Environmental Council

Written and Oral Comments on Draft 1.0, HAR 11-200.1

October 2, 2018

Last Name	First Name	Organization	Means Received	Date Received	Page
Kirkpatrick	John	None	Email	3/12/2018	2
Alivado	Shannon	General Contractors Association of Hawaiʻi	Email	5/21/2018	4
Fox	Mark	The Nature Conservancy	Email	5/21/2018	6
Hou	Ivan	Local 5	Email	5/21/2018	7
Miyasato	Blaine	Airlines Committee of Hawaiʻi	Email	5/21/2018	11
Norenberg	Debra	None	CiviComment	5/22/2018	13
Coleman	Stuart	Surfrider Foundation	Email	5/29/2018	17
McCrory	Lynn	Pulama Lānaʻi	Hand	5/30/2018	25
Wong	Donna	Hawaiʻi Thousand Friends	Email	5/31/2018	26
Strom	Susan	None	Email	6/1/2018	28
Walton	Anne	Integrated Ocean Management	Email	6/4/2018	35
Arakawa	David	Land Use Research Foundation	Email	6/5/2018	42
Asuncion	Leo	Office of Planning	Mail	6/5/2018	48
Cabral	Randy	Hawaiʻi Farm Bureau	Email	6/5/2018	55
Callentine	Livit	None	Email	6/5/2018	57
Fukuda	Karlynn	Munekiya Hiraga	Mail	6/5/2018	58
Hammerquist	Bridget	Friends of Māhāʻulepū	Email	6/5/2018	61
Hart	Jordan	Chris Hart & Partners	Email	6/5/2018	73
Kaimuloa	Kamakana	Chamber of Commerce Hawaiʻi	Email	6/5/2018	75
Lemmo	Sam	Office of Conservation and Coastal Lands, DLNR	Email	6/5/2018	78
Lim	Jennifer	Carlsmith Ball	Email	6/5/2018	79
Nagata	Stephanie	Office of Maunakea Management	Email	6/5/2018	133
O'Keefe	Sean	Alexander & Baldwin	Email	6/5/2018	135
Pahinui	Kathleen	None	Email	6/5/2018	139
Perriello	Mark	Kauaʻi Chamber of Commerce	Email	6/5/2018	140
Shigekuni	Vincent	PBR Hawaii & Associates	Email	6/5/2018	141
Teale	Laulani	None	Email	6/5/2018	143
Thompson	Kimbal	Marine and Coastal Zone Advocacy Council	Email	6/5/2018	144
Tumpap	Pamela	Maui Chamber of Commerce	Email	6/5/2018	146
Sichter	Lee	None	Mail	6/6/2018	148
Townsend	Marti	Sierra Club	Email	6/6/2018	151
Waits	Malia	None	Email	6/6/2018	155
Yee	Michael	Hawaiʻi Planning Department	Mail	6/6/2018	156
Sokugawa	Kathy	Honolulu Department of Planning and Permitting	Email	6/7/2018	159
Case	Suzanne	State Department of Land and Natural Resources	Email	6/8/2018	162
Butay	Jade	State Department of Transportation	Mail	6/13/2018	165
ORAL COMMENTS SUBMITTED DURING PUBLIC HEARINGS BEGIN ON PAGE 181					

This document contains all comments submitted on Public Notice Docket NO. R11-200-05-18 HAWAII DEPARTMENT OF HEALTH. The comments are organized into two groups: 1) written comments and 2) oral comments submitted at the public hearings. This document supersedes the June 12, 2018 document, which only contained the written comments.

The written comments are ordered by date received then last name. In some cases, comments were received both by email and mail. No differences between the mailed and emailed copies in these cases were identified so only the electronic copy is included.

The oral comments are organized by date, public hearing, and speaker. A table of contents for the oral comments is found on page 181. No oral comments were received at the public hearings in Hilo, Hawaiʻi or Wailuku, Maui.

This document is prepared for both paper and electronic viewing. As a paper document, this page provides the table of contents and each page has a header that identifies the master page number. As an electronic document, the table of contents contains a link to each comment and each comment is bookmarked for navigation.

Additional information on the Environmental Council and its administrative rules update process may be found at http://health.hawaii.gov/oeqc/rules-update/.

From: John Kirkpatrick
To: HI Office of Environmental Quality Control
Subject: FW: comment on Rationale and draft Rules, version 0.4
Date: Monday, March 12, 2018 9:32:45 AM

Aloha,

I am writing as one who has been involved in community consultations of various kinds, including HEPA and NEPA scoping meetings, for 30 years. I am writing as an individual, and not as a representative of my firm.

I am concerned by the requirement, in the Version 0.4 rules (p. 12) and rationale for rules changes (p. 22) , for an audio recording of comments at scoping meetings, to be provided to OEQC. This raises several practical issues:

1. Scoping meetings are often boisterous, with people speaking simultaneously. If an Agency or Applicant must capture those comments clearly, it will be necessary to insist on speaking procedures that often generate ill-will among commentators … and still may not insure that comments are clearly stated.
2. Even with multiple microphones and video recording by experienced professionals, some comments are hard to capture at best. As a result, some ambiguity and uncertainty as to precisely what was said, and to what point, is inevitable. Even a good recording is not a full and comprehensive record of all comments.
3. What is the evidentiary status of the audio recording submitted to OEQC? And what are the procedures for receiving, reviewing and storing the recordings?
    a. Does OEQC plan to review these recordings as part of the process of reviewing a draft EIS submittal? Will OEQC's submittal acceptance process include a decision that the recordings are adequate for the EIS process?
    b. If so, can you identify the criteria for such a decision, and the method of communicating the decision concerning the adequacy of recordings? Clearly the "standard quality" criterion (Rules, 0.4, p. 12) demands a judgment on the part of OEQC.
    c. Can OEQC be sure that such a review of the audio record can be completed in the period between submittal and publication dates – even for EISs with meetings on multiple islands? A contentious scoping meeting can easily last five hours, so a statewide scoping process could generate 30 hours of audiotape. (or more hours, assuming two separate recorders operating at the same time.)
    d. Has OEQC considered whether the decision to accept recordings as adequate could be challenged in court?
    e. If a commentator finds that his or her comment was not adequately summarized by the Agency or Applicant in the draft EIS, does that affect the acceptability of the draft EIS (including the response to summarized oral comments). Such a commentator could challenge the Agency or Applicant, a preparer and OEQC as failing to safeguard his or her right to participate in the process on the basis of any disparity between the audio record and the summary.
    f. Will the audio recordings kept by OEQC become part of the public record accessible for

review (a) during the draft EIS comment period and (b) afterward?

g. Does OEQC have facilities for on-site review of audio recordings? Will OEQC be willing to provide members of the public with copies of the audio recordings so they can in turn review them?

4. The draft rules (p. 41) identify a written summary of oral comments as a required component of an EIS. This item comes in a paragraph after the requirement that responses be made to written comments. Consequently, it appears that the Agency or Applicant is not required to provide responses to summarized oral comments – but this point may need to be clarified.

I recognize the value of scoping meetings of various kinds – public meetings, open houses, talk story sessions, and focus groups by community participants. I support the idea that a scoping meeting should occur early in the EIS process. At such meetings, my inclination has been to keep listening as long as people want to share their views, and to seek a mixture of venues and formats that encourage a wide range of people to share their views.

My concern is that inclusion of the audio recordings in the EIS process creates a new requirement that is often very difficult to implement and can raise questions, even legal challenges, about the adequacy of the written EIS submittals.

I strongly recommend that this requirement be dropped.

Thank you for your efforts to make the EIS rules clear and fair.

John Kirkpatrick, Ph.D. LEED AP | Senior Socio-Economic Analyst
Belt Collins Hawaii LLC
2153 North King Street, Suite 200 | Honolulu, HI 96819-4554 USA
T: 808.521.5361 | F: 808.538.7819 | www.beltcollins.com

This message is intended for use of the addressee and may contain information that is privileged and confidential. If you are not the intended recipient, you are hereby notified that any use or dissemination of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by reply and delete this message from your system. If this transmission includes an electronic file attachment, please view the complete Belt Collins Electronic Media Disclaimer Form at www.beltcollins.com/emdform

1065 Ahua Street
Honolulu, HI 96819
Phone: 808-833-1681 FAX: 839-4167
Email: info@gcahawaii.org
Website: www.gcahawaii.org

GCA of Hawaii
GENERAL CONTRACTORS ASSOCIATION OF HAWAII
Quality People. Quality Projects.

Sent via E-mail: qchawaii@doh.hawaii.edu

May 21, 2018

Honorable Puananionaona P. Thoene, Chair
Environmental Council
State of Hawaii
235 S. Beretania Street, Suite 702
Honolulu, Hawaii 96813

SUBJECT: COMMENTS REGARDING ENVIRONMENTAL COUNCIL'S DRAFT PROPOSED CHANGES TO HAWAII ADMINISTRATIVE RULES TITLE 11, CHAPTER 200 REGARDING CHAPTER 343, HRS, ENVIRONMENTAL IMPACT STATEMENTS.

Dear Chair Thoene and Members of the Environmental Council,

My name is Shannon Alivado and on behalf of the General Contractors Association of Hawaii (GCA), I am writing with comments to the proposed amendments to the administrative rules governing Chapter 343 and Environmental Impact Statements. The GCA is an organization comprised of over five hundred general contractors, subcontractors, and construction related firms. The GCA was established in 1932 and is the largest construction association in the State of Hawaii whose mission is to represent its members in all matters related to the construction industry, while improving the quality of construction and protecting the public interest. GCA commends the Council for proposing these proposed amendments to the rules and appreciates the opportunity to comment.

Upon review of the proposed changes to Hawaii Administrative Rules, Title 11, Chapter 200 (HAR 11-200) regarding Environmental Impact Statement Rules, GCA has some concerns regarding some of the most recent changes to the language as referenced below, which may create a more tenuous process in the disclosure of impacts to the environment, which are to be used by others to determine environmental impacts.

Legislative guidance indicates that "[t]he purposes of administrative rulemaking are to implement legislation and to establish operating procedures for state agencies. Generally, a legislative act will provide the skeleton or superstructure for a program. Agencies are required to 'fill in the details' and implement the program on a day-to-day basis." HAWAII ADMINISTRATIVE RULES DRAFTING MANUAL CH. 3 (2nd ed. 1984) (LEGISLATIVE REFERENCE BUREAU, STATE OF HAWAII). With that understanding the administrative rules are to implement legislation and to ensure the rules do not overstep the legislative intent of any statute.

GCA has the following comments for the Council to consider:

1) **Definition of environmental assessment (Section 11-200.1-2**. The most recent Version of the administrative rule amends the "environmental assessment from a written evaluation "to determine whether an action may have a significant environmental effect" to a written evaluation "that serves to provide sufficient evidence and analysis to determine whether an action may have a significant effect." This definition purports to broaden what would be required in an environmental assessment requiring what one would have to interpret as "sufficient evidence and analysis" as compared to "significant environmental effect." These change of words implies a legal standard – and would almost require further interpretation to determine what exactly it means. For these reasons the GCA would request that the definition of environmental assessment remain the same or if a change is necessary, that the change narrow the definition to ensure the applicant understands what is expected.

2) **New language "Analysis" vs. old language "Identification and Summary" (Section 11-200.2-1).** The GCA questions the nced to use the word "analysis" and whether the use of such word may be exceeding what the original intent of the content of an environmental assessment and environmental impact statement was meant to include. The new proposed language would require draft and final EAs and EISs to include an analysis of impacts and alternatives considered instead of an identification and summary of those impacts and alternatives. The issue lies with the interpretation of what "analysis" means - and if challenged the term itself may be considered subjective. We suggest deleting the reference to "summary analysis" and to simply allow applicant to "identify" any impacts to the environment.

GCA understands the importance of protecting the environment and works closely with regulatory agencies and the industry to ensure such protections are followed; the GCA wants to ensure such regulations are appropriate, and will not make doing business more complicated or difficult. Thank you for the opportunity to comment.

With regards,

Shannon Alivado
Director of Government Relations

Testimony of The Nature Conservancy of Hawai‘i
Supporting Version 1.0 of the Proposed Update to HAR Chapter 11-200.1, EIS Rules
Hawai‘i Environmental Council, Hawai‘i Office of Environmental Quality Control
May 21, 2018

The Nature Conservancy supports the proposed update and revisions to Hawai‘i Administrative Rules (HAR) Chapter 11-200.1 relating to environmental assessments and environmental impact statements. We also want to thank the Environmental Council members and the staff of the Office of Environmental Quality Control for your hard work through the revision process. We appreciate your thorough approach and the opportunity for stakeholders to participate throughout the process. Your foresight and willingness to undertake significant engagement and open dialogue both early in the process and through to formal rule making is an excellent example of good government.

We don’t have specific comments or proposed edits. We only wish to express our general appreciation and support for what you have done with the proposed revisions and, in particular, call out your work to clarify the significance criteria in Subchapter 7 and exemption provisions in Subchapter 8.

The significance criteria clarifications you have proposed in §11-200.1-13(b) calling out “substantial degradation” and “substantial adverse effect” on natural resources, environmental quality, species and habitat, and air and water quality help to distinguish actions that benefit the environment. Many natural resource conservation projects like controlling invasive plants and animals substantially improve the condition, health and function of the environment for both ecological and human well-being. Over many years, environmental assessments for these types of actions across the state have consistently received findings of no significant impact.

The amendments you have proposed in §11-200.1-15, -16 and -17 provide helpful guidance to agencies on evaluating the merits of proposed exemptions, consultation with other agencies, publication of exemptions notices, and developing and seeking council concurrence on exemption lists. Again, many natural resource management actions have minimal or no significant adverse effects on the environment and are exactly the types of beneficial actions that can and have been justifiably exempt from preparing environmental assessments and impact statements.

Thank you again for your good work and the opportunity to provide these comments.

Eric W. Gill, Financial Secretary-Treasurer Gemma G. Weinstein, President Godfrey Maeshiro, Senior Vice-President

May 21, 2018

Scott Glenn, Director
Office of Environmental Quality and Control
235 South Beretania Street, Suite 702
Honolulu, Hawai'i 96813

Re: Public Comment on Version 1.0 of the Proposed Update to HAR 11-200, EIS Rules

To Members of the Environmental Council and OEQC Staff,

Thank you for this opportunity to comment on draft Version 1.0 of the proposed changes to HAR 11-200. UNITE HERE Local 5 represents hotel, healthcare and airport workers across Hawaii. We appreciate the thoughtfulness of the process and the opportunities for the public to provide comment. There have been positive changes to the old rules such as clarification of ambiguous language and more detailed requirements for elements of the environmental review process.

However, we have concerns we describe below. Our concerns share common themes. First, the disparate motives and scale of applicant projects make the EIS rules sometimes a poor oversight tool that doesn't fit all. The EIS rule should provide different guidance and compliance requirements between agency-applicants doing public works or small scale or residential projects versus large for-profit commercial projects. Secondly, some of the draft language injects subjectivity into the process. Objective and quantifiable mechanisms should be introduced to the rules to ensure robust review of projects, avoid ambiguity and discourage misapplication of discretionary power.

Supplemental EIS Review and "Shelf Life"

Version 0.2 HAR 11-200-27 provided a five year timeline regulating when a prior decision/EIS can be used to determine whether a newer supplemental EIS is required. The language was removed after a few public comments raised concerns.

The five year life span should be reintroduced and included in the new rule. The five year shelf life is objective and quantifiable. The Version 0.2 language was not particularly onerous, it merely called for an agency to *consider* whether a new supplemental review was necessary, it did not mandate a supplemental review after five years. Without an objective measure the rule invites dispute over subjective interpretations, especially for controversial projects.

As the proposed rule HAR 11-200.1-30 is written now, it is unclear whether there is any mechanism or trigger that would bring regulatory attention to the fact an applicant is commencing work on a project that was more than five years old, short of the applicant voluntarily disclosing that changes to its approved project may be "substantive". Too much discretion is given to an applicant to decide what is "substantive". What mechanism in HAR 11-200.1-30 could be used by an agency to intervene before an applicant made

changes to a project's implementation, decided those changes were not "substantive", and then commenced with the project five, ten or fifteen years after its Final EIS was accepted?

Exemptions Based On Prior Alternative Analysis

HAR 11-200.1-11 added language that allows an agency to use a prior exemption, FONSI or accepted EIS to exempt a proposed action from a new HRS 343 review if that action was included as an alternative in a prior Final EA or accepted EIS and met other criteria.

By their nature, alternative actions are included as a *component* of a full review and are not as well analyzed and documented as the main action. Study as an alternative is not a substitute for a complete environmental review, notwithstanding new language in Version 1.0 that requires more detailed analysis of alternatives.

The rationales for Version 1.0 indicate that the exemption was intended to simplify an agency–applicant's routine operation or maintenance actions. However, we are concerned that the language as written invites a *non*-agency applicant's proposed action to be exempt if it is found to have "similar" effect as the prior determination or study.

This rule is problematic if it allows a proposal to be exempted based on a less-thorough analysis included as a mere component of a prior decision/EIS. This invites bait and switch behavior where less scrutinized alternative actions can become the de-facto proposed action.

Local 5 recommends that the exemption allowance is removed altogether. Alternatively, limit the proposed HAR 11-200.1-11 exemption to agency-applicants engaged in public works and applicants proposing small scale residential or commercial projects. Non-agency applicants engaged in large for-profit developments should explicitly not be eligible for a proposed action to be exempt simply because it was once included in the "alternatives" section of a prior study.

Program vs. Project

The proposed Version 1.0 rules clarify, define and require a programmatic plan for large scale projects (HAR 11-200.1-24 and 11-200.1-18). However, the proposed rule is permissive in allowing "conceptual" analysis when future effects or site-specific impact in a long-term program is "indiscernible". Allowing an applicant to temporarily get away with vagueness is one thing but the rule could open the door for applicants to commence with actions that are not properly studied beyond a vague summarization in their initial EA/EIS.

For example, if an applicant submitted a Programmatic EIS that contained vague analysis because effects were "indiscernible" at the time, could that applicant later be granted exemption for further EIS review (e.g. as allowed by HAR 11-200.1-30 for supplemental reviews) by claiming new proposed actions were already accepted within that prior vague EIS analysis?

Local 5 recommends that the proposed rules explicitly restrict the use of incomplete or conceptual analysis contained in prior EA/EIS if an applicant is relying on them for exemption for new actions that would themselves otherwise require a new EA/EIS. Again, subjectivity in the rule and the scale of applicant action causes concern. As written, this section of the draft rule invites exemptions to further HRS 343 review based on inadequate or incomplete analysis of effect.

Sea Level Rise

We live in an island state dependent on sandy beaches and tourism. Rising sea levels, beach erosion and tensions between oceanfront property owners and public beachgoers are problems that will only increase.

This rulemaking process is a timely opportunity to address sea level rise through early, thoughtful and strategic development planning. However, rule Version 1.0 mentions sea level rise only once (other rules and statutes notwithstanding). It would be a failure if the state did not take advantage of this chance to make sea level rise a point of emphasis in an environmental review.

Local 5 recommends that wherever the rule describes EA/EIS content requirements, a new section is added to specifically address sea level rise and shoreline developments. Any proposed action within a certain distance of a shoreline setback area shall include detailed analysis, using data that is generally accepted by scientific community, on concerns such as:

- What impact will sea level rise have on the project's safety and long-term economic viability?
- What is the expected useful life of a proposed development under various sea level rise scenarios?
- What impact will the project have upon the shoreline, high tide line, or beach? Will sea level rise and beach erosion combined with the project result in eventual loss of shoreline?
- What mitigation actions will be taken to minimize effect?
- What action will be taken to preserve the shoreline setback, public beach area, public access and prevent shoreline erosion?
- What immediate impact will the proposed action have upon the enjoyment of public beaches, public property, shoreline and public beach access? How will public access and enjoyment of these public goods be affected as projected sea level rise occurs ten, twenty, fifty years or more into the future?
- What impact will rare weather events have on the proposed action of sea level rise (flooding, hurricane storm surge, tsunami, etc…)?
- What does the applicant propose in order to settle or prevent future disputes between the private property owner and the public around property line disputes caused by encroaching high tide lines or shoreline erosion?
- Provide analysis of sea level rise effects upon the project at different levels and time frames. For example: best, middle and worst case scenarios of sea level rise at ten, twenty, fifty and hundred years out.
- How will sea level rise impact aquifer and groundwater levels and what impact will that have on any proposed underground structures?
- Where sea level rise impacts aquifer and groundwater levels, how will this impact a project's water usage relative to overall availability of drinking water in the area?

Consulted Party

Version 1.0 removes language that allows interested parties to become a "consulted" party on the rationale that all documents and data are now available online. However, one feature of being listed as a "consulted" party was the ability to request copies of documents be sent to the consulted party. This lost feature puts an onerous responsibility on the public to check public notice for new documents and risk missing deadlines if they happen to miss a release. The EIS rule should include a requirement that allows interested parties to join a mailing list or email list to be promptly notified of new submittals related to a proposed action.

Highway Signage

Version 1.0 allows exemptions and exemption lists for agencies to streamline their ordinary duties, including the "installation of routine signs and markers" (HAR 1-200.1-16). Excessive number of road signs on Hawaii's roads degrade the aesthetic quality of the state's natural environment (for example, the numerous "No Parking" and traffic signs along the scenic Ka Iwi Coast road on the east side of Oahu).

We urge you to consider the benefit of having an EIS mechanism to provide a check on the number of road signs and their impact on view planes.

Thank you for this opportunity to provide comment on the proposed revisions to HAR 11-200.

Sincerely,

Ivan Hou
Research Analyst
UNITE HERE Local 5

AIRLINES COMMITTEE OF HAWAII

Honolulu International Airport
300 Rodgers Blvd., #62
Honolulu, Hawaii 96819-1832
Phone (808) 838-0011
Fax (808) 838-0231

May 21, 2018

State Environmental Council
Office of Environmental Quality Control
235 S. Beretania Street, Suite 702
Honolulu, HI 96813

RE: Comments on Proposed Revisions to HAR Title 11-200 Environmental Impact Statements

Aloha Chair Thoene, Vice Chair Begier and Members of the Council:

The Airlines Committee of Hawaii (ACH), which is comprised of the 21 signatory air carriers that underwrite the State of Hawaii Airports System, appreciates this opportunity to submit comments on the proposed revisions to Hawaii Administrative Rules (HAR) Title 11-200 regarding Environmental Impact Statements (EIS). Our members are concerned with the impact some of the proposed rules would have on future airport projects, as well as the community statewide.

In particular, ACH is concerned with the following:

1. 11-200-1.1. (c) (3) – the requirement for "mutual, open and direct two-way communication, in good faith . . . "is aspirational in nature and very subjective. Both agency employees and the public may lack the time and expertise to engage in more extensive communications. We recommend you modify the language as follows:

   Make efforts to conduct any required consultation as mutual, open and direct, two-way communication, in good faith, to secure the meaningful participation of agencies and the public in the environmental review process.

2. 11-200.1-2 – The new definition of "environmental assessment" to a written evaluation "that serves to provide sufficient evidence and analysis to determine whether an action may have a significant effect" is more expansive and will likely require applicants to obtain more data and conduct additional analysis, although the Council has indicated that an EA does not require an "unduly long analysis".
   Also, the use of the term "evidence" implies a legal standard.

   We suggest you replace the word "evidence" with the word "facts".

3. 11-200.1-23 (d) The revised rule now expressly requires at least one public scoping meeting prior to filing a draft EIS, which shall be held "on the island(s) most affected by the proposed action," and including a "separate portion reserved for oral public comments," which shall be audio recorded. We appreciate the deletion of the requirement to transcribe individual oral comments, however, the addition of a new requirement to have public oral comments and to audio record those comments is problematic.
   Is this requirement not met if no one elects to speak orally at the time reserved for oral comments?
   We suggest modifying the requirement as follows:

   The EIS public scoping meeting shall include a separate portion reserved for oral public comments and that portion of the scoping meeting shall be audio recorded**, if such oral comments are made.**

4. 11-200.1-18 and 11.200.1-21 now require draft and final EAs and EISs to include an "analysis" of impacts and alternatives considered instead of an "identification and summary" of those impacts and alternatives. An "analysis" requires more time and effort and whether the analysis is sufficient can be challenged. The term itself is subjective.
   We suggest the language in the rationale be incorporated in the rules as follows:

   11-200.1-18 (d)(7):
   Identification and supporting information regarding impacts and alternatives considered;
   11-200.1-21 (6)
   Identification and supporting information regarding impacts and alternatives considered.

5. 11-200.1-24 and 11-200.1-27 - "reasonably foreseeable" consequences is a very subjective standard and will lead to challenges over whether the requirement has been met.
   We suggest the language be modified as follows:

   "the reasonably foreseeable environmental consequences"

   Thank you for your consideration of our comments and suggestions. We commend the Council for your collaboration and efforts in the development of these proposed rules.

   Sincerely,

Blaine Miyasato	Matthew Shelby
ACH Co-chair	ACH Co-chair

**ACH members are Air Canada, Air New Zealand, Alaska Airlines/Virgin America, All Nippon Airways/Air Japan, Aloha Air Cargo, American Airlines, China Airlines, Delta Air Lines, Federal Express, Fiji Airways, Hawaiian Airlines, Japan Airlines, Korean Air, Philippine Airlines, Qantas Airways, Southwest Airlines, United Airlines, United Parcel Service, and WestJet.*

§11-200.1-17

an EA pursuant to section 11-200.1-16(a)(1) or that an agency considers to be a routine activity and ordinary function within the jurisdiction or expertise of the agency that by its nature does not have the potential to individually or cumulatively adversely affect the environment more than negligibly.

(b) To declare an exemption prior to implementing an action, an agency shall undertake an analysis to determine whether the action merits exemption pursuant to section 11-200.1-15 and is consistent with one or several of the general types listed in section 11-200.1-15 or the agency's exemption list produced in accordance with section 11-200.1-16, and whether significant cumulative impacts or particularly sensitive environments would make the exemption inapplicable. An agency shall obtain the advice of other outside agencies or individuals having jurisdiction or expertise on the propriety of the exemption. This analysis and consultation shall be documented in an exemption notice. Unless consultation and publication are not required under subsection (c), the agency shall publish the exemption notice with the office through the filing process set forth in subchapter 4.

(c) Consultation regarding a 001 publication of an exemption notice is not required when:

(1) The agency has created an exemption list pursuant to section 11-200.1-16;

(2) The council has concurred with the agency's exemption list no more than seven years before the agency implements the action or authorizes an applicant to implement the action;

(3) The action is consistent with the letter and intent of the agency's exemption list; and

(4) The action does not have any potential, individually or cumulatively, to produce significant impacts.

(d) Each agency shall produce its exemption notices for review upon request by the public or an agency, and shall submit a list of exemption notices that the agency has created 002 the office for publication in the bulletin on the eighth day of each month pursuant to subchapter 4. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

SUBCHAPTER 9

200.1-26

#001

Posted by **Debra Koonohiokala Norenberg** on **05/23/2018** at **9:55am**

Type: Comment

Agree: 0, Disagree: 0

I strongly suggest an online database of exemption lists and any other pertinent information be made available to the public.

#002

Posted by **Debra Koonohiokala Norenberg** on **05/23/2018** at **9:47am**

Type: Comment

Agree: 0, Disagree: 0

All pertinent agencies etc. should be required in the exemption rules to submit their exemption list(s) for public review, etc. to the public via main stream media outlets and on the internet. The public should never be unnecessarily burdened by having to "request" an exemption list from ANY agency when in fact there have been and currently are pertinent exemption lists that do impact them and their awareness of the activities happening or not happening in their communities. Please, do everything necessary to keep the public REASONABLY informed and engaged.

DEPARTMENT OF HEALTH

The repeal of chapter 11-200 and the adoption of hapter 11-200.1, Hawaii Administrative Rules, on the Summary page dated MONTH DATE, YEAR, was adopted on MONTH DATE, YEAR, following public hearings held on MONTH DATE, YEAR, after public notice was given in the NEWSPAPER (published MONTH DATE, YEAR), NEWSPAPER (published MONTH DATE, YEAR), NEWSPAPER (published MONTH DATE, YEAR), NEWSPAPER (published MONTH DATE, YEAR), and NEWSPAPER (published MONTH DATE, YEAR).

The repeal of chapter 11-200 and the adoption of chapter 11-200.1 shall take effect ten days after filing with the Office of the Lieutenant Governor.

_____
(Name), Director

006

_____
(Name)

005

Governor
State of Hawaii

Dated: _____

004

APPROVED AS TO FORM:

_____
Deputy Attorney General

003

#003

Posted by **Debra Koonohiokala Norenberg** on **05/22/2018** at **4:24pm**

Type: Comment

Agree: 0, Disagree: 0

No FONSI can be reasonably anticipated beyond a shadow of a doubt especially by an untrained and ill equipped eye with a conflict of interest or bias. Therefor, to act upon the mere ANTICIPATION of a FONSI is erroneous behavior and in this case, a detriment to the community and the EA or EIS process. I believe it's best that all parties wait patiently until any EA or EIS is finalized once and for all before concluding or acting on anything.

#004

Posted by **Debra Koonohiokala Norenberg** on **05/22/2018** at **7:37pm**

Agree: 0, Disagree: 0

Last but not least, these proposed rule changes are monumental changes that greatly impact the public and our natural environment so, please give the public ample time to respond to the changes and make these proposed changes notoriously known via all mainstream media outlets in executive summary and include all pertinent contact information for the public to submit their comments to.

#005

Posted by **Debra Koonohiokala Norenberg** on **05/22/2018** at **7:25pm**

Agree: 0, Disagree: 0

When documents exceeding ten pages are submitted for public review, please include an unbiased and fact based executive summary that is no longer than three pages long. Honestly, few of us have the time to review lengthy documents in our busy schedule.

#006

Posted by **Debra Koonohiokala Norenberg** on **05/22/2018** at **4:28pm**

Agree: 0, Disagree: 0

Also, I don't appreciate this public comment process at all because apparently, it's not effective for garnering the comments necessary to validate this discussion. I strongly suggest you provide an easier route for comment submittals as soon as possible otherwise, without public input, this entire process is invalid.

May 29, 2018

The Environmental Council
235 South Beretania Street
Suite 702
Honolulu, Hawaiʻi 96813
Via Email: oeqchawaii@doh.hawaii.gov

Re: Hawaiʻi Administrative Rules governing Environmental Impact Statements

Dear Environmental Council,

The Surfrider Foundation appreciates this opportunity to comment on the proposed revisions on the Hawaiʻi Administrative Rules (H.A.R.) governing Environmental Impact Statements. The Surfrider Foundation is a national non-profit organization dedicated to the protection and enjoyment of our ocean, waves, and beaches. Surfrider has 80 chapters nationwide, including 5 in Hawaiʻi – the Hilo, Kauaʻi, Kona Kai Ea, Maui, and Oahu Chapters. We submit these comments on behalf of the five Hawaiʻi Chapters.

Finding, in part, that the quality of our environment is critical to humanity's well being, that our activities have broad and profound effects upon the interrelations of all components of the environment, and that the process of reviewing environmental effects is desirable, the Legislature declared that it was the purpose of Hawaiʻi Revised Statutes ("HRS") Chapter 343 to establish a system of environmental review which would ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations. (HRS, § 343-1.) The importance of the environment demands that this established system of environmental review remain comprehensive and robust. We appreciate the Environmental Council's consideration of these comments.

1. Actions Covered: Definitions of Projects and Program

Surfrider is concerned that the revised definitions of "project" and "program" are too narrow, and would inappropriately restrict the scope of actions subject to HRS Chapter 343's environmental review process.

Pursuant to the H.A.R., certain agency actions and applicant actions are subject to HRS Chapter 343 environmental review (Current Subchapter 5, Proposed Subchapter 6). "Actions" are defined as including any programs or projects to be initiated by an agency or applicant. Therefore, the threshold question of whether something is a "program" or "project" is crucial to Hawaii's entire environmental review process. While we appreciate the intent to distinguish between and clarify the meaning of projects and programs, the definitions cannot be too restrictive and inadvertently excuse certain activities which may not meet each of a definition's elements but nonetheless have a foreseeable impact(s) on the environment which warrants environmental review.

Specifically, the requirement for projects to have a defined beginning and end time is overly restrictive – an action may not have a defined beginning or a defined end time, but still have the potential to affect the environment. The requirements to be a "planned undertaking" and have a specific goal or purpose similarly seem to unnecessarily restrict what actions will be subject to environmental review. It isn't clear what purposes these requirements serve.

Instead, Surfrider suggests the following as an example of a more appropriate definition of "project":

> (a) "Project" means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following:
>
> > (1) An activity directly undertaken by any public agency including but not limited to public works construction and related activities clearing or grading of land, improvements to existing public structures, enactment and amendment of zoning ordinances, and the adoption and amendment of local General Plans or elements thereof.
> > (2) An activity undertaken by a person which is supported in whole or in part through public agency contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.
> > (3) An activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies. The term "project" refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term "project" does not mean each separate governmental approval. […]

The proposed definition of "program" is comparatively less problematic, though there are some vagueness concerns with the terms "phases within a general timeline," and whether something is undertaken for a broad goal or purpose. Surfrider offers the below definition as a suggestion for addressing these concerns:

> (a) "Program" means a series of projects carried out concurrently or sequentially that are related either:
>
> > (1) Geographically,
> > (2) As logical parts in the chain of contemplated actions,
> > (3) In connection with issuance of rules, regulations, plans, or other general criteria to govern the conduct of a continuing program, or
> > (4) As individual activities carried out under the same authorizing statutory or regulatory authority and having generally similar environmental effects which can be mitigated in similar ways.

> A program may include: a number of separate related projects which, if considered singly, may have minor impacts, but if considered together may have significant impacts; separate projects having generic or common impacts; an entire plan having wide application or restricting the range of future alternative policies or actions, including new significant changes to existing land use plans, development plans, zoning regulations, or agency comprehensive resource management plans; implementation of a single project or multiple projects over a long timeframe; or implementation of a single project over a large geographic area.

It is important to add that subsequent activities in a program should be examined in light of a program EIS to determine whether an additional environmental document must be prepared. If a later activity would have effects that were not examined in the program EIS, a new environmental assessment should be prepared leading to either an EIS or a Negative Declaration. An agency shall incorporate feasible mitigation measures and alternatives developed in a program EIS into subsequent actions in the program.

NEPA provides additional examples. While not specifically defining "project" or "program," the following regulations illustrate how the federal statute distinguishes between the two. Pursuant to 40 C.F.R. Section 1508.18(b)(4), projects include construction or management activities located in a defined geographic area including actions approved by permit or other regulatory decision, as well as federally assisted activities. Meanwhile, 40 C.F.R. Section 18(b)(3) provides that programs include a group of concerted actions to implement a specific policy or plan, and systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive. "Major Federal Actions" subject to NEPA's Environmental Impact Statement process are defined to include "actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27)[1]. Actions include the circumstance where the responsible official fails to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedures Act or other applicable law as agency action." (40 C.F.R. § 1508.18) Actions include new and continuing activities including projects or programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals. (40 C.F.R. § 1508.18)

We suggest and hope that the Council will revise the proposed definitions of project and program to avoid the foregoing narrowness and vagueness concerns.

2. Definition of Mitigation

[1] "Significantly," as used in NEPA, requires consideration of both context and intensity, which are described in more detail at 40 C.F.R. § 1508.27, which generally include the degree to which a proposed action affects public health and safety, the degree to which the possible effects on the quality of the human environment are likely to be highly controversial, and the degree to which the possible effects on the human environment are highly uncertain o involve unique or unknown risks.

We similarly suggest that the H.A.R include a definition of "mitigation," as it is defined in the NEPA regulations, 40 C.F.R. § 1508.20 (which, by way of example, has also been adopted in the California Environmental Quality Act ("CEQA") Guidelines, at California Code of Regulations Section 15370).

3. Objectivity in Preparation

While it isn't entirely clear, it appears that certain proposed revisions provide applicants with autonomy over preparing their own EAs, EISs, and even making determinations with respect to what would constitute "substantive" comments that require responses in subsequent documents. (*See*, e.g., §§ 11-200.1-12, 11-20.1-14(d), and 11-200.1-20(c), "For … applicant actions, the applicant shall: respond in the final EA in the manner prescribed in this section to all substantive comments… In deciding whether a written comment is substantive, the … applicant shall give careful consideration to the validity, significance, and relevance of the comment to the scope, analysis, or process of the EA, bearing in mind the purpose of this chapter and chapter 343, HRS….").

However, the rules should ensure that the HRS Chapter 343 environmental review process is fair and objective – that the fox is not guarding the hen house, so to speak. For example, under the National Environmental Policy Act ("NEPA") regulations, if an agency allows an applicant to prepare an environmental assessment, the agency, in addition to other requirements, shall make its own evaluation of the environmental issue and *take responsibility for the scope and content of the environmental assessment*. (40 C.F.R. § 1506.5)

Additionally, as another example, under CEQA, where draft EIRs may be prepared by applicants, they must first be independently analyzed by an agency before being subject to public consideration. *See*, e.g, California Code of Regulations Section 15084(e): "Before using a draft prepared by another person, the Lead Agency shall subject the draft to the agency's own review and analysis. The draft EIR which is sent out for public review must reflect the independent judgment of the Lead Agency. The Lead Agency is responsible for the adequacy and objectivity of the draft EIR."

Similarly, H.A.R. Chapter 11-200.1 must ensure that agencies retain ultimate oversight and responsibility for ensuring the adequacy of all EAs, EISs, and related determinations – not applicants, who may not have the public's best interests in mind when it comes to full and fair environmental review.

Additionally, there is some ambiguity in terms of what is required in EISs. Proposed Section 11-200.1-24(a) provides that, "In order that the public can be fully informed and that the accepting authority can make a sound decision based upon the full range of responsible opinion on environmental effects, an EIS shall include responsible opposing views, if any, of significant environmental issues raised by the proposal." While at first blush, this seems appropriate, this presents a potential ambiguity – who will decide what is a "responsible" opinion, and what exactly does the "responsible" qualifier mean? With contentious issues, where different parties have opposing views, it's foreseeable that an agency or applicant may deem a

differing view to be "irresponsible," but that doesn't mean that the opposing view should not be raised or given valid consideration in the EIS. Similarly, subsection (b) provides that "less important material [in an EIS] may be summarized, consolidated, or simply referenced." Particularly where an applicant is authorized to prepare its own EIS and respond to comments in its own EIS, this presents a concern – as applicants would be able to determine what is more and what is less important, and thereby avoid full and adequate discussion on certain issues.

4. Exempt Classes of Action

Surfrider generally has concerns with the revision's intent to increase the use of exemptions. Finding that the process of reviewing environmental effects is desirable, the Legislature declared that it was the purpose of Hawaii Revised Statutes Chapter 343 to establish a system of environmental review which would ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations. (Hawaii Revised Statutes, § 343-1.) The importance of the environment demands that this established system of environmental review remain comprehensive and robust, and *limit* – not expand - the opportunities for exemptions.

Moreover, many of the proposed revisions will result in vague, potentially broad exemptions. For example, under proposed § 11-200.1-15(c)(1)**,** what will constitute a "minor" expansion or a "minor" change in existing use? Similarly, under § 11-200.1-15(c)(2), regarding the replacement or reconstruction of existing structures, what qualifies as being "generally on the same site" or having "substantially the same purpose, capacity, density, height, and dimensions as the structure replaced"? If a 3-story building is reconstructed with 4 stories, is that substantially similar? What about 5 stories? Is something that's 15% larger "substantially" the same? What about 20%? The proposed rules are vague and potentially overbroad. Similarly, under Sections 11-200.1-15(c)(3) and (c)(4), what is considered a "small" facility or structure, and what is considered a "minor" alteration in the condition of land, water, or vegetation? Without clearly defined parameters, the new rules could allow abuse of exemptions, and allow projects with adverse impacts to escape proper environmental review.

With the foregoing concerns and need for revisions in mind, we do support the continued inclusion of proposed subsection (d), providing that all exemptions under – we believe this was intended to reference the new subsection 15 – are inapplicable where a cumulative impact is significant or where an action that may ordinarily have an insignificant impact on the environment may be significant in a particularly sensitive environment.

5. Supplemental EISs

It is critical that the rules clearly and adequately describe when supplemental EISs are required. As is, subsections 11-200.1-30(a) and (b) contain several triggers, which should be re-written more clearly and concisely in one subsection. It is good that pursuant to subsection (b), "where new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with,"

that an EIS is warranted. However, this is in addition to other triggers in subsections (a) and (b) which include the following: (1) where the scope of an action has been substantially increased, (2) when the intensity of environmental impacts will be increased, (3) when the mitigating measures originally planned will not be implemented, (4) whenever the proposed action has been modified to the extend that new or different environmental impacts are anticipated, (5) where the action has changed substantively in size, scope, intensity, use, location, or timing, among other things, (6) where any of the foregoing characteristics has changed which may have a significant effect, or (7) where there is a change in a proposed action resulting in individual or cumulative impacts not originally disclosed. Each of these triggers is listed separately, in two different subsections, and we would recommend they be presented more clearly and cohesively.

As an example, here is some suggested language for the H.A.R. rules on supplemental EISs:

(a) When an EIS has been certified or a negative declaration adopted for a project, no supplemental EIS shall be prepared for that project unless the accepting authority or approving agency determines, on the basis of substantial evidence in the light of the whole record, one or more of the following:

(1) Substantial changes are proposed in the project which will require major revisions of the previous EIS or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;
(2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIS or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
(3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIS was certified as complete or the negative declaration was adopted, shows any of the following:

(A) The project will have one or more significant effects not discussed in the previous EIS or negative declaration;
(B) Significant effects previously examined will be substantially more severe than shown in the previous EIS;
(C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative;
(D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant

effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative; or

(E) Mitigating measures originally planned will not be implemented.

(b) If changes to a project or its circumstances occur or new information becomes available after adoption of a negative declaration, the accepting authority or approving agency shall prepare a subsequent EIS if required under subdivision (a). …

6. Use of Prior Exemptions, FONSIs, or Accepted EISs

Proposed Section 11-200.1-11 provides situations where a prior exemption, FONSI, or accepted EIS satisfies chapter 343, HRS. However, as-is, these are too broad. Below are suggested revisions, such that even if a proposed activity or effect is "similar" to one previously considered, if the similar activity results in a new, *additional* direct, indirect or cumulative effect, an agency cannot determine that additional environmental review is not required. Namely, "similar" – for activities and effects – should be modified so that they are similar in terms of type, scope, amount, and intensity. For example:

… (a) when an agency is considering whether a prior exemption, FONSI, or an accepted EIS satisfies chapter 343, HRS, for a proposed activity, the agency may determine that additional environmental review is not required because:

(1) The proposed activity was a component of, or is substantially similar in type, scope, and intensity to an action that received an exemption, FONSI or an accepted EIS (for example, a project that was analyzed in a programmatic EIS), and the activity will not have a significant effect on the environment;
(2) The proposed activity, together with the prior reviewed action, is anticipated to have direct, indirect, and cumulative effects similar in type, scope, amount, and intensity, and the activity will not have a significant effect on the environment; …

While the Version 1.0 Rationale document provides that "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," (*see* page 38) this should also be clear in the rules themselves.

7. Climate Change

Surfrider Foundation supports incorporating sea level rise as a significance criterion. We support the proposed revised significance criteria subsections (11) and (13) in Section 11-200.1-13(b).

8. Compliance with Both NEPA and HRS Chapter 343

Proposed Section 11-200.1-31(6) provides that "[w]here the NEPA process requires earlier or more stringent public review, filing, and distribution than under this chapter, that NEPA process shall satisfy this chapter so

that duplicative consultation or review does not occur." However, it must be noted that the NEPA regulations, Section 14 C.F.R. 1506.2, provide as follows: "Where State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws." Accordingly, pursuant to federal law, while *one* document may result instead of multiple documents, that one document must still comply with and meet all potential layers of environmental review laws. Therefore, even if NEPA hypothetically required an earlier public review process, the resulting document would still have to comply with the state's requirements under the Hawaii Revised Statutes and Hawaii Administrative Rules, and couldn't simply be satisfied by NEPA should there be any discrepancies and additional requirements under the Hawaii laws.

Mahalo for considering these comments and concerns regarding the proposed revisions to the H.A.R. EIS Rules. We appreciate the Council's efforts to ensure that the Rules continue to provide for a robust, protective environmental review process under Hawaii Revised Statutes, Chapter 343.

Aloha,

Staley Prom	*Stuart Coleman*	*Carl Berg*
Legal Associate	Hawaii Manager	Kauai Chapter
Surfrider Foundation	Surfrider Foundation	Surfrider Foundation

FILE COPY

Pūlama Lānaʻi

May 30, 2018

RECEIVED

'18 JUN -6 A10:39

OFC. OF ENVIRONMENTAL QUALITY CONTROL

State Environmental Council
Office of Environmental Quality Control
Attn: EIS Rules
235 South Beretania Street, Suite 702
Honolulu, HI 96813

RE: Testimony for Public Hearing on Lānaʻi, at Lānaʻi High and Elementary School Cafeteria on May 30, 2018 from 3:00 to 5:00 pm, Public Notice Docket no. R11-200-05-18 HI DOH

This testimony is in **SUPPORT** of the repeal of HAR Title 11 Chapter 200, and adoption of Chapter 200.1 "Environmental Impact Statement Rules." This repeal and adoption update will substantially revise rules regarding the environmental review process at the State and County levels.

I am Lynn McCrory, Senior Vice President of Government Affairs for Pulama Lanai. Pulama Lanai is the entity that was set up by Larry Ellison to work with the community and government as we move the island of Lanai toward sustainability.

Points that we consider to be positive include the following:

1. Encouragement and requirement for greater interaction between the applicant and agencies/public. We support greater discussions with the community/agencies on proposed actions. We do this with monthly community informational meetings on any range of topics. If the proposed action is going to require an EA or EIS, we agree.
2. Differentiation between a Project and Program. We agree that this distinction from the beginning will clearly define the expanse of the proposed action.
3. Responding to substantive and non-substantive comments. We concur that in today's world of multiple look-alike letters with only a signature difference, along with non-substantive comments, should not be responded to individually, but can be responded to in the draft document. Substantive comments should require an individual response.
4. Federal entity issuing an exemption or a FONSI, allows the State or County to consider this in their determination. A Federal Exemption or FONSI for a NEPA document most times has a higher standard of compliance for the applicant to meet, and allowing the State and County to consider this in their decision process provides the information to the public and agencies.

We must protect our environment for our future generations. We humbly ask that you SUPPORT this repeal and adoption of the Environmental Impact Statement Rules. Mahalo!

Me ke aloha pumehana
With warm aloha,

Lynn P. McCrory

18-632

Lynn P. McCrory
Senior Vice President of Government Affairs

HONOLULU OFFICE 733 Bishop Street, Suite 2000 Honolulu, Hawai'i 96813 Tel 808 237 2001 Fax 808 566 6927 pulamalanai.com
LANA'I OFFICE 1311 Fraser Ave PO Box 630310 Lāna'i City, Hawai'i 96763 Tel 808 565 3000 Fax 808 565 3881

Hawaii's Thousand Friends
300 Kuulei Rd. Unit A #281 * Kailua, HI 96734 * Phone/Fax (808) 262-0682 E-Mail: htff3000@gmail.com

May 31, 2918

Environmental Council
oeqchawaii@doh.hawaii.gov

HAR Chapter 11-200 Environmental Impact Statement Rules Update

Hawaii's Thousand Friends has the following suggestions and comments and thanks the Council and OEQC for conducting this rules revision process with extensive and inclusive public outreach.

Subchapter 2 Definitions

"Exemption list" In the second to last line – *part two, the list may contain the types of actions…* change the word ~~may~~ to shall

Requiring examples of the types of actions an agency considers exempt gives the reader an idea of what actions are considered exempt so that the reader does not have to guess.

"Plan" There should be a definition for Plan because many projects and EISs are based on a *Plan*.

Suggested wording: "Plan" means a list of steps and actions with specific details on intended goals, short and long-term time frame, identification of all projects within the Plan, impacts of all elements of the Plan on the environment, cultural resources, historical structures, flora and fauna.

"Minor" There should be a general definition of minor explaining the range of projects that could meet the description of minor. Without a broad definition the word minor can and will be interpreted differently. The lack of clarity could lead to confusion and possible delays in a proposed action.

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

The purpose and location of the *Hawaii Documents Center* should be mentioned somewhere in the rules because most people are unaware that there is a central location for documents.

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

(c)(1) There should be examples of what is considered a minor expansion or change otherwise the public is totally unaware of the extent of the work that can be done under the exemption. An informed public can advert disagreements and calls to stop a project.

(10) While affordable housing is needed it is dangerous and negligent to exempt untold numbers of affordable housing developments around the state and in any community without consideration of impacts to the surrounding community i.e. traffic, lack of public parks, parking etc. and the natural environment.

Add a condition **(10)(E):** Is not located near or adjacent to a stream or body of water, endangered and/or threatened flora, endangered and/or threatened fauna and their habitat and identified archaeological sites.

Add a condition **(10)(F)** Is not located in an area that is prone to flooding or identified as a flood zone.

Add a condition **(10)(G)** Is not located in an area that is vulnerable to sea level rise or identified as an area susceptible to future sea level rise.

§11-200.1-16 Exemption Lists

(a) In the first sentence reinstate the word shall and delete the word ~~may~~. If agencies are going to be exempt from Chapter 343 then the public has a right to know what actions are exempted. It should not be left to the whim of an agency to determine if it will let the public know what actions are exempt. Exemptions from environmental review on islands with fragile and finite natural resources should be seen as a privilege and not a right.

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

Section (d)

(5) Add historical after cultural. When considering a development it is important to consider and understand the historical context of the area.

(6) Add archaeological site maps and maps showing locations of endangered and/or threatened flora and fauna and their habitat

§ 11-200.1.20 Public Review and Response Requirements for Draft Environmental Assessments

(c) In the third sentence keep the numerical thirty-day because it is easy to understand a numerical time limit and not everyone reviewing a DEA knows what the statutory review period is.

§ 11-200.1.28 Acceptability

(e) This paragraph is too long making it hard to read and comprehend. A good place to break is at the end of line 13. Beginning a new paragraph with the sentence *The agency shall notify the applicant and the office of the acceptance or non-acceptance...*

Proposed Repeal of HAR Title 11, DOH, Chapter 200, "Environmental Impact Statement Rules"

Proposed Promulgation of HAR Title 11, DOH, Chapter 200.1, "Environmental Impact Statement Rules"

An Informal Analysis

Subchapter 1 Purpose:

Subsection (c) (1) Why is the word "detail" stricken?

Subsection (c) (2) Replace "take care" with "take every measure"

Subchapter 2 Definitions:

Page 3, Paragraph 3: "Discretionary consent" needs to be evaluated whether this terminology should be in existence where an EA or EIS is concerned

Paragraph 6: is onerous in new definition, which implies the removal of more stringent requirements, and bestows full power to the Agency's judgment whether a proposed action may have significant environmental impact.

Page 4, Paragraph 2: Why is "Environmental impact" definition stricken?

Paragraph 5: Newly added "Exemption List" definition is onerous, and gives heightened powers to the Agency

Paragraph 6: "Exemption Notice" definition is amended to narrow the scope of power to a proposing agency or approving agency on behalf of the applicant, with the ability to determine exemptions from preparation of an EA

Paragraph 7: "Final environmental assessment" is amended to omit language involving a public consultation period

Page 5, Paragraph 9: Creates a new definition of "Program" to combine a series of projects which can either be separate projects or lumped together; their potential or non-potential of impacts, and ambiguous singular or multiple projects with ambiguous time frames over a wide geographical area.

Page 6, Paragraph 7: gives the Agency free license to interpret, implement, and act on any undefined terms not included in the Definitions Section, Subchapter 2.

Subchapter 4, Filing and Publication in the Periodic Bulletin (Pg. 8)

Subsection (b) is amended to remove the requirement of the Office to inform the public through the publication of a periodic bulletin, except for its **actions** (implying that the public is exempted from proposal notification PRIOR to action)

(2) removes availability of notices of the availability of EA's filed by the Agency

(3) only reviews of drafts of addendum **deemed appropriate** by the Office will be filed. Public comment possibilities are limited to a 30-day period

(6) gives the Office (or Agency?) the determination whether supplemental IES's are required or not required

Subsection (d) empowers the Office to publish other notices (of **which?** Non-specific) at their convenience, contingent upon whether they have space or time.

Filing Requirements for Publication & Withdrawal (Pg. 9)

Subsection (a) is newly created, and onerous, as it gives the Agency capability to file notices in the bulletin last-minute; only 4 business days prior to the **issue** date. Gives very little time for public intervention

Subchapter 5 Responsibilities (Pg. 13)

Subsection (a) is amended to add a provision to include an **authorized representative** of the Governor as an accepting authority.

(2) mimicks the provision with the Mayor's **authorized representative** powers, over County lands.

Subsection (b) amendments hint at conflict of interest by giving the approving agency which initially received and agreed to process the request for approval full power over whether to require an EA or EIS (NOT the public). This smacks of cronyism. The approving agency is also the accepting authority.

