PART II

MAJOR ASPECTS OF THE STATE EIS SYSTEM AND ASSOCIATED ISSUES

INTRODUCTION

The Hawaii State EIS Act (Act 246 (74)) and the Regulations of the Environmental Quality Commission (amplifying the provisions of the Act) are included as appendices to this report. Hence there is little purpose describing the EIS system of the State in detail following the outline of either the Act or the Regulations. Instead, because a purpose of this report is to investigate possible means for the improvement of the system, we have identified a number of individual features of the system that have been sources of controversy. For discussion in this chapter these features are grouped in major aspects of the system.

Criteria that we have used to identify controversial issues respecting these features include:

a) Differences between EIS system-provisions proposed in bills introduced prior to the passage of Act 246 and provisions in the Act.

b) Differences between the provisions of NEPA (which was the basis for some of the earlier bills) and the provisions in Act 246.

c) Amendments proposed to Act 246.

d) Differences between the provisions of the Act and the provisions in the EQC regulations.

e) Resolutions introduced concerning the interpretation or implementation of the Act.

f) Prior experience of the Environmental Center in its reviews of the pertinent legislation, regulation, exemption lists, environmental assessments, and EIS's.

g) Ambiguities in definitions and prescriptions brought to our attention in the course of the study.

h) Inefficiencies or problems of the EIS system brought to our attention in the course of the study.

i) Declaratory rulings by the Environmental Quality Commission.

j) Opinions of the Attorney General's office.

k) Judicial proceedings instituted.

OBJECTIVES OF THE SYSTEM

Introduction

As will be shown, recognition of the objectives of the EIS system is essential to the interpretation and evaluation of some of the prescriptions concerning the system. We have discussed in Part I, the objectives of EIS systems in general, and the relation of these objectives to the premises underlying the establishment of the systems. We discuss here the premises and objectives of the State EIS system as expressed in statements of findings and purposes relative to the EIS Act (Act 246, 1974) and in earlier bills proposing EIS system in Hawaii.

The stated purposes of NEPA and of some of the Hawaiian bills that proposed the establishment of environmental policy (and only incidentally the establishment of an EIS system) relate, of course, to the more fundamental aim of environmental management but not necessarily to the immediate goals of an EIS system.

Statements of Findings and Purposes

The following statement of purpose (or one very similar) was included in SB 36 (1973), SB 576 (1973), HB 111 (1973), HB 113 (1973), SB 1826 (1974), and SB 1893 (1974):

> The purpose of this Act is to establish a system of environmental review at the State and County levels which will ensure that environmental concerns are given appropriate consideration in decision-making along with economic and technical considerations.

This statement of purpose was, however, included in the first section of each of these bills, a section that would not have been incorporated in the statutes of the State even if the bill had passed.

HB 1552 (1973) and its HD 1, HB 1792 (1973), and SB 2110 (1974) proposed environmental policy prior to the passage of the State Environmental Policy Act (Act 247, 1974, HRS 344), but did not contain an explicit statement of the purposes of the EIS systems that they proposed.

Only HB 2040 (1974) and HB 2847 (1974) proposed to incorporate the statement of the findings and purpose within a statute, (in the case of these bills a new part of HRS 341 which deals with Environmental Quality Control).

The findings in these bills were as follows:

> (1) The quality of man's environment is critical to his well being;
>
> (2) Man's activities have broad and profound effects upon the interrelations of all components of his environment;
>
> (3) 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 adverse environmental effects which may result from the implementation of certain actions;

(4) Furthermore, 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 soiety as a whole.

The first two of these findings reflect, but with different phraseology, the two premises common to the environmental movement and EIS system that were described in Part I. The third reflects the fourth premise of EIS systems in general and identified explicitly (but not exclusively) the executive branch of the government as the intended client of the EIS system. The fourth, interestingly, calls attention to the importance of the public as a collateral client.

The purpose stated in these bills are identical to that already quoted as stated in earlier bills.

Essentially the same findings and the same purpose were stated in the first section of HB 2067 (74) as originally proposed and as recommended by the House Committee on Environmental Protection. The statement was, however, deleted in HD 1 by the House Committee on Judiciary and Corrections without explanation, although the statement of purpose was incorporated in the report of that Committee (House Stdg. Comm. Rept. 556, 1974), and in the subsequent reports of the Senate Committe on Ecology, Environment, and Recreation (Senate Stdg. Comm. Rept. 956, 1974) and of the Conference Committee (Conf. Comm. Rept. 27, 1974).

Discussion

As will be brought out later the purposes of the EIS system are of vital importance in defining the context within which the significance of environmental impacts is to be judged as a criterion for determining whether and to what extent actions are covered by the system; and within which the EIS's are to be judged acceptable.

Although the statement, in the Conference Committee report on HB 1065 and HB 2067 (74), that the purpose is "to establish a system of environmental review at the State and County levels which will ensure the environmental concerns are given appropriate consideration in decision-making together with economic and technical considerations" may be regarded as authoritative, this statement is not easily accessible to those who are concerned with the requirement of the EIS Act. Whenever amendment of the Act is next proposed, the Legislature would do well to consider incorporating this statement of purpose, or its equivalent, in the Act itself.

Collateral purposes that might well be recognized include meeting the public-education desideratum, indicated by finding (4) in HB 2040 (74) and HB 2847 (74), and the encouragement of concerns with the environmental impacts of actions on the part of the proposers as well as the approvers of action. These purposes should, however, be considered incidental to the prime purpose of providing decision-makers with the environmental impact information they should have.

COVERAGE OF THE EIS SYSTEM

Introduction

In principle, every human action affects the environment; however, the institution of a system for explicit appraisal of the environmental impacts of all human actions is unthinkable. In the establishment of any finite impact appraisal system consideration must, therefore, be given to: i) limiting the aspects of the environment on which impacts are of significant concern; ii) limiting the actions of significant concern; and iii) the concept of significance itself.

Under the National Environmental Policy Act (NEPA), federal agencies are required to consider the environmental impacts of all their activities (42 USC 341:102 generally). Specific EIS's are, however, required only in conjunction with Federal agency recommendations or reports "on proposals for legislation or other major Federal agency actions significantly affecting the quality of the human environment" (42 USC 341:102 C). What constitutes the human environment and what constitutes either a major action or a significant effect on this environment is not always clear (see Druley, 1976), and the deciding factor often appears to be the Council on Environmental Quality guideline that an EIS should be prepared for any major action whose environmental impacts are likely to be highly controversial (40 CFR 1500 (6)(a)).

The coverage of the Hawaii State EIS system is somewhat more explicitly defined. There are several issues as to its present coverage or the coverage that would be appropriate; these are the subject of the discussion in this chapter.

The Environment of Concern

The original concerns in the environmental movement were clearly with the human impacts on the natural environment, and these impacts are clearly the focus of concern in EIS systems. Alterations of natural ecological stresses, including inter-species impact, may be among the natural environmental impacts of significant concern, but EIS systems are concerned with such impacts only if they result from human actions.

Although the scope of EIS systems is thus clearly limited with respect to the origin of the environmental impacts of concern, their scope with respect to the environment in which impacts may occur is not so clearly limited. In neither NEPA or the State system is the environment of concern defined as the natural environment, probably because no need to do so was foreseen. In two different dimensions, however, the lack of definition has resulted in differences in opinion as to the scope of the systems. We characterized these in our preliminary report as the outdoor-indoor dimension and natural-social dimensions. For reasons that will become apparent, we are now characterizing the latter as the physical-social dimension and adding a brief discussion of another dimension, the natural-artificial one.

Natural vs articifial environmental concerns

The concerns that led to the establishment of EIS systems were predominantly with the impacts of human actions on the natural environment. These concerns are almost exactly paralleled, however, by concerns with the impacts of present and future human activities on environmental evidences of past human culture such as historical and archaeological sites. EIS systems are as effective in identifying the impacts of actions on such artificial features of the environment as on the natural features. Act 246 (1974) specifically includes actions proposing uses of historic sites among those covered by the EIS system. Although not all earlier proposals for the EIS system specifically included such actions in the coverage of the system, there is no evidence that the inclusion was considered inappropriate or that it is now considered inappropriate.

Although the coverage of the Hawaii State EIS system relates predominantly to the natural environment, it clearly relates also to historical and archaeological sites, and appropriately so.

Indoor vs outdoor environmental concerns

Except perhaps with respect to caves used for human habitation, indoor environments are artificially created and hence not part of the natural environment if a distinction is made between artificial and natural. Public concerns with indoor environments are reflected in many governmental regulations such as those reflected in building codes and industrial safety regulations, but in practice, the impacts with which EIS's have been concerned have remained almost exclusively those on the outdoor environment. The one notable exception is impacts on the quality of air as it moves through multi-story parking structures.

It seems appropriate that there should be standards pertaining specifically to the quality of air in parking structures or, perhaps better, standards as to provisions for the ventilation of parking structures. Until such specific standards have been adopted, however, it may be best to continue to address potential problems with the air quality in parking structures in EIS's on such structures.

Although the Director of the Department of Land and Natural Resources has suggested the substitution of some other qualifier than "outdoor" we do not know how better to describe the concern of the EIS system in this dimension than to indicate that it is restricted generally to the outdoor environment.

Physical vs social environmental concerns

In characterizing the third dimension as a physical-social one we use the term physical in the broad sense including chemical and biological. At least in one respect the ambiguity in the useage of the term environment in NEPA, with respect to the physical environment-social environment dimension may have been fortunate. If, reflecting the original concern of the environmental movement, the scope of the EIS system had been limited exclusively to impacts on the physical environment, there might have been no basis for weighing the impacts. Some human impacts on the physical environment, although they may be

of considerable interest to scientists or may affect the health of some non-human species, are of very little human concern -- even indirect long-term concern. Faced with a case involving an EIS that described the physical environmental impacts of an action but did not address their human implications, a federal court has wisely ruled that the environmental impacts of concern under NEPA includes the aesthetic and social consequences of alteration of the physical environment (Hanley vs Mitchell, 1972).

Some of the bills proposing EIS systems that were considered by the Hawaii Legislature in 1973, 1974, and 1975 contained explicit prescriptions for the address to social environmental impacts in EIS's -- others did not. Those that did used terms and phrases such as: a) social factors involving the project and economic and technical considerations (HB 111 (73), HB 113 (73)); b) social and economic cost and benefits (HB 1522 & HD 1 (73), SB 1826 (74)); c) cultural costs and benefits and social enhancement (SB 1826 (74)); d) socio-economic effects (SB 1895 (74)); and e) economic advantage (SB 2040 (74)). The Environmental Center advised against the imprecise use of language in such prescriptions (RL:0057), and considered that address to purely social impacts should not be necessary in an EIS (RL:0062).

As originally introduced, HB 2067 did not mention social impact. The definition of "significant effect" in HD 1, however, indicated a concern with the balance of the physical and social environment, and the definition in SD 1, and CD 1 (the version that became Act 246 (1974)) indicated concerns with adverse effects on economic or social welfare (HRS 343-1 (8)). The EQC regulations reflect this concern (1:4s) and require that the project description in an EIS must include a general description of the action's technical, economic, and social characteristics (1:42B3). The regulations also require address in an EIS to population and growth characteristics of the environmental setting (1:42C) and such possible secondary effects as impacts on population and growth (1:42e).

There have been some proposals to amend the provisions of the EIS Act with respect to social and economic effects. SB 1910 (76) and HD 110 (77) would have amended the Act to call explicitly for attention in an EIS to the growth-stimulating effects of an action, but since address to these is already required in the EQC Regulations (1:42(e)), the proposed amendment would not have had much practical effect. SB 2012, HD 1 (76) and HB 125 (77) would have added economic and social effects to the definition of significant impact in the Act but would have deleted the requirement to address such effects. This would have resulted in the inconsistency that the significance of social impacts would be a criterion for requiring an EIS but the EIS would not have to include these impacts.

Clearly a decision whether to undertake a public action or to permit a private one should be made after weighing all the public advantages and detriments that will result from the action, including the purely social and the economic costs and benefits. Whether all advantages and disadvantages merit equal consideration in an EIS is, however, open to question. Economic costs and benefits are, in general, at least as amenable to objective analysis as impacts on the physical environment. However, the purely social effects of actions are generally very difficult to analyze. The direct effects of an action on the physical environment may in time result in indirect effects of such purely social kinds as changes in crime rates, welfare case loads, or poverty. To the extent that such indirect social effects can be identified,

they should be recognized in an EIS. However, if social effects of these kinds were the basis for requiring EIS's on those actions that are their direct causes, the EIS system would have to cover all proposals for changes in police systems, welfare systems, school systems, and the like. In the enormous expansion of the EIS system that would result, the importance of identifying and appraising the impacts of actions on the physical environment would tend to be overlooked, and the system would no longer meet the objectives that led to its establishment. Many of the reviewers of the above discussion in our preliminary report believe that in spite of the limitations to analytic capabilities, there should be more thorough discussion of the social impacts of actions in EIS's. In the preliminary report we may not adequately have distinguished between the direct social impacts and the social implications of physical environmental impacts, and when this distinction was clarified, none of the reviewers seemed inclined to recommend that EIS's be required for actions whose only significant effects would be social in nature.

It seems rational that the central concerns of the State EIS system remain with the effects of actions on the physical environment, that these be appraised in the light of their humanistic impacts, but that the coverage of the EIS system need not extend to the purely social effects of actions.

If the Legislature decides that the purely social impacts of actions should be addressed in somewhat the same manner as environmental impacts are examined in the present system, and in the same documents, it would seem that the documents should be called simply impact statements and not environmental impact statements.

The Actions of Concern

Introduction

Under NEPA, the actions for which EIS's are required are federal agency actions but the actions covered are not restricted to projects to be undertaken by the agencies, the federal courts have ruled than an EIS may be required even if the action is merely the grant of a permit (Sierra Club vs Sargent and Corps of Engineers, 1972) or the guarantee of a mortgage (Silva et al. vs Romney et al., 1973). (The Corps of Engineers recognizes the possible applicability of EIS's to the granting of permits, in routinely incorporating preliminary EIS determinations in the public notices of permit applications.)

The actions covered by the NEPA EIS system thus include private, state, and county projects that are subject to approvals by federal agencies, as well as actions proposed by federal agencies.

In the Hawaii State EIS system and proposals for such systems a more or less clear distinction has been made between government agency actions and the private actions.

The first Hawaii State EIS system, established under the Governor's Executive Order of 23 August 1971, covered actions that would use state lands or state funds.

The EIS systems proposed in early EIS bills considered by the Hawaii Legislature would have covered the following:

SB 36 (73) and SB 576 (73): All major actions.

SB 1841 (73): Construction projects subject to county permits and slaughter house construction subject to state permits.

HB 111 (73): Public construction projects and private projects on conservation lands.

HB 113 (73) and HB 1794 (73): Major private actions.

HB 1522 (73): Public and private projects, except as exempt under regulations.

HB 1522, HD 1 (73): Public and private projects, without provision for exemption.

HB 1792 (73) and SB 2110 (74): Actions as defined in NEPA.

SB 1826 (74): Building construction and land development projects other than those for single family residence, except as exempt under regulations.

SB 893 (74): Changes in land-use classification or county general plans.

SB 2040 (74), HB 2067 (74), and HB 2857 (74): Projects using state or county lands or funds, and projects requiring government agency approvals.

Agency involvement criteria

In HB 2067 as it was passed, and hence under Act 246 (1974) (HRS 343), clear distinction is made between the criteria determining the coverage of agency actions and those determining the coverage of private actions under the Hawaii State EIS System.

The lands-or-funds criterion applicable to agency actions

Under HRS 343-4(a)(1), the coverage of actions proposed by government agencies extends to any "which will probably have significant effects and which proposes the use of state or county lands or the use of state or county funds, other than funds to be used for feasibility of planning studies for possible future programs or projects which the agency has not approved, adopted, or funded."

The law further specifies (HRS 343-4 (b)) that: "Acceptance of a required statement shall be a condition precedent to the use of state or county lands or of state or county funds in implementing a proposed action."

subjective judgements in some cases. A building permit, for example, is generally ministerial, involving no more than checking the proposed plans against explicit zoning restrictions, setback requirements, code requirements, and standards as to sewerage, etc. However, if a variance permitted in a code or standard were granted, the grant of the bulding permit would be discretionary (see Environmental Center RL:0149, p. 7).

