

Report of the Permitted Interaction Group to the Environmental Advisory Council to Explore Potential Improvements to the Exemptions Process

February 6, 2024

This Permitted Interaction Group (PIG) was authorized by the Environmental Advisory Council (EAC) in an action at its September 6, 2022 meeting. The purpose of the PIG is to help achieve the intent of Hawai'i Administrative Rules (HAR) Title 11, Chapter 200.1 (Rules) related to exemptions, in particular, exploring means to encourage agencies to prepare and/or update exemption lists and conduct their exemptions in accordance with the Rules. The PIG was charged to look at potential changes to policies, rules, and statutes to accomplish this.

Background

The exemption process stems from Hawai'i environmental law. Hawai'i Revised Statutes (HRS) §343-6 (a)(2) states:

After consultation with the affected agencies and the environmental advisory council, the office of planning and sustainable development shall adopt, amend, or repeal necessary rules for the purposes of this chapter . . . that shall . . . establish procedures whereby specific types of **actions**, because they will probably have minimal or no significant effects on the environment, are declared exempt from the preparation of an environmental assessment[.] [In this and other rule citations in this report, bold font indicates emphasis added.]

"Action" is defined in HRS § 343-2 as "any **program or project** to be initiated by any agency or applicant." The administrative rules (HAR 11-200, which in 2019 were replaced by HAR 11-200.1) implementing HRS Chapter 343 have consistently taken a broad view of agency activities that qualify as programs or projects, and thus are **actions**. For example, in discussing actions that could be exempted (but are still considered actions), HAR 11-200 named "Operations, repairs, or maintenance of existing structures, facilities, equipment ...," "Replacement or reconstruction of existing structures and facilities...", and even "Continuing administrative activities including, but not limited to purchase of supplies and personnel-related actions..." This language was carried through in HAR 11-200.1.

HAR § 11-200.1-2 has the following definitions:

"Exemption list" means a list prepared by an agency pursuant to subchapter 8. The list may contain in part one the types of routine activities and ordinary functions within the jurisdiction or expertise of the agency that by their nature do not have the potential to individually or cumulatively adversely affect the environment more than negligibly and that the agency considers to not rise to the level of requiring further chapter 343, HRS, environmental review. In part two, the list may contain the types of actions the agency finds fit into the general types of action enumerated in section 11-200.1-15.

"Exemption notice" means a notice produced in accordance with subchapter 8 for an action that a proposing agency or approving agency on behalf of an applicant determines to be exempt from preparation of an EA.

Prior to 2019, a strict reading of the Rules would indicate that exemption notices (essentially memos to file that had to be available for public inspection) were required for *all* exempt actions, whether major (e.g., reconstruction of a hospital building) or minor (e.g., purchase of a box of paper clips; promotion from Clerk-Typist I to Clerk-Typist II, etc.). In practice, it was accepted that it would be infeasible and absurd to prepare notices for hundreds of thousands of trivial actions that had no significant (or any) impact on the environment. It is unsurprising that our extensive discussions with dozens of agencies found none that fully or even substantially complied with this requirement. We are also unaware of any effort by the Office of Environmental Quality Control (OEQC) (now known as the Office of Planning and Sustainable Development (OPSD) Environmental Review Program (ERP)), the Environmental Council (now known as the EAC), or any other party to encourage compliance with this specific provision of the Rules. One can picture a gray line somewhere along the continuum of agency actions from trivial to consequential, beyond which all reasonable persons would agree that the law requires an exemption notice. In the opinion of one of our committee members, not knowing where this gray line lay was the primary factor that led many agencies to neglect altogether the preparation of exemption notices, for large or small actions alike.

HAR § 11-200.1-16 (a) states that "Each agency, through time and experience, **may** develop its own exemption list consistent with both the letter and intent expressed in this subchapter and in chapter 343, HRS[.]" This expresses the fact that the exemption list is voluntary. In the past, of course, many agencies have never developed one, with no marked consequences.

HAR § 11-200.1-16(d) encourages agencies to prepare exemption lists, and any agency that seeks to use an exemption list must submit it to the EAC for review and concurrence.

These exemption lists and any amendments to the exemption lists **shall** be submitted to the council for review and concurrence no later than seven years after the previous concurrence . . . Upon attaining quorum, the council shall review the exemption list for concurrence. The council may review agency exemption lists periodically.