Subchapter 6 Applicability (Pg. 15)

Subsection (a)(3) Please refer to 205-5(b) HRS to discover where exemptions & requirements lie referring to actions involving agricultural tourism under Environmental Review

Applicability of Chapter 343, HRS to Applicant Actions (Pg. 16)

Subsection (a), (2)(b) loosens the requirement involving agricultural tourism, for environmental review only under specific requirements

Subsection (b) is newly created to exempt certain applicant actions from environmental review. this section need dissection, as it creates potential loopholes for channels around the EIS/Environmental Review process

11-200.1-10 Multiple or Phased Actions (Pg. 17)

(1) is amended to remove the term "Project", and is replaced with the term "Action", which implies **initiation action** rather than a proposed goal

(4) Asserts that any related actions or projects could only require a single EA or EIS for the group of actions as a whole instead of individual actions, which creates potential gaps in environmental

protection between phases

11-200.1-11 Use of Prior Exemptions

Is a newly created Section which once again empowers the Agency to determine whether an additional ER is required. I propose this section be stricken, or re-drafted to involve more outside (public) participation

Subchapter 7 Determination of Significance (Pg. 18)

The amendments in this Section also allow for exemption liberties to the Agency and/or applicant for a proposed action whenever they deem pertinent, or enable a 'piggy back' on an already accepted EIS that was considered a portion of the project

11-200.1-13 Significance Criteria (Pg. 19)

Subsection (b) is amended to apply language clean-up, and utilize the term "substantial" adverse effects, which raises the question of how the Agency weighs this term as "substantial", or less-than-substantially adverse in determining whether an action may have a significant effect on the environment: What is the loss ratio to be deemed "**substantially adverse**"? Over 100 endangered birds? Over 2 lots of ancient gravesites? This needs to be clarified with deep consideration for the unique characteristics and culturally rich environment of Kaua'i

11-200.1-14 Determination of Level of Environmental Review (Pg. 20)

Is a newly created Section that (a) empowers the Agency to determine the level of environmental review necessary for an action, and (b) empowers the Agency to assess the significance of potential impacts of an applicant's proposed actions and determine the level of environmental review they deem necessary; (c) empowers the proposing Agency **or** approving agency to provide exemption from an environmental review; (d) is a concern, for when an exemption is ineligible for an action, the proposing agence or approving agency may provide and prepare an EA or EIS, which would allow in-house EA or EIS preparation, rather than independent, which leaves possibilities for bias

Subchapter 8 Exempt Actions, List, and Notice Requirements (Pg. 21)

(a) removes the provision of outside agencies' expertise involvement as to the propriety of the exemption. This also significantly empowers the Agency to have full oversight as to determining exemptions from an EA with dimished outside expertise input

(c) is expanded to allow for "minor" expansions and changes as eligible for exemption

11-200.1-16 Exemption Lists (Pg. 23)

Subsection (b) provides the Agency with the ability to exempt a specific activity from EA if it deems this activity to have minimal impact

11-200.1-17 Exemption Notices (Pg. 24)

Subsection (a) empowers the Agency to create an exemption notice for certain activities, or that which the Agency deems to be a routine activity and ordinary function within their environment more than negilbly. Define "neglibly"

Subsection (b) is created to empower the Agency to analyze whether certain actions merits exemption, and whether significant cumulative environmental impacts would make the exemption applicable. The Agency is required to obtain the advice of other outside agencies or individuals having jurisdiction or expertise on the propriety of the exemption, and document and publish the analysis.

Subsection (c) provides for exemptions regarding consultation and publication

Subchapter 9 Preparation of Environmental Assessments (Pg. 25)

(a) empowers the proposing agency or approving agency to direct the applicant's procedures for drafting an EA, and the scope and level of the draft EA

11-200.1-19 Notice of Determination for Draft EA's (Pg. 26)

Subsection (b) empowers the proposing agency or approving agency to deem **when** it is applicable to file a notice of anticipated determination and supporting draft EA with the Office

11-200.1-20 Public Review and Response Requirements for Draft Environmental Assessments (Pg. 27)

Subsection (b) is amended to provide the period for public comment review and for submitting written comments shall be 30 days from the date of publication of the **draft EA** in the bulletin, and includes commentary directed to the applicant additionally. Any comments outside of this 30-day period will not be considered in the final EA

Subsection (c) is amended to include the provision that the proposing agency or applicant may deem whether written comments are valid, significant, or relevant to the scope, and whether a response is necessary by determination of whether coments are substantive or non-substantive

11-200.1-22 Notice of Determination for Final Environmental Assessments (Pg. 30)

Subsection (a) is amended to provide for a 30-day determination for applicant actions by the approving agency of receiving the final EA

Subsecion (b) Question: when a FONSI or EISPN is determined to have or have not a significant effect on the environment, why has the notice to mandate filing these determinations with the office as early as possible been stricken from posting these determinations/provisions in the periodic bulletin **by** the office (e)?

Subsection 10 Preparation of Environmental Impact Statements (Pg. 320

Subsection (a) is created to indicate steps for preparing an EIS without first requiring an EA

Subsection (c) is tricky in regards to publication of an EISPN in the periodic bulletin; providing the public

a 30-day comment period from initial publication. With good cause (undefined), a comment period may be extended an additional 30 days if the **approving authority** consents to do so

11-200.1-24 Content Requirements: Draft EIS (Pg. 33)

Subsection (b) removes the requirement of effort to convey information of a developing EIS to the public, limiting the scope of the proposed action to vary with its determination of whether the action is a project or a program

Subsection (c) is created to allow for the omission of evaluating issues in a draft EIS which are not yet ready for decision at the project level, therefore evading consequential projections to be discussed and disseminated

Subsection (n) has deleted the usage of the term "Resources" which includes 'natural and cultural resources committed to loss or destruction by the action'

Subsection (o) should be amended to include "culturally sensitive and/or relevant sites" when addressing probable adverse environmental effects

11-200.1-26 Comment Response Requirements for Draft Environmental Impact Statements (Pg. 40)

Subsection (a) empowers the proposing agency or applicant to determine whether a written comment pertaining to the process of the EIS is valid, significant, or relevant, and to indicate which comments warrant no response

Subsection (c) allows for a single response to multiple comments that refer to the same issues on the same topic

11-200.1-27 Content Requirements; Final Environmental Impace Statement (Pg. 42)

Subsection (a) loosens terminology regarding the declaration of environmental implications of the proposed action from discussing **all** "relevant and feasible" consequences to replace language with "reasonably forseeable" consequences of the action.

Subsection (b)(4) also downgrades the response requirement of the applicant or proposing agency from addressing **each** substantive question, comment, or recommendation to a written general summary of oral comments made at any public meeting. This amendment potentially waters down pertinent concerns shared in public forum.

11-200.1-28 Acceptability (Pg. 43)

Subsection (c) is amended to provide the Governor or the Governor's authorized representative jurisdiction over **both State and County lands and State and County funds** to override local authority to accept an EIS (Great provision for well-funded, high-profile lobbyists)

Subsection (e) identifies the **accepting authority** and the **approving agency** as one and the same

Subchapter 11 National Environmental Policy Act (Pg. 47)

Section (2) creates new sections which allow for Federal exemption to be considered in the State or County Agency determination, which can create dire potential for State, County, and other (Federal[?]) Reserve lands.

Section (3) creates a provision to shift compliance responsibility from Federal to State and County where NEPA Acts are ambiguous, and can potentially cross jurisdictions

Subchapter 12 Retroactivity and Severability (Pg. 49)

Creates a new chapter to ensure compliance for EA's if the draft EA was published by the Office prior to the adoption of this chapter and has not received a determination within a period of 5 years from implementation of this chapter.

All subsequent ER's, including EISPN are required to comply with this chapter. Enforcing compliance can have several outcomes, contingent upon the language utilized in this chapter: (1) this could serve as a kickstarter to momentum for stalled projects along, which may be stalled for valid reasons of environmental or community concern, or (2) opening a log jam of shelved projects by loosening provisions and instigating a robust "land rush" of development activity; (3) strenghtening monopolyzing strategies utilized by well-funded public, corporate, or private entities.

Subsection (c) provides for the sweeping of delays for exemption lists that have received concurrence for a 7-year period after adoption of this chapter. Question: how should these exemption lists be considered or reviewed before a 7-year extension period is allowable? This Subsection needs clarification, as it alludes to an applicant potentially enjoying an extended exemption period with this provision.

With Aloha,

S. Strom

Wailua, Kaua'i, HI

Footnotes:

* In this casual analysis, I merely highlighted areas of potential problematic concern, or to draw attention to points and provisions I felt were critical, cloudy, or otherwise . Because of time constraints, I was not able to resource Statutes or consult with related experts, so I would recommend further study and consultation on the highlighted areas contained in this (informal) analysis.

** My overall concern is that this Proposal further erodes the common people of their governing capabilities over the Agenc(ies) involved, which were initially created to protect the environment (and its inhabitants), and in fulfilling its mission to stringently curtail the onslaught of developers and corporate entities who arrive to monopolize the land and water resources for profit insatiability.

*** A government agency should be a "People's Agency", and not a controlling entity **overriding** the People. Environmental safeguards are put in place to protect the environment and secure it for future generations from pollution, exploitation, pillaging, and decimation. There are several "user-friendly" shortcuts contained in these Rules on behalf of the applicant(s) and engaging agencies that can greatly impact the environmental and socioeconomic future of Kaua'i. Once forever changed, is rarely retractable.

RE: Comments on Version 1.0 Unofficial Ramseyer, Proposed Repeal of Hawaii Administrative Rule (recommended changes highlighted in yellow).

SUBMITTER: Anne Walton, Kauai, email: annehugginswalton@gmail.com

DATE: June 04, 2018

LOCATION	TEXT	PROPOSED CHANGE	COMMENT
1. Pg. 2, Definitions	"**Acceptance**" means a formal determination [of acceptability] that the document required to be filed pursuant to chapter 343, HRS, fulfills the definitions and requirements of an **environmental impact statement (EIS)**, [adequately describes identifiable environmental impacts, and satisfactorily responds to comments received during the review of the statement] as prescribed by section 11-200.1-28. **Acceptance** does not mean that the **action** is environmentally sound or unsound, but only that the document complies with chapter 343, HRS, and this chapter. A determination of **acceptance** is required prior to implementing or approving the **action**.	"**Acceptance**" means a formal determination [of acceptability] that the document required to be filed pursuant to chapter 343, HRS, fulfills the definitions and requirements of an **environmental impact statement (EIS)**, [adequately describes identifiable environmental impacts, and satisfactorily responds to comments received during the review of the statement] as prescribed by section 11-200.1-28. **Acceptance** does not mean that the **action** is environmentally sound or unsound, but only that the document complies with chapter 343, HRS, and this chapter. A determination of **acceptance** is ~~required prior~~ a prerequisite to implementing or approving the **action**, but does not necessarily ensure the action will be approved.	Just want to make it clear that "acceptance" only means the EIS complies with 343, HRS, it does not mean the action is approved or can be implemented.
2. Pg. 2, Definitions	"**Accepting authority**" means the ~~[final]~~ official who or **agency** that, [~~determines the acceptability of the EIS document~~] makes the determination that a final EIS is required to be filed, pursuant to chapter 343,HRS, and that the final EIS fulfills the definition and requirements of an **EIS**.	"**Accepting authority**" means the ~~[final]~~ official who or **agency** that, [~~determines the acceptability of the EIS document~~] makes the determination that a final EIS is required to be filed, pursuant to chapter 343,HRS, and that the final EIS fulfills the definition and requirements of an **EIS**. The **"Accepting authority"** will not be an official from or an agency that is proposing the action for which a determination on the need for an EIS is being requested; nor can an official from or an agency that is proposing an action make the final determination if an EIS fulfills the definition and requirements of an EIS.	The "accepting authority" and "approving authority" should be one in the same. As such, it would probably be much easier to just pick one term and not use them interchangeably. Also, if the "accepting authority" is proposing the action an accepting the EIS, that is a clear conflict of interest.
3.	"**Addendum**" means an	"**Addendum**" means an attachment	

Pg. 2, Definitions	attachment to a **draft** [~~environmental assessment~~] **EA** or draft [~~environmental impact statement~~] **EIS**, prepared at the discretion of the **proposing agency**, [or] **applicant**, or **approving agency**, and distinct from a **supplemental EIS** [statement], for the purpose of disclosing and addressing clerical errors such as inadvertent omissions, corrections, or clarifications to information already contained in the **draft** [~~environmental assessment~~] **EA** or the draft [~~environmental impact statement~~] **EIS** already filed with the **office**.	to a **draft** [~~environmental assessment~~] **EA** or draft [~~environmental impact statement~~] **EIS**, prepared at the discretion of the **proposing agency**, [or] **applicant**, ~~or **approving agency**~~, and distinct from a **supplemental EIS** [statement], for the purpose of disclosing and addressing clerical errors such as inadvertent omissions, corrections, or clarifications to information already contained in the **draft** [~~environmental assessment~~] **EA** or the draft [~~environmental impact statement~~	The approving agency should be just that, and not creating addendums to the EA or DEIS as that may pose a conflict of interest.
4. Pg. 2, Definitions	"**Approval**" means a **discretionary consent** required from an **agency** prior to [~~actual~~] implementation of an **action**. [~~Discretionary consent means a consent, sanction, or recommendation from an agency for which judgment and free will may be exercised by the issuing agency, as distinguished from a ministerial consent. Ministerial consent means a consent, sanction, or recommendation from an agency upon a given set of facts, as prescribed by law or rule without the use of judgment or discretion~~.]	"**Approval**" means a ~~**discretionary**~~ **ministerial consent** required from an accepting authority ~~**agency**~~ prior to [~~actual~~] implementation of an **action**. [~~Discretionary consent means a consent, sanction, or recommendation from an agency for which judgment and free will may be exercised by the issuing agency, as distinguished from a ministerial consent.~~ Ministerial consent means a consent, sanction, or recommendation from an agency upon a given set of facts, as prescribed by law or rule without the use of judgment or discretion.~~]~~	"Accepting authority" definition follows the one recommended above in #2
4. Pg. 2, Definitions	"**Approving agency**" means an **agency** that issues an **approval** prior to [~~actual~~] implementation of an **applicant action**.	"**Approving agency**" means an **agency** that issues an **approval** prior to [~~actual~~] implementation of an **applicant action** and is functionally the same as or synonymous with the accepting authority.	"Accepting authority" definition follows the one recommended above in #2
4. Pg. 3, Definitions	"**Discretionary consent**" means a consent, sanction, or recommendation from an **agency** for which judgment and free will may be exercised by the issuing **agency**, as distinguished from a ministerial consent. Ministerial consent means a consent, sanction, or recommendation from an **agency** upon a given set of facts, as prescribed by law without the use of judgment or discretion.	~~"**Discretionary consent**" means a consent, sanction, or recommendation from an **agency** for which judgment and free will may be exercised by the issuing **agency**, as distinguished from a ministerial consent.~~ Ministerial consent means a consent, sanction, or recommendation from an ~~**agency**~~ **accepting authority** upon a given set of facts, as prescribed by law without the use of judgment or	Discretionary consent should not be an option as it is just that and could lead to some unjustifiable decision making. There needs to be a basis for consent.

		discretion.	
4. Pg. 3, Definitions	"**EIS preparation notice**[~~,~~]", [~~or~~] "**EISPN**", or "**preparation notice**" means a determination [~~based on an environmental assessment that the subject~~] that an **action** may have a **significant effect** on the **environment** and, therefore, will require the preparation of an [~~environmental impact statement~~], **EIS**, based on either an **EA** or **agency's** judgment and experience that the proposed **action** may have a **significant effect** on the **environment**.	"**EIS preparation notice**[~~,~~]", [~~or~~] "**EISPN**", or "**preparation notice**" means a determination [~~based on an environmental assessment that the subject~~] that an **action** may have a **significant effect** on the **environment** and, therefore, will require the preparation of an [~~environmental impact statement~~], **EIS**, based on either an **EA** or ~~**agency's**~~ accepting authority's ministerial consent ~~judgment and experience~~ that the proposed **action** may have a **significant effect** on the **environment**.	Add "accepting agency's ministerial consent".
5. Pg. 4, Definitions	"**Exemption notice**" means a [~~brief notice kept on file by the proposing agency, in the case of a [public action, or the agency with the power of approval, in the case of a private action, when it has determined that the proposed project is an exempt or emergency project~~] notice produced in accordance with subchapter 8 for an **action** that a proposing **agency** or **approving agency** on behalf of the **applicant** determines to be exempt from preparation of an EA.	"**Exemption notice**" means a [~~brief notice kept on file by the proposing agency, in the case of a [public action, or the agency with the power of approval, in the case of a private action, when it has determined that the proposed project is an exempt or emergency project~~] notice produced in accordance with subchapter 8 for an **action** that a ~~proposing **agency**~~ or **approving agency** on behalf of the **applicant** determines to be exempt from preparation of an EA.	
6. Sub-Chapter 5, Responsibilities, pg. 13	(b) Whenever an **applicant** proposes an **action**, the authority for requiring an EA or [~~statements~~] **EIS**, [~~and for~~] making a determination regarding any required EA, and accepting any required [~~statements~~] EIS [~~that have been prepared~~] shall rest with the **approving agency** [~~initially receiving and agreeing~~] that initially received and agreed to process the request for an **approval**. With respect to EISs, the approving agency also called the **accepting authority**.	(b) Whenever an **applicant** proposes an **action**, the authority for requiring an EA or [~~statements~~] **EIS**, [~~and for~~] making a determination regarding any required EA, and accepting any required [~~statements~~] EIS [~~that have been prepared~~] shall rest with the **approving agency** [~~initially receiving and agreeing~~] that initially received and agreed to process the request for an **approval**. With respect to EISs, the approving agency also called the **accepting authority**.	See point #2 above about "approving" and "accepting authority". If they are one in the same, they need to be stated as such in the definitions. Also, the "approving agency" should not be the proposing agency.
7. Applicability of Chapter 343,HRS, pg. 16	(2)(A) "Discretionary consent" means an **action** as defined in section 343-2; or an approval from a decision-making authority in an agency, which approval is subject	~~(2)(A) "Discretionary consent" means an **action** as defined in section 343-2; or an approval from a decision-making authority in an agency, which approval is subject to a public~~	See comment #4

	to a public hearing.	~~hearing.~~	
8. Use of Prior Exemptions, pg. 17	When an **agency** determines that a prior exemption, **FONSI**, or an accepted **EIS** satisfies chapter 343, HRS, for a proposed activity, the **agency** may submit a brief written determination explaining its rationale to the **office** for publication pursuant to section 11-200.1-4 and the proposed activity may proceed without further chapter 343, HRS, environmental review.	When an **agency** determines that a prior exemption, **FONSI**, or an accepted **EIS** satisfies chapter 343, HRS, for a proposed activity, the **agency** may submit a brief written determination explaining its rationale to the **office** for publication pursuant to section 11- 200.1-4 and the proposed activity may proceed with~~out~~ further chapter 343, HRS, environmental review and approval by the approving agency.	As is, this leaves open too much opportunity for sliding a proposed action through the system based on another approved action and without adequate due process.
9. Subchapter 7 Determination of Significance, pg. 18	~~[©] [Agencies shall not, without considerable pre-examination and comparison, use past determinations, and previous statement to apply to the action at hand. The action for which a determination is sought shall be thoroughly reviewed prior to the use of previous determinations and previously accepted statements. Further, when previous determinations and previous statements are considered or incorporated by reference, they shall be substantially similar to and relevant to the action then being considered.]~~	[©] [Agencies shall not, without considerable pre-examination and comparison, use past determinations, and previous statement to apply to the action at hand. The action for which a determination is sought shall be thoroughly reviewed prior to the use of previous determinations and previously accepted statements. Further, when previous determinations and previous statements are considered or incorporated by reference, they shall be substantially similar to and relevant to the action then being considered.]	Suggest putting this piece back into the mix per the above comment #8.
10. Significance Criteria, Pg. 19	~~(1) [Involves an irrevocable commitment to loss or destruction of any natural or cultural resource]~~ Irrevocably commit a natural, cultural, or historic resource;	(1) [Involves an irrevocable commitment to loss, harm or destruction of any natural or cultural resource] ~~Irrevocably commit a natural, cultural, or historic resource;~~	Not sure this proposed change makes grammatical sense.
11. Significance Criteria, Pg. 19		"Substantial adverse affect" is not defined in the definitions section, yet is used widely throughout the "Significance Criteria" section. Seems like we need a definition.	See comment in column to left.
12. Determination of Level of Environmental Review, pg. 20	(c) If the **proposing agency** or **approving agency** determines, through its judgment and experience, that the **action** will individually and cumulatively	(c) If the ~~**proposing agency** or~~ **approving agency** determines, through its judgment and experience, that the **action** will individually and cumulatively	Remove "proposing agency" throughout this section.

	probably have minimal or no **significant effects**, and the **action** is one that is eligible for exemption under subchapter 8, then the **agency** or the **approving agency** in the case of an **applicant** may prepare an **exemption notice** in accordance with subchapter 8. (d) If the **proposing agency** or **approving agency** determines, through its judgment and experience, that the **action** is not eligible for an exemption, then the **proposing agency** shall prepare or the **approving agency** shall require the **applicant** to prepare an **EA** beginning with a **draft EA** in accordance with subchapter 9, unless: (1) In the course of preparing the **draft EA**, the **proposing agency** or **approving agenc**y determines, through its judgment and experience, that the **action** may have a **significant effect** and therefore require preparation of an **EIS**, then the **proposing agency** may prepare, or the **approving agency** may authorize the **applicant** to prepare an **EA** as a **final EA** to support the determination prior to preparing or requiring preparation of an **EIS** in accordance with subchapter 10; or (2) The **proposing agency** or **approving agency** determines, through its judgment and experience that an **EIS** is likely to be required, then the **proposing agency** may choose, or an **approving agency** may authorize an **applicant** to prepare an **EIS** in accordance with subchapter 10, beginning with preparation of an **EISPN**.	probably have minimal or no **significant effects**, and the **action** is one that is eligible for exemption under subchapter 8, then ~~the **agency** or~~ the **approving agency** in the case of an **applicant** may prepare an **exemption notice** in accordance with subchapter 8. (d) If the ~~**proposing agency** or~~ **approving agency** determines, through its judgment and experience, that the **action** is not eligible for an exemption, then ~~the **proposing agency** shall prepare or~~ the **approving agency** shall require the **applicant** to prepare an **EA** beginning with a **draft EA** in accordance with subchapter 9, unless: (1) In the course of preparing the **draft EA**, the ~~**proposing agency** or~~ **approving agenc**y determines, through its judgment and experience, that the **action** may have a **significant effect** and therefore require preparation of an **EIS**, then the **proposing agency** may prepare, or the **approving agency** may authorize the **applicant** to prepare an **EA** as a **final EA** to support the determination prior to preparing or requiring preparation of an **EIS** in accordance with subchapter 10; or (2) The ~~**proposing agency** or~~ **approving agency** determines, through its judgment and experience that an **EIS** is likely to be required, then the ~~**proposing agency** may choose, or an~~ **approving agency** may authorize an **applicant** to prepare an **EIS** in accordance with subchapter 10, beginning with preparation of an **EISPN**.	
13.	(a)[~~Chapter 343, HRS, states that~~	(a)[Chapter 343, HRS, states that a	Go back to

General Types of Actions Eligible for Exemption, Pg. 21	~~a list of classes of actions shall be drawn up which, because they will probably have minimal or no significant effect on the environment, may be declared exempt by the proposing agency or approving agency from the preparation of an environmental assessment provided that agencies declaring an action exempt under this section shall obtain the advice of other outside agencies or individuals having jurisdiction or expertise as to the propriety of the exemption.~~] Some **actions**, because they will individually and cumulatively probably have minimal or no **significant effects**, can be declared exempt from the preparation of an **EA**.	list of classes of actions shall be drawn up which, because they will probably have minimal or no significant effect on the environment, may be declared exempt by the proposing agency or approving agency from the preparation of an environmental assessment provided that agencies declaring an action exempt under this section shall obtain the advice of other outside agencies or individuals having jurisdiction or expertise as to the propriety of the exemption.] ~~Some **actions**, because they will individually and cumulatively probably have minimal or no **significant effects**, can be declared exempt from the preparation of an **EA**.~~	original language as it is clearer and stronger.
14. Preparation and Contents of a Draft Environmental Assessment, pg. 26	**(9)Agency** or **approving agency** [~~determination or, for draft environmental assessments only an~~] anticipated determination, including findings and reasons supporting the anticipated **FONSI**, if applicable; and	**(9)~~Agency~~** ~~or~~ **~~a~~ Approving agency** [~~determination or, for draft environmental assessments only an~~] anticipated determination, including findings and reasons supporting the anticipated **FONSI**, if applicable; and	Remove "agency".
15. Notice of Determination for Final Environmental Assessments, pg. 30	(b)[~~Negative declaration~~] If the **proposing agency** or **approving agency** determines that a proposed **action** is not likely to have a **significant effect**, it shall issue a notice of [~~determination which shall be~~] a [~~negative declaration~~,] **FONSI** [~~and the proposing agency or approving agency shall file such notice with the office as early as possible after the determination is made pursuant to and in accordance with section 11-200-9~~].	(b)[~~Negative declaration~~] If the ~~**proposing agency** or~~ **approving agency** determines that a proposed **action** is not likely to have a **significant effect**, it shall issue a notice of [~~determination which shall be~~] a [~~negative declaration~~,] **FONSI** [~~and the proposing agency or approving agency shall file such notice with the office as early as possible after the determination is made pursuant to and in accordance with section 11-200-9~~].	Remove "proposing agency".
16. Notice of Determination for Final Environmental Assessments,	(c)[~~Environmental impact statement preparation notice~~] If the **proposing agency** or **approving agency** determines that a proposed **action** may have	(c)[~~Environmental impact statement preparation notice~~] If the ~~**proposing agency** or~~ **approving agency** determines that a proposed **action** may have a **significant effect**, it	Remove "proposing agency" and retain the last clause.

pg. 30	a **significant effect**, it shall issue [~~a notice of~~] [~~determination which shall be~~] an [~~environmental impact statement preparation notice~~] **EISPN** [~~and such notice shall be filed as early as possible after the determination is made pursuant to and in accordance with section 11-200-9~~].	shall issue [~~a notice of~~] [~~determination which shall be~~] an [~~environmental impact statement preparation notice~~] **EISPN** [and such notice shall be filed as early as possible after the determination is made pursuant to and in accordance with section 11-200-9].	
17. Notice of Determination for Final Environmental Assessments, pg. 31	~~[(d)][When an **agency** withdraws a determination pursuant to its rules, the **agency** shall submit to the **office** a written letter informing the **office** of its withdrawal. The **office** shall publish notice of **agency** withdrawals in accordance with section 11-200-3.]~~	[(d)][When an **agency** withdraws a determination pursuant to its rules, the **agency** shall submit to the **office** a written letter informing the **office** of its withdrawal. The **office** shall publish notice of **agency** withdrawals in accordance with section 11-200-3.]	Please retain this section.

LAND USE RESEARCH FOUNDATION OF HAWAII
COMMENTS, CONCERNS AND OBJECTIONS TO
PROPOSED EIS RULES UPDATE (VERSION 1.0 DRAFT)
June 1, 2018

The Land Use Research Foundation of Hawaii ("LURF") understands and acknowledges the general intent of the proposed update of Chapter 200, Environmental Impact Statement ("EIS") Rules, and greatly appreciates the hard work of the Environmental Council and the Office of Environmental Quality Control and the open and transparent process relating to the preparation and dissemination of the revised drafts of the proposed EIS Rules.

LURF generally supports the proposed EIS Rules changes, however, we have general comments, concerns and opposition to certain specific sections, as follows:

General Comments and Concerns

1. **Some EIS challenges are used as delay tactics.** A common complaint is that project opponents use the EIS rules and technicalities to bring legal challenges and lawsuits to delay or stop projects, and new rules provide more litigation opportunities. This fact is not sufficiently addressed in the proposed rules or rationale.

2. **Some of the new requirements are not consistent with the purpose, intent and process of Chapter 343 and EIS Rules.** The purpose of the environmental review process is to create informational documents and allow public participation which disclose to decision-makers the significant and cumulative effects of a proposed action on the environment, economic and social welfare and cultural practices; mitigative measure to minimize such effects; alternatives to the action and effects; and includes satisfactorily responses to comments received during the review of the EIS. The EIS is not a permit or approval, it is a preliminary step in the discretionary approval process which also include various other opportunities for review of environmental issues, alternatives. public comment and responses by the applicant and/or agencies.

3. **Unnecessary, duplicative and/or gratuitous changes.** The majority of the current EIS rules work (no lawsuits); over 90% of the EIS' are "accepted;" the subject matter of some of the proposed changes are already addressed in the existing EIS law or rules; and the rationale for certain proposed changes are based on questionable "comments,' which should not justify a rule change;

4. **New rule changes which include vague, subjective, unenforceable or unnecessary requirements will result in conflicting interpretations, more uncertainty, needless confusion and unnecessary litigation;**

5. **Unintended negative consequences.** These legal challenges result in increased costs and delays for needed infrastructure and housing projects;

6. **Unfair, one-sided and biased against agencies and applicants.** Some of the proposed EIS rule changes do not address all relevant concerns in a fair and equitable manner.

Specific Comments, Concerns and Objections

- **§11-200.1-1(c)(3) Purpose (p. 1)**

(c) In preparing any document, **proposing agencies** and **applicants** shall:

(3) Conduct any required consultation as mutual, open and direct, two-way communication, in good faith, to secure the meaningful participation of agencies and the public in the environmental review process.

- **It is impossible to impose an aspirational "spirit" requirement with vague and subjective terms.** This proposed revision requires *"consultation"* that is *"mutual, open and direct, two-way communication, in good faith,"* to secure the "*meaningful*" participation of agencies and the public in the environmental review process."

- **Additional requirements are not consistent with the EIS law:** Chapter 343 and the relevant case law do not require adherence to a "spirit."

- **Unnecessary, duplicative and/or gratuitous change:** No EIS has be rejected (not accepted) or litigated on the basis of failure to have the appropriate *"spirit."*

- **Conflicting interpretations and needless confusion will occur, due to new terms which are vague and subjective:** *"mutual, open and direct, two-way communication, in good faith, and meaningful* participation."

- **Unintended negative consequences: An unreturned, or delayed response to a text, phone call or email by the applicant or an opponent could violate this section.** This section is so could also be violated and the EIS process could be challenged if a project opponent neglects, or refuses to consult in a *"mutual, open and direct, two-way communication, in good faith," or refuses to engage in "meaningful participation*."

- **Will result in unnecessary litigation:** Project opponents could bring legal challenges and lawsuits claiming a violation of this section.

- **Unfair, one-sided and biased against proposing agencies and applicants:** The proposed *"spirit"* requirements for proposing agencies or applicants, can result in lawsuits against the proposing agencies and applicants, but not against any project opponents or others who do not comply with the mandated *"spirit."*

- While aspirational, and a worthy goal, **this vague, subjective and unenforceable *"spirit"* requirements should be DELETED.**

- **§ 11-200.1-2 Definitions - Environmental Assessment (p. 4) The** proposed revision would change the definition of *"environmental assessment"* from a written *evaluation "to determine whether an action may have a significant environmental effect,"* to a written evaluation "that serves to provide ***sufficient evidence*** *and analysis* to determine whether an action may have a significant effect."

  - **Unnecessary, duplicative and/or gratuitous changes.** LURF understands that there is no major problem of EAs being rejected for "insufficiency," or failure to satisfy the requirements of Chapter 343 or the EIS Rules. Assuming that to be true, this proposed new definition of environmental assessment is unnecessary.

  - **The proposed new *"sufficient evidence"* requirement is inconsistent with the current EIS law.**
    - ✓ The Chapter 343 does not require the presentation of ***"sufficient evidence."*** The current definitions in Chapter 343 are working, so there is no need to add more subjective wording.
    - ✓ Chapter 343 already describes an EIS as "an ***informational document***...which discloses the environmental effects of a proposed action..."
    - ✓ Chapter 343 already defines and EA as a "***written evaluation*** to determine whether an action may have a significant effect."
    - ✓ "Sufficient evidence" is **not a defined term** in Chapter 343, or in the EIS Rules, this it is subjective and may be interpreted several different ways
    - ✓ "Evidence" is a legal term used in litigation; submittal and acceptance of evidence **requires certain specific legal requirements** that are not required of EAs or Chapter 343.
    - ✓ The ***"sufficiency"*** of an EA or EIS is a question of law (not a requirement for the preparation of an Environmental Assessment).

  - **Conflicting interpretations and needless confusion** will result from the proposed new requirement of *"sufficient evidence,"* which is a vague, subjective, undefined requirement which must be determined by a court of law. Given the term *"sufficient evidence,"* the preparers of EAs are likely to exercise more caution, and prepare even more lengthy EAs, with non-relevant information.

  - **Unnecessary litigation by project opponents** will result from vague and subjective terms and conflicting interpretations of *"sufficient evidence"*; and

  - **Unintended negative consequences of litigation:** Delay and increased costs for projects which could provide necessary infrastructure, housing, and other projects that will benefit the public.

  - **This vague, subjective and undefined requirement should be DELETED.** The current rules and definitions are sufficient.

- **§ 11-200.1-15 General Types of Actions Eligible for Exemption (Historic Structures) (p. 22)**

  [~~8~~](6) Demolition of structures, except those structures [~~located on any historic site as designated in~~] that are listed on, or that meet the criteria of listing on the national register or Hawaii [~~register as provided for in the National Historic Preservation act of 1966, Public Law 89-665, 16 U.S.C. §470, as amended, or chapter 6E, HRS~~] Register of Historic Places;

- This proposed revision would prohibit an exemption for the demolition of any structure built before 1968, based on a mere claim that the structure *"meets the criteria"* for listing on the national register or Hawaii Register of Historic Places ("Hawaii Register").

- **Proposed "changes" in requirements are not consistent with the intent and letter of the National Historic Preservation Act and the current EIS rules:** The National Historic Preservation Act and current EIS rules respects the private property rights of landowners, and requires the consent of the private owner, before property or structures are placed on the national register or Hawaii Register. The proposed revision does not address the issue of owner's consent.

- **Unnecessary, duplicative and/or gratuitous change:** LURF challenges the justification for this new standard. We are not aware of any need for this change, and not aware of the demolition of any historic structures *"that meet the criteria"* for listing on the national or Hawaii Register. The most reasonable and rational requirement to protect truly historic structures is the existing rule, which allows an exemption for demolition of all structures unless the structure is listed on the national or Hawaii Register.

- **Conflicting interpretations and needless confusion will occur, due to new terms which are vague and subjective:** *"Meet the criteria of listing"* is a vague and subjective term, and there will be differences of opinion and arguments regarding whether the criteria are met," and who has the authority to make such a determination that a structure *"meets the criteria?"*

- **Unintended negative consequences:** This rule could cause significant delays and obstacles in demolition of structures built before 1968 and delay building affordable housing in areas such as Mayor Wright Housing, Bowl-a-Drome and other areas in Iwilei, Kapalama and Moiliili. It could also delay or cause obstacles for the Rail Project.

- **Will result in unnecessary litigation:** Project opponents could bring legal challenges and lawsuits claiming a violation of this section.

- LURF would support a mutually agreed-upon criteria, process, photographs and recordation of information prior to demolition of certain buildings built before 1968.

- **This vague, subjective and unenforceable requirement should be DELETED.** The most reasonable and rational requirement is the existing rule, which allows an exemption for demolition unless the structure is on the national or Hawaii Register.

- **§ 11-200.1-23 New Requirement: Scoping Meeting and audio recording (p. 33)**

  (d) ~~At the discretion of the proposing agency or an applicant, a~~] No fewer than one EIS public scoping meeting [~~to receive comments on the final environmental assessment (for the EIS preparation notice determination) setting forth~~] addressing the scope of the draft EIS [~~may~~] shall be held on the island(s) most affected by the proposed action, within the public review and comment period in subsection [~~(b)~~] (c) [, ~~provided that the proposing agency or applicant shall treat oral and written comments received at such a meeting as indicated in subsection (d)~~]. The EIS public scoping meeting shall include a separate portion reserved for oral public comments and that portion of the scoping meeting shall be audio recorded.

- **The new requirement of public scoping meetings and audio recordings are inconsistent with Chapter 343.** Chapter 343, already requires numerous opportunities for substantial public review and comment of environmental documents; already requires responses to the comments by agencies/applicants; and the formal determination of *"acceptance"* of an EIS already requires that it *"adequately describes identifiable environmental impacts and satisfactorily responds to comments received during the review of the statement."* Chapter 343 **does not require a public scoping meeting or audio recordings**.

- **Unjustified and unnecessary changes and requirements:** While LURF supports oral comments at public scoping meetings, there is **no justification or facts** that the lack of a public scoping meeting or lack of audio recordings have resulted in *"non-acceptance"* of, or a court finding *"lack of sufficiency"* of an EIS. In fact, the comments from scoping meetings are advisory only, and should not result in lawsuits that would overturn an EIS which has been lawfully *"accepted."*

- **Unnecessary litigation:** Even though the comments at public scoping meetings are recommendations only, project opponents could bring lawsuits claiming a violation of any technicality relating to scoping meetings, oral comments and audio recordings.

- **Unintended consequences:**

  - ✓ Impossibility. It may be impossible to audio record simultaneous comments in a "charrette" public scoping setting.

  - ✓ **Project delay and increased costs.** Project opponents can claim a violation of EIS rules: if there are no oral comments (and thus no audio recording); if the recording is unintelligible; if the recording is lost, etc. Who must retain the copies of the recordings and for how long? Should copies of the audio recording be submitted with the DEIS and FEIS and retained by OEQC?

- **Unfair, one-sided and biased against proposing agencies and applicants:**
  - ✓ Would fairness dictate that an oral comment begets an oral response?

- ✓ Furthermore, comments at a public scoping meeting are *recommendations* only, and oral comments should not establish new legal requirements for an EA or EIS and create a new cause of action for lawsuits.
- ✓ The EIS document should address to substantive comments made in the scoping meeting, instead of requiring an audio recording.
- ✓ The applicant should not be responsible for retaining the audio recording forever.

- **The requirement to audio record oral comments should be <u>REVISED</u> to address the above-referenced comments and unintended consequences.**

OFFICE OF PLANNING
STATE OF HAWAII

FILE COPY

DAVID Y. IGE
GOVERNOR

LEO R. ASUNCION
DIRECTOR
OFFICE OF PLANNING

235 South Beretania Street, 6th Floor, Honolulu, Hawaii 96813
Mailing Address: P.O. Box 2359, Honolulu, Hawaii 96804

Telephone: (808) 587-2846
Fax: (808) 587-2824
Web: http://planning.hawaii.gov/

RECEIVED
'18 JUN -5 P4:29
OFC. OF ENVIRONMENTAL QUALITY CONTROL

DTS201806041320NI

June 05, 2018

To: Puananionaona "Onaona" Thoene, Chair
Environmental Council

Scott Glenn, Director
Office of Environmental Quality Control

From: Leo R. Asuncion, Director
Office of Planning

Subject: Agency Comments on Proposed Repeal and Promulgation of Hawaii Administrative Rules, Title 11, Department of Health, Chapter 200.1 Environmental Impact Statement Rules

Thank you for the opportunity to review and provide comments on the proposed repeal of Hawaii Administrative Rules (HAR) Title 11 Chapter 200, Environmental Impact Statement (EIS) Rules, and proposed adoption of HAR Title 11 Chapter 200.1 EIS Rules.

We understand that the Office of Environmental Quality Control (OEQC) and the State of Hawaii Environmental Council (Environmental Council) are presenting updated EIS rules for public input. OEQC anticipates that the proposed repeal and adoption will update and substantially revise rules regarding the system of environmental review at the state and county levels which shall ensure that environmental, economic, and technical concerns are given appropriate consideration in decision making in accordance with Chapter 343, Hawaii Revised Statutes (HRS).

The Office of Planning has reviewed the proposed EIS rule amendments in the document: *"Environmental Council Version 1.0 Unofficial Ramseyer, Proposed HAR Chapter 11-200.1, Environmental Impact Statements, March 2018"* and is providing on the attached pages general comments and specific recommendations on the proposed amendments.

If you should have any questions, please contact Joshua Hekekia, Planner, or myself at (808) 587-2846. Thank you again for the opportunity to comment.

Attachment

FILE COPY

OFFICE OF PLANNING COMMENTS FOR PROPOSED AMENDMENTS AS PRESENTED IN:
Environmental Council Version 1.0 Unofficial Ramseyer, Proposed HAR Chapter 11-200.1, Environmental Impact Statements: March 2018

Please note: To the extent possible, the unofficial Ramseyer amendments were retained in the following comments. All proposed amendments are highlighted in yellow, addition of language is underscored, and deletion of language is [~~bracketed and stricken~~].

Page 1, Suggest amendments to (a) and (b) under § 11-200.1-1 Purpose, with more straightforward language and positive sentiment as follows:

(a) Chapter 343, Hawaii Revised Statutes, (HRS), establishes a system of environmental review at the state and county levels [~~which~~] that shall ensure environmental concerns are given appropriate consideration in decision-making along with economic and technical considerations. The purpose of this chapter is to provide **agencies** and **persons** with procedures, specifications [~~of~~] regarding the contents of **environmental assessments** (**EAs**) and **environmental impact statements** (**EISs**), and criteria and definitions of statewide application.

(b) [~~[An EIS] **EAs and EISs** [is] are meaningless without the conscientious application of the [EIS] environmental review process as a whole, and shall not be merely a self-serving recitation of benefits and a rationalization of the proposed **action**.~~] **Agencies** and **applicants** shall ensure that [~~statements~~] **EAs** and **EISs** are prepared at the earliest opportunity in the planning and decision-making process. This shall assure an early open forum for discussion of adverse **effects** and available alternatives, and that the decision-makers will be enlightened to any environmental consequences of the proposed **action** prior to decision-making.

Page 2, Suggest amendments to the definition of "**Accepting authority**" as follows:

"**Accepting authority**" means the [final] [~~official who~~] **governor** or the **mayor**, or their authorized representatives, or **agency** that [~~, determines the acceptability of the EIS document~~] makes the determination that a final EIS is required to be filed, pursuant to chapter 343, HRS, and that the final EIS fulfills the definitions and requirements of an EIS.

Page 3, Suggest amending the definition of "**EIS preparation notice**" as follows:

"**EIS preparation notice**[,]", [or] "**EISPN**", or "**preparation notice**" means a determination [~~based on an environmental assessment that the subject~~] based on an **EA** or **approving agency's** determination that an action may have a significant effect on the environment and, therefore, will require the preparation of an [~~environmental impact statement~~] **EIS**. [~~, based on either an **EA** or an **agency's** judgment and experience that the proposed **action** may have a **significant effect** on the **environment**.~~]

Page 3, Suggest amending the definition of **"Discretionary consent"** by also including the definition of "discretionary consent" found in § 343-5.5, HRS which references public hearing as a distinguishing factor, as some judgment and free will is called for in almost all permit decisions, as follows:

"Discretionary consent" means a consent, sanction, or recommendation from an **agency** for which judgment and free will may be exercised by the issuing **agency**, as distinguished from a ministerial consent. Discretionary consent involves an approval from a decision-making authority in an agency that

18-620

is subject to a public hearing. Ministerial consent means a consent, sanction, or recommendation from an agency upon a given set of facts, as prescribed by law without the use of judgment or discretion.

Page 5, The definition of "program" is stated as: "a series of one or more projects to be carried out concurrently in phases within a general timeline, that include multiple sites or geographic areas, and is undertaken for a broad goal or purpose."

This definition could be interpreted too broadly and could encompass many agency plans not currently subject to environmental review. We would recommend, at a minimum, excluding agency capital improvement program and transportation improvement program plans linked to agency budgetary processes. Projects mentioned in these plans will subsequently undergo environmental review when their scope is more clearly defined. It may also be worthwhile to directly link "program" to "programmatic EA or EIS" to clarify the reference in the definition.

Page 6, Suggest amendments to the definition of "**Trigger**" as follows:

"**Trigger**" means any use or activity listed in section 343-5(a), HRS, requiring preparation of an [~~environmental assessment~~] **EA**.

Page 7, **§ 11-200.1-3** *Computation of Time*

The first sentence is not clear and hard to understand. Suggest referring to the language from HRS § 1-29 *Computation of time* for amendments.

Page 13, Suggest amendments to **§ 11-200.1-7 (a)** as follows:

If an **action** involves state and county lands, state and county funds, or both state and county lands and funds, the governor or the governor's authorized representative shall have the authority as to determine whether to accept the **EIS**.

Page 14, Suggest amendments to **§ 11-200.1-7 (e)** as follows:

The office shall not serve as the **accepting authority** for any [~~**proposed**~~] **agency** or **applicant action.**

Page 15, Subchapter 6 Applicability of Chapter 343, HRS, to Agency Actions - applicability to agricultural tourism

§ 11-200.1-8 Applicability of Chapter 343, HRS, to **Agency** Actions, Item (a)(3) is not warranted—and should be deleted. It is unlikely that any agency will be conducting a project of this specific nature; furthermore, unless someone is trying to use public tourism funds for agricultural tourism-related activities/programs. But any agency action is likely to trigger an environmental review by the primary triggers of public funds or lands. Accordingly, subsection (3) should be deleted.

[~~(3) Under section 343-5(a)(1), HRS, actions involving agricultural tourism under section 205-2(d)(11), HRS, or section 205-4.5(a)(13), HRS, must perform environmental review only when required under section 205-5(b), HRS.~~]

Page 15, Subchapter 6 Applicability of Chapter 343, HRS to Agency Actions – applicability to emergency actions. Emergency actions undertaken by a proposing agency during a governor-declared state of emergency may face

unforeseen delays due to issues such as: obtaining financing and adhering to procurement law, which may not allow for an activity to have "substantially commenced" within sixty days of the emergency proclamation. Activities that require a proposing agency to procure services to support emergency actions such as site designs, studies, and planning work would no longer be subject to exemption from Chapter 343, HRS. OEQC and the Environmental Council should evaluate if the 60-day limit for project commencement is feasible for these types of agency actions.

Page 16, Subchapter 6 Applicability of Chapter 343, HRS, to Agency Actions - applicability to agricultural tourism

> § 11-200.1-9 Applicability of Chapter 343, HRS, to **Applicant** Actions, Item (a)(2)(B) can be retained, but should be clarified as to when this would be required. Under Section 205-5(b), HRS, the counties are required to adopt ordinances for agricultural tourism to allow them to be a permissible use. Section 205-5(b), HRS, states that the counties **may** require an environmental review for these, so the language could be clarified to read as follows:
>
> Under section 343-5(a)(1), HRS, actions involving agricultural tourism under section 205-2(d)(11), HRS, or section 205-4.5(a)(13), HRS, [~~must perform~~] are subject to environmental review [~~only~~] when the respective county [~~required under~~] requires an environmental review under an ordinance adopted pursuant to section 205-5(b), HRS."

Pages 17 and 18, suggest moving **§ 11-200.1-12** *Consideration of Previous Determinations and Accepted Statements* to **§ 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 Activities*, and deleting **§ 11-200.1-11(c)**, which is not an appropriate content under § 11-200.1-11. Except for EISPN, it is not necessary for an agency to submit a written determination explaining its rationale to the OEQC for public notice when the agency determines that a proposed activity warrants an environmental review.

In addition, for proposed section (b) below, please see page 4-17 of the Hawaii Administrative Rules Drafting Manual, Third Edition § 00-4-10 Examples for appropriate formatting.

(a) When an **agency** is considering whether a prior exemption, **FONSI**, or an accepted **EIS** satisfies chapter 343, HRS, for a proposed activity, the **agency** may determine that additional environmental review is not required because:
   (1) The proposed activity 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 programmatic **EIS**);
   (2) The proposed activity 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**, the proposed activity was analyzed within the range of alternatives.

(b) A **proposing agency** or **applicant** may incorporate information or analysis from a relevant [~~Previous~~] prior [~~determinations~~] **exemption notice, final EA**, [~~and previously accepted statements may be incorporated~~] or accepted **EIS** into an **exemption notice, EA, EISPN, or EIS**, [~~by applicants and agencies~~] for a proposed action whenever the information or analysis [~~contained therein~~] is pertinent [~~to the decision at hand~~] and has logical relevancy and bearing to the proposed action [~~being considered~~] (for

example, a project that was broadly considered as part of an accepted programmatic **EIS** may incorporate relevant portions from the accepted programmatic **EIS** by reference).

~~(b)~~ (c) When an **agency** determines that a prior exemption, **FONSI**, or an accepted **EIS** satisfies chapter 343, HRS, for a proposed activity, the agency [~~may~~] shall submit a brief written determination explaining its rationale to the **office** for publication pursuant to section 11-200.1-4 and the proposed activity may proceed without further chapter 343, HRS, environmental review.

~~(c) When an **agency** determines that the proposed activity warrants environmental review, the agency may submit a brief written determination explaining its rationale to the office for publication pursuant to section 11-200.1-4 and the **agency** shall proceed to comply with subchapter 7.~~

Page 17, Office of Planning supports the proposed addition to Subchapter 6, § 11-200.1-11. This has potential applicability for affordable housing developments which may benefit from this amendment/addition.

Page 19, suggest adding the definition of "**sea level rise exposure area**" for new HAR Chapter 11-200.1.

Page 22, Office of Planning supports the proposed amendments to Subchapter 8 – Exempt Actions, Lists, and Notice Requirements. Specifically, amendments to § 11-200.1-15(c)(6), § 11-20.1-15(c)(9), and the addition of § 11-200.1-15(c)(10).

Page 25, suggest amending (b) and (c) by deleting the descriptions that will not provide a meaningful way to direct the preparation of a draft EA, as follows:

(b) [~~The scope of the **draft EA** may vary with the scope of the proposed action and its impact, taking into consideration whether the action is a project or a program.~~] Data and analyses in a **draft EA** shall be commensurate with the importance of the impact, and less important material may be summarized, consolidated, or simply referenced. A **draft EA** shall indicate at appropriate points in the text any underlying studies, reports, and other information obtained and considered in preparing the **draft EA**, including cost benefit analyses and reports required under other legal authorities.

(c) [~~The level of detail in a **draft EA** may be more broad for **programs** or components of a **program** for which site-specific impacts are not discernible, and shall be more specific for components of the program for which site-specific, project-level impacts are discernible.~~] **A draft EA** for a **program** may, where necessary, omit evaluating issues that are not yet ready for decision at the project level. Analysis of the **program** may be based on conceptual information in some cases and may discuss in general terms the constraints and sequences of events likely to result in any narrowing of future options. It may present and analyze in general terms hypothetical scenarios that are likely to occur.

Page 26, suggest amending item (9) by replacing "FONSI" with "determination" as follows:

(9) **Agency** or **approving agency** [determination or, for draft environmental assessments only an] anticipated determination, such as FONSI, if applicable, [~~including~~] and the findings and reasons supporting the anticipated [~~**FONSI**~~] determination [~~, if applicable~~]; and

Pages 26-27, under **§ 11-200.1-19** *Notice of Determination for Draft Environmental Assessments*, except under § 11-200.1-19(a), all terms referencing "FONSI" should be changed to "determination". Otherwise, a draft EA will direct exclusively to the determination of "FONSI" without "EISPN" for a final EA, which conflicts with **§ 11-200.1-22** *Notice of Determination for Final Environmental Assessments*.

Page 31, for the notice of a FONSI that will not be proceeded further to a EIS, suggest deleting the term "accepting authority" from (e)(2) as follows:

(2) Identification of the **approving agency** [~~or **accepting authority**~~];

Page 32, suggest changing the subjective term "With good cause" to an objective term "With explanations".

Page 34, suggest amending (b) and (c) by deleting the descriptions that will not provide a meaningful way to direct the preparation of a draft EIS, as follows:

(b) [~~The scope of the [statement] **draft EIS** may vary with the scope of the proposed action and its impact, taking into consideration whether the action is a project or a program.~~] Data and analyses in a **draft EIS** shall be commensurate with the importance of the impact, and less important material may be summarized, consolidated, or simply referenced. [~~Statement~~] A **draft EIS** shall indicate at appropriate points in the text any underlying studies, reports, and other information obtained and considered in preparing the [~~statement~~] **draft EA**, including cost benefit analyses and reports required under other legal authorities.

(c) [~~The level of detail in a **draft EIS** may be more broad for **programs** or components of a **program** for which site-specific impacts are not discernible, and shall be more specific for components of the program for which site-specific, project-level impacts are discernible.~~] **A draft EIS** for a **program** may, where necessary, omit evaluating issues that are not yet ready for decision at the project level. Analysis of the **program** may be based on conceptual information in some cases and may discuss in general terms the constraints and sequences of events likely to result in any narrowing of future options. It may present and analyze in general terms hypothetical scenarios that are likely to occur.

Page 35, suggest amending § 11-200.1-24 (g)(6) as follows:

(6) Summary technical data, diagrams, and other information necessary to [~~permit~~] [~~enable~~] allow an evaluation of potential environmental **impact** by commenting agencies and the public; and

Page 35, suggest amending the following the sentence under § 11-200.1-24 (h) as follows:

"For alternatives that were eliminated from detailed study, the section shall contain a brief discussion of the reasons for not studying those alternatives in detail" into "For alternatives that were eliminated from detailed study, the section shall ~~contain a brief discussion of~~ discuss the reasons ~~for not studying~~ why those alternatives were not studied in detail."

Page 36, regarding § 11-200.1-24 (j) - the rules should provide a definition for "natural or cultural resources" as written in the amended text "natural or cultural resources plans, policies, and controls for the affected area" or provide clarification of the subject term.

Page 37, Office of Planning supports the proposed amendments to § 11-200.1-24(o) and § 11-200.1-24(p).

Page 42, suggest changing § 11-200.1-27 (b)(3) to read as follows:

> (3) A list of persons, organizations, and public agencies who were consulted with in preparing the final EIS and those who had no comments shall be included in a manner indicating that no comment was provided;

Page 47, suggest amending the subsection (4), to add reference to cultural impacts to read as follows:

> "The [~~National Environmental Policy Act~~] **NEPA** requires that [~~draft statements~~] **EISs** be prepared by the responsible federal [~~agency~~] entity. In the case of actions for which an **EIS** pursuant to the **NEPA** has been prepared by the responsible federal entity, the draft and final federal **EIS** may be submitted to comply with this chapter, so long as the federal **EIS** satisfies the **EIS** content requirements of this chapter, including cultural impacts, and is not found to be inadequate under the NEPA: by a court; by the Council on Environmental Quality (or is at issue in pre-decision referral to Council on Environmental Quality) under the NEPA regulations; or by the administrator of the United States Environmental Protection Agency under section 309 of the Clean Air Act, title 41 United States Code section 7609."

A major reason why most NEPA EISs do not meet 343 EIS requirements is the cultural impact assessment requirement which is unique to Ch. 343, so it would be worthwhile to mention this requirement so this can be addressed in the NEPA document.