The inclusion of a "recommendation" as an "approval" is of significance primarily in the case of actions that meet the criterion of proposing amendments to general plans. The significance of that inclusion will be discussed in connection with the administrative criterion further limiting the EIS-system coverage of private actions.

Other criteria determining coverage of private actions

Legislative history

As originally introduced HB 2067 (74) would not have limited the coverage of private actions by the EIS system except as they required agency approvals. Their coverage was limited, however, in the process of amending the bill prior to its passage. In HD 1, prepared by the House Committee on Judiciary and Corrections, the projects requiring agency approvals were further limited to those in the shoreline setback areas or within 300 feet landward of them, those in the Conservation Land-Use District, those involving the construction of resorts or hotels, and those requiring changes in county zoning or general plans. In SD 1, prepared by the Senate Committee on Ecology, Environment, and Recreation, the definition of the shoreline areas to be covered by the EIS system was changed so that they included the shoreline setback areas or areas within 300 feet seaward of them; the coverage of resort and hotel construction was amended to become coverage of projects within the Waikiki-Diamond Head area of Oahu; and the coverage of projects requiring changes in county zoning was deleted although projects requiring changes in county general plans was retained. These last amendments were retained by the Conference Committee in CD 1 which was passed and approved as Act 246.

Present criteria

Private actions subject to the approval of a state or county agency are not covered in the Hawaii State EIS system unless they fall within one or more of a set of geographic and administrative categories, as follows:

(Geographic categories)

1. Action in the Conservation Land Use District (HRS 343-4 (a)(2)(A));

2. Action in the shoreline area defined under the shoreline setback law (HRS 205-31) (HRS 343-4 (a)(2)(B));

3. Action in an officially registered historic site (HRS 343-4 (a)(2)(C));

4. Action in the Waikiki-Diamond Head area of Oahu (HRS 343-4 (a)(2)(D));

(Administrative category)

5. Action proposing amendment to an existing county general plan resulting in a designation other than agriculture, conservation, or preservation (HRS 343-4 (a)(2)(E)).

Proposed revisons, generally

Several changes in the coverage of the State EIS system have been proposed in bills to amend HRS 343 or otherwise. Most of these relate to the criteria for determining EIS-system coverage of private actions. They may be grouped as follows:

1) Proposed revisions in the geographic categories

2) Proposed substitution of categories of permits for geographic categories

3) Proposed revisions in the administrative categories

4) Proposed provision for county options

5) Proposed deletion of criteria limiting coverage.

Before discussing these groups of proposed revisions, it seems well to identify the reasons for prescribing, in the State EIS Act, limitations to the system coverage of private actions beyond the limitation that the actions must be subject to agency approvals. We suggest that there are at least two such reasons.

i) It was sensible to limit the initial coverage of the EIS system until its utility could be demonstrated. Although certain expansions of the coverage of the system should now be entertained, the system is not operating well enough to encourage unlimited expansion. Unless and until the competencies and concerns of agencies in the use of the system are increased, great expansions of the coverage of the system might easily overload it and result in less adequate or more inappropriate usage.

ii) Some environmental impacts are of statewide concern; others are of concern primarily within a district or an island. It seems sensible that the coverage of the EIS system presecribed in the State EIS Act should relate primarily to actions that will have impacts of statewide concern. It seems equally sensible, however, that the coverage of actions whose impacts will be of local concern may be left to the counties to determine, and that the State EIS Act should facilitate and encourage county use of the EIS system, but not prescribe its coverage of these latter actions.

Proposed revisions in geographic categories

Revisions in the geographic categories determining EIS-system coverage of private actions that would have been made by amendments proposed in various bills include changes in the definitions of certain of the categories, additions of new categories, and deletion of present categories.

HB 368 (77) would have required EIS's on all actions to be undertaken in conservation lands, regardless of the significance of the environmental impacts that would result from them.

The EIS-system coverage of private actions in shoreline areas was dealt with in HB 2012 and its HD 1 (76); SB 1264 and its HD 1 (77); HB 125 (77); and HB 1065 and its HD 1 (77). In HB 2067, HD 1, the shoreline areas covered would have extended 300 feet inland from the shoreline. As amended in SD 1, however, they included merely the shoreline setback areas, defined in HRS 205-31, and areas 300 feet seaward of them. Since the shoreline setback lines lie only 20 to 40 feet inland of the shoreline, and all areas seaward of the shoreline are in the Conservation District, the coverage in SD 1 (and in the law as passed, HRS 343-4 (2)(B)) is mainly redundant to the coverage of the Conservation District (HRS 343-4 (2)(A)), the only additional coverage provided being that in the narrow setback areas along the shoreline. In the amendments proposed to the law these areas would be replaced by the Special Management Areas (SMA's) established in each county pursuant to the requirement of the Shoreline Protection Act (Act 176) of 1975. This Act required that the SMA's extend inland at least 100 yards from the shoreline (HRS 205 A-22 (5)).

HB 1065 (77) would have extended the coverage of the EIS system to those actions in the Agricultural Land-Use District that require special use permits.

HB 2069 (76) would have added the City and County ordinance map for the Diamond Head Historical, Cultural and Scenic District to the original definition of the Waikiki-Diamond Head area in which EIS's are required, and HB 125 (77) would have restricted the area covered to the Diamond Head Historical, Cultural, and Scenic District.

HB 2069 (76) would have extended the coverage to the Punchbowl Historical, Cultural and Scenic District as well, and HB 2012, HD 1 (76) would have extended the coverage to all actions to be undertaken in all historic, cultural and scenic districts established by the counties.

HB 1088 (75) would have extended the coverage to actions within stream or tsunami flood-hazard zones and on all lands having slopes of 20 percent or greater.

HB 1065 and its HD 1 (77) would have provided explicit authorization to the counties to extend the coverage of the State EIS system to actions in other geographically defined areas.

Discussion

Rationally the EIS system should cover actions in all areas in which, by State law, special consideration must be given to the environmental impacts of development. Such areas include those in the Conservation Land-Use District, in which actions are covered by the present EIS system, established pursuant to HRS 205-2. However, as pointed out by the Environmental Center (RL:0194) the coverage of all actions in the Conservation District regardless of the significance of their environmental imapcts, as was proposed in HB 368 (77), would have been inconsistent with the objectives of the EIS Act.

The rationale for the proposal in HB 1088 (75) that the EIS system cover actions on all lands with slopes of 20 percent or greater was probably based on the susceptibility of many steep lands to soil erosion. However, as pointed out by the Environmental Center (RL:0131), the proposed slope criterion was arbitrary and did not take into account either rainfall or soil type.

Areas of statewide environmental concern also include the Special Management Areas (SMA's) along the shoreline. Although HB 2067 was specifically amended in 1974 to change the definition of the shoreline areas covered by the EIS system so that they would extend only 20 to 40 feet inland, instead of 100 yards as originally proposed, the passage of the Shoreline Protection Act in 1975 should rationally have led to the enlargement of the shoreline areas covered by the EIS system to include the SMA's, which must extend at least 100 yards inland. The Environmental Center pointed out this rationality in its reviews of the bills that would have accomplished this enlargement (RL:0184, RL:0194, RL:0200, RL:0250, RL:0217), and in its report prepared for the counties on the provisions of the Shoreline Protection Act (SR:0009). Although not required by state law, the City and County of Honolulu may require EIS system coverage of actions in the SMA on Oahu under its Shoreline Protection Ordinance (Ord. 4529, as amended by Ord. 77-100).

The proposal that those actions in the Agricultural Land-Use District that need special-use permits should be covered by the EIS system merits special discussion. The rationale for the extension of coverage in this case depends on the extent to which, in calling for the establishment of the District, the Legislature was concerned primarily with preserving the economic base provided by agriculture or with broader aspects of environmental quality. From discussion with a representative of the Department of Agriculture, it appears that there is little concern in the Department with minor actions proposed in land not in actual agricultural use, and that the major concern is with major actions proposed in prime agricultural land. Consideration should be given to adding, to the geographic criteria for coverage of private actions, actions in prime agricultural lands as these are defined in State regulations.

We recommend that the Act be amended to extend the coverage of the EIS system to: i) actions in Special Management Areas established under the Shoreline Protection Act; and ii) Prime agricultural lands in the Agricultural Land Use district.

The rationale for including private actions of other geographically defined categories depends in large measure on whether the environmental concerns relating to these actions are primarily those of the State or of a County. If there is adequate statewide concern, it seems appropriate that the extension of coverage should be in the EIS Act; if not it seems more appropriate that the decision as to coverage should be left to the counties.

For example, although flood hazards are of statewide concern and the Department of Land and Natural Resources has had a hand in outlining flood hazard districts, the extent of Hawaiian involvement in the Federal Flood Insurance program seems to be subject to determination by the counties, and it is thus logical that the counties should have the option to extend the coverage of the EIS system to flood hazard zones.

County option also seems logical in the case of Historic, Cultural, and Scenic Districts which are established by county ordinance.

The Waikiki-Diamond Head area is a special case. The indication of a statewide concern with the environment in this area through the Legislature's inclusion of actions in this area in the coverage of the EIS system may clearly be considered appropriate. The appropriateness would seem somewhat reduced, however, if the area were limited to the Diamond Head Historic, Cultural, and Scenic District established by the county.

Another geographic category in which there is clear statewide environmental concern is actions in the Honolulu Civic Center which, although established by County Ordinance, is recognized in State law (HRS 6-7) as the site of the State Capitol and is the area in which other state buildings are concentrated, including Iolani Palace. (These provisions are now made in Sections 34 and 35 of a new chapter of Hawaii Revised Statues which has not as yet given a number.)

Specific authorization to the counties to extend the geographic coverage of the EIS system would be a useful prod to county extensions of the use of the system and we suggest that it be provided.

Proposed additions to and changes in administrative criterion

The effect of the present EIS-system coverage of private actions "proposing any amendments to existing county general plans..." depends critically on how the term approval is interpreted. Act 246 (1974) does not define approval, but the EQC regulations define approval in such a way as to include agency recommendations; and HB 1065 (77) proposed the addition of EQC's definition to the Act.

This definition of approval was intended to remedy a disparity between the coverage of the EIS system in a county in which a general plan amendment may be made by a planning agency or board and the coverage in a county in which such an amendment must be made by the county council.

An action proposing an amendment of a county general plan is covered by the EIS system (HRS 343-4(a)(2)(E) if it is subject to the "approval of an agency" (HRS 343 (4)(c)). A planning department is an agency, as defined in the Act. However, a county council, as a legislative body, is not an agency as defined by the Act, and if the final approval of the Council is necessary to an amendment of a general plan, as it is in some counties, an action proposing such an amendment is not covered by the EIS system if the term approval is strictly interpretated. If the meaning of the phrase "approval of agency" is enlarged, however, to include a "recommendation" for or against approval by an agency such as a planning department or board, the action proposing a general plan amendment would be covered by the EIS system.

Since there is as yet no legislative authorization of the EQC definition, the definition is open to challenge. The possible disparity in coverage among the counties should be dealt with by amendment of the Act, either as proposed in HB 1065, by deleting the entire provision respecting actions proposing general plan amendments, or otherwise.

HB 1088 (75) would have extended the coverage of the EIS system to include State actions that are inconsistent with county zoning or general planning. To the extent that this may actually occur, it would seem appropriate that the EIS system cover the inconsistent actions.

The matter of appropriate EIS system coverage of planning actions will be discussed at greater length in Part IV.

Additional administrative categories of actions that would logically be covered by the EIS system are comprised of actions that propose certain private actions in the Land-Use-District boundary changes.

As pointed out in the discussion of geographic categories, the statewide environmental concerns in the establishment of the Conservation Land-Use District thoroughly justify coverage of actions in that District by the EIS system. There is equal justification for the coverage of actions that would propose that the boundary of that District were changed so as to assign land in the Conservation District to some other District.

The environmental concerns relating to prime agricultural lands that we have discussed earlier similarly suggest that Land-Use District boundary changes that would assign to some other District prime agricultural land in the Agricultural Land-Use District should be covered by the EIS system.

We recommend that the EIS Act be amended to include, in the coverage of the EIS system: i) actions that propose to assign land within the Conservation Land-Use District to any other Land-Use District; and ii) actions that propose to assign prime agricultural land within the Agricultural Land-Use District to any other Land-Use District.

Proposed provision for county options

Reference has already been made to proposals that the counties be authorized to extend the coverage of the EIS system. SB 734 (77) would have replaced all the requirements as to coverage of private actions in the present law by such an authorization. As pointed out by the Environmental Center (RL:0219), this would unwisely have left optional with the counties the requirements for EIS's even in the case of actions subject to State agency permits, whose permit grants should depend upon the significance of the environmental impacts.

Proposed substitution of criteria based on nature of permits

The use of categories of agency approvals, rather than geographic categories, for defining the extent of EIS system coverage of private actions, has been suggested to us by the Department of Land Utilization of the City and County of Honolulu and other reviewers of our preliminary report.

In part the coverage under this alternative would remain identical to present or proposed coverage. Projects in the Conservation District subject to conditional use permits would be covered whether the basis for the coverage were the geographic location or the nature of the permits. Projects in the Special Management Areas along the coasts subject to SMA permits and projects in the Agricultural District subject to special use permits would be covered similarly under either a geographic or an approval category.

The principal rationale for the suggestion is that in the case of many approvals, even those considered discretionary, the discretion that the agency is allowed to exercise is limited to only a very few of the aspects of a project and its impacts that must be addressed in an EIS. If the EIS system is applied to a project subject to such an approval, an EIS is required if there is a significant impact and the EIS must address all the impacts, regardless of whether the agency has any power to disapprove the project on the basis of detrimental impacts or to require its modification to minimize them.

The identification of categories of approval allowing various degrees of discretion in environmental matters to the approving agencies is beyond our capabilities within the time limits of the present study. The tailoring of environmental assessment and EIS requirements to matters within the discretionary authority of agencies, even if they were desirable, is even further beyond our capabilities.

However, the suggestion merits thorough future consideration.

Proposed deletion of criteria

SB 1477 (75), HB 1904 (75), and SB 2444 (76) would have deleted all criteria limiting the coverage of private actions covered by the EIS system, so that the system would cover all private actions that are subject to permits and might have significant environmental effects. In principle, the EIS system defined under the proposed amendments would be ideal. However, the number of classes and types of actions to be considered for possible exemption, the number of actions to be environmentally assessed, and the number of EIS's would be enormously increased over the numbers in the present system. Until the present system works better it would seem that so great an expansion is unwise, and the Environmental Center advised against undertaking it in 1975 and 1976 (RL:0121; 0168).

Generality of actions

There are almost no explicit indications in EIS legislation, national or state, of the generality of the actions to which EIS's are intended to relate. Since, under NEPA, EIS's are to be prepared by agencies, it is implicit that the actions to which they apply are to be those proposed or approved by agenices, and the term "action" is defined in the Hawaii State EIS Act as "any program or project to be initiated by an agency or applicant".

In practice, most of the actions for which EIS's have been prepared are of the nature of projects, but questions have been raised whether the use of EIS's should not be extended to programs including many projects and even plans covering many programs.

We included a chapter on scheduling the consideration of environmental impacts in this part of the preliminary report. However, the earliest time when environmental impacts of human actions may be considered is closely correlated with the generality of the actions considered. The impacts of individual projects cannot be addressed until the projects have been identified, whereas at least the general nature of the impacts of programs and plans that cover many projects may be addressed when the programs and plans are formulated. Hence in this final version of the report we have shifted the discussion to the part on the place of the EIS system in environmental management.

The impacts of concern

Physical and social impacts

In our discussion of the environment of concern we have indicated that, in the Federal and State EIS systems, the environment of major concern in an EIS system is the physical environment, and we have suggested that an EIS should not be required for an action whose only significant direct impacts will be of a purely social nature, such as an expansion of a police force or of the welfare system. However, the EIS Act clearly requires attention in an EIS to commitments of natural resources, curtailments of beneficial uses of the environment, and adverse effects on the economic and social welfare (HRS 343-1(8)), and the EQC regulations clearly prescribe that the impacts to be addressed include those that are "secondary or indirect, as well as primary or direct" (Reg. 1:42 e), all of which are clearly social in nature or have social implications.