A novel feature of the 2019 rule update in HAR § 11-200.1-16 was to divide the exemption list into de minimis activities (Part 1) activities and non-de minimis activities (Part 2), and to establish different publication and documentation requirements for actions that fell under Part 1 or Part 2. De minimis activities are "Routine activities and ordinary functions within the jurisdiction or expertise of the agency that by their nature do not have the potential to individually or cumulatively adversely affect the environment more than negligibly and that the agency considers to not rise to the level of requiring chapter 343, HRS, environmental review." HAR § 11-200.1-2. Part 2 activities are presumed to qualify for exemption under most

circumstances but have enough potential for impact that they require some analysis and screening.

Under HAR § 11-200.1-17, Part 2 exemptions require (1) consultation, (2) preparation of an exemption notice, and (3) submitting a list to OPSD-ERP of all Part 2 exemptions made the prior month, including the name and location of the proposed action and contact information for the agency. The agency must submit the list of exemption notices to OPSDE-ERP so that notice of such can be published in *The Environmental Notice* published on the 8th of the month after the exemption was made.

De minimis exemptions have no such requirements, **as long as the agency has developed an updated exemption list dividing exemptions into Part 1 and Part 2.** HAR § 11-200.1-16(c) states:

An agency **may** use part one of its exemption list, developed pursuant to subsection (a)(1), to exempt a specific activity from preparation of an EA and the requirements of section 11-200.1-17 because the agency considers the specific activity to be de minimis.

If an agency does not develop an exemption list or update its existing exemption list to identify which activities are Part 1 and which are Part 2, agencies are required to undertake the extensive Part 2 exemption notice process (consultation, formal notice, publication) for *all* exemptions. This provision was promulgated to encourage agencies to develop an updated list. Because updating could not be undertaken immediately, the 2019 Rules include a retroactivity provision (HAR § 11-200.1-32(c)) that gives agencies seven years during which the old lists “may be used.” In our opinion, exactly **how** an old list “may be used” is murky. Presumably, agencies must follow the **former process**: create a memo to file for every exemption they make (whether it would be considered de minimis or not under the new Rules) and have it available for public inspection. The new requirements for consultation and publication would not apply. However, for the many agencies that never had any kind of list in the first place, the new Rules are silent.

Clearly, the Rules make developing a list and submitting it to EAC for potential concurrence an important goal for agencies seeking to ensure compliance with the State’s EIS laws and rules. The EAC developed over time informal policies concerning exemptions that were formalized as part of the EAC’s official policies and procedures. The EAC established a standing committee called the Exemptions Committee (ExCom) that takes the lead on reviewing agency exemption lists and working with agencies to refine those lists prior to any EAC concurrence. The ExCom periodically contacts agencies to remind them to create or update their exemption lists and serves as the first point of contact for agencies that provide their lists to the EAC through OPSD-ERP.

To briefly summarize the procedures: after a list is submitted by an agency, OPSD-ERP staff provide the list and the agency contact info to the EAC Chair and ExCom Chair, who then decide how to undertake an initial review. Once the list is preliminarily vetted for basic consistency

with the Rules, readability, and certain other content issues, it is provided to the ExCom at its next available meeting to obtain the committee members' comments. Once these comments are finalized, agency representatives are explicitly invited to discuss the list and the comments developed by the ExCom at the previous meeting. Often, there is some back and forth between the ExCom and agency to address questions raised by ExCom members. If the list is deemed acceptable for publication for public comments, with or without minor edits suggested by the ExCom, it is voted on, and if passed, sent to the EAC for a vote to authorize the list to be published in *The Environmental Notice* for a 15-day comment period. At the next available ExCom meeting, comments are reviewed and suggestions are made to the agency for finalization. If appropriate, the ExCom approves sending the list to the EAC for concurrence. If successfully concurred with by the EAC, it becomes the official agency exemption list. For some lists with issues, the process above may recur before finally resulting in concurrence.