RECEIVED
'18 JUN -5 P4:29
OFC. OF ENVIRONMENTAL
QUALITY CONTROL

P.O. Box 253, Kunia, Hawai'i 96759
Phone: (808) 848-2074; Fax: (808) 848-1921
e-mail info@hfbf.org; www.hfbf.org

June 5, 2018

Mr. Scott Glenn, Director
Office of Environmental Quality Control
State of Hawaii Department of Health
235 South Beretania Street, Suite 702
Honolulu, Hawaii 96813

Re: Proposed Revisions to Hawaii Administrative Rules Chapter 11-200, Environmental Impact Statements

Aloha Director Glenn,

The Hawaii Farm Bureau (HFB), organized since 1948 and comprised of 1,900 farm family members statewide, serves as Hawaii's voice of agriculture to support, advocate and advance the social, economic and educational interests of our diverse agricultural community.

HFB offers the following limited comments on the Proposed Revisions to Hawaii Administrative Rules Chapter 11-200, Environmental Impact Statements.

We understand the rationale underlying the proposed deletion of the list of statutory triggers in Section 11-200-6(b); however, we are concerned that by omitting the list, the proposed revisions will exacerbate the current confusion about activities that require preparation of an environmental assessment, particularly with regard to non-domestic wastewater treatment units. Not only do we believe that the list should be retained in the revised rule, we also suggest that clarifying language be included to explain the scope of the Hawaii Revised Statute Section 343-5(a)(9)(A) trigger as it applies to those non-domestic wastewater treatment units associated with agricultural operations.

Hawaii's farmers need to understand what types of wastewater systems will trigger review under Chapter 343, HRS. Under Section 343-5(a)(9)(A), an environmental assessment is required for actions that "propose any wastewater treatment unit, except an individual wastewater system or a wastewater treatment unit serving fewer than fifty single-family dwellings or the equivalent". This trigger can easily be interpreted for domestic wastewater systems; it requires an environmental review for new sewage treatment plants. Unfortunately, it is not clear how this trigger applies to non-domestic wastewater systems since these systems do not serve single-family dwellings. For wastewater systems that do not manage or treat domestic wastewater, we have not been able to determine how to measure the equivalent of fifty single-family dwellings.

Our concern is for the agricultural operations that generate wastewater of a type and quantity that is not “equivalent” to the wastewater from fifty single family homes. The statute itself is not clear as to the applicability of the exception under Section 343-5(a)(9)(A) to non-domestic wastewater systems. These rule revisions provide the perfect opportunity to clarify this area, before any further litigation occurs. Without clarification, even the smallest non-domestic wastewater system may be required to complete an environmental assessment before it is able to gain approval by the Hawaii Department of Health under Hawaii Administrative Rules Chapter 11-62.

Thank you for your consideration of our concerns. The Hawaii Farm Bureau appreciates the opportunity to provide comments on the proposed rules.

Sincerely,

Randy Cabral
President

From: Livit Callentine
To: HI Office of Environmental Quality Control
Cc: Jeffrey Dack
Subject: Comments on Proposed Amendments to OEQC Rules Regarding EAs and EISs
Date: Tuesday, June 5, 2018 4:41:07 PM

Comments on Proposed Amendments to OEQC Rules Regarding EAs and EISs.

I support the proposed revisions. I especially appreciate the expanded guidance on alternatives found in Section 11-200.1-24 Content Requirements; Draft Environmental Impact Statement item (h). We often see lip service only when considering alternatives. The recommended language goes a long way toward a requiring a sincere and robust consideration of alternatives. The term "reasonable" may become a loophole as it's a subjective term.

I recommend adding a definition of "reasonable alternatives" that includes language from NEPA's 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".

Thank you for your consideration.

Sincerely,

Livit Callentine, AICP
Staff Planner
Department of Planning
2200 Main Street, Suite 619
Wailuku, HI 96793
Voice/Fax: (808) 270-5537
livit.callentine@mauicounty.gov

MUNEKIYO HIRAGA
Planning · Project Management · Sustainable Solutions

FILE COPY

Michael T. Munekiyo
PRESIDENT
Karlynn K. Fukuda
EXECUTIVE VICE PRESIDENT
Mark Alexander Roy
VICE PRESIDENT
Tessa Munekiyo Ng
VICE PRESIDENT

RECEIVED

'18 JUN -5 A9:28

OFC. OF ENVIRONMENTAL
QUALITY CONTROL

June 5, 2018

18-614

Puananionaona Thoene, Chair
Environmental Council
c/o State of Hawai'i
Department of Health
Office of Environmental Quality Control
235 South Beretania Street, Suite 702
Honolulu, Hawai'i 96813

SUBJECT: Proposed Revisions to Hawai'i Administrative Rules, Chapter 11-200 Hawai'i Environmental Impact Statement Rules – Version 1.0, March 2018

Dear Chair Thoene and members of the Environmental Council:

Thank you for the opportunity to review and provide comments on the proposed revisions to the Hawai'i Administrative Rules (HAR), Chapter 11-200 Hawai'i Environmental Impact Statement Rules – Version 1.0, released in March 2018. We appreciate the Environmental Council's (EC) and the Office of Environmental Quality Control (OEQC) continued efforts on this matter. Munekiyo Hiraga offers the following comments and recommendations for your consideration on Version 1.0 of the HAR. We have outlined our comments by section of the rules to assist with the review.

HAR 11-200.1-5, Filing Requirements for publication and withdrawal

1. We appreciate the change of submittal deadline in Section (a) to OEQC to *"before the close of business four business days prior to the issue date"* as this will provide everyone with more time for the submittals prior to publication.

2. We note in section (e) (6) and (7) there isn't a provision for a copy of the Final Environmental Impact Statement (EIS) document to be provided to the Hawai'i Documents Center (HDC). We weren't sure if this was an oversight as the proposed rules currently require that copies of the Draft Environmental Assessment (EA), Final EA, the EIS Preparation Notice (EISPN) and Draft EIS to be sent to the HDC.

3. We note in section (e)(5) regarding the Draft EIS that there is no requirement for OEQC to review and approve a distribution list for the respective document. We

Maui: 305 High Street, Suite 104 · Wailuku, Hawaii 96793 · Tel: 808.244.2015 · Fax: 808.244.8729
Oahu: 735 Bishop Street, Suite 321 · Honolulu, Hawaii 96813 · Tel: 808.983.1233
www.munekiyohiraga.com

wanted to confirm that this would no longer be a requirement under the proposed rules. It also appears that copies of the Draft EIS documents are no longer required to be distributed to agencies for review and comment. We wanted to confirm that this was the intent as agency distribution is noted for the Draft EA. In Section (e)(1) the applicant is required to distribute copies of "*...the Draft EA to other agencies, having jurisdiction or expertise as well as citizens groups and individuals that the proposing agency reasonably believes to be affected*".

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

1. Section (c)(6) notes that "*Demolition of structures, except those structures that are listed on or that meets the criteria for listing on the national register or Hawaii Register of Historic Places*" would qualify for an exemption determination. We aren't sure at what point an applicant would be made aware that their property/structure would "*meet the criteria of listing on the national register or Hawaii Register of Historic Places*" and would therefore need to prepare a Chapter 343 Hawai'i Revised Statutes review document. We offer this comment for the EC's consideration.

Thank you again for the opportunity to provide our input and suggestions. We appreciate the efforts to update the HAR. We look forward to continued updates on the process. Should you have any questions on our comments and suggestions, please contact us at (808) 244-2015.

Very truly yours,

Karlynn Fukuda
Executive Vice President

KF:yp
K:\DATA\ADMIN\Legis 2\OEQC Rule Update 2017.doc

FILE COPY

From: Tracy Nakamoto
To: HI Office of Environmental Quality Control
Cc: Karlynn Fukuda; Tessa Munekiyo Ng; Mark Roy; Michael Munekiyo
Subject: Proposed Revisions to Hawaii Administrative Rules, Chapter 11-200 Hawaii EIS Rules - Version 1.0, March 2018
Date: Tuesday, June 05, 2018 08:03:46
Attachments: (Final) OEQC Rule Update 2017.pdf

RECEIVED

'18 JUN -5 A9:28

OFC. OF ENVIRONMENTAL QUALITY CONTROL

To: Puananionaona Thoene, Chair
Environmental Council
c/o State of Hawaii
Department of Health
Office of Environmental Quality Control

From: Karlynn Fukuda, Executive Vice President

Attachment:

1	6/5/18	Letter to Puananionaona Thoene, Chair Environmental Council

Message:

Please refer to the attached letter. The original will be forthcoming in the mail.

Please contact us at (808) 244-2015 should you have any questions. Thank you.

Tracy Nakamoto, Administrative Assistant
Email: tracy@munekiyohiraga.com
MUNEKIYO HIRAGA

Maui: 305 High Street, Suite 104, Wailuku, Hawaii 96793 T: 808.244.2015 F: 808.244.8729
Oahu: 735 Bishop Street, Suite 321,
Honolulu, Hawaii 96813 T: 808.983.1233
Planning. Project Management. Sustainable Solutions. www.munekiyohiraga.com

CONFIDENTIAL AND PRIVILEGED COMMUNICATION: This message (including attachments) is intended for the use of the designated recipient(s) named above. The contents of this correspondence are considered privileged and confidential. If you have received this message in error, kindly notify us immediately by email or telephone, and delete this email from your computer system. Thank you.

18-614

Friends of Maha`ulepu
PO Box 1654
Koloa, HI 96756
Ph. 808-742-1037

June 5, 2018

To: Environmental Council, State of Hawai'i
235 South Beretania Street, Suite 702
Honolulu, Hawai'i 96813

Subject: Environmental Council proposed Update HAR chapter 11-200.1, v 1.0.

Aloha e Members of the Environmental Council,

Please find below the comments of the Friends of Māhā'ulepū, a 501(c)(3) nonprofit organization based on Kaua'i ("FOM") on proposed amendments to Hawaii Administrative Rules (HAR) chapter 11-200, Environmental Impact Statement (EIS) Rules, v. 1.0 (EIS Rules v. 1.0). We appreciate the the opportunity to participate in the rules update process. We offer the following to assist the Office of Environmental Quality (OEQC) and the Environmental Council in assembling EIS Rules v. 1.0 in an effort to achieve the best possible protection for our environment.

Many of the proposed rules, particularly §11-200.1-14 ("Determination of Level of Environmental Review"), provide much needed guidance in keeping with case law and we offer the following to improve even more on the current version:

1. Amend Chapter 200 instead of repealing and replacing with Chapter 200.1

We understand the Council's rationale in reorganizing the rules as a whole (permitting the EIS rules to be "cleaner" and more logically grouped), however, case law and crucial court decisions have been made based on the existing rules. Repealing "Chapter 200" and approving a new "Chapter 200.1" will increase the difficulty of tracking amendments and judicial case law interpreting and applying these rules. In other contexts, including statutes addressing real property and insurance industries, the repeal of statutes and replacement under new statutory numbers has allowed parties to obscure or avoid unfavorable case law. Integrating amendments to HAR chapter 11-200 instead of repealing avoids this undesirable result.

2. Revise § 11-200.1-13(b) standards for finding significant impacts in compliance with HRS § 343-5 and more recent case law.

EIS Rules v.1.0 § 11-200.1-13(b) proposes adding the phrase "is likely to" regarding whether a proposed action would have a significant environmental impact. We submit that this phrase is less likely to result in environmental review. More importantly, it is weaker by being less inclusive than the standard required by the rule's governing statute HRS § 343-1 "that an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which *may result* from the implementation of certain actions." (Emphasis

added) Per statute the triggers that mandate environmental review do so because of a recognition that an applicant has no way to appreciate the environmental consequence of their action prior to the environmental review. For that reason, both the statute and the Hawaii State Supreme Court have called for the environmental review process to be done at the earliest practible time and prior to any permits and approvals for any project or action that "may result" in a significant effect on the environment:

> "(b) In determining whether an action may have a significant effect on the environment, the agency shall consider every phase of a proposed action, the expected impacts, both primary and secondary, and the cumulative as well as the short-term and long-term effects of the action. In most instances, an action shall be determined to have a significant effect on the environment if it ~~is likely to~~ **may**:"

This definition would conform to HRS § 343-5(c)(4) & (e)(3), which provides that an EIS "shall be required if the agency finds that the proposed action may have a significant effect on the environment[.]"

The Council's Rationale relied on a 2005 case which interpreted "may" as indicating "likely," which the case further discussed: "[l]ikely is a word of general usage and common understanding, broadly defined as of such nature or so circumstantial as to make something probable and *having better chance of existing or occurring than not.*" *Kepo'o,* 106 Hawai'i 270, 289 n. 31, 103 P.2d 939, 958 n. 31(Haw. 2005). In 2010, however, the Hawai'i Supreme Court revisited this interpretation noting "the United States Court of Appeals for the Ninth Circuit has held that, under the aforementioned standard, plaintiffs 'need not show that significant effects will in fact occur' but instead need only 'raise [ ] **substantial questions whether a project may have a significant effect** [ ].'" *Unite Here! Local 5 v. City & County of Honolulu,* 123 Hawai'i 150, 178, 231 P.3d 423, 451 (2010) *quoting Klamath Siskiyou Wildlands Ctr. v. Boody,* 468 F.3d 549, 562 (9th Cir. 2006) (underscored emphasis in original) (bold emphasis in original quotation). The *Unite Here!* decision thus re-introduced the statutory standard of "may have a significant effect." As proposed, the "likely to" standard both exceeds the authority granted under HRS §343-5 and is contrary to more recent applicable case law and should be revised.

3. Amend definitions of "action" and "project" and add a definition for "mitigation" under § 11-200.1-2.

   a. *"Action" should be defined to include re-permitted programs and projects, and even and especially those that have not previously undergone environmental assessment.*

The definition of "action" as "any program or project *to be initiated* by an agency or applicant" includes a potential loophole for programs or projects that have previously escaped review and are ongoing. The result is an interpretation of "to be initiated" that is inconsistent with the intended assessment of incremental and cumulative impacts in, for example, annual permit renewals for actions that have never been subject to an environmental assessment. Several cases, including one in Kaua'i's environmental court, is directly concerned with this issue. Agencies that claim to have "always" granted one-year permits for uses of State lands and waters

should be required to undergo a HRS chapter 343 assessment of potential significant impacts of the cumulative and incremental uses of those lands and waters over the years.

In light of such confused interpretations and to avoid unnecessary litigation, we suggest adding the following sentence to the definition of "action:"

> "Action" means any program or project to be initiated by an agency or applicant. **Discretionary approvals for programs or projects that fall under any of the classes for environmental review pursuant to HRS § 343-5 are considered 'actions,' particularly where no review has previously been undertaken concerning potential significant impacts**.

§11-200.1-2 (amended). Such a particularized definition of "action" would be further complementary to §11-200.1-15(d), which specifies that "[a]ll exemptions under subchapter 8 are inapplicable when the cumulative impact of planned successive actions in the same place, over time, is significant, or when an action that is normally insignificant in its impact on the environment may be significant in a particularly sensitive environment." The interplay between this proposed definition of "action" and limits to the application of exemptions would ensure that ongoing actions that have previously escaped review would now become subject to a full review of cumulative impacts.

b. Definition of "project" is overly restrictive, but "program" is helpful.

Under the current HAR Chapter 11-200, "project" and "program" are not defined and are generally given their plain and ordinary meaning in case law. The proposed definition of "project" is too restrictive and may allow actions to go unreviewed.

Defining a "project" as "a discrete, planned undertaking that has a defined beginning and end time, is site-specific, and has a specific goal or purpose" could be interpreted to allow projects to avoid review if any of the following six elements are lacking: (i) discrete undertakings; (ii) planned undertakings; (iii) with a defined beginning; (iv) with a defined end time; (v) site-specific; or (vi) with a specific goal or purpose. For instance, applicants/ agencies can withhold "projects" so that they can propose them at separate times, and this would run afoul of prohibitions against segmentation.

For these reasons, we suggest either removing the definition of "project" or making the most of the elements disjunctive instead of conjunctive: "Project means a discrete, planned undertaking that has a defined beginning **or** end time **or** is site-specific **or** has a specific goal or purpose". §11-200.1-2 (amended).

The new definition of "program," reproduced here for ease of reference, could mitigate against segmentation of projects, and we recommend its inclusion:

> "Program" means a series of one or more projects to be carried out concurrently or in phases within a general timeline, that may include multiple sites or geographic areas, and is undertaken for a broad goal or purpose. A program may include: a number of separate projects in a given geographic area which, if considered singly, may have minor impacts, but if considered together may have significant impacts; separate projects having generic or common impacts; an entire plan having wide application or restricting the range of future alternative policies or actions, including new significant changes to existing land use plans, development plans, zoning regulations, or agency comprehensive resource

management plans; implementation of a single project or multiple projects over a long timeframe; or implementation of a single project over a large geographic area."

Potential issues, however, include the meaning of a "general timeline" and whether an action could evade being part of that timeline by merely not being proposed. However, the definition outlines potential kinds of projects, specifically including "a number of separate projects" and calling out comprehensive resource management plans, which greatly aids in the application of EIS rules.

c. Define "mitigation," perhaps in reference to federal rules.

Neither the existing EIS rules nor the v. 1.0 of Chapter 11-200.1 includes a definition of "mitigation." As discussed further *infra*, mitigation is a key and controversial aspect of environmental impact review. Mitigation could be defined as steps required to be taken and that have effects including:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.
(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
(e) Compensating for the impact by replacing or providing substitute resources or environments. 40 C.F.R § 1508.20.

Defining "mitigation" in this way would allow greater guidance by reference to federal case law and also ensure a more reasonable interpretation of "mitigation" is used during the environmental impact assessment process.

4. <u>Use of prior exemptions, FONSIs, or EISs should follow a public notice process and explicitly require accounting for cumulative impacts.</u>

Proposed § 11-200.1-11 v 1.0 titled, "Use of Prior Exemptions, Findings of No Significant Impact, or Accepted Environmental Impact Statements to Satisfy Chapter 343, HRS for Proposed Activities" permits agencies to forego additional environmental review for three reasons:

(1) The proposed activity 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 programmatic EIS);
(2) The proposed activity 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, the proposed activity was analyzed within the range of alternatives.

Id. Under (1) and (2), it is unclear whether and how this use of exemptions, FONSIs, and prior EISs accounts for cumulative impacts beyond and additional to the earlier, reviewed action. That is, the "cumulative effects" are similar to those analyzed in the prior exemption, but this may be taken to mean the proposed action has a similar cumulative, *non-additive* impact as the earlier reviewed action. This confusion may be remedied as follows: "(2) The proposed activity**, when added to the prior reviewed action,** is anticipated to have direct, indirect, and cumulative effects similar to those analyzed in a prior exemption, final EA, or accepted EIS;"

Under (3), a FONSI may be issued for an FEA based on the selection of a particular alternative. Thus, additional environmental review in the form of full EIS preparation may be needed for a proposed activity, even where it was "analyzed within the range of alternatives" for a FEA. The third situation should be removed or amended to reflect: "(3) In the case of ~~**a final EA or**~~ an accepted EIS, the proposed activity was analyzed within the range of alternatives."

§ 11-200.1-11 (b) allows the agency to submit a determination that no further environmental review is needed to OEQC. Such a determination appears equivalent to a HRS chapter 343 exemption and should be subject to the same requirements as Proposed § 11-200.1-17 concerning Exemption Notices. At minimum, OEQC should require submission of the agency's determination and rationale and the same should be noticed in *The Environmental Notice* to ensure the public is informed of decision making that may affect their rights to a clean and healthful environment.

5. Exemption rules should address "grandfathered" actions and should not apply to actions of potential significant effect;

   a. *Exemptions for replacement or reconstruction of existing structures and facilities should not apply to nonconforming or grandfathered structures or facilities.*

The Environmental Council is given latitude to define the types of actions that "will probably have minimal or no significant effects on the environment" through its rules pursuant to HRS § 343-6(a)(2). Proposed §11-200.1-15 v. 1.0 titled, "General Types of Actions Eligible for Exemption" offers the following example as a type of action eligible for exemption:

> Replacement or reconstruction of existing structures and facilities where the new structure will be located generally on the same site and will have substantially the same purpose, capacity, density, height, and dimensions as the structure replaced;

§11-200.1-15 (c)(2). Many existing structures and facilities would unquestionably have triggered environmental review, had HRS chapter 343 existed at the time that they were installed. For example, certain stream diversions, seawalls, and other structures never underwent environmental review and have been determined to qualify as non-conforming grandfathered-in structures under HRS chapter 183C, which governs Conservation District Use Permits (CDUPs). Owners of structures that have obtained CDUPs are now seeking to renovate existing structures on the same footprints, but have balked at agency EA requirements, despite clear evidence of potential significant impacts.

The point of grandfathering is to not disturb existing rights, but the intent was also not to allow the exempted grandfathered structure to be perpetuated forever. This exemption should be stricken or language indicating that this exemption does not apply to non-conforming or grandfathered structures or facilities.

b. Exemptions should not apply if an action "may have significant impacts."

§11-200.1-15(d) operates to ensure consistency and purpose throughout the EIS rules, including rules that call out exemptions. Currently, however, subsection (d) provides: "All exemptions under subchapter 8 are inapplicable when the cumulative impact of planned successive actions in the same place, over time, is significant, or when an action that is normally insignificant in its impact on the environment may be significant in a particularly sensitive environment." (Emphasis added).

Instead, the exemption should not apply when the otherwise-exempted action "may have significant effects" and therefore we suggest amending subsection (d) as follows: "All exemptions under subchapter 8 are inapplicable when the cumulative impact of planned successive actions in the same place, over time, **may be significant**, or when an action that is normally insignificant in its impact on the environment may be significant in a particularly sensitive environment."

6. Require expert consultation for proposed mitigation measures.

Proposed §11-200.1-23, titled "Consultation Prior to Filing a Draft Environmental Impact Statement" requires under subsection (b) "[d]ata and analyses in a draft EIS shall be commensurate with the importance of the impact, . ." This requirement indicates that substantive data and analysis will be provided in reference to impacts, and particularly those that may be significant. Proposed §11-200.1-24 (p) requires that the draft EIS:

> consider mitigation measures proposed to avoid, minimize, rectify, or reduce impacts, including provision for compensation for losses of cultural, community, historical, archaeological, fish and wildlife resources, including the acquisition of land, waters, and interests therein. Description of any mitigation measures included in the action plan to reduce significant, unavoidable, adverse impacts to insignificant levels, and the basis for considering these levels acceptable shall be included. Where a particular mitigation measure has been chosen from among several alternatives, the measures shall be discussed and reasons given for the choice made. The draft EIS shall include, where possible, specific reference to the timing of each step proposed to be taken in any mitigation process, what performance bonds, if any, may be posted, and what other provisions are proposed to assure that the mitigation measures will in fact be taken.

Subsection (p) provides important guidance on mitigation, but should further include a requirement that the agency or applicant consult with an expert scholar or specialized agency on the likelihood that the mitigation will work as proposed. Alternatively, subsection (p) could require that a determination that a proposed mitigation measure is supported by a previous specific finding by a specialized agency or consultant in regard to the proposed action. Such additional requirements are reasonable because they are only addressed to mitigation of "likely significant impacts" and does not require consultation for all potential significant impacts.

7. Comments should be readable and responses should be substantive.

a. Comments reproduced in environmental disclosure documents should be readable.

Proposed HAR §§ §11-200.1-21 (Contents of a FEA) and §11-200.1-27 (Content requirements for FEISs) should be amended to require that comments and responses are readable by imposing minimum font size and page orientation requirements. Some EISs have reproduced comments in 7-point font and in landscape orientation. Many members of the public lack regular, convenient access to personal computers or hard copies of the environmental review documents, and often resort to reading the documents on phones. Such inconvenience may dissuade such members of the public from reading the documents and commenting. This situation may be avoided by amending HAR § 11-200.1-21(10) to provide:

> (10) Written comments, if any, and responses to the comments received, if any, pursuant to the early consultation provisions of section 11-200.1-18(a), and statutorily prescribed public review periods in accordance with section 11-200.1-20 **in a readable format of no less than 12 point font and in portrait orientation.**

Likewise, HAR § 11-200.1-27(b)(1) should be amended to provide:

> (1) The draft EIS prepared in compliance with this subchapter, as revised to incorporate substantive comments received during the review processes in conformity with section 11-200.1-26, including reproduction of all comments and responses to substantive written comments **in a readable format of no less than 12 point font and in portrait orientation**;

Court rules currently impose such specifications on pleadings. Imposing similar requirements is both reasonable and will help avoid shortcuts that thwart public participation in the environmental review process.

b. Substantive responses required for each fact and issue raised in "batched" comments under Proposed HAR § 11-200.1-26.

"Batched" comments, as used here, refers to form letters or petitions, that contain identical or near-identical language, and that raise the same issues on the same topic. They are efficient means whereby affected, concerned communities can mobilize and educate each other, agencies, and applicants about on-the-ground impacts of proposed actions. Where batched comments are received on an EA or EIS, there should be significant procedural safeguards in place for the public's environmental rights.

Batched comments or their responses are relevant to EAs and EISs. Proposed §11-200.1-19(e), addressing public review and response requirements for DEAs, and §11-200.1-26, addressing comment response requirements for DEISs, both allow for grouping of responses to topics raised and the omission of the requirement that all comments be reproduced in a final EA or EIS.

The multitudinous of batched comments means that each topic raised, and particularly where a raised topic was further elaborated on in the comment, should meet with a *substantive* response that fully addresses each fact and issue raised. At minimum, we suggest the following amendment to § 11-200.1-20(e):

(e) For comments that are form letters or petitions, that contain identical or near-identical language, and that raise the same issues on the same topic:
(1) The **substantive** response may be grouped, under subsection (d)(1), with the response to other comments under the same topic and issue with all commenters identified in the distinctly labeled section identifying commenters by topic **and name**; or
(2) A single **substantive** response may be provided that addresses all substantive comments**, point by point,** within the form letter or petition and that includes a distinct section listing the individual commenters who submitted the form letter or petition. At least one representative sample of the form letter or petition shall be appended to the final document;
provided that, if a commenter adds a distinct substantive comment to a form letter or petition, that comment must be responded to pursuant to subsection (d) **and reproduced in the final document**.

§ 11-200.1-20(e) (amended). §11-200.1-21, titled "Contents of a final environmental assessment," should also be amended to reflect:

Written comments, if any, and responses to the comments received, if any, pursuant to the early consultation provisions of section 11-200.1-18(a), and statutorily prescribed public review periods in accordance with section 11-200.1-20. **If applicable, at least one representative comment received as a form letter or petition and all distinctive comments received as part of a form letter or petition, as well as the substantive responses, must be included in the final document.**

§11-200.1-21 (amended). Similarly, §11-200.1-26, titled "Comment response requirements for draft environmental impact statements" should include parallel amendments under subsection (c).

8. Supplemental EIS rules should provide for changed circumstances and new information warranting review.

Proposed §11-200.1-30, addressing Supplemental Environmental Impact Statements (SEISs) provides that no SEIS is required "to the extent that the action has not changed substantively in size, scope, intensity, use, location or timing, among other things." This provision, however, does not address situations where the "action" has not changed, but the circumstances under which the action may have significant environmental impacts has changed. Proposed §11-200.1-30 should be amended to "changed circumstances" or new information. These were decisive in case law addressing SEISs in Hawai'i. For this reason, §11-200.1-30 should be amended to reflect:

An EIS that is accepted with respect to a particular action shall satisfy the requirements of this chapter and no supplemental EIS for that proposed action shall be required, to the extent that the **likelihood that an** action **may have significant impacts** has not changed substantively in size, scope, intensity, use, location, or timing, among other things. If there is any change in any of these characteristics **due to changes in the action, circumstances surrounding the action, or new information concerning the environmental impacts of the action** which may have a significant effect, the original statement that was changed shall no longer be valid because an essentially different

> action would be under consideration and a supplemental EIS shall be prepared and reviewed as provided by this chapter. As long as there is no change in a proposed action resulting in individual or cumulative impacts not originally disclosed, the EIS associated with that action shall be deemed to comply with this chapter.

§11-200.1-30(a) (amended).

9. Five-year review should be required where the action has not substantially commenced.

At its March 6, 2018 meeting, the Environmental Council considered a motion that sought to reinstate language from v. 0.2 which would require "substantial" progress or commencement within five years of the acceptance of an EIS, or else the EIS would be deemed void. In relevant part §11-200-27 (v 0.2) provided:

> The accepting authority or approving agency in coordination with the original accepting authority shall be responsible for determining whether a supplemental EIS is required. If a period of five years has elapsed since the acceptance of the final EIS, and program or project has not substantially commenced, the accepting authority or approving agency shall formally evaluate the need for a supplemental EIS and make a determination of whether a supplemental EIS is required. A written summary of this evaluation and the determination will be submitted to the office for publication in the periodic bulletin.

HRS chapter 343 document preparation is often a condition of permits for actions, during which permitting process further conditions and amendments may be imposed on the action and cause further delay to the program or project. This is particularly the case for actions that are controversial and have caused concern amongst various permitting authorities. In such cases, selected alternatives, new information, and changed circumstances should be re-evaluated in the context of the environmental review document. Requiring further formal evaluation after five years for actions that have not commenced would accomplish this aim.

10. Increase agency and applicant oversight and the public's confidence in the environmental review process.

There is no question that the legislature intended for our environment to be as carefully protected as possible. The Hawaii State Constitution and our statutes recognize the integral relationship between our environment and our economy.

> HRS § 341-1 Findings and purpose. The legislature finds that the quality of the environment is as important to the welfare of the people of Hawaii as is the economy of the State. The legislature further finds that the determination of an optimum balance between economic development and environmental quality deserves the most thoughtful consideration, and that the maintenance of the optimum quality of the environment deserves the most intensive care.

Current and proposed EIS rules permit agencies and applicants to prepare EAs and EISs for their own programs and projects. Although the governor or mayor is nominally positioned as

the final accepting authority, further safeguards would increase public confidence in the environmental review process. We recommend the following amendment to §11-200.1-7(e):

> (e) The office **(OEQC)** shall not serve as the accepting authority for any proposed agency or applicant action. **As part of and in addition to their review of time and procedural requirements, the office shall review both applicant- and agency-prepared EAs and EISs to determine whether responses to public comments were sufficient upon request by agencies or members of the public.**

Appropriate statutory authority exists to install OEQC's review of the sufficiency of responses to public comments upon request from agencies or members of the public. The Environmental Council is authorized to make rules that "[p]rescribe procedures for the submission, distribution, review, acceptance or nonacceptance, and withdrawal of an environmental impact statement[.]" HRS § 343-6(a)(7). The proposed amendment to §11-200.1-7(e) concerns procedures for the submission, distribution, review, acceptance of environmental disclosure documents. HRS § 343-5(c) provides, "The office, when requested by the agency, may make a recommendation as to the acceptability of the final statement." HRS chapter 341 anticipated that OEQC harbor the capacity to review EAs and EISs. In furtherance of its duties to direct agencies in matters concerning environmental quality, the OEQC Director is required to "[o]ffer advice and assistance to private industry, governmental agencies, or other persons upon request." HRS § 341-4(b)(7).

a. Require greater agency oversight over applicant-prepared documents.

Applicant-prepared environmental review documents currently lack sufficient oversight from agencies or other entities with duties to the public and Hawai'i's public trust. Adding further safeguards for applicant-prepared EAs and EISs would improve public confidence in the environmental review process. Applicants would be permitted to prepare environmental review documents for applicant actions and agencies may also permit applicants to prepare environmental review documents for agency actions. § 11-200.1-14(b) & (d)(2). Agencies approving the EAs/ EISs should be more stringently held accountable to ensuring the documents comply with HRS chapter 343 required content and procedures. This concern is not mere speculation. Several community groups, including the Sierra Club Maui Group and the Maui Tomorrow Foundation pointed out the appearance of impropriety in regard to an applicant-prepared EIS for a project that was responsive to a county-issued request for proposals (RFP). The applicant had been the only bidder for the county's RFP and the community groups subsequently challenged the EIS. Although not necessarily an issue applicable in all counties, one of the community groups' claims concerned Maui county agencies' unwritten rule of imposing stricter scrutiny on agency-prepared environmental documents. Agency staff were more directly answerable to the actions that their agencies proposed and their attentions to the EAs/EISs they prepared reflected this greater accountability.

Language in the current § 11-200.1-14 could be strengthened to increase public scrutiny and accountability for applicant-prepared EAs/EISs. As pointed out by Surfrider Foundation's comments on the HAR chapter 11-200.1 draft rules, under National Environmental Policy Act ("NEPA") regulations, if an agency allows an applicant to prepare an environmental assessment, the agency, in addition to other requirements, shall make its own evaluation of the environmental issue and take responsibility for the scope and content of the environmental assessment. 40

C.F.R. § 1506.5. Surfrider also noted the California Environmental Quality Act (CEQA) requires that applicant-prepared environmental disclosure documents must first be independently analyzed by an agency before being subject to public consideration. *See e.g,* California Code of Regulations § 15084(e) ("Before using a draft prepared by another person, the Lead Agency shall subject the draft to the agency's own review and analysis. The draft EIR which is sent out for public review must reflect the independent judgment of the Lead Agency. The Lead Agency is responsible for the adequacy and objectivity of the draft EIR.").

Similar provisions should be added to HAR chapter 11-200.1, which describes interactions between agencies and applicant-prepared environmental disclosure documents. For example, § 11-200.1-14, titled "Determination of level of environmental review" could be amended by adding a new provision as follows:

> (b) For an applicant action, within thirty days from the receipt of the applicant's complete request for approval to the approving agency, through its judgment and experience, an approving agency shall assess the significance of the potential impacts of the action, including the overall cumulative impact in light of related past, present, and reasonably foreseeable actions in the area affected, to determine the level of environmental review necessary for the action.
>
> [. . . .]
>
> (d) If the proposing agency or approving agency determines, through its judgment and experience, that the action is not eligible for an exemption, then the proposing agency shall prepare or the approving agency shall require the applicant to prepare an EA beginning with a draft EA in accordance with subchapter 9, unless:
>
> [. . . .]
>
> (2) The proposing agency or approving agency determines, through its judgment and experience that an EIS is likely to be required, then the proposing agency may choose to prepare, or an approving agency may authorize an applicant to prepare, an EIS in accordance with subchapter 10, beginning with preparation of an EISPN.
>
> **(e) The approving agency for all applicant-prepared EAs or EISs shall subject both the draft and final versions of the documents to the agency's own review and analysis. The draft EAs or EISs which are sent out for public review must reflect the independent judgment of the approving agency. The approving agency is responsible for the adequacy and objectivity of the draft and final EAs or EISs. If requested by the agency and/or the public, the FEA or FEIS should also be reviewed by OEQC as provided for in 11-200.1-7(e).**

§11-200.1-14 (proposed amendment in bold). The proposed language tracks that of the relevant CEQA provisions.

b. Require actual consideration of comments in preparing substantial responses.

Preparation of substantial, on-point, responses to public comments should be better assured in the environmental review process. In a recent example, members of the public submitted comments on a county-prepared DEA-AFNSI as late as the evening of the due date for comments, March 12, 2018. On March 13, 2018, the county issued a FEA-FONSI for the project. The FEA-FONSI later published in the OEQC Environmental Notice reflects that county responded to comments by letters dated March 12, 2018. Consequently, public commenters

rightly suspected responses to their comments were prepared prior to the submission of their comments, constituted canned-responses, or were assembled and inserted after the published date of the FEA-FONSI. In any case, public confidence in the ability of the EA review process to ensure their meaningful participation was totally undermined.

The potential for preparers to utilize insubstantial, canned statements in their responses to public comments and to approve a final EA or EIS without actual consideration of public comments could be avoided by strengthening provisions for responses in the following sections:

- §11-200.1-20 Public review and response requirements for draft environmental assessments.
- §11-200.1-23 Consultation prior to filing a draft environmental impact statement.
- §11-200.1-24 Content requirements; draft environmental impact statement.

11. Retain HAR §11-200-5(a) requirement to assess environmental impacts, including overall, cumulative impacts, and in light of related actions in the region and further actions contemplated at the earliest practicable time

Agencies and applicants are required to prepare an EA at the earliest practicable time to determine whether an EIS shall be required. HRS §343-5(b) & (e). Currently, HAR §11-200-5(a) provides further, more specific guidance that agencies "shall assess at the earliest practicable time the significance of potential impacts of its actions, including the overall, cumulative impact in light of related actions in the region and further actions contemplated." The proposed HAR chapter 200.1 lacks this significant guidance. Rather, § 11-200.1-18(a) tracks language under HAR §11-200-9(a)(1) concerning the timing of seeking advice from county agencies responsible for implementing general plans.

We strongly recommend retaining HAR §11-200-5(a) provisions requiring the assessment of significant potential impacts of its actions, including the overall, cumulative impact in light of related actions in the region and further actions contemplated at the earliest practicable time.

Mahalo nui for considering our testimony. We appreciate the time and effort that OEQC and the Environmental Council has taken with the rules and look forward to future drafts. Please direct any questions to myself at the address, email, and telephone number below.

(Bold underlined material added).

Mahalo nui,

Bridget Hammerquist, President
Friends of Maha'ulepu
P.O. Box: 1654
Koloa, HI 96756
friendsofmahaulepu.org
(808)742-1037

CHRIS HART & PARTNERS, INC.
Landscape Architecture
City & Regional Planning

June 5, 2018

Mr. Scott Glenn, Director
Office of Environmental Quality Control
235 South Beretania Street #702
Honolulu, HI 96813

Dear Mr. Glenn:

RE: Comments on the Proposed Update of Hawaii Administrative Rules Title 11, Department of Health Chapter 200, "Environmental Impact Statement Rules"

Thank you for the opportunity to comment on the proposed rule changes for Environmental Impact Statements.

Chris Hart and Partners Inc, is a land use planning firm located in Wailuku, on the island of Maui. Our firm prepares HRS 343 compliance documents on a regular basis. We appreciate OEQC's efforts in reviewing the current rules and proposing changes to enhance the process. We offer the following comments for your consideration:

- **Cumulative impacts:**
    - Specific guidance on the necessary analysis of cumulative impacts required for any proposed action should be provided to an applicant by a responsible party (accepting agency, approving authority or OEQC).
    - When other projects or actions in various stages of development are known to exist and require cumulative analysis, a responsible party should identify for the applicant which projects should be analyzed (i.e. which of the proposed and unrelated projects or actions are anticipated to occur).
    - As an alternative, a benchmark or threshold of progress for the likelihood of a proposed but uninitiated action which may require cumulative analysis should be established.
    - Baseline data from agencies should be established and made available for use in cumulative impact analysis.

- **Agency exemptions (Affordable Housing):**
    - Within the proposed rules Zoning is addressed. For Maui County specifically, the need (or lack of need) for Compliance with general and or community plans should also be addressed.
    - *Question:* In the context of "residential" does the scale/density need to be equal to the specific zone and or community plan designation? Should that be stated or is it already implied?

115 N. Market Street, Wailuku, Maui, Hawaii 96793-1717 • Ph 808-242-1955 • Fax 808-242-1956
www.chpmaui.com

- **Agency exemption notice:**
  - When an Agency exempts itself in error, it may never be known to the general public, or may become known sometime after work has been initiated.
    - It would be appropriate for agencies to disclose the details of anticipated exemptions for critical analysis by the general public prior to the initiation of action.
    - It would be appropriate for agencies to prepare an exemption notice with publication, including a reasonably detailed scope description with diagrams (i.e. 1-2 pages of text, 1-2 pages of diagrams of the proposed action).
    - This information should be disclosed at the earliest practical time, and should be hosted in OEQC's library for public access.
    - When not an emergency, it would be reasonable for an agency to give the public thirty (30) days to review and comment on a proposed exemption prior to the initiation of action.

Thank you for your consideration of our comments. Please feel free to call me at (808) 242-1955 or email Jhart@chpmaui.com should you have any questions.

Sincerely yours,

Jordan E. Hart, President

ENCLOSURES: ()

Cc.

Brett Davis bdavis@chpmaui.com (via email)
Raymond Cabebe Rcabebe@chpmaui.com (via email)

June 5, 2018

Office of Environmental Quality Control
235 South Beretania Street, Suite 702
Honolulu, HI 96813
ATTN: EIS Rules
TRANSMITTED VIA EMAIL ONLY

To whom it may concern,

This letter is in response to the State of Hawaii Department of Health's (DOH) proposed repeal of Hawaii Administrative Rules (HAR) Title 11 Chapter 200, "Environmental Impact Statement Rules" and adoption of Chapter 200.1, "Environmental Impact Statement Rules". According to Public Notice Docket No. R11-200-05018, this proposed repeal and adoption will "update and substantially revise rules regarding the system of environmental review at the state and county levels which shall ensure that environmental, economic, and technical concerns are given appropriate consideration in decision making in accordance with Chapter 343, Hawaii Revised Statues."

The Chamber of Commerce Hawaii ("The Chamber") is Hawaii's leading statewide business advocacy organization, representing about 2,000+ businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

The Chamber appreciates the opportunity to provide the following comments regarding the proposed changes to the HAR as they pertain to Environmental Impact Statement (EIS) processes.

- *Amended § 11-200.1-1(c)(3) (Purpose)* Conduct any required consultation as mutual, open and direct, two-way communication, in good faith, to secure the meaningful participation of agencies and the public in the environmental review process.
    - Comment: The requirement for "mutual, open and direct two-way communication, in good faith..." is aspirational in nature and very subjective. Agency staff and the public often lack the time and expertise to engage in such communications.
    - Recommended language: Make efforts to conduct any required consultation as mutual, open and direct, two-way communication, in good faith, to secure the meaningful participation of agencies and the public in the environmental review process.

- *Amended § 11-200.1-2 (Definitions) "Environmental assessment" or "EA" means a written evaluation that serves to provide sufficient evidence and analysis to determine whether an action may have a significant effect.*
    - Comment: This proposes to modify the definition of an EA from a written evaluation "to determine whether an action may have a significant environmental effect" to a written evaluation "that serves to provide sufficient evidence and analysis to determine whether an action may have a significant effect." It is clear that the proposed definition is more expansive and will likely require applicants to obtain more data and conduct additional analysis than is currently practiced. Furthermore, the use of the term "evidence" implies a legal standard.
    - Recommended language: Replace the word **"evidence"** with **"facts".**

- *Amended § 11-200.1-23 (d) (Consultation Prior to Filing a Draft Environmental Impact Statement) No fewer than one EIS public scoping meeting addressing the scope of the draft EIS shall be held on the island(s) most affected by the proposed action, within the public review and comment period in subsection (c). The EIS public scoping meeting shall include a separate portion reserved for oral public comments and that portion of the scoping meeting shall be audio recorded.*
    - Comment: The proposed revision that shifts the focus to written comments and removes the requirement to transcribe oral comments is a welcomed change. However, the inclusion of a new requirement for public oral comments during public scoping meetings and the need for such comments to be audio recorded offsets the efficiencies achieved in focusing on written comments. Additionally, there is some concern as to whether this requirement is met if no one elects to speak during the time allotted during the meeting.
    - Recommended language: **The EIS public scoping meeting shall include a separate portion reserved for oral public comments and that portion of the scoping meeting shall be audio recorded, if such oral comments are made.**

- *Amended §§11-200.1-18 (Preparation and Contents of a Draft Environmental Assessment); 11-200.1-21 (Contents of a Final Environmental Assessment); 11-200.1-24 (Content Requirements; Draft Environmental Impact Statement); and 11-200.1-27* (Content Requirements; Final Environmental Impact Statement)
    - Comment: The revised rules will require draft and final EAs and EISs to include an "analysis" of impacts and alternatives considered instead of an "identification and summary" of those impacts and alternatives. While it has been indicated by the Environmental Council that the substitution of the word "analysis" for "summary" is not intended to require a lengthy discussion, an "analysis" creates a different standard and likely requires a more lengthy and involved discussion than presently required. Additionally, whether the analysis is sufficient can be challenged as the term itself is subjective. Furthermore, the phrase "reasonably foreseeable" is a considerably subjective standard and will likely lead to challenges over whether the requirement has been satisfied.

- Recommended language:
  - §11-200.1-18 (7): **Identification and supporting information regarding impacts and alternatives considered;**
  - §11-200.1-21 (6)**: Identification and supporting information regarding impacts and alternatives considered;** and
  - §§11-200.1-24 and 11-200.1-27: Modify **"reasonably foreseeable consequences"** to **"reasonably foreseeable environmental consequences".**

Thank you for this opportunity to provide comments.

From: Lemmo, Sam J
To: Glenn, Scott J.
Subject: FW: OEQC amendments
Date: Tuesday, June 5, 2018 3:18:51 PM

Scott, we were thinking of something like this.

Mahalo
Sam Lemmo, Administrator
Department of Land and Natural Resources
Office of Conservation and Coastal Lands
(808) 587-0377

From: Habel, Shellie L
Sent: Tuesday, June 05, 2018 3:10 PM
To: Lemmo, Sam J <sam.j.lemmo@hawaii.gov>
Subject: OEQC amendments

Suggested additions are in bold.

In section 11-200.1-18 *Preparation and Contents of a Draft Environmental Assessment* we recommend adding (d) **(11) "Discussion of vulnerabilities and adaptation measures if proposed action will take place fully or partly within the State sea level rise exposure area".**

In section 11-200.1-18 *Preparation and Contents of a Draft Environmental Assessment* we recommend amending (d) (6) "Summary description of the affected environment, including suitable and adequate regional, location and site maps such as Flood Insurance Rate Maps, Floodway Boundary Maps, or United States Geological Survey topographic maps, **State sea level rise exposure maps**;"

In section 11-200.1-24 *Content Requirements; Draft Environmental Impact Statement* we recommend adding **"The draft EIS shall contain a separate and distinct section that provides State sea level rise exposure maps and discusses vulnerabilities and adaptation measures if proposed action will take place fully or partly within the State sea level rise exposure area".**

CARLSMITH BALL LLP

A LIMITED LIABILITY LAW PARTNERSHIP

ASB TOWER, SUITE 2100
1001 BISHOP STREET
HONOLULU, HAWAII 96813
TELEPHONE 808.523.2500 FAX 808.523.0842
WWW.CARLSMITH.COM

DIRECT DIAL NO.
808.523.2557

JLIM@CARLSMITH.COM

June 5, 2018

VIA E-MAIL: OEQCHAWAII@DOH.HAWAII.GOV

Director Scott Glenn
Office of Environmental Quality Control
S. Beretania Street, Suite 702
Honolulu, Hawaii 96813

Re: Comments to Version 1.0 Draft Hawaii Administrative Rules
Chapter 11-200 Environmental Impact Statement Rules

Dear Director Glenn:

Thank you for the opportunity to review and provide comments on Version 1.0 of the proposed revisions to Hawaii Administrative Rules Chapter 11-200. Please find attached hereto and incorporated herein a copy of Version 1.0 with my comments (comments #1 through #70) and suggested revisions in redline for the Environmental Council's consideration. I am a partner at the law firm Carlsmith Ball LLP, and I submit these comments on my own behalf, as an attorney who practices in the field of environmental law, and not on the behalf of any clients. As such, these comments should not be interpreted as affecting the legal position(s) of any of my law firm's past, present or future clients.

I commend the excellent work of the Office and the Environmental Council in preparing Version 1.0, and acknowledge the extensive and inclusive outreach efforts that were made prior to the preparation of Version 1.0. While it may appear at first glance that I am submitting an extensive number of comments and proposed revisions, several of the changes proposed are in the nature of "housekeeping" or "clean up" comments to address inconsistencies between the various sections of the rules, lack of clarity in language, and redundancy. Other comments relate to the statutory authority provided under Hawaii Revised Statutes Chapter 343, and proposed rules that go beyond that statutory authority.

I appreciate this opportunity to provide comments for the Council's consideration and look forward to the completion of this important process.

Sincerely,

Jennifer A. Lim

JAB1/jah
Attachment

4845-6269-0919.1

Attachment to June 5, 2018 letter from Jennifer A. Lim

SUBCHAPTER 1

PURPOSE

§11-200.1-1 Purpose. (a) Chapter 343, Hawaii Revised Statutes (HRS), establishes a system of environmental review at the state and county levels that shall ensure that environmental concerns are given appropriate consideration in decision-making along with economic and technical considerations. The purpose of this chapter is to provide agencies and persons with procedures, specifications regarding the contents of environmental assessments and environmental impact statements, and criteria and definitions of statewide application.

(b) EAs and EISs are meaningless without the conscientious application of the environmental review process as a whole, and shall not be merely a self-serving recitation of benefits and a rationalization of the proposed action. Agencies and applicants shall ensure that EAs and EISs are prepared at the earliest practicable time~~opportunity in the planning and decision-making process~~. This shall assure an early, open forum for discussion of adverse effects and available alternatives, and that the decision-makers will be enlightened to any environmental consequences of the proposed action prior to decision-making.

(c) In preparing any document, proposing agencies and applicants shall:

(1) Make every effort to convey the required information succinctly in a form easily understood, both by members of the public and by government decision-makers, giving attention to the substance of the information conveyed rather than to the particular form, or length, of the document;

(2) Take care to concentrate on important issues and to ensure that the document remains essentially self-contained, capable of being understood by the reader without the need for undue cross-reference.~~; and~~

~~(2) Conduct any required consultation as mutual, open and direct, two-way communication, in good faith, to secure the meaningful participation of~~

Comment [Public1]: Jennifer A. Lim.
There is a significant difference in the timing of the planning process and the decision-making process, therefore it is misleading to instruct people to prepare EAs at the earliest opportunity in the planning and decision-making process.
The planning process often starts several years before decision-making. Project planning can start well before the EA/EIS scoping. This language creates ambiguity on the appropriate timing for the preparation of an EA or EIS, particularly for applicant actions.

With regard to applicant actions, HRS § 343-5(e) makes it clear that an EA or EIS is required "at the earliest practicable time" in connection with the receipt of an application for approval of an action that requires discretionary consent from an agency. There is no need to attempt to further expound what is already clear in the law.

Comment [Public2]: Jennifer A. Lim.
The spirit in this subsection is understandable, but it is a statement of policy that cannot be measured in result, and therefore creates an unnecessary point for litigation.

~~agencies and the public in the environmental review process.~~

[Eff](Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-1, 343-6)

SUBCHAPTER 2

DEFINITIONS

§11-200.1-2 Definitions. As used in this chapter:

"Acceptance" means a formal determination that the document required to be filed pursuant to chapter 343, HRS, fulfills the consultation and content ~~definitions and~~ requirements of an EIS, as prescribed by section 11-200.1-28. Acceptance does not mean that the action is environmentally sound or unsound, but only that the document complies with chapter 343, HRS, and this chapter. A determination of acceptance is required prior to implementing or approving the action.

Comment [Public3]: Jennifer A. Lim.
What is meant by fulfilling the definitions of an EIS? The content requirements of an EIS are not set forth in the definitions.

"Accepting authority" means the official who, or agency that, makes the determination that a final EIS is required to be filed, pursuant to chapter 343, HRS, and whether ~~that~~ the final EIS fulfills the criteria necessary for acceptance. ~~definitions andrequirements of an EIS~~.

Comment [Public4]: Jennifer A. Lim.
The term "acceptance" is defined above and should be clear. Therefore, the term "accepting authority" should be able to rely on the term "acceptance." If not, then the term "acceptance" should be refined further.

"Action" means any program or project to be initiated by an agency or applicant.

"Addendum" means an attachment to a draft EA or draft EIS, prepared at the discretion of the proposing agency, applicant, or approving agency, and distinct from a supplemental EIS, for the purpose of disclosing and addressing clerical errors such as inadvertent omissions, corrections, or clarifications to information already contained in the draft EA or the draft EIS filed with the office.

Comment [Public5]: Jennifer A. Lim.
Shouldn't this also mention the "accepting authority"?

"Agency" means any department, office, board, or commission of the state or county government that is part of the executive branch of that government.

"Applicant" means any person that, pursuant to statute, ordinance, or rule, officially requests approval from an agency for a proposed action.

"Approval" means a discretionary consent required from an agency prior to implementation of an action.

"Approving agency" means an agency that issues an approval prior to implementation of an applicant action.

"Council" means the environmental council.

"Cumulative impact" means the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes the other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

"Discretionary consent" means a consent, sanction, or recommendation from an agency for which judgment and free will may be exercised by the issuing agency, as distinguished from a ministerial consent. Ministerial consent means a consent, sanction, or recommendation from an agency based upon a given set of facts, as prescribed by law without the use of judgment or discretion.

"Draft environmental assessment" means the EA submitted by a proposing agency or an approving agency for public review and comment when that agency anticipates a finding of no significant impact (FONSI).

"Effects" or "impacts" as used in this chapter are synonymous. Effects may include ecological effects (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic effects, historic effects, cultural effects, economic effects, social effects, or health effects, whether primary, secondary, or cumulative, immediate or delayed. Effects may also include those effects resulting from actions that may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

"EIS preparation notice", "EISPN", or "preparation notice" means a determination that an action may have a significant effect on the environment and, therefore, will require the preparation of an EIS, based on either an EA or an agency’s judgment and experience that the proposed action may have a significant effect on the environment.

"EIS public scoping meeting" means a meeting in which agencies, citizen groups, and the general public assist the proposing agency or applicant in determining the range of actions, alternatives, impacts, and proposed mitigation measures to be considered in the draft EIS and the

significant issues to be analyzed in depth in the draft EIS.

"Emergency action" means an action to prevent or mitigate loss or damage to life, health, property, or essential public services in response to a sudden unexpected occurrence demanding the immediate action.

"Environment" means humanity's surroundings, inclusive of all the physical, economic, cultural, and social conditions that exist within the area affected by a proposed action, including land, human and animal communities, health, air, water, minerals, flora, fauna, ambient noise, and objects of historic, cultural, or aesthetic significance.

"Environmental assessment" or "EA" means a written evaluation that serves to provide sufficient information ~~evidence~~ and analysis to determine whether an action may have a significant effect.

Comment [Public6]: Jennifer A. Lim.

The term "information" conveys the intent without the troublesome legal and evaluative connotations arising from the word "evidence."

"Environmental impact statement", "statement", or "EIS" means an informational document prepared in compliance with chapter 343, HRS. The initial EIS filed for public review shall be referred to as the draft EIS and shall be distinguished from the final EIS, which is the document that has incorporated the public's comments and the responses to those comments. The final EIS is the document that shall be evaluated for acceptability by the accepting authority.

"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.

"Final environmental assessment" means either the EA submitted by a proposing agency or an approving agency following the public review and comment period for the draft EA and in support of either a FONSI or an EISPN.