In themselves, alterations of the physical environment have little human significance. The primary concern of an EIS system is primarily with the human implications of physical environmental changes. It is especially in the light of these human implications that the signficance of the physical environmental impacts is to be judged. The indirect social impacts should, then, be of major concern in an EIS. The criterion of significance in relation to EIS's is discussed at some length below, but misinterpretation of the discussion of the physical-social environment question in our preliminary report leads us to stress here that our suggestion does not mean that social impacts should not be addressed in an EIS if one is required.

The significance criterion

The concept and its application

The test of the possible significance of the environmental effects that may result from an action was applied in the first Hawaii State EIs system, as well as in NEPA, for determining whether an EIS on the action was needed. Its application was proposed to various extents (or not proposed) in the several bills for new State EIS systems that have been introduced, and it is applied in the present State EIS system. The significance of potential environmental impacts is the essential concern of the appraisals in EIS systems. However, significance is a relative characteristic, not an absolute one; and it is a characteristic not amenable to unequivocal determination. Further, the use of a characteristic that is to be assessed as a basis for determining whether the assessment should be made is logical only in a practical sense.

The matter of practicality enters through the facts that all human actions have environmental impacts, but that the impacts of most are so minor, so well recognized, or so universal that their special appraisal is not warranted. The most cost-effective EIS system is one that provides for successive stages of appraisal through which actions are eliminated successively from further concern on the basis of improbabilities that they will have significant impacts, the appraisals becoming more intense in the successive stages.

Since the significance of environmental impacts is relative, not absolute, and is essentially amenable only to imprecise judgment, the best that can be doen in applying the concept of significance in an EIS system is to identify the objectives of the system (in the context of which the judgments are to be made), to prescribe the procedures by which the bases for judgment are to be assembled, and to assign the responsibilities for making the judgments. It is primarily for this reason that the definition of the purposes of the EIS system is so important.

References to concept

The environmental impacts with which SB 36 (73), SB 576 (73), HB 111 (73), HB 113 (73), HB 1792 (73), and HB 1794 (73) were concerned were adverse impacts without limitation as to significance. HB 1522 and HD 1 (73) indicated restriction of the concern to significant impacts but did not define them. Significant impacts were defined in SB 1826 (74) and SB 1893 (74), and although the concerns originally indicated in SB 2040 (74) and HB 2067 (74) were with adverse impacts, these were replaced by significant impacts, which were defined.

HB 368 (77) proposed removal of the significance-impact limitation from actions undertaken in the Conservation Land-Use District, but as pointed out by the Environmental Center (RL:0194) this would have subjected all actions on this district to EIS requirements even if their environmental effects would be entirely insignificant.

The definition of significant impact in HB 2067, HD 1 as passed and approved as Act 246 (1974) reads as follows:

"'Significant impact' means the sum of the effects that affect the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the enviornment, are contrary for the State's environmental policies or long-term environmental goals as established by law, or adversely affect the economic or social welfare" (HRS 343-1 (8)).

As pointed out by the Environmental Center, this defines "environmental impact" (in the singular) in terms of multiple effects, whereas the references to the concept elsewhere in the Act are in terms of "significant environmental effects (HRS 343-4 (a)) or minimal or no significant effect on the environment" (HRS 343-5 (6) and (7)). The definition also implies the equivalence of effects and actions ("the sum of actions...including actions that...").

Although the deficiencies in the definition and the inconsistency between definition and useage of the concept are of little practical importance, it would be well to improve the definition editorially whenever the EIS Act is next amended.

Use of concept as EIS-requirement criterion

As will be shown later, the wording of Act 246 has allowed the EQC to design an EIS system that satisfy well the specifications of a multiple-stage system. However, the wording of the Act leaves a loophole in its use of impact significance as a criterion for requiring preparation of an EIS. HRS 343-4 (b) and (c) allow but do not require an agency to require an EIS on an action that it proposes or that is subject to its approval if the action "may have a significant effect on the environment", but HRS 343-4 (a) actually prescribes the requirement only if the action "will probably have significant environmental effects" (emphasis added). Until an EIS has been prepared on an action, an environmental impact of the action may not even be identified and the significance of identified impacts may not be recognized. An agency is unlikely to require preparation of an EIS for one of its own actions or for an action proposed to it that it favors if ensuing significant effects are merely possible and not probable as judged by pre-EIS information.

It is, of course, impossible to prove that an action will have no significant environmental impact. However, the criterion that an action may reasonably have such impacts would be more appropriate for the requirement of an EIS than that the action will probably have such impact. We recommend that the EIS Act be amended to require the preparation of an EIS for an action if it may reasonably be supposed that the action will have significant environmental impacts.

Inverse impacts

Although the impacts of major concern in an EIS system are those of an action on the environment, the inverse of these impacts ought not to be neglected--the impacts of the environment on the action or on human activities that will be promoted by the action. In particular, two kinds of inverse impacts should be of concern--those of natural hazards and those of natural resource limitations. For example, a proposed structure may itself be vulnerable to a natural hazard; its construction may be made difficult by the hazardous condition or by the limitation of some resource; the use by which a project is justified may place people in jeopardy with respect to either a natural hazard or the exhaustion of a natural resource. The matter of inverse impacts is discussed further in the chapter on EIS contents.

THE MULTIPLE SCREENING PROCEDURE

Introduction

The procedures by which it is determined which actions are covered by the EIS system, among the host of those whose undertaking is considered, and to what extent they are covered, are prescribed by Act 246 (1974), and in greater detail by the EQC Regulations. The procedures for actions proposed by agencies (Figure 2) differs in detail from that for actions proposed by private applicants (Figure 3). However, the principal steps in both procedures are identical and may appropriately be described as constituting a multiple-screening procedure.

Actions that are covered by the system are identified by the first screen as prescribed in the Act itself. The identification criteria are that an action: i) proposes use of state or county lands or funds, or ii) is subject to agency approval and meets any of the five geographic or administrative criteria determining coverage of private actions (see section on criteria determining coverage of private actions).

From the actions that are passed by the first screen, those that are exempt are identified by the second screen. As provided by the Act (HRS 343-5(6) and (7)), the EQC has provided for exemptions in its Regulations in the form of: i) ten classes of actions that will generally be exempt (Reg. 1:33a); ii) a statement as to exceptions to the exemption of actions within those classes, for example, actions in especially sensitive environments (Reg. 1:33b); and iii) a requirement that agencies list types of actions that fall within the ten classes and are not subject to the exception (Reg. 1:33d).

The environmental impacts of the actions that pass the first screen but not the second must be assessed by the proposing agency (HRS 343-4(b); Reg. 1:30a) or the approving agency (HRS 343-4(c); Reg. 1:30b). The results of the assessment screening may be either a Negative Declaration--a declaration that no significant impact will result from the action and a determination that no EIS must be prepared (Reg. 1:31c 1)--or a Preparation Notice--a declaration that a significant impact may result from the action and a determination that an EIS must be prepared (Reg. 1:31c 2).

An action that is rejected by the first screen, that is passed by the second screen, or that is the subject of a Negative Declaration on the basis of the third screening, needs no further consideration in the EIS system. The preparation, review, and acceptance of an EIS is a condition precedent to the undertaking or approval of the action only if it passes the first screen, is rejected by the second, and is the subject of a Preparation Notice.

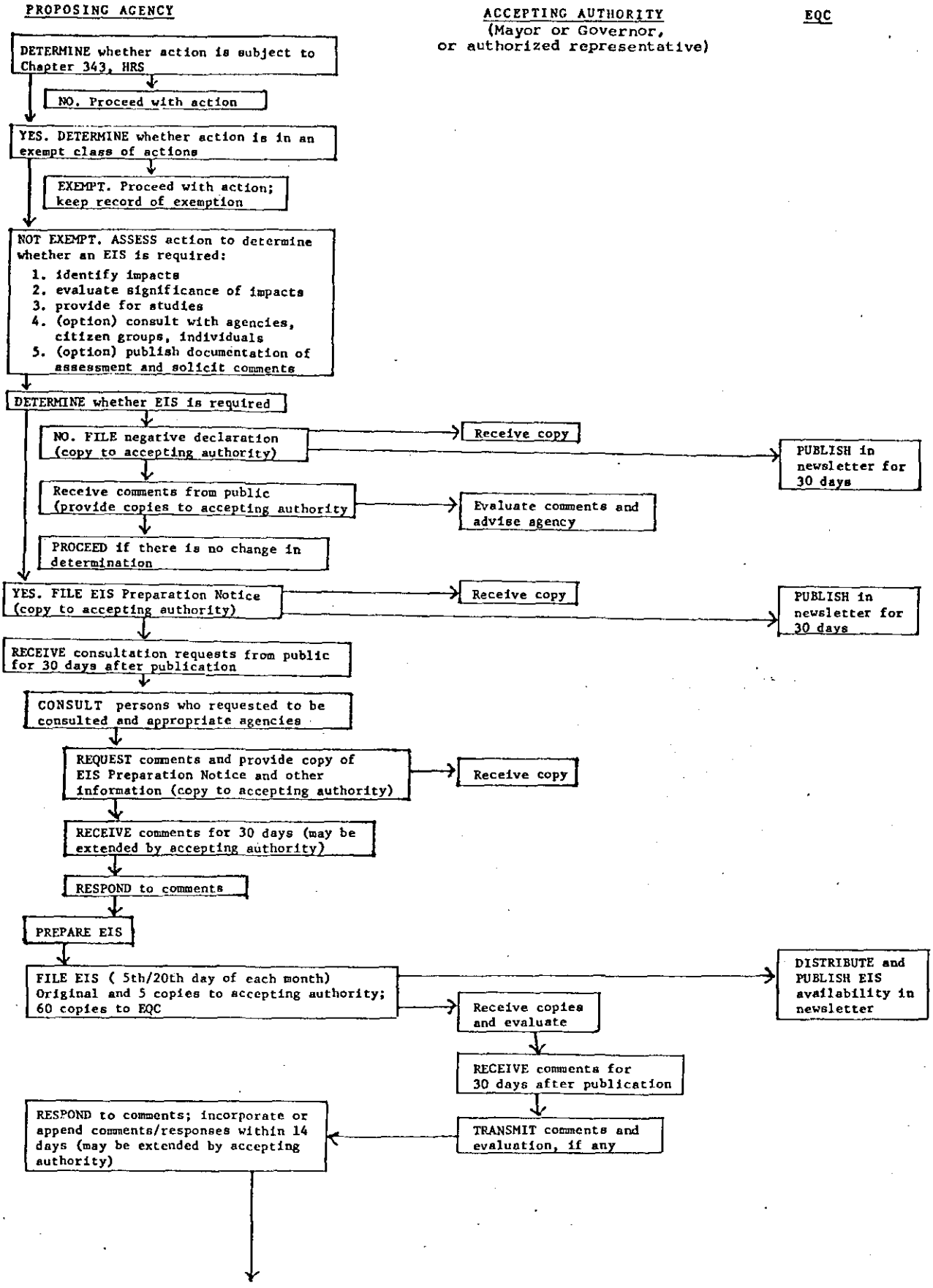
The Exemption Screen

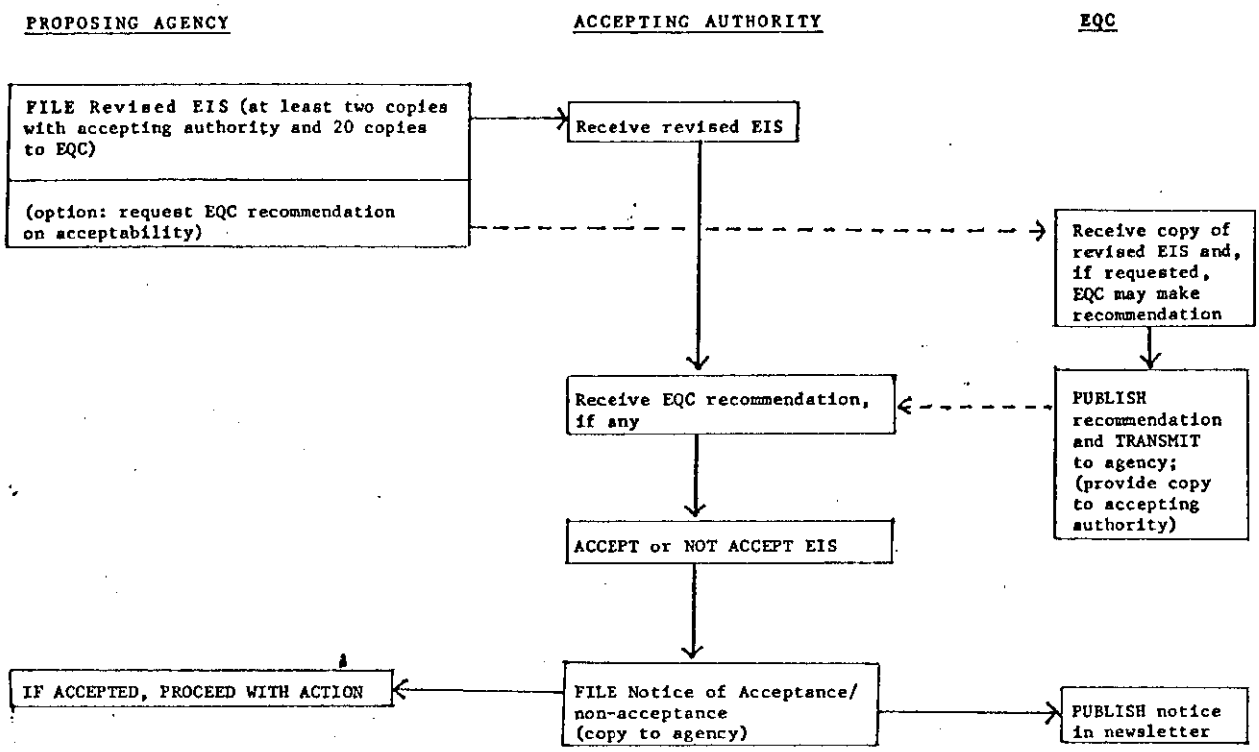
Introduction

As pointed out by the Environmental Center in a 1976 review for the Senate Committee on Ecology, Environment and Recreation of "Exemptions from Environmental Assessment in the State EIS system" (RL:0193), the exemption screen is a critical one. The EQC Regulations state that all exemptions under its designated

Figure 2

EIS PROCEDURES FOR AGENCY PROPOSED ACTIONS





Prepared by OEQC

classes "are inapplicable when the cummulative 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" (Reg. 1:33b). However, there is no mechanism for identifying those actions for which the exemption indicated by inclusion in an agency exempt list is thus inapplicable. Even within the EQC list itself there are exempt classes that are defined so broadly as to include actions that will generally have significant environmental impacts, and, especially as originally proposed, there were many types of actions listed by agencies that included actions whose impacts would be significant.

There are procedural problems with the method of EQC approval of exemption lists, and the exemption provisions in the EIS Act itself are unnecessarily redundant.

Exemption provisions of Act 246

In an October 1975 review of the EIS Act and EQC regulations (RG:0023), the Environmental Center called attention to an unnecessary redundancy in the provisions of the Act itself with respect to exemptions.

> Both of the two subsections of the Act that provide for lists of classes of action to be exempted use the criterion that the actions "will probably have minimal or no significant impacts" [HRS 343-5(6) and (7)]. Other than a minor typographical error [the omission of (a) in the citation of Sec. 343-4 (a)(2) in Sec. 343-5(7)], the subsections differ only in that the second pertains to actions "which provide essential public services." Actions to which this second subsection pertains are included entirely in the first subsection. No further clarification is added by the redundancy.

We repeat the Center's recommendation that, when any amendment of Act 246 is undertaken:

> That Act 246 be amended to delete the second subsection [of 343-5(7)] pertaining to lists of classes of action to be exempt from EIS requirements.