Issues with the Exemption Process

Below are four specific (and somewhat interrelated) issues the PIG identified with the current exemption process:

1. Agencies that do not choose to update (or develop) an exemption list.
2. Agencies that do not properly conduct the exemption process for Part 2 exemptions: which at a minimum requires some consultation and providing basic information on the exemption via a spreadsheet to OPSD-ERP for publication of in *The Environmental Notice*.
3. The question of whether agencies should be required to have an updated list, or even any list at all, to take advantage of Part 1 (de minimis) exemptions. The reality is that each agency conducts hundreds of de minimis actions every week, and it is extremely unlikely that those agencies that lack the required updated, EAC-concurred lists prepare internal exemption notices for them. In the view of some on the PIG, this requirement in the rules is unrealistic. If an agency is forced for practicality's sake to ignore or violate one section of a rule, the fear is that it may lead to ignoring and violating other sections, just as occurred in the past. This view holds that the function of exemption lists should not be to allow agencies to take advantage of Part 1 exemptions, but rather to help focus and organize an agency's thinking about the environmental consequences of the actions it conducts or permits; to provide a clear record of this for the public and other agencies; and to provide an efficient and transparent means to sort actions as they come up into the Part 1, Part 2, and EA "bins." Some members are concerned that the apparent connection in the Rules between an updated list and the ability to make Part 1 exemptions appears to impose a burdensome requirement. Submittal to the EAC for concurrence of a list that has been voluntarily prepared should simply be a sign that the list will be reviewed for quality by the third-party that the Legislature set up to help interface between the public and agencies and to monitor environmental progress. It is important to note that the PIG was not unified in its assessment of the degree to which Issue No. 3 represented a significant problem.

4. The question of the breadth of meaning for the terms *action*, *program* and *project*. Are all de minimis activities truly actions with potential to significantly affect the environment, worthy of serious consideration in environmental documents? What was the Legislative intent for the term action, which is only defined in the statute as a project or program? Does recent case law clarify the term? Previous rules notwithstanding, can our Rules further define this term to promote a more sensible process? Can we accomplish this with guidance? Or is the solution statutory?

Potential Solutions for the EAC to Consider

The PIG feels that the solutions to Issues 1 and 2 are readily addressable at least in part through agency outreach. The EAC has previously sent two series of letters to agencies explaining the new Rules and outlining the benefits and the relative simplicity of the process. The second letter highlighted other agencies that have successfully completed the process. These letters were successful in encouraging agency participation. So far, six State agencies and nine County agencies (mostly City and County of Honolulu) have gone through the process to update their exemption lists into Part 1 and Part 2. But this represents less than half of agencies that frequently make Part 2 exemptions. For the neighbor islands, County-wide lists that encompass most of the agencies in the County might simplify the process. Maui County has such a list, although it is outdated. One approach would be rather than sending yet another letter, ExCom members and perhaps some OPSD-ERP personnel would meet island-by-island with agency officials. The PIG felt that focusing on the 2 to 5 agencies that most need it (i.e., those that do work that either do or approve work that may have environmental impacts) would be most effective: e.g., Public Works, Planning, Water Supply, Environmental Management, Housing, and Parks and Recreation. The thought is to have maximum 2-hour meetings in person, all in the same room at the same time, armed with good, encouraging information. It was suggested that we offer a standardized format for an exemption list, based on ones we have received from other agencies that we appreciated for consistency and ease of production and review. A standardized format could ease the process for respondents as they have examples to follow. We might also include some of the environmental topics that we have consistently brought up to agencies; i.e., having all new and reconstructed lighting conform to the State's Night Sky Protection Policy to be exempt, and not exempting new or reconstructed seawalls.

Concerning Issue 2, specifically, the PIG undertook an exercise in November 2022 to list all the agencies that had complied with the section of the Rules requiring them to inform OPSD-ERP of their exemption notices since the inception of the new Rules. This table is reproduced in an Attachment _A_. It lists each agency that made a submittal and which months the submittals were made. The list indicates whether the agency has an exemption list and the date of the list. The table seems to show that **those agencies that make exemption lists are the same ones that publish their exemption notices**. One may draw several not mutually exclusive conclusions. Perhaps following one part of the Rules (update or create a new exemption list) leads them to do follow other parts (prepare exemption notices for Part 2 exemptions); alternatively, perhaps some agencies that lack lists never have the occasion to make a Part 2 exemptions. But it is clear that some agencies are complying with the process. It would appear through our personal experiences with some agencies that are aware of the new Rules and periodically make exemptions are not doing it in accordance with the Rules.

Another avenue for addressing agencies is for our I&O forum on exemptions to specifically invite agencies that have not submitted lists. At least a portion of the presentation could be tailored to encourage development of a list and proper execution of the exemptions process.

For Issue 3, we feel it is important to have wider discussion among EAC members to better define our goals. If the EAC shares the thought that this is a genuine issue in need of a fix, further analysis would be needed. Do we wish to explicitly disconnect obtaining a concurred exemption list from the ability to take advantage of the lack of notice, consultation and publication requirements possible under Part 1? Our PIG had a great diversity of opinion, and moving forward should involve input and consideration from the full EAC.

