Version 2.0 Rationale

Final Proposed Hawaii Administrative Rules
Title 11 Department of Health
Chapter 200.1 Environmental Impact Statement Rules

March 2019

State of Hawaii Environmental Council
Prepared with the assistance of the Office of Environmental Quality Control (OEQC).

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I. Introduction

A. Purpose

The Version 2.0 Rationale ("Rationale Document") describes the rationale for the updates made to the administrative rules for the environmental review process.

The Environmental Council ("Council") proposes to repeal Hawaii Administrative Rules ("HAR"), Title 11, chapter 200, entitled "Environmental Impact Statement Rules" (referred to in this document as the "1996 Rules"), and adopt HAR, Title 11, chapter 200.1, also entitled "Environmental Impact Statement Rules" (referred to in this document as the "Final Proposed Rules"). The Final Proposed Rules modernize the process, bringing it into greater alignment with the statute, State Supreme Court rulings, and best practice. The Final Proposed Rules repeal and replace rather than revise the existing rules because it reorganizes the structure and makes numerous revisions and additions.

The 1996 Rules establish the procedures, content requirements, criteria, and definitions for applying chapter 343, Hawaii Revised Statutes ("HRS"). In response to public petition, the Council has collaborated with state and county agencies, as well as citizen groups and members of the public, to complete a comprehensive review of the 1996 Rules. This effort has resulted in the Final Proposed Rules, which could replace the 1996 Rules for environmental review in Hawaii.

The Council recognizes the importance of transparency in the review process. Accordingly, the Council, in collaboration with the Office of Environmental Quality Control ("OEQC") has prepared this Rationale Document to describe the decisions throughout the rules update process. The Rationale Document is divided into three main sections. The first section, the Introduction, describes the history of the update process up to submittal to the Governor for approval. The second section, Global Discussion Points, describes the general changes between the 1996 Rules and the Final Proposed Rules. The third section, Section-Specific Changes, addresses the proposed changes section by section. This document is intended to serve as a reference for agencies, citizen groups, practitioners, and the general public interested in the rationale behind the Final Proposed Rules and for future decision makers in understanding the context and meaning of the Final Proposed Rules language.

The Rationale Document also includes two appendices that show the Final Proposed Rules in a customized Ramseyer format (referred to as "Unofficial Ramseyer"). Appendix 1 shows the proposed changes from the 1996 Rules to the Draft Proposed Rules (Version1.0) to the Final Proposed Rules (Version 2.0). Appendix 2 shows the proposed changes from the 1996 Rules to the Final Proposed Rules (Version 2.0).

B. History of the Rules Update (2011-2014)

In 2011, the public formally petitioned the Council to update the 1996 Rules. The Council initiated consultation with state and county agencies, as well as the public, to identify potential issues with the 1996 Rules. The Council considered the concerns raised during the consultation process and prepared a draft rules package that was referred to at that time as “Version 1”. In 2012, the Council published that Version 1 for public comment, and invited the public to provide feedback in an Excel table (“comment matrix”). Agencies, citizen groups, and the general public submitted comments via the comment matrix to the Council. The Council tasked the Rules Committee to review the comment matrix and propose changes to that Version 1. The Rules Committee met regularly for the next two years to update it. However, due to various administrative challenges, including maintaining quorum, the Council was not able to complete the review process.

C. Current Rules Update (2016-Present)

In February 2016, following Governor Ige’s appointment of seven members to the Council, the Council resumed the process to update the 1996 Rules. The Council began by reviewing the work already undertaken by the previous Council. The Council then began the process of developing discussion drafts to disseminate to agencies, citizen groups, and the general public. In an effort to ensure transparency and to develop effective rules, the Council solicited feedback at every stage of the review process. The initial drafts (Versions 0.1, 0.2, and 0.3) included footnotes to explain the proposed changes. Starting with Version 0.4, the Council prepared rationale documents to explain the proposed changes in the drafts.

i. 2016 Permitted Interaction Group

At the February 23, 2016 Council meeting, the Council established the Permitted Interaction Group (“PIG”) to provide recommendations to the Council about updating the 1996 Rules. The PIG served only an advisory function and did not have decision-making authority. The Council developed the following principles to inform the PIG review process:

- Be consistent with the intent and language of chapter 343, HRS;
- Align statutes, case law, and practice wherever feasible;
- Increase clarity of the process and legal requirements; and
- Align with the National Environmental Policy Act (“NEPA”) where applicable.

The PIG met at least once a month to develop recommendations to update the 1996 Rules. The Council considered the work done by the previous Council including Version 1, the comment matrix, and the responses to the public comments. The previous Council had proposed draft language in response to some, but not all, of the public comments. The PIG retained the proposed language, and collaborated with the Council and the OEQC to draft additional language to respond to the outstanding comments. The PIG also collaborated with the Council and OEQC to draft additional language to address issues raised following the initial comment period. The PIG consolidated all of the proposed changes into Version 0.1.

ii. Rules Update Version 0.1

At the July 27, 2017 Council meeting, the PIG presented Version 0.1 to the Council for consideration (refer to Version 0.1 for additional background information). The PIG recommended the following changes to the 1996 Rules:

- "Housekeeping" (i.e., spelling/grammatical corrections);
- Clarifying roles and responsibilities at various stages of environmental review;
- Modernizing submittals and deadlines to recognize electronic communication;
- Setting clearer thresholds for exemptions and the role of exemption lists;
- Clarifying when and how to proceed directly to preparing an environmental impact statement ("EIS") instead of an environmental assessment ("EA");
- Clarifying when and how to prepare programmatic EISs and supplemental EISs;
- Responding to comments in EAs and EISs; and
- Conducting joint federal-state environmental review.

At the August 8, 2017 Council Meeting, the Council approved Version 0.1 as the baseline document for further edits and to serve as a foundation for early consulting with affected agencies, citizen groups, and the general public. The Council's approval of Version 0.1 concluded the work of the PIG.

In August 2017, the OEQC and the Council began working with the William S. Richardson School of Law to provide research and drafting assistance. The OEQC set up an online comment platform using CiviComment to track and review public comments on the rules update. The OEQC also set up a webpage tracking the rules update progress, Council meetings, and comment deadlines (see http://health.hawaii.gov/oeqc/rules-update/). The webpage offered users an option to sign up to receive email notifications regarding changes to the rules update schedule and comment deadlines posted to the rules update webpage.

iii. Version 0.2

The Council reviewed Version 0.2 at the September 5, 2017 Council meeting. Version 0.2 incorporated public and agency comments, as well as comments submitted by Council members. The Council closed comments on Version 0.2 on October 20, 2017.

Version 0.2 updated almost every section of the 1996 Rules. In addition to the "housekeeping" updates (i.e., spelling/grammatical corrections), the following major topics were addressed:

- Clarifying definitions and aligning terms with statutory definitions;
- Explicitly incorporating cultural practices in accordance with Act 50 (2000);
- Updating requirements and procedures to publish in the OEQC periodic bulletin (i.e., *The Environmental Notice*);
- Aligning the "triggers" with statutory language;
- Clarifying the environmental review process for emergencies and emergency actions;
- Clarifying roles and responsibilities of proposing agencies and approving agencies;
- Revising the requirements and procedures for creating exemption lists and exempting actions from further environmental review;

- Modernizing submittals, deadlines, comment and response, and distribution to recognize electronic communication;
- Revising the comment and response requirements and procedures for EAs and EISs;
- Clarifying style standards for EAs and EISs;
- Distinguishing between a program and a project;
- Clarifying significance criteria thresholds for an exemption notice, Finding of No Significant Impact ("FONSI"), or EIS Preparation Notice ("EISPN");
- Clarifying requirements and procedures for directly preparing an EIS instead of an EA;
- Revising requirements for conducting scoping meetings following an EISPN;
- Clarifying content requirements for draft and final EISs;
- Revising procedures for appealing non-acceptance to the Council;
- Revising procedures for joint federal-state environmental review;
- Revising the requirements and procedures for determining when to do a supplemental EIS, including aligning the requirements with statute and case law; and
- Adding a retroactivity section for actions that have already completed environmental review or are undergoing review at the time the rules would be enacted.

iv. Version 0.3

Version 0.3 was published on October 31, 2017. Version 0.3 included additional changes based on comments submitted by agencies, citizen groups, the general public, and the Council. Most notably, Version 0.3 reorganized, added, and deleted sections of the 1996 Rules. The purpose of the reorganization was to ensure that the structure of the rules more closely followed the sequence of steps in the environmental review process.

To avoid confusion between the 1996 Rules and Version 0.3, Version 0.3 was called "HAR Chapter 11-200A" and an "A" was added to the end of each subchapter and section number.

For example, section 3 in the 1996 Rules describes the periodic bulletin, whereas section 3A in Version 0.3 describes the computation of time. Section 3 in the 1996 Rules was moved to subchapter 4A Filing and Publication in the Periodic Bulletin and the content in section 3 was divided into three sections: 4A, 5A, and 6A.

Version 0.3 did not include all of the changes proposed in Versions 0.1 and 0.2. Rather, Version 0.3 only showed changes with respect to the existing 1996 Rules and 2007 amendment.

In addition to reorganizing the rules and "housekeeping" updates (i.e., spelling/grammatical corrections), the following major topics were addressed in Version 0.3:

- Clarifying definitions and aligning them with statutory definitions;
- Incorporating cultural practices in accordance with Act 50 (2000);
- Updating requirements and procedures to publish in the OEQC periodic bulletin (i.e., *The Environmental Notice*), including republication for unusual situations;
- Aligning the "triggers" with statutory language;
- Clarifying the environmental review process as it applies to states of emergency and emergency actions;

- Clarifying roles and responsibilities of proposing agencies and approving agencies in the environmental review process;
- Revising the requirements and procedures for creating exemption lists and exempting actions from further environmental review;
- Modernizing submittals, deadlines, comment and response, and distribution to recognize electronic communication;
- Revising the comment and response requirements and procedures for EAs and EISs;
- Clarifying style standards for EAs and EISs;
- Distinguishing between a program and a project;
- Clarifying significance criteria thresholds for determining whether to issue an exemption notice, FONSI, or EISPN;
- Clarifying requirements and procedures for directly preparing an EIS instead of an EA;
- Revising requirements for conducting scoping meetings following an EISPN;
- Clarifying content requirements for draft and final EISs;
- Revising comment and response requirements;
- Clarifying acceptance criteria;
- Clarifying procedures for appealing non-acceptance to the Council;
- Revising procedures for joint federal-state environmental review;
- Consolidating into one section the requirements and procedures for determining when to do a supplemental EIS, and aligning the requirements with statute and case law; and
- Adding a retroactivity section for actions that have already completed environmental review or are undergoing review at the time the rules would be enacted.

v. Version 0.4

Version 0.4 was published on February 14, 2018 and discussed at the February 20, 2018 Council meeting. Version 0.4 included additional changes based on agency and public comments, as well as Council input. Version 0.4 introduced the following new topics:

- Providing a new process, referred to as the “green sheet” for agencies to examine: (1) whether a proposed activity is covered by an existing environmental review document; (2) the level of review necessary for a proposed action; and (3) whether a proposed action requires additional review.
- Requiring agency exemption lists to be categorized into two parts: (1) allowing for agencies to designate certain activities as *de minimis* and therefore not requiring exemption documentation; and (2) those activities requiring exemption documentation and publication in the periodic bulletin.
- Explicitly requiring consideration of the impacts of sea level rise and greenhouse gases as significance criteria.
- Requiring submission to OEQC of an audio recording of oral comments received at the public scoping meeting(s) on an EIS.

Version 0.4a incorporated additional “housekeeping” updates (i.e., spelling/grammatical corrections) and other minor corrections. The Council considered Version 0.4a at the March 6, 2018 Council meeting and voted 13-0-0 (with two excused) to approve Version 0.4a, as amended. The amended Version 0.4a became Version 1.0 (“Draft Proposed Rules”).

Additionally, the Council voted to approve the Public Notice of Rulemaking, Version 1.0 Rationale, the Draft Proposed Rules, and the unofficial Ramseyer formatted version of the changes from the 1996 Rules documents (collectively referred to as the "Rules Package").

Finally, the Council voted to recommend Governor Ige approve the Draft Proposed Rules for formal public hearing, and to send the Rules Package to the Small Business Regulatory Review Board ("SBRRB") for review. The Council also voted to authorize the OEQC Director to handle all administrative matters to achieve these motions.

vi. Version 1.0

The OEQC finalized Version 0.4a and supporting materials as Version 1.0. On March 21, 2018, the SBRRB reviewed the Rules Package and unanimously voted to recommend that Governor Ige allow the Council to proceed with public hearings for the Draft Proposed Rules.

vii. Public Hearings

In March 2018, Governor Ige approved the public hearings for the Draft Proposed Rules. On April 20, 2018, the State of Hawaii Department of Health ("DOH") issued a Notice of Public Hearings announcing the public comment period. While state law normally requires only one public hearing for administrative rulemaking, chapter 343, HRS, requires the Council to hold one public hearing in each county. The Council sought to give people more opportunities to participate, so it chose to go over and above by holding at least one hearing on each major island. Between May 21, 2018 and May 31, 2018, the Council held nine (9) public hearings on Oahu (2), Maui (2), Hawaii (2), Molokai, Lanai, and Kauai. The OEQC posted the draft documents on CiviComment to track and review public comments. In total, the Council received 29 oral comments and 36 written comments during the comment period. On October 2, 2018, the Council released the compilation of all written and oral comments.

viii. 2018 Permitted Interaction Group

At the June 12, 2018 Council meeting, the Council established a second Permitted Interaction Group ("2018 PIG"). The 2018 PIG was asked to: (1) review and respond to the written and oral comments received at the public hearings and during the comment period; and (2) prepare a report to the Council on any changes to the Draft Proposed Rules recommended by the 2018 PIG.

On October 25, 2018, the PIG published the Report of the Environmental Council Permitted Interaction Group ("PIG Report"). The PIG Report provided discussion points for the Council in considering whether to modify the Draft Proposed Rules based on the oral and written comments received during the public comment period.

ix. Version 1.1

The Council met in November and December 2018 to review public comments on Version 1.0. At the November 13, 2018 meeting, the Council discussed section 11-200.1-1 through section

11-200.1-18. At the November 27, 2018 meeting, the Council discussed section 11-200.1.19 through section 11-200.1.31. The Council made no amendments to 11-200.1-31 or section 11-200.1-32. The proposed changes to Version 1.0 were consolidated into Version 1.1. The OEQC prepared a Version 1.1 of the Draft Proposed Rules and supporting documentation.

At the December 18, 2018 meeting, the Council made minor technical edits to Version 1.1 and approved the Final Proposed Rules as Version 2.0. The Council voted on the motion to request the Governor to: (1) repeal chapter 11-200, Hawai'i Administrative Rules (HAR), entitled "Environmental Impact Statement Rules" and (2) promulgate chapter 11-200.1, HAR, entitled "Environmental Impact Statement Rules", as amended. The Council approved the motion at 12-0-0 (with two excused and one vacant seat). The Council also authorized the OEQC Director to act on the Council's behalf in obtaining recommendations and administrative approvals to submit the Final Proposed Rules to the Governor for approval.

x. Version 2.0

The OEQC presented Version 2.0 to the SBRRB on January 17, 2019. The SBRRB unanimously recommended that the Governor approve the Final Proposed Rules. Following the SBRRB meeting, the OEQC revised the supporting documentation, including this Rationale Document, to support the Final Proposed Rules as presented in Version 2.0. The OEQC submitted the request to the Governor for approval in March 2019.

D. Process Moving Forward

Should the Governor approve the Final Proposed Rules as the Final Rule by signing it into law, the Council and OEQC will assist agencies with their updating their internal policies to comply with the new rules as well as update guidance for all stakeholders, including agencies, applicants, citizen groups, the general public, and consultants.

II. Global Discussion Points

A. Reorganization

The purpose of reorganizing the 1996 Rules was to (1) consolidate similar rules into the same section; and (2) reflect the sequence of the environmental review process.

The 1996 Rules repeat or cross-reference many steps in the process. For example, the 1996 Rules describe publishing in the periodic bulletin (i.e., *The Environmental Notice*) in section 3, and then provide additional publication requirements in the following sections 9, 15, and 20. The Final Proposed Rules consolidate how to publish into a single section (HAR § 11-200.1-4).