Exempt classes of actions

Present list

The classes of actions exempt from assessment by the EQC may be summarized as follows:

1. Operations, repairs, or maintenance of existing structures, etc.
2. Replacement of existing structures, etc.
3. Construction of single, new small structures, including single family residences, etc.

4. Minor alterations to land, water, or vegetation.

5. Basic data collection and research.

6. Administrative activities.

7. Construction of accessory structures.

8. Interior alterations.

9. Demolition of structures, with certain exceptions.

10. Zoning variances, with some exceptions.

As pointed out by the Environmental Center in the 1976 review referred to above (RL:0193) and in earlier reviews, the EQC has actually defined several of these classes in such a way as to include certain types of action that will generally have significant environmental impacts and hence should not be exempt.

Significance of impacts of maintaining topographical features

The major problem concerns the first exempt class, which has been defined by the EQC (Reg. 1:33a 1) so that it includes "...maintenance of exisitng topographical features. The inappropriateness of this inclusion has been discussed in detail by the Environmental Center (RL:0023) as follows:

> Topographical features are natural features subject to natural change. An interference with a natural change is just as much an environmental impact as is an inducement of a change to a natural feature. In some cases the artificial maintenance of a topographic feature, is appropriate--in other cases it is not.
>
> Outstanding among such features whose artificial maintenance is attempted are beaches. No listing of examples seems necessary to indicate that some beach maintenance activities are successful but some have highly significant undesirable environmental impacts. Categorical exemption of beach maintenance operations from EIS requirements is quite inappropriate.
>
> The recognition of exceptions to the general classes of exemptions reduces the inappropriateness of the present exemption of maintenance of topographic features, but not sufficiently. Together with the cumulative effects of successive actions, the undertaking of an action "in a particularly sensitive environment" constitutes an exception to the exemption [EQCR 1:33b]. However, the need for maintenance of a beach stems from its susceptibility to change, hence every beach requiring maintenance must be considered to be in a sensitive environment. It can be interpreted that only extreme beach maintenance need indicate a particularly sensitive environment, and most beach maintenance activities, even though they have significant environmental effects will be exempted.
>
> Similar arguments can be made in the case of other natural features such as stream banks and flood plains. It cannot be represented that maintenance of natural features is necessarily undesirable, but only that the environmental impacts of each program of maintenance of a natural feature should be analyzed, as is required in the preparation of an EIS.

The EQC exemption of actions maintaining topographic features is quite inappropriate. The definition of the first exempt class should be amended to delete the "topographic features" to which it now applies.

Significance of impacts of construction, maintenance or demolition of structures

The third EQC exempt class applies to the "construction and location of single, new, small facilities or structures" including certain specifically identified types. The second EQC class applies to the replacement or reconstruction of existing structures or facilities. The ninth EQC class applies to the demolition of structures. As pointed out by the Environmental Center when the EQC Regulation were first proposed in 1974 (RR:0021).

> Serious envrionmental impacts may result from constructing, reconstructing, or demolishing such structures as those built to control erosion, control drainage including flooding, control wave effects, or induce sedimentation as on a beach. Yet the proposed regulations would unwisely exempt from EIS preparation the construction of such structures if they are "small" in sec. 1:33 (a)(3), and the reconstruction and demolition of such structures whether large or small in secs. 1:33(a)(2) and 1:33(a)(9) respectively.

The remedy proposed by the Center in the case of these inappropriately broad classes was through amendment of EQC regulation 1:33(b) rather than 1:33(a):

> Sec. 1:33(b) renders the exemptions in sec. 1:33(a) inapplicable in two cases: *i)* successive actions whose cumulative impact may be significant; and *ii)* actions with normally insignificant impact carried our in a particularly sensitive environment. However, the environmental control structures that should be excepted from the exemptions of sec. 1:33(a)(2)(3), and (9), need not be built repeatedly to have significant impact; and they cannot be considered to have normally an insignificant impact, because they are built in sensitive environments deliberately to have an impact on those environments. To render inapplicable the exemptions from EIS preparation for the construction, demolition, or reconstruction of such structures as those discussed, sec. 1:33(b) should be amended by adding a third case of inapplicability of automatic exemption: "...or when an action consists of the construction, demolition, or reconstruction of a structure intended to affect the external environment.

On the basis of Reg. 1:33(b), if it is amended as suggested, the EQC could reject as inappropriately exempted any type of construction, reconstruction, or demolition of a structure intended to affect the external environment, such as flood-control structure, a breakwater, or a structure influencing beach erosion and accretion.

Exempt types of actions

Introduction

As originally proposed by agencies, the lists of types of actions to be exempt contained many types defined so broadly that they would have significant

environmental impacts. In addition, in many of the lists the types of action proposed for exemption were not explicitly related to the classes of actions approved for exemption by the EQC Regulations. The inappropriateness of exempt types of actions was considerably reduced as the types were redefined in the lists that have been approved by the EQC. Some problems still remain, however, even with the agency lists as approved by EQC. The following discussions of the remaining problems in the approved lists and suggestions as to remedies are drawn in part from a 1976 review by Environmental Center (RL:0193).

There are also problems with the procedures used in exemption list review and approval, and with the status of the lists already approved stemming from a ruling that the procedure was improper.

Exempt types of Class 1

Apparently on the basis of the present definition of EQC Class 1, the State Department of Transportation has included in its list of exempt types of action: "19. Sand replenishment to existing beaches." Beach sand replenishment would not be undertaken if it did not have a significant environmental impact in reducing the effect of beach erosion. In some cases the direct effect of the replenishment is beneficial. In other cases the replenishment may result in detrimental sand accummulation, for example in channels or covering live reefs. The use of sand of inappropriate character may result in detrimental effects in the beach intended to be improved. Detrimental effects may well result from the removal elsewhere of the sand to be used in replenishment.

No sand replenishment program should be undertaken at any beach without assessment of the environment impacts of the program. The exemption is inappropriate.

Exempt types of Class 3

In general the types of class 3 action in the approved agency exemption lists seem appropriate. However, questions may be raised whether some of the structures are sufficiently "small" to have negligible environmental impacts.

The construction of roofs over existing bleachers is included in the exemption list of the Honolulu Department of Parks and Recreation approved 14 April 1976. The construction of such roofs, even over small bleachers, might result in a significant detrimental esthetic impact. The water tank construction included in the same list might have similar detrimental environmental effects. The operation of cesspools, whose construction is included in the list of the same agency approved 3 March 1976, might result in deleterious water quality effects, etc.

Exempt types of Class 4

The exemption list of the Honolulu Department of Public Works approved 18 Aug. 1975 includes, under "D" [Class 4], "2. Chemical control of vegetation," without any qualification as to purpose, method, or extent of herbicide usage. Chemical control of vegetation is also included in the list of that agency approved 15 Dec. 1975 under Class 1 in relation to "vegetation clearing from stream," where the herbicide to be used and the method and extent of use are carefully specified.

The EQC is considering under what conditions herbicide usage is properly exempt and under what conditions the proposed usage should be the subject of environmental assessment. Chemical control of vegetation should not be exempt without qualification.

What magnitude of alteration is considered "minor" by some of the agencies is not clear. For example, the Honolulu Dept. of Public Works has included in its list of exempt types, approved 18 Aug. 1975, berms, drainage ditches, and "ground improvements" with no limitations as to size.

The magnitude of alterations considered "minor" should be stated in the description of each type of action proposed for exemption.

Exempt types of Class 5

The class 5 types of action in the approved agency exemption list seem generally appropriate. Comment should be made on the collection activities listed, for example, by the DLNR Fish and Game Division. The collection of individuals of a rare and endangered species may affect significantly the population and survival of the species. Such collection should be undertaken only after assessment of the impact...

The Environmental Center has made a special study of the appropriate application of the EIS system to the University research program (SR:0010). It has now been decided that the Center and the Office of Research Administration should develop and institute a system for this application. In a first stage those subprograms appropriate for exemption under EQC Class 5 or other classes will be listed for the approval of the University Administration and EQC.

Exempt types of Class 7

As in the case of exemption Class 4, it is not clear what magnitude of construction is intended in the case of some of the actions included in the Class 7 types listed by some agencies. The list of the Department of Accounting and General Services, for example, includes scoreboards and portable bleachers. These are no doubt considered accessory to athletic fields. Their construction may, however, materially change the esthetic impacts of the fields... The list of the Hawaii Housing Authority includes signs and fences, but it is not even clear to what facilities these would be auxiliary and no limits are set to their size. Some size limits should be placed on such structures to make their exemption appropriate.

(It should be noted that bath houses continue to be placed on beaches so close to the shoreline that they are vulnerable to beach retreat (although not by the Department of Accounting and General Services); that beach and maintenance projects or restoration are proposed as a consequence; and that the proposed beach projects may have very detrimental effects.)

Lacks of assignment of exempt types to exempt classes

The types of action listed for exemption by some agencies have not been assigned to the exemption classes adopted by the EQC. The original list and one of the additional lists approved for the State Department of Transportation lack such assignments, as do the lists for Honolulu Department of Services and [the] original lists of the Hawaii County Department of Public Works.

Exemption list procedures

In its October 1975 review of the EIS Act and EQC regulations (RG:0023), the Environmental Center called attention to the discrepancy between: a) the EQC requirement for formal documentation of rationale for the determination that individual actions would have no significant environmental impacts (assessments leading to "negative declarations"); and b) the lack of any similar requirement in the case of exemption of action types, each type including many individual actions.

> Probably the gravest inadequacies of the State EIS system relate to the lists of types of actions to be exempt that are compiled by agencies under the provision of the EQC regulations. This provision specifically requires that these lists must be "consistent with both the letter and intent expressed these exempt classes [established by EQC] and Chapter 343, Hawaii Revised Statutes" [EQCR 1:33d]. The inadequacies may stem from the fact that no agency has or can be expected to have adequate broad internal environmental competence, and the tendency of each agency to promote its own programs and hence to minimize the disclosure of environmentally detrimental impacts of those programs...
>
> For the purposes of discussion it seem desirable to distinguish between three sets of types of actions:
>
> *i*) Types of actions that can obviously without more than the most cursory assessment be regarded as having, without exception, no significant environmental impact.
>
> *ii*) Types of actions that can be found by assessment to have, without exception, no significant environmental impact.
>
> *iii*) Types of actions that can be found by assessment to have, no significant enviornmental impact generally, but including a few actions that may have a significant impact.
>
> There is, of course, no concern with the types of the first set. Common sense indicates that an exhaustive search for and listing of these types would be unproductive. The distinction between the second and third sets is, however, important. Careful assessment will be necessary to determine which particular actions may have significant environmental effects within a class which in general would not have such effects.
>
> The EQC regulations do not call for any assessment of a [type] of actions proposed for categorical exemption from the EIS requirements. Even assessments carried out under the EQC provisions would be limited in their utility. These provisions, restricted to individual actions require documentation and notice of determination, but leave optional the public distribution and review of the documentation [EQCR 1:31].

In practice the exemption lists submitted by some agencies have been published and approved without even identifying which general EQC exemption class justifies the exemption of each listed type of action [e.g. exemption lists proposed by State Dept. of Transp., City and County Dept. of Transp. Serv., and County of Hawaii: EQC Bull. 8 Sept. 75]. The lists lack any indications of the location, scope, duration or intent of the actions proposed for exemption. The lists include indiscriminately the action types of the first set that should questionably be considered at all [e.g. litter container pickups, window modifications], types of the second set that should be considered but probably in their entirety should be exempt, types of the third set that clearly include actions that should not be exempt [e.g. chemical control of vector] and even of actions that should generally be subject to specific individual assessment [e.g. sand replenishment to existing beaches, releases and recoveries (of plants and animals)].

It should be noted that some of the lists referred to above were subsequently revised to refer the exempt types to EQC exempt classes.

It should be especially noted that although the EQC has provided for exceptions to the exempt classes [EQCR 1:33b], it has prescribed no means for implementing this provision, even in the case of an [exception] to its own list of classes.

The inadequacies of the present exemption [procedure] could be remedied without amendment to Act 246 and solely by the use of procedures already provided in the EQC regulations.

As already indicated, the assessment procedure [EQCR 1:30] could effectively be used to screen the exemption lists proposed by agencies. The definition of assessment [EQCR 1:4h] would have to be revised to make the procedure applicable to types of actions proposed for exemption, and the assessment procedure should be prescribed in the provision for agency proposals for exempt classes [EQCR 1:33].

In addition to the assessment, an EIS might very appropriately be called for in the case of any type of actions for which the exemption decision is difficult, under the provision of the Act that "a group of actions may be treated by a single statement" as authorized by the Act [HRS 343-5(2)]. The EQC regulations now provide for EIS's for groups of actions in the case of both government actions [EQCR 1:12c] and private actions [EQCR 1:22a].

The exempt types would have to be carefully defined so as to exclude all actions that might have a significant impact or to identify those circumstances under which an assessment would be made for an individual actions within the class. The provision in the Rules of the EQC [Subpart d] that "an interested person or agency may petition the EQC for a "declaratory order on the applicability of any statutory provision or of any rule or regulation or order of the Commission" will allow for public challenge in case an action has been improperly exempted under the procedures described.

The Center recommended in its 1976 review of the exemption process (RL:0193):

> That the Legislature by resolution call upon the EQC to apply its assessment procedures to the exemption types and classes proposed by agencies in the future, to use the provisions for group action EIS's in the case of difficult decisions as to exempt types or classes and review all exemption-type lists already approved using the same procedures.

Status of exemption lists

Although the exemption lists filed by agencies with the EQC appear to have some de facto importance, their legal status is, at best, questionable. The appropriateness of their approval by the EQC has been challenged on the basis that:

i) To the extent that the EQC regulations require that the EQC concur with an agency list (under Reg. 133d), the list represents an extension of the EQC regulation concerning exempt classes (Reg. 1:33 generally).

ii) HRS 343-5 requires the EQC to hold a hearing in each county on any proposed amendment of its regulations, and hence on the extension in question.

Considering that the requirement of public hearings in all counties on all agencies exemption lists, and particularly the need for such hearings on each change in a list suggested in the future, would be unduly burdensome, the Environmental Center suggested the following alternative arguement to the EQC:

i) The EQC concurrence with an agency exemption list represents, not an extension or amendment of its regulations, but an interpretation of the applicability of the EQC regulation regarding specific exempt classes of action (Reg. 1:33a) in the light of the EQC regulation regarding exclusions from these classes (Reg. 1:33b), and

ii) Such an interpretation represents a "declaratory order as to the applicability of any...regulations...of the Commission" and hence is subject to the procedures called for under EQC Rule 1:22, requiring public notice and a public meeting, but not a public hearing in each county.

The Center considered that

> it would probably be wise if the EQC were to hold a public hearing under Rule 1:24. (This rule and HRS 91-9, which would be applicable under it, do not require a public hearing in each county.)

The Center also suggested that

> The EQC establish the practice of holding a public hearing (but not one in each county) on each agency exempt list proposed for EQC concurrence and each proposed change in such a list, or on groups of proposed lists and changes, under Rule 1:24 and HRS 91:9, and

The Center further suggested that

> whenever an amendment is next proposed to the EQC Rules or Regulations (under HRS 343-5 and Rule 1:17) Reg. 1:33 be amended so that a public hearing shall be held on any agency list or change submitted for concurrence under Reg. 1:33 c or d.

The Attorney General's Office has, however, ruled (7 Jul 1977) that the EQC approval of an agency exemption list represents rulemaking. Under the provisions of HRS 91, such rulemaking requires a public hearing (but not a hearing in each county).

Discussion of the problem at the EQC meeting on 30 November 1977 indicated that it stems in part from the insufficiency of EQC funds to allow holding a public hearing in each county on proposed exemption lists and revisions to them. The possibility was discussed that the EQC no longer require concurrence with agency exemption lists and that each agency take full responsibility for the preparation and adoption of its exemption list under its own rulemaking procedures.

It was noted that HB 1065, CD 1 (77) proposed amendment of the provision of the EIS Act concerning exemptions to authorize explicitly EQC's provision for agency exemption lists and to provide for public input into the approval process.

In the meantime, the EQC decided: 1) That all further agency exemption lists and changes in lists should be considered at public hearings; and 2) that the lists already approved should be reconsidered at public hearings.