"Finding of no significant impact" or "FONSI" means a determination by an agency based on an EA that an action not otherwise exempt is not likely to ~~will not~~ have a significant effect on the environment and therefore does not require the preparation of an EIS. A FONSI is required prior to implementing or approving the action.

"Impacts" means the same as "effects".

"Issue date" means the date imprinted on the periodic bulletin required by section 343-3, HRS.

"Mitigation" means . . . .

"National Environmental Policy Act" or "NEPA" means the National Environmental Policy Act of 1969, Public Law 91-190, 42 U.S.C. sections 4321-4347, as amended.

"Office" means the office of environmental quality control.

"Periodic bulletin" or "bulletin" means the document required by section 343-3, HRS, and published by the office.

"Person" includes any individual, partnership, firm, association, trust, estate, private corporation, or other legal entity other than an agency.

"Primary impact", "primary effect", "direct impact", or "direct effect" means effects that are caused by the action and occur at the same time and place.

"Project" means a specific plan or design, or a ~~discrete,~~ planned undertaking that ~~has a defined beginning and end time,~~ is site-specific, and has a specific goal or purpose.

"Program" means a series of one of more projects to be carried out concurrently or in phases within a general timeline, that may include multiple sites or geographic areas, and is undertaken for a broad goal or purpose. A program may include: a number of separate projects in a given geographic area which, if considered singly, may have minor impacts, but if considered together, may have significant impacts; separate projects having generic or common impacts; an entire plan having wide application or restricting the range of future alternative policies or actions, including new significant changes to existing land use plans, development plans, zoning regulations, or agency comprehensive resource management plans; implementation of a

Comment [Public7]: Jennifer A. Lim

The rules should make clear what is meant by mitigation measures. Please provide a definition.

NEPA and CEQA both define "mitigation" in almost identical language. Council could use this definition. The NEPA definition 40 CFR 1508.20, provides: Mitigation includes:
(a) Avoiding the impact altogether by not taking a certain action or parts of an action.
(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
(e) Compensating for the impact by replacing or providing substitute resources or environments.

The Council should also clarify that the proposed mitigation measures are taken into consideration when an agency is deciding whether a proposed action may have a significant effect (i.e. the proposed mitigation measures are considered as part of the action when making a determination whether an EIS should be required). This concept is already present through the Draft EA content requirements, which includes a requirement for proposed mitigation measures. Nevertheless, the concept of mitigation should also be incorporated into the Significance Criteria under 11-200.1-13.
In other words, a FONSI can be issued based upon mitigation measures. This concept exists in the current rules (because the content requirements for a Draft EA include proposed mitigation measures), but clarity through express language would be helpful.

Comment [Public8]: Jennifer A. Lim.
This revision is proposed to make this definition closer to what was relied upon by the Hawaii Supreme Court in *Umberger*.

Additionally, there are projects that are of an on-going nature and therefore do not have defined end points or end times. For example, a forest management plan would not necessarily have an end time, it would be on-going, but it could still fit within the Court's definition of a "project."

The other deletions are to remove ambiguity and excess language.

single project or multiple projects over a long time frame; or implementation of a single project over a large geographic area.

"Proposing agency" means any state or county agency that proposes an action under chapter 343, HRS.

"Secondary impact", "secondary effect", "indirect impact", or "indirect effect" means an effect that is caused by the action and is later in time or farther removed in distance, but is still reasonably foreseeable. An indirect effect may include a growth-inducing effect and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air, water, and other natural systems, including ecosystems.

"Significant effect" or "significant impact" means the sum of effects on the quality of the environment, including actions that irrevocably commit a natural, cultural, or historic resource, curtail the range of beneficial uses of the environment, are contrary to the State's environmental policies or long-term environmental goals and guidelines as established by law, substantially adversely affect the economic welfare, social welfare, or cultural practices of the community and State, or are otherwise set forth in section 11-200.1-13.

"Supplemental EIS" means an updated EIS prepared for an action for which an EIS was previously accepted~~, but which has since changed substantively in size, scope, intensity, use, location, or timing, among other things~~.

"Trigger" means any use or activity listed in section 343-5(a), HRS, requiring preparation of an environmental assessment.

Unless defined in this section, elsewhere within this chapter, or in chapter 343, HRS, a proposing agency or approving agency may use its administrative rules or statutes that they implement to interpret undefined terms. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-2, 343-6)

SUBCHAPTER 3

COMPUTATION OF TIME

§11-200.1-3 Computation of time. In computing any period of time prescribed or allowed by this chapter, order

Comment [Public9]: Jennifer A. Lim.
This definition should more closely track the Significance Criteria in 1-13. Even if the definition isn't intended to recite all of the elements under 11-200.1-13, the elements that are intended to be recited should match the language in 1-13.

Comment [Public10]: Jennifer A. Lim.
Note that the clause "community and State" is consistent with statute, but not consistent with what is currently in section 11-200.1-13 (significance criteria). Cannot have conflicting terms within these rules.

However, the language used in this definition is correct and consistent with statute and legislative history. The language in current 11-200.1-13 is not correct.

The correct phrase is "community and State." In fact, HB2895 in 2000, which resulted in Act 50, initially contained the term "community or State" but that was intentionally changed in HB2895 HD1, which is what was enacted as Act 50, and the language is "community and State."

Comment [Public11]: Jennifer A. Lim.

This definition continues the existing ambiguity created by the definition, which does not address the additional language under existing 11-200-26 that makes it clear that the Supplemental EIS is required if changes to those characteristics may have a significant effect. This definition also ignores the proposed language in 11-200.1-30, which clarifies that if there are any such changes and those changes "may have a significant effect" then a SEIS shall be prepared.

Suggest a more simplified definition as follows:

"'Supplemental EIS' means an updated EIS prepared for an action for which an EIS was previously accepted."

The details of when a SEIS is required should be left to 11-200.1-30 (similar to the manner in which EIS and EA are defined in this Definitions section, without excessive detail) and not addressed in the Definitions section of the rules.

of the council, or by any applicable statute, the day of the act, event, or default after which the designated period of time is to run, shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or state holiday, in which case the last day shall be the next business day.

[Eff] (Auth: HRS §§1-29, 8-1, 343-6) (Imp: HRS §§1-29,8-1, 343-6)

SUBCHAPTER 4

FILING AND PUBLICATION IN THE PERIODIC BULLETIN

§11-200.1-4 Periodic bulletin. (a) The periodic bulletin shall be issued on the eighth and twenty-third days of each month.

(b) When filed in accordance with section 11-200.1-5, the office shall publish the following in the periodic bulletin to inform the public of actions undergoing chapter 343, HRS, environmental review and the associated public comment periods provided here or elsewhere by statute:

(1) Determinations that an existing exemption, FONSI, or accepted EIS satisfies chapter 343, HRS, for a proposed action~~activity~~;

(2) Exemption notices and lists of actions an agency has determined to be exempt;

(3) Draft EAs and appropriate addendum documents for public review and thirty-day comment period, including notice of an anticipated FONSI;

(4) Final EAs, including notice of a FONSI, or an EISPN with thirty-day comment period and notice of EIS public scoping meeting, and appropriate addendum documents;

(5) Notice of an EISPN with thirty-day comment period and notice of EIS public scoping meeting, and appropriate addendum documents;

(6) Evaluations and determinations that supplemental EISs are required or not required;

(7) Draft EISs, draft supplemental EISs, and appropriate addendum documents for public

Comment [Public12]: Jennifer A. Lim.

Chapter 343 does not come into play for matters ambiguously referred to as "proposed activities." Clearly this is a typo, and I believe the Council's new 11-200.1-11 contains the similar typo. This must be corrected.
The term "proposed activity" is far more broad than "proposed action" and using the term not only greatly exceeds statutory authority, it also creates an ambiguity.

review and forty-five day comment period;

(8) Final EISs, final supplemental EISs, and appropriate addendum documents;

(9) Notice of acceptance or non-acceptance of EISs and supplemental EISs;

(10) Republication of any chapter 343, HRS, notices, documents, or determinations;

(11) Notices of withdrawal of any chapter 343, HRS, notices, documents, or determinations; and

(12) Other notices required by the rules of the council.

(c) When filed in accordance with this subchapter, the office shall publish other notices required by statute or rules, including those not specifically related to chapter 343, HRS.

(d) The office may, on a space or time available basis, publish other notices not specifically related to chapter 343, HRS.

[Eff] Auth: HRS §§341- 3, 343-5, 343-6) (Imp: HRS §§341-3, 343-3, 343-6)

§11-200.1-5 Filing requirements for publication and withdrawal. (a) Anything required to be published in the bulletin shall be submitted to the office before the close of business four business days prior to the issue date, which shall be the issue date deadline.

(b) All submittals to the office for publication in the bulletin shall be accompanied by a completed informational form that provides whatever information the office has determined in advance it needs to properly notify the public. The information requested may include the following: the title of the action; the islands affected by the proposed action; tax map key numbers; street addresses; nearest geographical landmarks; latitudinal and longitudinal coordinates or other geographic data; applicable permits, including for applicants, the approval requiring chapter 343, HRS, environmental review; whether the proposed action is an agency or an applicant action; a citation to the applicable federal or state statutes requiring preparation of the

Comment [Public13]: Jennifer A. Lim.

Suggest this minor addition to tie into the term "issue date deadline" used in subsection (c).

Comment [Public14]: Jennifer A. Lim.

The current language is far too open ended, and could result in less than uniform requirements being imposed by the office, and therefore little predictability and therefore lack of due process.

Proposed revision is intended to at least avoid the possibility of a surprise for the agency or applicant making the submission.

Would prefer that the office stated its affirmative duty to post the required forms online, and agencies and applicants have the obligation to complete those forms.

Comment [Public15]: Jennifer A. Lim.

Recognizing that this sentence is not stating affirmative obligations, but rather possible requirements, it would nevertheless be helpful for the Council to clarify if **all** triggers and approvals should be listed, or if listing only one, when there may in fact be more than one, will suffice.

In light of the fact that many projects require more than one approval under 343, and that certain triggers may be uncovered during the environmental review process itself, it seems appropriate that listing only one trigger should be sufficient.

document; the type of document prepared; the names, addresses, email addresses, phone numbers and contact persons as applicable of the accepting authority, the proposing agency, the approving agency, the applicant, and the consultant; and a brief narrative summary of the proposed action. ~~that provides sufficient detail to convey the full impact of the proposed action to the public~~.

(c) The office shall not accept untimely submittals or revisions thereto after the issue date deadline for which the submittal was originally filed has passed.

(d) In accordance with the agency's rules or, in the case of an applicant EA or EIS, the applicant's judgment, anything filed with the office may be withdrawn by the agency or applicant that filed the submittal with the office. To withdraw a submittal, the agency or applicant shall submit to the office a written letter informing the office of the withdrawal. The office shall publish notice of withdrawals and the rationale in accordance with this subchapter.

(e) To be published in the bulletin, all submittals to the office shall meet the filing requirements in subsections (a)to(c) and be prepared in accordance with this chapter and chapter 343, HRS, as appropriate. The following shall meet additional filing requirements:

(1) When the document is a draft EA with an anticipated FONSI, the proposing agency or approving agency shall:

(A) File the document and determination with the office;

(B) Deposit, or require the applicant to deposit, concurrently with the filing to the office, one paper copy of the draft EA at the nearest state library in each county in which the proposed action is to occur and one paper copy at the Hawaii Documents Center; and

(C) Distribute, or require the applicant to distribute, concurrently with its publication, the draft EA to other agencies having jurisdiction or expertise as well as citizen groups and individuals that the proposing agency reasonably believes to be affected;

(2) When the document is a final EA with a FONSI, the

Comment [Public16]: Jennifer A. Lim.

Although I assume the term "consultant" is intended to mean the EA or EIS preparer, that is not defined anywhere.

Comment [Public17]: Jennifer A. Lim.

Deletion suggested because it is unclear what nature of brief summary would have the ability to "convey the full impact of the proposed action to the public." All of these words are not needed, and in fact create a litigation risk due to confusing standards.

A brief narrative summary of the proposed action should be sufficient to provide enough information so that members of the public can determine if they want to review the actual document.

proposing agency or approving agency shall:

(A) Incorporate, or require the applicant to incorporate, the FONSI into the contents of the final EA, as prescribed in sections 11- 200.1-21 and 11-200.1-22;

(B) File the final EA and the incorporated FONSI with the office; and

(C) Deposit, or require the applicant to deposit, concurrently with the filing to the office, one paper copy of the final EA with the Hawaii Documents Center;

(3) When the document is a final EA with an EISPN, the proposing agency or approving agency shall:

(A) Incorporate, or require the applicant to incorporate, the EISPN into the contents of the final EA, as prescribed in sections 11-200.1-21, 11-200.1-22, and 11-200.1-23;

(B) File the incorporated EISPN with the final EA; and

(C) Deposit, or require the applicant to deposit, concurrently with the filing to the office, one paper copy of the final EA with the Hawaii Documents Center;

(4) When the notice is an EISPN without the preparation of an EA, the proposing agency or approving agency shall:

(A) File the EISPN with the office; and

(B) Deposit, or require the applicant to deposit, concurrently with the filing to the office, one paper copy of the EISPN at the nearest state library in each county in which the proposed action is to occur and one paper copy at the Hawaii Documents Center;

(5) When the document is a draft EIS, the proposing agency or applicant shall:

(A) Sign and date the draft EIS;

(B) Indicate that the draft EIS and all

Comment [Public18]: Jennifer A. Lim.

Note that in this section you are requiring the proposing agency or applicant to sign and date the draft EIS. Is the intention to preclude the EIS preparer (the undefined "consultant") from signing and dating the draft EIS?

ancillary documents were prepared under the signatory's direction or supervision and that the information submitted, to the best of the signatory's knowledge fully addresses document content requirements as set forth in subchapter 10;

(C) File the draft EIS with the accepting authority and the office simultaneously;

(D) Deposit, or require the applicant to deposit, concurrently with the filing to the office, one paper copy of the draft EIS at the nearest state library in each county in which the proposed action is to occur and one paper copy at the Hawaii Documents Center; and

(E) Submit to the office one true and correct copy of the original audio file, at standard quality, of all oral comments received at the time designated within the EIS public scoping meeting(s) for receiving oral comments;

(6) When the document is a final EIS, the proposing agency or applicant shall:

(A) Sign and date the final EIS;

Comment [Public19]: Jennifer A. Lim.

Same as comment #18. Is the Council intentionally requiring the proposing agency or applicant to sign and date the final EIS. Is the intention to preclude the EIS preparer from signing and dating the final EIS?

(B) Indicate that the final EIS and all ancillary documents were prepared under the signatory's direction or supervision and that the information submitted, to the best of the signatory's knowledge fully addresses document content requirements as set forth in subchapter 10; and

(C) File the final EIS with the accepting authority and the office simultaneously;

(7) When the notice is an acceptance or non-acceptance of a final EIS, the accepting authority shall:

(A) File the notice of acceptance or non-acceptance of a final EIS with the office; and

(B) Simultaneously transmit the notice to the proposing agency or applicant;

(8) When the notice is of the withdrawal of an anticipated FONSI, FONSI, or EISPN, the proposing agency or approving agency shall include a rationale of the withdrawal specifying any associated documents to be withdrawn;

(9) When the notice is of the withdrawal of a draft EIS or final EIS, the proposing agency or applicant shall simultaneously file the notice with the office and submit the notice with the accepting authority; and

(10) When the submittal is a changed version of a notice, document, or determination previously published and withdrawn, the submittal shall be filed as the "second" submittal, or "third" or "fourth", as appropriate. Example: A draft EIS is withdrawn and changed. It is then filed with the office for publication as the "second draft EIS" for the particular action.

[Eff](Auth: HRS §§343-3, 343-5, 343-6)(Imp: HRS §§341-3, 343-3, 343-6)

§11-200.1-6 Republication of notices, documents, and determinations. (a) An agency or applicant responsible for filing a chapter 343, HRS, notice, document, or determination may file an unchanged, previously published submittal in the bulletin provided that the filing requirements of this subchapter and any other publication requirements set forth in this chapter or chapter 343, HRS, are satisfied.

(b) When the publication of a previously published chapter 343, HRS, notice, document, or determination involves a public comment period under this chapter or chapter 343, HRS:

(1) The public comment period shall be as required for that notice, document, or determination pursuant to this chapter or chapter 343, HRS, or as otherwise statutorily mandated (for example, publication of an unchanged draft EIS initiates a forty-five day public comment period upon publication in the bulletin); and

(2) Any comments received during the comment period must be considered in the same manner as set

Comment [Public20]: Jennifer A. Lim.

Please clarify, must previously published Draft EA or Draft EIS be withdrawn in order for a Second Draft EA or Second Draft EIS to be published? This language suggests that to be the case.

In the case of withdrawal of a Draft EIS, are the comments received in response to the initial Draft EIS valid for standing to bring a challenge under HRS 343-7(c)? Or are the comments received in response to the initial (and subsequently withdrawn) Draft EIS disregarded for that purpose?

forth in this chapter and chapter 343, HRS, for that notice, document, or determination type, in addition to comments received in any other comment period associated with the publication of the notice, document, or determination.

[Eff] (Auth: HRS §§341-3, 343-5, 343-6) (Imp: HRS §§341-3, 343-3, 343-5, 343-6)

SUBCHAPTER 5

RESPONSIBILITIES

§11-200.1-7 Identification of approving agency and accepting authority. (a) Whenever an agency proposes an action, the authority to accept an EIS shall rest with:

(1) The governor, or the governor's authorized representative, whenever an action proposes the use of state lands or state funds or whenever a state agency proposes an action under section 11- 200.1-8; or

(2) The mayor, or the mayor's authorized representative, of the respective county whenever an action proposes only the use of county lands or county funds.

If an action involves state and county lands, state and county funds, or both state and county lands and funds, the governor or the governor's authorized representative shall have the authority to accept the EIS.

(b) Whenever an applicant proposes an action, the authority for requiring an EA or EIS, making a determination regarding any required EA, and accepting any required EIS shall rest with the approving agency that initially received and agreed to process the request for an approval. With respect to EISs, this approving agency is also called the accepting authority.

(c) If more than one agency is proposing the action or, in the case of applicants, more than one agency has jurisdiction over the action, and these agencies are unable to agree as to which agency has the responsibility for complying with chapter 343, HRS, the agencies involved shall consult with one another to determine which agency is responsible for compliance. In making the decision, the agencies shall take into consideration, including but not limited to the following factors:

Comment [Public21]: Jennifer A. Lim.

This is problematic with respect to applicant actions. The language assumes that an agency will question its own authority/jurisdiction. More likely, if an applicant approaches agency A and agency A has jurisdiction, the inquiry stops. As it should. Neither agency A nor the applicant should have to chase down potential agency B or C to make sure that those agencies are ok with agency A being the approving agency or accepting authority.

(1) Which agency has the greatest responsibility for supervising or approving the action as a whole;

(2) Which agency can most adequately fulfill the requirements of chapter 343, HRS, and this chapter;

(3) Which agency has special expertise or greatest access to information relevant to the action's implementation and impacts;

(4) The extent of participation of each agency in the action; and

(5) In the case of an action with proposed use of state or county lands or funds, which agency has the most land or funds involved in the action.

(d) If there is more than one agency that is proposing the action, or in the case of applicants, more than one agency has jurisdiction over the action, and after applying the criteria in subsection (c) these agencies are unable to agree as to which agency has the responsibility for complying with chapter 343, HRS, the office, after consultation with the agencies involved, shall apply the same considerations in subsection (c) to decide which agency is responsible for compliance.

(e) The office shall not serve as the accepting authority for any proposed agency or applicant action.

(f) The office may provide recommendations to the agency or applicant responsible for the EA or EIS regarding any applicable administrative content requirements set forth in this chapter.
[Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

SUBCHAPTER 6

APPLICABILITY

§11-200.1-8 Applicability of chapter 343, HRS, to agency actions. (a) Chapter 343, HRS, environmental review shall be required for any agency action that includes one or more triggers as identified in section 343- 5(a), HRS.

(1) Under section 343-5(a), HRS, use of state or county funds shall include any form of funding assistance flowing from the State or a county, and use of state or county lands includes any use

(title, lease, permit, easement, license, etc.) or entitlement to those lands.

(2) Under section 343-5(a), HRS, any feasibility or planning study for possible future programs or projects that the agency has not approved, adopted, or funded are exempted from chapter 343, HRS, environmental review. Nevertheless, if an agency is studying the feasibility of a proposal, it shall consider environmental factors and available alternatives and disclose these in any future EA or EIS. If the planning and feasibility studies involve testing or other actions that may have a significant impact on the environment, an EA or EIS shall be prepared.

Comment [Public22]: Jennifer A. Lim.

This is problematic language because an EA cannot be prepared if the proposed actions may have a significant impact on the environment. In such a case, an EIS must be prepared. My suggestion is to strike the entire sentence as excessive because it is unnecessary. Actions, whether testing or otherwise, will require 343 review, so there's no need to restate that here. Having this sentence merely creates confusion.

(3) Under section 343-5(a)(1), HRS, actions involving agricultural tourism under section 205-2(d)(11), HRS, or section 205-4.5(a)(13), HRS, must perform environmental review only when required under section 205-5(b), HRS.

(b) When an agency proposes an action during a governor-declared state of emergency, the proposing agency shall document in its records that the emergency action was undertaken pursuant to a specific emergency proclamation. If the emergency action has not substantially commenced within sixty days of the emergency proclamation, the action will be subject to chapter 343, HRS.

(c) In the event of a sudden unexpected emergency causing or likely to cause loss or damage to life, health, property, or essential public service, but for which a declaration of a state of emergency has not been made, a proposing agency undertaking an emergency action shall document in its records that the emergency action was undertaken pursuant to a specific emergency and shall include the emergency action on its list of exemption notices for publication by the office in the bulletin pursuant to section 11-200.1-17(d) and subchapter 4. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

§11-200.1-9 Applicability of chapter 343, HRS, to applicant actions. (a) Chapter 343, HRS, environmental review shall be required for any applicant action that:

(1) Requires one or more approvals prior to implementation; and

(2) Includes one or more triggers identified in section 343-5(a), HRS.

(A) Under section 343-5(a), HRS, use of state or county funds shall include any form of funding assistance flowing from the State or a county, and use of state or county lands includes any use (title, lease, permit, easement, license, etc.) or entitlement to those lands.

(B) Under section 343-5(a)(1), HRS, actions involving agricultural tourism under section 205-2(d)(11) or section 205-4.5(a)(13), HRS, must perform environmental review only when required under section 205-5(b), HRS.

(b) Chapter 343, HRS, does not require environmental review for applicant actions when:

(1) Notwithstanding any other law to the contrary, for any primary action that requires a permit or approval that is not subject to a discretionary consent and that involves a secondary action that is ancillary and limited to the installation, improvement, renovation, construction, or development of infrastructure within an existing public right-of-way or highway, that secondary action shall be exempt from this chapter; provided that the applicant for the primary action shall submit documentation from the appropriate agency confirming that no further discretionary approvals are required.

(2) As used in this subsection:

(A) "Discretionary consent" means an action as defined in section 343-2, HRS; or an approval from a decision-making authority in an agency, which approval is subject to a public hearing.

(B) "Infrastructure" includes waterlines and water facilities, wastewater lines and wastewater facilities, gas lines and gas facilities, drainage facilities, electrical, communications, telephone, and cable television utilities, and highway, roadway, and driveway improvements.

(C) "Primary action" means an action outside of the highway or public right-of-way that is

on private property.

(D) "Secondary action" means an action involving infrastructure within the highway or public right-of-way.

[Eff] (Auth: HRS §§343-5, 343-5.5, 343-6) (Imp: HRS §§343-5, 343.5.5, 343-6)

§11-200.1-10 Multiple or phased actions. A group of actions proposed by an agency or an applicant shall be treated as a single action when:

(1) The component actions are phases or increments of a larger total undertaking;

(2) An individual action is a necessary precedent to a larger action;

(3) An individual action represents a commitment to a larger action; or

(4) The actions in question are essentially identical and a single EA or EIS will adequately address the impacts of each individual action and those of the group of actions as a whole.

[Eff] (Auth: HRS §§343-5, 343-6) (Imp:HRS §343-6)

§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~~activities~~. (a) When an agency is considering whether a prior exemption, FONSI, or an accepted EIS satisfies chapter 343, HRS, for a proposed action~~activity~~, the agency may determine that additional environmental review is not required because:

(1) The proposed action~~activity~~ 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_~~matic~~ EIS);

(2) The proposed action_~~activity~~ 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, the proposed action_~~activity~~ was analyzed within the

Comment [Public23]: Jennifer A. Lim.

Perhaps should use the newly defined term "program" here in the place of undertaking.

Comment [Public24]: Jennifer A. Lim.

There is no legal basis for requiring any environmental review for "proposed activities." HRS 343-5 is quite clear that that review is required for "actions." And for applicants, the review is required for "actions" that require discretionary consent.

This proposed rule impermissibly attempts to expand Chapter 343 coverage to something more than actions. That is not authorized under statute. Every instance of the term "proposed activity" must be corrected to "proposed action."

Comment [Public25]: Jennifer A. Lim.

Without defining the term "programmatic EIS" the use of this term raises confusion. Consider if simply calling it a "program EIS" would provide clarity.

range of alternatives.

(b) When an agency determines that a prior exemption, FONSI, or an accepted EIS satisfies chapter 343, HRS, for a proposed action, ~~activity,~~ the agency may submit a brief written determination explaining its rationale to the office for publication pursuant to section 11-200.1-4 and the proposed action ~~activity~~ may proceed without further chapter 343, HRS, environmental review.

(c) When an agency determines that the proposed action ~~activity~~ warrants environmental review, the agency may submit a brief written determination explaining its rationale to the office for publication pursuant to section 11-200.1-4 and the agency shall proceed to comply with subchapter 7.
[Eff](Auth: HRS §§343-5, 343-6)(Imp: HRS §§343-5, 343-6)

SUBCHAPTER 7

DETERMINATION OF SIGNIFICANCE

§11-200.1-12 Consideration of previous determinations and accepted statements. A proposing agency or applicant may incorporate by reference or otherwise information or analysis from a relevant prior exemption notice, final EA, or accepted EIS into an exemption notice, EA, EISPN, or EIS, for a proposed action whenever the information or analysis is pertinent and has logical relevancy and bearing to the proposed action (for example, a project that was broadly considered as part of an accepted program ~~matic~~ EIS may incorporate by reference relevant portions from the accepted program~~matic~~ EIS by reference).
[Eff] (Auth: HRS §§343-5, 343-6)(Imp: HRS §§343-5, 343-6)

§11-200.1-13 Significance criteria. (a) In considering the significance of potential environmental effects, agencies shall consider and evaluate the sum of effects of the proposed action on the quality of the environment. ~~and shall evaluate the overall and cumulative effects of an action~~.

(b) In determining whether an action may have a significant effect on the environment, the agency shall consider every phase of a proposed action, the expected impacts, ~~both primary and secondary, and the cumulative as well as the short-term and long-term effects of the action~~, and the proposed mitigation measures. In most instances, an action shall be determined to have a significant effect on the environment if it is likely to:

Comment [Public26]: Jennifer A. Lim.

Recommend making it clear that the information is sufficient if properly cited and identified as being incorporated by reference. There's no benefit to making any one document voluminous merely to add reports, etc., that were already published.

Comment [Public27]: Jennifer A. Lim.

Consider using the term "program EIS" which is consistent with the defined terms in these rules rather that introducing the undefined term "programmatic."

Comment [Public28]: Jennifer A. Lim.

Deletion suggested to clarify and keep language consistent. Taken as originally drafted, the suggestion is that the agencies only must consider "overall" effects (and overall is not defined) and "cumulative" effects. But that is not true. Effects include primary, secondary, cumulative, immediate and delayed (see definition of "effects" or "impacts"). Therefore, rely on the defined terms the Council has established and remove excessive language that creates an ambiguity.

Comment [Public29]: Jennifer A. Lim.

Suggest deleting "both primary and secondary" etc. because that is all covered under the defined term "effects" or "impacts."

Comment [Public30]: Jennifer A. Lim.

Addition proposed in connection with comment in Definition section (Comment #7) regarding the need for a definition for "mitigation" and the need to clarify that mitigation measures are taken into account when determining whether a proposed action is likely to have a significant effect on the environment.

(1) Irrevocably commit a natural~~, cultural, or historic~~ resource;

(2) Curtail the range of beneficial uses of the environment;

(3) Conflict with the State's environmental policies or long-term environmental goals established by law;

(4) Have a substantial adverse effect on the economic welfare, social welfare, or cultural practices of the community or State;

(5) Have a substantial adverse effect on public health;

(6) Involve adverse secondary impacts, such as population changes or effects on public facilities;

(7) Involve a substantial degradation of environmental quality;

(8) Is individually limited but cumulatively has substantial adverse effect upon the environment or involves a commitment for larger actions that are likely to have a substantial adverse effect upon the environment;

(9) Have a substantial adverse effect on a rare, threatened, or endangered species, or its habitat;

(10) Have a substantial adverse effect on air or water quality or ambient noise levels;

(11) Have a substantial adverse effect on or is likely to suffer damage by being located in an environmentally sensitive area such as a flood plain, tsunami zone, sea level rise exposure area, beach, erosion-prone area, geologically hazardous land, estuary, fresh water, or coastal waters;

(12) Have a substantial adverse effect on scenic vistas and viewplanes, during day or night, identified in current, final county or state plans or studies; or

Comment [Public31]: Jennifer A. Lim.

The term "historic" has no place in subsection (1), and the council's "Rationale" document provides an alarming explanation for why it was inserted here.

In the Rationale it is explained that "historic sites are a trigger in chapter 343, HRS and are given prominent consideration in the environmental review process." It is true that "historic sites" are given special attention in chapter 343, but "historic resources" are not.

The special attention is found in HRS 343-5(a)(4), which makes the use of any "historic site as designated in the National Register or Hawaii Register" a trigger for environmental review. However, there is a world of difference between historic sites so designated (there is a process for such sites getting designated), and the council's proposed, undefined and therefore ambiguous, term "historic resource." The term "historic resource" invites litigation. HRS 6E (which is not within the ambit of HRS 343) defines "historic property" as "any building, structure, object, district, area, or site, including heiau and underwater site, which is over fifty years old." Is the council's intent to say ... [1]

Comment [Public32]: Jennifer A. Lim.

This deletion is required to be within the statutory authority under HRS 343. Please see definition of "significant effect" under HRS 343-2.

Recommend not attempting to expand upon what is provided by statute, when the statutory language establishes a more clear standard. Impacts to cultural practices is addressed in (4). There is no need to depart from statute and try to jam it into (1) as well.

Comment [Public33]: Jennifer A. Lim.

This term "community or State" is not consistent with the definition of "Significant Effect" where you use the correct term "community and State."

Note that Act 50 (2000) codified in HRS 343-2 (Definitions) uses the term "the community and State" in the definition of Significant Effect (not "community or State"). Furthermore, the legislature intentionally used the word "and" instead of "or." In version one of HB2895 the term used was "community or State" but in the final version (HB2985 HD1), that was changed to "community and State." Based on that history, this rule goes beyond what was intended by statute.

Comment [Public34]: Jennifer A. Lim.

Clarification suggested in recognition that county and state plans often take years to prepare and there are several iterations of draft plans during that process, and also that county and state plans change over time, so what was previously not identified as a scenic vista in a county plan may be so identified in a later plan. The significant effect analysis should be based upon the final published plan in effect at the time the analysis is taking place.

(13) Require substantial energy consumption or emit substantial greenhouse gases.

[Eff](Auth: HRS §§343-5, 343-6)(Imp: HRS §§343-2, 343-6)

§11-200.1-14 Determination of level of environmental review. (a) For an agency action, through its judgment and experience, a proposing agency shall assess the significance of the potential impacts of the action, including the overall cumulative impact in light of related past, present, and reasonably foreseeable actions in the area affected, to determine the level of environmental review necessary for the action.

(b) For an applicant action, within thirty days from the receipt of the applicant's complete request for approval to the approving agency, through its judgment and experience, an approving agency shall assess the significance of the potential impacts of the action, ~~including the overall cumulative impact in light of related past, present, and reasonably foreseeable actions in the area affected,~~ to determine the level of environmental review necessary for the action.

Comment [Public35]: Jennifer A. Lim.

Deletion suggested because the term "impacts" includes primary, secondary, and cumulative, and the defined term "cumulative" addresses past, present and reasonably foreseeable future actions. Therefore there is no need to add this extraneous language. Every time the council adds fluff around the use of a defined term within these rules, it calls into question the validity of the definition.

(c) If the proposing agency or approving agency determines, through its judgment and experience, that the action will individually and cumulatively probably have minimal or no significant effects, and the action is one that is eligible for exemption under subchapter 8, then the agency or the approving agency in the case of an applicant may prepare an exemption notice in accordance with subchapter 8.

(d) If the proposing agency or approving agency determines, through its judgment and experience, that the action is not eligible for an exemption, then the proposing agency shall prepare or the approving agency shall require the applicant to prepare an EA beginning with a draft EA in accordance with subchapter 9, unless:

(1) In the course of preparing the draft EA, the proposing agency or approving agency determines, through its judgment and experience, that the action may have a significant effect and therefore require preparation of an EIS, then the proposing agency may prepare, or the approving agency may authorize the applicant to prepare an EA as a final EA to support the determination prior to preparing or requiring preparation of an EIS in accordance with subchapter 10; or

(2) The proposing agency or approving agency determines, through its judgment and experience that an EIS is likely to be required, then the proposing agency may choose to prepare, or an approving agency may authorize an applicant to prepare, an EIS in accordance with subchapter 10, beginning with preparation of an EISPN.

[Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

SUBCHAPTER 8

EXEMPT ACTIONS, LIST, AND NOTICE REQUIREMENTS

§11-200.1-15 General types of actions eligible for exemption. (a) Some actions, because they will individually and cumulatively probably have minimal or no significant effects, can be declared exempt from the preparation of an EA.

(b) Actions declared exempt from the preparation of an EA under this subchapter are not exempt from complying with any other applicable statute or rule.

(c) The following general types of actions are eligible for exemption:

(1) Operations, repairs, or maintenance of existing structures, facilities, equipment, or topographical features, involving minor expansion or minor change of use beyond that previously existing;

(2) Replacement or reconstruction of existing structures and facilities where the new structure will be located generally on the same site and will have substantially the same purpose, capacity, density, height, and dimensions as the structure replaced;

(3) Construction and location of single, new, small facilities or structures and the alteration and modification of the facilities or structures and installation of new, small equipment or facilities and the alteration and modification of the equipment or facilities, including, but not limited to:

(A) Single-family residences less than 3,500 square feet, as measured by the controlling law under which the proposed action is being considered, if not in conjunction with the building of two or more such units;

(B) Multi-unit structures designed for not more than four dwelling units if not in conjunction with the building of two or more such structures;

(C) Stores, offices, and restaurants designed for total occupant load of twenty individuals or fewer per structure, if not in conjunction with the building of two or more such structures; and

(D) Water, sewage, electrical, gas, telephone, and other essential public utility services extensions to serve such structures or facilities; accessory or appurtenant structures including garages, carports, patios, swimming pools, and fences; and, acquisition of utility easements;

(4) Minor alterations in the conditions of land, water, or vegetation;

(5) Basic data collection, research, experimental management, and resource and infrastructure testing and evaluation activities that do not result in a serious or major disturbance to an environmental resource;

(6) Demolition of structures, except those structures that are listed on ~~or that meet the criteria for listing on~~ the national register or Hawaii Register of Historic Places;

Comment [Public36]: Jennifer A. Lim.

Revision to be consistent with statute. Merely meeting the criteria for listing is not sufficient.

(7) Zoning variances except shoreline setback variances;

(8) Continuing administrative activities;

(9) Acquisition of land and existing structures, including single or multi-unit dwelling units, for the provision of affordable housing, involving no material change of use beyond previously existing uses, and for which the legislature has appropriated or otherwise authorized funding; and

(10) New construction of affordable housing, where affordable housing is defined by the controlling law applicable for the state or county proposing agency or approving agency, that meets the following:

(A) Has the use of state or county lands or funds or is within Waikiki as the sole triggers for compliance with chapter 343, HRS;

(B) As proposed conforms with the existing state urban land use classification;

(C) As proposed is consistent with the existing county zoning classification that allows housing; and

(D) As proposed does not require variances for shoreline setbacks or siting in an environmentally sensitive area.

(d) All exemptions under subchapter 8 are inapplicable when the cumulative impact of planned successive actions in the same place, over time, is significant, or when an action that is normally insignificant in its impact on the environment may be significant in a particularly sensitive environment.

(e) Any agency, at any time, may request that a new exemption type be added, or that an existing one be amended or deleted. The request shall be submitted to the council, in writing, and contain detailed information to support the request as set forth in section 11-201-16, HAR, environmental council rules.
[Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

§11-200.1-16 Exemption lists. (a) 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, of:

(1) 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. Examples of routine activities and ordinary

Comment [Public37]: Jennifer A. Lim.

Clarification requested.

Is this intended to mean a project that is (A) Proposed within existing state urban district lands, as defined under HRS 205; or (B) consistent (i.e. conforms) with uses allowed in the state urban district, even if the real property itself is not within the state land use urban district?

Similar question as to (10)(C).

Comment [Public38]: Jennifer A. Lim.

This last clause is ambiguous. Understandably this is a difficult concept to specify, but without specificity and standards, many properties could be alleged as being within an "environmentally sensitive area." Use of the term will invite unnecessary litigation.

This should be better explained through the use of some of the language in 11-200.1-13(b)(11) . .. such as areas within a flood plain, tsunami zone, sea level rise exposure area, beaches, erosion-prone areas, geologically hazardous land.

functions may include, among others: routine repair, routine maintenance, purchase of supplies, and continuing administrative activities involving personnel only, nondestructive data collection, installation of routine signs and markers, financial transactions, personnel-related matters, construction or placement of minor structures accessory to existing facilities; interior alterations involving things such as partitions, plumbing, and electrical conveyances; and

(2) Types of actions that the agency considers to be included within the exempt general types listed in section 11-200.1-15.

(b) 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.

(c) An agency may use part two of its exemption list, developed pursuant to subsection (a)(2), to exempt from preparation of an EA a specific action that the agency determines to be included under the types of actions in its exemption list, provided that the agency fulfills the exemption notice requirements set forth in section 11-200.1-17 and chapter 343, HRS.

(d) 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; provided that in the event the council is unable to meet due to quorum when a concurrence for an agency exemption list is seven years or older, the agency may submit a letter to the council acknowledging that the existing exemption list is still valid. Upon attaining quorum, the council shall review the exemption list for concurrence. The council may review agency exemption lists periodically.
[Eff] (Auth: HRS §§343-5, 343-6)(Imp: HRS §§343-5, 343-6)

Comment [Public39]: Jennifer A. Lim.

This seems to prejudice agencies who, as a result of this rule, may be stuck with old exemption lists due to no fault of their own. If the council cannot deliberate due to lack of quorum or otherwise, the agency's updated exemption list should become effective as a matter of law with a set period of time, e.g., on the 30th day after submittal to the council.

§11-200.1-17 Exemption notices. (a) Each agency shall create an exemption notice for an action that it has found to be exempt from the requirements for preparation of an EA pursuant to section 11-200.1-16(a)(2) or that an agency considers to be included within a general type of action pursuant to section 11-200.1-15. An agency may create an

exemption notice for an activity that it has found to be exempt from the requirements for preparation of an EA pursuant to section 11-200.1-16(a)(1) or that an agency considers to be a routine activity and ordinary function within the jurisdiction or expertise of the agency that by its nature does not have the potential to individually or cumulatively adversely affect the environment more than negligibly.

(b) To declare an exemption prior to implementing an action, an agency shall undertake an analysis to determine whether the action merits exemption pursuant to section 11-200.1-15 and is consistent with one or several of the general types listed in section 11-200.1-15 or the agency's exemption list produced in accordance with section 11-200.1-16, and whether significant cumulative impacts or particularly sensitive environments would make the exemption inapplicable. An agency shall obtain the advice of other outside agencies or individuals having jurisdiction or expertise on the propriety of the exemption. This analysis and consultation shall be documented in an exemption notice. Unless consultation and publication are not required under subsection (c), the agency shall publish the exemption notice with the office through the filing process set forth in subchapter 4.

(c) Consultation regarding and publication of an exemption notice is not required when:

(1) The agency has created an exemption list pursuant to section 11-200.1-16;

(2) The council has concurred with the agency's exemption list no more than seven years before the agency implements the action or authorizes an applicant to implement the action;

(3) The action is consistent with the letter and intent of the agency's exemption list; and

(4) The action does not have any potential, individually or cumulatively, to produce significant impacts.

(d) Each agency shall produce its exemption notices for review upon request by the public or an agency, and shall submit a list of exemption notices that the agency has created to the office for publication in the bulletin on the eighth day of each month pursuant to subchapter 4. [Eff](Auth: HRS §§343-5, 343-6)(Imp: HRS §§343-5, 343-6)

SUBCHAPTER 9

PREPARATION OF ENVIRONMENTAL ASSESSMENTS

§11-200.1-18 Preparation and contents of a draft environmental assessment. (a) A proposing agency or an approving agency shall require an applicant to seek, at the earliest practicable time, the advice and input of the county agency responsible for implementing the county's general plan for each county in which the proposed action is to occur, and consult with other agencies having jurisdiction or expertise as well as those citizen groups and individuals that the proposing agency or applicant reasonably believes may be affected.

(b) The scope of the draft EA may vary with the scope of the proposed action and its impact, taking into consideration whether the action is a project or a program. Data and analyses in a draft EA shall be commensurate with the importance of the impact, and less important material may be summarized, consolidated, or simply referenced. A draft EA shall indicate at appropriate points in the text any underlying studies, reports, and other information obtained and considered in preparing the draft EA, including cost-benefit analyses and reports required under other legal authorities.

Comment [Public40]: Jennifer A. Lim.

If referenced, must the material be public? Or can private and unpublished reports, etc., be referenced?

Comment [Public41]: Jennifer A. Lim.

What does this mean? Cost benefit analyses to determine whether a particular study should be done for the draft EA?
This should be deleted. Or explained.

(c) The level of detail in a draft EA may be more broad for programs or components of a program for which site-specific impacts are not discernible, and shall be more specific for components of the program for which site-specific, project-level impacts are discernible. A draft EA for a program may, where necessary, omit evaluating issues that are not yet ready for decision at the project level. Analysis of the program may be based on conceptual information in some cases and may discuss in general terms the constraints and sequences of events likely to result in any narrowing of future options. It may present and analyze in general terms hypothetical scenarios that are likely to occur.

(d) A draft EA shall contain, but not be limited to, the following information:

(1) Identification of the applicant or proposing agency;

(2) For applicant actions, identification of the approving agency;

(3) List of all ~~required~~ permits and approvals (state, federal, and county) know at that time to be required for the proposed action and, for applicants, identification of which approval necessitates chapter 343, HRS, environmental review;

Comment [Public42]: Jennifer A. Lim.

By the use of the singular, is the intent that the applicant must identify only 1 of the approvals that requires 343 review? See also Comment # 15.

(4) Identification of agencies, citizen groups, and individuals consulted in preparing the draft EA;

(5) General description of the action's technical, economic, social, cultural, and environmental characteristics;

(6) Summary description of the affected environment, including suitable and adequate regional, location and site maps such as Flood Insurance Rate Maps, Floodway Boundary Maps, or United States Geological Survey topographic maps;

(7) Identification and analysis of impacts and alternatives considered;

(8) Proposed mitigation measures;

(9) Agency or approving agency anticipated determination, including findings and reasons supporting the anticipated FONSI, if applicable; and

(10) Written comments, if any, and responses to the comments received, if any, and made pursuant to the early consultation provisions of subsection (a) and statutorily prescribed public review periods.

[Eff]Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

§11-200.1-19 Notice of determination for draft environmental assessments. (a) After:

(1) Preparing, or causing to be prepared, a draft EA;

(2) Reviewing any public and agency comments; and

(3) Applying the significance criteria in section 11-200.1-13;

if the proposing agency or the approving agency anticipates that the proposed action is not likely to have a significant effect, the proposing agency or approving agency shall issue a notice of an anticipated FONSI subject to the public review provisions of section 11-200.1-20.

(b) The proposing agency or approving agency shall file the notice of anticipated determination ~~when applicable~~ and supporting draft EA with the office as early as possible in accordance with subchapter 4 after the determination is made pursuant to and in accordance with this subchapter and the requirements in subsection (c). For applicant actions, the approving agency shall also send the anticipated FONSI to the applicant.

Comment [Public43]: Jennifer A. Lim.

No need for the clause "when applicable" because it is unnecessary and this entire section deals with what the agency is to do when reviewing an EA.

(c) The notice of an anticipated FONSI shall include in a concise manner:

(1) Identification of the proposing agency or applicant;

(2) Identification of the approving agency or accepting authority;

(3) A brief description of the action;

(4) The anticipated FONSI;

(5) Reasons supporting the anticipated FONSI; and

(6) The name, title, email address, physical address, and phone number of an individual representative of the proposing agency or applicant who may be contacted for further information.

[Eff](Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

§11-200.1-20 Public review and response requirements for draft environmental assessments. (a) This section shall apply only if a proposing agency or an approving agency anticipates a FONSI determination for a proposed action and the proposing agency or the applicant proposing the action has completed the draft EA requirements of sections 11-200.1-18 and 11-200-19.

(b) Unless mandated otherwise by statute, the period for public review and for submitting written comments shall be thirty days from the date of publication of the draft EA in the bulletin. Written comments shall be received by or postmarked to the proposing agency or approving agency and applicant within the thirty-day period. Any comments outside of the thirty-day period need not be responded to nor considered in the final EA.

Comment [Public44]: Jennifer A. Lim.

In other words, if the commenter fails to send the comments to both the agency and the applicant, the comment can be ignored.

(b) For agency actions, the proposing agency shall, and for applicant actions, the applicant shall: respond in the final EA in the manner prescribed in this section to all substantive comments received or postmarked during the statutorily mandated review period, incorporate comments into the final EA as appropriate, and include the comments and responses in the final EA. In deciding whether a written comment is substantive, the proposing agency or applicant shall give careful consideration to the validity, significance, and relevance of the comment to the scope, analysis, or process of the EA, bearing in mind the purpose of this chapter and chapter 343, HRS. Written comments deemed by the proposing agency or applicant as non-substantive and to which no response was provided shall be clearly indicated.

(d) Proposing agencies and applicants shall respond in the final EA to all substantive comments in one of two ways, or a combination of both, so long as each substantive comment has clearly received a response:

(1) By grouping comment responses under topic headings and addressing each substantive comment raised by an individual commenter under that topic heading by issue. When grouping comments by topic and issue, the names of commenters who raised an issue under a topic heading shall be clearly identified in a distinctly labeled section with that topic heading. All substantive comments within a single comment letter must be addressed, but may be addressed throughout the applicable topic areas with the commenter identified in each applicable topic area. All comments, except those described in subsection (e), must be appended in full to the final EA;~~document~~; or

(2) By providing a separate and distinct response to each comment clearly identifying the commenter and the comment receiving a response for each comment letter submitted. All comments, except those described in subsection (e), must either be included with the response or appended in full to the final EA~~document~~.

(e) For comments that are form letters or petitions, that contain identical or near-identical language, and that raise the same issues on the same topic:

(1) The response may be grouped under subsection (d)(1) with the response to other comments under the same topic and issue with all commenters identified in the distinctly labeled section identifying commenters by topic; or

(2) A single response may be provided that addresses all substantive comments within the form letter or petition and that includes a distinct section listing the individual commenters who submitted the form letter or petition. At least one representative sample of the form letter or petition shall be appended to the final document;

provided that, if a commenter adds a distinct substantive comment to a form letter or petition, that comment must be responded to pursuant to subsection (d).

(f) In responding to substantive written comments, proposing agencies and applicants shall endeavor to address~~resolve~~ conflicts, inconsistencies, or concerns identified and to provide a response that is commensurate with the content of those comments. The response shall indicate changes that have been made to the text of the draft EA. The response shall describe the disposition of significant environmental issues raised (for example, the response may point to revisions to the proposed action to mitigate anticipated impacts or objections raised in the comment, or may refute the comment). In particular, the issues raised when the proposing agency's or applicant's position is at variance with recommendations and objections raised in the comments shall be addressed in detail, giving reasons why specific comments and suggestions were not accepted. ~~, and factors of overriding importance warranting an override of the suggestions~~.

Comment [Public45]: Jennifer A. Lim.

No doubt there are many instances where the burden of "resolving" conflicts is too great, and the conflicts arise from deeply held beliefs. The applicant or agency is not under an obligation, in an EA, to make people happy about the proposed action; i.e., there is no obligation to resolve conflicts. The EA is a disclosure document. It is not an advocacy piece or tool for negotiation.

Comment [Public46]: Jennifer A. Lim.

This clause suggests far too much power in the hands of commenters. An EA is a disclosure document and the applicant's obligation is to publish the comments and respond to the comments, but the applicant does not have to advocate to identify "overriding" matters of importance.

(g) An addendum document to a draft EA shall reference the original draft EA it attaches to and shall comply with all applicable filing, public review and comment requirements set forth in subchapters 4 and 9. [Eff (Auth: HRS §§343-3, 343-5, 343-6)(Imp: HRS §§343-3, 343-5, 343-6)

§11-200.1-21 Contents of a final environmental assessment. A final EA shall contain, but not be limited to, the following information:

(1) Identification of the applicant or proposing agency;

(2) Identification of the approving

agency, if applicable;

(3) Identification of agencies, citizen groups, and individuals consulted in preparing the EA;

(4) General description of the action's technical, economic, social, cultural, and environmental characteristics;

(5) Summary description of the affected environment, including suitable and adequate regional, location and site maps such as Flood Insurance Rate Maps, Floodway Boundary Maps, or United States Geological Survey topographic maps;

(6) Identification and analysis of impacts and alternatives considered;

(7) Proposed mitigation measures;

(8) The agency determination and the findings and reasons supporting the determination;

(9) List of all required permits and approvals (state, federal, and county) and, for applicants, identification of which approval necessitates chapter 343, HRS, environmental review; and

(10) Written comments, if any, and responses to the comments received, if any, pursuant to the early consultation provisions of section 11-200.1- 18(a), and statutorily prescribed public review periods in accordance with section 11-200.1-20.

[Eff](Auth: HRS §§343-5,343-6) (Imp: HRS §§343-5, 343-6)

§11-200.1-22 Notice of determination for final environmental assessments. (a) After:

(1) Preparing, or causing to be prepared, a final EA;

(2) Reviewing any public and agency comments; and

(3) Applying the significance criteria in section 11- 200.1-13,

the proposing agency or the approving agency shall issue a notice of a FONSI or EISPN in accordance with subchapter 9, and file the notice with the office in accordance with

subchapter 4. For applicant actions, the approving agency shall issue a determination within thirty days of receiving the final EA.

Comment [Public47]: Jennifer A. Lim.

This is an excellent clarification. However, it should be paired with language similar to that applied for final EISs, as follows:

A FONSI determination shall be deemed made if the approving agency fails to issue a determination within thirty days after receipt of the final EA.

(b) If the proposing agency or approving agency determines that a proposed action is not likely to have a significant effect, it shall issue a notice of a FONSI.

(c) If the proposing agency or approving agency determines that a proposed action may have a significant effect, it shall issue an EISPN.

(d) The proposing agency or approving agency shall file in accordance with subchapter 4 the notice and the supporting final EA with the office as early as possible after the determination is made, addressing the requirements in subsection (e). For applicant actions, the approving agency shall send the notice of determination for an EISPN or FONSI to the applicant.

(e) The notice of a FONSI shall indicate in a concise manner:

(1) Identification of the applicant or proposing agency;

(2) Identification of the approving agency ~~or accepting authority~~;

Comment [Public48]: Jennifer A. Lim.

Why would there be an accepting authority when the determination is a FONSI?

(3) A brief description of the proposed action;

(4) The determination;

(5) Reasons supporting the determination; and

(6) The name, title, email address, physical address, and phone number of an individual representative of the proposing agency or applicant who may be contacted for further information.

(f) The notice of determination for an EISPN shall be prepared pursuant to section 11-200.1-23.

[Eff] (Auth: HRS §§343-5, 343-6)(Imp: HRS §§343-5, 343-6)

SUBCHAPTER 10

PREPARATION OF ENVIRONMENTAL IMPACT STATEMENTS

§11-200.1-23 Consultation prior to filing a draft environmental impact statement. (a) An EISPN, including

one resulting from an agency authorizing the preparation of an EIS without first requiring an EA, shall indicate in a concise manner:

(1) Identification of the proposing agency or applicant;

(2) Identification of the accepting authority;

(3) List of all ~~required~~ permits and approvals (state, federal, and county) know at that time to be required for the proposed action and, for applicants, identification of which approval necessitates chapter 343, HRS, environmental review;

(4) The determination to prepare an EIS;

(5) Reasons supporting the determination to prepare an EIS;

(6) A description of the proposed action and its location;

(7) A description of the affected environment, including regional, location, and site maps;

(8) Possible alternatives to the proposed action;

(9) The proposing agency's or applicant's proposed scoping process, including when and where the EIS public scoping meeting or meetings will be held; and

(10) The name, title, email address, physical address, and phone number of an individual representative of the proposing agency or applicant who may be contacted for further information.

(b) In the preparation of a draft EIS, proposing agencies and applicants shall consult all appropriate agencies, including the county agency responsible for implementing the county's general plan for each county in which the proposed action is to occur and agencies having jurisdiction or expertise, as well as those citizen groups, and concerned individuals that the proposing agency or applicant reasonably believes to be affected. To this end, agencies and applicants shall endeavor to develop a fully acceptable draft EIS prior to the time the draft EIS is filed with the office, through a full and complete consultation process, and shall not rely solely

Comment [Public49]: Jennifer A. Lim.

In the case of more than one approval, sufficient to list only one?
See also Comments # 15 and 42.

upon the review process to expose environmental concerns.

(c) Upon publication of an EISPN in the periodic bulletin, agencies, groups, or individuals shall have a period of thirty days from the initial publication date to make written comments regarding the environmental effects of the proposed action. With good cause, the approving agency or accepting authority may extend the period for comments for a period not to exceed thirty additional days. Written comments and responses to the substantive comments shall be included in the draft EIS pursuant to section 11-200.1-24. For purposes of the EIS public scoping meeting, substantive comments shall be those pertaining to the scope of the EIS.