The order of the sections in the 1996 Rules does not reflect the order of the environmental review process. For example, the significance criteria, which are part of the initial decision to prepare an exemption, EA, or EIS, are described in section 12, following the draft EA section. The Final Proposed Rules move the significance criteria to before deciding the level of review.

Similarly, the 1996 Rules group the EA and EIS steps by content and then process. For example, the 1996 Rules organize the EIS sections in the following order: consultation prior to a draft EIS, general content requirements for EISs, content for a draft EIS, content for a final EIS, followed by style, filing, distribution, review, and the acceptability of a final EIS. The Final Proposed Rules reorganize these sections into the flow of the process: consultation prior to preparing a draft EIS, content requirements for a draft EIS, public review of a draft EIS, comment responses for a draft EIS, content requirements for a final EIS, and the acceptability of a final EIS. The Final Proposed Rules consolidate filing and distribution requirements into the subchapter on filing and publishing in the periodic bulletin, as noted above.

The reorganization was first introduced in Version 0.3. The labeling of the sections, however, has changed. In Version 0.3, the “A” was appended to the chapter and section numbers (e.g., section 11-200A-1A). In Version 1.0, the labeling was again amended. The “A” was dropped and a numerical system was introduced to delineate between the sections (e.g., section 11-200.1-1). The labeling change reflected a decision by the Council to repeal the 1996 Rules and adopt new rules instead of amending the 1996 Rules. The Final Proposed Rules retain the labeling introduced in Version 1.0.

The order of the rules in Version 1.0 has been retained in the Final Proposed Rules. The following table illustrates where sections from the 1996 Rules appear in the Final Proposed Rules. In general, almost every section includes new and moved 1996 language. The 1996 Rules sections cited below are the primary sources for the corresponding Final Proposed Rules sections. “New” indicates that the section is almost entirely new but may also incorporate important points from a 1996 Rules section.

Version 1.1 Chapter 11-200.1, HAR	1996 Section
Subchapter 1 Purpose	
§11-200.1-1 Purpose	1, 14, 19
Subchapter 2 Definitions	
§11-200.1-2 Definitions	2
Subchapter 3 Computation of Time	
§11-200.1-3 Computation of Time	New
Subchapter 4 Filing and Publication in the Periodic Bulletin	
§11-200.1-4 Periodic Bulletin	3, 11.2, 21, 27
§11-200.1-5 Filing Requirements for Publication and Withdrawal	3, 9, 10, 11.1, 11.2, 20, 23
§11-200.1-6 Republication of Notices, Documents, and Determinations	New
Subchapter 5 Responsibilities	
§11-200.1-7 Identification of Approving Agency and Accepting Authority	3, 4, 23
Subchapter 6 Applicability	
§11-200.1-8 Applicability of Chapter 343, HRS, to Agency Actions	New, 5, 8
§11-200.1-9 Applicability of Chapter 343, HRS, to Applicant Actions	New, 5, 6
§11-200.1-10 Multiple or Phased Actions	7
§11-200.1-11 Use of Prior Exemptions, Findings of No Significant Impact, or Accepted Environmental Impact Statements to Satisfy Chapter 343, HRS, for Proposed Actions	New
Subchapter 7 Determination of Significance	
§11-200.1-12 Consideration of Previous Determinations and Accepted Statements	13
§11-200.1-13 Significance Criteria	12
§11-200.1-14 Determination of Level of Environmental Review	New, 5, 8
Subchapter 8 Exempt Actions, List, and Notice Requirements	
§11-200.1-15 General Types of Actions Eligible for Exemption	8

Version 1.1 Chapter 11-200.1, HAR	1996 Section
§11-200.1-16 Exemption Lists	8
§11-200.1-17 Exemption Notices	8
Subchapter 9 Preparation of Environmental Assessments	
§11-200.1-18 Preparation and Contents of a Draft Environmental Assessment	9, 10, 19
§11-200.1-19 Notice of Determination for Draft Environmental Assessments	11.1
§11-200.1-20 Public Review and Response Requirements for Draft Environmental Assessments	9.1
§11-200.1-21 Contents of a Final Environmental Assessment	10
§11-200.1-22 Notice of Determination for Final Environmental Assessments	9, 11.2
Subchapter 10 Preparation of Environmental Impact Statements	
§11-200.1-23 Consultation Prior to Filing a Draft Environmental Impact Statement	9, 15
§11-200.1-24 Content Requirements; Draft Environmental Impact Statement	16, 17, 19, 22
§11-200.1-25 Public Review Requirements for Draft Environmental Impact Statements	22
§11-200.1-26 Comment Response Requirements for Draft Environmental Impact Statements	22
§11-200.1-27 Content Requirements; Final Environmental Impact Statement	16, 17, 18
§11-200.1-28 Acceptability	23
§11-200.1-29 Appeals to the Council	24
§11-200.1-30 Supplemental Environmental Impact Statements	26, 27, 28, 29
Subchapter 11 National Environmental Policy Act	
§11-200.1-31 National Environmental Policy Act Actions: Applicability to Chapter 343, HRS	25, New
Subchapter 12 Retroactivity and Severability	
§11-200.1-32 Retroactivity	New
§11-200.1-33 Severability	30

B. General Changes

The general changes discussed in this section appear consistently throughout the Final Proposed Rules.

The Final Proposed Rules have replaced the term “which” with “that” where appropriate. The 1996 Rules frequently used the term “which” in place of “that” (reflecting a grammar style no longer preferred). “Which” is appropriate where the following clause is not necessary to the meaning of the sentence and is descriptive of the clause that precedes it. “That” is appropriate when the preceding clause is dependent on the clause following “that”; the words after “that” are essential to the meaning of the sentence.

The Final Proposed Rules reduce the confusion between “approving agency” and “accepting authority”. Chapter 343, HRS, uses both terms and states that in the case of applicants, the approving agency is the accepting authority. For sections in the Final Proposed Rules relating to EISs and accepting authorities, the Final Proposed Rules remove the reference to approving agency. Therefore, throughout the document, the term “approving agency” is either replaced with “accepting authority” or removed when the two terms appear together. The Final Proposed Rules also consolidate language regarding the Governor or the Mayor as the accepting authority into one section.

The Final Proposed Rules generally follow the Legislative Reference Bureau (“LRB”) recommendation to avoid the use of acronyms or abbreviations in rules. However, the Final Proposed Rules do incorporate certain acronyms and abbreviations that are commonly used in the environmental review process, which follows examples from other rules where omitting the acronym or abbreviation would be more burdensome on the reader. For example, in chapter 11-55, HAR, Water Pollution Control, “National Pollutant Discharge Elimination System” is abbreviated as “NPDES”. This abbreviation is appropriate because it is commonly used by practitioners and is generally recognized within the field.

The Final Proposed Rules include the following for consistency and to avoid confusion:

- EA: environmental assessment
- EIS: environmental impact statement
- EISPN: environmental impact statement preparation notice
- FONSI: finding of no significant impact
- HAR: Hawaii Administrative Rules
- HRS: Hawaii Revised Statutes
- NEPA: National Environmental Policy Act

The Final Proposed Rules replace the term “assessment” with the abbreviation “EA”, and replace the term “statement” with the abbreviation “EIS”. Additionally, the Final Proposed Rules specify whether an EA or an EIS is “draft” or “final”.

C. Topical Changes

The topical changes discussed in this section address new issues, strategies, and approaches that have emerged since the 1996 Rules were adopted. These changes reflect changing law and public policy, as well as emerging science and technology. These changes typically appear in numerous sections throughout the Final Proposed Rules.

i. Digitizing the Process

The Final Proposed Rules have been updated to reflect increased access to computers and the internet in 2018. When the 1996 Rules were promulgated, home use of computers and internet was relatively uncommon. Accordingly, the periodic bulletin (i.e., *The Environmental Notice*) was physically mailed to subscribers using the United States Postal Services. Proponents also physically mailed copies of EAs and EISs to requesting parties.

Today, the periodic bulletin (i.e., *The Environmental Notice*) is distributed electronically, and EAs, EISs, and other environmental review documents are publicly available in the OEQC's online database. Many of the mailing and print-copy requirements for environmental review documents were included in the 1996 Rules to ensure access. With widespread digital distribution, these concerns are no longer as prominent.

The Final Proposed Rules, therefore, make modifications in many areas related to digitization. The Final Proposed Rules require agencies and applicants to submit their materials electronically to the OEQC for publication in *The Environmental Notice* and for the OEQC to distribute *The Environmental Notice* electronically. The Final Proposed Rules also require agencies to provide an exemption notice electronically. Proposing agencies and applicants are no longer required to mail individual responses to commenters because the responses are easily accessible in the document posted online. Some paper copies of EAs and EISs, however, are still required in the Final Proposed Rules. For example, a copy of a draft EA must be given to the library in the area most affected by the action and one paper copy of the draft and final EA filed with the State Library's Hawaii Documents Center.

ii. Programmatic Approaches and Defining Project and Program

The Final Proposed Rules recommend programmatic environmental review to evaluate the effects of broad proposals or planning-level decisions that may include: (1) a wide range of individual projects; (2) implementation over a long timeframe; or (3) implementation across a large geographic area. Programmatic environmental review (i.e., "program-level" review), is distinguishable from project-based environmental review (i.e., "site-specific" review). The level of detail in programmatic environmental review should be enough to make an informed choice among program-level alternatives and broad mitigation strategies. Programmatic environmental review allows for analysis of the interactions of a number of planned projects or phases in a program. This broader level of review may satisfy compliance with chapter 343, HRS, as described in the new section on use of prior exemptions, FONSIs, and accepted EISs or may be followed by site-specific or component-specific exemptions, EAs, or EISs that are based on the

approved or accepted programmatic document, a process known as “tiering”, as the elements of the program are proposed to be implemented.

Version 0.1 introduced a separate section detailing the requirements for programmatic environmental review for EISs. The Council realized, however, that this approach would have to be replicated, and therefore create redundancy, in the subsequent sections (e.g., exemptions, EAs, and supplemental EISs). This approach would also have resulted in the default process becoming the “project” process and created a bifurcated process for projects and programs. It also raised questions about rights to action involving this bifurcated process; whether someone could sue to require someone to undergo the “project” versus the “program” pathway.

In Version 0.2, the requirements for the environmental review process were integrated into the “Environmental Assessment Style” section and the existing “Environmental Impact Statement Style” section. It became apparent that more detail was necessary for actions that had site-specific impacts and less detail was necessary for broader actions that were still in a more conceptual phase and intended to be implemented in multiple locations or in phases. Versions 0.1 and 0.2 did not, however, define “project” or “program”, which made discussion of “programmatic” environmental review more complicated.

While the Council was drafting Version 0.3, the Hawaii Supreme Court issued its decision in *Umberger v. Department of Land and Natural Resources*, 140 Hawai‘i 500, 507, 403 P.3d 277, 284 (2017). Recognizing that the term “project” and “program” are not statutorily defined under chapter 343, HRS, the Court relied on the definition in the Merriam-Webster Dictionary for the plain-meaning of the terms. The Court provided: “‘Program’ is generally defined as ‘a plan or system under which action may be taken toward a goal.’ ‘Project’ is defined as ‘a specific plan or design’ or ‘a planned undertaking.’” *Umberger*, 140 Hawai‘i at 513, 403 P.3d at 290. While the distinction between program and project helped frame the Final Proposed Rules, there remained some ambiguity because the judicial definition for “program” included the word “action”, which is defined in chapter 343, HRS, as “a project or program”. Therefore, the Council sought further clarification.

To provide greater clarity and to be able to discuss the concept of “programmatic” more succinctly, the Council proposed definitions for “project” and “program” in Version 0.3. The Final Proposed Rules substantially retain these proposed definitions from Version 0.3. Version 1.0 retained the use of the word “programmatic” as the adjective of the word program. However, in response to public feedback requesting a separate definition for the term “programmatic”, the Council replaced the word with “program” so that the Final Proposed Rules refer to “program EAs” and “program EISs”. Using the definitions to distinguish between projects and programs, the Final Proposed Rules also allow for the preparation of programmatic exemptions, EAs, and EISs while avoiding complicated and potentially confusing terms.

iii. “Green Sheet”

The “green sheet” process informs agency decision-making about whether a proposed action fits within an existing chapter 343, HRS, document or determination or requires additional

environmental review. The “green sheet” process was adapted from the City and County of Honolulu Department of Planning and Permitting’s internal review process (referred to as the “green sheet”) for documenting chapter 343, HRS, analysis. The Council has modified the approach to incorporate considerations that the U.S. Bureau of Land Management and U.S. Department of Transportation (“USDOT”) use in their own NEPA adequacy analysis.

During the public comment period, commenters recognized the need for a standardized evaluation process to determine: (1) whether an agency is eligible to prepare a supplemental EIS; (2) whether an agency action is covered by a previous determination or accepted EIS; (3) whether a project is covered by a programmatic exemption, EA or EIS; and (4) whether a federal EA or EIS meets the requirements of chapter 343, HRS. Stakeholders also recommended incorporating the USDOT re-evaluation process for considering when a supplemental EIS may be warranted.

In response to the first issue, the Final Proposed Rules retain the requirement from the 1996 Rules (section 27) that an agency submit a determination of whether a supplemental EIS is required to the OEQC for publication in the bulletin. The Final Proposed Rules moved the supplemental EIS section into the subchapter on EISs but otherwise only make housekeeping edits to the sections. The “green sheet” is a process introduced in section 11-200.1-11.

Section 11-200.1-11 was introduced to provide agencies with guidance on whether an action is covered under an existing exemption, EA, or EIS. Agencies are provided the following criteria:

(1) Whether the proposed action was a component of, or is substantially similar to, an action that received an exemption, FONSI, or an accepted EIS (for example, a project that was analyzed in a program EIS);
(2) Whether the proposed action is anticipated to have direct, indirect, and cumulative effects similar to those analyzed in a prior exemption, final EA, or accepted EIS; and
(3) In the case of a final EA or an accepted EIS, whether the proposed action was analyzed within the range of alternatives.

If the criteria apply, the proposed action could be covered under the existing HEPA process. If the criteria do not apply, an agency must conduct a separate chapter 343, HRS, analysis; that is, the agency needs to decide if an exemption, EA, or EIS is appropriate. In either case, the agency may publish the determination with the OEQC for publication in the periodic bulletin.

For NEPA, an agency, in the act of issuing an exemption, FONSI, or acceptance, would in effect “certify” that the federal document and process meets the requirements of chapter 343, HRS. That is, if an agency were to issue a FONSI for a federal EA that was not published in the periodic bulletin, then the agency would be at fault for not fully complying with chapter 343, HRS. Similarly, an agency issuing an acceptance based on a federal EIS would be affirming that the federal EIS meets the content and process requirements of chapter 343, HRS, including any provisions related to NEPA as set forth in section 11-200.1-31.

The OEQC is available to assist agencies in developing a standardized form that can serve as a "green sheet". The form will help agencies track determinations that an action is covered by an existing chapter 343, HRS, process. Agencies will be able to track (1) whether a programmatic EIS covers the action; (2) whether a supplemental EIS is required; and (3) whether NEPA is an aspect of the action. The Council notes that the "green sheet" may vary by agency, depending on the agency's specific needs.

iv. Exemptions

The Final Proposed Rules update the exemption process to (1) clarify which activities agency undertake could be considered *de minimis* versus needing an exemption notice filed; (2) rename the "exemption classes" to "general types" and revise the general types (including adding a provision for affordable housing as described below); (3) obtain Council concurrence on the exemptions lists on a regular basis; and (4) increase timely public access to information about exemptions (see subchapter 8).

Section 11-200.1-16 separates the exemption list into the following two sections: (1) *de minimis* actions (i.e., routine operations and maintenance, ongoing administrative activities, and other similar items); and (2) general types of actions listed in section 11-200.1-15 and agency-specific actions recorded in exemption notices (see section 11-200.1-17). The Final Proposed Rules require agencies to consider in advance what activities the agency considers to be *de minimis*, and to include them in Part 1 of the agency's exemption list. By including *de minimis* actions in the exemption list, an agency can alert staff to situations where an activity might be in the gray area of a project or program for the purposes of chapter 343, HRS, but perhaps not rising to the level of requiring environmental review. *De minimis* activities presumptively do not require documentation (i.e., an exemption notice) or consultation. Many of these activities (e.g., repainting buildings to fixing plumbing and purchasing office supplies) are already exempt by agencies because they fall under one or more of the classes in the 1996 Rules.