Discussion and recommendations

Some agencies seem to be continuing to consider their exemption lists as valid de facto even if not legally. Other agencies seem to have increased greatly the use of the next screening step, the environmental assessment, to identify projects for which EIS's need not be prepared.

The most expeditious means should be adopted to have the exemption lists reviewed again, revised as appropriate, and properly approved. Through the revisions, each type of action to be exempt should be identified with the EQC class in which it falls. Each type should be redefined, if necessary, to exclude any actions that might have significant environmental impacts, and each list to be submitted for reapproval should be accompanied by a statement of rationale indicating that no significant impacts will result from the action included.

It would, in our opinion, be unwise for so substantial a matter as the content of an agency exemption list to be left to the agency. Consistency of exemption provisions, such as may be assured by the requirement of EQC approval, is important. Consistency of exemption provisions among agencies, can, in practical terms, be assured only by the coordinating-review-approval responsibility of a single agency such as EQC. At least provision for public notice and public input, and for a public meeting for adoption (as proposed in HB 1065, HD 1) seems necessary.

We recommend:

1) That the Legislature amend the EIS Act as has been proposed in HB 1065, CD 1 (1977):

   a) to provide explicit authorization for EQC to require agencies to draw up lists of types of actions to be exempt, subject to EQC approval; and

   b) to provide that these lists must be made available for public review and comment.

2) That the EQC:

   a) Amend its Regulations in accordance with the above proposed amendments of the Act.

   b) Require that each type of action proposed by an agency for exemption be identified with one of the EQC classes of exempt actions and be so defined as to exclude any actions that may have significant environmental impacts.

   c) Require that an agency, in submitting an exemption list for approval, accompany it with the equivalent of a brief statement of rationale.

   d) Reconsider all original agency exemption lists in accordance with these amendments of the Act and the Regulations.

The rationale statement referred to in c) might be a brief document and if appropriate might combine groups of similar actions with similar environmental concerns. The statement should include sufficient information to define specifically the activities to be exempt, the types of location in which they will be undertaken, their frequency (if applicable), and/or the sizes of structures involved. The intent of the rationale statement for an exempt type of action should define the actions in sufficient detail to demonstrate that environmental impacts from their undertaking will not be significant.

Emergency exemptions

In addition to listing classes of action that may be exempt because they will probably not have significant environmental effects, the EQC in its regulations has provided that any program or action may be exempt in the event of the declaration of a state of emergency by the Governor and that "emergency

repairs for public service facilities" may be exempt even in the absence of such an declaration (1:33f). The provisions are obviously wise, but there is no authorization for them in the State EIS Act.

We recommend that the Act be amended to authorize the EQC provisions.

The Assessment Screen

General Provisions

Actions covered by the EIS system that are not eliminated by the exemption screen from further consideration are next screened by assessment of their possible environmental impacts. The Act provides that, in the case of agency actions, the assessment is to be made by the proposing agencies (HRS 343-4(b)), and that, in the case of applicant actions, the assessment is to be made by the approving agencies (HRS 343-4(c)). The EQC Regulations formalize the process (1:30) and call for determinations in the form of Negative Declarations in the case of actions that will have no significant impacts, and EIS Preparation Notices in the case of actions that will have significant impacts.

No action for which a Preparation Notice is issued may be approved or undertaken until the EIS has been prepared, reviewed, and accepted. The criterion used in the assessment screen is the same that is applied throughout the system, that of the significance of the environmental impact. However, in the assessment screen this criterion is applied to individual proposed actions, and not to types, classes, or general categories of actions. An EIS Preparation Notice should be issued if there is a significant possibility that the action to which it pertains will have a significant environmental impact. A Negative Declaration should be issued only if the assessment indicates that no such significant possibility exists.

Documentation of assessments

The EQC Regulations require that the assessment be documented (1:30c), and at least in the case of an applicant action (1:30b) require that the assessment include: (1) an identification of potential impacts; (2) evaluations of their potential significance; and (3) areas that need further study; as well as the (4) determination whether an EIS is needed and, if so, (5) what information it should contain. The documentation is, thus, equivalent to a simple EIS.

The EIS Act does not specifically authorize EQC's requirement of documentation; but because issuance of a Negative Declaration or Preparation Notice may be appealed to the courts, agency documentation is clearly advisable to indicate that the determination was not arbitrary or capricious. HRS 1065, HD 1 (1977) proposed to add, to the definition in the EIS Act, a definition of an "assessment" as a document, and to revise the prescriptions as to procedures in the case of both actions proposed by agencies and actions subject to agency approvals so as to formalize the assessment process in accordance with the prescription in the EQC Regulations. We recommend the passage of these amendments.

Number and adequacy of assessments

Although use of the assessment screen is essential and although most of the determinations made on assessment have been appropriate, misuses of the assessment screen represent a major failure of the EIS system.

From June 1975, when the EQC Regulations took effect, through December 1977 approximately 874 Negative Declarations have been filed, an average of about 28 per month. The actual numbers filed by month have varied considerably, for example 18 in April 1977 and 64 in November 1977. The Environmental Center was concerned with the appropriateness of about 10 percent of these, and in spite of limitations of staff time requested copies of the environmental assessment documents in the case of 59 Negative Declarations. It was the judgement of the Center staff that the determinations were appropriate on the evidence of the documentation provided in the case of 29. In the case of the remaining 30 the Center called attention to impacts that were overlooked and impacts considered insignificant that should clearly have been considered significant in the context of the EIS Act. Subsequent correspondence with the assessing agencies indicated that with more complete documentation 17 of the Negative Declarations would have been appropriate. The Center remains unconvinced of the appropriateness of the remaining 13 Negative Declarations.

We discuss below only three examples of inappropriate Negative Declarations. One of these was subsequently withdrawn and an EIS was prepared. Another turned out to have been issued after the action to which it pertained had already been undertaken. The appropriateness of the third is being challenged in the courts. So far as we are aware, the actions covered by the rest of the 13 inappropriate Negative Declarations proceeded without EIS's.

Examples of inappropriate negative declarations

Herbicide use in Kekaha Game Management Area

A Negative Declaration was issued in December 1975 by the Department of Natural Resources for the use of herbicides in the incremental control of shrubs in a number of non-contiguous areas totalling 500 acres in the Kekaha Game Management Area of southwestern Kauai. The Environmental Center pointed out in the review of the Department's assessment that: "The intent of the project is clearly environmental modification, that such modification will be significant (otherwise there would be no point in carrying out the project), and that an EIS should be prepared so as to assure a complete identification and evaluation of the potential impacts of this type of operation." The Center raised serious questions as to the herbicides to be used in the project and the way in which they were to be used.

The Department subsequently prepared an EIS for the project, which it submitted for review in December 1977. The EIS included an identification of the herbicides, indicated that the herbicides would be used in accordance with their labels, and discussed the impacts of the project.

We note that the redesign of the project to make it environmentally satisfactory and its implementation could have been accomplished much short of the two-year period if the Department had not tried to avoid compliance with the letter and intent of the EIS Act through the issuance of a Negative Declaration.

Kawaikoi trail development

A Negative Declaration was filed in May 1975 on trail construction proposed by the Department of Land and Natural Resources in the Kawaikoi drainage basin within the Waimea Canyon-Alakai Forest Management Area in the Conservation District of Kauai. The Environmental Center called attention to a number of potentially significant impacts of the construction. Correspondence from the Department indicated that the proposed development included both improvement of trails that had been constructed in 1973 and 1974 and construction of new trails. The earlier trail construction should have been covered by the original State EIS system under the Governor's Executive Order. It was the opinion of the Environmental Center that the assessment under the new State system should have distinguished among the improvement of existing trails, new construction in progress, and new construction not yet undertaken and discussed the environmental impacts of the work that was still to be undertaken. On the basis of the information available, the Center considered that a brief EIS should have been prepared on the construction yet to be undertaken because of the probable impacts on rare and endangered species.

Hanawi water diversion

A Negative Declaration was issued by the State Department of Land and Natural Resources (DLNR) on the project proposed by East Maui Irrigation Co. to divert the waters of the Hanawi Big Spring on the north coast of East Maui, pumping these waters to an EMI ditch through which they would be transported to Central Maui.

Resolutions were introduced in the 1976 legislature calling for DLNR to reconsider its negative declaration (SR 408 (76) and SCR 117 (76)) but tabled by the Senate Committee on Ecology, Environment and Recreation. The Center supported these resolutions (RL:0191).

The argument that the Negative Declaration was inappropriate may be put succinctly as follows:

1. The project proposed is in the Conservation Land Use District and is subject to a permit from the Board of Land and Natural Resources. Hence it is clearly covered by the EIS system.

2. There are rare and endangered indigenous species of gobies in the waters of Hanawi Stream below the proposed diversion. The persistence of these species would be threatened by the diversion. The diversion would also have resulted in changes in the appearance and other characteristics of the stream. That the esthetic and other effects of the diversion would probably be significant in the context of the EIS is perhaps questionable. It is also questionable whether the rare species of gobies would probably be catastrophically affected by the proposed diversion, or whether there was any reasonable possibility that the diversion might result in the total loss of the species. That the diversion would probably have a significant effect on the gobies is, however, clear. The only remaining question is whether the threat to the gobies is significant in the context of the EIS law.

3. The Hanawi area is a candidate for inclusion in the Natural Area Reserves System of the State.

4. A significant effect is defined in the EIS Act as including any effect that is contrary to the State's environmental policies (HRS 343-1 (8)). The State Environmental Policy Act of 1974 states that "It shall be the policy of the State (a) to conserve the natural resources" (HRS 344-3) and prescribes consideration of the following guidelines: "Protect endangered species of indigenous plants and animals..." (HRS 344-4 (3)(A)).

5. The Natural Reserve System Act of 1970 recognizes that: a) "The State of Hawaii possesses unique natural resources such as distinctive marine and terrestrial plants and animals, many of which occur nowhere else in the world, that are highly vulnerable to loss by the growth of population and technology"; b) "these unique natural resources should be protected and preserved"; and c) "natural area reserves" should be established to preserve in perpetuity...communities, as relatively unmodified as possible, of the natural flora and fauna" (HRS 195-1).

As the EIS Act is now phrased, the requirement of a formal EIS if a "proposed action may have a significant effect on the environment" is permissive, not mandatory. The requirement of a formal EIS is, however, mandatory, if the action "will probably have significant effects." The issuance of the Negative Declaration on the Hanawi project might merely have represented poor judgement except for the presence of the endangered indigenous gobies in Hanawi Stream and the policies regarding endangered indigenous species. In the light of this presence and this policy, the issuance of the Negative Declaration was clearly contrary to the letter as well as the spirit of the EIS Act. An EIS preparation notice should have been issued. One of the principal responsibilities in preparing the EIS would have been to determine: i) the present status of the gobies, ii) the magnitude of the reduction in flow of the stream in which they live that would have resulted from the proposed diversion, and iii) the extent of the threat to their persistence posed by these reductions.

The issuance of the Negative Declaration on the proposed Hanawi water diversion is being challenged in the courts.

PLACEMENTS OF RESPONSIBILITIES

Managerial Responsibilities

Previous systems and proposals

The EIS system established under NEPA was a comparatively decentralized one. The Council on Environmental Quality (CEQ) established pursuant to Title II of NEPA, was not originally empowered to adopt regulations binding on departments. Although the CEQ has adopted Guidelines (40 CFR 1500) that the departments were advised to follow, the only prescriptions that they had originally had to follow were those set forth in NEPA itself with such interpretations as the courts issued. However, in executive order no. 11991 issued by the President on 25 May 1977, the CEQ is authorized to issue regulations on procedures for carrying out the EIS requirements under NEPA.

Under the first Hawaii State EIS system established under the Governor's Executive Order of 23 August 1971, the Office of Environmental Quality Control (OEQC) was to act as a clearing house for EIS's and review comments on them, to advise and assist the Governor in reviewing EIS's to reflect State positions, and to advise State departments on appropriate procedures; but in this system also the actual prescriptions were in the establishing document.

In many of the bills proposing legislative establishment of a supplementary or expanded EIS system in Hawaii there were no detailed prescriptions as to how the system would operate. However, under SB 2040 (1974) and its HD 1 the OEQC would have been specifically authorized to make recommendations concerning the acceptability of EIS's; in HB 1522 (1973) and its HD 1 the OEQC would have had the power of acceptance of EIS's on agency actions; and under SD 36 (1973), SB 576 (1973), HB 111 (1973), HB 113 (1973) and HB 1794 (1973) the OEQC would have had this power with respect to all EIS's.

In HB 2067 (1974) as originally submitted, the OEQC was directed to establish a procedure for receiving, distributing, and evaluating EIS's and to promulgate regulations in the operation of the system. However, in SD 1 of this bill, this responsibility was transferred to the Environmental Quality Commission that was to be established.

Present Hawaii State System

As prescribed in the version of HB 2067 that was passed and became Act 246 (1974) (HRS 343-5) the EQC:

1) Has promulgated Regulations governing the State EIS System;

2) Is notified of all assessment determinations, EIS's ready for review, and EIS's accepted; and publishes notices of these in a semi-monthly bulletin;

3) May make a recommendation as to the acceptability of an EIS at the request of an applicant, accepting agency, or proposing agency;

4) May be appealed to by an applicant whose EIS has been held unacceptable by an agency; and

5) Has promulgated Rules under which it will consider such appeals and petitions for declaratory rulings on interpretations of the EIS law or regulations.

The EQC has, however, no power to rule that the EIS on an agency action is unacceptable, and it has not provided under its regulation for any reviews of determinations whether EIS's are or are not required.

The Governor's Executive Order of 1971 has not been rescinded. It is the impression of some of the persons with whom we have consulted in preparing this report that all of the powers the Executive Order provided to OEQC became void when the EIS Act took effect. It is the impression of others that, although the Act clearly takes precedence over the Order, the Order is still in force with respect to provisions in which it does not conflict with the Act. The difference in interpretation is of little consequence because, under the Environmental Quality Control Act of 1970 (HRS 341-4), the Governor may delegate to the Director of the OEQC any powers that are his to delegate.

Under the EIS Act, the regulations under which the EIS system operates are clearly those of the EQC, and some of the clearinghouse functions that were placed in the OEQC by the Executive Order have been placed in the EQC. However, in the operation of the EIS system the OEQC retains an advisory function with respect to State agency EIS's.

In addition to the powers placed in the EQC and with the Governor, the EIS Act places other powers with the Mayors and in approving agencies. The State EIS system is, thus, one with only partial managerial centralization.

Responsibilities for preparing assessments and EIS's

Formal provisions

Provisions in other systems

There are some significant differences in the placement of responsibilities among NEPA and state EIS systems. Under NEPA, the EIS on a project must be issued by the federal agency having the power of approval of the project. This may be the agency that will undertake the project. However, in the case of a private project needing a federal permit the EIS responsibility rests with the permit-granting agency. In the case of a project to be undertaken by a state agency with federal support, under the 1975 amendment provided in PL 94-83, the state agency might prepare the EIS although the responsibility for the EIS would rest with the federal agency providing the support.

The CEQ guidelines (40 CFR 1500-7(c)) recognize that the proposer of an action may provide, (and may be required to provide) an environmental assessment that will be appraised by the responsible federal agency in determining whether an EIS is needed, and that may be used by the agency in preparing the EIS if one is needed.

In the federal system, the responsible federal agency must first prepare a draft EIS, and the draft must be submitted to all federal and state agencies having administrative responsibilities respecting the affected environment and must be made available to the public. A final EIS that responds to all review comments must be prepared by the same agency.

Several of the EIS systems in other states operate somewhat as the NEPA system in the case of EIS's on private projects. In California, for example, a private land developer is expected to provide to the county planning body the project information necessary to the development of an EIS, but the preparation of the EIS is the responsibility of the county planning body, which is expected to use its own information on the environment that may be affected and the probable nature of the effects. In several of the states an agency is allowed to recover by fees charged against private purposers of actions the expected costs of preparing the EIS's on those actions.

In the first State EIS system established by Executive Order, there was no formal provision for assessments, but the responsibility for preparing EIS's rested with the agencies proposing the actions to which they related.