(d) No fewer than one EIS public scoping meeting addressing the scope of the draft EIS shall be held on the island(s) most affected by the proposed action, within the public review and comment period in subsection (c). The EIS public scoping meeting shall include a separate portion reserved for oral public comments and that portion of the scoping meeting shall be audio recorded. [Eff](Auth: HRS §§343-5, 343-6) (Imp: HRS §343-6)

§11-200.1-24 Content requirements; draft environmental impact statement. (a) The draft EIS, at a minimum, shall contain the information required in this section. The contents shall fully declare the environmental implications of the proposed action and shall discuss all reasonably foreseeable consequences of the action. In order that the public can be fully informed and that the accepting authority can make a sound decision based upon the full range of responsible opinion on environmental effects, an EIS shall include responsible opposing views, if any, on significant environmental issues raised by the proposal.

(b) The scope of the draft EIS may vary with the scope of the proposed action and its impact, taking into consideration whether the action is a project or a program. Data and analyses in a draft EIS shall be commensurate with the importance of the impact, and less important material may be summarized, consolidated, or simply referenced. A draft EIS shall indicate at appropriate points in the text any underlying studies, reports, and other information obtained and considered in preparing the draft EIS, including cost benefit analyses and reports required under other legal authorities.

Comment [Public50]: Jennifer A. Lim.

As noted in section 11-200.1-18 (comment #41), the concept of a "cost benefit analysis" is not explained and it is not at all clear what is intended.

(c) The level of detail in a draft EIS may be more

broad for programs or components of a program for which site-specific impacts are not discernible, and shall be more specific for components of the program for which site-specific, project-level impacts are discernible. A draft EIS for a program may, where necessary, omit evaluating issues that are not yet ready for decision at the project level. Analysis of the program may be based on conceptual information in some cases and may discuss in general terms the constraints and sequences of events likely to result in any narrowing of future options. It may present and analyze in general terms hypothetical scenarios that are likely to occur.

(d) The draft EIS shall contain a summary that concisely discusses the following:

(1) Brief description of the action;
(2) Significant beneficial and adverse impacts ~~(including cumulative impacts and secondary impacts~~);
(3) Proposed mitigation measures;
(4) Alternatives considered;
(5) Unresolved issues; and
(6) Compatibility with land use plans and policies, and listing of permits or approvals; and
(7) A list of relevant documents for actions considered in the analysis of the preparation of the EIS.

Comment [Public51]: Jennifer A. Lim.

Consistent with prior comments, reduce the word count and rely on the definitions (the terms "effects" and "impacts" are defined). Every time a defined term is used and supplemented, it confuses the reader and raises doubts of the utility of the defined term.

Comment [Public52]: Jennifer A. Lim.

Please clarify (7). It is not clear what this is requiring. A list of documents for prior actions?

(e) The draft EIS shall contain a table of contents.

(f) The draft EIS shall contain a separate and distinct section that includes the purpose and need for the proposed action.

(g) The draft EIS shall contain a description of the action that shall include the following information, but need not supply extensive detail beyond that needed for evaluation and review of the environmental impact:

(1) A detailed map (preferably a United States Geological Survey topographic map, Flood Insurance Rate Maps, or Floodway Boundary Maps as applicable) and a related regional map;

(2) Objectives of the proposed action;

(3) General description of the action's technical, economic, social, cultural, and environmental

characteristics;

(4) Use of state or county funds or lands for the action;

(5) Phasing and timing of the action;

(6) Summary technical data, diagrams, and other information necessary to enable an evaluation of potential environmental impact by commenting agencies and the public; and

(7) Historic perspective.

(h) The draft EIS shall describe in a separate and distinct section reasonable alternatives that could attain the objectives of the action. The section shall include a rigorous exploration and objective evaluation of the environmental impacts of all such alternative actions. Particular attention shall be given to alternatives that might enhance environmental quality or avoid, reduce, or minimize some or all of the adverse environmental effects, costs, and risks of the action. Examples of alternatives include:

(1) The alternative of no action;

(2) Alternatives requiring actions of a significantly different nature that would provide similar benefits with different environmental impacts;

(3) Alternatives related to different designs or details of the proposed actions that would present different environmental impacts;

(4) The alternative of postponing action pending further study; and

(5) Alternative locations for the proposed action.

In each case, the analysis shall be sufficiently detailed to allow the comparative evaluation of the environmental benefits, costs, and risks of the proposed action and each reasonable alternative. For alternatives that were eliminated from detailed study, the section shall contain a brief discussion of the reasons for not studying those alternatives in detail. For any agency actions, the discussion of alternatives shall include, where relevant, those alternatives not within the existing authority of the agency.

(i) The draft EIS shall include a description of the environmental setting, including a description of the environment in the vicinity of the action, as it exists

Comment [Public53]: Jennifer A. Lim.

As a matter of drafting subsection (1) and (4) are not alternatives that "could attain the objectives of the action" and therefore this subsection (h) should be modified so that "no action" is not an example of a reasonable alternative that could attain the objectives of the action.

before commencement of the action, from both a local and regional perspective. Special emphasis shall be placed on environmental resources that are rare or unique to the region and the action site (including natural or human-made resources of historic, cultural, archaeological, or aesthetic significance); specific reference to related actions, public and private, existent or planned in the region shall also be included for purposes of examining the possible overall cumulative impacts of such actions. Proposing agencies and applicants shall also identify, where appropriate, population and growth characteristics of the affected area, any population and growth assumptions used to justify the proposed action, and any secondary population and growth impacts resulting from the proposed action. ~~and its alternatives. In any event, it is essential that~~ The ~~the~~ sources of data used to identify, qualify, or evaluate any and all environmental consequences shall be expressly noted in the draft EIS.

(j) The draft EIS shall include a description of the relationship of the proposed action to published, state or county land use and natural or cultural resource plans, policies, and controls for the affected area. Discussion of how the proposed action may conform or conflict with objectives and specific terms of approved or proposed land use and resource plans, policies, and controls, if any, for the area affected shall be included. Where a conflict or inconsistency exists, the draft EIS shall describe the extent to which the agency or applicant has reconciled its proposed action with the plan, policy, or control, and the reasons why the agency or applicant has decided to proceed, notwithstanding the absence of full reconciliation.

(k) The draft EIS shall also contain a list of necessary approvals required for the action from governmental agencies, boards, or commissions or other similar groups having jurisdiction. The status of each identified approval shall also be described.

(l) The draft EIS shall include an analysis of the probable impact of the proposed action on the environment, and impacts of the natural or human environment on the action. This analysis shall include consideration of all phases of the action and consideration of all consequences on the environment, including direct and indirect effects. The interrelationships and cumulative environmental impacts of the proposed action and other related actions shall be discussed in the draft EIS. The draft EIS should recognize that several actions, in particular those that involve the construction of public facilities or structures (e.g., highways, airports, sewer systems, water resource actions, etc.) may well stimulate or induce secondary effects.

Comment [Public54]: Jennifer A. Lim.

This clause re impacts resulting from the alternatives is clearly misplaced. It belongs in (h)(5). This is a hold over from the old rules and should be cleaned up now.

Comment [Public55]: Jennifer A. Lim.

This section needs to be clear that the plans, etc., need to be public, approved, plans. Private resource management plans in the vicinity of the proposed action would likely be unknown to the agency or applicant.

These secondary effects may be equally important as, or more important than, primary effects, and shall be thoroughly discussed to fully describe the probable impact of the proposed action on the environment. The population and growth impacts of an action shall be estimated if expected to be significant, and an evaluation shall be made of the effects of any possible change in population patterns or growth upon the resource base, including but not limited to land use, water, and public services, of the area in question. Also, if the proposed action constitutes a direct or indirect source of pollution as determined by any governmental agency, necessary data regarding these impacts shall be incorporated into the EIS. The significance of the impacts shall be discussed in terms of subsections (m), (n), (o), and (p).

(m) The draft EIS shall include in a separate and distinct section a description of the relationship between local short-term uses of humanity's environment and the maintenance and enhancement of long-term productivity. The extent to which the proposed action involves trade-offs among short-term and long-term gains and losses shall be discussed. The discussion shall include the extent to which the proposed action forecloses future options, narrows the range of beneficial uses of the environment, or poses long-term risks to health or safety. In this context, short-term and long-term do not necessarily refer to any fixed time periods, but shall be viewed in terms of the environmentally significant consequences of the proposed action.

(n) The draft EIS shall include in a separate and distinct section a description of all irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented. Identification of unavoidable impacts and the extent to which the action makes use of non-renewable resources during the phases of the action, or irreversibly curtails the range of potential uses of the environment shall also be included. The possibility of environmental accidents resulting from any phase of the action shall also be considered.

(o) The draft EIS shall address all probable adverse environmental effects that cannot be avoided. Any adverse effects such as water or air pollution, urban congestion, threats to public health, or other consequences adverse to environmental goals and guidelines established by environmental response laws, coastal zone management laws, pollution control and abatement laws, and

environmental policy including those found in chapters 128D (Environmental Response Law), 205A (Coastal Zone Management), 342B (Air Pollution Control) , 342C (Ozone Layer Protection), 342D (Water Pollution), 342E (Nonpoint Source Pollution Management and Control), 342F (Noise Pollution), 342G (Integrated Solid Waste Management), 342H (Solid Waste Recycling), 342I (Special Wastes Recycling), 342J (Hazardous Waste, including Used Oil), 342L (Underground Storage Tanks), 342P (Asbestos and Lead), and 344 (State Environmental Policy), HRS, and those effects discussed in this section that are adverse and unavoidable under the proposed action must be addressed in the draft EIS. Also, the rationale for proceeding with a proposed action, notwithstanding unavoidable effects, shall be clearly set forth in this section. The draft EIS shall indicate what other interests and considerations of governmental policies are thought to offset the adverse environmental effects of the proposed action. The draft EIS shall also indicate the extent to which these stated countervailing benefits could be realized by following reasonable alternatives to the proposed action that would avoid some or all of the adverse environmental effects.

Comment [Public56]: Jennifer A. Lim.

Query whether this language belongs here. The requirements related to the alternatives analysis should be consolidated into one subsection (11-200.1-24(h)). As currently drafted, this creates a hidden "gotcha" for EIS preparers. This is a hold over from the old rules and should be corrected now.

The alternatives analysis requires a comparative analysis, which should sweep in this requirement. However, if additional language regarding alternatives analysis is needed, that language should be inserted into subsection (h) and not here.

(p) The draft EIS shall consider mitigation measures proposed to avoid, minimize, rectify, or reduce impacts, including provision for compensation for losses of cultural, community, historical, archaeological, fish and wildlife resources, including the acquisition of land, waters, and interests therein. Description of any mitigation measures included in the action plan to reduce significant, unavoidable, adverse impacts to insignificant levels, and the basis for considering these levels acceptable shall be included. Where a particular mitigation measure has been chosen from among several alternatives, the measures shall be discussed and reasons given for the choice made. The draft EIS shall include, where possible, specific reference to the timing of each step proposed to be taken in any mitigation process, what performance bonds, if any, may be posted, and what other provisions are proposed to ensure that the mitigation measures will in fact be taken in the event the action is implemented.

(q) The draft EIS shall include a separate and distinct section that summarizes unresolved issues and contains either a discussion of how such issues will be resolved prior to commencement of the action, or what overriding reasons there are for proceeding without resolving the issues.

(r) The draft EIS shall include a separate and distinct section that contains a list identifying all

governmental agencies, other organizations and private individuals consulted in preparing the draft statement, and shall disclose the identity of the persons, firms, or agency preparing the statement, by contract or other authorization.

(s) The draft EIS shall include a separate and distinct section that contains:

(1) Reproductions of all written comments submitted during the consultation period required in section 11-200.1-23;

(2) Responses to all substantive written comments made during the consultation period required in section 11-200.1-23. Proposing agencies and applicants shall respond in the draft EIS to all substantive written comments in one of two ways, or a combination of both, so long as each substantive comment has clearly received a response:

(A) By grouping comment responses under topic headings and addressing each substantive comment raised by an individual commenter under that topic heading by issue. When grouping comments by topic and issue, the names of commenters who raised an issue under a topic heading shall be clearly identified in a distinctly labeled section with that topic heading. All substantive comments within a single comment letter must be addressed, but may be addressed throughout the applicable different topic areas with the commenter identified in each applicable topic area. All comments, except those described in paragraph (3), must be appended in full to the final document; or

(B) By providing a separate and distinct response to each comment clearly identifying the commenter and the comment receiving a response being responded to for each comment letter submitted. All comments, except those described in paragraph (3), must either be included with the response, or appended in full to the final document;

(3) For comments that are form letters or petitions, that contain identical or near-identical

language, and that raise the same issues on the same topic:

(A) The response may be grouped under paragraph (2)(A) with the response to other comments under the same topic and issue with all commenters identified in the distinctly labeled section identifying commenters by topic; or

(B) A single response may be provided that addresses all substantive comments within the form letter or petition and that includes a distinct section listing the individual commenters who submitted the form letter or petition. At least one representative sample of the form letter or petition shall be appended to the final document; and

(C) Provided that, if a commenter adds a distinct substantive comment to a form letter or petition, then that comment must be responded to pursuant to paragraph (2);

(4) A summary of any EIS public scoping meeting (or meetings)~~s~~, including a written general summary of the oral comments made, and a representative sample of any handout provided by the agency or application related to the action provided at the EIS public scoping meeting(s);

(5) A list of those persons or agencies who were consulted and had no comment in a manner indicating that no comment was provided; and

(6) A representative sample of the agency consultation request letter.

(t) An addendum to a draft EIS shall reference the original draft EIS to which it attaches and comply with all applicable filing, public review, and comment requirements set forth in subchapter 10.
[Eff] (Auth: HRS §§343-5, 343-6)(Imp: HRS §§343-2, 343-5, 343-6)

§11-200.1-25 Public review requirements for draft environmental impact statements. (a) Public review shall not substitute for early and open discussion with interested persons and agencies concerning the environmental impacts of a proposed action. Review of the

Comment [Public57]: Jennifer A. Lim

Suggested for clarity. The public could, of course, bring handouts to a public scoping meeting, but the applicant or accepting authority would have no way to know if it received copies of all such handouts. Obviously the intent of this provision is to require the handouts from the applicant, but the express language is not so clear.

draft EIS shall serve to provide the public and other agencies an opportunity to discover the extent to which a proposing agency or applicant has examined environmental concerns and available alternatives.

(b) The period for public review and for submitting written comments shall commence from the date that notice of availability of the draft EIS is initially issued in the periodic bulletin and shall continue for a period of forty-five days, unless mandated otherwise by statute. Written comments to the accepting authority with a copy of the comments to the proposing agency or applicant, shall be received by or postmarked to the approving agency or accepting authority and applicant, within the forty-five-day comment period. Any comments outside of the forty-five day comment period need not be responded to nor considered. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

Comment [Public58]: Jennifer A. Lim.

Need to make it clear that the comments must go to the accepting authority AND applicant in order to be considered. Consistent with the language in the EA sections. This is a basic concept of fairness, and if the applicant has to respond to the comments, the commenter must be obligated to send the comments to the applicant.

§11-200.1-26 Comment response requirements for draft environmental impact statements. (a) In accordance with the content requirements of section 11-200.1-27, the proposing agency or applicant shall respond within the final EIS to all substantive written comments received by or postmarked to the approving agency or accepting authority and applicant during the forty-five-day review period. In deciding whether a written comment is substantive, the proposing agency or applicant shall give careful consideration to the validity, significance, and relevance of the comment to the scope, analysis, or process of the EIS, bearing in mind the purpose of this chapter and chapter 343, HRS. Written comments deemed by the proposing agency or applicant as non-substantive and to which no response was provided shall be clearly indicated.

Comment [Public59]: Jennifer A. Lim.

See comment above regarding the obligation of commenters to submit comments to the applicant.

(b) Proposing agencies and applicants shall respond in the final EIS to all substantive written comments in one of two ways, or a combination of both, so long as each substantive comment has clearly received a response:

(1) By grouping comment responses under topic headings and addressing each substantive comment raised by an individual commenter under that topic heading by issue. When grouping comments by topic and issue, the names of commenters who raised an issue under a topic heading shall be clearly identified in a distinctly labeled section with that topic heading. All substantive comments within a single comment letter must be addressed, but may be addressed

throughout the applicable topic areas with the commenter identified in each applicable topic area. All comments, except those described in subsection (c), must be appended in full to the final document; or

(2) By providing a separate and distinct response to each comment clearly identifying the commenter and the comment receiving a response for each comment letter submitted. All comments, except those described in subsection (c), must either be included with the response or appended in full to the final document.

(c) For comments that are form letters or petitions, that contain identical or near-identical language, and that raise the same issues on the same topic:

(1) The response may be grouped under subsection (b)(1) with the response to other comments under the same topic and issue with all commenters identified in the distinctly labeled section identifying commenters by topic; or

(2) A single response may be provided that addresses all substantive comments within the form letter or petition and that includes a distinct section listing the individual commenters who submitted the form letter or petition. At least one representative sample of the form letter or petition shall be appended to the final document;

Provided that if a commenter adds a distinct substantive comment to a form letter or petition, then that comment must be responded to pursuant to subsection (d).

(d) In responding to substantive written comments, proposing agencies and applicants shall endeavor to ~~resolve~~address conflicts, inconsistencies, or concerns identified and to provide a response that is commensurate with the content of those comments. The response shall indicate changes that have been made to the text of the draft EIS. The response shall describe the disposition of significant environmental issues raised (for example, the response may point to revisions to the proposed action to mitigate anticipated impacts or objections raised in the comment, or may refute the comment). In particular, the issues raised when the proposing agency's or applicant's position is at variance with recommendations and objections raised in the comments shall be addressed in detail, giving reasons why specific comments and suggestions were not accepted.~~, and factors of overriding importance warranting an override of the suggestions.~~

Comment [Public60]: Jennifer A. Lim.

As noted in the comment in section 11-200.1-20 (see Comment # 46), no doubt there are many instances where the burden of "resolving" conflicts is too great, and the conflicts arise from deeply held beliefs. The applicant or agency is not under an obligation in an EIS to make people happy about the proposed action; i.e., there is no obligation to **resolve** conflicts. The EIS is a disclosure document. It is not an advocacy piece or tool for negotiation.

Comment [Public61]: Jennifer A. Lim.

As noted above in the EA section, this language immediately elevates in importance any comment received, if it is at odds with the proposed action. An EIS is a disclosure document, not a determination on the value or importance of a proposed action.

[Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

§11-200.1-27 Content requirements; final environmental impact statement. (a) The final EIS, at a minimum, shall contain the information required in this section. The contents shall fully declare the environmental implications of the proposed action and shall discuss all reasonably foreseeable consequences of the action. In order that the public can be fully informed and the accepting authority can make a sound decision based upon the full range of responsible opinion on environmental effects, an EIS shall include responsible opposing views, if any, on significant environmental issues raised by the proposal.

(b) The final EIS shall consist of:

(1) The draft EIS prepared in compliance with this subchapter, as revised to incorporate substantive comments received during the review processes in conformity with section 11-200.1-26, including reproduction of all comments and responses to substantive written comments;

(2) A list of persons, organizations, and public agencies commenting on the draft EIS;

(3) A list of those persons or agencies who were consulted with in preparing the final EIS and had no comment shall be included in a manner indicating that no comment was provided;

(4) A written general summary of oral comments made at any public meetings; and

(5) The text of the final EIS written in a format that allows the reader to easily distinguish changes made to the text of the draft EIS.

[Eff] (Auth: HRS §§343-5, 343-6)(Imp: HRS §§343-2, 343-5, 343-6)

§11-200.1-28 Acceptability. (a) Acceptability of a final EIS shall be evaluated on the basis of whether the final EIS, in its completed form, represents an informational instrument that fulfills the intent and provisions of chapter 343, HRS, and adequately discloses and describes all identifiable environmental impacts and satisfactorily responds to review comments.

Comment [Public62]: Jennifer A. Lim.

Depending upon what is meant by "any public meetings" and also depending upon the process followed by the accepting authority (some of which require public hearings), this could be a tremendously burdensome obligation.
Do public meetings also include informal gatherings that the agency or EIS preparer may have with some interested members of the community?
If the council does not explain exactly what it intends by the term "public meetings" it invites litigation over this issue.

(b) A final EIS shall be deemed to be an acceptable document by the accepting authority ~~or approving agency~~ only if all of the following criteria are satisfied:

(1) The procedures for assessment, consultation process, review, and the preparation and submission of the EIS, from proposal of the action to publication of the final EIS, have all been completed satisfactorily as specified in this chapter;

(2) The content requirements described in this chapter have been satisfied; and

(3) Comments submitted during the review process have received responses satisfactory to the accepting authority~~, or approving agency~~, including properly identifying comments as substantive and responding in a way commensurate to the comment, and have been appropriately incorporated into the final EIS.

(c) For actions proposed by agencies, the proposing agency may request the office to make a recommendation regarding the acceptability or non-acceptability of the EIS. If the office decides to make a recommendation, it shall submit the recommendation to the accepting authority and proposing agency. In all cases involving state funds or lands, the governor or the governor's authorized representative shall have final authority to accept the EIS. In cases involving only county funds or lands, the mayor of the respective county or the mayor's authorized representative shall have final authority to accept the EIS. The accepting authority shall take prompt measures to determine the acceptability or non-acceptability of the proposing agency's EIS. If the action involves state and county lands, state or county funds, or both state and county lands and state and county funds, the governor or the governor's authorized representative shall have final authority to accept the EIS.

(d) Upon acceptance or non-acceptance of the EIS, a notice shall be filed by the appropriate accepting authority with both the proposing agency and the office. For any non-accepted EIS, the notice shall contain specific findings and reasons for non-acceptance. The office shall publish notice of the determination of acceptance or non-acceptance in the periodic bulletin in accordance with subchapter 4. Acceptance of a required statement shall be a condition precedent to the use of state or county lands or funds in implementing the proposed action.

Comment [Public63]: Jennifer A. Lim.

In what instances would an approving agency be making a determination on the acceptability of a final EIS? The very definition of "accepting authority" is the office or agency who determines that a final EIS is acceptable.

(e) For actions proposed by applicants requiring approval from an agency, the applicant or accepting authority~~, which is the approving agency,~~ may request the office to make a recommendation regarding the acceptability or non-acceptability of the EIS. If the office decides to make a recommendation, it shall submit the recommendation to the applicant and the approving agency within the period requiring an approving agency to determine the acceptability of the final EIS. Upon acceptance or non-acceptance by the approving agency, the agency shall notify the applicant of its determination, and provide specific findings and reasons. The agency shall also provide a copy of this determination to the office for publication in the periodic bulletin. Acceptance of the required EIS shall be a condition precedent to approval of the request and commencement of the proposed action. The agency shall notify the applicant and the office of the acceptance or non-acceptance of the final EIS within thirty days of the final EIS submission to the agency; provided that the thirty-day period may, at the request of the applicant, be extended for a period not to exceed fifteen days. The request shall be made to the accepting authority in writing. Upon receipt of an applicant's written request for an extension of the thirty-day acceptance period, the accepting authority shall notify the office and applicant in writing of its decision to grant or deny the request. The notice shall be accompanied by a copy of the applicant's request. An extension of the thirty-day acceptance period shall not be granted merely for the convenience of the accepting authority. If the agency fails to make a determination of acceptance or nonacceptance of the EIS within thirty days of the receipt of the final EIS, then the statement shall be deemed accepted.

Comment [Public64]: Jennifer A. Lim.

No need for this language defining the accepting authority. The term accepting authority is already defined, and adding "which is the approving agency" confuses the reader.

Comment [Public65]: Jennifer A. Lim.

What is the timeframe within which the office will decide whether it intends to make a recommendation?

(f) A non-accepted EIS may be revised by a proposing agency or applicant. The revision shall take the form of a revised draft EIS which shall fully address the inadequacies of the non-accepted EIS and shall completely and thoroughly discuss the changes made. The requirements for filing, distribution, publication of availability for review, acceptance or non-acceptance, and notification and publication of acceptability shall be the same as the requirements prescribed by subchapters 4 and 10 for an EIS submitted for acceptance. In addition, the subsequent revised final EIS shall be evaluated for acceptability on the basis of whether it satisfactorily addresses the findings and reasons for non-acceptance.

(g) A proposing agency or applicant may withdraw an EIS by simultaneously sending a written notification to the office and to the accepting authority informing the office of the proposing agency's or applicant's withdrawal. Subsequent resubmittal of the EIS shall meet all requirements for filing, distribution, publication, review, acceptance, and notification as a draft EIS. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

§11-200.1-29 Appeals to the council. An applicant, within sixty days after a non-acceptance determination by the accepting authority~~approving agency~~ under section 11-200.1-28 of a final EIS, may appeal the non-acceptance to the council, which within the statutorily mandated period after receipt of the appeal, shall notify the applicant appealing of its determination to affirm the accepting authority's ~~approving agency's~~ non-acceptance or to reverse it. The council chairperson shall include the appeal on the agenda of the next council meeting following receipt of the appeal. In any affirmation or reversal of an appealed non-acceptance, the council shall provide the applicant and the accepting authority ~~agency~~ with specific findings and reasons for its determination. The accepting authority and approving agency ~~agency~~ shall abide by the council's decision. [Eff](Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

§11-200.1-30 Supplemental environmental impact statements. (a) An EIS that is accepted with respect to a particular action is usually qualified by the size, scope, location, intensity, use, and timing of the action, among other things. An EIS that is accepted with respect to a particular action shall satisfy the requirements of this chapter and no supplemental EIS for that proposed action shall be required, to the extent that the action has not changed substantively in size, scope, intensity, use, location, or timing, among other things. If there is any change in any of these characteristics which may have a significant effect, the original statement that was changed shall no longer be valid because an essentially different action would be under consideration and a supplemental EIS shall be prepared and reviewed as provided by this chapter. ~~As long as there is no change in a proposed action resulting in individual or cumulative impacts not originally disclosed, the EIS associated with that action shall be deemed to comply with this chapter.~~

(b) The ~~accepting authority or~~ approving agency ~~in~~

Comment [Public66]: Jennifer A. Lim.

Is this 60 days after publication of notice of the non-acceptance?

Comment [Public67]: Jennifer A. Lim.

Is the intent that the council must base its affirmation or reversal upon the specific findings and reasons given by the accepting authority for not accepting the EIS? That should be the case because the accepting authority is obligated to review the entire EIS and make a determination and in the case of non-acceptance, issue findings and specific reasons. The council's ability to affirm or reverse should be limited to the issues raised by the accepting authority, and that should be clearly stated here.

Otherwise the non-acceptance/appeal route will become a hamster wheel that will burn agency resources.

Comment [Public68]: Jennifer A. Lim.

There is no change to the original statement. This language makes no sense in the existing (old) rules and should be eliminated from the new rules. The sentence should read:

"if there is any change in any of these characteristics that may have a significant effect, the original EIS shall no longer be valid because an essentially different action would be under consideration and a supplemental EIS shall be prepared . . . ."

Comment [Public69]: Jennifer A. Lim.

This sentence is superfluous and actually contradicts what is written above.
This is superfluous because the term "significant effect" should sweep in individual and cumulative impacts. This sentence is confusing because why does it identify individual and cumulative impacts, but not secondary impacts? Rely on the definition of impacts/effects.

This sentence contradicts what is written elsewhere in the section because the requirement is to see if there is a change that is likely to have a significant effect.

~~coordination with the original accepting authority~~ shall be responsible for determining whether a supplemental EIS is required. This determination will be submitted to the office for publication in the periodic bulletin. Proposing agencies or applicants shall prepare for public review supplemental EISs whenever the proposed action for which an EIS was accepted has been modified to the extent that new or different environmental impacts are anticipated. A supplemental EIS shall be warranted when the scope of an action has been substantially increased, when the intensity of environmental impacts will be increased, when the mitigating measures originally planned will not be implemented, or where new circumstances or evidence have brought to light different or likely increased environmental impacts not previously addressed.~~dealt with.~~

Comment [Public70]: Jennifer A. Lim.

There is no good reason to require the current agency to coordinate with the original accepting authority. The current approving agency has to make its decision based upon what is in the original EIS and the approval currently being sought. There is no particular wisdom remaining within the original accepting authority. And if the original accepting authority is not acting as an approving agency for the instant action, it should not be forced to review the instant action and get involved with a determination on that instant action.

(c) The contents of the supplemental EIS shall be the same as required by this chapter for the EIS and may incorporate by reference unchanged material from the same; however, in addition, it shall fully document the proposed changes from the original EIS, including changes in ambient conditions or available information that have a bearing on a proposed action or its impacts, the positive and negative aspects of these changes, and shall comply with the content requirements of subchapter 10 as they relate to the changes.

(d) The requirements of the thirty-day consultation, public notice filing, distribution, the forty-five-day public review, comments and response, and acceptance procedures, shall be the same for the supplemental EIS as is prescribed by this chapter for an EIS.
[Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

SUBCHAPTER 11

NATIONAL ENVIRONMENTAL POLICY ACT

§11-200.1-31 National environmental policy act actions: applicability to chapter 343, HRS. When a certain action will be subject both to the National Environmental Policy Act of 1969 (NEPA), as amended (P.L. 91-190, 42 U.S.C. sections 4321-4347, as amended by P.L. 94-52, July 3, 1975, P. L. 94-83, Aug. 9, 1975, and P.L. 97-258 section 4(b), Sept. 13, 1982) and chapter 343, HRS, the following shall occur:

(1) The applicant or agency, upon discovery of its proposed action being subject to both chapter 343, HRS, and the NEPA, shall notify the

responsible federal entity, the office, and any agency with a definite interest in the action (as prescribed by chapter 343, HRS).

(2) When a federal entity determines that the proposed action is exempt from review under the NEPA, this determination does not automatically constitute an exemption for the purposes of this chapter. In these cases, state and county agencies remain responsible for compliance with this chapter. However, the federal exemption may be considered in the state or county agency determination.

(3) When a federal entity issues a FONSI and concludes that an EIS is not required under the NEPA, this determination does not automatically constitute compliance with this chapter. In these cases, state and county agencies remain responsible for compliance with this chapter. However, the federal FONSI may be considered in the state or county agency determination.

(4) The NEPA requires that EISs be prepared by the responsible federal entity. In the case of actions for which an EIS pursuant to the NEPA has been prepared by the responsible federal entity, the draft and final federal EIS may be submitted to comply with this chapter, so long as the federal EIS satisfies the EIS content requirements of this chapter and is not found to be inadequate under the NEPA: by a court; by the Council on Environmental Quality (or is at issue in pre-decision referral to Council on Environmental Quality) under the NEPA regulations; or by the administrator of the United States Environmental Protection Agency under section 309 of the Clean Air Act, title 41 United States Code section 7609.

(5) When the responsibility of preparing an EIS is delegated to a state or county agency, this chapter shall apply in addition to federal requirements under the NEPA. The office and state or county agencies shall cooperate with federal entities to the fullest extent possible to reduce duplication between federal and state requirements. This cooperation, to the fullest extent possible, shall include joint EISs with concurrent public review and processing at both levels of government. Where federal law has EIS requirements in addition to but not in conflict with this chapter, the office and agencies

shall cooperate in fulfilling the requirements so that one document shall comply with all applicable laws.

(6) Where the NEPA process requires earlier or more stringent public review, filing, and distribution than under this chapter, that NEPA process shall satisfy this chapter so that duplicative consultation or review does not occur. The responsible federal entity's supplemental EIS requirements shall apply in these cases in place of this chapter's supplemental EIS requirements.

(7) In all actions where the use of state land or funds is proposed, the final EIS shall be submitted to the governor or an authorized representative. In all actions when the use of county land or funds is proposed and no use of state land or funds is proposed, the final EIS shall be submitted to the mayor, or an authorized representative. The final EIS in these instances shall first be accepted by the governor or mayor (or an authorized representative), prior to the submission of the same to the responsible federal entity.

(8) Any acceptance obtained pursuant to this section shall satisfy chapter 343, HRS, and no other EIS for the proposed action shall be required.

[Eff](Auth: HRS §§343-5, 343-6)(Imp: HRS §§343-5, 343-6)

SUBCHAPTER 12

RETROACTIVITY AND SEVERABILITY

§11-200.1-32 Retroactivity. (a) This chapter shall apply immediately upon taking effect, except as otherwise provided below.

(b) Chapter 11-200 shall continue to apply to environmental review of agency and applicant actions which began prior to the adoption of chapter 11-200.1, provided that:

(1) For EAs, if the draft EA was published by the office prior to the adoption of this chapter and has not received a determination within a period of five years from the implementation of this chapter, then the proposing agency or applicant

must comply with the requirements of this chapter. All subsequent environmental review, including an EISPN must comply with this chapter.

(2) For EISs, if the EISPN was published by the office prior to the adoption of this chapter and the final EIS has not been accepted within five years from the implementation of this chapter, then the proposing agency or applicant must comply with the requirements of this chapter.

(3) A judicial proceeding pursuant to section 343-7, HRS, shall not count towards the five-year time period.

(c) Exemption lists that have received concurrence under chapter 11-200 may be used for a period of seven years after the adoption of this chapter, during which time the agency must revise its list and obtain concurrence from the council in conformance with this chapter.
[Eff] (Auth: HRS §343-6) (Imp: HRS §343-6)

§11-200.1-33 Severability. If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application; and to this end, the provisions of this chapter are declared to be severable.
[Eff] (Auth: HRS §§343-5, 343-6)(Imp: HRS §§343-6,343-8)

Page 19: [1] Comment [Public31] Public 6/5/2018 3:02:00 PM

Jennifer A. Lim.

The term "historic" has no place in subsection (1), and the council's "Rationale" document provides an alarming explanation for why it was inserted here.

In the Rationale it is explained that "historic sites are a trigger in chapter 343, HRS and are given prominent consideration in the environmental review process." It is true that "historic sites" are given special attention in chapter 343, but "historic resources" are not.

The special attention is found in HRS 343-5(a)(4), which makes the use of any "historic site as designated in the National Register or Hawaii Register" a trigger for environmental review. However, there is a world of difference between historic sites so designated (there is a process for such sites getting designated), and the council's proposed, undefined and therefore ambiguous, term "historic resource." The term "historic resource" invites litigation. HRS 6E (which is not within the ambit of HRS 343) defines "historic property" as "any building, structure, object, district, area, or site, including heiau and underwater site, which is over fifty years old." Is the council's intent to say that any action that may commit a 50 year old building (even if such building has not been placed on the historic register) is likely to cause a significant effect on the environment?

The council can correct this to refer to historic sites to be consistent with 343-5(a)(4), or the council must delete the term "historic resource."

OMKM
Office of Mauna Kea Management

University of Hawai'i at Hilo

640 N. A'ohoku Place, Room 203, Hilo, Hawai'i 96720

Telephone (808) 933-0734 Facsimile (808) 933-3208

Mailing Address: 200 W. Kawili Street, Hilo, Hawai'i 96720

June 4, 2018

Ms. Puananionaona Thoene, Chair
Environmental Council
Office of Environmental Quality Control
235 South Beretania Street, Suite 702
Honolulu, Hawaii 96813

Dear Ms. Thoene:

I am writing in support of The Environmental Council's (Council) repeal of Hawai'i Administrative Rules (HAR) Chapter 11-200 and Adoption of HAR Chapter 11-200.1 (DOCKET NO. R11-200-05-18 Hawaii Department of Health).

The existing rules under HAR Chapter 11-200 have been in existence for over 20 years with only very limited revisions, but these rules have broad relevance and impact on land use in Hawai'i. During this same 20-year period there have been numerous legal challenges related to land use practices and it has become increasingly apparent there is a need for clarity in definitions and processes.

I commend the Office of Environmental Quality Control and Council for being proactive and demonstrating best practices in communicating their interest in updating the rules, engaging the community, providing multiple opportunities for public engagement, addressing public comments in the draft revisions, documenting and explaining the rationale for changes, and in holding formal hearings on proposed revisions.

The proposed changes to HAR Chapter 11-200 will improve the system of environmental review at the state and county levels to ensure environmental, economic and technical concerns are given appropriate consideration in decision-making. Examples of such changes the Council is proposing, which I support, include:

- A clearer pathway for going directly to an Environmental Impact Statement Preparation Notice (EISPN) and identification of content requirements for an EISPN when an Environmental Assessment was not previously prepared. (§ 11-200.1-4, § 11-200.1-14, and § 11-200.1-23)
- Improved integration of the use of the internet and computers. (general)
- Clarification of criteria for identifying when an activity is covered under existing documentation or when new reviews are needed. (§ 11-200.1-11)
- Periodic reviews of agency exemption lists. (§ 11-200.1-16)
- A provision for streamlining the reply process by allowing the grouping of comment responses under topic headings. (§ 11-200.1-20 and § 11-200.1-26)

Ms. Puananionaona Thoene
Page 2
June 4, 2018

One section I feel that needs clarification is §11-200.1-13, significance criteria. In determining the action's effect on the environment, the agency is required to consider the expected primary and secondary impacts and cumulative effects of the action. This section lists 13 situations where a significant effect on the environment could occur, but the effects are negative. While the Council combined the terms "substantial" and "adverse" to integrate both "positive" and "negative" effects when determining significance (companion rules rationale document, page 41), it remains unclear how the rules treat actions that have positive significant short and long term effects. A clear statement of how positive or beneficial impacts affect the significance determination and need for level of review (exempt, EA, or EIS) would improve the application of these rules.

Mahalo for the opportunity to comment on these proposed rules.

Sincerely,

Stephanie Nagata

Stephanie Nagata
Director

ALEXANDER & BALDWIN
PARTNERS FOR HAWAI'I

June 5, 2018

Mr. Scott Glenn, Director
Office of Environmental Quality Control
State of Hawaii Department of Health
235 South Beretania Street, Suite 702
Honolulu, Hawaii 96813

Attention: EIS Rules

Subject: Proposed Revisions to Hawaii Administrative Rules Chapter 11-200, Environmental Impact Statements

Dear Mr. Glenn:

Alexander & Baldwin, Inc. (A&B) requests that you consider the following comments on the proposed changes to Hawaii Administrative Rules (HAR) Chapter 11-200, Environmental Impact Statements.

Proposed Subchapter 8, Exempt Actions, List, and Notice Requirements
The proposed Section 11-200.1-15(c)(6) includes among the general types of actions eligible for an exemption from the preparation of an Environmental Assessment "Demolition of structures, except those structures that are listed on or that meet the criteria for listing on the national register or Hawaii Register of Historic Places".

Conversely, the existing Section 11-200-8(a)(8) identifies as an exempt class of action "Demolition of structures, except those structures located on any historic site as designated in the national register or Hawaii register as provided for in the National Historic Preservation Act of 1966, Public Law 89-665, 16 U.S.C. §470, as amended, or chapter 6E, HRS".

The Version 1.0 Rationale states (on page 46) that the intent of the proposed change is "to better balance the concerns of historic preservation" because some "stakeholders expressed concern that eligible buildings of potential significance were being demolished while others expressed concern that any building more than fifty years old was too broad of a standard". Under the proposed change, demolition of any structure that is 50 years old and that also "meets the criteria" under Hawaii Administrative Rules Section 13-198-8 for listing on the state or federal register would no longer be eligible for exemption.

For the reasons detailed below, A&B strongly objects to this proposed change, and urges that the existing language under Section 11-200-8(a)(8) be retained.

Firstly, concerns regarding eligible buildings of potential significance being demolished, whether or not they are associated with an action triggering review under Chapter 343 Hawaii Revised Statutes,

Environmental Affairs • P.O. Box 266 • Puunene, Hawaii 96784 • Telephone (808) 877-2959 • Fax (808) 871-7663

are adequately addressed under administrative rules pertaining to historic preservation in Hawaii, including but not limited to HAR Chapter 13-198.

HAR Chapter 13-198 already provides opportunities for the protection of buildings of potential significance by allowing any person to nominate a building, structure, object, district or site for entry into the Hawaii Register of Historic Places. However, HAR Chapter 13-198 also contains important protections for property owners who do not wish to see their property listed on the state or federal register. Those protections would effectively be circumvented if the revised language is adopted as proposed. Additional requirements for historic preservation review by the appropriate agency (the State Historic Preservation Division of the Department of Land and Natural Resources) are triggered by any application for a demolition permit when the structure to be demolished is 50 years old or greater. It is inappropriate and unnecessary to expand this regulatory program through the imposition of additional historic preservation requirements under HAR Chapter 11-200.1.

Secondly, although criteria for listing on the Hawaii Register of Historic Places under HAR Section 13-198-8 are referenced in the Rationale, these criteria are highly subjective, and there is no process proposed, no arbiter identified, and no authority established, for making the determination as to whether or not a property "meets the criteria" for listing on the state or federal registers under the proposed §11-200.1-15(c)(6).[1] Whereas the existing language of §11-200-8(a)(8) provides clear guidance as to which structures are eligible for the demolition exemption (i.e., a structure is either on the historic register or is not), the proposed change will, at best, introduce significant delays in the process of determining whether an Environmental Assessment is required for a demolition and will almost certainly result in disagreement over whether criteria are met.

Finally, the proposed change is at odds with the Legislative intent of Chapter 343, HRS, which includes a trigger under Section 343-5(a)(4) for actions that "Propose any use within any historic site as designated in the National Register or Hawaii Register, as provided for in the Historic Preservation Act of 1966, Public Law 89-665, or chapter 6E". It is clear from this language that the Legislature DID NOT intend that an action such as the issuance of a demolition permit would trigger environmental review under Chapter 343, HRS for sites which merely "meet the criteria" for listing on the state or federal register as opposed to actually being designated. The language of the exemption under Section 11-200.1-15(c)(6) should remain consistent with Legislative intent expressed in the language of the trigger.[2]

From a practical standpoint, A&B is concerned that the proposed rule change will prevent entities with facilities located on state or county land from removing such facilities upon termination of existing

---

[1] Importantly, a detailed process for determining whether a building, structure, object, district, or site is eligible for listing is specified in Subchapter 2 of HAR Chapter 13-198. This process includes submittal of information to a review board, conduct of a hearing at which interested persons or agencies are afforded an opportunity to submit data, views, or arguments relevant to the listing, examination of witnesses by the review board, and opportunity for a contested case hearing if the property owner objects to the decision of the review board. It is clearly impracticable to employ this process each time a decision needs to be made regarding eligibility for exemption from Chapter 343, HRS.

[2] The Rationale states that the proposed new language "better aligns the exemption standard with the helicopter facilities trigger in section 343-5(a)(8)(C) regarding any historic site as designated or under consideration for designation." The fact that the Legislature expressly included the "under consideration for designation" language only under the helicopter trigger rather than making any changes to the historic sites trigger provides clear indication that they intended the language should apply ONLY to helicopter facilities, not to all historic sites.

revocable permits without first completing an unnecessary, time consuming, and costly environmental review under Chapter 343, HRS. Not only would this requirement significantly delay termination of such agreements (and thereby extend the period during which rent payments must continue to be made), it will also prevent the affected state or county land from being put to other uses during the time it takes to complete the environmental review that would be necessary in order for demolition of improvements to proceed.

Proposed Subchapter 6, Applicability

In the proposed Section 11-200.1-9(a)(2), a reference to Section 343-5(a), HRS has been inserted to replace the listing of statutory triggers included in the existing Section 11-200-6(b). According to the Rationale, this change will allow the rules to remain aligned with the statute without amendment of the rules in the event of future amendments to Section 343-5(a), HRS. However, one function served by administrative rules is to provide greater detail regarding requirements specified in the statute, including clarifying how those requirements are to be interpreted by the implementing agency. This function is especially important when the language of the statute is unclear.

In the case of the trigger under Section 343-5(a)(9)(A) relating to wastewater treatment units, there is a lack of clarity in the statutory language that has contributed to significant uncertainty regarding the types of proposed wastewater systems that are intended to trigger review under Chapter 343, HRS.

Under Section 343-5(a)(9)(A), an environmental assessment is required for actions that "propose any wastewater treatment unit, except an individual wastewater system or a wastewater treatment unit serving fewer than fifty single-family dwellings or the equivalent". For domestic wastewater (i.e., sewage) systems, this trigger is easily interpreted because the trigger was written specifically to address new sewage treatment plants that prior to 2004 did not, by themselves, trigger environmental review under Chapter 343, HRS. Specifically, a septic system or a wastewater treatment plant (WWTP) with the capacity to serve 49 single family homes would not trigger environmental review, while a WWTP sized to serve 50 single family homes or the equivalent would trigger environmental review. However, the applicability of this trigger to non-domestic wastewater systems cannot readily be determined because such systems do not serve any single-family dwellings.[3] Moreover, it is unclear how to determine "the equivalent" of fifty single-family dwellings for wastewater systems that do not manage or treat domestic wastewater.

While a Hawaii court has ruled that a wastewater treatment unit being constructed as part of a proposed dairy farm triggered environmental review under Chapter 343, HRS, other types of non-domestic wastewater systems associated with agricultural operations may generate wastewater of a type and quantity that is clearly not "equivalent" to the wastewater from fifty single family homes. Because the statute is not sufficiently clear regarding the applicability the exception under Section 343-5(a)(9)(A) to non-domestic wastewater systems, and because each non-domestic wastewater system requires an approval from the Department of Health under HAR Chapter 11-62, it is necessary to provide clarification regarding this issue in the implementing regulation. Failure to provide such

[3] Non-domestic wastewater means all wastewater excluding domestic wastewater (i.e., domestic sewage). Non-domestic wastewater systems may manage wastewater from farms, dairies, agricultural processing facilities, power plants, vehicle maintenance facilities such as those with wash racks or car/truck/bus washing facilities, and other industrial, commercial, or agricultural operations, any of which could potentially be covered by Section 343-5(a)(9)(A) if they include any wastewater treatment unit.

clarification would potentially subject every non-domestic wastewater system, no matter how small, to a determination by the courts that an environmental assessment is required before it can be approved.

A&B recommends that the existing language in Section 11-200-6(b) listing the categories of action which require preparation of an environmental assessment be retained in the revised rule. We further recommend that consideration be given to including in the rule language clarifying the scope of the Section 343-5(a)(9)(A), HRS trigger as it applies to non-domestic wastewater treatment units, particularly those associated with agricultural operations.

Thank you for the opportunity to comment on the proposed rules.

Sincerely,

Sean M. O'Keefe
Director, Environmental Affairs
Alexander & Baldwin, Inc.

From: Kathleen Pahinui
To: HI Office of Environmental Quality Control
Subject: Support Rule Changes
Date: Wednesday, May 16, 2018 6:40:38 PM

Aloha -

I support the proposed rule changes with the following additions:

- Would request that more community input be required for the Environmental Assessment (EA).
- Require presentations to the Neighborhood Boards for both the EA and Environmental Impact Statement (EIS).

Mahalo,

Kathleen M. Pahinui
Waialu, North Shore, Oahu Resident

June 5, 2018

State Environmental Council
Office of Environmental Quality Control
235 South Beretania Street, Suite 702
Honolulu, Hawaii 96813

Attn: EIS Rules

Dear Distinguished Members of the Council:

The Kauai Chamber of Commerce commends the collaborative effort that resulted in these proposed rules. However, we write to you today with concerns, as some of the revisions may unintentionally create undue burden and hardship for small businesses operating in Hawaii.

1. **Amended § 11-200.1-1(c)(3)**

The requirement for "mutual, open and direct two-way communication, in good faith," is aspirational and subjective. Often both agency employees and the public lack the time and expertise to engage in such communications. We humbly suggest the language be modified to say: Make efforts to conduct any required consultation as mutual, open and direct, two-way communication, in good faith, to secure the meaningful participation of agencies and the public in the environmental review process.

2. **Amended § 11-200.1-2**

The use of term "evidence" implies a legal standard. We recommend replacing "evidence" with the word "facts".

3. **Amended § 11-200.1-23 (d)**

The deletion of the requirement to transcribe individual oral comments is good, as is the focus on written comments. However, the addition of a new requirement to have public oral comments and to audio record those comments offsets the efficiencies gained by the focus on written comments. What happens if no one elects to speak orally at the time reserved for oral comment? Does that mean the requirement has not been met? We suggest the requirement be modified to say that: The EIS public scoping meeting shall include a separate portion reserved for oral public comments and that portion of the scoping meeting shall be audio recorded, if such oral comments are made.

4. **Affordable Housing**

We applaud the affordable housing provisions in the proposed rules. Hawaii is experiencing a housing crisis, as more and more residents, who are priced out of the market, leave the state in search of the American dream of home ownership.

Thank you for your consideration as you deliberate the final rule.

June 4, 2018

Mr. Scott Glenn, Director
Office of Environmental Quality Control
State of Hawai‘i
235 South Beretania Street, Suite 702,
Honolulu, Hawai‘i 96813

Attn: EIS Rules

SUBJECT: PUBLIC NOTICE DOCKET NO. R11-200-05-18
HAWAI‘I DEPARTMENT OF HEALTH

Dear Mr. Glenn,

Thank you very much for the opportunity to provide written testimony on the above docket.

Firstly, you and your small, but hard-working staff should be recognized for addressing a long-overdue review of HAR 11-200. This effort, including public outreach, occurred over many months and appeared to be very inclusive, providing reviewers with various venues to provide comments.

Our following comments and questions are in regard to the “Standard” format version of the proposed amendments (HAR 11-200.1):

1) We are sure there is good reasoning for this, but why there isn’t language like 11-200. 1-9(b) for “Agency Actions” (11-200. 1-8)?
2) With respect to 11-200.1-13(b)(11), could OEQC designate what agency’s data they suggest planners rely on for determining if a project is proposed in a “sea level rise exposure area”.
3) In regard to “general types of actions eligible for exemption,” the proposed language “or meet the criteria for listing on” (11-200.1-15 (c) (6)) should be deleted since it is the State Historic Preservation Division’s current policy not to provide HRS Chapter 6E Review until a permit is sought (where SHPD would be a standard reviewing party). In practice, while an archaeological or historical architectural report is prepared and included in a HRS Chapter 343 document, SHPD will not comment.
4) In regard to “general types of actions eligible for exemption,” could 11-200.1-15 be revised to add “emergency housing” or “safe-zone housing”? This would primarily be for areas for “homeless” or “houseless” who could not even qualify to pay the rent for “affordable housing” rentals. We are proposing that unlike 11-200.1-15 (c) (10), these projects would not be required to share the criteria of 11-200.1-15 (c) (10) (B) and 11-200.1-15 (c) (10) (C).

5) In regard to 11-200.1-23 (a) (9), the requirement of providing when and where an EIS public scoping may be held, could be problematic in implementation. For instance, what if due to unforeseen circumstances, the meeting location or date or time is changed from what is reported in an EISPN?

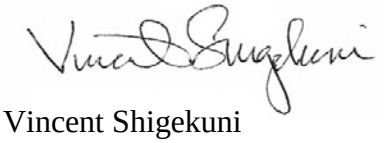
6) In regard to 11-200.1-23 (d), please clarify if the EIS public scoping meeting must be limited to a "public hearing format." In practice, we find many residents prefer to provide oral public comments, one-on-one, to avoid "public speaking" before an audience.

7) Some of the major revisions to HAR 11-200.1 involve guidance on providing responses to comments received during public review periods. While inappropriate for inclusion in the content of the new rules (HAR 11-200.1), is it possible for OEQC to provide a sample of how 11-200.1-24 (s) (2), 11-200.1-24 (s) (3), 11-200.1-26 (b), and 11-200.1-26 (c) would be implemented?

If you have any questions regarding the above, please do not hesitate to contact me.

Sincerely,

PBR HAWAII



Vincent Shigekuni
Senior Vice President

From: Laulani Teale
To: HI Office of Environmental Quality Control
Subject: EIS comments
Date: Tuesday, June 5, 2018 11:45:26 PM

Because I have been so crazy busy and because these are due, I am just sending a super-quick summary of my main concerns with the EIS process:

1. Use of names as having been consulted without explicit CONSENT is not okay. It should be a requirement that each person or organization listed as having been consulted should have to approve the use of his/her/their name prior to inclusion.

2. EIS preparers should not be hired by the developer/project. There should be a standard scale, based on budget/area, and those initiating the project should pay a standard fee based on that scale, which should then be used to pay for a preparer that the State assigns from a list.

The corruption in the current systen is extremely high. If th

--
Laulani Teale, MPH
Coordinator, Ho'opae Pono Peace Project
An affiliate of Seventh Generation Fund for Indigenous Peoples
http://www.7genfund.org/
(808)256-6637

June 5, 2018

Office of Environmental Quality Control
235 S. Beretania St. Suite 702
Honolulu, Hawaii 96813

Subject: Proposed Updates to Hawai‘i Administrative Rules (HAR) Chapter 11-200, Environmental Impact Statement (EIS) Rules

Ladies/Gentlemen:

We are submitting comments on proposed rule changes for administration of the State environmental impact law, HRS, Chapter 343, referenced above. These comments are presented by the Marine and Coastal Zone Advocacy Council (MACZAC). I am chair of MACZAC which advises the State Office of Planning and advocates for the public on coastal and marine issues. Established by the State Legislature, the council is comprised of members from six islands serving on a volunteer basis and representing various interests and areas of expertise.

We commend your office for undertaking this difficult and important task and wish to express our gratitude for your diligence, attention to detail, and sensitivity to community input.

Our comments are limited to those sections of the rules most relevant to our kuleana. Although the coastal zone includes land from the tops of the mountains to the sea, as well as nearshore waters within State jurisdiction, we wish to focus on the rules that apply mainly to actions located on coastal lands and in the ocean.