The Final Proposed Rules removes the proposed language in Version 1.0 that would allow agencies to not consult on an exemption or publish it in the bulletin if the agency had a timely Council-concurred exemption list. The Council removed this language because of comments that the language was inconsistent with the statute. Basing process completion requirements on the status of Council concurrence raises questions about an action appropriately completing environmental review and the Council's role in agency decision making.

After adoption of the Final Rule, agencies would have seven years to reorganize and update their exemption lists to comply with the rules (see section 11-200.1-32). The Council and OEQC can assist agencies with this transition.

v. Affordable Housing

See the discussion in section 11-200.1-15, General Types of Actions Eligible for Exemption, for discussion about the exemptions regarding affordable housing.

vi. Climate Change

The Council maintains that chapter 343, HRS, is broadly written to require examination of any relevant impact of potential significance in relation to a proposed action, rather than a laundry list of impacts. This means that chapter 343, HRS, already requires the examination of sea level rise and other climate change impacts, much as any other emerging impact would warrant consideration in an EA or EIS.

The Final Proposed Rules make two changes to the significance criteria regarding climate change. The first is to incorporate sea level rise into significance criterion 11. Under the Final Proposed Rules, when determining whether issuing an exemption is appropriate, considering if an EA must be prepared, or preparation of an EIS is warranted, proposing and approving agencies must consider whether a proposed action is likely to have a substantial adverse effect on or is likely to suffer damage by being located in a sensitive area such as the sea level rise exposure area (e.g., exacerbating coastal erosion or increasing exposure to hazards such as inundation). This determination is in turn documented in an exemption notice, EA, or EIS. Agencies must also consider whether the proposed action will be impacted by sea level rise. Also, the Final Proposed Rules clarify that the state sea level rise exposure area maps should be included in EAs and EISs to demonstrate the potential vulnerability of a proposed action. The Council views these revisions as meeting the directive to the Council in Act 17, Session Laws of Hawaii 2018, to promulgate rules for EAs and EISs to examine sea level rise.

The second is to amend significance criterion 13 to require agencies to consider in a significance determination whether a proposed project will emit substantial greenhouse gases at any stage or may emit substantial greenhouse gases as an indirect or cumulative impact.

The *Hawaii Sea Level Rise Vulnerability and Adaptation Report*, released in December 2017 by the Department of Land and Natural Resources, calls on the OEQC to develop guidance on addressing climate change in EAs and EISs. Guidance from the OEQC will be forthcoming after the rules update is completed. In developing the guidance, the OEQC will look to the Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews, issued by the Council on Environmental Quality Control on August 5, 2016 (81 FR 51866; https://www.federalregister.gov/documents/2016/08/05/2016-18620/final-guidance-for-federal-departments-and-agencies-on-consideration-of-greenhouse-gas-emissions-and).

vii. “Direct-to-EIS”

In 2012, the Legislature amended chapter 343, HRS, to allow proposing agencies and applicants, with authorization by their approving agencies, to directly prepare an EIS when there is clear potential for a significant impact. The 1996 Rules are written such that an EA that is prepared prior to an EIS is part of the definition of an EIS and is one of the steps in the process of developing an EIS. The Final Proposed Rules amend the definition of an EIS and allow for EISs to begin at the EISPN stage without first preparing an EA.

Because the 1996 Rules do not reflect this statutory change, there is confusion about the requirements for an EISPN when an applicant or proposing agency began with an EIS versus beginning with an EA and finding that an EIS is needed. To reduce this confusion, the Final Proposed Rules standardize the requirement of an EISPN regardless of how a proposing agency or applicant begins an EIS.

The Final Proposed Rules include a public scoping meeting requirement, as well as incorporation of public feedback from the scoping meeting into the draft EIS. In the past, the preparation of an EA would provide the public an early opportunity to provide comments on an action. The scoping meeting requirement at the EISPN phase balances the increased efficiency of proceeding directly to an EIS with providing adequate opportunity for public engagement.

Because the 1996 Rules assumed that an EA would be done before an EISPN, the content requirements for an EISPN were minimal. In the Final Proposed Rules, those details are intended to be filled out with the preparation of the draft EIS and with incorporation of public feedback from the mandatory scoping meeting and any other public consultation an agency or applicant chooses to undertake.

viii. Republication of EAs or EISs

On occasion, an agency or applicant would like to extend a public comment period for an EA or EIS. The statute is silent on extending public comment periods. However, it does allow for an applicant to request an agency to extend the acceptance period by fifteen (15) days (chapter 343-5(e), HRS).

In the past, agencies have offered extended comment periods to allow the public more time to engage in the process and provide additional feedback. This approach creates complications for the environmental review process. If an agency does not announce this extension through the periodic bulletin (i.e., *The Environmental Notice*), then not all stakeholders may be aware of the extension. In effect, this gives some members of the public more time than others. Also, an extension of time creates uncertainty in legal standing for individuals who submit comments after the statutory deadline of a comment. The statute sets clear limitations on rights to pursue legal remedies, one of which is having commented during the draft EIS comment period. Extending the comment deadline also creates questions of standing for the courts.

To meet the need of additional comment time while complying with the statute, the Final Proposed Rules add a new section on republishing EAs and EISs for additional comment time. This creates the option of another comment period of thirty (30) days for draft EAs and EISPNs, and forty-five (45) days for draft EISs.

A comment received during the republication period is treated the same as a comment submitted during the initial publication period. That is, the proposing agency or applicant will have to respond to the comment and the commenter will have legal standing. Comments received in between publication periods do not have legal standing because they are not submitted during a legal window. The OEQC recommends agencies contact any members of

the public who submit comments between publication periods so that they are aware that they will have to resubmit the comment during the re-publication comment period.

ix. Response to Comments

The Final Proposed Rules amend how proposing agencies and applicants are to respond to comments.

a. *Individually Mailed Responses, Comment Grouping, and Form Letters/Petitions*
When the 1996 Rules were promulgated, the main method of EA/EIS dissemination was through paper copies of the documents. Hard copies of responses were mailed to commenters and made available through a paper copy of the EA or EIS at the library or other certain physical locations.

Today, EAs, EISs, and other environmental review documents are easily accessible through the OEQC website. Accordingly, the Final Proposed Rules have introduced changes based on the wide accessibility of EAs and EISs online.

First, the Final Proposed Rules no longer require a written response to be physically mailed to each commenter. Comments must still, however, be responded to and appended to the final EA or final EIS, with some minimal exceptions.

Second, because comments no longer must be mailed individually to commenters, the Final Proposed Rules allow proposing agencies and applicants to respond to comments based upon the "grouping" model allowed under NEPA. Proposing agencies and applicants may group comments into general topics (e.g., endangered species). Within each topic there may be several issues (e.g., monk seals and hawksbill turtles). Proposing agencies and applicants must respond to each substantive point raised under the topic. This approach increases efficiency, particularly when many comment letters are received that raise the same issues. Grouping also gives the approving or accepting agency, and the public, a comprehensive understanding of all the issues raised under a single topic.

Commenters expressed concern that commenters would not be able to determine whether their comments received a response. To mitigate this concern, proposing agencies and applicants are required to list commenters whose comments are being addressed under each topic heading or section. Additionally, all comment letters containing substantive comments must be appended to the final EIS or EA.

The Final Proposed Rules also allow proposing agencies and applicants to respond directly to a specific comment. The response letter is usually included before or after the comment letter so that the commenter can clearly identify that a response has been provided. Although not required, proposing applicants and agencies may mail written responses to commenters.

It has become common practice for commenters to submit form letters and petitions during the public comment period. To recognize and respond to commenters who submit identical or near-

identical comments, the Final Proposed Rules allow proposing agencies and applicants to respond to form letters and petitions with a single response or, if following the grouping procedure, to address the issues raised in the form letter in the appropriate topic areas. At least one representative form letter or petition must be appended to the document. However, proposing agencies and applicants must identify all the commenters who submitted the form letter or signed the petition. Identification can be achieved by including all identical and near-identical copies of the petition or form letter. Alternatively, proposing agencies and applicants can provide a list the names of those who provided the identical or near-identical comments.

Commenters were concerned the form letter process may allow proposing agencies or applicants to overlook comments that add in additional substantive points to form letters. The Final Proposed Rules address this concern by requiring that form letters that have additional substantive points be appended in full to the document, and receive a response, either as a separate response, or as part of a grouped response.

b. *"Substantive" Comments*
Under the 1996 Rules, proposing agencies and applicants were only required to respond to "substantive" comments. A comment is considered "substantive" if it addresses some specific aspect of the proposed action, the document, or the process.

The Council considered eliminating this qualification in Version 0.2 to require proposing agencies and applicants to respond to *all* comments. The Council reasoned that eliminating the qualification would help ensure that all comments would receive a response. However, the Council was concerned about the potential burden of responding to statements that are clearly outside the scope of the action. Similarly, responding to inflammatory comments, formalities, or pleasantries may not be an effective use of time and resources. Taking these concerns into account, Version 0.3 retained the qualification that "substantive" comments require a response. Version 0.3 also emphasized that the accepting authority had to be satisfied that a comment is "substantive", as well as whether the response is adequate. The Final Proposed Rules retain this and emphasize that an accepting authority could issue a non-acceptance for comments it deemed to be substantive but the proposing agency or applicant had not considered to be so and therefore had not responded to in a commensurate manner.

x. Scoping Meetings

In the 1996 Rules, a 30-day comment period followed the publication of the EISPN to help obtain public input on what issues the EIS should focus on as potentially significant and which issues are potentially less important and therefore could be summarized in the EIS, a process which is referred to as scoping. The proposing agency or applicant has the option to hold a scoping meeting. If the proposing agency or applicant chooses to hold a scoping meeting, then the proposing agency or applicant must treat oral and written comments the same; that is, oral and written comments from a scoping meeting have to be written down and responded to in the draft EIS. In practice, many proposing agencies and applicants choose to either not hold scoping meetings, or hold meetings that are similar but do not meet the legal description of a scoping meeting to avoid responding to oral comments.

Commenters expressed concern that the elimination of the statutory requirement to produce an EA prior to an EIS would diminish opportunities for public involvement. Prior to the statutory change, an EA would be prepared as part of the EISPN, usually including a comment period from draft to final EA. Since the change in statute, most EISs begin with an EISPN and an EA is not prepared. Because the 1996 Rules assume an EA has been done before an EISPN, there are very few content requirements for an EISPN. The public often requests a scoping meeting as a way to get more information about a proposed action.

The Council considered modifying the rules to require scoping meetings during the EIS process. The Council reasoned that there are several potential benefits to this requirement: (1) scoping meetings supplement the limited content requirements in the EISPN; (2) scoping meetings help the proposing agency or applicant to focus the document on the important issues; and (3) the approach is consistent with the federal NEPA process, thereby increasing efficiency in the process for HEPA-NEPA joint actions.

The Final Proposed Rules require a scoping meeting be held on each island affected by a proposed action. This requirement addresses the public's need to be better informed about a proposed action while giving proposing agencies and applicants the opportunity to meaningfully engage the public. Proposing agencies and applicants have prepared, on average, 10-15 EISs per year since 2012. Agencies are responsible for a majority of the EISs and have exclusively prepared statewide EISs. Accordingly, the requirement to hold scoping meetings on multiple islands will have a minimal impact on non-agency applicants.

The Council recognizes that requiring a scoping meeting will add a new cost to undertaking an EIS. The 1996 Rules requires that oral comments be written down and responded to in writing. Under the Final Proposed Rules, proposing agencies and applicants are no longer required to transcribe written comments and respond to them in writing. Instead the proposing agency or applicant record oral comments during a specific portion of the EIS public scoping meeting set aside to receive oral comments and include a summary of the oral comments in the draft EIS. There is no longer a requirement to respond in writing to the summary.

xi. HEPA-NEPA Joint Actions

The Final Proposed Rules seek to align the federal and state environmental review processes to increase efficiency for actions that require review under both statutes. Under the Final Proposed Rules, a proposing agency or applicant can prepare a single document and conduct a single comment period that satisfies both federal and state requirements. The Final Proposed Rules encourage the use of the NEPA environmental review document, but require that each agency make an independent determination, pursuant to chapter 343, HRS, of the necessary level of environmental review. A NEPA document (such as an EA or EIS) cannot be used as a chapter 343, HRS, document if it does not meet the requirements for chapter 343, HRS, review (including required public comment periods). When a federally prepared EA or EIS meets all the process and content requirements, then a Hawaii decision-maker can use the federal document. This can be noted in the "green sheet".

The Final Proposed Rules contain provisions for agencies to determine the necessary level of environmental review under chapter 343, HRS. For example, NEPA could allow for a categorical exemption, while chapter 343, HRS, may require an EA or even an EIS. Alternatively, NEPA could require a federal EA, while chapter 343, HRS, may allow for an exemption.

xii. Retroactivity

The Final Proposed Rules provide accommodations for: (1) actions that are undergoing environmental review if the Final Rules are promulgated into law; and (2) actions that may have to repeat the environmental review process following pending litigation. Version 0.2 introduced a retroactivity section that was later modified in Version 0.3. The retroactivity section provides that proposed actions that have completed a formal public engagement step shall continue under the 1996 Rules for five years from the date the Final Proposed Rules are promulgated into law.

As applied, once a draft EA has been published, the proposed action remains under the 1996 Rules until either it receives a determination (FONSI or EISPN) or five years have passed. Similarly, for an EIS, publication of the EISPN would mean the proposed action stays under the 1996 Rules until either a determination is made (acceptance or non-acceptance) or five years have passed. This ensures that the proposing agency or applicant has a consistent process and the public has an expectation of the process for its duration.

EISs accepted before the enactment of any Final Rules would remain under the 1996 Rules for purposes of supplemental EISs.

The retroactivity section also allows agencies to maintain their exemption lists for up to seven years before needing to obtain Council concurrence. The retroactivity period allows for an agency to review its existing exemption list to reflect the changes associated with the Final Rules.

III. Section-Specific Changes

Subchapter 1 Purpose

Subchapter 1 (Purpose) creates a distinct subchapter for the section setting forth the purpose of chapter 11-200.1, HAR. Although this subchapter contains only one section, creating a new subchapter is in line with creating a new structure for chapter 11-200.1, HAR, providing a clear outline of the contents of the chapter through the subchapter headings.

§ 11-200.1-1 Purpose

Section 11-200.1-1 describes the purpose of the rules in chapter 11-200.1, HAR. Section 11-200.1-1 adapts the policy statements for EISs, found in section 11-200-14 of the 1996 Rules, to apply to the environmental review process as a whole.

Section 11-200.1-1 incorporates the housekeeping changes described in the General Changes section and updates the arrangement of words and phrases to improve syntax.

Subsection (a) of 11-200.1-1 was formerly section 11-200.1, HAR (1996). Subsection (a) introduces the terms “environmental impact statement” and “environmental assessment” and provides the acronyms “EIS” and “EA”.

Subsection (b) derives from 11-200-14, HAR (1996), “General Provisions”, which is the first section in subchapter 7, “Preparation of Draft & Environmental Impact Statements” under the 1996 Rules. The section has been modified to apply to exemption notices, EAs, and EISs. The subsection emphasizes that exemption notices, EAs, and EISs should be prepared at the earliest practicable time and describes the spirit in which the documents should be prepared. The purpose of preparing the documents is to enlighten decision-makers about any environmental consequences. The addition of the language “prior to decision-making” emphasizes the timing of when an exemption notice, EA, or EIS should be prepared. After-the-fact exemption notices, EAs, or EIS, are inappropriate.

Subsection (c) adapts language from section 11-200-19, HAR (1996) regarding Environmental Impact Statement Style to make it applicable to both agencies and applicants and to all environmental review documents. However, the sections are rearranged in the Final Proposed Rules. The language is also modified to be grammatically correct and increase readability.

Paragraph (3) provides new direction for engaging in consultation. Council members and commenters expressed concern that the consultation process is often a mere formality, without a true, open, and mutual dialogue between action proposing agencies and applicants and members of the public. Paragraph (3) specifically calls for “mutual, open, and direct, two-way communication, in good faith”.