The degree to which Issue 4 is a genuine problem is a matter of debate. Are agencies wasting a lot of time evaluating their most trivial activities for compliance with the EIS statute and rules? Is this a fatal flaw whereby agencies could be targeted by plaintiffs for non-compliance? If not, then it might not be worth seriously addressing a non-problem. On the other hand, it would make sense to remove actions for which there is a consensus that there is no potential for environmental impacts from the need for evaluation of any type. The PIG explored whether this could be done by statute, rules or guidance. More legal research on case law may be needed to determine the implications of the Legislature changing the definition of action. For example, the definition of “project” in the Rules could be expanded by explicitly excluding “routine repair, routine maintenance, purchase of supplies, and continuing administrative activities involving personnel only, nondestructive data collection, financial transactions, and personnel-related matters” that are listed in HAR § 11-200.1-16(a), and then changing that section to delete those activities. Short of amending the Rules, or perhaps in anticipation of the need to do so, the EAC could issue an opinion stating that these activities by definition are considered to lack the potential for environmental impact and should thus be excluded from being considered an action subject to HRS 343. As with Issue 3, the PIG felt this matter should involve input and consideration from the full Council.

ATTACHMENT A

Dates that Agencies Filed Exemption Notices and Published on ERP Website between Sept 2019 and Sept 2022

Agency/Island <i>If row is shaded grey, agency has an exemption list.</i>	List of Exemptions Publication Date			
	2019	2020	2021	2022
Dept of Transportation (DOT)/Statewide <i>Exemption list: Concurred 2/1/2022</i>	Sept, Nov, Dec	Jan, Feb, Mar, Apr, May, June, July, Aug, Sept, Oct, Nov, Dec	Jan, Mar, Apr, May, June, Jul, Aug, Sept, Oct, Nov, Dec	Feb, Apr, Jun, Jul
Commission on Water Resource Management (CWRM)/Statewide <i>Exemption list: Concurred 1/5/2021</i>	Aug, Dec	Aug, Sept, Oct		
Dept of Land and Natural Resources (DLNR)/Statewide <i>Exemption list: Concurred 11/10/2020</i>	Aug, Sept, Nov, Dec	Jan, Feb, Mar, Apr, May, June, July, Aug, Sept, Oct, Nov, Dec	Jan, Feb, Mar, Apr, May, Jun, Jul, Aug, Sept, Oct, Nov, Dec	Jan, Feb, Mar, Apr, May, Jun, Jul, Aug
Dept of Education (DOE)/Statewide <i>Exemption list: Reviewed 8/20/2015</i>	Nov, Dec	Jan, May, Sept, Oct, Dec	May, June, Oct, Nov, Dec	Jan, Feb
Dept of Agriculture (DOA)/Statewide <i>Exemption list: Concurred 5/1/2018</i>		Jan, Apr, May, Aug		
Dept of Hawaiian Homelands (DHHL)/Statewide <i>Exemption list: Concurred 4/6/2021</i>	Dec	Feb, Mar, Apr, May, June	Feb, Mar, May	
Agribusiness Development Corp (ADC)/Statewide <i>Exemption list: Concurred 5/1/2018</i>		Feb		
University of Hawaii Manoa (UHM)/Statewide <i>Exemption list: Reviewed 8/9/2016</i>		Feb, Mar, Sept	Jan, Mar, May, Nov	Jan, Apr, May, Jul
Hawaii Housing Finance Development Corp (HHFDC)/Statewide <i>Exemption list: Reviewed 9/6/2022</i>	Sept, Oct, Nov	Apr	Nov	Feb, Mar
Dept of Accounting and General Services (DAGS)/Statewide <i>Exemption list: Concurred 4/18/2011</i>	Nov, Dec	Jan, Feb, Mar, Apr, May, July, Sept, Dec	Jan, Mar, May, Jul, Nov, Dec	Jan, Feb, Mar, Apr, May, Jun, Jul, Aug
Aloha Tower Development Corporation (ATDC)/Statewide		May		
NELHA/Statewide <i>Exemption list: Concurred 5/9/2017</i>		July		
Hawaii Health Systems Corporation (HHSC)/Statewide			May, Oct	
Univ of Hawaii Community Colleges/Statewide				May, Jul