The placement of EIS-preparation responsibility would also have rested with the proposers of the actions, whether the proposers were private applicants or public agencies, in all of the bills calling for an enlarged EIS system in Hawaii. HB 1522 (1973), SB 1826 (1974) and SB 1893 (1974) also would have provided that the proposers of actions prepare the assessments on the basis of which it would have been decided whether EIS's were necessary.

Provisions in present State system

In the Hawaii State EIS system, an assessment must be made of a non-exempt action to determine whether an EIS will be required. The assessment and the determination are made by the agency that must approve the project, if it is a private project, or by the proposing agency in the case of an agency project.

The responsibility for preparing an EIS in the State system rests with the proposer of the action to which it related. This will be an agency, as in the case of the NEPA and California systems, only if action is proposed by an agency. In the case of a private action it is the private proposer.

An EIS initially proposed in the state system is essentially a draft EIS, as in the federal system, although not formally identified as such. It must be submitted for review, not only to other agencies but to other interested parties, and a final or revised version that responds to all of the review comments must be prepared by the party preparing the initial version.

Discussion

Comments on EIS preparation responsibility

Although in all of the EIS systems the responsibility for preparing an EIS on a project that will be undertaken by an agency rests with the agency, the Hawaii State system differs from those under NEPA and in most other states in placing the EIS-preparation responsibility, in the case of a private action, on

the proposer of the action rather than on the agency that must approve it. The placement of responsibility for EIS preparation is not as important as the placement of the authority for EIS acceptance, but there are those who believe strongly that the proposer of a project, whether an agency or a private party, should not prepare the EIS for the project.

There is one strong argument against allowing the private proposer of a project to prepare the EIS on his project. This rests on the recognition that the proposer will, in all probability, have a strong bias toward the project, and that he will tend to minimize the disclosure of detrimental impacts in the EIS. Those who make this argument believe that some disinterested agency should have the responsibility for EIS preparation. The bias undoubtedly exists. It affects agency proposers of action equally with private proposers. However, there is no assurance that any agency is truly disinterested and unbiased.

There are two arguments for allowing or requiring that the proposer of a project prepare the EIS on his project.

With this placement, the expense of preparing the EIS is born by the principal beneficiaries of the project. There are other ways in which this cost burden may be placed on the proposer. This is achieved, for example, by the provisions in some state systems whereby agencies may be required to submit information necessary for the preparation of the equivalent of EIS's and that agencies may collect fees from private proposers to cover the costs of EIS preparation have this effect.

The second argument is stronger. The placement of EIS preparation responsibility on the proposer of the action best promotes the intimate coupling of the consideration of environmental impacts and the development of project plans. If EIS preparation does not begin until an applicant applies for approval for his project, the project planning is well along and may be nearly complete before the environmental impacts of the project are seriously considered. The environmental consequences of possible alternative plans should have received thorough consideration long before, and choices among alternatives may effectively have been foreclosed by the subsequent investment of time and labor in the plans submitted for approval.

How well the coupling of environmental impact considerations is actively achieved depends in large measure, of course, on the policies of the proposer of the project. In practice, both agency and private proposers of projects tend to contract with professional consultants for both the design of their projects and the preparation of the EIS's. In the design of a complex action, the prime contractor is likely to employ or contract with a number of specialists; and the preparation of an EIS must necessarily involve a number of specialists in different disciplines. If, however, the proposer of the action makes his arrangements for design and for EIS preparation with different prime contractors, the coupling of planning and environmental impact consideration is likely to be very poor unless the proposer of the action makes both arrangements simultaneously and require close cooperation between the contractors.

Weighing the three arguments, it has seemed best to the Environmental Center that the responsiblity for preparing EIS's should rest with the proposers, where it is now placed in the EIS Act, and that the bias of the proposers should be offset in the EIS review process.

At least in the case of State-agency actions, however, we suggest that preparation of the EIS's could be improved by greater centralization as discussed below.

Suggested improvement in State-agency EIS preparation

No single agency can be expected to have the multi-disciplinary competence to provide all of the input necessary to an EIS. This is one of the reasons why agencies turn to consultants for EIS preparation. Another reason, however, has been that the agencies do not have sufficient staff to handle EIS preparation as well as their other duties. This is not an altogether sound reason. It is sensible that agencies turn to consultants to meet short-term needs, but it is ordinarily best for the government to provide adequate staff to meet continuing needs.

Within a single agency, both the sporadic nature of the need to prepare EIS's and the need for employment of specialists in many disciplines would make it inefficient to provide an in-house staff adequate to EIS-preparation needs. In the State government as a whole, however, the load of EIS preparation is fairly uniform over time, and most of the disciplinary competence necessary for EIS preparation is (or might be made) available in one agency or another. We suggest therefore that the State arrange more effectively for the pooling of agency services in preparing EIS's.

Environmental competences are spread widely among State departments. Probably the greatest concentration is in the Department of Land and Natural Resources, although the Department of Health has a special concentration related to environmental pollution. The Office of Environmental Quality Control, however, has the responsibility for coordinating the activities of State agencies in environmental matters. We suggest that proposing agencies turn first to the OEQC for assistance in preparing EIS's, and that the OEQC make its staff available to assist in the preparation and arrange for means for drawing on the staffs of other State agencies.

No change in either the EIS Act or the EQC Regulations would be necessary to implement this suggestion. Experience may indicate that some staff expansions may be desirable, particularly in the OEQC itself. Experience may indicate also the desirability of some formalization of inter-agency staff assignments, although the Program Planning and Budgeting System should be capable of handling the budget problems associated with such assignments.

Comments on assessment responsibility

If the responsibility for EIS preparation rests with the proposer of a project, the question may be asked whether the responsibility for initial assessment should not be similarly placed. In the Hawaii State system, the assessment responsibility rests with an agency--the proposer of the action in the case of an agency action but not the proposer in the case of an applicant action. If distinction is made between the determination whether an EIS is required or not and the assessment on which the determination is made, the same three arguments that apply to the placement of EIS preparation responsibility are applicable to assessment responsibility. However, in the assessment-

determination stage of the EIS system, there is no provision for external review, and the responsibility for offsetting the bias of a private proposer of a project rests entirely on the approving agency. Hence, although in the Hawaii State EIS system the responsibility for assessment is placed on agencies proposing projects, we do not suggest that the responsibility for assessment should also be placed on applicant-proposers. It would seem advantageous if applicants are required by approving agencies to submit information in which assessments may be based. Further, we suggest that the Legislature consider amendment of the EIS Act to provide that approving agencies may charge fees reflecting the cost of assessing applicant-proposed projects.

Possible improvement of State-agency assessment

The suggestions that we have made toward improving the preparation of State-agency EIS's are applicable also to the environmental assessments of State agencies. In some agencies the assessment load is a fairly continuous one, and it would seem most effective if the agencies were provided with staff adequate to handle most of the load. Even in the case of these agencies, however, the pooling of inter-agency staff competence through the OEQC would be helpful in meeting the needs for disciplinary diversity, and in other agencies the pooling would be advantageous in the light of the sporadic nature of the load.

Other possible improvements

It is possible that experience after the above suggestions have been implemented will indicate ways in which the preparation of assessments by county agencies and the preparation of EIS's on both county-agency actions and applicant actions might be improved.

We believe, however, that no changes should be made that will tend to reduce the coupling between action planning and EIS preparation.

Power of acceptance

Placement of acceptance power

In other EIS systems

Under NEPA, there is no requirement that EIS's be subject to acceptance by agencies or officials other than the agencies which are responsible for their preparation. When the federal EIS's had to be submitted to the Council for Environmental Quality, the CEQ could advise the President on the undertaking of the actions to which they related on the basis of the impacts disclosed in the EIS's, whether adequately or not. Under a recent Executive Order, however, the EIS's are to be submitted to the Environmental Protection Agency, and it is not clear how an inadequate disclosure of environmental impacts in and EIS might affect the undertaking of the action to which it relates, because the responsibility for advising the President still rests with CEQ.

In the EIS systems of most other states, also, there are no specific requirements for acceptance, and in only a few are there definitions of roles similar to that formerly played by CEQ. For example, in Connecticut the State Planning Council makes recommendations to the Governor concerning the undertaking of proposed actions after reviewing the Environmental Evaluations and review comments. In Virginia, the Council on the Environment reviews the Environmental Impact Reports and prepares statements on the environmental impacts for the Governor. In Minnesota, the Environmental Quality Council has the further power to require revision of any EIS's considered unacceptable.

In the first Hawaii State EIS system, under the Governor's Executive Order, the OEQC was expected to advise the Governor on the acceptability of EIS's. Hence, by implication at least, the Governor reserved to himself the power of EIS acceptance. Under a few of the bills proposing expansions of the State EIS system, the EIS acceptance power would have been placed as in the NEPA system. However, under several of the 1973 bills (SB 36, SB 576, HB 111, HB 113, and HB 1794) the OEQC would have been given the power to accept EIS's on both agency and applicant-proposed actions, and under HB 1522 (1973) the OEQC would have had this power with respect to agency-proposed actions, although the approving agencies would have had the power in the case of applicant-proposed actions.

In the present State system

Under the EIS Act, the EIS on a project proposing the use of state lands or funds, after revision on the basis of review comments, is subject to the acceptance of the Governor or his authorize representative. The EIS on a project proposing the use of county lands or funds but not state lands or funds is subject to the acceptance of the mayor or his authorized representative. The EIS on a privately proposed project is subject to the acceptance of the approving agency.

Discussion

EIS's on applicant actions

In all of the EIS systems that cover private actions, agencies have the power to accept the pertinent EIS's. We have already discussed the implications of the requirement that the same agencies prepare the EIS's in most systems, other than that of Hawaii. Only in the Hawaiian system is there a provision for administrative appeal of an agency acceptance decision, and this is limited to appeals by applicants of non-acceptance decisions (HRS 343-4(c)). Appeals may be made to the courts, of course, and provisions regarding judicial procedings are to be discussed later in this report.

EIS's on agency actions

In the case of agency-actions (in Hawaii those that will use state or county lands or funds), the EIS acceptance power is clearly separated from the EIS preparation responsibility only in the Hawaii and Minnesota systems. The separation is most distinct in Minnesota, but it may be assumed that the acceptor of an EIS will be more apt to heed recommendations from agencies,

other than those proposing the actions and preparing the EIS's, if he is the chief executive of the government (state or county), as in the Hawaii system, than if he is the head of the proposing and preparing agency.

It has recently been proposed by an agency of the City and County of Honolulu that the Mayor delegate to each agency the authority to accept its own EIS's. The language of the EIS Act permitting a representative of the mayor to accept an EIS on an action proposing use of county lands or funds would not specifically disallow multiple delegations of the sort proposed, nor does the similar language in the case of actions proposing use of state lands or funds disallow similar multiple delegations on the part of the Governor. However, if the legislature intended that agencies be allowed to accept their own EIS's, it is very doubtful that the placements of acceptance authority with the mayors and the Governor, respectively, would have been specified in the Act, particularly in the light of the alternative placements proposed in earlier bills. We do not believe it would be wise to allow agencies to accept their own EIS's, even though this is the practice under NEPA and most other state systems.

Ambiguity

The EIS Act is specific with respect to the placement of preparation responsibility and acceptance authority in the case of a project proposing the use of both state and county lands or funds. In this case, the EIS preparation responsibility rests with the agency proposing to carry out the project and the EIS acceptance authority rests with the Governor. The Act is not specific, however, with respect to the placement of preparation responsibility or acceptance authority in the case of a project that is proposed by an applicant (and that is in one of the five categories of applicant actions covered by the system), but will also use state or county lands or funds.

Such a case has been brought to the attention of the EQC. The Hawaiian Electric Company (HECO) has applied to the Board of Land and Natural Resources (BLNR) for a permit for a powerline that will cross both private and state lands in the Conservation Land Use District. On assessment of the project, BLNR has issued a Preparation Notice. As the applicant, HECO has a responsibility for preparation of an EIS. In granting permission to use state lands, however, BLNR also has such a responsibility. As the approving agency the BLNR has the power of acceptance of the EIS to be prepared by HECO. However, since the project will use state lands, the Governor also has EIS acceptance power.

In this case, the EQC has ruled that the EIS must be acceptable to both BLNR and the Governor. In essence, either has veto power over the acceptance.

In the placement of acceptance authority with the governor in the case of projects that will use both state and county lands or funds in the EIS Act, the Legislature clearly intended to reduce the possibility that one authority might veto the acceptance decision of another. There are, however, very few cases like the HECO one that fall within both applicant-action and agency action categories. Hence the EQC ruling seems quite sensible.

The EQC did not specifically rule who had the responsibility for preparing the EIS or EIS's but it seemed understood that there would be but one and that one would be prepared by HECO. This also seems sensible for several reasons.

(i) The impacts that are of concern are clearly those of the project taken as a whole, not separately those of the part on private land and the part on state land. (The EQC Regulations (1:12c) appropriately require that components of an action shall be considered together in the EIS system.)

(ii) HECO is the proposer of the entire project.

(iii) An EIS prepared by HECO, if and when accepted by BLNR, may appropriately be considered a BLNR EIS (just as an EIS prepared by a private consultant for the proposer of an action is considered the EIS of the proposer, or as an EIS prepared by a state agency if accepted by a federal agency may be considered under NEPA as a federal-agency EIS.)

(iv) The closest coupling of design development and environmental impact consideration will be achieved by HECO is preparing the EIS.

EIS CONTENT AND FORM

EIS Content

Prescriptions

Other legislative prescriptions and proposed prescriptions

In NEPA the contents of EIS's are prescribed as follows:

> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

In the California Environmental Quality Act the above contents or their equivalent are prescribed, and in addition: mitigation measures proposed to minimize environmental impacts, and the growth-inducing impact of the proposed action.

In the legislation establishing EIS systems in most other states, EIS contents are prescribed more or less as in NEPA or the California Act, and in some of the EIS bills considered by the Hawaii legislature prior to the passage of the EIS Act, there were content prescriptions--in some cases identical to those in NEPA and in other cases emphasizing more heavily the social impacts, the economic impacts, or both.

Prescriptions in Hawaii EIS Act

The only provisions in Act 246 respecting the contents or form of an EIS, other than the instruction that the EQC had to prescribe the contents in its Regulations (HRS 343-5(1)), are in the definition of "Environmental Impact Statement" (HRS 343-1(6)). According to the definition, an EIS is a document "which discloses the environmental effects of a proposed action on the economic and social welfare of the community and State, effects on the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects."

Prescriptions in EQC Regulations

As required in the Act, the EQC has prescribed the contents of EIS's in Regulation 1:42, which provides that an EIS shall, at a minimum, contain the information abbreviated below:

a. A summary

b. A project description, including a map, statement of objectives, general description, use of public funds or lands, phasing and timing, summary of technical data, and historical perspective

c. A description of the environmental setting

d. The relationship of the action to land use controls

e. The probable impact of the action on the environment, including secondary effects, population and growth impacts, and effects of such impacts

f. Any probable adverse environmental effects

g. Alternatives to the action, with their effects

h. The relationship between short-term environmental uses and long-term productivity

i. Mitigating measures proposed to minimize impacts

j. Any irreversible commitment of resources

k. An indication of policies offsetting adverse impacts

l. The identity of parties consulted

m. The comments and responses made in consultation

n. A summary of unresolved issues

o. A list of necessary approvals

Discussion

Derivation of content requirements

Most of the specific topics whose address is required in the EQC regulations were expanded or otherwise modified from the EIS content requirement prescriptions in NEPA or in bills proposing State EIS systems prior to the passage of Act 246, as indicated in the following table.

Topics Required in EIS's

Topic identification in Reg. 142	Equivalents in NEPA and Pre-Act 246 Bills
(b)	HB 1522 (73)
(c)	SB 36[i)], SB 576[i)], HB 111[i)], HB 113[i)], HB 15522 (73), SB 1826[ii)]
(d)	HB 6522 (73)[iii)]
(e)	NEPA, SB 36 (73), HB 576 (73), HB 111 (73), HB 113 (73), HB 1522 (73), HB 1792 (73), HB 1794 (73), SB 2040 (74), SB 2110 (74), SB 2857 (74)
(f)	As for topic (e) except SB 2040
(g)	As for topic (e)
(h)	HB 1522 (73), HB 1722 (73), HB 2857 (74)
(i)	SB 204 (74), HB 2857 (74)
(j)	As for topic (e)
(l)	HB 1522
(o)	HB 1522

Notes:

i) The nearest equivalent of topic (c) related to an outline of natural, social and economic factors involving the project.

ii) The nearest equivalents to topic (e) related to the social impact and the economic impact.

iii) The nearest equivalent to topic (d) related to the relation of the project to others in the area.