MACZAC strongly supports clarifications to the environmental review process for emergency actions. Allowing an agency to bypass Chapter 343 after an emergency is valid in many circumstances, but MACZAC believes that use of this exemption merits more stringent review. We have long advocated that shoreline hardening along Honoapi`ilani Highway on the island of Maui should have required Chapter 343 documentation. Continued hardening of the shoreline may be contributing to accelerated erosion to the detriment of Maui’s beaches. Previous seawall construction done by emergency proclamation did not take into account environmental and cultural concerns or local knowledge of the problems and solutions. Construction work at Ukumehame caused a silt plume that settled over the reef, contributing to degradation of corals. Additional shoreline hardening was proposed at Olowalu by an emergency proclamation from Hurricane Iselle. Beach erosion at this site is chronic; it was not caused by a hurricane. Waves at Olowalu were no larger than on a normal day during and shortly after Hurricane Iselle. The community expressed concern about impacts to the reef at Olowalu, which is one of the healthiest reefs on Maui and already impaired due to silt runoff and warming ocean temperatures causing the corals

to bleach. In addition, the cumulative impact of more seawalls is leading to permanent loss of access to important cultural and recreational areas. Fortunately, the Olowalu project was stopped in response to community concerns. By requiring that emergency actions be substantially completed within 60 days after a proclamation, the proposed rules change will make it more difficult for agencies to use the emergency action exemption where it does not apply.

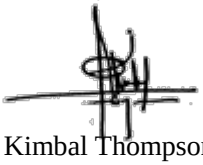
MACZAC also strongly supports the addition of sea level rise exposure areas to the list of areas that could be considered environmentally sensitive (Subchapter 7, Determination of Significance). Data and maps are available to identify many future inundation areas, and research continues to update and add to our knowledge of sea level rise impacts. Coincidentally, Honoapi`ilani Highway is most likely in a sea level rise exposure area, with the ocean currently washing onto the roadway most days at high tide.

We have two additional comments/suggestions.
The proposed rules change puts more emphasis on the assessment of impacts on "cultural practices" but does not appear to define cultural practices. One of our MACZAC members, now retired, had many years of experience preparing both NEPA (National Environmental Policy Act) and Chapter 343 documents. She shared that just about every activity in the ocean could be defined as "cultural" even though the practitioner may consider them as recreational or as a subsistence activity with no cultural component, e.g., surfing, fishing, opihi picking, limu gathering. She and/or close family members have engaged in all of these activities but never considered them as part of their culture. We suggest that "cultural practices" be defined in the rules.

Another suggestion is that certain beneficial projects in the coastal zone known to have little or no impact on sensitive resources be exempted from the Chapter 343 process. Examples include Hawaiian fishpond seawall reconstruction and repairs, removal of invasive species, and installation of pin moorings in sandy substrate to prevent anchoring of boats in coral. The rules change would allow this if an agency includes such projects on its list of exemptions. Another approach used under the NEPA process is the preparation of a categorical exclusion or CATEX to document that a project can move forward without an environmental assessment or EIS. Perhaps a CATEX could be required for emergency actions.

Thank you for this opportunity to comment on updates to HAR Chapter 11-200.

Sincerely,



Kimbal Thompson, Chair
Marine and Coastal Zone Advocacy Council

Puananionaona Thoene, Chair
Environmental Council
c/o State of Hawaii
Department of Health
Office of Environmental Quality Control
235 South Beretania Street, Suite 702
Honolulu, Hawaii 96813

Proposed Revisions to Hawaii Administrative Rules—Version 1.0, March 2018

Thank you for the opportunity to provide comments. We were unable to attend the meeting last week due to a large event we held, but appreciate the opportunity to submit written comments today.
Please find highlights on each section we have concerns with and our comments and suggestions under each below.

Amended § 11-200.1-1(c)(3)

- We feel the language in this section is too vague and may result in a longer process.
- Since the language is not clear and definitive, it is hard to say what the impacts will be.
- We suggest the language be modified to say "Make efforts to conduct any required consultation as mutual, open and direct […]"

Amended § 11-200.1-2 (Definitions)

- The language in this section including "significant environmental effect" and "sufficient evidence" are too broad and may be interpreted differently.
- We understand the Council indicated that an EA does not require an "unduly long analysis," but feel the vague language in this section could lengthen the process and require applicants to have additional data and analysis than what is currently required.
- We want to hear what the proposed reasonable timeframe for an analysis is and if it went beyond that reasonable timeframe, it would be considered "unduly long".
- We suggest the term "evidence" be changed to the word "facts" as "evidence" implies a legal standard.

Amended § 11-200.1-23 (d) (Consultation Prior to Filing a Draft Environmental Impact Statement)

- We appreciate the deletion of the requirement to transcribe individual oral comments and the focus on written comments.
- However, by adding the requirements to have public oral comments and audio record them may make the process less efficient. Additionally, it raises the concern that if oral comments are not given, some may say the requirement has not been met.
- We suggest the language be changed to state:
- "The EIS public scoping meeting shall include a separate portion reserved for oral public comments and that this portion of the scoping meeting shall be audio recorded, if such oral comments are made."

Page 2.

Amended §§ 11-200.1-18 (Preparation and Contents of a Draft Environmental Assessment) and 11-200.1-21 (Contents of a Final Environmental Assessment)

- Including an "analysis" of impacts and alternatives would require more time (possibly years) and effort. This could significantly delay many projects and result in substantial negative impacts.
- The degree to which an analysis of impacts and alternatives should be covered is unclear.
- Given this, we are concerned that the sufficiency of any analysis might be challenged, creating further burdens for all parties concerned.
- We suggest the language in the rationale be amended to: "Identification and supporting information regarding impacts and alternatives considered;"

Amended §§ 11-200.1-24 (Content Requirements; Draft Environmental Impact Statement), and 11-200.1-27 (Content Requirements; Final Environmental Impact Statement)

- "Reasonably foreseeable consequences" is highly subjective and we believe it will lead to requirement challenges, a longer process and delays.
- What is reasonably foreseeable to one may be very different to another. Are we talking six months, a year, two years? The time frame should be spelled out for public consideration.
- Further, the word environmental should be inserted so that it reads "reasonably foreseeable environmental consequences."

Mahalo for the opportunity to provide comments and feedback on the proposed EIS changes. If we can be of further assistance, please don't hesitate to give us a call.

Sincerely,

Pamela Tumpap

Pamela Tumpap
President

To advance and promote a healthy economic environment for business, advocating for a responsive government and quality education, while preserving Maui's unique community characteristics.

95 Mahalani Street, Suite 22A, Wailuku, Hawaii 96793 808-244-0081 info@MauiChamber.com MauiChamber.com

FILE COPY

Lee Sichter LLC
45024 Malulani Street #1, Kaneohe, Hawaii 96744
Ph. (808) 382-3836; Fax. (808) 234-0872; Web. www.leesichter.com

RECEIVED
'18 JUN -6 A8:37
OFC. OF ENVIRONMENTAL
QUALITY CONTROL

May 30, 2018

Mr. Scott Glenn
Executive Director
Office of Environmental Quality Control
235 South King Street, Suite 702
Honolulu, Hawai`i 96813
Attn: EIS Rules

Dear Mr. Glenn:

Comments on Proposed Draft EIS Rules
Chapter 200.1 Hawaii Administrative Rules

I am writing to follow up on the oral testimony that I presented at your public hearing at the State Capitol Auditorium on Monday, May 21, 2018. Mahalo for the opportunity to review and comment on the Draft EIS rules.

Overall, I support the general direction that the rules are taking and believe they will help to clarify the process. As a land use planner with 39 years of experience preparing environmental assessments and impact statements in Hawai`i, I am pleased with the efforts of the Environmental Council and the work product it has produced.

I do, however, have two specific comments which I would like the Council to consider.

1. I am concerned that the Council has not offered a definition of the term "substantial" in the proposed rules. The lack of clarifying language results in this word remaining as a discretionary term, leaving the general public and applicants without any clear guidance.

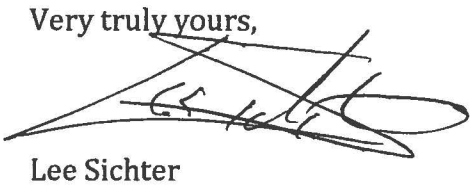
   A key element of the planning profession is the ability to evaluate the impacts of a proposed plan to determine its success. I propose that the Council take its lead from this philosophy and add to the term "substantial" the word "measurable". Thus, every time the word "substantial" is used in Section 11-200.1-13 (significance criteria) for example, it would read "substantial measurable". We must be able to evaluate quantitatively the impacts with which we are concerned. Anything less does not fulfill the legislative intent of Chapter 343.

2. I strongly oppose the inclusion of the term, "...or that meet the criteria for listing on..." at subsection 11-200.1-15(c)(6). Presently, the demolition of a structure listed on the national or state historic register triggers environmental assessment. The addition of the proposed language would expand this trigger to any structure that is over 50 years old.

   If I could sum up my planning career over the past 39 years, it would be "addressing the tension between urban/suburban development and rural preservation". With respect to the City and County of Honolulu, the development policy is absolutely clear: promote higher density in existing urban areas and discourage development outside of designated urban areas. However, to achieve this goal and implement this policy, especially in the Primary Urban Center, a great deal of redevelopment must occur. The greatest potential for redevelopment is the Beretania/Young/King Street corridor, which currently allows mixed-use development up to 150 feet, but is largely occupied by 2-5 story structures dating back to the 1950s or earlier. The Council's inclusion of the proposed language will place an additional burden on the owners of these properties, in terms of both time and money. These properties have not redeveloped for two reasons; first, many are too small to support higher density and must be consolidated with adjoining properties to do so, and second, the owners cannot afford to abandon their economic livelihood for the time it would take to redevelop their property. They are land rich and cash poor with their only source of revenue being generated out of a 50+ year old structure. The proposed language goes to the heart of the second reason. Requiring an EA to be done prior to the demolition of a 50+ year old building would add another 6 months to a year to the development process timeline, making it that much more difficult for the small business owner to redevelop their property. I believe that the unintended consequence of the proposed language would be to further slow the redevelopment of urban Honolulu, thereby exacerbating an already significant housing crisis. Please leave sub-paragraph c6 as it is.

If you have any questions or require any additional information, please call me at 382-3836.

Very truly yours,



Lee Sichter

LEE SICHTER
45-024 MALULANI ST #1
KANEOHE, HAWAII 96744

HONOLULU HI 968
31 MAY 2018 PM 5 L

MR. SCOTT GLENN
EXECUTIVE DIRECTOR
OFFICE OF ENVIRONMENTAL QUALITY CONTROL
235 SOUTH KING STREET SUITE 702
HONOLULU, HAWAII 96813

18-630

ATTN: EIS RULES

96813-450335

FILE COPY

SIERRA CLUB OF HAWAI'I
MĀLAMA I KA HONUA. Cherish the Earth.

Director Scott Glenn
Office of Environmental Quality and Control, State of Hawai'i
235 South Beretania Street, Suite 702
Honolulu, Hawai'i 96813

June 5, 2018

Aloha Director Glenn,

On behalf of our 20,000 members and supporters, the Sierra Club of Hawai'i offers these formal comments on the proposed changes to Hawai'i Administration Rules §11-200 implementing Haw. Rev. Stat. §343.

For the most part, the Sierra Club finds the changes proposed to HAR §11-200 to be an improvement. The regulations are presented in a logical order and written in direct, simple language that is easy to understand. The proposed changes are well-documented and explained.

We would like to especially highlight the Council's revisions to improve meaningful participation in the environmental review process (HAR 11-200A-1A), specificity on the requirements for publication (HAR 11-200A-5A), inclusion of cultural resources and practices in the significance criteria (HAR 11-200A-12A), and inclusion of climate change related concerns in the significance criteria triggering the requirement for an environmental evaluation, including flooding, erosion, and greenhouse gas emissions (HAR 11-200.1-13(b)). Thank you very much for re-focusing these regulations on the fundamental purposes of HRS §343.

That said, several concerns we raised with the Environmental Council throughout this extensive public process remain:

I. Significance Criteria (HAR 11-200.1-13(b)).

The newly proposed regulations add the words "likely to" ahead of the list of potential conditions that would require an environmental impact statement. The standard instead should be "raise substantial questions regarding." This change might seem minor at first, but think about it: If the trigger to requiring an EIS is something is LIKELY to happen, then it will be much harder to require an EIS. Besides how would one know if something is likely to happen? The whole purpose of an environmental evaluation is to determine IF there might be impacts from the proposed action, and if so how severe would the impacts be.

The proposed regulations cite the Kepo‘o v. Kane case from 2005 as the basis for the wording “likely to.” We content that the better case to rely on is the 2010 Unite Here! v. County case regarding development at Turtle Bay and the need for a supplemental EIS.

In its decision in the Unite Here! Case, the Supreme Court distinguished its earlier ruling and clarified the standard to be “raises substantial questions regarding.” The Court said:

> This court has recently stated that the phrase "may have a significant effect" as used in HEPA means "whether the proposed action will `likely' have a significant effect on the environment." Kepo`o v. Kane, 106 Hawai`i 270, 289, 103 P.3d 939, 958 (2005)(construing HRS § 343-5(c)). [22] Further, the United States Court of Appeals for the Ninth Circuit has held that, under the aforementioned standard, plaintiffs "need not show that significant effects will in fact occur" but instead need only "raise[] substantial questions whether a project may have a significant effect[]." Klamath Siskiyou Wildlands Ctr. v. Boody, 468 F.3d 549, 562 (9th Cir. 2006) (underscored emphasis in original) (bold emphasis added).
>
> The record in this case — particularly the post-1985 EIS traffic reports — clearly "raises substantial questions," id., regarding changes in the project area and its impact on the surrounding communities.

For these reasons, we are strongly urging the Environmental Council to either cross out the words “likely to” thereby leaving that part of the regulation unchanged. Or, replacing the phrase “likely to” with “raises substantial questions regarding.”

II. Affordable Housing Exemption (HAR 11-200.1-15(c)(11)).

We recognize that Hawai‘i is suffering a housing crisis. More affordable housing must be built to ensure that everyone in Hawai‘i has a decent place to live. This mandate, however, does not justify total circumvention of the laws designed to ensure a high-quality of living for all of Hawai‘i’s people. Compliance with Chapter 343 is as much about protecting natural and cultural resources as it is about ensuring livable communities, good urban design, satisfaction of minimum infrastructure needs, and thoughtful traffic management. Affordable housing projects have the potential to significantly affect the quality of life for residents of the proposed project, as well as the surrounding community. The exemption as currently written is ripe for abuse by developers seeking to build less-than-affordable housing without any environmental review.

At the very least, this exemption should define affordable housing as 60% AMI or below and expire ten years after adoption. If the housing crisis still exists in 10 years, then we can consider an extension of the exemption.

III. Pay-to-degrade

The proposed revisions missed the opportunity to address the growing popularity of "pay to degrade" arrangements, where project proponents provide financial support for ancillary, indirect activities to "mitigate" the significant impact anticipated by a project proposal. For example, when a project proponent proposes to destroy a culturally significant viewplane or undermine the dominance of nature in a conservation district by building a massive structure, and then proposes to reduce the significance of these harms by paying to an education fund or furnishing the structure with cultural artifacts. Arranging a community benefits package to ensure the profits of a proposal are shared more equally is important but it is not the same as mitigating the harm of a proposed activity to a level that is less than significant.

These regulations should make clear that only mitigation measures that directly reduce the significant impact anticipated by the project should be considered, e.g. create new habitat to off-set habitat that will be lost due to a project.

IV. Exemptions

We understand the motivation to hone in on when an environmental review is needed and when it is not. It is important to save resources by focusing them on the proposed actions that really need our collective attention. We can see the logic behind the restructuring of the exemption process. That said, there is still a major problem for the lack of a definition for the word "minor."

Properly employing exemptions hinges almost completely on whether an agency considers a proposed action to be "minor." What qualifies as minor? This is a difficult, but crucial question to answer.

In addition, renewed exemptions should be reconsidered by the agency in full, instead of simply just granted again because it was granted before. Changes in the condition of the surrounding environment, community sentiment, and the activity itself warrant an agency to make a more thoughtful evaluation about whether an exemption is still appropriate.

V. Supplemental EIS triggers

The issue of when is an environmental evaluation is too old to be valid has been seriously and repeatedly litigated in Hawai‘i. This rewrite of the regulations should not miss the opportunity to provide clarity on this question. Think of how significantly our environment is evolving in the context of climate change. Nothing should be assumed.

The regulations in this regard should be amended to:

A) Set a shelf-life EAs and EISs. We propose 5 years.

B) Make clear that changed conditions to the surrounding environment and community -- not

just to nature of the proposed action -- are grounds for requiring a new environmental review.

C) Require environmental review on the renovation or reconstruction of previously exempted projects.

Thank you again for this opportunity to provide feedback on the proposed changes to HAR §11-200. Please contact us at your convenience to follow up on any of our comments.

Sincerely,

Marti Townsend
Director
Sierra Club of Hawai‘i

From: Malia Waits
To: HI Office of Environmental Quality Control
Subject: Written testimony-belated
Date: Wednesday, June 6, 2018 2:24:21 PM

Aloha mai Kakou,
I know its past the deadline, however I feel its relevant to at least submit an email.
My name is Malia A. Waits and my concern is with the relevant substitutions for the FONSI wording in the new rule changes. There is no clear relevance addressing this in particular. Another concern is the exemption process has decreased operational efficiency when communicating with the public on exemptions granted.
Thank you for your time.
Aloha,
Malia

Harry Kim
Mayor

Michael Yee
Director

Daryn Arai
Deputy Director

West Hawai'i Office
74-5044 Ane Keohokalole Hwy
Kailua-Kona, Hawai'i 96740
Phone (808) 323-4770
Fax (808) 327-3563

FILE COPY

County of Hawai'i
PLANNING DEPARTMENT

East Hawai'i Office
101 Pauahi Street, Suite 3
Hilo, Hawai'i 96720
Phone (808) 961-8288
Fax (808) 961-8742

June 1, 2018

RECEIVED
'18 JUN -6 A8:37
OFC. OF ENVIRONMENTAL
QUALITY CONTROL

Ms. Puananionaona P. Thoene, Chair
State of Hawai'i, Department of Health
Environmental Council
235 South Beretania Street, Suite 702,
Honolulu, HI 96813

Dear Ms. Thoene:

SUBJECT: Comments on Draft, Version 4 of Hawai'i Administrative Rules (HAR) Chapter 11-200 Environmental Impact Statements (EIS)

We greatly appreciate the Environmental Council and Office of Environmental Quality Control (OEQC) for pursuing this important task of updating and improving the rules for Environmental Impact Statements (EIS), Hawai'i Administrative Rules (HAR) Chapter 11-200. We have been reviewing the various versions of the revised EIS rules as they have been generated by the Environmental Council. In response to the latest draft, Version 4, we offer the following comments:

- The clarifications concerning de minimis actions and thresholds for exemptions will assist County agencies in identifying the actions that require examination for their potential to cause significant impacts, while avoiding needless documentation for truly minor projects with no potential.

- The requirement to provide a scoping meeting at the EIS level is in line with the federal procedures and will assist all parties in properly determining the scope of the action and the studies that will need to be completed.

- The requirement for audio recordings of the oral comments made during the comment portion of the scoping meeting is a fair one that will ensure that a valuable piece of public input, especially in a culture with a long and important oral tradition, is not ignored or lost.

18-631

- We appreciate having a version of the rules that fully takes into account and organizes the requirements concerning cultural impact assessment, proceeding direct to EIS, and affordable housing that were implemented as laws but not integrated into the rules.

- The reorganization, clarifications and consistency improvements in the sections that deal with supplemental documents and programmatic EISs will make the process much easier to understand and navigate.

- The simplification and clarification on responses to written comments will be helpful to agencies as they prepare or evaluate EAs and EISs.

- The section of the rules dealing with conducting joint federal-state environmental review is an important improvement that will assist agencies involved in this process.

- It is important to have provisions in the revised rules that modernize submittals and deadlines to consider electronic communication, which will help save time, money and resources.

- Regarding exemptions, we support the provision that eliminates the requirement for consultations and publication if the agency has properly considered an exemption list and the Environmental Council has approved the exemption list for the agency within 7 years of the action. We recommend adding a clarification that once an action is listed on an exemption list, it is exempt across the board so that any agency can use exemptions from another agency's exemption list.

- We support requiring consideration of the impacts of sea level rise and greenhouse gases as significance criteria.

We appreciate the opportunity to offer testimony and participate in this process. If you have any questions, please contact me or April Surprenant of my office at (808) 961-8288.

Sincerely,

MICHAEL YEE
Planning Director

AS:ja
\\Coh33\planning\public\wpwin60\CZM\Letters\2018\06-01-2018 Comments on Draft Ver.4 of HAR Ch. 11-200 EIS.doc

County of Hawai'i
PLANNING DEPARTMENT
101 Pauahi Street, Suite 3
Hilo, Hawai'i 96720-4224

Ms. Puananionaona P. Thoene, Chair
State of Hawai'i, Department of Health
Environmental Council
235 South Beretania Street, Suite 702,
Honolulu, HI 96813

18-631

96813\2419 C032

FILE COPY

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU
650 SOUTH KING STREET, 7TH FLOOR • HONOLULU, HAWAII 96813
PHONE: (808) 768-8000 • FAX: (808) 768-6041
DEPT. WEB SITE: www.honoluludpp.org • CITY WEB SITE: www.honolulu.gov

KIRK CALDWELL
MAYOR

KATHY K. SOKUGAWA
ACTING DIRECTOR

TIMOTHY F. T. HIU
DEPUTY DIRECTOR

EUGENE H. TAKAHASHI
DEPUTY DIRECTOR

1598843 (lli)

June 5, 2018

Ms. Puananionaona Thoene
Chair
Environmental Council
Office of Environmental Quality Control
235 South Beretania Street, Suite 702
Honolulu, Hawaii 96813

Dear Chair Thoene:

SUBJECT: Proposed Revisions to Hawaii Administrative Rules
Title 11-Chapter 200 Environmental Impact Statement Rules

We appreciate the opportunity to submit comments on Draft Version 1.0 of the proposed rule revisions to the Hawaii Administrative Rules Title 11-Chapter 200 regarding Environmental Impact Statement (EIS) processes, requirements, and documents.

The Department of Planning and Permitting offers the following:

1. §11-200.1-2 Definitions.
"Program" now includes "an entire plan having wide application or restricting the range of future alternative policies or actions, including new significant changes to existing land use plans, development plans, zoning regulations, or **agency** comprehensive resource management plans..." We support this modification to the definition as it further clarifies the intent.

2. §11-200.1-5 Filing Requirements for Publication and Withdrawal.
Please include the information that the Hawaii Documents Center is a part of the Hawaii State Library.

3. §11-200.1-7 Identification of Approving Agency and Accepting Authority.
We support the additional language that further defines the approving agency and accepting authority where more than one agency is involved.
We also support the language that grants the Office of Environmental Quality Control the power to determine responsibility should there be any confusion between agencies.

4. §11-200.1-13 Significance Criteria.
In general, we support the inclusion of "sea level rise exposure area" as an "environmentally sensitive area" and the addition of the emission of substantial greenhouse gases as a significance criterion. Regarding the former, there may be some conflict in determining the sea level rise exposure area since there are a variety of available sources of data, some areas of no data, different ranges within data sets (e.g. best to worse case scenarios, target year of analysis, etc.), and there are still some variations of thought within the scientific community. As to the latter, some quantification, thresholds, or at least further clarification is needed to define what is meant by a "substantial" amount of greenhouse gas emission, especially in light of National and State goals and policies.

5. 11-200.1-15 General Types of Actions Eligible for Exemption.
We support the new exemption list item for new construction of affordable housing. However, we do not support criteria C that will only exempt affordable housing if the proposed action is consistent with existing county zoning that allows housing. Affordable housing development proposals processed under Hawaii Revised Statues (HRS) Section 201H sometimes propose affordable housing on land that is not in a county zoning district which permits residential development, or requires exemptions from development standards in order to make the project feasible. In this situation, the developer often requests an exemption from county zoning requirements. The request is vetted and sometimes granted. Criteria C would require such a developer to enter into the environmental review process which would create delay and possibly affect funding and/or final affordability. Therefore, we recommend Criteria C be amended to consider the 201H approval process.

6. §11-200.1-20 and 11-200.1-26 Comment Response Requirements (both environmental assessment (EA) and EIS documents).
We do not support the limiting of responses to substantive comments only. We prefer requiring responses to all comments, though they may be grouped. Responses to non-substantive comments can be simple (e.g. "this rule does not apply to this project") and can be in the form of a singular response to a collection of form letters or a petition as long as all unique comments are clearly acknowledged, especially since this is a public participatory process. Too often we have seen preparers ignore comments deemed unfavorable to the preparer, the applicant, or to the preferred alternative, resulting in a weakened final document. The proposed change in response requirements can make this situation worse. It clearly gives the power of determining what is substantive or not to the preparer or proposing agency as well as allows for interpretation of the comments. The accepting or approving agency does not have authority to weigh in at this level even though a thorough response to a comment could make a difference in the strength of the final EA or EIS and in the ultimate decision-making. Therefore, while we have no issues with any changes to the procedure of submitting comments and responses, we do not support the limiting of responses.

In a related matter, we recommend that all individuals providing comments be required to include their full names and mailing addresses or email addresses. If handwritten, this information must be legible. Without legible names and addresses, the preparer's response should not be required, but optional. The aim of this recommendation is three-fold; 1) to reduce duplicate comments from a single person, 2) to discourage non-substantive comments or comments in the pejorative without a specific tie-in to the proposed project or analysis, and 3) to encourage more thoughtful and constructive comments as well as general civility before the comments are even submitted. The mailing and email addresses can be kept confidential if so desired. Even further, perhaps instructions for comments can be included in the Environmental Notices.

7. <u>§11-200.1-23 Consultation Prior to Filing a Draft Environmental Impact Statement (Public Scoping Meeting)</u>.
We support the new requirement for a public scoping meeting as part of an EIS Preparation Notice. We see this as beneficial in eliciting important considerations early on, especially from community members and outside experts.

Thank you for the opportunity to comment. Should you have any questions, please contact me at 768-8000.

Very truly yours,

Kathy K. Sokugawa
Acting Director

KKS:bkg

DAVID Y. IGE
GOVERNOR OF
HAWAI'I

SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
FIRST DEPUTY

JEFFREY T. PEARSON, P.E.
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

STATE OF HAWAI'I
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAI'I 96809

June 7, 2018

MEMORANDUM

TO: Scott Glenn, Director
Office of Environmental Quality Control

FROM: Suzanne D. Case, Chairperson
Department of Land and Natural Resources

SUBJECT: DLNR Comments on the Proposed Revision to HAR, Chapter 11-200, Environmental Impact Statement Rules (Version 1.0)

The Department of Land and Natural Resources (DLNR) would like to thank the Environmental Council members and the staff at the Office of Environmental Quality Control (OEQC) for their transparency and opportunity for comment during the rules revision process. Comments from the Department on the proposed amendments to HAR Chapter 11-200, Environmental Impact Statement Rules (Version 1.0) are detailed below.

Subchapter 6 Applicability

<u>§11-200.1-8 Applicability of chapter 343, HRS, to agency actions</u>

- The State Legislature recently passed HB 2106 relating to sea level rise. The measure is awaiting Governor's action. The bill requires all environmental assessments and environmental impact statements prepared pursuant to Chapter 343, Hawaii Revised Statutes, whether in draft or final form, to include consideration of sea level rise based on the most recent scientific data available regarding sea level rise. However, the proposed rules do not discuss sea level rise, except in the context of making a determination of significance. We expected the new rules to have a substantive discussion of sea level rise in the "Content Requirements" sections of the rules. This does not appear to comport with the requirements of HB 2106.

Subchapter 7 Determination of Significance

<u>§11-200.1-12 Consideration of previous determinations and accepted statements</u>

- In previous years, exemption notices were signed by the Chairperson or Department administrators. These exemptions are still cited and included as part of project

compliance. The Department agrees that prior exemptions, findings of no significant impact, or accepted environmental impact statements can be incorporated into exemption notices.

- There is a reference to a "Programmatic EIS" and "Programmatic EA", but no other mention of these types of documents in the proposed rules. Suggest adding to Subchapter 2 Definitions and recommend an attempt by OEQC to formalize programmatic environmental documents.

§11-200.1-13 Significance criteria

- Supports the inclusion of culture into the significance criteria, but recommends that "cultural resource" and "cultural practice" be defined.

Subchapter 8 Exempt Actions, List, and Notice Requirements

§11-200.1-16 Exemption lists

- In 2015, the Department of Land and Natural Resources created a department-wide exemption list. The Environmental Council concurred with DLNR's Exemption List on June 5, 2015. The proposed language in the rules requires existing exemption lists to be submitted to the council for review and concurrence every seven years, even if the Department's exemption list has not changed. We suggest that the proposed language be changed to require each agency to review their own exemption list within seven years and submit a formal letter to the council acknowledging that the existing list is still valid. Council concurrence should only be needed when amendments are sought.

§11-200.1-17 Exemption notices

- The Department agrees with the proposed amendment in subsection (c) which clarifies that consultation regarding *and* publication of an exemption notice is not required when the agency has created an exemption list. However, this seems to contradict subsection (d) which states each agency shall submit a list of exemption notices to OEQC for publication in the bulletin. Please clarify if agencies are required to submit their list of exemptions for publication each month. Monthly compilation of exemption notices and submission to OEQC will be time-consuming and onerous for Department staff. Therefore, the Department would prefer to continue the practice of keeping exemption notices on file for review upon request by the public or an agency.

Subchapter 9 Preparation of Environmental Assessments

§11-200.1-18 Preparation and contents of a draft environmental assessment

- Recommend amending (d) (6) "Summary description of the affected environment, including suitable and adequate regional, location and site maps such as Flood Insurance

Rate Maps, Floodway Boundary Maps, or United States Geological Survey topographic maps, State sea level rise exposure maps".

- Recommend adding (d) (11) "Discussion of vulnerabilities and adaptation measures if proposed action will take place fully or partly within the State sea level rise exposure area".

Subchapter 10 Preparation of Environmental Impact Statements

§11-200.1-23 Consultation prior to filing a draft environmental impact statement

- Recommend adding "The draft EIS shall contain a separate and distinct section that provides State sea level rise exposure maps and discusses vulnerabilities and adaptation measures if proposed action will take place fully or partly within the State sea level rise exposure area".

DAVID Y. IGE
GOVERNOR

JADE T. BUTAY
DIRECTOR

Deputy Directors
ROY CATALANI
ROSS M. HIGASHI
EDWIN H. SNIFFEN
DARRELL T. YOUNG

IN REPLY REFER TO:
STP 8.2443

STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

June 13, 2018

TO: THE HONORABLE BRUCE ANDERSON, PH.D.
DIRECTOR, DEPARTMENT OF HEALTH

ATTN: SCOTT GLENN, DIRECTOR
OFFICE OF ENVIRONMENTAL QUALITY CONTROL

FROM: JADE T. BUTAY
DIRECTOR OF TRANSPORTATION

SUBJECT: COMMENTS REGARDING PROPOSED CHANGES TO THE OFFICE OF ENVIRONMENTAL QUALITY CONTROL'S HAWAII ADMINISTRATIVE RULES DRAFT 1

The Hawaii Department of Transportation (HDOT) thanks the Office of Environmental Quality Control (OEQC) and the Environmental Council (EC) for undertaking this ambitious effort to update the Hawaii Administrative Rules, Title 11-200 (HAR 11-200). We also appreciate being given the opportunity to review and provide comments on the various drafts that have been developed throughout this process. HDOT's comments will pertain to the Draft 1, Ramseyer Unofficial Version dated March 2018. HDOT offers the following specific concerns, comments, and suggestions with additional suggestions and comments summarized in the attached table.

First, HDOT is concerned with the proposed new language allowing the EC to provide Concurrency after the agency has already certified that the existing list is still valid in 11-200.1-16(d). The proposed language states:

> "(d) 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**; provided that in the event the **council** is unable to meet due to quorum when a **concurrence** for an **agency exemption list** is seven years or older, the **agency** may submit a letter to the **council** acknowledging that the existing **exemption list** is still valid. Upon attaining quorum, the **council** shall review the **exemption list** for **concurrence**. [~~The lists shall be reviewed periodically by the council.~~] The **council** may review **agency exemption lists** periodically."

The proposed language requires existing exemption lists and those with proposed amendments to go through the EC concurrency process. This treats exemption lists that have amendments and those that do not the same. For the cases where there are no changes proposed to an agencies' existing exemption list, this process is unnecessary as the EC has already concurred on the existing list.

STP 8.2443

Rather, HDOT continues to suggest that the proposed language simply require each agency to review their own Exemption List within seven years and submit a formal letter to the EC acknowledging that the existing list is still valid. If amendments are sought or needed then EC concurrence can be acquired per your revised language. This will allow the EC to focus on those lists that need review and concurrence.

Second, proposed changes in 11-200-.1-16 and item (b) creates a de minimis list of activities that are exempt from HAR 11-200.1-17. HDOT suggest that OEQC develop a list of activities that should be placed under de minimis that can be used by all agencies. Agencies could add to this list when updating their own exempt list however, OEQC should create a base list that each of the agencies can use.

Third, HDOT is concerned regarding the proposed language to require public scoping meetings in 11-200.1-4 and item (b)(4) and in other sections of Draft 1 and states:

> "(4) Final **Environmental Assessments**, including notice of a **Finding of No Significant Findings**, or an **Environmental Impact Statement Preparation Notice** with thirty-day comment period and notice of **Environmental Impact Statements (EIS) public scoping meeting,** and appropriate **addendum** documents;"

HDOT recommends changing the requirement from a "scoping" to "consultation" meeting. Scoping meetings are a new requirement and the determination that the scoping meeting is necessary should be left to the agencies. HDOT understands that OEQC may be using scoping meeting to maintain similar language to National Environmental Policy Act requirements however, mandatory EIS scoping meetings adds another layer to the process, which adds time and cost to projects and may not be necessary depending on the proposed project. HDOT suggest "consultation" as it could include scoping but also include other meetings that do not necessary affect the scope and leave that determination to the agencies.

Finally, there is still a lack of consistency of language and terms. Terms such as "comment period," "review period," and "consultation period" seem to be used interchangeably, but they are not equivalent terms and causes confusion.

If you have any questions, please contact Mr. Norren Kato of the HDOT Statewide Transportation Planning Office at (808) 831-7976 or by email at norren.m.kato@hawaii.gov.

Attachment

c: Scott Glenn, Chair of the Rules Committee, Environmental Council

Comments/Edits to Hawaii Administrative Rules, Chapter 11-200
Draft 1 HAR-11-200A
Ramseyer Version
(Highlighted Text is Our Suggested Revisions or Related to Our Comments)

Comment #	Text and proposed edits	Comment/edits	Location in Draft 1
1	Language should be added that makes filing with the OEQC electronic unless otherwise noted.	Suggested addition	
2	Language should be added that makes distribution of environmental documents through download link or other electronic distribution forms allowed unless otherwise noted.	Suggested addition	
3	DOT objects to 30-day period to make decisions when OEQC itself recognizes decisions may take longer and allows extension of time. Agencies should be allowed same extension of time as OEQC.	Suggested addition	
4	Ensure emergency actions rules and procedures are consistent and do not conflict with other sections of the HRS that discuss emergency powers.	Check for consistency.	
5	Following the adoption of the revised rules, DOT requests training be provided by OEQC on how the new rules will be implemented. This would be useful for HDOT staff.	Suggestion for follow up action after adoption of new rules.	
6	~~[An EIS] **EAs** and **EISs** [is] are meaningless without the conscientious application of the [EIS] environmental review process as a whole, and shall not be merely a self-serving recitation of benefits and a rationalization of the proposed **action**.~~	Suggest deletion. Does not add or inform regarding the rules, additionally purpose of environmental review process is explained earlier in 11-200.1-1(a)	Page 1 11-200.1-1(b)
7	In preparing any ~~document~~ environmental study, **proposing agencies** and **applicants** shall	Wording should be specific – "document" is too general.	Page 1 11-200.1-1 (c)

Comment #	Text and proposed edits	Comment/edits	Location in Draft 1
8	"Action" means ~~any~~ programs or projects to be initiated by and agency or applicant	Suggest delete word "any" – "any program and project" is too broad a definition; there are financial programs, management programs, training programs, etc, that do not have the potential to rise to the level of an action that requires environmental review.	Page 2 11-200.1-2
9	Add definition of "Days"	Define if working or calendar days. Make consistent throughout the document.	11-200.1-2
10	Compile a list of Discretionary consents by agency.	This will help if more than one agency has jurisdiction over an action and clarification is needed as to which agency has responsibility for complying with Chapter 343.	Page 3 11-200.1-2
11	Add definition of "Ministerial Consent"	Recommend separate definition for "Ministerial Consent"	11-200.1-2
12	Add definition of "Early Consultation"	Recommend separate definition for "Early Consultation"	11-200.1-2
13	"EIS public ~~scoping~~ consultation meeting"	Suggest modifying "scoping meeting" to "consultation meeting"	Page 3 11-200.1-2
14	human and animal communities, ~~health,~~ air, water, minerals, flora, fauna, ambient noise, and	Consideration of environmental factors (land, air, water, flora, fauna) contributes to environmental, economic and social health. Listing "health" is unnecessary and problematic.	Page 3 11-200.1-2
15	Exemption: minor and/or routine actions that are anticipated to have minimal or no significant effect on the environment such that the preparation of EAs and/or EIS necessary are based on a determination by proposing or approving agency.	Recommend insert definition of "**Exemption**"	11-200.1-2

Comment #	Text and proposed edits	Comment/edits	Location in Draft 1
16	A **FONSI, Exemption,** or approved **EIS** is required prior to implementing or approving the **action**.	Suggest insert highlighted text for clarification. Without the added text the last statement within the definition is incorrect.	Page 5
17	plan resulting in a single or multiple projects having wide application or restricting the range of future alternative policies or **actions**,	Suggest insert highlighted text for clarification.	Page 5
18	regulations, or **agency** comprehensive resource management plans; ~~implementation of a single **project** or multiple **projects** over a long timeframe~~; or implementation of a single **project** over a large geographic area.	Suggest deletion of highlighted text. A single project is not a program, over long timeframe is a phased project.	Page 5, Page 6 11-200.1-2
19	In computing any period of time prescribed or allowed by this chapter, order of the **council**, or by any applicable statute, the day of the act, event, or default after which the designated period of time is to run, shall not be included. The last day of the period so computed shall be included unless it is a Sunday or legal holiday.	This is confusing. Suggest clarifying if time is calendar days or working days.	Page 7 11-200.1-3
20	period and notice of **EIS public** ~~**scoping**~~ **consultation meeting,** and appropriate **addendum**	This is a **new** requirement that should be left to the complexity of the project issues, permit process, and agency determination. Mandatory EIS scoping meetings will add another layer to the process, add time to project approvals, add cost to projects, and could be a negative deterrent to needed development. Rather than mandatory scoping meeting, we suggest consultation as a scoping meeting could be held but at the discretion of the agency.	Page 8 11-200.1-4 (b)(4)
21	Notice of an **EISPN** with thirty-day comment period ~~**and notice of EIS public scoping meeting,**~~ and appropriate **addendum** documents; Or Notice of an **EISPN** with thirty-day comment period and notice of **EIS public** ~~**scoping**~~ **consultation meeting,** and appropriate **addendum** documents;	Mandatory public scoping meetings create another layer and cost in the process; the meetings should be dependent on the type of permits or authorizations required, not only on the Ch. 343 process. Recommend deleting that language or changing "scoping meeting" to "consultation meeting" and letting the agency decide if a scoping meeting is necessary.	Page 8 11-200.1-4(b)(5)
22	**applicant** shall submit to the **office** a ~~written~~ letter informing the **office** of the	A letter can be transmitted through the postal service, fax, or electronically (PDF though email).	Page 9

Comment #	Text and proposed edits	Comment/edits	Location in Draft 1
			11-200.1-5(d)
23	proposed **action** is to occur and one paper copy at the Hawaii Documents Center.	What's the Hawaii Documents Center? Need an address here.	Page 9 11-200.1-5(e)(1)(B)
24	(C) Distribute, or require the **applicant** to distribute, concurrently [~~with the filing in paragraph (5),~~] with its publication, the draft [~~environmental assessment~~] **EA** to other agencies having jurisdiction or expertise as well as citizen groups and individuals [~~which~~] that the **proposing agency** reasonably believes to be affected;	Subsection (e)(1)(C) provides distribution requirements for a Draft EA. However, this is the only section where this language appears. By comparison, for the Draft EIS, Section (e)(5) says to file the Draft EIS with the accepting authority and OEQC, and deposit one paper copy in the nearest state library and one at the Hawaii Documents Center. Language should be consistent.	Page 9, Page 10 11-200.1-5(e)(1)(C)
25	~~§11-200.1-6 Republication of Notices, Documents, and Determinations~~	Delete the section. The issue with the extension of comment period should be a stand-alone discussion, case by case basis and not connected to republication of documents. If the process allows comment-period extensions, new language should allow this process, without republication of the environmental documents.	Page 12 11-200.1-6
26	(1) Under section 343-5(a), HRS, use of state or county funds shall include any form of funding assistance flowing from the State or a county, and use of state county lands includes any use (title, lease, permit, easement, licenses, etc.) or entitlement to those lands. Except routine activities and ordinary functions that by their nature do not have the potential to individually or **cumulative**ly adversely affect the **environment** more than negligibly do not rise to the level of an **action** requiring chapter 343, HRS environmental review. Examples of routine activities and ordinary functions may include, among others, routine repair, maintenance, purchase of supplies, continuing administrative activities involving personnel only and personnel-related matters, and the routine rental and/or lease of interior building, office, warehouse, hangar, and/or commercial space (within the built environment) by lease, rental agreement, and/or revocable permit.	Insert highlighted text. While the use of state lands is a trigger, the action associated with the use is actually what may have generated the environmental consequence. The rental and/or lease of commercial space within improved airport terminals, building, hangars, and other structures are routine and ordinary activities that by their nature have no potential to individually or cumulatively adversely affect the environment. Such activities are different from the issuance of leases, permits and easements, and/or licenses of state and county lands for development. The interior renovation of such space related to such commercial rentals or revocable permits also have little to no adverse environmental effect as it is limited to within the built environment.	Page 15 11-200.1-8(a)(1)

Comment #	Text and proposed edits	Comment/edits	Location in Draft 1
27	If the **emergency action** has not **substantially commenced** within	**"substantially commenced"** does not appear to have been defined.	Page 15, Page 6 11-200.1-8(b)
28	When an **agency** proposes an **action** during a governor-declared state of emergency, the **proposing agency** shall document in its records that the **emergency action** was undertaken pursuant to a specific emergency proclamation. If the **emergency action** has not **substantially commenced** within sixty days of the emergency proclamation, the **action** will be subject to chapter 343, HRS.	HDOT recommends defining what is meant by "substantially commenced." There may be occasions where HDOT may be called upon to repair or replace facilities substantially damaged after a disaster and during a declared state of emergency. However, prior to beginning structural repairs, HDOT may need to acquire requisite federal and state permits, conduct structural assessments, acquire funding, expedite procurement and contracts, develop and approve facility designs, deal with various insurance related processes through the State Risk Manager, etc. Based on the proposed language, it is not possible to determine when or if the action has been "substantially commenced."	Page 15 11-200.1-8(b)
29	(A) Under Chapter 343-5(a), HRS, use of state or county funds shall include any form of funding assistance flowing from the State or a county, and use of state or county lands includes any use (title, lease, permit, easement, licenses, etc.) or entitlement to those lands. Except routine activities and ordinary functions that by their nature do not have the potential to individually or **cumulative**ly adversely affect the **environment** more than negligibly do not rise to the level of an **action** requiring chapter 343, HRS environmental review. Examples of routine activities and ordinary functions may include, among others, routine repair, maintenance, purchase of supplies, continuing administrative activities involving personnel only and personnel-related matters, and the routine rental and/or lease of interior building, office, warehouse, hangar, and/or commercial space (within the built environment) by lease, rental agreement, and/or revocable permit.	Insert highlighted text. While the use of state lands is a trigger, the action associated with the use is actually what may have generated the environmental consequence. The rental and/or lease of commercial space within improved airport terminals, building, hangars, and other structures are routine and ordinary activities that by their nature have no potential to individually or cumulatively adversely affect the environment. Such activities are different from the issuance of leases, permits and easements, and/or licenses of state and county lands for development. The interior renovation of such space related to such commercial rentals or revocable permits also have little to no adverse environmental effect as it is limited to within the built environment.	Page 16 11-200.1-9(a)(2)(A)
30	Insert new item #2 and new wording: The agency that initially approves the primary action shall also be responsible for approving Chapter 343 requirements when secondary action within the highway or public right-of-way triggers an EA.	Clarifying language for this conflicting right of way exemption.	Page 16 Between 11-200.1-9 (b)(1) and (2)

Comment #	Text and proposed edits	Comment/edits	Location in Draft 1
31	(2) An individual [~~project~~] **action** is a related and necessary precedent [~~for~~] to a larger [~~project~~] **action**	Insert "related and ". An individual action may be a "necessary precedent", but not tied to, or proposed by the agency or applicant of the "larger action". Number is in consistent as other sections started with lowercase alphabet.	Page 17 11-200.1-10(2)
32	For an **applicant action**, ~~within thirty days~~ from the receipt of the **applicant's** fully completed request for	Disagree with 30-day requirement for agency to approve and insert words "fully completed" for clarification.	Page 20 11-200..1-14(b)
33	"…the **approving agency** may [~~authorize~~]require the **applicant** to prepare an **EA** as a **final EA** to support the determination…" "…an **approving agency** may [~~authorize~~]require an **applicant** to prepare an 5 **EIS** in accordance with subchapter 10A, beginning with preparation of an 6 **EISPN**."	The term "authorize" is unclear for some. A suggested replacement word that could be used is "require".	Page 20 11-200.1-14(1) and (2)
34	Any **agency**, at any time, may request that a new exemption [~~class~~] type be added, or that an existing one be amended or deleted. The request shall be submitted to the **council**, in writing, and contain detailed information to support the request as set forth in section 11-201-16, HAR, environmental **council** rules	Questions: Is the intent to allow to the general list of types of add to the Exemption List? If general list of types, is that necessary or can it just be done by adding to Exemption List?	Page 22 11-200.1-15(e)
35	HDOT suggest that OEQC develop a list of activities that should be placed under de minimis that can be used by all agencies. Agencies could add to this list when updating their own exempt list; however, OEQC should create a base list that each of the agencies can use.	List generated by OEQC can serve as a base upon which agencies can develop their updated exemption list.	Page 23 11-200.1-16(b)
36	(d) 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. (1) For exemption lists where there are **no** changes and amendments **are not** requested, a letter submitted by the agency certifying that the existing list has been reviewed by the agency and no changes or amendments are required shall be sufficient to be granted continued concurrence. No meeting is necessary.	Suggest to change to revised highlighted language. The proposed language requires existing exemption lists and those with proposed amendments to go through the EC concurrency process. This treats exemption lists that have amendments and those that do not the same. For the cases where there are no changes proposed to an agencies' existing exemption list, this process is unnecessary as the EC has already concurred on the existing list.	Page 23 11-200.1-16(d)

Comment #	Text and proposed edits	Comment/edits	Location in Draft 1
	(2) For exemption list where changes or amendments **are** requested, the Environmental Council shall meet to review the proposed changes prior to granting concurrence. In the event the council is unable to meet due to quorum, the existing exemption list is considered valid until the council can have quorum and meet to consider the proposed changes and amendments. The Environmental Council may review agency exemption list periodically.	Rather, HDOT continues to suggest that the proposed language simply require each agency to review their own Exemption List within seven years and submit a formal letter to the EC acknowledging that the existing list is still valid. If amendments are sought or needed then EC concurrence can be acquired per your revised language. This will allow the EC to focus on those lists that need review and concurrence.	
37	A **proposing agency** shall, or an **approving agency** shall require an **applicant** to [~~Seek~~] conduct Early Consultation, seeking, at the earliest practicable time, the advice and input of the county **agency**	Suggest insert additional wording.	Page 25 11-200.1-18(a)
38	~~The scope of the **draft EA** may vary with the scope of the proposed **action** and its **impact**, taking into consideration whether the **action** is a **project** or a **program**. Data and analyses in a **draft EA** shall be commensurate with the importance of the **impact**, and less important material may be summarized, consolidated, or simply referenced. A **draft EA** shall indicate at appropriate points in the text any underlying studies, reports,~~	Recommend deletion; language creates confusion.	Page 25 11-200.1-18(b)
39	~~and other information obtained and considered in preparing the **draft EA**, including cost benefit analyses and reports required under other legal authorities.~~	Recommend deletion; an EA should not follow an EIS style guideline nor mirror the EIS contents. The current system is fine.	Page 25. 11-200.1-18(b)
40	~~The level of detail in a **draft EA** may be more broad for **programs** or components of a **program** for which site-specific **impacts** are not discernible, and shall be more specific for components of the **program** for which site-specific, **project**-level **impacts** are discernible. A **draft EA** for a **program** may, where necessary, omit evaluating issues that are not yet ready for decision at the **project** level. Analysis of the **program** may be based on conceptual information in some cases and may discuss in general terms the constraints and sequences of events likely to result in any narrowing of future options. It may present and analyze in general terms hypothetical scenarios that are likely to 12 occur.~~	Perhaps place in another section; creates confusion with the current process, which is working fine.	Page 25 11-200.1-18(c)

Comment #	Text and proposed edits	Comment/edits	Location in Draft 1
41	(3) List of all reasonable anticipated required permits and **approvals** (State, federal, county) [~~required~~]	Insert additional words "reasonable anticipated".	Page 25 11-200.1-18(d)(3)
42	(10) Written comments and responses to the comments [~~under~~] received and made pursuant to the early consultation provisions of [~~sections 11-200-9(a)(1), 11-200-9(b)(1), or 11-200-15,~~] subsection (a) and 30-day public review and comment period (or as otherwise statutorily prescribed) ~~public review periods~~.	Recommend consistent use of "early consultation' and other language throughout. To be consistent, early consultation should be used consistently to describe this activity. "Statutorily prescribed public review periods" is confusing. Recommend modifying or eliminating as this pertains to Draft EA's and since there hasn't been a public review period, and therefore not comments or responses from such a review.	Page 26 11-200.1-18(d)(10)
43	(2) [~~reviewing~~] Reviewing any public and **agency** comments, [~~if any~~,] during the Early Consultation and 30-day public review and comment period and	Recommend consistent language. 11-200 1.19 (a)	Page 26 11-200.1-19(a)(2)
44	(2) Identification of the **approving agency** ~~**or accepting authority**~~;	Recommend deletion. 11-200 1.19 (c) This section enumerates what should be included in an anticipated FONSI notice. Accepting authority is language specific to EISs; anticipated FONSIs relate to EAs.	Page 26 11-200.1-19(c)(2)
45	Written comments [~~to the proposing agency or approving agency, whichever is applicable, with a copy of the comments to the applicant or proposing agency~~] shall be received by or postmarked to the **proposing agency** or **approving agency** and should also be submitted to **applicant**[~~,~~] within the thirty-day period.	Suggest insert additional words.	Page 27 11-200.1-20(b)
46	~~[thirty day]~~ thirty day review period (or review period as otherwise statutorily mandated) ~~review period~~, incorporate comments into the final	Suggest addition and deletion of highlighted words for consistency.	Page 27 11-200.1-20(c)

Comment #	Text and proposed edits	Comment/edits	Location in Draft 1
47	(9) List of reasonably foreseeable required permits and **approvals** (State, federal, county) [~~required~~]	Suggest additional wording. Also number inconsistency as list is previously lowercase letters then numbers.	Page 29 11-200.1-21(9)
48	~~or 11-200-15~~], and 30-day comment period (or other statutorily prescribed public review periods)	Suggested for consistency. Also number inconsistency as list is previously lowercase letters then numbers.	Page 30 11-200.1-21(10)
49	the **proposing agency** or the **approving agency** shall make a determination and file the appropriate ~~issue~~ [~~one of the following notices~~] ~~a~~ notice of [~~determination~~] a **FONSI** or **EISPN** in accordance with [~~section~~	Somewhat confusing. Recommend using FONSI and EISPN as the "notice" (with defined submittal requirements that is issued following a "determination"). As opposed to referring to the FONSI and EISPN as the actual "determination".	Page 30 11-200.1-22(a)(3)
50	**approving agency** shall issue a determination within thirty days of receiving the final EA.	Disagree with establishing a time limit of 30-days.	Page 30 11-200.1-22(a)(3)
51	shall issue an ~~notice of~~ [~~determination which shall be~~] an [~~environmental impact statement preparation notice~~] **EISPN** [~~and such notice shall be filed as early as possible after the~~	Suggest insert and delete highlighted text.	Page 30 11-200.1-22(c)
52	The **proposing agency** or **approving agency** shall file in accordance with subchapter 4A the ~~notice~~ EISPN and the supporting final **EA** with the **office** as early as possible after the determination is made, addressing the requirements in subsection (e). For **applicant actions**, the **approving agency** shall send the ~~notice of determination for an~~ **EISPN** or **FONSI** to the **applicant**.	Suggest delete and insert highlighted text.	Page 30 11-200.1-22(d)
53	The ~~notice of~~ [~~determination~~] ~~a~~ **FONSI** shall indicate in a concise manner: (1) ~~Identification of t~~The **applicant** or **proposing agency**; (2) ~~Identification of t~~The **approving agency** or **accepting authority**;	Suggest delete and insert highlighted text.	Page 31

Comment #	Text and proposed edits	Comment/edits	Location in Draft 1
	(3) [~~Brief~~] A brief description of the395 proposed **action**; (4) [~~Determination~~] The Finding of No Significant Impact (FONSI) determination		11-200.1-22(e)(1-4)
54	(f) The ~~notice of determination for an~~ EISPN shall be prepared pursuant to section 11-200.1-23	Create new subsection (f) and delete highlighted text. There is a procedural void following this rule. What happens after publication? Is there a challenge period. Recommend including.	Page 31 11-200.1-22(e)
55	(1) ~~Identification of t~~The **proposing agency** or **applicant**; (2) ~~Identification of t~~The **accepting authority**;	Suggest delete and insert highlighted text.	Page 32 11-200.1-23(a)(1,2)
56	(3) List of all reasonably foreseeable required permits and **approvals** (State, federal, county) and, for	Suggest insert text for consistency.	Page 32 11-200.1-23(a)(3)
57	The **proposing agency's** or **applicant's** proposed ~~scoping~~ consultation process, including	Suggest delete and insert highlighted text for consistency with this page.	Page 32 11-200.1-23(a)(9)
58	~~, including when and where the **EIS public scoping meeting** or meetings will be held~~	Proposing/Approving Agency should determine the need for a public scoping meeting. The meeting should be driven by project complexity, impacts, public interest, and agency determination. If language in preceding comment is accepted, then this comment can be disregarded. Preceding language leaves the determination of a need of a scoping meeting to agency.	Page 32 11-200.1-23(a)(9)
59	This section discusses the draft EIS process in item (b) and discusses EISPN in item (c)	Perhaps switch around the items to move language from (b) to (c) and vice-versa.	Page 32 11-200.1-23(b,c)

