be informal or optional.

Section (c): The first sentence in this paragraph needs editing for clarity. It currently reads "[u]pon receipt of request, the proposing agency or applicant...." The definition of request needs to be made explicit in this sentence.

Section (d): There are several concerns regarding response to comments: First, with regard to the statement that "[a]ny substantive comments received" will be responded to in writing, who is to determine the substantive nature of comments? Second, the proposed revision states "[l]etters submitted which contain no comments do not require a written response." This does not seem appropriate, since it is important to be aware of whether or not agencies have considered the ramifications of proposed actions and, in some cases, who or which division within an agency has looked at the case.

11-200-17 Content Requirements; Draft EIS

We strongly support the OEQC's added language of "a separate and distinct section" to the sections mandating draft EIS contents. This will serve to give consistency to form and content of EIS documents.

Section (l): This section lists several chapters of the Hawaii Revised Statutes which are relevant to content requirements of a draft EIS. Our reviewers suggest that it would be better to

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use generic terminology to replace these specific references. Thus if changes occur in any of the referenced laws, the EIS rules would not be outdated.

11-200-23 Acceptability

Section (e): In addition to our earlier concerns regarding an Addendum, this section, which describes the requirements for resubmittal of a non-accepted EIS, needs revision for consistency. It states that "[t]he revision shall take the form of a revised draft EIS document or an addendum, either of which shall fully address the inadequacies of the non-accepted EIS and shall completely and thoroughly discuss the changes made." However, the last sentence, which describes the evaluating criteria for the revised document only mentions the revised draft EIS. The term, Addendum, needs to be included in this sentence as well.

11-200-26 General

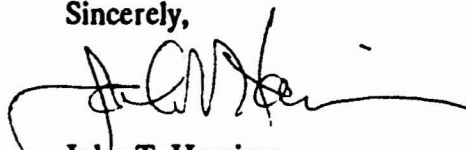
We suggest the following changes: First, the word, "major", deleted in the second line, also should be deleted from the last sentence. Second, the proposed revision that reads "which are significant in effect under section 11-200-12..." needs to be changed. Alterations to the referenced elements of size, scope, location, or timing are not significant per se. It is the impact of such changes which is of concern with regard to measurement of significance.

Conclusion

As noted at the outset of our comments, the proposed additions seem to clarify the EIS procedures. Although certain problems need attention, the general direction of the changes seems entirely appropriate and timely.

Thank you for the opportunity to comment.

Sincerely,



John T. Harrison
Environmental Coordinator

cc: Roger Fujioka
Peter Rappa
Jacquelin Miller
Casey Jarman
Chris Welch