Subchapter 2 Definitions

Subchapter 2 (Definitions and Terminology) creates a distinct subchapter for the section setting forth definitions and terminology used in chapter 11-200.1, HAR. Although this subchapter contains only one section, creating a new subchapter is in line with creating a new structure for chapter 11-200.1, HAR, providing a clear outline of the contents of the chapter through the subchapter headings.

§ 11-200.1-2 Definitions

Section 11-200.1-2 replaces section 11-200-2, HAR (1996). Section 11-200.1-2 provides the definitions and terms used in chapter 11-200.1, HAR. The Final Proposed Rules authorize agencies to use their own statutes and administrative rules to interpret unidentified rules. Section 11-200.1-2 incorporates the housekeeping edits described in the General Changes section. The definitions are listed in alphabetical order and amended to remove process steps, clarify their meaning, or make them more consistent with other changes throughout the Final Proposed Rules.

In the Final Proposed Rules, the definition of “acceptance” is modified to remove redundant language. Additionally, the process steps are moved to section 11-200.1-28.

The definition of “accepting authority” is modified to distinguish between “agency actions” and “applicant actions” for whom makes the determination that an EIS fulfills the requirements for acceptance.

The definition of “addendum” is modified to incorporate housekeeping changes and to include that an “applicant” also may attach an addendum to a draft EA or EIS.

The definition of “approval” is modified to remove the word “actual” from the phrase “prior to the actual implementation of the action” because “actual” was an unnecessary adjective. The definitions of “discretionary consent” and “ministerial consent” that were embedded in the 1996 definition of “approval” have been removed and made into a standalone definition under “discretionary consent”.

The definition of “approving agency” is modified to remove the word “actual” from the phase “prior to the actual implementation of the action” because “actual” was an unnecessary adjective. The word “applicant” was added before the word “action” because an approving agency is only necessary within the environmental review context for applicants. Chapter 343, HRS, only applies to applicants when an applicant action needs a discretionary consent (an approval) to proceed and contains a trigger under section 343-5, HRS.

The definition of “cumulative impact” is slightly modified for housekeeping purposes (“which” to “that”).

The definitions of “discretionary consent” and “ministerial consent” are removed from the 1996 definition of “approval” and made into a standalone, combined definition (discretionary consent and ministerial consent). The definition of “discretionary consent” is consistent with both chapter 343, HRS, and the 1996 Rules language. The definition of “ministerial consent” is consistent with the 1996 Rules language. It is not a defined term in chapter 343, HRS.

The definition of “draft environmental assessment” is modified for housekeeping purposes, and to use the term “finding of no significant impact” in place of “a negative declaration determination”.

The definition of “effects” and “impacts” is slightly modified for housekeeping purposes (changing “which” to “that”), and to incorporate the language “immediate or delayed” that is part of the 1996 Rules definition of “environmental impact”, which is proposed to be deleted due to redundancy.

The definition of “EIS preparation notice” re-orders the words “EIS preparation notice” and “preparation notice”, and adds in the acronym “EISPN” because “EISPN” and “EIS preparation notice” are used most frequently throughout the rules. The definition is accordingly put in alphabetical order. The definition is updated to incorporate the “Direct-to-EIS” route, which, pursuant to section 343-5(e), HRS, begins with an EISPN. Note that section 343-5(e), HRS, only allows an agency to use its judgment and experience to determine whether an agency or applicant may begin with an EISPN. An applicant must consult with an agency first to receive this authorization. Housekeeping changes are also included.

The definition of “EIS public scoping meeting” is added. An EIS public scoping meeting is a new requirement as part of the EIS preparation process and is outlined in section 11-200.1-23. The purpose of an EIS public scoping meeting is for interested parties to assist the applicant or agency in developing the scope of the EIS.

The definition of “environment” is modified to include health, so that it corresponds to the definition of “effects” or “impacts” under both chapter 343, HRS, and the 1996 Rules. It is also modified to include “cultural”, as required by Act 50 Session Laws Hawaii of 2000.

The definition of “environmental assessment” is modified to clarify that an EA needs to provide sufficient evidence to make a significance determination as opposed to merely making that assertion, or, on the opposite end of the spectrum, providing an unduly long analysis. The statutory and 1996 Rules provide only that an EA is a written evaluation “to determine whether an action has a significant environmental effect”. The proposed definition expands it to “a written evaluation that serves to provide sufficient evidence and analysis to determine whether an action may have a significant effect”.

The definition of “environmental impact” is deleted because it was unnecessary with both “impact” and “environment” already included as defined terms. The words “immediate or delayed” have been incorporated into the definition of “effects” or “impacts”.

The definition of “environmental impact statement” is modified with housekeeping changes.

The definition of “exempt classes of action” is deleted because the concept of “classes of action” is removed in subchapter 8. Subchapter 8 uses the term “general types” of action that may be exempted in order to be more consistent with chapter 343, HRS.

The definition of “exemption list” is added because it is a frequently used term in subchapter 8A. The new definition clarifies that the exemption process is part of the chapter 343, HRS, process.

The definition of “exemption notice” is modified to reflect the updates to the exemption process under subchapter 8. It recognizes that an exemption notice may be prepared for both agency and applicant actions. Further, it removes the reference that the notice be kept on file because in some circumstances a notice may be required to be published in the bulletin.

The definition of “final environmental assessment” is modified to reflect that chapter 343, HRS, now provides for a “Direct-to-EIS” pathway when, based on an agency’s judgment and experience, the agency concludes that the proposed action may have a significant effect on the environment. The agency may then directly proceed to an EIS, or in the case of an applicant, may authorize an applicant to proceed directly to the preparation of an EIS. For both proposing agencies and applicants, the EIS preparation begins with an EISPN. Because the “Direct-to-EIS” pathway exists, it is less likely that an agency will submit or require the applicant to submit a final EA without the preparation of a draft EA. The line referring to this process has therefore been removed. The definition has also been modified to include housekeeping changes.

The definition of “finding of no significant impact” or “FONSI” no longer refers to “negative declaration”. The acronym FONSI is introduced because it is frequently used in the Final Proposed Rules and in practice. The definition no longer specifies that a “FONSI is required prior to implementation” because that is a process element and not intrinsic to the definition.

The definition of “impacts” is added to redirect the reader to “effects”. “Impacts” and “effects” are used synonymously throughout the Final Proposed Rules.

The definition of “National Environmental Policy Act” is slightly modified to include housekeeping changes, including adding in the acronym “NEPA”.

The definition of “negative declaration” is deleted and moved alphabetically under “finding of no significant impact”.

The definition of “office” includes minor housekeeping changes.

The definition of “periodic bulletin” is modified to include “bulletin” as an abbreviated reference to the “periodic bulletin”.

The definition of “preparation notice” is deleted and moved under “Environmental Impact Statement Preparation Notice” or “EISPN”. The term EISPN is used more frequently throughout the Final Proposed Rules.

The definition of “primary impact” is modified slightly to incorporate housekeeping changes.

The definition of “program” is added to distinguish projects and programs from one another and to facilitate discussion of a programmatic approach to environmental review. The proposed definition is aligned with but significantly expands upon the definition set forth by the Hawaii Supreme Court in *Umberger. See* 140 Hawai‘i at 513, 403 P.3d at 290 (see II.C.ii Programmatic Approaches and Defining Project and Programs). The definition no longer refers to a single project conducted over a long timeframe as that is a phased project.

The definition of “project” is added to distinguish between projects and programs and to facilitate discussion of a programmatic approach to environmental review. The Council added the phrase “has potential impact to the environment” to clarify the nexus of a project for environmental review purposes. The proposed definition is consistent with but expands upon the definition set forth by the Hawaii Supreme Court in *Umberger* (see II.C.ii Programmatic Approaches and Defining Project and Programs).

A definition of “proposing agency” is added because the term is used frequently throughout both the 1996 Rules and the Final Proposed Rules, but was not previously defined.

The definition of “secondary impact”, “secondary effect”, “indirect impact” or “indirect effect” is modified to correct grammar and readability.

The definition for “significant effect” or “significant impact” is amended according to Act 50 of the 2000 legislative session, which added “cultural practices of the community and State” to the definition of “significant effect” in chapter 343, HRS.

The definition of “supplemental EIS” is amended to refer to an “updated” instead of an “additional” EIS.

The definition of “trigger” is added to refer to any use or activity listed in section 343-5(a), HRS. The Draft Proposed Rules language was derived from the statute but in the context of these rules was not as clear. Therefore, the Council amended the definition in the Final Proposed Rules because a trigger could result in an exemption notice or EIS, not only an EA. The 1996 Rules listed common “triggers” from section 343-5(a), HRS. However, the list has been omitted from the Final Proposed Rules.

Subchapter 3 Computation of Time

Subchapter 3 (Computation of Time) creates a distinct subchapter standardizing the computation of time for all time periods prescribed by this chapter and chapter 343, HRS. Although this subchapter contains only one section, creating a new subchapter is in line with creating a new structure for chapter 11-200.1, HAR providing a clear outline of the contents of the chapter through the subchapter headings.

§ 11-200.1-3 Computation of Time

Section 11-200.1-3 is a new section. The section describes how to compute days within the Final Proposed Rules. Section 11-200.1-3 provides that time periods prescribed by the Final Proposed Rules should generally be "computed by excluding the first day and including the last." If the last day happens to fall on a weekend or state holiday, than the last day should be the next business day. Weekends and state holidays are otherwise included in the total count.

The Final Proposed Rules are consistent with chapter 11-201-14, HAR (1985), Environmental Council Rules of Practice and Procedure ("Council Rules") but adopt the more succinct statutory language.

Pursuant to section 343-5, HRS, the comment period for an EA is thirty (30) days, and for an EIS is forty-five (45) days. Under the Final Proposed Rules, the day an EA or and EIS is published in the periodic bulletin (i.e., *The Environmental Notice*) is identified as day zero. For example, if the OEQC publishes an EA in the periodic bulletin on Sunday, April 8, 2018, April 8 is counted as day zero. The thirty days would begin to count on Monday, April 9 and therefore the deadline would fall on Tuesday, May 8, 2018.

Subchapter 4 Filing and Publication in the Periodic Bulletin

Subchapter 4 (Filing and Publication in the Periodic Bulletin) creates a distinct subchapter setting forth information about the periodic bulletin (i.e., *The Environmental Notice*) and requirements for filing submittals to OEQC for publication in the periodic bulletin. This subchapter reorganizes the previous periodic bulletin section from the 1996 Rules into three sections.

Section 200.1-4 addresses the purpose of the periodic bulletin and publication requirements. Section 200.1-5 establishes procedures for filing submittals for publication and consolidates previous language in various sections of the 1996 Rules regarding filing requirements into one place. Section 200.1-6 includes new language addressing occasions when an agency or applicant seeks to publish the same notice, document, or determination that it has published before and addresses the associated comment periods that arise when republication occurs.

§ 11-200.1-4 Periodic Bulletin

Section 11-200.1-4 replaces section 11-200-2, HAR (1996). This section is adapted from sections 11-200-3, 11.2, 21, and 27 of the 1996 Rules. The Final Proposed Rules separate section 11-200-3, HAR (1996) into two sections: Periodic Bulletin (section 11-200.1-4) and Filing Requirements for Publication and Withdrawal (section 11-200.1-5).

In the Final Proposed Rules, subsection (a) provides that the periodic bulletin (i.e., *The Environmental Notice*) will be published electronically. OEQC will provide paper copies of the periodic bulletin request. Additionally, the periodic bulletin will be made available at public libraries.

Subsection (b) lists the types of notices, documents, and determinations published in the periodic bulletin, pursuant to chapter 343, HRS. Paragraph (2) introduces a new requirement to publish lists of exempted actions. Paragraph (11) requires republication of any chapter 343, HRS, notices, documents or determinations, and for notices of their withdrawal in accordance with other applicable requirements of the chapter.

Subsection (c) requires the OEQC to publish other notices required by statute or rules. For example, section 13-222-12, HAR, requires public notice in the periodic bulletin for shoreline certifications.

Subsection (d) authorizes the OEQC to publish additional items in the periodic bulletin as time and space allow. Space is generally not a concern for the electronic document. However, time is likely to be an issue given that the Final Proposed Rules reduced the submittal deadline from eight (8) days to five (5) days.

§ 11-200.1-5 Filing Requirements for Publication and Withdrawal

Section 11-200.1-5 consolidates language from sections 11-200-3, 9, 10, 11.1, 11.2, 20 and 23, HAR (1996). In the 1996 Rules, the filing requirements are integrated into content or process steps and require numerous cross-references. This section standardizes the filing requirements for each document or determination into one section.

Section 11-200.1-5 consolidates notices, documents, and determinations required under chapter 343, HRS, as well as requirements for publication pursuant to other statutes or administrative rules (e.g., chapter 13-222-12, HAR for shoreline applications).

Subsection (a) provides that submissions to the OEQC must be electronic and before the close of business five (5) days prior to issue date. Under the 1996 Rules, the deadline was eight (8) days prior to the issue date. The Council considered this deadline and determined the OEQC no longer needs eight days to prepare the periodic bulletin. In Version 1.0, a four (4) day deadline was proposed. However, the Council ultimately decided that a five (5) day deadline would be the most practical to alleviate any potential burden on the OEQC, as well as to accommodate limited staffing and resources.

Subsection (b) authorizes OEQC to request geographic data such as that included in a standard geographic information systems file. Subsection (b) also requires proposing agencies and applicants to identify the specific approval requiring an applicant to undertake environmental review.

Subsection (d) consolidates language on withdrawal from environmental review and permits anything filed with the OEQC (e.g., EA or EIS) to be withdrawn at any time.

The Final Proposed Rules require paper copies in only two circumstances, both related to the state library. Consistent with the library's archival requirements, the Final Proposed Rules require submission of one paper copy of any draft or final EA or EIS to be deposited with the State Library Document Center. Additionally, a paper copy of a draft EA, EISPN, or draft EIS must be deposited in the local library nearest to the proposed action. This is so that those living nearest to the proposed impacts and have limited electronic access (or capability) are still able to participate in the environmental review process at the scoping and draft phases.

Subsection (e) incorporates the requirement in section 11-200.1-18 to record and submit oral comments at public scoping meeting for EISs. It is incumbent upon the proposing agency or applicant to ensure that one unaltered/unedited copy of the recording of the oral comments is submitted to the OEQC. The OEQC recommends proposing agencies or applicants consider using backup methods to record oral comments in the event of file corruption. Standard quality means all oral comments can be clearly heard.

§ 11-200.1-6 Republication of Notices, Documents, and Determinations

Section 11-200.1-6 was introduced to address the practice of republication of chapter 343, HRS, notices, documents, and determinations. Chapter 343, HRS, is silent on whether comment periods may be extended. In practice, proposing agencies, applicants, and approving agencies have sought to extend comment periods. When this occurs outside of the standard time period for public comment, or outside of the notification process through the periodic bulletin, inconsistencies can arise in the process creating questions of public notification and, in some cases, standing. To avoid inconsistencies, section 11-200.1-6 specifies the standard filing, comment, and response requirements of chapter 343, HRS, apply each time something is published.

In the Final Proposed Rules, subsection (a) provides that any proposing agency or applicant that filed a chapter 343, HRS, notice, document, or determination may withdraw and republish a notice, document, or determination that has not been changed. Other submittals to the OEQC required by council rules, statute other than chapter 343, HRS, or an agency's administrative rules other than this chapter, may also be withdrawn and republished, in accordance with that statute or those rules. There is no chapter 343, HRS, obligation to publish an unchanged document again; however, a proposing or approving agency's own statutes, rules, or procedures may require or call for it.

Subsection (b) describes when a public comment period is required with the republication of a chapter 343, HRS, notice, document, or determination and how comments received in two or more comment periods for an unamended but republished notice, document, or determination are to be handled. The requirement to address comments in all comment periods resulting from multiple publications is to reduce the possibility of repeated publications to achieve fewer comments. Comments received outside of the multiple comment periods do not have to be addressed.

Subchapter 5 Responsibilities

Subchapter 5 (Responsibilities) creates a distinct subchapter identifying the decision-making authority when agencies and applicants undergo chapter 343, HRS, environmental review in various circumstances. Although this subchapter contains only one section, creating a new subchapter is in line with creating a new structure for chapter 11-200.1, HAR providing a clear outline of the contents of the chapter through the subchapter headings.