Comment #	Text and proposed edits	Comment/edits	Location in Draft 1
60	An **EIS public scoping meeting**	Consistent use of language: scoping, consultation, or hearing? Suggest consultation be used for consistency and it does not preclude a scoping meeting being conducted but leaves the decision to the agency.	Page 33
61	[~~At the discretion of the proposing agency or an applicant, a~~] ~~An **EIS public scoping meeting**~~ [~~to receive comments on the final environmental assessment (for the EIS preparation notice determination) setting forth~~] ~~addressing the scope of the draft **EIS**~~ ~~[may] shall[419] be held within the thirty-day public review and comment period in 8 subsection~~ [~~(b)~~] ~~(c)[420]~~	Recommend deletion of new highlighted language; EIS public scoping meetings should not be mandatory and should be at the discretion of the proposing/approving agency. If language in preceding comment is accepted, then this comment can be disregarded. Preceding language leaves the determination of a need of a scoping meeting to agency.	Page 33 11-200.1-23(d)
62	action. In order that the public can be fully informed and that the **agency** ~~can make~~ has made a sound decision based upon the full range of responsible opinion on environmental	Suggest insert and delete highlighted text. Disclosure not decision-making document? The environmental documents are disclosure documents. Not decision making documents. They provide the information relative to the environmental conditions but do not decide if a project is constructed. The language in this section should be revised with that understanding.	Page 33 11-200.1-24(a)
63	(4) ~~Use of [public] state or county funds or lands for the **action**~~343 trigger requiring the environmental assessment;	11-200. 1-24 (g)(4). This requirement seems to request a statement of what "triggered" the requirement of the EIS rather than if government land or funds is being used.	Page 35 11-200.1-24(g)(4)
64	The draft **EIS** shall also contain a list of reasonably anticipated necessary **approvals**, required for the **action**,	Suggest insert highlighted text.	Page 36 11-200.1-24(k)
65	(l)… including **direct** and **indirect effects** [shall be included]. The interrelationships and cumulative environmental **impacts** of the proposed **action** and other related [projects] **actions** shall be discussed in the draft **EIS**. [It should be realized] The draft **EIS** should recognize that several **actions**, in particular those that involve the construction of public facilities or structures (e.g., highways, airports, sewer systems, water resource [projects] **actions**, etc.) may well stimulate or induce **secondary effects**. These **secondary effects** may be equally important as, or more important than, **primary effects**, and shall	Using both "direct and indirect effects" and "primary and secondary effects." Choose one set of terms for consistency.	Page 36 11-200.1-24(l)

Comment #	Text and proposed edits	Comment/edits	Location in Draft 1
66	The draft **EIS** shall include in a separate and distinct section [~~a description of~~] that describes all irreversible and irretrievable commitments	Suggested deletion and insertion of highlighted text	Page 37 11-200.1-24(n)
67	consultation period required in section 11-200-23A. If a number of comments are	Recommend consistent terms throughout.	Page 38 11-200.1-24(s)(1)
68	Responses to all substantive written comments made during the thirty-day consultation period	Recommend consistent use of terms throughout.	Page 38 11-200.1-24(s)(2)
69	Responses to all substantive written comments made during the thirty-day **(**or as statutorily prescribed) consultation period required in section 11-200A-23A**.**	Add highlighted language	Page 38 11-200.1-24(s)(2)
70	Public review shall not substitute for early and open discussion with interested **persons**	Is "open discussion" Early Consultation, Public Hearing, or scoping? Recommend consistent use of language and terms.	Page 40 11-200.1-25(a)
71	from the date that notice of availability of the draft **EIS** is initially ~~issued~~ published in the **periodic**	Recommend using published instead of ~~issued~~ to be specific.	Page 40 11-200.1-25(b)
72	outside of the forty-five day comment period need not be [~~considered or~~] responded to	Comment or review period? Recommend consistent use of terms.	Page 40 11-200.1-25(b)

Comment #	Text and proposed edits	Comment/edits	Location in Draft 1
73	postmarked to the approving agency or accepting authority during	As this relates to both applicants and agencies accepting authority should be added.	Page 40 11-200.1-26(a)
74	the forty-five-day review period.	Comment or review period? Recommend consistent use of terms.	Page 40 11-200.1-26(a)
75	**action**. In order that the public can be fully informed and that the **agency** ~~can make~~ has made a sound decision based upon the full range of responsible opinion on environmental	Suggest delete and insert text. See also comment for page 68 regarding the use of "decision".	Page 42 11-200.1-27(a)
76	incorporate substantive comments received during the [~~consultation and~~] 45-day review processes in conformity with section 11-200A-26A, including reproduction of all	Suggest insert "45-day". Should it be comment or review period instead review processes. Recommend consistent use of terms.	Page 42 11-200.1-27(b)
77	recommendation to the **applicant** and the **approving agency** within the [~~thirty-day~~] period requiring an **approving agency** to determine the acceptability of the final **EIS** [~~and~~	OEQC acknowledges difficulty with completing actions within 30-day time frame, so they should not place such similar time constraints on Agency actions.	Page 44 11-200.1-28(e)
78	~~**Acceptance** of the required **EIS** shall be a condition precedent to **approval** of the request and commencement of the proposed **action**. [An approving agency shall take prompt measures to determine the acceptability or non-acceptability of the applicant's statement.]~~[552] ~~The **agency** shall notify the **applicant** and the **office** of the **acceptance** or non-acceptance of the final **EIS** within thirty days of the final **EIS** submission to the **agency**~~[553]~~[,],~~[554] ~~provided that the thirty-day period may, at the request of the **applicant**, be extended [at the request of the applicant]~~[555] ~~for a period not to exceed fifteen days. The request shall be made to the **accepting authority** in writing. Upon receipt of an **applicant's** written~~[556] ~~request for an extension of the thirty-day **acceptance** period, the~~	Recommend deletion of this section unless the same standard applies to agency actions submitted to "accepting authority" for review. If the "approving agency" has 30 days to accept applicant actions, then the "accepting authority" should be subject to the same requirement and conditions.	Page 44 11-200.1-28(e)

Comment #	Text and proposed edits	Comment/edits	Location in Draft 1
	~~**accepting authority** shall notify the **office** and **applicant** in writing of its decision to grant or deny the request. The notice shall be accompanied by a copy of the **applicant's** request. An extension of the thirty-day **acceptance** period shall not be [allowed] granted[557] merely for the convenience of the **accepting authority**. In the event that the **agency** fails to make a determination of **acceptance** or non-acceptance [for] of[558] the [statement] **EIS**[559] within thirty days of the receipt of the final **EIS**, then the **statement** shall be deemed accepted~~.		
79	11-200.1-30 Supplemental Environmental Impact Statements	Recommend this entire section also include option for Supplemental Environmental Assessments	

Date	Hearing	Last Name	First Name	Organization	Page
5/21/2018	Oʻahu AM	Fox	Mark	The Nature Conservancy	183
		Sichter	Lee	Individual	183
		Townsend	Marti	Sierra Club	184
5/21/2018	Oʻahu PM	Lum	Lori	Airlines Committee of Hawaiʻi	187
		Arakawa	David	Land Use Research Foundation	188
		Lim	Jennifer	Individual	192
5/22/2018	Hawaiʻi AM	No Speakers		Not Applicable	NA
5/22/2018	Hawaiʻi PM	Alivado	Shannon	General Contractors Association of Hawaiʻi	196
		Nakama	Teresa	Individual	197
5/24/2018	Molokaʻi	Ritte	Walter	Individual	202
		Holt	Karen	Individual	209
5/29/2018	Kauaʻi	Berg	Carl	Surfrider Foundation	214
		Regush	Rayne	Individual	214
		Souza	Jean	Individual	215
		Kechloian	Eileen	Individual	216
		Hammerquist	Bridget	Friends of Māhāʻulepū	216
		Rachap	Allan	Individual	217
		Hinazumi	David	Grove Farm Company	218
		Brown-Clay	Jesse	Individual	219
		Reis	Timothy	Individual	220
		Cowden	Felicia	Individual	221
		Kalai	Hope	Individual	223
		Davenport	Vivien	Individual	224
		Taylor	Ken	Individual	225
		Hammerquist	Bridget	Friends of Māhāʻulepū	226
		Strom	Susan	Individual	227
5/30/2018	Lānaʻi	McCrory	Lynn	Pulama Lānaʻi	233
		Johnson	Gabe	Individual	236
5/31/2018	Maui AM	No Speakers		Not Applicable	NA
5/31/2018	Maui PM	Paltin	Tamara	Individual	240
		Buika	Jim	Individual	242

The Department of Health provided hearings officers for all public hearings. Steve Jacobson was the hearings officer for all hearings except the Molokaʻi public hearing, for which Wilfredo Tungol served as the hearings officer.

Oral testimony was received at each hearing except for the morning hearings in Hilo, Hawaiʻi and Wailuku, Maui. Speakers at each public hearing are identified at the beginning of the transcription by initials and first and last name. In the case of Molokaʻi, Maui, and Lānaʻi, there were individuals who did not wish to testify but their comments were nonetheless transcribed to complete the record.

Primary and backup recordings were made for each public hearing. The Council retained a professional transcriber to transcribe all recordings. Transcripts from the transcriber have been lightly edited for spelling, formatting, and readability.

In all cases except the Molokaʻi hearing, the primary recording was sufficient to transcribe the comments, except for unintelligible moments that the backup recording was also unable to clarify. In the case of the Molokaʻi hearing, the hearing was held in an open space and the wind made many parts of the recording unintelligible. The professional transcriber was unable to transcribe the Molokai hearing, so the Council approached another professional transcriber for help and both responded that the primary and backup recordings were not able to be transcribed. The Council Chair voluntarily transcribed the hearing to the extent she was able given the quality of the recordings.

Public Hearing 1: O'ahu, 9:00 AM, May 21, 2018

HO: Hearing Officer Steve Jacobson
MF: Mark Fox
LS: Lee Sichter
MT: Marti Townsend

HO: Good morning everyone. It seems to be 9 o'clock so why don't we get started. My name is Steve Jacobson. I'm the hearings officer for the Hawaii Health Department. We are here today on public dock -- excuse me, on docket number R112000518 of the Department of Health for public hearings on a proposed repeal of current Hawaii Administrative Rules Title 11, Chapter 200, called Environmental Impact Statement Rules, and adoption of a new Chapter 200.1 which would bear the same title. The proposed repeal and adoption would update and substantially revise the rules regarding the system of environmental review at state and county levels which are designed to ensure that the economic -- environmental economic and technical concerns are given appropriate concerns in decision-making by the Hawaii Department of Health in accordance with H.R.S. Chapter 3 -- excuse me, 343.

Purpose of the rule is to provide agencies, applicants and the public with environmental review procedures, specifications of contents of environmental assessments and environmental impact statements, and criteria and definitions that apply statewide. The proposed amendments have been on line for your review and remain there at the website identified in the, um, in the notice of -- of the hearing. And in addition to the public testimony, information would -- can be submitted in writing to: Attention EIS Rules, and this is from the announcement, 235 South Beretania Street, Suite 702, in Honolulu, or there's an email address for the DOA -- DOH and we'll have that and it's available at the desk there. Written testimony needs to be reserved by -- received by Tuesday, June 5th, at 4:30 p.m.

At the request of the Environmental Council, I am reading -- I am providing some additional background information on this effort. Before these draft rules were released, a first working draft was released in July 2017. Public comments were received and the second working draft came out on September 2017. After more public comments, a third working draft came out in October 2017. After still more, a fourth -- still more comments, a fourth working draft came out in February 2018 and the current draft rules are the product -- so the current draft rules are actually the product of four sets of public comments already.

Following completion of -- of the -- of these public hearings, and this is just one of the public hearings being -- being held on, um, this -- on this, I guess we can call it final draft, we're also going to be up Big Island, Molokai, Kauai, Lanai, Maui, um, those will be final rules and the Council will review the comments and receive and complete -- consider revisions of the draft rules at its public meetings under the Sun -- Sunshine Law.

All right. Let me just say today that my role is I'm the Health Department's hearings officer. I not only conduct hearings like this, but also resolve disputes that come

Public Hearing 1: O‘ahu, 9:00 AM, May 21, 2018

up in the administrative process. Because of that, I have no role whatsoever in what these rules are going to end up saying. My only function here today is that of a moderator, okay. So you don't -- you don't need to convince me. What you do is have convincing public testimony that's reviewed by the Council or -- and/or have your written comments that -- that -- that are pertinent, um, and meritorious.

Um, I have one speak -- when I -- at the time I came up here, there was one person who wanted to speak. That was Mr. Fox. Were there any others who want to speak? Okay. All right. So we have two. There's a microphone over there that makes it easier to record your testimony. If Mr. Fox can go first and then the second gentleman can go. I'm -- microphone is what I'm pointing at.

Mark Fox, The Nature Conservancy

MF: Thank you very much. My name is Mark Fox. I work for the Nature Conservancy of Hawaii. The only comment we wanted to share was put in our written testimony and submitted. But very briefly, I just want to thank the Environmental Council and the OEQC for those four versions and that long process that they went through, um, over the last year to just have an open dialogue. I attended, um, a handful of those meetings, um, for the Environmental Council and what I really appreciated was that, um, it was truly a discussion about the rules and various issues and iterations and, um, I have never seen anything like that in 18 years of, um, government relations work with the Nature Conservancy and another 10 before that working on federal issues and other capacities. I've never seen it done that way, um, and it was really refreshing. It was an example of good government and I think resulted in really good set of proposed rules coming forward today and over your hearing process. So just to thank you.

HO: Okay.

MF: I appreciated that.

HO: You're welcome on behalf of those conducting the hearing. Sir, you're next and if you could state -- state your name at the beginning of your testimony so it's in the record.

Lee Sichter

LS: Good mor -- good morning. Thank you very much. My name is Lee Sichter. I'd like to echo Mark's remarks about the transparency of the process. I've had the opportunity to participate in it and I really appreciate that. I'd like to offer a few specific comments.

First of all, I support the new language in Section 1.9(b) related to the exemption of infrastructure projects. And I also support the Section 1.23(d) regarding requirement for scoping meetings or environmental impact statements.

I would like to again request as I've done in some of the previous opportunities I've had comment that the Environmental Council bite the bullet, take the hard step and define the word substantive. The term substance or substantive is used throughout the document and it is not defined in at least practitioners like me who have been preparing

Public Hearing 1: O‘ahu, 9:00 AM, May 21, 2018

EIS's for 40 years still with a lack of clarity on what the term means.

Secondly, I -- I'd like to express my opposition to Section 1.15(c)(6) which is requiring that any historic structure that is eligible for listing on the Hawaii register trigger an environmental assessment. My concern there is while the -- the previous rules require that any structure listed on the -- on the register and proposed for demolition be subjected to an environmental assessment which I agree with, I believe that the requirement for environmental assessment to demolish any structure that is eligibly -- eligible be listed on -- on state register has an unintended consequence and that unintended consequence is that at a time when we are, and I don't use this term lightly, at a time when we are desperately trying to renovate the primary urban center and encourage a greater density in the primary center to take pressure off of the rural areas, I believe this language puts an unnecessary burden on the landowners of property that are available for renovation and redevelopment. But if the structure if 50 years old or older, then they are burdened with an additional process which might even end up to be the -- the straw that breaks accounts back and it's cost prohibitive and time prohibitive.

So for those reasons, I oppose that particular language. I would prefer that language be left as it is and that demolition of listed structures trigger an EA, but not demolition of eligible structures. Thank you very much.

HO: Okay. Thank you for your testimony. Is there anyone else who wishes to speak? My watch, I think it's a little behind, but I have 9:10. I'm going to hold the record open until 9:15 in case anyone shows up and also go out and check in the hall to see if anybody wants to testify just to make sure we're not missing anyone. I don't think there were any massive traffic jams this morning that would stop anybody. Oh, actually, Ms. Luca, you're going to check? Okay. Thank you.

Nobody -- nobody has to stay so if -- what -- what I will do -- what I will do and -- and I -- I do see one person blindly, if you have written comments, please be sure to remember that the deadline is June 5th and that they need to be in by, um, 4:30 p.m. We have the address for those here, but if -- if you don't get it from us and then forget, you can find it on the DOH website. I think it pops up right at the -- maybe the -- maybe in the first window. Yes.

Okay, we do have one additional speaker. Okay, your microphone is right there. Okay, we do have one additional person who wishes to speak. If you could, um, state your name first so we have it for the record.

Marti Townsend, Sierra Club

MT: Hello, my name is Marti Townsend. I'm with the Sierra Club. Um, apologize for being late.

Okay, so we have been involved with the rule-making process from very early on. Really appreciate the Office of Environment Quality and Control and the Environmental Council for being particularly open and transparent in engaging in their rule-making process. Um, a lot of our concerns were addressed through that back and forth. We're just trying to understand exactly where, um, you know, the administration is trying to direct in the environmental review process. These rules are extremely important. Um, we really appreciate the effort to try to, um, better organize them and make it more

Public Hearing 1: O‘ahu, 9:00 AM, May 21, 2018

logical and succinct and consistent in its approach.

We do have a few, um, issue areas that we will describe in more detail, um, in written comments. They've been raised all along and recognize that we win some and lose some.

So we're concerned about the affordable housing exemption. We support the building of affordable house, but are concerned that way this exemption is written. It is right for abuse, um, and we offer some suggestions for improving it.

Um, we were also concerned with some sections the way in which they describe, um, may have a significant effect as likely to have a significant effect and that might seem like a very minor distinction, um, but it does put more of a burden on, um, people trying to demonstrate or raise concerns about environmental impacts. Um, the language should not be likely to have significant impact, but we'll detail those concerns and offer, um, language to use instead, um, in our written comments.

Um, other than that thank you very much for addressing batched comments. I know that was a very controversial issue and I think you guys have figured out how to, um, try and thread that needle. Um, yeah, that's basic. Thank you very much.

HO: Okay. Thank you. Anyone else wish to speak at this point? Let's hold it open for another minute or two since we did have one person who -- who came late. Maybe till 9 -- till 9:20. Okay. Um, we'll keep it open till 9:30, but, again, um, if you -- nobody has to stay.

Public Hearing 2: O'ahu, 6:00 PM, May 21, 2018

HO: Hearing Officer Steve Jacobson
LL: Lori Lum
DA: David Arakawa
JL: Jennifer Lim

HO: Okay. Why don't we -- why don't we get started since it is 6 o'clock. Um, my name is Steve Jacobson. I'm the Health Department's hearings officer. Today is the 21st of May. It is approximately 6 o'clock in the evening in Honolulu, Hawaii. We're at the board room of the Department of Health building, Kinau Hale, 1250 Punchbowl Street in Honolulu.

The matter before us today is the, um, docket number R112000518, it's the Hawaii Department of Health which is a public hearing, one of several that will be held around the state, on the proposed repeal of Hawaii Administrative Rules Title 11, Chapter 200, and the re -- adoption in their place of Chapter 200.1. The proposed repeal and adoption will update and substantially revise the rules regarding the system of environmental review at state and county levels, revised rules regarding -- regarding -- to -- to ensure that environmental economic and technical concerns are given appropriate consideration in decision-making as provided in the Hawaii Revised Statutes, Chapter 343.

Um, the purpose of the rule is to provide agencies, applicants and the public with environmental review procedures, specify the contents of environmental assessments and environmental impact statements, and criteria and definitions that will apply statewide. These will be H.R.S Chapter 91 rules. Um, the Environmental Council has asked the public to review the rules and we're having the same -- this meeting for that purpose.

The proposed amendments are on line. Um, it looks like most of you have them already. Um, as in either online and in the locations indicated in the notice of the hearing. Um, and if you don't have that address, I -- I will -- I have it here and -- and we -- we can give it to you after the hearing. Just ask.

Um, written testimony may also be -- tonight we're here for oral testimony, but written testimony can also be given. Um, it needs to be received by Tuesday, June 5th, at 4:30 p.m., um, and there's a mailing address for that as well as an email address and that again is on the notice of the hearing. If -- if you need it or need to find it again, we -- we -- again, we have copies of that here. Um, it's also available online on the Department of Health website.

For this particular hearing, the Environmental Council -- the State Environmental Council has asked that its hearing officer read some additional background information on this rule-making effort. Before releasing these current draft rules, the Council -- Environmental Council prepared four public working drafts and received comments on all four of them. The first one was -- first draft was released July 2017. Um, public comments were received. Second working draft came out September 2017. More public comments. The third working draft came in October 2017 and then -- but still more

public comments after that. The fourth working draft came out in February 2018 which again received more comments. There were -- and then these current draft rules were released for which this public hearing -- these -- this public hearing and the others being held around the state are being held.

Once these public hearings are done, the -- the Environmental Council review the comments received and consider revisions to the draft rules at public meetings under the Sunshine Law. Um, and to receive, um, updates on what the Council is doing in that regard, you can contact the Office of Environmental Quality Control here in the Department of Health.

So that you understand my function here, I -- I -- I do not have any input into what these rules are going to be. My function here is to act as a moderator, um, and solely as a moderator. There are occasions when I -- I hear contested cases within the Health Department. There are occasions when, um, I don't directly consider applications for en -- for en -- for environmental per -- permits, but I may -- I review cases where the questions come up such as why didn't they apply for permits. So I need to know what the legality is.

Anyway, I'm making a short story long here. I need to -- I need to rule -- I need to -- to make rulings regarding these rules so I can't be part of the -- one of the people who made them in the first place.

Okay. Um, do we -- do we have people who wish to give oral testimony today? One? Okay. Any -- any -- two?

Lori Lum, Airlines Committee of Hawai‘i

LL: I just signed in.

HO: Okay. Yes. Okay. All right. So three. Um, why don't you come down and let's hear your voice. Can we hear you on this?

LL: I think that --

HO: Go ahead.

LL: Thank you.

HO: Okay, that's fine. Why don't -- you raised your hand first. He raised his hand second. Um, so if -- if you just -- are -- are comfortable where you are and I'll move this over a little bit. Okay.

LL: Thank you. So, I'm Lori Lum and I'm here on behalf of the Airlines Committee of Hawaii which is comprised of the twenty-one signatory air carriers that underwrite the State of Hawaii Airport System. And, first of all, we really want to commend the Council for their collaboration and efforts in the development of these proposed rules. We really do appreciate the opportunity, um, to provide comments on the working drafts and now, um, here tonight on these proposed new rules.

So our members have a few concerns, um, that the impact some of the rules will

Public Hearing 2: O‘ahu, 6:00 PM, May 21, 2018

have on future airport projects. And we did submit our written comments in to OEQC earlier today, um, and the concerns really come overall under two categories.

One is in reading the new rules, there were certain sections that had some vague and subjective language. So in our written testimony, we do -- did provide some suggestions on that we felt perhaps would provide one (unintelligible), um, on that, um, and at -- one example would be in some sections they talk about reasonably foreseeable consequences and we felt reasonably foreseeable might be somewhat subjective.

Um, the other thing is we do want to note that the definition of the term, um, “environmental assessment” was changed and they added now providing sufficient evidence and analysis to determine whether an action may have significant effect and the word “evidence” implies a legal standard so we have again a suggestion there that perhaps you want to replace the word “evidence” with the word “facts”.

Um, the other thing I think we’d just like to comment is um -- sorry. Look at my notes. I forgot one thing. Um, well again, in -- in a -- again, in addition to just addressing some of the vague and subjective language error comments, we also want to help avoid, you know, any increase in the likelihood of litigation. So those suggestions are in as well, but basically tho -- those are our comments and we thank you for the opportunity to testify.

HO: Okay. Thank you for your testimony. Sir, um, gentleman in the red shirt.

David Arakawa, Land Use Research Foundation

DA: Me?

HO: Yes. Okay.

DA: Okay. Dave Arakawa on behalf of the Land Use Research Foundation of Hawaii.

HO: Okay.

DA: And it seems like the room is full of my clients that’s why I have to give them copies of my -- my draft, um, which I’m not going to submit right now.

But anyway, we understand and acknowledge the intent of the proposed update for the EIS rules. We appreciate the hard work and -- of the Environmental Council and OEQC and the open and transparent process relating to the preparation and dissemination of the various drafts. We think OEQC and the Environmental Council did a good job in reaching out to the -- the public and -- and the state orders, um, when preparing these various drafts.

We do, however, have some general comments, concerns and, um, we wanted to express specific concerns, maybe about five specific concerns. But our general comments of concerns, um, I guess the first one is well-known, but I’m not sure if I saw it in the text, it’s probably in there, I -- I need to read it again, that some EIS challenges are used merely as delayed tactics. You know, they look at technicalities in the rules or in the law to delay a project so that the project becomes unfeasible and the cost increase.

Um, you know, I’m not sure if that -- well, that for certain stakeholders for the

Public Hearing 2: O‘ahu, 6:00 PM, May 21, 2018

landowners and developers that seems to be an issue. Um, that issue is not emphasized as much as other issues, um, you know, in -- in the rules and in the rationale.

Um, there are a number of unnecessary -- secondary number of unnecessary duplicative of gratuitous changes and, um, you know, we would say that the EIS law works right now and, um, you can just take a look at the number of lawsuits based on the EIS rules and whether that would warrant a number of these changes, whether, um, there are rejections of draft EIS's, right, or are there EIS's that haven't been accepted. And we understand that over 90 percent of the EIS's prepared are accepted. So, you know, if it's not broke, why try to change it, right.

And while we all try to make things better and we're all for making things better, making it more elegant or making it flow more sometimes it cause -- causes more problems, which is the third issue, unintended consequences of language changes. Sometimes, um, vague and subjective language sounds better, is nicer, is aspirational, but it causes -- it can cause conflicting (unintelligible) issue, conflicting interpretations and needless confusion which can result from the newly proposed changes which include vague, subjective or unenforceable terms. Some of these terms that I'm going to talk about are -- are not enforceable.

Um, fifth, and I think Lori already talked about this, all of these things can cause unnecessary litigation, um, especially the vague and subjective terms and conflicting interpretations. Some of the additional requirements are not consistent with the EIS law and not consistent with the, um, I guess the intent of the even (unintelligible). So we would take issue at some of them. They're great to have maybe. They're nice to have, these changes, or there's something aspirational, but not required by the EIS law.

Um, and lastly, some of the provisions we would argue are unfair, one-sided and bias against the agencies and applicants. And, um, some of the proposed EIS rule changes do not address all relevant concerns in a fair and equitable manner.

So I'm just gonna go through five -- um, five issues right now. There are a lot of other manini issues, but these are the five that we wanted to talk about.

One is, um, Section 11.200, 11-200.1-1C3. This is the spirit requirement. There's a spirit requirement that consultation should take place that is mutual, open, direct, two-way communication, in good faith to secure meaningful participation of agencies and the public in the environmental review process. Again, you know, there's nothing in the EIS law that requires the spirit be -- be codified in the rules. So we'd argue that, you know, it's inconsistent with the EIS law. The EIS is pretty -- law is pretty clear. You -- you need to inform the -- the decision-maker of various facts and circumstances rela -- relating to the impacts on the environment and you have to allow for public input.

You know, those are the two main -- main issues. The spirit in which that is done is hard to measure. Um, so we would argue that that -- that provision is -- will be hard to enforce, hard to define.

Um, there are conflicting interpretations and -- and needless confusion that can result. For instance, unintended consequences. If there's an unreturned or delayed response to a text, a phone call, or an email, there could be an allegation of violation of this term, right. Is that right?

Yeah, he didn't return my email. I texted him five times. He only responded after the last time. I waited two weeks for a response, right. You know, is that going to -

Public Hearing 2: O‘ahu, 6:00 PM, May 21, 2018

- is that going to sink --

HO: Yeah.

DA: -- with EIS? Hopefully not.

HO: Okay. David, you missed the part when I got here that's -- when I say I'm just the moderator.

DA: Yeah, yeah, yeah.

HO: So I'm -- so I'm not the -- I'm not the decision-maker.

DA: Right, right, right.

HO: Okay.

DA: Just wanted to make sure --

HO: Okay, okay. Sure. Yeah. Okay.

DA: So, and I figure, if you understand it, then maybe other people will, you know. So --

DA: So you're my --

HO: Well, yeah. They'll know it. They'll know it.

DA: You might be --

HO: Just email --

DA: You might be -- yeah. I'm looking at you, um, right, you're not the judge, right, you're not the --

HO: We've been on the opposite side in litigation before, so.

DA: So did I win? Anyway, um, and it's going to result in this kind of, um, vague spirit requirements, going to result in unnecessary litigation. It's a he said, he said, she said, she said. That kinda stuff. Um, and we would agree that this provision should be deleted.

Second issue would be the use of the term "sufficient evidence". Evidence is a legal term. Evidence does not appear anywhere on the EIS law. So we'd argue, okay, here we go making it up. And that is for the -- um -- the decision-maker to decide whether there's sufficient evidence to grant a permit or whatever it is. This is a EIS document. It's informational document. So enough said about -- about that.

Um, the third issue is -- um -- is issue relating to historic structures. Section 11-

Public Hearing 2: O‘ahu, 6:00 PM, May 21, 2018

200.1-15. That section relates the general types of actions eligible for exemption and, um, the current provision allows for an exemption for demolition of structures except those structures located on any historic site as designated in, um, the National Historic register or the Na -- the Hawaii Register of Historic Places. So it has to be on the register. And it’s a -- it’s a -- it’s not subjective. It’s an objective measure.

Um, the rules proposed to change it changed this requirement to -- to say that the exemption is available only if you meet the criteria of listing, meet the criteria of listing, and that’s a vague standard. Um, it’s arguable. Um, stick the Land Use Commission law, right. People could say the lava flow, right, should be urbanized because under the LUC rules, there’s no agriculture that ever took place on it so it should be urbanized. Others would say it should be left in its natural state. You know, so just saying that you meet the criteria, who’s going to decide that, right. So we would argue that the best judge of whether a property is historic property or not would be whether it’s on the register or not.

Um, Land Use Research Founda -- well, I don’t -- I can’t speak for Land Use Research Foundation, but personally our family was -- was -- was one of the -- well, was a family that urged, um, the preservation of plantation homes, Hawaii Plantation Villages, and the, um, restoration and preservation of the iconic Waipahu Plantation Sugar Mill style.

So we have aloha for historic structures, but not if some yahoo start -- cause anybody can make this claim. Anybody can propose it. So somebody coming off the airplane can say, I propose this as a historic structure, and there you go, right. You lose your exemption and I think it meets the criteria. There you go, you lose the exemption.

So, again, the, umm, conflicting interpretations, the unattended negative consequences are huge especially when you’re talking about the 1965 deadline. So anything built prior to 1965 would fall under this -- could possibly fall under this. And -- and somebody who doesn’t like a project could say, that’s a historic structure. So there we go. The Bowl-A-Drome, Mayor Wright Housing, um, Pucks Alley, all of these places and -- and all of these structures along the railroad could be blocked, right, conceivably or required to -- actually required to, um, to prepare a environmental impact statement or EA. But more dangerous than not there’s a -- there’s a question on the state rules, historic preservation rules whether a piece of property can be designated on the state register without the consent of the landowner. And under the federal register, you cannot. You need the consent of the landowner. On the state register, it looks like you have to go through a contested case hearing. So the state perhaps, depending on the interpretation, could designate a structure as a historic structure against the will of the landowner. So, um, we believe that this perpetuates -- this section perpetuates those kind of problems. We’d ask that this section be deleted.

The second to the la -- oh, this is the last. The last, um, issue is relating to the scoping meeting and the fact that this -- these new requirements will require a recording of the scoping meeting. And, you know, I don’t know. We wonder about that. It would cause problems in cases where you have charrettes and you have five or six different stations where people can comment on different issues, whether there has to be a recording device on all of them and then a separate, um, section of the public scoping meeting just for recording of -- of verbal or oral comments and something -- (unintelligible) kinda dictates to me that an oral comment dictates or begets an oral

Public Hearing 2: O‘ahu, 6:00 PM, May 21, 2018

response. So if somebody said something orally, you can say, yeah, sure, we'll include that. What's wrong with that, right, you know. So, um -- I mean, that's --- that's one of our -- our major comments and we'll submit -- um, we'll submit testimony on that, written testimony on that.

But perhaps this section could be violated if there are no oral comments. What if there are no oral comments? This section does not say what happens if there are no oral comments and none are recorded or if the recording is unintelligible or if the recording is lost, who's going to retain copies of the recordings, for how long should it be retained. Maybe a good -- a good practice would be to submit the recording with your draft EIS or submit the recording with your final EIS so then wait you see holding or some government agency would be holding the recording. So there are all those questions.

And, finally, um, you know, I said that -- that I -- my testimony would be a prop, but can you imagine, not can you imagine, but I think our clients would be very, very upset if I said, okay, you're not getting any written testimony from us, it was oral, deal with it. You know, and I expect it to be word for word like I said it and if it's not, I'm appealing the rules, right, you know. Hey, I mean, that's what an opponent would do. That's what -- you didn't record my oral comments the way I wanted you to so I'm appealing it, right. You know, so this is an example. This is an example. If I don't submit any written testimony and we look at the record of -- of this hearing and the minutes of this hearing and I object to it, can we throw out the rules, right, you know. So that's the kind of danger there is in this kind of requirement. We don't have any objection to oral recordings. We don't have any objection to oral testimony, but, um, -- or responses to oral testimony. We don't have any objections to preparing responses to the oral comments, right, but, um, raising those things to a level of a -- of a requirement that could kick out your EIS could result in a legal challenge and reversing EIS. That's -- that's a major concern.

Thank you very much.

HO: Okay. Thank you for your testimony. Yes?

Jennifer Lim

JL: Okay. Hi, I'm Jennifer Lim, the attorney at Carlsmith Ball, but I'm actually here this evening for my own behalf. I'm not representing any clients and that's because I have been following, um, -- and have been quite impress with what I've seen the Council do and what the Office has done. I think that just the ambition of trying to take on this kind of task and, um -- and really clarify and update the rules is a -- a commendable, um, activity and I think that they've done a very good job.

I am going to have written comments that I'll submit before the deadline, um, which I think is the first week of June, but I wanted to come --

HO: It -- it's Tuesday, June 5th, at 4:30.

JL: Okay, thank you.

HO: Okay.

Public Hearing 2: O‘ahu, 6:00 PM, May 21, 2018

JL: I just want to limit my comments other than saying that I think that overall they've done a spectacular job just to two details. One of those details, it's -- it's really quite detailed, but it's Section 200.1-11 and it's the section that's titled, "Use of prior exemptions, findings of no significant impact, or accepted environmental impact statements to satisfy chapter 343, HRS, for proposed activities." And the term "proposed activities" is where I want to focus my attention cause what you'll see throughout that entire section, 1-11, is the use of the term "proposed activities".

Proposed activities is not a term of art. The term of art, which is actually legally defined as proposed actions, Chapter 343, under 343-5A and under 343-5E for applicant actions, it's triggered by actions. There have to be actions and -- and -- and we have definitions for what actions are. There's nothing triggered by the term "proposed activities". So when I read this section, I thought, oh-oh, this is big mistake, this is really impermissibly enlarging the times when agencies or applicants have to scream whatever it is they're going to do because it's supposed to be based on whether something's a proposed action. But now in this section for the first time we come across the phrase "proposed activity". So I would really recommend -- I -- I -- I don't believe that was the Council's intent although I don't -- I don't know. It's just so unusual that this is the only section where the term "proposed activities" is used that I would recommend that the Council get rid of the word activities and replace it with action.

And although I said that's the only place, there is one other tiny place and that's in Section 200.1-4B1, um, where there's a reference to proposed activity and that I think it should also be changed to proposed action cause, again, proposed action is what triggers 343, activities or everything, and everything doesn't trigger Chapter 343. Um, so that's -- that's my statement on that.

And then one other I -- I suppose element, um, that I would think would be helpful to consider is the insert into Section 201-13. So that's the significant criteria section. A reference to the fact that mitigation measures are also taken into consideration when determining whether or not proposed action may have a significant effect on the environment. Mitigation has to be presented in the draft EA. So naturally, if it -- if an EA is supposed to be the document that you look at to determine whether or not something's going to have a significant effect, then -- and -- and you have to have mitigation in it, then naturally we understand that mitigation is understood to be part of the EA package of analysis. So then mitigation should be part of what is considered when the agencies making a decision whether or not an EA is appropriate or if an EIS should be done. That's it.

HO: Okay. Thank you for your testimony. Anyone else wish to speak? Okay. Well, this hearing is scheduled from 6:00 to 8:00 so we're going tp keep the record open until 8:00, but we don't have to. You -- you can all feel free to stay, but -- and thank you for coming.

Public Hearing 4: Kona, Hawai'i, 5:00 PM, May 22, 2018

HO: Hearing Officer Steve Jacobson
SA: Shannon Alivado
TN: Teresa Nakama

HO: Okay. Good afternoon everyone. Thank you for coming to our public meeting. My name is Steve Jacobson. I'm the Health Department's hearings officer. I'm sitting down here cause God hasn't called me to my position and that looks a bit much for me. So, um, but also, um, it gets me closer to -- to you folks.

Um, this matter we've called as docket number -- Health Department docket number R11200518 which is a public -- is a series of public hearings actually. This is the fourth we've conducted and they'll be five more after this on other -- on other islands. On -- for -- on a proposed repeal of the Hawaii Administrative Rules Title 11, Chapter 200, the current rules which were promulgated in 1996 and adoption of a new Chapter 200.1. Both -- both are repealed and the new title to be called Environmental Impact Statement Rules.

The proposed rule, repeal and adoption is to update and substantially revise the rules regarding the system of environmental review. We have to say both the state and county levels. These will be statewide rules. They will include definitions applicable statewide, um, and they will -- to -- their purpose is to ensure that environmental economic and technical concerns are all given the appropriate consideration in decision-making by public bodies as provided with H.R.S. Chapter 343.

Um, the purpose of the rule is to provide agencies, apps -- applicants and the public with environmental review procedures specified what the contents of environmental assessments and impact statements. It should be -- and the criteria and the definitions that will apply statewide.

The proposed amendments have been or available online, um, at -- at a website listed in the public notice of the hearing. Um, if you don't have that notice, and -- but want -- but want -- but want to get the website, I -- I will have it at the end of the hearing, um, so you -- you can get it. So they can also be made by making a written request to the Office of Environmental Quality Control in Department of Health in Honolulu. The address is 235 Beretania Street, Suite 702. Um, hard copies will be mailed upon request. Um, advise them to page -- call (808) 586-4185.

All right. Um, in addition to this hearing today, any of you folks can comment on the proposed rules any time between now and Tuesday, June 5thh, at 4:30 in writing and addresses that are also listed in the notice of the public hearing. And, again, I -- I have those addresses there. There's an email address and a postal address.

At the request of the Environmental Council, um, I'm asked to read additional background information on this particular rule-making effort. Before these draft rules, these current draft rules were -- were prepared -- the Council prepared four public working drafts before. First working draft released July 19 -- July 2017. Public comments were received. Work -- another working draft came out in September of 2017

Public Hearing 4: Kona, Hawai‘i, 6:00 PM, May 22, 2018

after more public comments. A third draft came out on October 2017 and a fourth working draft after still more public comments came out in February of 2018. Um, after which more comments were received on this particular set of rules that is this hearing is about -- about were -- were set forth.

After the completion of the public hearings, the Council -- the Environmental Council, review the comments received and consider more revisions to the draft rules at public meetings under the Sunshine Law. And if anyone wishes to receive updates on the Council's progress on the public hearings, if they can contact the Officer in Environme -- Environmental Quality Control, again, OEQC, to -- to request to be added, there is an email list.

Okay. I'm the -- I'm the Health Department's hearings officer. I do not have input into these rules. So my role tonight is that of a moderator to receive your comments which are being recorded right here and, um, those -- those comments will be passed on to the Environmental Council for its uses as just discussed to see -- see if they -- they should be making any additional changes to the -- to the drafts that they've made. Um, I may, in fact, hear cases -- I've -- as a hearings officer for the whole department, I may end up hearing cases in future months and years that may involve whether some of these questions like whether somebody should have filed an EIS or -- or -- or prepared other environmental information. And so I can't have input into these rules because otherwise I'd be in a -- in -- in an appropriate position. All right.

SA: Would you make it available at all public libraries?

HO: I'm sorry?

SA: Would you make it available for the (unintelligible) of the changes to public libraries?

HO: Um, I -- I will pass on that suggestion. Again, I'm gathering infor -- I'm gathering information. I will --

SA: That will be great.

HO: I will -- okay. Public library statewide, correct. Okay. Okay. All right. Is there anyone who wishes to give oral testimony today? One? Okay.

SA: And I may -- I may also.

HO: Two. Okay. All right. Um, why don't you -- you don't need to come all -- well, sit wherever you want. Here -- here -- no, no. I'm not -- I'm not afraid of you. Come up here. That's fine.

SA: Oh, yeah, that is kinda close.

HO: Okay.

SA: Sorry.

Public Hearing 4: Kona, Hawai‘i, 6:00 PM, May 22, 2018

HO: Well, I'll back off. Okay.

SA: I'm good.

HO: Okay, okay.

SA: No, I'm fine. I'm fine.

HO: Here we go. Okay.

SA: Yeah. Thank you.

Shannon Alivado, General Contractors Association of Hawai‘i

HO: Okay. Could you please state your name first?

SA: Yes, I will. My name is Shannon Alivado and I'm here on the -- on behalf of the General Contractors Association of Hawaii. And, um, first off I wanted to thank the Council for their process of going through almost four versions of administrative rules that they let out to the public for review and comment and, um, somewhat of a -- a conversation, a back and forth with respect to their proposed, um, changes.

One thing I wanted to mention, and I hope they hear, is that the legislative intent of the EIS process is mainly a disclosure document. That disclosure document is something that agencies, legislators, the public is able to use to determine whether there are environmental impacts to a certain project or improvement. So I just wanted to ensure that these rules reflect that it's an environmental disclosure document and a document to be used, um, in that way.

And with specifics, I wanted to go over five points.

HO: Okay.

SA: Um, and this sections I -- I will reference and, um, I'll just -- I -- I also have submitted testimony in writing, um, as well.

So Section 11-200.1-1(c)(3), Purpose Clause. The purpose clause now provides that consultation requires mutual open and direct two-way communication in order to secure the meaningful participation of agencies and the public in the process. Um, the one comment and recommendation is that there should be an effort to conduct any required consultation as mutual, open and direct, two-way communication in good faith.

I think the problem with, um, this provision is that often both agency employees and the public lack the time and expertise to engage in such communication. So if it is required, there should be, um, assurance that these dialogues are open and mutual and that they're not an extra added burden to the process.

Point number two, Section 11-200.1-2, Definition of Environmental Assessment. Um, it talks about the word, um, "evidence" and it appears to imply that it's a -- it's legal standard. So the suggestion is that you replace the word "evidence" with the word

Public Hearing 4: Kona, Hawai‘i, 6:00 PM, May 22, 2018

"facts". So that's that point.

Number 3, Section 11-200.1-23(d), um, is with respect to consultation prior to filing a draft EIS. And, um, now it requires that at least one public scoping meeting prior to the filing of a draft EIS shall be held on islands most affected by the action. And I think the -- the concern is that this public scoping meeting shall include a separate portion reserved for oral comments. And -- and the suggestion is that that oral comments be recorded, but we want to ensure that if that is going to be part of a requirement that if there are no oral comments presented that that's not seen as being, um, not meeting the criteria of the public scoping meeting. So that was number three.

Number four is with respect to Sections 11-200.1-18 and all the way through 27, which is the content of the final EIS, EA's, um, and draft EIS's. And this -- um, I think the -- the -- the most recent language includes language that suggest a summary analysis of impacts and alternatives considered and that technical language appears to require that this analysis, per se, is something more than a summary. So, again, going back to my first point of it being a disclosure document, something that is presented to agencies that can look at it and determine whether or not there's an environmental impact. Again, not making it overburden for the applicant or the person writing up the EIS. As we know, the process is already a very long process and very expensive for, you know, those, um, those partaking in the process however necessary. We agree that it's necessary.

Um, and with that, I think that concludes my comments.

HO: Okay.

SA: Thank you very much.

HO: Thank you for your testimony.

SA: Thank you.

HO: Okay. Is there other testimony?

Teresa Nakama

TN: Teresa Nakama. Um, I haven't had time to read everything that -- all the changes. I just started on this, but I wanted to make sure that, um, the venue that all of this is, it becomes, um, very transparent and I don't see -- I guess I'm looking at, um -- let's see. Changes in 11-200.1-20, Public Review and Response Requirements and you've taken away the 30-day, but I don't understand what is statutorily mandated. What does that mean?

HO: Okay. I'm --

TN: If you take away --

HO: I'm -- I'm not here to answer questions. I --

Public Hearing 4: Kona, Hawai‘i, 6:00 PM, May 22, 2018

TN: Yeah.

HO: I just -- I -- actually --

TN: So to --

HO: -- I don’t know what they mean --

TN: -- to me --

HO: -- by it either, so.

TN: Yeah.

HO: Okay.

TN: So it -- it looks like you’ve taken out some, um, requirements and put in something that’s not understandable by way of a deadline date.

HO: Okay.

TN: So, um, I need to go back and read all of this and I was hoping that we have still an open period.

HO: We’re -- we’re -- we’re here till 7 o’clock tonight, so.

TN: Yeah, but then --

HO: If you want to read it now.

TN: Yeah.

HO: If you want to do that, but there is -- there is --

TN: But -- but we -- we have a comment period that we can still?

HO: Yes. It’s till -- until, um --

TN: June 5th, you said?

HO: -- June 5th, and if you -- you -- if you -- if you don’t have this, if you want you can take the --

TN: Oh, that would --

HO: -- address down.

Public Hearing 4: Kona, Hawai‘i, 6:00 PM, May 22, 2018

TN: -- that would be great.

HO: Okay.

TN: And then we can address this more thoroughly.

HO: Yes.

TN: Okay. I just -- I want -- I just --

HO: Okay, but -- but please give it back. That's my copy.

TN: Yeah. I just want to be more transparent --

HO: If you could please give me back my copy, so.

TN: -- and, you know, whatever legal terms you're using to have definitions on legal terms here because, you know, the layman people don't understand when what is statutorily required. Then they have to look it up and then you're looking up in legal books so that's not transparency to me, so.

HO: Okay.

TN: If -- if, you know, the whole changes that it's coming about that it becomes more transparent and, you know, --

HO: Okay.

TN: -- more layman terms. Okay?

HO: Okay.

TN: All right. Thank you.

HO: Thank you. You're -- don't leave with my copy.

TN: Oh.

HO: If you could -- no, if you can just --

TN: I -- I copy it?

HO: Yeah. Just -- just make -- yeah.

TN: Or -- thank you.

Public Hearing 4: Kona, Hawai‘i, 6:00 PM, May 22, 2018

HO: All right. That's the only one I have and it's got my notes on it, so. Okay. Does anyone else wish to testify? Okay. Thank you for your testimony by the way. Okay, um, we will be here until 7 o'clock if anyone else shows and wants to give testimony or if those who were here but haven't testified yet and changed their minds and want to say or if anybody wants to add anything to what they've already said. So, um, and it's at -- I -- I will -- let's see. What term do I use for this one. I will adjourn -- I will adjourn this hearing, but it will not be closed until 7 o'clock.

Public Hearing 5: Molokaʻi, 3:00 PM, May 24, 2018

HO: Hearing Officer Wilfredo Tungol
WR: Walter Ritte
NOTE: Mr. Ritte requested that the June 1994 Governor's Molokaʻi Subsistence Task Force Final Report be incorporated by reference into his comments. The Council obtained a digital scan of the report from the University of Hawaiʻi and uploaded it to the Office of Environmental Quality Control online document library. The report may be found at:
http://oeqc2.doh.hawaii.gov/Miscellaneous_Docs/1994-Governors-Molokai-Subsistence-Task-Force-Final-Report.pdf
KH: Karen Holt
SG: Scott Glenn
SD: Stephanie Dunbar-Co

NOTE: The Molokaʻi public hearing was held in an open-air space. The recording and the backup recording were both difficult to hear due to winds. This made some comments unintelligible and are identified as such.

HO: Good afternoon. My name is Wilfredo Tungol. I'm the hearing officer for today's public hearing. Before we begin, I would like to make a note that it's now 3:40, May 24, Thursday, and we're here at the Mitchell Pauole Community Center.

Before we begin, I would like to make a few introductory remarks about the proposed rules. So at the request of the Environmental Council, I'm reading this additional background information on this rule-making effort. Before releasing this draft rules, the Council prepared four public working drafts and received comments on each draft. The first working draft was released in July 2017. The Council received public comments on it and released the second working draft in September 2017. The Council received public comments on it and released the third working draft in October 2017. The Council received public comments on it and released the fourth working draft in February 2018. The Council received public comments on it and released the current draft rules for which this public hearing is being held.

Um, following the completion of this public hearings, the Council reviewed the comments received and considered revisions to the draft rules at its public meeting under the Sunshine Law. So to receive updates on the Council's progress following the public hearings, you may contact the Office of Environmental Quality Control to request to be added to their email list.

So the purpose of today's public hearing is basically to take oral testimony regar -- regarding environmental impact statement rules pursuant to public hearing docket number R11-200-5-18 Department of Health. We will not be taking questions. If you plan to submit oral testimony, comment on the testimony of others or have questions that you would like to have addressed, please be sure that you state and spell your name for the record. Okay.

Public Hearing 5: Moloka‘i, 3:00 PM, May 24, 2018

And, um, if you had signed up to testify, um, when I call your name, please approach the podium and I -- I think you already signed -- sign in so there's no need for that formality and you may present your testimony. Or, if you submitted something in writing earlier, you can stand on the written testimony if you wish. Please note that prior submitted written testimony is already in the record and will be taken into account. Therefore, if you plan to testify on what you have submitted earlier, please speak only to the high points of your written testimony.

Okay. Are there any questions regarding what I have covered? Okay. So if there are no questions, let's proceed. And, again, let the record reflect that today's May 24, 2018 and we are on the island of Molokai at the Mitchell Pauole Community Center. So, Walter.

Walter Ritte

WR: Okay, yes.

HO: You just have to speak up a little bit though.

WR: Okay.

HO: Want to make sure -- yeah, you can come out and (unintelligible).

WR: (Unintelligible).

HO: Oh, okay. That'll be fine. Yeah.

WR: Yeah, my name is Walter Ritte from Molokai. Um, the first thing I'd like to make comments on is, um, the people who do the EIS. Um, as Hawaiians, we've had an experience with people who do culture assessments. In the beginning it was Bishop Museum and they had credibility and then today we find, um, archeologist like up to higher, like have gun will travel kind wise.

HO: Uh huh.

WR: And our experience is that these guys have lost the credibility with the community, um, because of some of the things that they've done on Molokai. They would come here and walk through the fields (unintelligible) cultural sites. And they come for couple of days and then they write their report.

So I'm concerned about who is doing the EIS's, whether they should be mutual in some sort of way. We have reimbursed them, but the state hires them so that there's some credibility in who's doing these -- these EIS's.

Um, one of the things that I want, um, to be considered and protected in the EIS process is subsistence activities. So I brought with me today, um, a copy of the Governor's Molokai Subsistence Task Force Final Report. It was done June 1994 on the island of Molokai. It's a substantial report that gives credibility to the idea that Molokai has two economies. One is a cash economy and the other one is a subsistence economy.

Public Hearing 5: Moloka‘i, 3:00 PM, May 24, 2018

So many times these EIS's don't give enough credence to the idea of subsistence and I'll give couple examples.

Um, fishing, um, wildlife in the forest. Um, when we first started using the forest, when we were -- when we were younger we'd go up almost every weekend to use the forest and we were pig hunters. And then Nature Conservancy, um, came to Hawaii. And lot of the things that they do up there, um, I think had been a little bit too lenient about trying to figure out what the impacts are on people that have subsistence activities in these areas. That's one of the, um, examples.

Um, when we were growing up, um, we used to call 'em taro patches, um, noe fishponds. And then when we started using 'em, um, the state and the federal government (unintelligible) and they had all kinds of clashes about what we can and cannot do because our subsistence activities came under different categories. So we had all kinds of problems, um, in our valleys and in our fishponds as far as subsistence use.

Um, Molokai, in this document, um, hunting and fishing is the primary subsistence activities on Molokai.

I wanted to talk about another issue which is the idea of whether or not there's going to be batching. So I'm really against that and we did a lot of our hearings. Number one, on Molokai, a lot of the hearings got verbally like I'm doing today. So we've got to make sure that that always stays in the process.

Um, people on Molokai, um, come from a culture of oral traditions. So for some reason, writing our testimony has not been a strong point and if they want us to participate they're going to have to leave the door open to all participation like we're doing today.

I wanted to talk about cumulative impacts. Um, examples of cumulative impact, it's interesting because Molokai, um, before they had the EIS process, they were doing, um, a reservoir on Molokai, a huge reservoir, a billion gallon reservoir and they had enough to do an EIS. And what we were afraid of on Molokai was that there was a plan on the west side of Molokai to put 30,000 homes on Molokai to be a better community for (unintelligible). And the key to all of this was that reservoir to provide enough water. They told us the reservoir was for farmers, but we knew behind the scenes that that reservoir was to supply 30,000 homes with water. So there was no EIS process. And as soon as that reservoir was built, um, and the water started going through the pipes to the west side of Molokai, there was an EIS process.

HO: There was?

WR: There -- they -- they created an EIS process.

HO: Okay.

WR: But if there was an EIS process, they could have put in there the cumulative impact of 30,000 homes. There was enough -- there was going to be enough water really for the 30,000 homes, but there was enough. There was enough. So what happened was the whole west end dream just went under cause there was no long-term (unintelligible). So I'm really supportive of looking at cumulative impacts.