In SB 2040 (74) and HB 2857 (74), the content prescriptions were in the EIS definition. In the other bills they were in specific sections on content. The address to topics (a), (k), (m), and (n) is not prescribed in NEPA and would not have been prescribed in any of the pre-Act 246 bills. However, some of the bills called for content topics not appearing specifically in the EQC prescriptions:

Methods of analysis: SB 36 (73), SB 576 (73).

Environmental, social, biological, and economic costs and benefits: HB 1522, HD 1 (73).

Proposed amendment

The only amendment that has been proposed to the very brief content prescriptions in the EIS definition in Act 246 was the deletion of the effects of the action on the economic and social welfare of the community, and the State, proposed in HB 2012, HD 1 (76) and HB 125 (77).

General scope

Considering the purposes and coverage of the EIS system, there can be little argument with the general scope of the prescribed contents, and a degree of legislative satisfaction with the content prescriptions of the EQC in their Regulations seems indicated by the fact that no resolutions have been introduced calling for their revision.

The question of the appropriateness of extending the coverage of EIS's to purely social impacts of actions has been discussed in the discussion on the "environment of concern" in the chapter in the "Coverage of the EIS system." Hence we need only to reiterate the importance of discussion in EIS's of the indirect social impact of actions.

Experience indicates, however, that one topic whose discussion is not now required in the EQC regulations should be required. This topic is discussed below.

Possible improvements

The topic whose address is not required in an EIS, but should be, is environmental hazards. As pointed out in our discussion of the impacts of concern in connection with the coverage of the EIS system, the extent to which a hazard should be discussed in the EIS on a project is limited to the extent to which the hazard may significantly affect the project or human activities that will result from the project.

In many state EIS's concerning projects that will involve significant hazards there have been discussions of the hazards. The impacts of direct concern are not so much those of the proposed project on the environment as the inverse--infrequent but expectable impacts of the environment on the project and on such human uses of the hazard area as the project may promote. Any changes in hazard that will result from the project should be regarded as direct impacts of the project, and any changes in human exposure to the hazard as secondary impacts of the project, but otherwise address to natural hazards is not prescribed in the requirement of discussion of probable impacts of the proposed action on the project (Reg. 1:42e). Natural hazards are properly regarded generally as "adverse environmental effects which cannot be avoided" (Reg. 1:42g) and means for their minimization as mitigation measures proposed to minimize impact. However, they cannot be regarded thus in the context of the EQC regulations which define environmental impact as effects on the environment (Reg. 1:4 1) not effects of the environment.

Even though natural hazards have been discussed in many of the EIS's in which their address would be appropriate, we consider that specific requirement of their address should be provided. Our opinion is strongly reinforced by a communication from the State Civil Defense Division. It has also been appropriately suggested that the environmental hazards to be addressed in EIS should include not only the purely natural hazards such as floods, tsunamis, and lava flows but also hazards generated by human activity such as significant, continuing, air and water pollution.

The EQC Regulations should be amended to add, to the content requirements of EIS's (1:42), environmental hazards to the extent that such hazards may significantly affect the proposed action or human activities that will be promoted by the action.

If necessary to authorize this extension of EIS requirements, the EIS Act should also be amended. It would probably be simplest to add something like "environmental hazards associated with the proposed action" to the brief prescription of content requirements in the definition of "Environmental Impact Statement" (HRS 343-1(c)).

Natural resource limitations represent another set of impacts of the environment on human activities promoted by projects. The Environmental Center has claimed that the failure to address the impacts of such limitations was a defect in one EIS. The EIS was that issued by the Maui County Board of Water Supply on its proposed Central Maui Water Transmission System (July 1976). The limitation in question was the water resource whose development was needed to provide the supply for the system. The Board of Water Supply was advised by its attorneys that discussion of the water resource that was to be developed to supply the System was not required in the EIS on the Water Transmission System. (Response to Environmental Center comments in Revised EIS, September 1976). The grounds for the advice were that the water was being developed under a separate project, a private one not covered by the EIS system. Although thus advised, the Department did provide some discussion of the water resource and its limitation in response to the Environmental Center's comment.

The EQC regulations already require: i) discussion of natural resources subject to limitations, in the description of the environmental setting of a project (1:42c); and ii) discussion of irreversible and irretrievable commitments of resources (1:42j). The regulations also require discussion of secondary effects among the impacts of a project (1:42e). Hence even if the project were one that would merely lead to the drain on the limited natural resource rather than actually made the drain, and even if the limitation might affect others in addition to those served directly by the project, it would seem that address to the impacts of the natural resource limitation is already required. Hence, no revision of the EQC regulations seems needed in this respect.

EIS FORM

As submitted

The length of EIS's, and the slavish use in them of the list of EIS content prescriptions as an outline, have led to a great deal of redundancy in EIS's, had made them very difficult to review, and have probably reduced their effectiveness. Neither the length nor use of the outline are necessary. Indeed the EQC has advised against them in Reg. 1:43 on style.

> In developing the EIS, preparers should 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. Statements should indicate at appropriate points in the text any underlying studies, reports, and other information obtained and considered in preparing the Statement including any cost-benefit analyses and reports required under other legal authorities. Care should be taken to ensure that the Statement remains an essentially self-contained instrument, capable of being understood by the reader without the need for undue cross-reference.

In the opinion of the Environmental Center, the prime requirement is "to convey the required information in a succinct form easily understood." Even the bulkiest EIS can present more than a summary of the pertinent information. It would be best if the EIS itself were a simple and short summary.

The outline

The order in which required topics are listed in the EQC regulations (1:42) seems to stem from their derivation from previous lists of topics rather than a logical arrangement.

The order of listing is logical with respect to some of the topics, e.g. the summary (a), the project description (b), the environment description (c), and the overall impact (3). The adverse impacts (f) are merely a part of the overall impact (e). However, irreversible commitments of resources (j) are merely a part of the adverse impacts; and mitigation measures (i) pertain directly to the adverse impacts. The offsetting policies (k) relate to land-use plans (d) as well as irreversible commitments of resources (j).

The concerns with an impact in an EIS are logically greatest with the adverse impacts, including resource commitments, so there may be some reason to listing these separately from the general impacts, but their separate discussion in EIS's leads either to considerable redundancy or to an illogical development of the topics.

Even though the EQC regulations indicate that the order of listing of content requirements does not need to be used as an outline for the EIS, the

extent to which it is so used, and the resulting redundancy and lack of orderly development of ideas, suggest that the list of content requirements might be revised.

Reproduction of comments and responses

In our preliminary report we commented that the requirement for actual "reproduction of all comments and responses made in the response period (m) seems quite unnecessary," and we suggested that it would be sufficient to address, in context in the body of the EIS, any substantive issues raised in the consultation process. However, several of the reviewers of that report indicated the value they placed on having the comments available verbatim, associated with the commentators, and coupled with the responses.

We have, therefore, withdrawn the suggestion, but we consider that even though the comments of those involved in the consultation process are appended to an EIS, together with the responses to them, all substantive results of the consultation should be reflected in context in the body of the EIS.

Use of appendices

The EQC has advised that an EIS should be a self-contained document (Reg. 1:43). There is, however, no way in which it can be both complete in itself and concise. Every EIS is based on general texts, monographs manuals and professional papers whose content is not reproduced in the EIS. Many are supported by special studies, details of which are unnecessary in the EIS itself. We recommend that the EIS should merely cite and summarize the pertinent content of other immediately pertinent documents. These documents include appendices that would present all of the necessary detail that was developed in the course of the EIS study. The appendices should, however, be separately bound so that it would be unnecessary to reproduce them for those who are not interested in the detail. They should be made available, however, to those who are interested.

The immediately pertinent documents to be cited should also include such reports, not produced by the EIS study itself, as provide information on the impacts of actions of the type proposed and on the environment of the area in which the action is proposed. Such documents should be available to those interested.

The appendices and other pertinent documents should, of course, cite authorities on which they are based, such as general texts, monographs, manuals, and professional papers.

As revised

In NEPA, the document submitted for review is termed a draft EIS, distinct from the EIS which is in the revised document considered ready for acceptance. In the State EIS system, no such distinction is made, but the EIS as submitted for review differs from that submitted for acceptance in that the latter must represent reponse to all review comments.

The suggestion has been made to us, and we consider it appropriate, that the EIS Act and the EQC regulations be amended to identify the environmental impact statements submitted for review as draft EIS's so that the term environmental impact statement, if used without implied or actual qualification, will refer to the final version after revision on the basis of review comments.

Ideally the responses to review comments should be made through revision of the EIS, and should appear wherever logical in the EIS outline as would appropriately be the case of responses to comments received in the consultation phase (see above). In practice, however, few EIS's are actually revised on the basis of review comments, and the comments and responses are lumped at the back of all EIS's.

As in the case of consultation comments and responses, this treatment of the review comments and responses to the EIS adds to the bulk and detracts from the usefulness of the EIS. The primary reason for the treatment is the time-limitation placed on response to review comments in the EQC regulations. The problems with this and other time limitations will be addressed in a special chapter.

CONSULTATION AND REVIEW

The review process

Function

No single party, even a large government agency, can be expected to have the full variety of competence necessary to identify and analyze all of the impacts of actions. Hence review of EIS's by parties other than their preparers is essential to the preparation of adequate EIS's. External review, and the requirement that response be made to review comments, are especially important in the case of EIS's prepared by the proposers of the actions to which they relate. This is the case with EIS's on agency-proposed projects in all systems, and is the case with all EIS's in the Hawaii State system. Wisely, there are extensive provisions for public review of EIS's in the Hawaii system.

Limitation

The response to review comments is one we will address in discussing the acceptability of EIS's. We should at least call to attention here, however, two limitations to the adequacy of the review process itself.

One is the 30-day limit to the review process imposed by EQC regulations. That there should be a time limit is reasonable; the prescribed time limit is necessitated in the case of EIS's in applicant actions by the EIS Act requirement that a decision be made as to the acceptability of an applicant's EIS within 60 days of its submission; and the 60-day limitation is ordinarily reasonable. The time-limit problem is further discussed in a chapter on times and time limits generally, and proposals are there made for exceptions to the time limits under certain circumstances.

The other limitation to the adequacy of the review process is in the extent to which agencies (other than the proposing or accepting agency) contribute to EIS reviews. There seems to be a considerable range of policy among agencies as to the extent to which their staffs are encouraged, or even given the opportunity, to review the EIS's prepared by or subject to the acceptance of other agencies. We have the impression that some agencies deliberately refrain from or soften negative criticism of the EIS's of other agencies in the hopes that they will be spared negative criticism of their own EIS's. There have been cases in which an agency with the power to prohibit an action on the grounds of an impact it would produce has failed to comment on the lack of recognition in an EIS of the impact. Agencies that fail to participate thoroughly in the process of EIS review not only violate the spirit of the EIS Act; they violate the letter of the State Environmental Policy Act.

We are unaware of any amendment of the EIS Act or Regulations that is likely to result in improvement in agency participation in the review process. However, we suggest that the OEQC might usefully perform a coordinating role with respect to state-agency reviews of EIS's, similar to the coordinating role we have suggested in the case of state agency EIS preparations. An agency might feel freer to criticize the EIS of another agency at the request of OEQC than on its own initiative, and the OEQC might discern topics on which specialists in an

agency should comment that would not otherwise be brought to the attention of those specialists. OEQC coordination might also reduce redundancy in review comments.

The consultation process

Function

The time limitation to the process of formal review of EIS's makes it essential that EIS's, as submitted for review, are as nearly acceptable as possible. To promote the adequacy of EIS's as submitted for formal review, the EQC regulations require that, in the preparation of an EIS, a "consultation process" must be used that may serve as an early, less formal review.

Following notice of the issuance of an EIS preparation notice, anyone may request to be consulted in the preparation of the EIS. The proposer of the action is required to submit the assessment to consulted parties, to request their comments and given them 30-days to comment, and to take their comments into account in preparing the EIS.

Limitation

Initially, the proposers of actions tended to make only the assessments and the Preparation Notices available to consulted parties. Especially in the case of an action for which an EIS will be required, for the Preparation Notice there is little reason to put more into the assessment than the showing or admission that there will be some significant impact. The degree of which the use of the consultation process will reduce the criticism of an EIS in the formal review process depends, however, on the extent to which the information supplied to consulted parties corresponds to the information to be included in the EIS. The EQC Regulations provide that the proposer of an action may supply to parties desiring to be consulted more information than was in the assessment, and with experience, some proposers have realized that they will reduce the labor necessary to respond to formal review criticism and improve the chances that their EIS's will be considered acceptable if they provide to consulted parties the equivalent of draft EIS's.

Role of the Environmental Center

Prior to the passage of the EIS Act, the Environmental Center had been extensively engaged in the review of federal EIS's and EIS's produced in the first State system under the Governor's Executive Order. As a part of the University, the Center considered that it should not be routinely involved in the preparation of EIS's, although it responds to requests from preparers for advice on sources of pertinent information. When the institution of the consultation process was proposed in the EQC Regulations, it was clear that this process combined EIS-preparation and EIS review aspects. To maintain its independence in the review of EIS's, to continue to avoid routine preparation responsibilities, and to avoid the possibility that the Center might be used in place of paid consultants in the preparation of EIS's, the Center decided that it should not be engaged in the consultation process (Center Review RR:0021).

The Center continues to be extensively engaged in the review of EIS's, but reviews EIS's selectively rather than routinely. A summary of the Center's EIS reviews is included in the list of references to this report.

TIMES AND TIME LIMITS APPLYING TO ASSESSMENT AND EIS PREPARATION AND ACCEPTANCE

Provisions

The EIS Act prescribes several time limits to the initiation of or response to appeals. These will be discussed in the chapter on appeals. With respect to the normal EIS system procedures the Act makes only one prescription--that an approving agency must determine whether the EIS of an applicant is or is not acceptable within 60 days of its submission (HRS 343-4(c)).

The EQC Regulations provide additionally that:

(i) Agencies are to assess actions they propose at the earliest possible time (1:30a).

(ii) Approving agencies are to assess the actions proposed by applicants and make determinations whether EIS's are required within 30 days of the applications (1:30b).

(iii) The EQC will publish notices of Negative Declarations and EIS Preparation Notices received five days or more in advance of the semi-monthly Bulletin publication dates (1:31d).

(iv) Interested parties have 30 days after the publication of an EIS Preparation Notice to indicate their desire to be consulted in the preparation (1:31d).

(v) Consulted parties have 30 days after receiving requests for comments to provide the comments (1:41b).

(vi) Official filing dates for EIS's are the 5th and 20th days of the months (or the next working days if these fall on weekends or holidays). (These dates, immediately preceding Bulletin publication dates, are the dates from which the 60-day limit as prescribed in the Act for the acceptance determination in the case of applicant actions (1:50)).

(vii) Agencies and the public have 30 days after publication of notice of the submission of an EIS to provide their review comments (1:61).

(viii) Proposers of actions have 14 days after the end of the review period to respond to review comments.

(ix) The EQC has 30 days to respond to an agency request for a recommendation as to the acceptability of the EIS on an agency-proposed action (1:72a).

(x) The EQC has 10 days to respond to an agency or applicant request for a recommendation as to the acceptability of an applicant-proposed action, provided the 60-day limit for the acceptance determination is not exceeded (1:72b).

EIS ACCEPTABILITY AND ACCEPTANCE DECISIONS

Acceptability

Formal provisions

As defined in Act 246 (HRS 343-1(1)):

> "Acceptance" means a formal determination by an agency, the governor of the State, or the mayor of a county, that the document required to be filed pursuant to section 343-4 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.