§ 11-200.1-7 Identification of Approving Agency and Accepting Authority

Section 11-200-1.7 replaces section 11-200-4, HAR (1996). The language has been adapted from sections 11-200-3, 4, and 23, HAR (1996). Section 11-200-1.7 distinguishes between approving agencies and accepting authorities.

Subsection (a) provides that the Governor has the authority to accept an EIS whenever an action proposes the use of state lands or funds. Alternatively, the Mayor has the authority to accept an EIS when an action proposes the use of county lands or funds.

Subsection (b) consolidates language from section 11-200-23 in the 1996 Rules. That language discussed who the accepting authority would be for state or county lands or funds. The Council moved it to this section as it pertains to identification of the accepting authority rather than determining acceptability.

Subsection (c) clarifies that, if an applicant proposes an action, the approving agency for environmental review compliance is also the accepting authority. Section 343-5(e), HRS, states that for applicants “the agency initially receiving and agreeing to process the request for approval shall require the applicant to prepare an [EA] of the proposed action”, which is the approving agency. The statute further states that the “authority to accept a final statement shall rest with the agency initially receiving and agreeing to process the request for approval”. The agency with the authority to accept a final statement is the accepting authority, which is the agency initially receiving and agreeing to process the request for approval. This section adds language for applicants undertaking an EA to identify the approving agency.

Subsections (d) and (e) describe the process to select the appropriate accepting authority, when two or more agencies are involved in an action. A list of considerations is provided for the agencies to make their decision, including a new consideration for which agency may have the most lands or funds involved in a proposed action.

Although subsection (f) states that the OEQC may not serve as the accepting authority for any action, subsection (g) authorizes OEQC to provide recommendations to an agency or applicant.

Subchapter 6 Applicability

Subchapter 6 (Applicability) creates a distinct subchapter setting forth procedures for determining whether an activity requires chapter 343, HRS, environmental review. This subchapter reorganizes the previous applicability subchapter from the 1996 Rules to show the chronological steps that a proposing or an approving agency will follow when making this determination.

Section 11-200.1-8 addresses applicability of chapter 343, HRS, environmental review to agency actions, particularly the use of state or county lands or funds trigger, and emergency actions. Section 11-200.1-9 addresses applicability to applicant actions and incorporates section 343-5.5, HRS. Section 11-200.1-10 addresses the treatment of multiple or phased actions. Section 11-200.1-11 addresses the use of prior exemptions, FONSIs, and accepted EISs and introduces the evaluation tool informally called the “green sheet” based on the City and County of Honolulu Department of Planning and Permitting worksheet.

§ 11-200.1-8 Applicability of Chapter 343, HRS, to Agency Actions

Section 11-200.1-8 replaces section 11-200-5, HAR (1996). All language in this section has been adapted from section 11-200-5, HAR (1996). Section 11-200.1-8 incorporates Hawaii Supreme Court decision *Umberger*. In that case, the Hawai‘i Supreme Court held that for an activity to be subject to environmental review, “it must fall within at least one category of land uses or administrative acts (known as “triggers”, now defined as a term in the Final Proposed Rules) enumerated in section 343-5(a), HRS (2010).”

Subsection (a) incorporates by reference the triggers that necessitate environmental review under chapter 343, HRS. The Final Proposed Rules retain the provision in the 1996 Rules that feasibility and planning studies are exempt from chapter 343, HRS, environmental review. The Council removed the language pertaining to agricultural tourism based on comments received on the Draft Proposed Rules. The language was unnecessary for agency actions as an agency would already be using state or county lands or funds.

Subsection (b) addresses situations where an agency must respond to an emergency and that response would fall within the scope of chapter 343, HRS, but the nature of the emergency requires immediate response. For example, during a forest fire, an emergency firebreak may need to be cut. In the case of King Tides, an issue raised by one commenter, the exemption would not extend to reconstruction of homes after the emergency has passed, but may apply to immediate measures taken to address the situation. The Final Proposed Rules emphasize that an agency must take immediate action to address the emergency for the exemption to apply. The agency has a responsibility to document the exemption when it undertakes an emergency action, whether an emergency proclamation has been made or not, in case a question arises about the lack of an assessment. That documentation, like other non-published exemptions,

must be available upon public request and must be included in the list of exemptions required to be routinely filed with and published by OEQC.

Subsection (b) also ensures that the exclusions from chapter 343, HRS, are related to the declared emergency by requiring substantial commencement of the action within sixty (60) days of the emergency proclamation. Under chapter 127A-14(d), HRS, a state of emergency automatically terminates after sixty (60) days. Supplemental emergency proclamations would re-start the 60-day count and extend the time that an action has to reach substantial commencement. This provision does not explicitly reference the possibility for extension because the extension is provided for under section 127A-14(d) and the Council does not have rulemaking authority under chapter 127A, HRS. The term “substantially commenced” is not defined in the Final Proposed Rules because the intent is to provide direction to agencies to timely implement the action but not define the standard for all agencies in all situations.

§ 11-200.1-9 Applicability of Chapter 343, HRS, to Applicant Actions

Section 11-200.1-9 replaces section 11-200-6, HAR (1996). Pursuant to section 11-200.1-9, there are two essential elements necessitating chapter 343, HRS, review for applicant actions: (1) discretionary consent; and (2) a statutory trigger under section 343-5, HRS. Section 11-200.1-9 accounts for an applicant action that may require multiple approvals. Each approval should be considered as part of the whole action and not as creating discrete actions. By incorporating reference to section 343-5(a), HRS, into subsection (a), much of what was included in section 11-200-6(b), HAR (1996) becomes unnecessary and was therefore removed. If section 345-5(a), HRS, is amended, the incorporation of the statutory triggers by reference allows the rules to remain aligned with section 345-5(a), HRS, without also requiring an amendment to the rules. This approach helps to ensure consistency between the rules and the statute over time.

Subsection (a) incorporates chapter 343, HRS, requirements for actions involving agricultural tourism under section 205-2(d)(11) or section 205-4.5(a)(13), HRS. Pursuant to section 343-5(a)(1), HRS, actions involving agricultural tourism are subject to environmental review only when required by county ordinance. The Council revised the Final Proposed Rules regarding agricultural tourism based on comments received on the Draft Proposed Rules.

Subsection (b) incorporates section 343-5.5, HRS, exclusions from environmental review. The exclusions were added to chapter 343, HRS, through the 2012 legislative amendments (L 2012, c 312 § 1). Subsection (b) also provides the following definitions, specific to subsection (b): “discretionary consent”, “infrastructure”, “primary action”, and “secondary action”.

§ 11-200.1-10 Multiple or Phased Actions

Section 11-200.1-10 replaces section 11-200-7, HAR (1996). Section 11-200.1-10 clarifies the scope of an action to reduce the potential for segmentation. Section 11-200.1-10 also clarifies

that multiple or phased actions may be reviewed in an EA or EIS and do not necessarily require an EA prior to preparing an EIS. The Final Proposed Rules eliminate the language “proposed by an agency or applicant” because the language is repetitive. By definition, an “action” is proposed by an agency or applicant. The term “undertaking” is replaced with “program” and the term “project” with “action” for consistency and clarity. An “undertaking” is not defined in statute or rule and actions are not limited to projects, but may also be programs.

§ 11-200.1-11 Use of Prior Exemptions, Findings of No Significant Impact, and Accepted Environmental Impact Statements to Satisfy Chapter 343, HRS, for Proposed Actions

Section 11-200.1-11 replaces section 11-200-13, HAR (1996). Section 11-200-13, HAR (1996) permitted prior determinations and accepted EISs to satisfy chapter 343, HRS, for proposed actions if the prior determination or accepted EIS was pertinent and relevant to the proposed action. The 1996 Rules advise agencies to take a hard look before allowing use of prior determinations and accepted EISs in place of additional chapter 343, HRS, environmental review. Section 11-200.1-11 introduces tiering and incorporating portions of an existing determination or accepted EIS into environmental review of proposed actions.

Section 11-200.1-11 clarifies when and how an agency may determine that a prior exemption, final EA, or accepted EIS satisfies chapter 343, HRS, for a proposed action. In order for a proposed action to use a prior exemption, final EA, or accepted EIS: (1) the proposed action must have been considered a component of or be substantially similar to the action that received the exemption, FONSI, or acceptance; (2) the proposed action must be anticipated to have similar direct, indirect, and cumulative effects as those analyzed in a prior exemption, final EA, or accepted EIS; and, (3) in the case of a final EA or accepted EIS, the proposed action must have been analyzed within the range of alternatives. In essence, the agency must be able to determine that the proposed action was covered under the prior exemption, FONSI, or accepted EIS.

Section 11-200.1-11 applies to situations where a program EIS, and later in time a component of that program EIS that was analyzed in detail, is ready to be implemented. The component may on its own be considered an action for purposes of chapter 343, HRS, but because it was a component of an accepted EIS, is anticipated to have similar direct, indirect, and cumulative effects as those analyzed in the accepted EIS, and the proposed action was analyzed in the range of alternatives in the accepted EIS, an approving agency may determine that chapter 343, HRS, is already satisfied. The proposing agency or applicant may then proceed with other permitting requirements outside of chapter 343, HRS. An agency determining whether a prior accepted EIS satisfies chapter 343, HRS, review for a proposed action should also consider whether the accepted EIS was accepted at a time when environmental conditions and information were similar. If there have been significant changes since the time the accepted EIS was prepared, the proposed activity cannot be considered “similar” because the environmental impacts could be different than those analyzed in the accepted EIS.

This rationale for determining whether chapter 343, HRS, review is necessary is an existing practice for many agencies when they are considering whether to undergo chapter 343, HRS, environmental review or deciding whether an applicant must undergo chapter 343, HRS, environmental review.

Section 11-200.1-11 creates a consistent process and provides agencies with direction on what to consider when determining if a proposed action is covered under a prior exemption, final EA, or accepted EIS. Subsection (b) provides that agencies may publish a determination and brief rationale that a prior exemption, final EA, or accepted EIS satisfies the chapter 343, HRS, requirements for a proposed action.

Subsection (c) provides that when an agency determines that a prior exemption, final EA, or accepted EIS does not satisfy chapter 343, HRS, environmental review for a proposed activity, then the proposing agency or applicant should proceed to subchapter 7 to determine the level of environmental review necessary.

Subsection (d) emphasizes that agencies should exercise due diligence in applying this section. The term “considerable” has been replaced with “careful” to describe the quality of the analysis. The term “pre-examination” has been replaced with “examination” to clarify the language. In the same subsection, the phrase “substantially similar to and relevant” is simplified to “substantially relevant.”

Subchapter 7 Determination of Significance

Subchapter 7 (Determination of Significance) creates a distinct subchapter to provide direction to agencies in deciding the level of review necessary to satisfy chapter 343, HRS. This subchapter logically follows subchapter 6 because proposing agencies and approving agencies will have to determine the significance after determining applicability. This subchapter reorganizes the subchapter on determination of significance from the 1996 Rules to show the chronological process that an agency will follow when determining the appropriate level of review.

Section 11-200.1-12 addresses circumstances in which an agency may consider previous determinations and previously accepted EISs when deciding the appropriate level of review for a new action. Section 11-200.1-12 is distinguishable from section 11-200.1-11 because it describes the process to incorporate material from previous chapter 343, HRS, actions into a new action rather than the process to determine if an action is already covered by chapter 343, HRS.

Section 11-200.1-13 presents the significance criteria that agencies use as a basis for determining potential impacts. Section 11-200.1-14 provides that the proposing or approving agency use its judgment and experience to initially determine whether the appropriate level of environmental review is an exemption, preparation of an EA, or direct preparation of an EIS.

§ 11-200.1-12 Consideration of Previous Determinations and Accepted Statements

Section 11-200.1-12 replaces section 11-200-13, HAR (1996). In the Final Proposed Rules, section 11-200.1-12 provides for the incorporation by reference of previous determinations and accepted EISs into a proposed action. The Final Proposed Rules replace the term “programmatic” with “program” to be more consistent and clearer.

§ 11-200.1-13 Significance Criteria

Section 11-200.1-13 replaces, and is adapted from, section 11-200-12, HAR (1996). This section presents the criteria that an agency is to use for determining whether an exemption, FONSI, EISPN, or acceptance is appropriate.

Section 11-200.1-13 provides: “In most instances, an action shall be determined to have a significant effect on the environment if it may . . .” The Council considered whether the term “likely” was appropriate in this context of the rules. The term “may” is used in section 343-5, HRS. The Hawaii Supreme Court has interpreted the word “may” to mean “likely”. For example, in *Kepoo v. Kane*, 103 P.3d 939, 958 (Haw. 2005) the Hawaii Supreme Court held that the proper inquiry for determining the necessity of an EIS is whether the proposed action will “likely” have a significant effect on the environment. However, more recent court cases have offered

additional perspectives on the meaning of "may" such that the use of "likely" did not seem clearly warranted. The Council chose to retain the statutory language of "may" instead of the term "likely" in the Final Proposed Rules to maintain consistency with the statute. The Council also added a reference to mitigation measures as well to the consideration of significant effects to be consistent with EA and EIS content requirements.

The term "consequences" is replaced with the term "impacts" because the rules define "impacts" but not "consequences".

The term "adverse" is added to specific criteria where applicable. This language more closely matches the definition of "significant effect" in section 343-2, HRS, including mirroring the emphasis on "adverse" effects. Section 343-2, HRS, defines "significant effect" as:

> the sum of effects on the quality of the environment, including actions that **irrevocably commit** a natural resource, **curtail** the range of beneficial uses of the environment, are **contrary** to the State's environmental policies or long-term environmental goals as established by law, or **adversely affect** the economic welfare, social welfare, or cultural practices of the community and State. (emphasis added)

Section 11-200.1-13 retains the word "substantial" from the 1996 Rules.

Combining "substantial" and "adverse" sets a higher standard and emphasizes negative effects. This change addresses whether an action having substantial beneficial effects would require the preparation of an EIS or make an action ineligible for an exemption. The introductory language of the section retains the requirement that agencies consider the sum of effects on the quality of the environment and the overall and cumulative effects of an action. For example, a proposed renewable energy project may have substantial beneficial effects with respect to energy and greenhouse gases but may also irrevocably commit to loss or destruction of a natural or cultural resource. In this case, an agency must still consider the sum of effects and the overall and cumulative effects, which could warrant the preparation of an EIS instead of issuing a FONSI.

In the Final Proposed Rules, Criterion (1) has been updated to reflect the statutory language in chapter 343, HRS. Specifically, Criterion (1) distinguishes between "cultural resources" and "historic resources" as potential triggers. This approach is distinguishable from NEPA which includes historic properties as a subset of cultural resources."

Criterion (3) references laws in addition to chapter 343, HRS, that define "significant effect" (e.g., the State Planning Act or Renewable Portfolio Standards). "Laws" may be broadly understood to include common law and executive orders so long as they establish long-term environmental policies or goals, but not to encompass all statutes, administrative rules, and court decisions.

Criterion (4) updates language to match the definition of "significance" in section 343-2, HRS. The statutory language was amended by Act 50 (2000) to include cultural practices as part of

the definition of significance. Act 50, Session Laws of Hawaii 2000 requires the consideration of impacts on cultural practices when making a determination of significance effect. It amended the definition of "significant effect" in section 343-2, HRS, to mean "the sum of effects on the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the State's environmental policies or long-term environmental goals as established by law, or adversely affect the economic welfare, social welfare, or cultural practices of the community and State."

Act 50 also amended the definition of "environmental impact statement" or "statement" in section 343-2, HRS to include the disclosure of effects of a proposed action on cultural practices, as follows:

> "environmental impact statement" or "statement" means an informational document prepared in compliance with the rules adopted under section 343-6 and which discloses the environmental effects of a proposed action, effects of a proposed action on the economic welfare, social welfare, and cultural practices of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.
>
> The initial statement filed for public review shall be referred to as the draft statement and shall be distinguished from the final statement which is the document that has incorporated the public's comments and the responses to those comments. The final statement is the document that shall be evaluated for acceptability by the respective accepting authority.

Pursuant to Act 50, cultural practices are an integral component of the significance criteria and must be considered in making a significance determination.

Criterion (11) adds the sea level rise exposure area to the list of example areas that could be considered environmentally sensitive. The language is adapted from the December 2017 Climate Change Mitigation and Adaptation Commission report. This criterion addresses concerns related to climate change adaptation such as impacts from sea level rise, increased hurricane frequency and/or intensity, and endangered species migration. The list is not exhaustive and other areas may be considered environmentally sensitive, including areas likely to experience wave inundation, increased exposure to hurricanes, or flooding outside of a designated flood plain.