Agency/Island <i>If row is shaded grey, agency has an exemption list.</i>	List of Exemptions Publication Date			
	2019	2020	2021	2022
Hawaii Public Housing Authority <i>Exemption list: Concurred 12/13/1989, Reviewed 15/5/2016</i>			Sept	
Planning Dept/County of Maui <i>Exemption list: All Depts - Concurred 1/10/2007</i>	Aug, Sept, Oct, Nov, Dec	Jan, Feb, Mar, Apr, May, June, July, Aug, Sept, Oct, Nov, Dec	Jan, Feb, Mar, May, Jul, Sept, Oct, Nov, Dec	Feb, May, Jun, Jul, Aug
Dept of Housing and Human Concerns (DHHC)/County of Maui <i>Exemption list: All Depts - Concurred 1/10/2007</i>	Nov	Apr	Jan	
Dept of Parks and Rec (DPR)/County of Maui <i>Exemption list: All Depts - Concurred 1/10/2007</i>		July, Aug		Jan, Mar, Apr, May, Jun, Jul, Aug
Dept of Public Works (DPW)/County of Maui <i>Exemption list: All Depts - Concurred 1/10/2007</i>		July, Sept, Nov, Dec	Jan, Feb, Mar, May, June, Aug, Oct, Nov	Jun, Aug
Dept of Water Supply (DWS)/County of Maui <i>Exemption list: All Depts - Concurred 1/10/2007</i>			Feb, Mar, Apr, May, Jul, Aug, Oct	Mar, Jul
Dept of Environmental Management (DEM)/County of Maui <i>Exemption list: All Depts - Concurred 1/10/2007</i>			Mar	Feb, Mar
Dept of Fire and Public Safety/County of Maui <i>Exemption list: All Depts - Concurred 1/10/2007</i>				Feb
Dept of Management (DEM)/County of Maui <i>Exemption list: All Depts - Concurred 1/10/2007</i>				Apr
Dept of Public Works (DPW)/County of Hawaii <i>Exemption list: Concurred 1/5/2021</i>	Sept, Oct, Dec	Feb, Mar, Apr, May, July, Aug, Oct, Nov	Apr, Jul, Oct	Jan, Mar, Jun, Jul
Office of Housing and Community Development (OHCD)/County of Hawaii <i>Exemption list: Concurred 7/11/2018</i>	Dec	Jan, Mar	Jan, Jun	Jan, Jul
Dept of Env Management (DEM)/County of Hawaii <i>Exemption list: Concurred 1/8/2019</i>			May, Sept	

Agency/Island <i>If row is shaded grey, agency has an exemption list.</i>	List of Exemptions Publication Date			
	2019	2020	2021	2022
Dept of Public Works (DPW)/County of Kauai <i>Exemption list: Concurred 11/17/2012</i>			Mar	
Dept of Planning and Permitting (DPP)/City and County of HNL <i>Exemption list: Dept of General Planning Concurred 10/15/1986</i>	Sept, Oct, Nov, Dec	Feb, Mar, June, July, Aug, Sept, Oct, Dec	Jan, Feb, Mar, Apr, May, Jun, Jul, Aug, Sept, Oct, Nov	Jan, Apr, May, Jul, Aug
Dept of Design and Construction (DDC)/City and County of HNL <i>Exemption list: Concurred 9/1/2020</i>	Oct, Nov	Jan, Mar, Apr, May, June, July, Aug, Dec	Feb, Jun, Jul, Oct, Nov, Dec	Jan, Apr, May, Jun, Aug
Dept of Environmental Services(ENV)/City and County of HNL <i>Exemption list: Concurred 3/2/2021</i>	Oct	Jan, Feb, Mar, Apr, May, June, Sept, Oct	Jul	Aug
Dept of Transportation Services (DTS)/City and County of HNL <i>Exemption list: Concurred 1/4/2022</i>		Jan, May	Apr, Jul	Aug
Dept of Land Management (DLM)/City and County of HNL <i>Exemption list: Concurred 11/10/2020</i>		May	Dec	
Dept of Parks and Rec (DPR)/City and County of HNL <i>Exemption list: Concurred 7/20/2016</i>		Oct		
Board of Water Supply (BWS)/City and County of HNL <i>Exemption list: Concurred 4/5/2022</i>	Dec	Jan, Mar, May, Jun, Oct	Jan, Mar, May, Jun, Oct	
Dept of Community Services (DCS)/City and County of HNL			Apr	