The EQC Regulations expand upon EIS acceptance as follows:

> 1:70 GENERAL. 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.
>
> 1:71 CRITERIA FOR ACCEPTANCE. A Statement will be deemed to be an acceptable document only if all of the following criteria are satisfied:
>
> a. 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 herein;
>
> b. the content requirements described under Section 1:42 have been satisfied;
>
> c. 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, whichever applicable, to the Statement.

Discussion

Editorial comment

In the definition of "acceptance" in the Act there is no recognition that under the provisions of HRS 343-4(b), either the Governor or a mayor may delegate the power of EIS acceptance to a representative. HB 1065, HD 1 proposed to delete the incomplete identification of the accepting authorities in the definition. We consider this a minor but desirable amendment.

Test and context of adequacy

Whether the criteria pertaining to procedure, general contents, and incorporation or appending of responses to review comments have been satisfied is amendable to clerical checking. Whether an EIS "adequately discloses and describes all identifiable environmental impacts and satisfactorily responds to review comments" is, however, a judgemental decision.

It should be recognized that since the impacts of any action will be infinitely ramifying, they cannot be fully identified or appraised by finite analysis. It would be absurd to incur, in the preparation of an EIS, a cost approaching the present value of all possible future detriments that would result from the action to which it pertains if the action were undertaken, or approaching the present value of all immediate and future benefits that would be foregone if the action were not undertaken.

An exact value cannot be placed on an EIS; neither can an exact determination be made of the analysis required to make it acceptable. However, the context in which acceptability should be judged is clearly to be identified with the prime purpose of the EIS system. The criteria for adequacy of an EIS might be expressed in a number of ways in the context of this purpose--to provide decision makers with the environmental information necessary to wise decisions. It may be unwise to adopt formally any precise definition of these criteria. Guidelines may, however, be of use to accepting authorities. The following guidelines are proposed on the basis of reviews of suggestions in our preliminary report:

Suggested guidelines

The test of adequacy will be met if:

1) The description in an EIS of the project, its environment, and its environmental impacts are valid.

2) The identification in the EIS of the environmental impacts of the project and its reasonable alternatives is comprehensive.

3) The appraisal of the environmental impacts represents analysis in sufficient depth to meet the needs for a wise decision whether the action should be undertaken or approved.

The validity is phrased as an absolute criterion because invalid descriptions should not be tolerated in an EIS.

Comprehensiveness in the identification of the environmental impact is also phrased as an absolute criterion. Comprehensiveness should, however, be judged with respect to the environment of concern in the EIS system, principally the natural outdoor environment and those aspects of the social environment influenced by natural resources availability and natural environmental quality.

The criteria respecting depth of analysis is, however, phrased as a relative one, the test of sufficiency being related to the decision whether or not the project should or should not be undertaken or approved. This decision must be based on the weighing of all benefits and all detriments, tangible and intangible, of the project. The analysis of the environmental impacts should rationally be considered sufficient if the results indicate:

a) The total detriments, at best, will exceed the total benefits;

b) The total detriments, at worst, will be less than the total benefits; and the detriments of any alternative will not be less;

c) The costs of analysis in greater depth are likely to exceed the net benefits; or

d) The costs of further analysis and replanning are likely to exceed any increases in net benefits that might result.

Although if any one of these four criteria are met, in addition to other prescribed criteria, and hence the EIS is considered acceptable, the project should not be approved if the acceptability depends on criterion a). No environmental grounds for disapproval would exist if the acceptability depends on criterion b). If the acceptability depends on criteria c) or d) the approval of the project must be purely at the discretion of the approving agency.

It is, of course, on the basis of weighing the costs and the benefits of an action that the decision should be made whether to carry out or to approve the action. Because the weighing process must include intangible aspects it is inescapably subjective. The EQC Regulations stipulate that: "agencies or applicants that prepare cost-benefit analyses of proposed actions shall attached such analyses or summaries thereof to their EIS's", but this stipulation was probably intended to refer to economic costs and benefits. In any case the final judgement of the overall costs relationship between and overall benefits must be that of the agency or official who will make the final decision whether an action should be undertaken or approved. Although the decision as to the acceptability of the EIS on the action is a separate one, the judgement of the adequacy of the EIS in the light of the criteria indicated above inescapably involves the same considerations of overall costs and benefits. The EIS-acceptance decision and the action-approval decision are thus linked.

Application

It is, of course, the accepting authority that must judge an EIS by all of the criteria in the suggested guidelines. The consultation comments and review comments are likely to draw the attention of the accepting authority to any lack of validity or comprehensiveness. However, the disciplinary specialists who have the greatest competence to judge an EIS by these criteria are very apt to consider the analysis represented in an EIS insufficient even though it meets one of the sufficiency criteria identified above. All four of the sufficiency criteria involve the consideration of total costs and

benefits, and not merely the environmental ones. The weighing of total costs and benefits is otherwise a concern in the proposing agency's decision whether the action should be undertaken or the approving agency's decision whether the action should be approved rather than in the accepting agency's decision. There is no problem in either the case of a private action, for which the EIS-accepting agency and the action-approving agency are the same, or in case of an agency action if the governor or mayor has the power to approve the action as well as accept the EIS. There may theoretically be a problem in the case of an action to be undertaken by a semi-autonomous agency, but it is hardly conceivable that the governor or mayor would not be provided with, and taken into account in his acceptability decision, the judgement of even a semi-autonomous agency on the total benefits and costs of one of its actions.

Acceptance decisions

Acceptance vs approval

As indicated in the previous action, the decision as to the acceptance of an EIS is to be distinguished from the decision to undertake or approve the action to which it relates. In some of the EIS-System bills introduced prior to the passage of the EIS Act, the decision as to the adequacy of an EIS was referred to as an approval decision, and in others as an acceptance decision. In the EIS Act itself, although the term "acceptance" was defined (HRS 343-1 (1)) and used generally, the term "approval" was used for the same decision in two sections (HRS 343-4(f) and (g) and HRS 343-5 (3)).

We recommend that the Act be amended to substitute the term "acceptance" for "approval" in these sections.

Effects of acceptance

The effect of the acceptance of an EIS is clearly that an agency is free to proceed, in consideration of the environmental impacts described, with the decision whether or not the action to which it relates should be undertaken or approved.

Effects of non-acceptance

The effect of the non-acceptance of an EIS is not so clear. The State EIS Act provides that the acceptance of the EIS on a project is a condition precedent to the undertaking of the project by an agency or the approval of the project by an applicant. A judgement of non-acceptability does not necessarily mean that the project should not be undertaken or approved. However, the Act makes no provision concerning administrative procedures for revision of an EIS held unacceptable or for its resubmission.

If the proposer of an action whose EIS was determined unacceptable wishes to attempt a further revision of the EIS, the stage of the EIS system to which he should most appropriately be required to return would seem generally to be the post-consultation phase of EIS preparation. We recommend that the EQC Regulations be amended to allow this. The proposer of the action should realize that, if the EIS was considered unacceptable by reason of inadequate

address to issues raised in the consultation process, he would do well to consult again with those who called attention to those issues. If the proposer of the action is an applicant for a permit, and if a time limit for action on his original application has expired, it would seem necessary for him to make a new application, and for the EIS process to begin again at the beginning. No amendment of the EIS Act or EQC Regulations could extend a permit application time limit.

Acceptability in practice

Inadequacies in EIS's as submitted for review

General comments

It is intended, of course, that as the consideration of the environmental impacts of a project moves from the assessment phase through the consultation and review phases, the adequacies of the description of the impacts will be successively improved. If the consultation stage were as successful as it should be, the EIS as submitted for review should be very nearly acceptable. The extent of review commentary on most EIS's suggests that there is room for considerable improvement in the consultation phase.

In this section, we will identify some of the types of inadequacy that have been found by the Environmental Center in its reviews of EIS's.

The criteria used in Center reviews have been essentially those identified earlier in this chapter as tests for adequacy of EIS's, although these were not explicitly stated until recently. However, the Center recognizes that the judgement of the depth of analysis of the environmental impacts of a project necessary to meet the needs of a wise decision concerning the undertaking or approval of the project is a subjective one, and that ultimate judgement of acceptability rests with the EIS acceptor, not with the Center or its reviewers.

Errors in fact

In EIS's reviewed prior to the effective date of the EQC regulations, the Environmental Center found several examples of statements that were demonstrably invalid; for example, that no rare or endangered species were present in a project vicinity, or that certain quantitative limits applied to environmental processes.

Quantitative inadequacies

Outright misstatements have been rare in the EIS's reviewed in recent years. However, EIS's still contain some quantitative statements that are based on inadequate analysis, misapplications of analytic techniques or data, and applications of techniques or data that are no longer considered valid, as judged by those competent to make the judgements.

In some cases, competent persons may disagree as to the validity or data used in an EIS analysis. We consider that, in these cases, the EIS should indicate the range of competent opinion, and that an EIS is inadequate if it includes, among alternative analytic means, only that which minimizes the estimate of a detrimental effect or maximizes the estimate of a beneficial one.

If better definition of the effects is necessary to the justification of the project, and if further analysis would provide the better definition, the EIS should not be considered acceptable until it includes the results of the further analysis. It is not adequate merely to indicate, as some EIS's have, that further analysis is needed, or even that further analysis has been undertaken.

Qualitative inadequacies

Qualitative inadequacies involve subjective judgements which the Environmental Center attempts to avoid. However, we consider an EIS inadequate if it assigns minimum qualitative importance to a detrimental impact or maximum qualitative importance to a beneficial impact disregarding divergent assignments of importance that would be given to the impacts by significant fraction of the affected public.

Incompleteness

Many of the inadequacies found in EIS's are in the form of failures to identify impacts that would be considered significant by those affected, whether in the near or distant future and whether in the immediate vicinity of the actions or remote from them.

Inadequacies in accepted EIS's

Even as accepted, some EIS's have seemed inadequate to the Environmental Center. Unless the Center's opinion as to the validity of some claim or the adequacy of some analysis not previously reviewed is solicited, the Center examines in the revised EIS's only the responses to its earlier review comments. Thus, the original discussions to which the Center comments pertained and the responses in the Center comments generally from the sole basis for a Environmental Center judgement that a revised EIS should have been considered unacceptable.

An inadequate response to a Center review comment on an EIS may take any of several forms; for example, the following:

(i) To a comment that some significant impact was not analyzed in an EIS, a response that an analysis was originally included, or was being supplied, when in fact no such analysis was provided.

(ii) To a comment that some significant impact was not analyzed or was inadequately analyzed, a response purporting to supply or improve the analysis but that, in fact, did not constitute an appraisal of the impact.

(iii) To a comment that some significant impact was not analyzed (or was erroneously analyzed) a response recognizing that the analysis (or

Both the Act and the Regulations provide that the applicant may appeal to the EQC on a decision as to the acceptability of his EIS (HRS 343-6 (c)); Reg. 1:81 (c). Hence it is entirely consistent that the applicant be entitled to appeal to the EQC on a determination whether the EIS is necessary or not. (An applicant will wish to appeal, in the case of the determination on assessment only if it results in an EIS Preparation Notice, and in the case of an acceptable decision only if the EIS is not acceptable).

We recommend that the EQC regulations be revised to provide that, within some specified time period, say 30 days, an applicant may appeal the issuance of a Preparation Notice.

If applicants have the right to appeal the issuance of Preparation Notices, we suggest that other parties might reasonably have the right to appeal Negative Declarations. Although the Act provides for such appeals to the courts (HRS 343-6 (b)), it does not provide for such appeals to the EQC. We recommend that provisions be made for administrative remedy prior to recourse to the courts, and that the Act should be amended to remove the restriction that only applicants may have standing from the provision concerning appeals concerning determinations on assessments (HRS 343-5 (4)).

Appeals on failures to make determinations

The Act provides HRS 343-6 (a) that, if an agency responsible for assessing of an action and making a determination whether or not an EIS is necessary fails to do so, judicial proceedings may be instituted, but not until the agency undertakes or approves the action without the determination. HB 1065, HD 1 (1977) proposed to amend this provision so that an applicant shall be judged aggrieved, and hence may turn to the courts if the agency has not made an assessment of the action within 30 days of his application. Since, by the Regulations, the agency is supposed to make the determination within 30 days, the proposed amendment is appropriate. The same bill also proposed to recognize that the EQC, any agencies having approval powers over the action, and the general public should have standing with respect to an appeal on a failure to make an assessment and determination. This proposal also is reasonable. We recommend that the EIS Act be amended in accord with both proposals.

As now worded, the provision regarding appeals on failures to make determinations is limited to the case of actions "not otherwise exempted. No specific provision is made for the appeal of: i) the establishment of a class or type of actions to be exempted that is defined so broadly as to include actions that will have significant impacts; or ii) a failure to make a determination in the case of an action that falls within an inappropriately broad exempt type or that is improperly assigned to an appropriately exempt type. The impression given is that appeals in these latter cases are not allowed, but in actuality the effect is that no time limit is set for appeals involving exemptions.

Failures to assess and make determinations in the case of appropriately exempt actions are proper and legally defensible, but such failures should be equally open to challenge in the cases of actions not exempt and actions inappropriately exempt. The present provision may easily be extended to cover the latter case, and hence, indirectly, the inappropriate exemptions themselves.

We recommend that the subsection of the Act pertaining to appeals on failures of agencies to make determinations be amended to delete the restriction to actions not exempted.

Appeals of improper determinations

The Act provides (HRS 343-6 (b)) that judicial proceedings may be instituted concerning improper determinations on assessment, but only within 60 days after notice of the decisions.

It would be well to amend the Act to require that, if an appeal is made to the courts, any administrative remedy that is provided should first be sought, whether the right to appeal to the EQC is limited to the applicant as at present or the limitation is removed as recommended above.

The 60-day limitation to the period following determination before a judicial appeal is initiated is reasonable in the case of an appeal by a plaintiff who is now barred from appeal to EQC, in the case of an appeal that EQC declines to hear, or in the case of an appeal in which the EQC renders its decision within 30 days. In the case of an appeal on which the EQC renders its decision more than 30 days after the original determination, the time limit for initiating a judicial appeal might appropriately be limited to 30 days following the EQC decision.

EIS-Acceptance decisions

Other than the provisions for an applicant to appeal to the EQC the decision of an agency not to accept his EIS, the Act provides for appeals only to the courts in the case of EIS-acceptance decisions, and it limits standing to institute such appeals to "affected agencies or persons who will be aggrieved by a proposed action and who provided written comments to such a statement during the designated review period," and for such persons only to the extent of the issues on which they commented in the review process (HRS 343-6 (c)).

Strictly speaking, the proposer of an action whose EIS has been judged unacceptable is aggrieved, not by the action, but by the decision not to accept the EIS. We recommend that the Act be amended to recognize the standing of the proposer of the action to initiate judicial preceedings on acceptance decisions.

The requirement that, to have standing a person must have provided written comments during the review process is in accord with the principle that administrative processes should be exhausted before recourse is made to the courts. However, an impact that will be a source of grievance to a person may very well first come to light through review comments supplied by someone other than that person, and we repeat a recommendation made several times previously by the Environmental Center that the Act be amended so that the limitation as to contestable issues be applied to those that have been addressed in the review process but not necessarily by the contesting person. HB 1065, HD 1 (1977) would have rectified the matter.

PENALTIES

Among the various bills proposing EIS systems in Hawaii, only SB 36 (73) would have prescribed penalties. The actions for which EIS systems would have been required in the system proposed in that bill included major private projects whether or not they required agency permits, so there might have been some point to the penalty provision. In an EIS system covering only agency actions and those private actions that are subject to agency permits, there would seem to be no point to a penalty provision.

The undertaking without an agency approval of a private action subject to such an approval is a violation of whatever law or regulation requires the approval, and penalties have presumably been provided for in the case of such violations wherever appropriate. The agency approval of an action requiring an EIS, without the EIS, would be a fault of the agency. However, there is no point to assessing a penalty against an agency, either for such a fault or for its undertaking an action requiring an EIS without the EIS, because payment of the penalty would simply represent a transfer of funds within government.

There are no penalty provisions in the EIS Act and, because it pertains only to agency actions and certain private actions subject to agency approvals, none would be rational.