Criterion (12) provides that both the daytime and nighttime effects on scenic vistas and viewplanes must be considered when determining if an action is likely to have a significant effect. Bright lighting around a site at night, for example, may disrupt scenic vistas or viewplanes even though the site is not conspicuous and does not otherwise have a substantial adverse effect on the scenic vista or viewplane during the day.

Criterion (13) incorporate greenhouse gas emissions to reflect the well-established science that greenhouse gas emissions have a cumulative impact and have more sources beyond fossil fuel burning. A proposed action having substantial emissions (relative to the State of Hawaii) may not be the result of energy use, especially as Hawaii progresses toward its 100% renewable energy goal.

§ 11-200.1-14 Determination of Level of Environmental Review

Section 11-200.1-14 is a new section. Section 11-200.1-14 was introduced in the Final Proposed Rules to describes the pathways of chapter 343, HRS, environmental review: exemption, EA resulting in a FONSI or EISPN, “Direct-to-EIS”, and EIS resulting in an acceptance or non-acceptance. Once an agency concludes that the proposed action is not covered by a previous determination or accepted statement (such as via the “green sheet”), the agency must then determine the appropriate review using its judgment and experience: exemption, EA, or EIS.

Section 11-200.1-14 adapts language from sections 11-200-5(a) and 11-200-9(b), HAR (1996) and from sections 343-5(b) and 343-5(e), HRS. Agencies have thirty (30) days to inform applicants what level of environmental review they must undertake. The time period begins when the agency deems the request for approval is complete.

Section 11-200.1-14 incorporates the exemption standard provided in section 11-200-8, HAR (1996) and section 343-6(a), HRS (“actions [that] will probably have minimal or no significant effects on the environment”).

Where an action requires chapter 343, HRS, environmental review, preparation of an EA beginning with a draft EA is required unless one of two situations exist: (1) a proposing agency may begin with a final EA, or an approving agency may authorize an applicant to begin with a final EA, when more information is required to determine whether an EIS is required (this was the process prior to the “Direct-to-EIS” statutory change and agencies have expressed value in keeping it); or (2) an agency may follow the “Direct-to-EIS” route as provided for in section 343-5, HRS.

Subchapter 8 Exempt Actions, List, and Notice Requirements

Subchapter 8 (Exempt Actions, List, and Notice Requirements) creates a distinct subchapter addressing the matter of exemptions. This subchapter divides section 11-200-8, HAR (1996) into three distinct sections.

Section 11-200.1-15 establishes the general types of actions under which an exemption may be declared. Section 11-200.1-16 provides direction to agencies for the creation of an exemption list. Section 11-200.1-17 advises agencies on how to prepare an exemption notice

§ 11-200.1-15 General Types of Actions Eligible for Exemption

Section 11-200.1-15 replaces section 11-200-8, HAR (1996). Section 11-200.1-15 provides the general types of actions eligible for exemption. It incorporates the standard for declaring actions exempt provided in section 343-6(2), HRS. An action is eligible for exemption if it will probably individually and cumulatively have minimal or no significant effects.

Section 11-200.1-15 eliminates the language from the 1996 Rules regarding “classes of actions”. The Council reasoned that chapter 343, HRS, does not use the term “classes” and therefore the term has the potential to cause confusion. The Final Proposed Rules instead use the term “General Types” provided in the statutory language. The “types” of exemptions on agency exemption lists include: (1) general types listed in agency rules; (2) general types listed in agency-specific exemption lists; and (3) exemptions listed in exemption notices.

Additionally, section 11-200.1-15 eliminates “classes” 6 and 7 from the 1996 Rules. Classes 6 and 7 are now considered *de minimis* and therefore do warrant a specific class. *De minimis* actions that warrant an exemption are discussed in section 11-200.1-16.

The Final Proposed Rules retain the language from the 1996 Rules for general types (2), (4), and (7). The Final Proposed Rules provide modifications for the remaining general types. General Type (1) replaces the term “negligible” with the term “minor” and removes “or no” before “expansion or change”. Activities that are “negligible” and require “no expansion” and “no change” are now considered *de minimis* and should be reflected in Part 1 of the agency’s exemption list.

General Type (3) recognizes that agencies measure residence area differently and directs the proposing agency or approving agency to apply its own measurement approach. The term “persons” is replaced with “individuals” because the definition of person in chapter 343, HRS, and the Final Proposed Rules is inconsistent with the meaning here.

General Type (5) incorporates infrastructure testing such as temporary interventions on roadways to test new designs or effects on traffic patterns.

General Type (6) provides an exemption for demolition of structures. In Version 1.0 of the proposed rules, General Type (6) excluded structures that were listed or met the criteria for listing on the National Register of Historic Places or the Hawaii Register of Historic Places. The Final Proposed Rules removed the exclusion for structures that met the criteria for listing because it introduces too much uncertainty into the exemption process. The determination of what meets the criteria for listing falls to the National Park Service and the State Historic Preservation Division. Under the Final Proposed Rules, structures that "meet the criteria for listing" can still be eligible for the exemption, however, once a structure is listed on either the federal or state register, the structure may no longer be exempted.

General Type (8) still applies to administrative activities. However, the reference to purchase of supplies and personnel-related activities has been deleted because they are *de minimis* and therefore should be included an agency's exemption list.

General Type (9) incorporates the 2007 amendment to the 1996 Rules to exempt the acquisition of land and structures for affordable housing.

General Type (10) was proposed by the Council to provide a means for the development of affordable housing in urbanized areas where it would have minimal to no significant impact and meet the criteria for exemption as well as four specific criteria for this exemption general type.

In developing this exemption general type and criteria, the Council considered the different agency definitions of affordable housing. The Council considered multiple approaches to affordable housing, ranging from requiring 100% affordable housing at various mixtures of area median income (AMI) percentages to the language as proposed. Setting a specific mixture or requiring 100% affordable housing would set a standard unlikely to be met. Creating a standard for an exemption under chapter 343, HRS, separate and distinct from a standard set by a proposing agency or approving agency but not grounded in a specific statute or policy goal would be difficult to justify. Because chapter 343, HRS, is about disclosure by agencies to the public prior to making a decision or implementing an action, the Council believes that the public is best served by the agency using its own standard when considering whether a proposed action meets the meaning of "affordable housing". This is also consistent with General Type (9), acquisition of affordable housing, which is not defined, and with the Council's direction in section 11-200.1-2 to agencies to use their own statutes and rules for understanding terms that are not defined in chapter 343, HRS, or the Final Proposed Rules.

In addition, the potential to integrate mixed-use (e.g., offices, retail) with affordable housing is an explicit goal of some state and county agencies. Allowing for the potential of mixed use while keeping the agency to its own criteria for affordable housing could promote better urban communities that are multi-income and multi-use. Therefore, this exemption directs agencies to use their respective affordable housing law.

For example, section 201H-36(a)(4), HRS, sets forth one standard:

> affordable rental housing where at least fifty per cent of the available units are for households with incomes at or below eighty per cent of the area median family income as determined by the United States Department of Housing and Urban Development, of which at least twenty per cent of the available units are for households with incomes at or below sixty per cent of the area median family income as determined by the United States Department of Housing and Urban Development.

This standard applies when the Hawaii Housing Finance and Development Corporation is approving a proposal related to that standard, whereas each county has its own county ordinance that would be the controlling law for the respective county agency making decisions about whether to use county lands or funds. Chapter 343, HRS, applies before chapter 201H, HRS, and the Final Proposed Rules do not alter that order.

To reinforce the purpose of this exemption, several additional criteria are included.

The affordable housing exemption only applies when one or both of two possible triggers apply: (1) the action involves the use of state or county lands or funds; and (2) the action occurs within Waikiki. The first limitation keeps the focus on the involvement of the state or county to support affordable housing development where the only reason someone would undergo environmental review is because government is subsidizing funding or leasing out land to assist the production of affordable housing. The second limitation is included because Waikiki is a developed, urbanized area that meets the other criteria of being classified state urban land and zoned to allow housing. The presence of other triggers such as use within a shoreline (including a Waikiki shoreline) or occurring within a designated historic site would mean this exemption would not be applicable.

The affordable housing exemption only applies to actions on land that has already been classified by the State Land Use Commission as urban. If the proposed action involves land classified as agriculture, conservation, or rural, or includes a boundary amendment to change the classification to urban, then the exemption would not be applicable.

The affordable housing exemption applies to land that has already been zoned by the county to a zoning classification that allows for housing, recognizing that each county has unique zoning regimes.

The affordable housing exemption does not apply to areas with shoreline setback variances. This exception alleviates pressure on environmentally sensitive areas such as sea level rise exposure areas and erosion-prone areas.

Subsection (d) provides exceptions under section 11-200.1-15 when exemptions, including for those listed in the *de minimis* category, are inapplicable when the cumulative impact over time is significant or when an action is being carried out in a particularly sensitive environment. For example, it may be routine groundwork to remove a small ailing tree outside an agency building, but if the tree is designated as an Exceptional Tree pursuant to chapter 58, HRS, then the

normally routine activity may be significant, and an exemption would be inapplicable. The Final Proposed Rules add a reference to significance criterion 11 as examples of environmentally sensitive areas.

Pursuant to section 11-200.1-15(d) in the Final Proposed Rules, the exceptions do not apply when: (1) the cumulative impact of planned successive actions in the same place, over time, is significant; or (2) when an action that is normally insignificant is conducted in a particularly sensitive environment.

§ 11-200.1-16 Exemption Lists

Section 11-200.1-16 replaces section 11-200-8, HAR (1996). Many agencies do not regularly conduct activities that require chapter 343, HRS, environmental review, and therefore do not maintain exemption lists. Nevertheless, these agencies may still be eligible for the exemptions listed in section 11-200.1-15. To capture the discretionary nature of developing an exemption list, subsection (a) provides an agency “may” develop an exemption list.

The Final Proposed Rules replace the term “class” with the term “General Types”.

As discussed in more detail in the Topical Changes section, exemption lists include: (1) *de minimis* actions (i.e., routine operations and maintenance, ongoing administrative activities, etc.); and (2) general types of actions listed in section 11-200.1-15 and agency-specific actions recorded in exemption notices (see section 11-200.1-17).

Section 11-200.1-16 applies to both applicant and agency actions. A proposing agency or an approving agency may determine that a proposed activity does not rise to the level of an action that requires an exemption notice because the proposed activity likely will have no or negligible environmental impact (Part 1 of the agency’s exemption list). The agency may also exempt a proposed action based on either Part 2 of the approving agency’s exemption list, or in accordance with a general type under section 11-200.1-15.

Pursuant to section 11-200.1-16, agencies are to submit their exemption lists for review and concurrence by the Council every seven years.

§ 11-200.1-17 Exemption Notices

Section 11-200.1-17 replaces section 11-200-8, HAR (1996). Section 11-200.1-17 requires agencies to: (1) create exemption notices with the general types of exemptions listed in section 11-200.1-15, and agency-specific exemptions on the exemption list; (2) maintain exemption notices on file; and (3) provide a list of all exemption determinations to the OEQC for publication in the periodic bulletin on the eighth (8th) day of each month. Agencies are also required to electronically provide their exemption notices to the public upon request. Exemption notices should be prepared prior to undertaking an action, except in the case of an emergency action under section 11-200.1-8.

Agencies are generally required to consult with outside agencies or individuals that function within the jurisdiction or have expertise in the area. The Draft Proposed Rules considered requiring agencies to document any consultations in the exemption notice and publish it with the OEQC unless: (1) the agency has created an exemption list in accordance with the enacted rules; (2) the agency received Council concurrence within seven years of the proposed implementation of the proposed action; and (3) the action is consistent with the letter and intent of the agency's exemption list. Unpublished exemption notices would still be included in the list of exemption notices that the agency routinely provides to the office for publication in the bulletin pursuant to subsection (d).

However, the Council was concerned about the potential burden of publishing exemption determinations if agency lists lacked concurrence. Also, this raised statutory questions about the Council's authority relative to a proposing or approving agency in decision making for specific actions. Furthermore, commenters were concerned about the unknown effects on applicants who obtain exemption declarations when the seven (7) years pass or the Council no longer concurs with an agency exemption list.

Council members expressed concern that this amendment would keep the process for obtaining exemption notices burdensome to the public. Currently, the public must request the exemption declaration from the agency. This process can be challenging for neighbor island residents who cannot visit the agency offices in person to pick up a hard copy of the file. Public records (UIPA) requests can be time consuming and are not always effective.

The Final Proposed Rules remove the publication requirement for exemption notices but still require agencies to obtain Council concurrence for their exemption list every seven (7) years, file lists of exemption notices monthly with the OEQC, and produce them electronically to the public and agencies upon request.

Subchapter 9 Preparation of Environmental Assessments

Subchapter 9 (Preparation of Environmental Assessments) creates a distinct subchapter addressing EAs. This subchapter provides direction to an agency when it has decided that preparation of an EA is the appropriate level of chapter 343, HRS, environmental review. The sections are ordered by process sequence, starting with the consultation requirement prior to beginning a draft EA, and ending with the determination to issue an EISPN or a FONSI.

Section 11-200.1-18 describes the requirement of early consultation, the scope of analysis and level of detail required in a draft EA, and the content requirements for a draft EA. Section 11-200.1-19 describes the process and content requirements for issuing a notice of an anticipated FONSI based on a draft EA. Section 11-200.1-20 describes the requirements for public review and response to comments for a draft EA. Section 11-200.1-21 describes the contents of a final EA. Section 11-200.1-22 describes the determination to issue an EISPN or FONSI and the FONSI content requirements.

§ 11-200.1-18 Preparation and Contents of a Draft Environmental Assessment

Section 11-200.1-18 replaces section 11-200-10, HAR (1996). The Final Proposed Rules retain the draft EA contents requirements, rearranged chronologically. The final EA content requirements were moved to section 11-200.1-21.

Section 11-200.1-18 describes how the distinction between a project and program influences the style of the document and the breadth and specificity of analysis and information contained therein.

In the Final Proposed Rules, subsection (a) requires the applicant to “conduct early consultation” to solicit input from the county, agencies, citizen groups, and the general public.

Subsection (b) is adapted from section 11-200-19, HAR (1996). Subsection (b) mirrors the language in section 11-200.1-24 for the contents of a draft EIS, and provides that the scope and specificity within an EA will be commensurate with the scope of the action and the degree of specificity to which impacts are discernible at the time of preparation. This section also applies to the style, breadth and specificity of analysis and information contained in a final EA.

Subsection (c) distinguishes between the level of detail and style of assessment for programs, which may be broader in nature, and projects, which are site-specific and discrete. The Final Proposed Rules remove the language regarding conceptual information in response to public comments that such information invites vagueness and allows proposing agencies and applicants to bypass impact analysis by stating that the information is not ready for impact analysis at this point or is an unresolved issue. By providing language on the level of detail and

style of assessment for different types of actions, the rules give the proposing agency or applicant direction regarding how to address projects or programs at risk of segmentation and acknowledges the tension between the requirement to conduct environmental review at the earliest practicable time with the desire for project specificity. This paragraph mirrors the proposed paragraph in section 11-200.1-24 regarding the contents of a draft EIS.

A draft EA for a program may omit issues that are not ripe for discussion on a narrower scale. In the case of such an omission, a subsequent project may require its own chapter 343, HRS, determination (see subchapter 7).

Subsection (d) outlines the content requirements for a draft EA. A draft EA must include a summary description of the affected environment, including cultural and historical characteristics, and include relevant maps. The Final Proposed Rules include a new recommendation to include state sea level exposure maps as applicable. The Council recognized that the sea level exposure maps may be inaccurate at the parcel level. However, the Council concluded that the sea level exposure maps still provide value when considering indirect and cumulative impacts at a larger scale. Moreover, the maps listed in the Final Proposed Rules are only examples and therefore not required.

In previous versions, a draft EA had to include a “summary of the impacts”. In the Final Proposed Rules, the requirement is changed to an “analysis of the impacts.” The Council reasoned that “summaries” often identify an impact without providing a sufficient discussion to support a conclusion. By requiring an “analysis” instead of a “summary”, the Council is requiring that the final EA both: (1) identify the impact; and (2) provide information to support a conclusion.

§ 11-200.1-19 Notice of Determination for Draft Environmental Assessments

Section 11-200.1-19 replaces section 11-200-11.1, HAR (1996). Section 11-200.1-19 reflects changes made to the EA process in chapter 343, HRS, that enable applicants to prepare their own EAs, as opposed to agencies preparing EAs on behalf of applicants. It separates language from the 1996 Rules into subsections to increase clarity.

Section 11-200.1-19 incorporates the filing requirements in subchapter 4, and clarifies that approving agencies have a responsibility to send their determination to the applicant directly, but not necessarily via postal mail (electronic distribution is preferred).

Section 11-200.1-19 requires the proposing agency or applicant provide the name and contact information of a specific individual with authority and knowledge to answer questions regarding the proposed action and the environmental review. A generic phone line or email address of the proposing agency or applicant without an individual identified will not satisfy this requirement.

The Final Proposed Rules replace the term “determination” to “FONSI” in section 11-200.1-19 because a FONSI is the only determination applicable in this context.

§ 11-200.1-20 Public Review and Response Requirements for Draft Environmental Assessments

Section 11-200.1-20 replaces section 11-200-9.1, HAR (1996). If an agency does not anticipate a FONSI, then it will likely move, to or authorize an applicant to directly move to, prepare an EIS. This determination requires the approving agency to use its judgment and expertise. In some cases, although an agency may anticipate a FONSI, the FONSI may not be issued until an EA is completed.

Section 11-200.1-20 is updated to reflect the practice that the applicant, rather than the approving agency, prepares the EA.

Pursuant to chapter 343, HRS, subsection (a) provides that the public review period is thirty (30) unless otherwise provided by statute. For example, the development or expansion of forensic facilities of the department of health or in-state correctional facilities have 60-day comment periods for draft EAs (and EISs), per sections 334-2.7 and 353-16.35, HRS, respectively.

Subsection (b) provides that the comment period for draft EAs be 30 days from publication in the bulletin. The phrase “unless mandated otherwise by statute” acknowledges that for some actions, such as forensic hospitals or jails, the comment period is stated in that relevant statute and might be longer than 30 days. The Final Proposed Rules also clarify that, in the case of applicants, so long as the approving agency or the applicant (or the applicant’s consultant) receives the comment within the comment period or postmarked before its end, then the comment is considered timely received. A commenter is not required to send the comment to both the applicant and the approving agency but may do so. Subsection (b) retains language from the 1996 Rules that comments received outside of the thirty-day comment period do not need to be considered. The Council considered whether to require agencies to respond to comments submitted after the 30-day comment period. Chapter 343, HRS does not provide specific guidance on extensions. On one hand, the 30-day period is a challenge for entities that meet monthly (e.g., O‘ahu neighborhood boards). On the other hand, however, requiring agency response following the deadline would render the deadline meaningless. Moreover, agencies still have discretion to respond to comments received after the deadline (however these responses create ambiguity about legal standing). Ultimately, the Council decided not to update the rules to require agencies to respond to comments after the 30-day deadline. The Council reasoned that the opportunity for republication in section 11-200.1-6 provides ample opportunity for additional public comment. A comment received during the republication period is treated the same as a comment submitted during the initial publication period.

Subsection (c) mirrors language from section 11-200.1-26 providing guidance on how to distinguish substantive from non-substantive comments, the minimum level of detail a proposing

agency or applicant should include in a response, and clearly identifying those comments which the proposing agency or applicant considered to be non-substantive.

Pursuant to subsections (d) and (e) in the Final Proposed Rules, proposing agencies and applicants are no longer required to respond to each commenter individually. Instead, the Final Proposed Rules allow proposing agencies and applicants to respond to the issues raised in the comments by commenter or by subject matter. The proposing agency or applicant must still identify the commenters in the final EA and notify commenters when the final EA is published. Commenters must still be identified in the response within the EA. The Council reasoned that responding to individual comments can be extremely burdensome for proposing agencies and applicants, particularly with the increasing number of form letters and petitions submitted during the public comment period. This approach reduces the burden on proposing agencies and applicants to respond to similar comments. This approach also focuses attention on the content of the comments and the issues raised, rather than on responding to each individual commenter separately.

The Final Proposed Rules have incorporated the NEPA approach to group identical or similar comments and provide a response to the group as a whole (see e.g., United States Council on Environmental Quality's ("CEQ") Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations").

Section 11-200.1-20 now requires proposing agencies and applicants, rather than the approving agency, to prepare their own documents.

§11-200.1-21 Contents of a Final Environmental Assessment

Section 11-200.1-21 replaces section 11-200-10, HAR (1996). Section 11-200.1-21 lists the specific content requirements for a final EA. The regulatory language is updated to be consistent with section 11-200.1-18.

A final EA must include a summary description of the affected environment, including cultural and historical characteristics, and include relevant maps. The Final Proposed Rules include a new recommendation to include state sea level exposure maps as applicable. The Council recognized that the sea level exposure maps may be inaccurate at the parcel level. However, the Council concluded that the sea level exposure maps still provide value when considering indirect and cumulative impacts at a larger scale. Moreover, the maps listed in the Final Proposed Rules are examples.

In previous drafts, a final EA had to include a "summary of the impacts". In the Final Proposed Rules, the requirement is changed to an "analysis of the impacts." The Council reasoned that "summaries" often identify an impact without providing a sufficient discussion to support a conclusion. By requiring an "analysis" instead of a "summary", the Council is requiring that the final EA both: (1) identify the impact; and (2) provide information to support a conclusion.

§ 11-200.1-22 Notice of Determination for Final Environmental Assessments

Section 11-200.1-22 replaces section 11-200-11.2, HAR (1996), and is adapted from section 11-200-9(b)(8), HAR (1996) in the 1996 Rules. Section 11-200.1-22 aligns the process with Act 172 (2012), “Direct-to-EIS”, which requires the applicant to prepare documents instead of the approving agency. Section 11-200.1-22 references subchapter 9, which describes the process and requirements for preparation of an environmental assessment previously included in sections 11-200-9(a) and 11-200-9(b), HAR (1996).

Section 11-200.1-22 requires the proposing agency or applicant to submit a single electronic version of the notice of determination and final EA to the OEQC. The specific filing and publication requirements are set forth in subchapter 4.

Pursuant to section 11-200.1-22, approving agencies must send a determination directly to the applicant, but not necessarily via postal mail (electronic distribution is sufficient). For applicant actions, the agency to issue its determination within thirty (30) days of receiving the final EA.

Section 11-200.1-22 requires the proposing agency or applicant provide the name and contact information of a specific individual with authority and knowledge to answer questions regarding the proposed action and the environmental review. A generic phone line or email address of the proposing agency or applicant without an individual identified will not satisfy this requirement.

Subsection (f) directs the reader to subchapter 10 because the Final Proposed Rules create a standard set of content requirements for an EISPN regardless of whether the EISPN is a result of a final EA or a “Direct-to-EIS” determination.

Subchapter 10 Preparation of Environmental Impact Statements

Subchapter 10 (Preparation of Environmental Impact Statements) creates a distinct subchapter that addresses EISs. This subchapter provides direction to an agency when it has decided that an EIS is the appropriate level of review, whether by the "Direct-to-EIS" pathway as addressed in subchapter 7 (Determination of Significance) or by the issuance of an EISPN after a final EA, as addressed in subchapter 9 (Preparation of Environmental Assessments). The sections in this subchapter are ordered chronologically to show the process that will be followed, starting with the publication of an EISPN, and ending with the matter of supplemental EISs.

Section 11-200.1-23 describes the contents of an EISPN, as well as the requirement of full and complete consultation, the EIS public scoping meeting, and the comment period following the publication of an EISPN. Section 11-200.1-24 describes the content requirements for a draft EIS, the scope of analysis and level of detail required in a draft EIS, and the response requirements to comments submitted during the 30-day scoping period. Section 11-200.1-25 describes the public review requirements for a draft EIS. Section 11-200.1-26 sets forth the requirements for responding to comments submitted on a draft EIS.

Section 11-200.1-27 describes the content requirements for a final EIS. Section 11-200.1-28 specifies the criteria for deeming a final EIS an acceptable document and outlines the steps following an acceptance or non-acceptance determination. Section 11-200.1-29 describes how an applicant may appeal an agency determination of non-acceptance to the Council. Section 11-200.1-30 addresses circumstances when a supplemental EIS may be required after acceptance of an EIS.

§ 11-200.1-23 Consultation Prior to Filing a Draft Environmental Impact Statement

Section 11-200.1-23 replaces section 11-200-15, HAR (1996). Section 11-200.1-23 sets forth the content requirements for an EISPN. As discussed in the rationale for section 11-200.1-10, section 11-200.1-23 retains the 1996 Rules requirement for the identification of all permits and approvals expected for the project. Section 11-200.1-23 adds a new requirement for applicants to identify which specific discretionary approval necessitates the applicant to undergo environmental review. This requirement ensures that the public and decision-makers are provided this information in the absence of an EA in the "Direct-to-EIS" process. The content requirements for the EISPN are standard regardless of how one arrives at conducting an EIS (e.g., resulting from an EA or directly preparing an EIS).

Section 11-200.1-23 requires the proposing agency or applicant to provide the name and contact information of a specific individual with authority and knowledge to answer questions regarding the proposed action and the environmental review. A generic phone line or email

address of the proposing agency or applicant without an individual identified will not satisfy this requirement.

Section 11-200.1-23 removes the previous requirement for an individual to become a consulted party to engage directly in providing and receiving public documents and determinations related to the proposed action. All documents and determinations are now published online and available through the OEQC's website: http://oeqc2.doh.hawaii.gov/EA_EIS_Library/.

The 1996 Rules allow proposing agencies and applicants discretion to conduct public scoping meetings. The Council considered input from a wide range of stakeholders regarding this discretionary requirement. The Council recognized that public scoping meetings are a very valuable tool to determine the scope of the draft EIS. Ultimately, the Council decided to update the Final Proposed Rules to require public scoping meetings. Pursuant to chapter 343, HRS, proposing agencies and applicants should engage meaningfully with individuals, organizations, and agencies early and often throughout the environmental review process.

The Council discussed where public scoping meetings would be required to be held. The Council sought to balance community input and engagement with reducing the burden on proposing agencies and applicants. Different options were considered, including requiring a public scoping meeting in the "county", or "island" or on the "islands" where the action will have the greatest effect. The Council noted the importance of holding the scoping meeting closest to where there will be an effect and should be held on the island of those likely impacts. Therefore, the word "county" was inappropriate because public scoping meetings for actions proposed in Maui County could be held on an island different than that of the action.

The Council also considered but left for future guidance documents that accessibility must be considered when planning the scoping meeting. For example, an action that will have an impact on individuals in the Hilo area of the Island of Hawaii should hold a meeting in the vicinity of Hilo, not Kona. The Council also considered that there may be instances where an action could adversely affect multiple communities on more than one island and accounts for this by pluralizing "island" in parenthesis: island(s).

Moreover, the Final Proposed Rules no longer require the proposing agency or applicant to transcribe individual oral comments. Instead, proposing agencies or applicants are required to record oral comments and provide a summary of the oral comments in the draft EIS. Proposing agencies and applicants must still provide written responses to written comments pursuant to section 11-200.1-24.

Section 11-200.1-23 allows the approving agency or accepting authority, with good cause, to extend the comment period on its own initiative or at the request of another party.

The draft EIS content requirements are now provided in section 11-200.1-24.

§ 11-200.1-24 Content Requirements; Draft Environmental Impact Statement

Section 11-200.1-24 replaces section 11-200-17, HAR (1996) and sets forth the content requirements for draft EISs. Section 11-200.1-24 includes language from sections 11-200-16 and 11-200-19, HAR (1996).

Section 11-200.1-24 was updated to be more consistent with the NEPA language. Section 11-200.1-24 provides that the scope and specificity within an EIS is to be commensurate with the scope of the action and the degree of specificity to which impacts are discernible at the time of preparation.

Section 11-200.1-24 distinguishes between project and program EISs. Version 0.3 proposed definitions for “project” and “program”, and this section describes how the distinction between a project and program influences the style of the document and the breadth and specificity of analysis and information contained therein.

Section 11-200.1-24 provides the program EIS may omit issues that are not ripe for discussion on a narrower, project-specific level. In the case of such an omission, a subsequent project may require its own chapter 343, HRS, determination or environmental review (see subchapter 7).

Section 11-200.1-24 distinguishes between the level of detail and style of assessment for programs, which may be broader in nature than that for projects, which are site-specific and discrete. The Final Proposed Rules remove the language regarding conceptual information in response to public comments that such information invites vagueness and allows proposing agencies and applicants to bypass impact analysis by stating that the information is not ready for impact analysis at this point or is an unresolved issue. Most environmental review focuses on site-specific and discrete projects. By providing language on the level of detail and style of assessment for different types of actions, the rules describe how to address projects or programs at risk of being viewed as segmented and acknowledges the trade-off between earliest practicable time to begin environmental review and project specificity. This paragraph mirrors the proposed paragraph in section 11-200.1-18 regarding contents of a draft EA.

Section 11-200.1-24 amends the requirements for proposing agencies and applicants to respond to comments consistent with section 11-200.1-26. Proposing agencies and applicants are no longer required to respond to similar comments individually and instead can respond to grouped comments by issue. This approach allows proposing agencies and practitioners to focus attention on the content of the comments and the issues raised. The responses must be included in the draft EIS but do not need to be sent individually to each commenter. The preparer must include the names of the individual commenters who provided comments each issue to help commenters track the responses.

Proposing agencies and applicants are required to provide a written summary of oral comments from the public scoping meetings in the draft EIS. The purpose of the summary is to capture

generally the comments made at the scoping meeting. Proposing agencies and practitioners do not have to respond directly to oral comments in the EIS, but issues raised in the comments must be taken into consideration assessing potential significance. A court reporter or transcriber is not required at the public scoping meeting.

Section 11-200.1-24 requires the proposing agency or applicant to include copies of the handouts distributed at any public scoping meeting, including the agenda, in the draft EIS. Handouts not related to the action need not be included. For example, general promotional materials for the proposing agency or applicant are not required, but a fact sheet outlining the proposed action is required.

Section 11-200.1-24 distinguishes between: (1) a consultation in which an agency, citizen group, or individual provides comments to the proposing agency or applicant regarding the action; and (2) a consultation in which the proposing agency or applicant only provides information about the action to the agency, citizen group, or individual. Section 11-200.1-24 requires the proposing agency or applicant to list individuals, organizations, or agencies were "consulted with" but had "no comment". This can occur in at least two instances: (1) an agency responds to a written request for comments that it has "no comment"; and (2) a proposing agency or applicant provides information but does not solicit feedback. The Council incorporated this requirement in response to public concern that attendance at an EIS public scoping meeting did not necessarily imply input on an EIS. The Final Proposed Rules clarify that if the proposing agency or applicant desires to include attendees at informational meetings as those "consulted with" then it should indicate whether those individuals or organizations gave "no comment". This approach protects individuals and organizations who wish to gather more information through an informational session but are not be prepared to provide informed feedback at such a preliminary session.

Pursuant to section 11-200.1-24, proposing agencies or applicants are only required to provide one copy of the consultation letter in the EIS.

Subsection (h) requires that a draft EIS describe the no action alternative, as well as other reasonable alternatives, that could attain the objectives of the proposed action. Pursuant to Section 11-200.1-24, the proposing agency or applicant needs to provide sufficient detail to allow a comparison of impacts for each reasonable alternative. In developing this language, the Council considered the NEPA language provided in 40 CFR 1502.14(a). ("Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated."). Proposing agencies and applicants are still required to explain why certain alternatives are not reasonable to obtain the objectives of the action.

Subsection (o) requires proposing agencies and applicants consider specific environmental laws, policies, goals, and guidelines, in the draft EIS. Section 11-200.1-24 includes an updated list of specific statutes and also requires proposing agencies and applicants to include any laws

relevant to the significance criteria or criterion under section 11-200.1-13 that required preparation of the EIS.

Subsections (i) and (j) include resources of "cultural" significance as part of the impacts to be analyzed in line with Act 50 (2000).

Subsection (s) mirrors other sections in the Final Proposed Rules regarding responding to comments. Proposing agencies and applicants are no longer required to respond to each commenter individually. Instead, the Final Proposed Rules allow proposing agencies and applicants to respond to the issues raised in the comments by commenter or by subject matter. The proposing agency or applicant must still identify the commenters in the final EA and notify commenters when the final EA is published. Commenters must still be identified in the response within the EA. The Council reasoned that responding to individual comments can be extremely burdensome for proposing agencies and applicants, particularly with the increasing number of form letters and petitions submitted during the public comment period. This approach reduces the burden on proposing agencies and applicants to respond to similar comments. This approach also focuses attention on the content of the comments and the issues raised, rather than on responding to each individual commenter separately.

The Final Proposed Rules have incorporated the NEPA approach to group identical or similar comments and provide a response to the group as a whole (see e.g., United States Council on Environmental Quality's ("CEQ") Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations").

§ 11-200.1-25 Public Review Requirements for Draft Environmental Impact Statements

Section 11-200.1-26 replaces section 11-200-22, HAR (1996), which has been divided into two sections: section 11-200.1-25 and section 11-200.1-26. Section 11-200.1-25 encourages open and early consultation with interested agencies, citizen groups, and the general public. The approving authority and accepting agency are the same for an applicant submitting an EIS. Section 11-200.1-25 also relates back to section 11-200.1-1, which provides the spirit in which consultation should be conducted to align with the purpose of the chapter.

Pursuant to section 11-200.1-25, the standard comment period for a draft EIS is forty-five (45) days, however the review period may vary by statute. For example, the development or expansion of forensic facilities of the department of health or in-state correctional facilities have 60-day comment periods for draft EISs (and EAs), per sections 334-2.7 and 353-16.35, HRS, respectively.

Subsection (b) clarifies that commenters may send written comments to either the approving agency or applicant instead of requiring the comment to be sent to both.

§ 11-200.1-26 Comment Response Requirements for Draft Environmental Impact Statements

Section 11-200.1-26 replaces section 11-200-22, HAR (1996), which has been divided into two sections: section 11-200.1-25 and section 11-200.1-26. Section 11-200.1-26 more specifically addresses response requirements for written comments received during the 45-day public review and comment period.

The comment response requirements for an EIS mirror those for an EA, found in subchapter 9. Similarly, section 11-200.1-26 allows proposing agencies and applicants to batch comments and respond to issues rather than respond to each comment individually. This approach allows proposing agencies and applicants to focus on the content of the comments and the issues raised. If the batching option is used, the agencies, citizen groups, and the general public who commented on the specific topic to which the response is directed must be identified as part of the response. Responses to substantive comments must be included as part of the draft EIS. Section 11-200.1-26 describes the factors to be considered when determining whether a comment is substantive, and requires that comments deemed non-substantive and to which a response was not given must be clearly indicated (see section 11-200.1-27).

Previously, response letters reproduced in the text of the final EIS were required to indicate “verbatim” changes to the text of the draft EIS. The Council considered whether this requirement was necessary and determined that the tracking burden acted as a deterrent to preparers to make changes. In an effort to encourage agency responsiveness to public comments, the Council removed this requirement from section 11-200.1-25. Under the Final Proposed Rules, the response only need to indicate whether changes have been made to the text of the draft EIS.

§ 11-200.1-27 Content Requirements; Final Environmental Impact Statement

Section 11-200.1-27 replaces section 11-200-18, HAR (1996). Section 11-200.1-27 incorporates the content requirements for a final EIS from section 11-200.1-24, HAR (1996). Additionally, section 11-200.1-27 incorporates the requirement that the reproduction and response to comments on the draft EIS within the final EIS conform with the requirements set forth in section 11-200.1-26.

Subsection (a) amends the requirement for a final EIS to discuss all “relevant and feasible consequences” to “all reasonably foreseeable consequences”. The Council proposed this revision because the phrase “reasonably foreseeable” is a phrase line from NEPA. Therefore, there is more case law history and federal guidance to assist in its interpretation and application to various circumstances.

Like section 11-200.1-24 for draft EISs, section 11-200.1-27 lists the specific content requirements for the final EIS. Section 11-200.1-27 also distinguishes between a consultation in which an agency, citizen group, or individual provides comments to the proposing agency or applicant regarding the action and a consultation in which the proposing agency or applicant only provides information about the action to the agency, citizen group, or individual. Section 11-200.1-27 requires an indication of when an agency, citizen group, or individual was "consulted with" but had "no comment" if that agency, citizen group, or individual is included as a "consulted" entity in the draft EIS.

Section 11-200.1-27 also specifies that proposing agencies or applicants must provide a summary of the oral comments made at any EIS public scoping meeting held pursuant to section 11-200.1-23.

Section 11-200.1-27 adds additional requirements specific to the preparation of the final EIS, including responses to comments received on the draft EIS and a list of persons or agencies consulted in preparing the final EIS.

§ 11-200.1-28 Acceptability

Section 11-200.1-28 replaces section 11-200-23, HAR (1996). The Final Proposed Rules introduce several minor clarifying amendments, including: (1) breaking up long paragraphs into subsections; (2) clarifying that the section applies to final EISs; (3) clarifying that the acceptability of the final EIS includes a review of acceptability of the full environmental review process from the proposal of the action to publication of the EIS; (4) clarifying that an acceptability determination requires the approving agency or accepting authority to assess whether the proposing agency or applicant classified comments as "substantive" and have included satisfactory responses to these comments in a manner commensurate with the level of detail included in the substantive comment; and (5) clarifying that comments must have been satisfactorily incorporated into the final EIS.

In the Final Proposed Rules, the subsections in section 11-200.1-28 have been reordered to consolidate the language specific to applicants into one place, language specific to agencies in one place, and language specific to both in one place. The language regarding identification of the accepting authority for the use of state or county lands or funds was moved to section 7.

In section 11-200.1-28, the term "satisfactorily" refers to the satisfaction of the accepting authority that the requirements have been met. The clarifications regarding the designation of "substantive" comments and the responses thereto are intended to address concerns that proposing agencies or applicants may intentionally or unintentionally disregard substantive comments as non-substantive. The EIS process must be satisfactory to the accepting authority, including the proposing agency or applicant's exercise of discretion in designating comments as substantive or non-substantive. Subsection (b) also requires that accepting authorities ensure that comments have been "appropriately incorporated into the final EIS". The addition of the

word “appropriately” recognizes that not all comments will be incorporated into the final EIS, and that some comments, such as form letters or petitions, may not need to be appended if there is a representative sample included pursuant to the comment response provisions of this subchapter.

Subsection (c) authorizes the OEQC to submit a recommendation regarding acceptability or non-acceptability of a proposed action to the accepting authority, applicant, and proposing agency, as applicable. The Final Proposed Rules do not place a deadline on the OEQC’s recommendation because chapter 343, HRS, does not impose a deadline on the determination of acceptability of agency actions. The Council took into consideration that the OEQC should endeavor to provide a recommendation as early as practicable, but that requiring a deadline may prevent the OEQC from providing a recommendation if an accepting authority takes longer than usual to make a determination.

Subsection (e) also clarifies that the 30-day period for an approving agency to determine the acceptability of an EIS begins with the submission of the final EIS to the approving agency or accepting authority, rather than publication of the final EIS in the bulletin. Further, subsection (e) clarifies that the 30-day acceptance determination period may be extended at the request of the applicant for an additional fifteen (15) days.

Other minor changes were made in accordance with global edits throughout the Final Proposed Rules, such as updating section references, and replacing the term “statement” with EIS and clarifying that “state or county lands or funds” can include “state or county lands”, “state or county funds” or both state and country lands and state and county funds.

Finally, minor changes are made to clarify the process for withdrawing an EIS.

§ 11-200.1-29 Appeals to the Council

Section 11-200.1-29 replaces section 11-200-24, HAR (1996). Section 11-200.1-29 describes the process by which the Council hears the appeal.

Pursuant to section 11-200.1-29, an applicant may file an appeal with the Council after the non-acceptance determination by the approving agency under the acceptability criteria in subchapter 10. Upon receipt of an appeal, the Council chairperson shall include the appeal on the agenda of the next council meeting. This connects the receipt of the notice of the appeal under section 343-5(e), HRS, with the timing of the next Council meeting.

Previous draft versions of the rules included provisions that an applicant may also seek judicial review of the non-acceptance pursuant to chapter 91, HRS, and that pursuing an appeal to the Council does not abrogate the applicant’s right under section 343-7(c), HRS, to bring a judicial action. However, the Council later removed this provision in response to public feedback that such language was unnecessary and may be outside the scope of the Council’s authority.

The Council also considered including a provision that an entity other than an applicant could appeal the non-acceptance of an EIS to the Council. However, the Council removed this provision from the Final Proposed Rules as well.

Finally, the Council considered increasing the 30-day time limit in which the Council must make a decision on an applicant's appeal to better accommodate the Council's monthly meeting schedule, among other things. The Council ultimately decided, however, that the Council would work to make a determination within the statutory prescribed period of time. This allows the Final Proposed Rules to be consistent with the statute, but also for flexibility in the future should the statutorily prescribed time period be changed.

The Final Proposed Rules also remove references to the approving agency to reduce confusion.

§ 11-200.1-30 Supplemental Environmental Impact Statements

Section 11-200.1-30 consolidates sections 11-200-26 through 11-200-29, HAR (1996) into one section. Subsection (a) was formerly section 11-200-26, HAR (1996). Subsection (b) was formally section 11-200-27, HAR (1996). Subsection (c) was formerly section 11-200-28, HAR (1996). Subsection (d) was formerly 11-200-29, HAR (1996).

In Version 0.1, the Council considered, but ultimately rejected, proposed changes to the sections dealing with supplemental EISs that would have: (1) added "new information" as a factor to consider when weighing the necessity of a supplemental EIS; (2) provided for which sources of new information should be considered when determining the necessity of a supplemental EIS; and (3) established a five-year review requirement of accepted EISs for actions that had not yet substantially commenced.

The public expressed concern about establishing "new information" as a factor for requiring preparation of a supplemental EIS. Many practitioners expressed that this requirement was already clear in case law, particularly through *Unite Here! Local 5 v. City and County of Honolulu*, 231 P.3d 423, 430 (Haw. 2010) (the "Turtle Bay case"). Altering this section could conflict with Hawaii Supreme Court precedent.

The public also expressed concern about requiring a five-year "re-evaluation" period based on that in NEPA. Some commenters interpreted this proposal as a "shelf-life" that a supplemental EIS would be required regardless of any or no changes. The proposed rules in Version 1.0 did not provide an expiration date. Instead the Final Proposed Rules provided a checkpoint for review so long as the action had not yet substantially commenced. The 1996 Rules provide that a supplemental EIS must be prepared in certain circumstances, but do not establish the time period or requirement for making that determination. The five-year review was intended to address that gap. The language of "substantial commencement" ensured that actions that were already well underway or completed were not subject to the uncertainty of a supplemental EIS review. This also posed interpretation challenges. A definition for "substantial commencement"

was considered in conjunction with this section. It was deleted in Version 0.3 from the supplemental EIS provisions.

In support of the five-year review, some commenters provided that a clear checkpoint would help establish certainty. In the Turtle Bay case, a review for the necessity of a supplemental EIS took place because the developer sought a discretionary permit necessary to proceed with the completion of the proposed action. If only ministerial approvals were necessary for completion, then under the 1996 Rules the necessity of a supplemental EIS may not have been considered.

Taking those concerns into account, the Council decided to retain the original language from the 1996 Rules and only combine the sections into one section with housekeeping edits. The proposed requirement for five-year review was removed from subsequent drafts. As an alternative, the Final Proposed Rules require agencies to follow a process (e.g., the “green sheet”) when considering issuing permits for actions with existing EAs and EISs (see section 11-200.1-12).

Subchapter 11 National Environmental Policy Act

Subchapter 11 (National Environmental Policy Act) creates a distinct subchapter to describe how to conduct environmental review for chapter 343, HRS, when federal National Environmental Policy Act (NEPA) environmental review is also applicable. Although this subchapter contains only one section, creating a new subchapter is in line with creating a new structure for chapter 11-200.1, HAR, providing a clear outline of the contents of the chapter through the subchapter headings.

§ 11-200.1-31 National Environmental Policy Act Actions: Applicability to Chapter 343, HRS

Section 11-200.1-31 replaces section 11-200-25, HAR (1996). The 1996 Rules allowed cooperation between federal and state agencies on actions requiring both NEPA and HEPA review. The Final Proposed Rules clarify that where an action triggers both NEPA and HEPA review, the NEPA document may be used to satisfy the HEPA requirements, so long as the document meets the required HEPA criteria.

The Council recognized that a particular level of review may be required under NEPA but not HEPA. For example, federal categorical exclusions (the federal equivalent of a state exemption) do not automatically result in exemptions under chapter 343, HRS. Conversely, the federal government may issue a FONSI for its purposes, but a state or county agency may require an EA or EIS be done for its purposes, or issue an exemption based on the federal FONSI. State and county agencies must still make a determination, through their own judgment and experience, that the action is exempt, requires an EA, or may proceed directly to preparing an EIS, under chapter 343, HRS, and assess the HEPA-specific content requirements, before determining whether the NEPA document satisfies the required level of review under HEPA.

To that end, subchapter 7 and section 11-200.1-11 (the “green sheet”) provides a tool to guide agencies on how to prepare the evaluation of whether or not the NEPA document satisfies the requirements of chapter 343, HRS.

Similar environmental statutes in Massachusetts and Washington accept that federally-prepared EISs are sufficient so long as they meet the state’s statutory requirements. The goal is to allow a federal EIS to meet the chapter 343, HRS, requirements provided that it addresses chapter 343, HRS, content and process requirements. In this case, state and county agencies can provide the information to the federal preparer for inclusion in its document rather than the state or county agency preparing a second document.

Section 11-200.1-31 provides which agency is responsible (federal, state, or county) for preparing the document, as well as delegation of that responsibility from the federal agency to a state or county agency.

Furthermore, section 11-200.1-31 addresses situations where federal regulations and state regulations may result in additional requirements for the proposing agency and applicant. For example, under a federal regulation, a public scoping meeting may be required prior to publishing a Notice of Intent to prepare an environmental impact statement, whereas state regulations would require a public scoping after the publication of an EISPN. This clause reduces the burden on the proposing agency or applicant to conduct two public scoping meetings.

Section 11-200.1-31 provides that in the case of joint documents, the preparation of any supplemental documentation would be due to federal requirements and that HEPA supplemental requirements would be satisfied by the federal requirements. Section 11-200.1-31 further clarifies who the accepting authority is for federal, state, and county actions.

Note that for Item (7), Version 2.0 submitted to the SBRRB inadvertently omitted the edit to replace “an” with “the” regarding the Governor’s authorized representative. This was corrected in the Version 2.0 submitted to the Governor for approval.

Lastly, section 11-200.1-31 provides that any acceptance pursuant to this section satisfies chapter 343, HRS, and that no other EIS shall be required for the proposed action. If the NEPA process requires supplemental review, the responsible federal entity’s supplemental review requirements would apply instead of requirements under chapter 343, HRS.

Subchapter 12 Retroactivity and Severability

Subchapter 12 (Retroactivity and Severability) creates a distinct subchapter addressing the retroactivity and severability of the Final Rules when enacted.

Section 11-200.1-32 describes when chapter 11-200.1, HAR takes effect. Section 11-200.1-33 includes the severability clause.

§ 11-200.1-32 Retroactivity

Section 11-200.1-32 is a new section that describes when the Final Rules take effect and how the Final Rules apply to actions that have already completed the environmental review process, or alternatively, are undergoing it at the time the Final Rules take effect. Section 11-200.1-32 was developed in response to public comments concerning actions currently pending. Section 11-200.1-32 ensures that an action is not prevented from proceeding under the 1996 Rules when it otherwise would but is delayed due to a judicial proceeding or other reasons.

Section 11-200.1-32 allows agencies time to update their existing exemption lists from “classes” to “types” of action, to designate those activities that would fall under Part 1 of the agency’s exemption list, and to reassign exemptions to the appropriate general types.

As used in this section, publication by OEQC requires that the document was submitted and met all requirements for publication.

§ 11-200.1-33 Severability

Section 11-200.1-33 replaces section 11-200-30, HAR (1996). Section 11-200.1-33 provides that each provision is severable and that the invalidity of any provision in this chapter does not affect the validity of any other provision. The Final Proposed Rules do not update section 11-200-30, HAR (1996).