When we went up to Mauna Kea, um, the idea was to have a few observatories up

Public Hearing 5: Moloka‘i, 3:00 PM, May 24, 2018

there and then they started building more and more and more. Then -- then they came up with the TMT and the excuse on the TMT is that the place is already damaged. The sanctity of the place is already gone so therefore the impact of this new giant telescope was going to be (unintelligible). So to me that goes -- that takes a cumulative impacting and turns it (unintelligible).

So I'm really nervous about how we're going to determine cumulative impacts. And then mitigation measures. Um, it's kind of a joke. Nobody follows through about whether or not people are following through on the mitigation measures. There should be some kind of a binding plan that's done by experts. To make sure that mitigation mea -- measures are followed through on and it's done.

Um, let's talk about affordable housing be exempt from the EIS. Um, I think that's a crack in the door that's not going to do well in the long -- in the long run. I'm against -- I'm not against affordable housing. I'm against them not doing any EIS.

Um, I like the idea of making sure we keep scoping as part of the process. It alerts the community. Um, it's not easy to get your community to come out to meetings so a scoping process would at least start the talk. (Unintelligible) that's going to happen. So I think scoping is important. Um, and, of course, I support oral testimonies as I said earlier.

Um, I'm dubious about ability to pay in order to degrade. So if I'm going to do something that's going to cause (unintelligible) effects of it over here, I can go plant trees over there or something.

We have the monies to -- to go do that. And it doesn't solve the problem that we're left with. So I don't like the idea of people being able to pay in order to okay the negative impacts on (unintelligible).

Um, I wasn't sure whether on the active 200, um, of our cultural impact guidelines is -- is in there. I was just told now that it isn't there and I wanted to know what section that would be, cultural impacts. I know the governor vetoed it from the beginning.

HO: Yeah.

WR: I think it was Cayetano. No, the next governor.

HO: Uh huh.

WR: I think, um, I was watching this -- this thing that was happening in Maui and, you know, they're building all of this stuff at the airport, Maui airport, and people are wondering about the cumulative impact and I think they kept saying there's no FONSI. But that runway is extended and widened or whatever they're going to do with the runway. They never allowed that to be part of the original process.

So they kept saying we're building this for the cars, let the cars go or FONSI on the map. They're building this for FONSI on the map. But when you put the whole thing together, major impact. It's almost like the same story that we had on the west side of Molokai before they had an EIS. Um, I think I'm going to end there. And I don't understand how all subsistence activities can be protected, um, but I'm really glad that the cultural impacts aren't in there and I don't know if we need to put a section in there

Public Hearing 5: Moloka‘i, 3:00 PM, May 24, 2018

on the subsistence impacts. I don't know how the process work, but that would be my recommendation.

HO: Okay. So, um, again, for the record, that was Walter Ritte, R-I-T-T-E. And, Walter, may I just ask you since you alluded to attached forest report of 1994, do you have an extra copy that you can submit if you want that to be submitted?

WR: I was told that my life would be in jeopardy if I didn't give this back. That's how hard it is to find one of these.

HO: It's -- it's not in -- it's not in the web, huh?

WR: Um, there is a website.

HO: Okay.

SG: We'll -- we'll look for it.

WR: Carrie (unintelligible) website.

SG: We'll find it.

HO: We'll find it and -- and if we don't --

SG: We'll call you.

HO: Yeah.

SD: I think I have it.

WR: Karen has the website with all of this stuff on it.

KH: I think I have a digital copy of that. I think so.

WR: It's really –

KH: 19 --

HO: Okay.

KH: What was the date?

HO: 1994.

WR: Yeah. But it's -- it's all vital for Molokai.

Public Hearing 5: Moloka‘i, 3:00 PM, May 24, 2018

HO: Right. And -- and -- and so my suggestion, Walter, if you think that's really important is go ahead and leave it for -- for -- with your testimony and if you need a copy back or you need that back, Scott, can your office send it back?

SG: We'll find it. We'll find it.

WR: I cannot do that because it's not --

SG: You -- you don't have to leave it.

HO: Oh, you don't have to leave it? Okay.

WR: -- it's not mine.

HO: Okay.

SG: No, we will find it.

WR: Borrowed this from Karen (unintelligible).

HO: Okay, okay. So we'll do it this way, Walter. We'll -- we'll -- find it on the website. If we don't, we'll ask you to let us make a copy. How's that?

WR: Yeah.

HO: Okay?

WR: That'll be fine.

HO: Because it seems like it's important for you to have the -- the Council consider that.

WR: Yup. Yeah.

HO: So -- so that's one. And then the other thing is, um, I did want to point out, I -- I didn't say it the beginning that the -- the notice is both for the repeal of an old Title 11, Chapter 200, which hasn't been, you know, um, amended for over twenty some years. The -- and, of course, the adoption of this current proposed rule, which will be Chapter 200.1, Environmental Impact Statement Rules. So that's the purpose of this hearing. One is to repeal the old, old rules and then the more important one of course is the adoption of the proposed rules.

And, also, I think we do have copies if you want to look at it in detail and I know you've mentioned the -- um, some of the important criteria at least in your opinion. So, yeah, normally I won't -- I won't comment on it. I'm -- I'm only here to listen, but, um, it is in the proposed rule. There's a Section 11-200.1-3 called Significance Criteria. So you might want to look at that. It does cover the concerns that you brought up, um, but, you know, if there's more that you think should be included, again, you know we have

Public Hearing 5: Moloka‘i, 3:00 PM, May 24, 2018

your testimony. Okay?

WR: What is, um, 200-7?

HO: 200-7?

WR: 7.

HO: That's a -- that's an old one. Unless you mean 200.1? That's the new rule. It's 200.1.

WR: I'm looking for the Cultural Im -- Cultural Impact.

HO: Oh, okay. That's the one I just alluded to.

SG: (Inaudible) and it shows the changes from the old rules.

WR: Yes.

SG: So this is the new language being put in here.

WR: Oh, okay.

SG: And then down here they're adding the word, "Have a substantial adverse effect on cultural practices" (unintelligible). And there's another (unintelligible) as well.

WR: It's where?

SG: Um, oh, it's back here. In some of the EIS language. So, oh, we added it to the definition. So the definition of "effects". So cultural effects is in there and that's existing the language. The definition of environment, the word cultural has been added to the definition of environment. And significant effect, cultural practices has been added to the definition of significant effect.

WR: Okay. There's no section --

Scott: There's not a distinct section.

WR: -- cultural impact guidelines? (Unintelligible).

SG: No distinct section. We -- what they did was move it throughout.

WR: To --

SG: Yeah. Instead of a standalone, it puts it into everything.

WR: Yeah. Is that good or bad?

Public Hearing 5: Molokaʻi, 3:00 PM, May 24, 2018

SG: I can't reply on that right now.

WR: For us it's bad because how we going to find all of that? Unless we stay up till 12 o'clock going through all the different sections looking for cultural. Anyway, my -- my hope is that they're be a section cultural impact online.

HO: Uh huh.

WR: So that, as Hawaiians, we'll know we can go to this one section and (unintelligible).

HO: Okay.

WR: At least it's in there somewhere.

HO: Yeah, but --

WR: It's --

HO: But it's -- it's duly noted. I tried to take what you're saying is you want something like a section --

WR: Yeah.

HO: -- specifically by itself.

WR: Include, you know, the subsistence part cause subsistence was a huge part of our culture. I mean, that's kept us alive for thousands of years without the lawyers. So it was really important.

HO: Okay.

WR: So any adverse impacts on those things. (Unintelligible). They never take care of their subsistence fishing grounds. Okay. Thank you very much.

HO: Thank you. Okay. Okay. Thank you. Anyone else wish to speak at this point? Let's hold it open for another minute or two since we did have one person who -- who came late. Maybe till 9 -- till 9:20. Okay. Um, we'll keep it open till 9:30, but, again, um, if you -- nobody has to stay.

(Unintelligible)

Public Hearing 5: Moloka‘i, 3:00 PM, May 24, 2018

Karen Holt

KH: I have just general comments (unintelligible) it's really important in my view since it was enacted, it really has not accomplished what I think its original drafters hoped that it would. It's supposed to protect our environment from the degradation (unintelligible).

Some of the issues that I understand are in these changes include how to assess cumulative environmental impacts. For Hawaii that is a really important issue. The Hawaii Supreme Court case that talked about that provision, requirement in the EIS law that cumulative impacts be looked at is actually something that was (unintelligible) lawsuit (unintelligible) because there was a contract that was paid for with the Molokai Ranch and the Department of Land and Natural Resources to pump the water from the (unintelligible) irrigation system to here (unintelligible) and at the time for the plans for the resident (unintelligible) probably for about 30,000 people to live there with hotels and condominium developments and what happens was that the agreement was to be allowed to use the water was signed just before the EIS, Chapter 343 was and therefore, ultimately the court ruled that there wasn't an EIS requirement.

But in a famous footnote they said that the scope of development would be served by that water system would have warranted a full EIS if the law had been in effect. Because it wasn't in effect, a full EIS was not warranted, and the Westin was developed, and there's a hotel up there and several condominiums. That was one of the richest fishing grounds in the whole state before that development happened. People knew that and there was no formal route to discuss that with anybody so the hotel was built and all of the districts from the lands above got worse and worse. And today, if you talk to old-time fisherman, they'll say it's nothing like it used to be. And that would have been one of the things that a full EIS probably would have looked into. Another issue would have been whether or not there were any cultural sites impacted and there was really very little done prior to the construction of the hotel (unintelligible) to determine whether or not graves were being turned over or significant sites were being (unintelligible) so that's another oversight and things were lost irretrievably as well.

Environmentally, that entire ahupuaa is very challenged because it, basically, they planned to group up to 30,000 people up there with a small airport, and they got zoning to do that and so the only thing the pilots (unintelligible) doing at that point was an adequate supply of water. They were going to be taking from the middle of the island (unintelligible) is not needed, so today the first hotel that was built is shuttered and in decay. They never did get the real estate purchases like they wanted, and so people have estimated to me that there might be 80 households on the island, on the west part of the island, living in this area that is supposed to hold (unintelligible). So the fact that no EIS was done there because the law was passed a little too late resulted in the irrevocable loss of many resources both environmental and cultural.

So I think that for our island at least, we probably all agree that this process that's absolutely critical, there are many permits somebody has to get in order to degrade the environment but the EIS is supposed to be one that (unintelligible) cumulative impacts of your proposing would have been given more consequential than what (unintelligible). So the cumulative impact provisions of the EIS law in my opinion (unintelligible) and if anything should be enforced or (unintelligible).

I also understand that there may be a provision, kind of like a carbon taxes that if

Public Hearing 5: Moloka‘i, 3:00 PM, May 24, 2018

you give money here you can degrade certain environmental features of where you're developing and I think that's senseless. In Hawaii land is a commodity. We don't have the ability to make new land unless we rely on Pele. It's a slow process. If you do build where Pele wants to go then you are going to have some issues (unintelligible), which is what is happening now. So the fact that it's a limited commodity means that the vigil in protecting it has to be extreme and the pay to play concept of giving money over here so you can annihilate and burn resources over here in an island community is senseless in my opinion because we are not going to get it back where it's degrading because it's all connected. Traditional Hawaiian philosophy was that everything plays a role, and you need to be nice to the land or you may die. And I don't know that we always put that into our corporate policy practice, but it's true. And if you grew up in Hawaii, you have seen the changes, and they're not going to be easy to fix. So I don't agree with the notion that people can pay in order to degrade the planet. To me, that's actually the complete ending of cultural tradition as well as (unintelligible). If there's an environmental problem, it's to be avoided at all costs.

I understand there may also be some attempt to eliminate the requirement of significance for an EIS. (unintelligible) To me if you have significant environmental effects (unintelligible).

Another issue that I think is troublesome to most permitting processes is the question of cultural resources because there are requirements that they protect them from (unintelligible) what I would call operationalize (unintelligible). There are many hired archaeologists and so-called cultural experts who do that as a business, so when you hire somebody, when the developer hires someone to do that, it's always 100% predictable how that's going to turn out. An example, when I first came here, when they were trying to develop (unintelligible) Bay, which is on the west side, and completely untouched and so the developer hired an archaeological firm to see if there was anything there. And this paid contracted firm said oh no, there's nothing there. Well there are archaeologists who work in the area already just as volunteers and they were horrified. So the society for Hawaiian archaeology came in as a group of volunteer professionals, reassessed the area, and they found burials, the richest single historical site in the entire island chain, that had been overlooked by the contracted archaeologist because it had the most fishhooks and other kinds of fishing material intact. They found structures that appeared to have probably (unintelligible) none of it was in the report that was done by the commercial archaeologist.

So that's troublesome because when Hawaii is relying on that layer of professionals to be able to tell us don't this because there burials (unintelligible), the fact of the matter is that money gets in the middle of that and if you want to earn a regular living you need to say it's quick you can go. And then we have to rely on the state to take precautions to ensure that the study is actually adequate and really does (unintelligible). So operation wise the protection of cultural resources is that has not been done well really ever. I can remember as a child learning to swim at Waikiki when they were building a bunch of hotels, and every once in a while everyone would be buzzing a little bit because a skull would (unintelligible). There was no stop to the construction. It was just interesting, they're like look (unintelligible). So we really need to do a better job. Hawaiians did not leave libraries for their books, they left stone implements, some wooden things that survive, they were (unintelligible).

Public Hearing 5: Moloka‘i, 3:00 PM, May 24, 2018

And those things are tangible relics of culture, civilizations (unintelligible) and without those tangible evidences, I think we are all much (unintelligible) because we won't know if we can't see some of (unintelligible). The consequences of not (unintelligible) for this island we have these fishing grounds that (unintelligible) so the fishing grounds were irrevocably ruined, whatever reef systems are there are buried by erosion and fishing, nearshore fishing (unintelligible). And so what we lost, a huge part of (unintelligible) 1960s of development (unintelligible) because it's in Hawaii, even if it's on a volcano, so the people who made all the money off of it are all gone and now these folks who (unintelligible) are in shelters. So for us we have to realize (unintelligible) the deal that we never scrutinized (unintelligible) to use the Molokai water system included one affordable water well that the Molokai ranch had (?). The West end is a very dry area which is why it didn’t have a continuous population there. People would go fish, (unintelligible) mostly it was an area where (unintelligible) so because there was no (unintelligible) the past however long it has been, since the 70s I think (unintelligible) early 2000s they were in the process of redoing their (unintelligible) and the new guys didn't file their application on time, so that fight wound up at the Supreme Court.

I believe it was 2007 or 06, the Hawaii Supreme Court ruled that in order to continue pumping that potable source which would require (unintelligible) that the Ranch would need to get the permits. And so it is now May 24, 2018, the Supreme Court has said (unintelligible) they have never gotten their permits. They are illegally pumping that well. Every day they could be fined $5,000. (unintelligible) multiply that by how many (unintelligible) and how many years it has been, it's not enough (unintelligible). Is the state done anything to enforce that? Nothing. So you might have avoided that problem if an EIS was done, but it wasn't. So now they're pumping a lot of water out of these mountains. The Ranch actually (unintelligible) and that's what our native species rely on, (unintelligible) nearshore fisheries, fish that need fresh water, they rely on those streams coming down, so that's exactly the damage (unintelligible) and not correctly on (unintelligible) so you guys are the preventive measure. The EIS is the preventive measure. (unintelligible) because if you don't, you'll mess up habitats that you'll never be able to (unintelligible) fish, plant species are gone. How are you going to do that? So I think that our community (unintelligible) that EIS could be incredibly powerful to protect this island. We were the first casualty of the new law because it was passed (unintelligible) but the consequences of that failure to have that foresight and investigation are visible today in the form of the (unintelligible) hotel, wasted fisheries and cultural sites that were (unintelligible). So there may be other things that I should address, but I think that general overview all translates to I personally strongly support this process and I hope it's not (unintelligible) and there are some things (unintelligible) like pay to play, that's scary to me. The (unintelligible) always have money to play, the people who don't (unintelligible) who want to attempt their families, the environment (unintelligible).

Public Hearing 6: Kaua'i, 6:00 PM, May 29, 2018

HO: Hearing Officer Steve Jacobson
CB: Carl Berg
RR: Rayne Regush
JS: Jean Souza
EK: Eileen Kechloian
BH: Barbara Hammerquist
AR: Allan Rachap
DH: David Hinazumi
JB: Jesse Brown-Clay
TR: Timothy Reis
FC: Felicia Cowden
HK: Hope Kalai
VD: Vivien Davenport
KT: Ken Taylor
SS: Susan Strom

HO: Good evening everyone. Let's get started if we can, please. Um, my name is hello, everyone. Okay. Aloha. My name is Steve Jacobson. I'm the hearings officer for the Health Department. My -- I'm -- I'm here today to be essentially the moderator for this hearing. Please understand, um, that I have no input into these rules. I'm collecting testimony that's given to the people who do have the input and deciding what it is. In fact, if a case comes up and somebody didn't file an impact statement, I'm going to have to decide whether they should have filed one so I can't have any input into these rules in my job on the Health Department. So I'm holding these hearings on behalf of the Environmental Council and also the Office of Environmental Quality Control, um, of the State of Hawaii, both of which are attached to the Health Department of Health, um, but have separate -- that's -- it's complicated.

Anyway, um, today is the 29th of May, 2018. It is approximately 6:05 p.m. We are at Wilcox Elementary School in Lihue on the Island of Kauai. Um, and this is the sixth of nine hearings that are being held throughout the state and the Department of Health's docket number R11200518 which in -- which involves, and I have to do a little reading here to -- to make sure I get everything in the record, which involves public hearings for the proposed repeal of Chapter 200 of Title 11 of the Hawaii Administrative Rules and the adoption of a new Chapter 200.1, both of which will be entitled, "Environmental Impact Statement Rules".

Um, the proposed repeal and adoption update and substantially invo -- revise the rules regarding the system of environmental re -- review at the -- both the state and county levels which -- to -- to ensure that environmental economic and technical concerns are given appropriate consideration in matters to which they are subject in accordance with H.R.S. Chapter 343. The purpose of the rules is to provide agencies, applicants and the public with environmental review procedures, specify the contents of

Public Hearing 6: Kaua‘i, 6:00 PM, May 29, 2018

environmental assessments and environmental impact statements and criteria and definitions that apply statewide.

Also, at the request of the eco -- the Environmental Council, I have been asked to give you this additional background on the -- this rule-making effort. These current rules are the fifth draft of proposed Chapter 200.1, 200.1. The first working draft was released in July 2017 after being prepared by the Environmental Council. The Council then received public comments, revi -- then made some revisions. Second working draft out in September 2017. More revisions, more review and revisions. Third draft October 2017. Again, reviewed and revised. Fourth working draft February 2018. The Council also received comments on that draft and released the current draft rules for which this hearing is being held. So what you're -- this hearing is about is the fifth draft of the proposed rules.

After completion of all nine of these public hearings, the Council will review the comments received at all the public hearings and also provided in writing. That's the Environmental Council doing that, um, and will consider re -- revisions to the draft -- to come up with a new draft and consider revisions to that at public meetings under the Sunshine Law. To review -- to receive updates on the Council's progress following the public hearings, you can contact the Office of Environmental Quality Control to request to be added to its email list. In addition, anyone who wish -- any member of the public who wishes to speak, um, may -- is -- the -- the purpose of this hearing is to receive their testimony on the proposed rules tonight. They may also -- any of -- anyone can also submit written testimony that -- but it needs to be received by Tuesday, June 5th, 2018, at 4:30 p.m., that is Tuesday of next week, um, at the -- there's an -- there's a, um, mailing address and there's also an email address that is in the notice of this hearing. If you don't have those, um, please check afterwards. There's announcement somewhere. I don't know where they went. And, also, we have copies of them, copies of them so you can take down the addresses if you wish to submit written comments. And, again, they can be submitted both my email or by U.S. postal mail, or hand delivered, I guess, too.

So, okay. With that introduction, does anyone wish to testify on the proposed rules? Okay, I see -- I think there are five people I've seen hands and that's -- why don't we -- I'm going -- the witnesses, if you could please sit right here in front of me, facing me, so that I -- we can get the recording of your testimony. Um, and it's easier to sit at the end of these tables than to try and get in the middle of -- cram yourself into the middle of them. Um, why don't we -- um, actually, can -- can I have the sign in sheet? Let me --A couple more people are signed in.

Oh, okay. There's still more -- okay. Um, could I see the -- your hands first? Okay, why don't -- sir, you go first, you second, somebody over there third, fourth, fifth. Okay. If you can remember that order and if you can't, well, we've to figure it out. But, sir, if you could please come up here. And when you give your testimony, please give your -- give us your name, too, um, so we -- we will have that in the record and, um, we can advise -- so advise the Environmental Council and keep you in touch with what's going on.

Um, we talked about a 3-minute limit. That was when we have 2 -- when we do have 2 hours of time. Um, please try and be concise on your points, but I'm not going to -- we're not going to close the door on you or -- anyway, sir, go ahead. State -- please state your name, too.

Public Hearing 6: Kaua'i, 6:00 PM, May 29, 2018

Carl Berg, Surfrider Foundation

CB: My name is Carl Berg and I'm speaking representing the Surfrider Foundation and we have submitted testimony in writing to you, but I wanted to just bring out the main points that we are extremely concerned about.

First is the definition of projects and programs because they are too narrow and what can appropriately restrict the scope of the actions.

Second is the definition of mitigation and we failed in this case that the Hawaii Administrative Rules used the definition "mitigation" as it's in NEPA.

Third is the objectivity and preparation. It isn't entirely clear, but it appears that certain proposed revisions provide the applicants with autonomy over providing their own EA, EIS's and even making determinations with respect to what would constitute substantial comments.

Fourth, Surfrider generally has concerns with the revisions intact to increase the use of exemptions. It's pretty vague.

Fifth, supplemental EIS's is critical. The rules clearly and adequately describe what -- when supplemental EIS's are required. Um, there's several triggers and they used be written more clearly.

Six, we -- is the use of prior exemptions, FONSIs, and accepted EIS's. The proposed section provides situations where a prior exemption or accepted EIS satisfies 343. However, um, these are way too broad where they're accepted.

Seventh is the -- the climate change. Surfrider Foundation supports incorporating sea level rise as a significance in the criteria. We totally support the proposed revised significance criteria sections 11 and 13.

And, finally, in compliance with both NEPA and H.R.S. Chapter 343, um, the -- the proposed section provides that here the NEPA process requires earlier more stringent public review and distribution than on to this chapter that NEPA shall satisfy this chapter so that duplicative consultations are not necessary to occur.

HO: Okay.

CB: That's it.

HO: Thank you for your testimony.

FC: Um, can I say -- I'm -- I'm live streaming. If anybody does not want their face on camera, please let me know and I'll turn it away. But we do have a pretty good audience so I don't want anybody to feel that they have to be filmed if they don't want to. Are you okay?

Rayne Regush

RR: Aloha. My name is Rayne Regush and I appreciate the diligent process that's underway to update the rules and I wanted to thank Scott Glenn and his team and the Environmental

Public Hearing 6: Kaua'i, 6:00 PM, May 29, 2018

Council as well.

Because I serve on several boards and councils that are focused on environmental issues, I have submitted written comments on draft EA's and draft EIS's many times. On most occasions, we have received the consultants' written response to our comments prior to the final EA or final EIS being published. However, the rules do not provide guidance as to the timing of the distribution of these response letters from the consultant. The rules do require that letters be prepared and it outlines how they should be prepared and for the EA it's in Chapter 200-9.1(d) and for the EIS it's Chapter 200-22(c). And, generally, consultants mail their response letters when the final EIS is submitted to the accepting authority and then this means that the response letters are in the hands of the commentors several weeks in advance of the publication of the notice of acceptance because the accepting authority usually takes three to four weeks to review the final EIS before acceptance and the notice of acceptance then has to be transmitted to the OEQC by that authority for publication. So this can add another two weeks' time to that acceptance, um, and it's published in the environmental notice. So in total, it can be anywhere from maybe three to six weeks in advance of the publication notice that the commentors will receive a response letter. So all of this practice is fine, but, nonetheless, this is a gray area in the rules because we have one consultant in particular and on more than one occasion who has simply told us to read the final EA or the final EIS to see their written response to our written comments. And I would be glad to share more information specifically off line. So I do not believe that it's the intent of the rules to leave the commentor uninformed and left to watch dog each issue of the OEQC environmental notice to learn if the final has been published so that then we can see the consultants response to our written comments.

So, therefore, I would ask that you please include some specificity in the rules regarding the mailing of responses from consultants to the commenters. Mahalo.

HO: Okay. Thank you. Good evening.

Jean Souza

JS: Good evening. I'm Jean Souza.

HO: Okay.

JS: Representing myself. My comments relate to subchapter 5, Responsibilities of Section 11-200.1 through 7. I'd like to suggest additional wording as follows: The proofing agency, otherwise known as the accepting authority, or governors, or mayors, authorized representative shall not be the agency proposing the action. Or, an alternative wording but same intent is: The agency proposing the action shall not be the approving agency, also known as the accepting authority, or the governors, or mayors, authorized representative to accept an EIS or the agency conducting the public hearing.

The reason is that I have observed poorly written EA's and EIS's with incomplete and contradictory statements and reports. The proposing agency should not be the same one that is responsible for submitting the EA, EIS and should not be the same one that conducts the public hearing and should not be the same one that accepts the EA, EIS.

Public Hearing 6: Kaua'i, 6:00 PM, May 29, 2018

There -- there is the potential for more independent and factual and accurate reviews and unbiased assessments of the impacts and identification of appropriate mitigation measures if the accepting authority is not the proposing agency and if the agency conducting the public hearing is not the proposing agency. Thank you.

HO: Thank you for your testimony. Um, next speaker, please. Who is it? Who -- who is the fourth one? Who else wants to speak? Okay. Sir, you in the -- oh, okay. Go ahead and then you in the -- the fellow -- the gentleman in the blue shirt afterwards. By the way, I've noticed that there's --, it appears as though there may be ten people who are here that haven't signed in. If you would please sign in at the close of the meeting or whenever so we know. Okay.

Eileen Kechloian

EK: Hi.

HO: If you could please -- please state your name first.

EK: My name is Eileen Kechloian. I live in Koloa. And the reason I -- the one thing I want to pay attention to and have paid more attention to is the fact that currently there are EA's and that are being done for an agency project with the accepting office being the same agency that's doing the project and then they are accepting it and finalizing it. Doesn't make sense to me that an agency who wants to do a project should be the one that accepts and finalizes their own project because there needs to be some segregation of, um, responsibility there. And I -- I didn't see anything in the new rules that stated that it would be separated. Okay. Thank you.

HO: Okay. Thank you for your testimony. Oh -- oh, okay. Oh, yeah, you -- the lady here and then if you could go after her. Okay. I -- I'm counting 31 people here by the way and that's more than the total we had for two meetings on Oahu. So, um, thank you -- thank you very much for your interest. Okay, if you could please go ahead and state your name first.

Bridget Hammerquist, Friends of Māhā'ulepū

BH: My name is Bridget Hammerquist and I'm here on behalf of a environmentally concerned group friends of Mahaulepu and we have actually a 12-page comment. I'm sorry I won't try and go through all of it at this point, but just offer the -- some of the key things that we're looking at, um, and appreciate very much the opportunity to comment and the fact that you are putting it out for public input.

Um, first and foremost is a change that -- in the administrative rules, there's now language that suggests an applicant, whether agency or private sector, um, would conduct an environmental assessment or an EIS assuming a trigger suggests the need only if there is a likelihood or a likely significant impact to the environment. That one I think we feel the strongest about because it is, um, it basically uses a standard that's not even used in

Public Hearing 6: Kaua'i, 6:00 PM, May 29, 2018

the parent statute of Hawaii Revised Statute 343 under which the rules are promulgated, um, only calls for a situation where there may be a significant impact to the environment.

Um, the Environmental Council did indicate a case that was relying on from 2005, but there are more recent Hawaii Supreme Court and Ninth Circuit cases which we put in our opinion that actually spell out why the standard should be made in the issue of, um, when a trigger would suggest the need for environmental review that -- that be followed through if there may be a significant impact to the environment. And I would just offer that it kind of make sense to use a maize standard or a potential for a significant environmental impact because until environmental assessment or environmental impact study has been done, I don't think there's anyone that knows whether or not the environmental -- this significant impact is likely. I think that likely is something that comes from doing the study. So to say you don't have to do the study unless you first have a threshold finding of likely significant impact is really defies logic and good reasoning. Um, so that's one of our concerns.

We also are concerned about the accepting authority, um, being a party that is also the applicant as -- as is Ms. Souza explained. I think that when an agency or a private applicant is looking to do a project, they should, um, apply -- it would be really prudent to have meetings conducted by someone unrelated to them because I think the hostilities at some of those meetings could be better controlled and then finally I don't think the fox should guard the hen house. I think the accepting authority should always be a different entity than the applying authority. Um, that's just kind of a basic.

Um, and then I would just offer, um, as a final consideration that, um, wait, hold on, I lost my train here. Um, I'm sorry. I -- I apologize. I can't call it up. I just thought I'd do three with you tonight and I can only do two right now, but I probably almost exhausted my time anyway. So we'll be filing our total page.

HO: Okay. We'll, we -- we do have till 8 o'clock so if everybody, when they speaks, if you recall what three is, please -- please let us know.

BH: Okay.

HO: Okay.

BH: Will do. I just tried to --

HO: Please let me know.

BH: -- pick the three highlights. Thanks.

HO: Okay. Sir, if you were going to --

Allan Rachap

AR: Um, my name is Allan Rachap and I live in Koloa and I'm a layman. I'm not a lawyer. I have not studied the legal (unintelligible) of proposed changes, but, um, following up on Mrs. Hammerquist's testimony, I'm -- I'm really taken aback by the change from

potential for -- for impact to the environment to likely significant environmental impact. Um, who makes that determination? I mean, I want to do something and it could have some environmental impact. I don't think it does. I want to do it because that's what my agency bosses are telling me to do or I'm in the private sector and that's how I'll make money when I do that. And so I can sit back and I can say, well, it's not likely that it's going to do any harm so I'm not going to file an EA or an EIS. And who said so? Me, you know. I'm the guy that wants to do this thing and I can decide that I don't need to do it because it's not likely to harm anything.

And frequently, these people get backed up by consultants who will submit a two-hour PowerPoint presentation backed up with 500 pages of appendices and all that telling the hearing agency that, oh, yeah, no, there's no problem here, there's no -- I mean, these consultants will tell you whatever you want to hear. You pay 'em money and they'll tell you that the moon is made out of green cheese. I guarantee you. I'll get a professor with long credentials who will testify to whatever it is I'm paying him to take deposition of. And a lot of these people are very well-known to the agency, the OEQC and, you know, the others at -- at the Health Department. A lot of them are former employees. It's sort of a merry-go-round, you know, and that you go from agency to consultancy and then maybe back to an agency and all that.

But, um, it bothers me that as Mrs. Hammerquist said that we're letting the fox guard the hen house and there seems to be no independent protection of the public and the environment taking place here and I think that of all the proposed changes, this one really stands out as we don't want to do an EIS so we'll just say there's no likelihood of it. And if -- if that's the way the game is being played, then, you know, it seems to me the public and the environment don't get a fair shake. Thank you.

HO: Thank you very much. Um, other speakers? The gentleman in the blue you are being very polite back there. Thank you. Yeah, just put that --

David Hinazumi, Grove Farm Company

DH: Good evening. My name is David Hinazumi and I work for Grove Farm Company. We're a private landowner here on Kauai. Um, thank you, first of all, for this opportunity to testify on -- on these revisions. Um, as a whole, we support, um, the -- the intent of all of these revisions with couple of specific concerns.

First one is in subchapter 1 entitled, Purpose. It's subsection (c)(3). The primary phrase we have concern with is, um, "to secure a meaningful participation". Um, the concern with that is that it is a subjective, um, determination and if there is on the -- either agency or public side, um, if there's no participation from -- from that side either for meaningful participation or two-way communication, it would make this requirement impossible to satisfy. And from the applicant side, um, it's just needing to be able to comply with -- comply with these rules.

Other specific concern is in subchapter 8. It is subsection (c)(6) regarding demolition of structures. The concern is, um, structures that meet the criteria for listing on a register and same concern as far as, um, it possibly being impossible to satisfy because if you needed to show that it does not meet the listing on a register, who is going to hear it. I don't think you normally go into an agency to say I need a determination that

Public Hearing 6: Kaua'i, 6:00 PM, May 29, 2018

this doesn't apply. So, um, again, it's just a matter of, um, clarifying the language to make it possible for the applicant to comply with the -- with the rules.

Um, in general, um, we would just like to state that, um, we would -- we support the rules and what we -- if we are an applicant in the future, we'd just ask for is clarity on the rules to make it, um, possible to comply with all of these rules and hopefully avoid any, um, unnecessary litigation when there's subjective or ambiguous terms.

Thank you.

HO: Okay. Thank you for your testimony. Were there others who wish to testify? If you could raise your hands, please. Okay. Um, yes, come -- come on up and then the gentleman behind you next.

??: And then I can (unintelligible).

HO: Okay. And if you could please state your name.

Jesse Brown-Clay

JB: Aloha. My name is Jesse Brown-Clay from Wailua, Kauai. Um, I've wanted to discuss two points.

The first is subchapter 8 with the exempt -- exempt actions items list. Um, I wanted to echo -- echo what Bridget was saying in that, um, how is it deter -- if what I read was that if something -- it does not pose a signi -- potential significant impact on the environment that it could be exempt from having to do a environmental impact statement. And, um, I'm curious how that would be determined and what the standards are for a significant impact on the environment and it seems kind of like I'd say of everything that I've read, the exemptions was something that concerned me most, um, in that there would be a looser regulation around the need to do an environmental impact statement.

My second kind of group of comments is about the public process around environmental impact statements. Um, recently, I got to attend a meeting on the -- it was the presentation of the draft environmental impact statement for a new landfill being built here on Kauai and, um, what I saw from fellow community members here on Kauai is a -- a general frustration, um, with that public process. One notable thing was that there was a lot of questions, um, and the presenting -- presenting consultants and -- and entities weren't able to nor was it part of the public process for them to answer questions. It seemed -- they -- they stated that the process is to submit questions in writing and then they would answer those questions in the environmental impact statement. I believe that one for the landfill was a thousand page document, um, and so there was a little bit of frustration from the general public about, um, the process in general.

The -- the other thing I noticed that was amongst the kind of the younger generation and a general frustration and kind of lack of information, lack of transparency or a outreach around environmental impact statements and ongoing and new development or construction projects. Um, so what I would love to see as we move forward in the future as a state, um, is kind of a more robust public outreach process, um, education and, I mean, more meetings and, um, making this. I believe that with, um, our current technology and online platforms that we can really make information accessible to people

and, um, and have there be more just kind of education and outreach on -- on all projects to more -- to like -- that -- the goal being to engage the public more and to make -- to -- to make it more accessible especially for young people, especially for people who are busy working and don't have the time, um, to read through even the updates to these rules or a thousand page environmental impact statement or whatever it may be.

Um, so, that's kind of a -- a broader, softer comment, um, but I think one that I would love to see the, you know, during this revision process there'd be a little bit of focus on the, um, kind of the public process be -- the ability to answer questions, um, in meetings and having there be just kind of more information out there. I think that's all I have for now.

HO: Okay. Thank you very much for your testimony.

JB: Thank you.

Timothy Reis

TR: Aloha. My name is Timothy Reis. Um, I didn't know really what this meeting was about. I just heard it was about ES -- EIS rule changes and I just kinda wanted to share some comments and my mana'o in regards to maybe some concerns regarding the existing EIS process.

Um, couple cultural issues, um, rocks in particular. Um, I -- my interest is in rocks. I'm an aspiring ads maker and, um, I've witnessed and observed instances where development had an EIS conducted. The groundbreaking began and large numbers of rocks, mountains of rocks show up and some of them are usually really unique in shape and peculiar.

Um, I would like to see ground penetrating radar implemented or a requirement in any sort of development, um, going forward. There has been a long history of sites, sacred sites, being demolished to the plantation areas. They were pushed in the valleys or what not, scraped off the top. The rocks were used for various purposes as well during the Hawaiian Kingdom era.

However, I was flown here, not grown here. I've had to come back and learn what it means to be Hawaiian and it's been an incredible journey, um, that I'm hoping that I can place my children further ahead than I was and reconnecting with those sacred sites is something that's very important. It's culturally sensitive sites.

Um, I think it's generally accepted is sacred sites are built on top of continually so there might've been a point in history where the top was scraped away, but there were still foundations. There was still evidence of that in the ground.

One reason, um, this is really important to me, I brought a rock and can I show it real quick? So this is a volcanic glass-tipped tool that isn't in archeological record anywhere. And my point is, is that, um, we don't know really what we're talking about here in Hawaii when we talk about the Kanaka and the people that we're here. The history that the archeology tells about doesn't match our oral traditions and I think that you will not find a record of an volcanic glass-tipped tool.

And this is just one example of something that's been missed. It will be continued to be missed and possibly destroyed for future generations. For me, it's very

important because this defines who I am, um, and I think what really needs to occur is education amongst archaeologists that are in the fields. If you're up on the plateau and you come across a bunch of river rocks, they're probably not river rocks from the river. They probably are stone implements indicating a house site. The heiaus are built from spe -- specific stones, uniform in most cases. It's very easy to identify it. I think the education amongst the state arc -- archaeologist needs to be updated.

The other thing is a concern for me is the pueo or the Hawaiian short eared owl. Um, last I checked it wasn't on the endangered species list. I believe it's because it's a subspecies, but it was listed as imperiled which, to me, a layperson, it seems like that's worse than endangered, yeah, that it's going away. And I don't know if there is a pueo reserve on the islands. I -- I don't know of one here, but I -- it's something that I don't know if that's within your realm or what not, but when you take a look at open spaces that are -- is the habitat of these animals and they're looking to develop them, I think that should be considered as we move forward with development, um, the amount of habitat that's available for that animal.

The other thing is a concern for me is wells. Um, I feel I have a claim to the freshwater springs that come out of the mountains which is healthy drinking water. And as we move forward. that's becoming extremely valuable. We have a lot of people that are drilling wells on areas that don't have water, and as I understand it, um, those potentially are affecting those springs that I have a vested interest in. So I don't know if well diggers are people requesting to dig a well are required to go through some sort of impact statement to identify the springs in the area that could potentially be affected, but, um, these are just concerns of mine regarding things that I would like to see maybe requiring environmental impact statement if the people are requesting to have it done. I feel like it affects things that are very important to not just the Kanaka culture, but the people who call this place home.

HO: All right. Thank you for your testimony.

TR: Thank you.

HO: Sorry, I just -- I just have one thought which is that the number of the matters you talked about like -- like the, um, pueo concern is also -- what we're talking tonight is -- is the form of impact statement was required to be minimum, but if you're specifically interested in issues like that, there's other -- there's other areas that should investigate that far beyond the scope of this hearing, but other places where you could contribute what you have.

TR: Thank you for that. Thank you very much.

HO: Sure. You're welcome. Ma'am?

Felicia Cowden

FC: So, um, I was going to speak. If you're all right, I'd rather stand?

Public Hearing 6: Kaua'i, 6:00 PM, May 29, 2018

HO: That's fine.

FC: Um, I want to speak to actually a lack of trust that I have in the process. Not a lack of trust in the Office of Environmental Quality Control, but when I watch -- um, I do a lot of community advocacy including through the media and so I play very careful attention to like the -- the Mauna Kea issue.

I saw that the Office of Mauna Kea Management worked with Group 70 who also did the EIS who also -- you know, so it's like -- as Bridget was saying, the fox would guard, um, guarding the hen house, and when we had a dairy here, Group 70 made the plan for it. They did the, um, EIS that said there's no -- or the environmental assessment that there's no impact. And I went to a -- a workshop pretty recently. As we're watching the hopscotching and the winning in courts and I went to this workshop that two of the major sponsors were Silver Bait and Ulupono who happened to be involved with the dairy. And when we were in that workshop there was -- it was called like Managing the Public Process and so they had a series of consultants.

Peter Adler taught. It was -- organized it. It was an expensive thing to attend and it was mostly department heads from government and then some developers. So this is very timely and how it came out with this Office of -- um, OEQC piece and I had Scott on my show closely thereafter. We did two shows on that -- that workshop that I attended. And in that workshop, it was heavy guidance on how to subvert the intention of the public, how to work around what was needed, how to change the question instead of saying how do you feel about series of telescopes on the top of the mountain. You say what does the Mauna mean to you and they gave a lot of guidance to deflect the question and how to control the outcome. And it -- it was, I would say, shamelessly so.

There was never ever anything that said we need to actually listen to what the people were saying and there was a close tie in and that was the University of Hawaii event. It was at the East-West Center I believe. Um, so there was a close tie in of how that came right along the heels of the creation of this document and, um, it seems that what is in there somewhat would frustrate the efforts of friends of Mahalopu which I observed this group. So I -- I'm nervous of it. So when I see wording that shifts or changes that might change that threshold of accountability, it's -- it's a big issue for me and somebody else said something to this effect. Like I literally gained weight watching the four months of hearings, the contested case hearings for Mauna Kea and the consultants that did it, the archaeologist couldn't even -- he lived in Hawaii for 26 years, couldn't have the confidence to try a five syllable Hawaiian word. I mean, there wasn't even curiosity about the culture and what was exposed in that and he owned is that he hadn't even read the document that he cut and pasted that was written in 1984 yet he signed. All he did was the cover letter. And the hearings officer did not include the most critical information from the many citizens who took months off, even lost their homes from not being able to pay the mortgage when one of the (unintelligible) homes, but a lot of people went through a lot of stress.

So the system very much biases in favor of the larger developer and anything that takes away from the citizen being able to step up and say, hey, so if the burden of proof is somehow shifted on to the people when we're looking at words like likely, if -- if there's no problem then, no problem, but that's something that I just can't emphasize enough.

We've had huge community challenges over pesticides and there's no way to

Public Hearing 6: Kaua'i, 6:00 PM, May 29, 2018

have the community meet the burden of proof because we are a small community and that came out really heavily as a stipulation for us. Our population will never be statistically significant in anything we might say. So if we ever have to have the likelihood culpability of proof, I worry that we won't be able to do that. If there is no problem, if there's truly no change of wording in there, which I had somebody on the board say was the case, maybe I missed it. As what Scott had said you guys have really erred on the side of honesty and are having revision after revision. So if there's been another revision since the last one I read that used that word likelihood, well, great, thank you. And, if not, we -- we need to fix that. So thank you so much.

HO: Did -- I'm sorry. Did you put your name on the --

FC: I thought I did, but in case I didn't -- didn't I not?

HO: No.

FC: Okay, bad me. Felicia Cowden from Kilauea.

HO: Okay. Thank you. Is there anyone else who wishes to speak? Okay. So if you could --

Hope Kalai

HK: Aloha.

HO: Aloha. If you can -- if you can maybe sit there closer or -- or -- we can get the recorder closer here or something. Okay.

??: And -- and maybe speak up so people can hear you. I'm saying that people can't hear.

HK: Okay.

HO: Okay. But please state your name, first and last name.

HK: My name is Hope Kalai and I want to thank you for coming here to listen to all of us because this is a big meeting for Kauai. You might not realize that, but what do we got, 30 or 40 people here. We are stati -- statistically significant for Kauai.

HO: Actually, you -- you have way more people now than -- than Oahu did.

HK: AO Kauai.

HO: (Unintelligible).

HK: Yay. Thank you, Kauai, for coming here.

HO: Okay. Okay.

Public Hearing 6: Kaua'i, 6:00 PM, May 29, 2018

HK: But what I wanted to request of you is to not lessen any of the considerations of this community. Listen to us, hear us. We have significant cultural -- we -- this is a mishmash of people. There is nobody here that would say the same thing as I would say. My mana'o is different than anybody else's here and we need to be heard. We don't need to be batched into one -- one comment consideration. If I say the waters of Waialeale are significant to me, everybody else here might say that same exact word, but have a totally different meaning for it. So the -- the batching thing to me is really scary.

The fact that you cannot consider -- I'm -- I'm afraid that this new, um, plan does not consider cultural impacts. It doesn't consider access impacts. There's a lot of people here that are trails and beach and mountain access advocates and there's a couple of people here that are on Naalahele and open space and have been for many years. We don't get papered on EIS projects. I don't know why. We don't exist. We don't matter. We need to be considered. We don't need to be not considered. It doesn't need to be lessened. Our water here -- the wa -- what's going on with the water is very significant. It's very important and it hasn't been considered adequately through the EIS process and we are very afraid if you weaken that process and lessen the constraints on it that it's going to get only worse.

So, we're asking you to please consider our community. Consider our island voices and don't squash us. Don't -- don't make us less heard by batching our responses. Um, we have some significant problems here that deserve consideration especially cultural impacts that I'm really afraid are going to be washed out by this revision process. So I'm asking you please to listen to our community needs, to our community voices especially with regards to water, um, cultural and tradition practices public access to beach and mountains, and our environmental. Um, our endangered species on Kauai I don't think will be given honor by this new process. So, we're asking you please to give con -- serious consideration, um, to our voices and don't batch our comments. That to me is really scary so thank you very much.

HO: Okay. Thank you for your testimony.

HK: And I'm really concerned that we're building houses in Loi.

HO: Okay. Um, anyone else who wishes to speak?

Vivien Davenport

VD: Hello. My name is Vivien Davenport from Lihue and I believe that the whole process is built to not hear our voices. Starting from -- well, let's start from the fact that it's only a PDF file. So if I want to just talk about this with friends, I can't copy and paste the one little part I want to talk about. Even in a letter back to you I can't do that, copy and paste. This is what I'm talking about. I have to refer line and verse like it's a bible or something. Um, why don't you just put it in Word and put it up on the internet so we can chop it up and talk about it and send our comments back to you. That would be preferable to the way it is.

What would be even more preferable, community meetings where people get up

Public Hearing 6: Kaua'i, 6:00 PM, May 29, 2018

and speak and ask their questions and you -- then another community meeting where you come back and answer us if you don't know the answers right now.

And, um, I'm sorry, but I'm really emotional about this and I feel like you guys are going through this process because you keep getting drama and you keep getting drama because the people weren't heard because the process was set up so that only people that do email and PDF and work in cubicles can even comment. What about the farmers? What about the Hawaiians? What about the kanaka? What about people with a language barrier? We want to hear everybody in our community. We know from experience that somebody that just -- that works in the dirt or works with rocks that you might not think they know very much. They know a lot. They know about the microbes. So, please, stop this bullshit. Have community meetings cause you're going to have 'em anyway. You're going to have 'em at the last minute with a lot of drama where we're going to go, hey, you did it again, we don't know what's going on.

The business, you know, they did their own yay and we have to read a PDF file and it's stupid. It's ridiculous. Change the whole thing. We want community meetings where we hear each other's comments and where you don't just go, why we're here if a hundred people said the same thing. You don't just post one letter that represents a hundred comments and then another one letter that represents one comment. You must think we're stupid.

HO: Thank you very much for your testimony. Um, sir, come up. For those -- for those of you who weren't here at the beginning of the meeting, my -- my position is just the hearings officer for the Health Department. I do not have any -- I -- I -- I'm a moderator, but I don't have any input into what these rules are going to say or into the process. So, um, please -- please understand that. I -- I'm the person who if there's a contested case that comes out of a -- of a supposed violation or alleged violation, I'll handle that case. In fact, I have a case right now where some -- a government agency exempted itself from building a -- a running track on top of the -- near Pearl Harbor on top of an old munition stuff, okay, but that's the type of thing I handle. Okay. So, but anyway, please -- I don't mean to -- but it -- it -- it's not me who's making these comments, but it will be (unintelligible) of making the decision. Just please understand that. Thank you. And I wasn't taking any comments directly to you personally, but, okay, yeah.

All right. Sir, go ahead and if you could start with your name.

Ken Taylor

KT: Thank you. Um, thank you all for being here this evening. Um, my name is Ken Taylor from Kapaa and I want to address some issues and -- and question whether how will your environmental, um, activity is really, um, protecting the islands. The human population living as we do has exceeded the carrying capacity of the earth and all of the islands of Hawaii. This situation is not sustainable that all proposals to save the environment or to make move towards sustainability are serious intellectual frauds. If they do not advocate, we do think population to sustainable levels at the local, national and global scales.

You have heard hundreds of people talking about endlessly about sustainability. Did any of them ever tell you what the first law of sustainability is? Well, here it is. Population growth and/or growth of -- in the rate of consumption of resources cannot be

sustained.

Back in '09, Paul Hawkins gave a commencement address in -- about a university up in Oregon and I've just taken out one little paragraph of his comments, but he said, we have an economy that tells us that it is cheaper to destroy earth in real time rather than renew, restore and sustain it. You can print money to bail out a bank, but you can't print life to bail out a planet." At present, we are stealing the future, selling it in the present and calling it growth domestic product. We can just as easy have an economy that is based on healing the future instead of stealing it. We can either create assets for the future or take assets of the future. One is called restoration and the other exploit -- exploitation. And whenever we exploit the earth or the community, we exploit people and cause untold suffering. Working for the earth is not a way to get rich, it's a way to be rich. The fact that there's a highway to hell and only a stairway to heaven says a lot about an anticipated traffic numbers.

Self-evident truth. If any fraction of the observed global warming can be attributed to the activities of humans, then this constitutes positive proof that human population living as we do has exceeded the carrying capacity of the earth. This situation is not sustainable. As a consequence, it is an inconceivable truth that all proposals or efforts to slow global warming or to move towards sustainability are serious intellectual frauds if they do not advocate reducing population to a sustainable level at the local maximum global scales.

HO: Sir, can you --

KT: Now, my -- my question is --

HO: Okay. Did you have any comments on the rules that are being proposed?

KT: Just -- yeah.

HO: Okay.

KT: Just -- my -- my questions is, not only does this document that you revised and the revisions, how do they reso -- how do they solve any of these problems? You folks come in from Honolulu have a different environment than we have on Kauai. We don't want your environment over here and we want to protect what we have and we never want to see Honolulu on Kauai. Thank you.

HO: Okay. Thank you. More people have come in who -- if you want to -- please sign up if you haven't already. Others who wish to speak? Did -- did you remember your third point? Did you --

Bridget Hammerquist, Friends of Māhā'ulepū

BH: Yes.

HO: Okay. Why don't you come up and add to your testimony then.

Public Hearing 6: Kaua'i, 6:00 PM, May 29, 2018

BH: Thank you for having me back. Again, it's Bridget Hammerquist.

The third point that I was going to make is that there's three words used not infrequently in the new rules as well as in the old that need definition that don't now have good clear definitions and they are project, action and mitigation. And I think there's been a fair amount of case law in tugging and pooling to try to get those better defined. So we are making some suggestions to the Environmental Council on what might make for meaningful clear definitions of those terms.

And then I would just offer if I may in response to that one woman's comment who expressed frustration. We recently went through an environmental assessment on Kauai where there was public comment and it was due on the 12th of March. On the 13th of March, the agency went into OEQC and filed their final and said there was a finding of no environmental impact of any significance so they filed a FONSI.

Some of the comments that were filed on the 12th were filed after 5:00 p.m., up till 6:00 or 6:30, um, because they're electronically able to be filed. And I really would encourage and request that when the Council does its final rule revision that it gives some effect to the concept that if a draft environmental assessment or draft environmental impact statement must provide a 30-day window for people to comment. Inferentially in that requirement is that the agency or applicant, if private sector, is expected to receive those comments, give it some consideration and then respond to it which is physically impossible if they're prepared to and file a FONSI the very next day after the environmental comments are due to the draft.

So I would just ask them to add to the rules something that requires not only a response to the comments, but that they -- there'd be at least, um, some evidence that the applicant has in fact taken the comments into consideration. Otherwise, the rules are being given very short thrift and of no affect. Thank you.

HO: Okay. Thank you. Other testimony? Yes, please. Is the sign in sheet going around somewhere that I can't see cause there was a third page of it? Oh, you've got it. Okay. Good. Thank you.

?? Okay. And I'm -- I'm written down. Okay. You can hold this cause you seem to be near this.

HO: Those of you have children here, please be sure to sign their names, too. This is a historical document so -- so, you know, 50 years from now if they think that they want -- gee.

Susan Strom

SS: Hi, I'm --

??: Nice and loud.

HO: Okay.

Public Hearing 6: Kaua'i, 6:00 PM, May 29, 2018

SS: My name is Susan Strom. I live in Wailua.

HO: I'm -- I'm sorry I didn't hear.

SS: My name is Susan Strom.

HO: Susan Strom, okay.

SS: I live in Wailua.

HO: Thank you.

SS: Um, I have one question just prior to this -- one concern I'll share it with you out of the blue. Um, in giving this testimony, who is carrying this testimony to the agency?

HO: Okay, the --

SS: You're recording this testimony?

HO: Yeah. There -- there are nine of these hearings being held statewide. This is the sixth of these hearings.

SS: Yes.

HO: Yeah, sixth of the ninth.

SS: Yes.

HO: Um, all these comments will be given to Office of Environmental Quality Control which is within the Health Department which we'll relay all of the -- all of the testimony and all of the written comments to the Environmental Council which is the -- which is the body that -- that will make the determination on the rules. This is the fifth draft. They'll be making additional suggestions which will go into a sixth and then it'll go to the Environmental Council which will hold its own Sunshine hearings. Okay?

SS: Okay.

HO: Now, the Environmental Council, it -- it's not -- it's not a Honolulu body. It's a statewide body. There are representatives from this island on it. There are representatives from all the other islands on it, um, and my understanding is -- is -- how that works is that there is, um, they work very hard to get the input from other -- other people and, um, from the people on the different islands and to retain that (unintelligible) to, um, in what they're doing. Um, so, but Environmental Council not -- not just in Honolulu, you know, people from all over, so.

SS: And who is recording this now so that this information is cared for this --

Public Hearing 6: Kaua'i, 6:00 PM, May 29, 2018

HO: The recorder is right next to you.

SS: Right here. Thank you.

HO: So, okay.

SS: Okay, okay.

HO: All right.

SS: Just didn't know if this was being used as a microphone or recording.

??: And -- and I'll give this to him, too.

SS: Okay. Thank you. So, um, before I just comment on this one paragraph, um, I haven't had time to read the entire statement so I apologize for that. I also, if I hadn't happen to cross this by accident on social media, I wouldn't even know this meeting existed. So I guess my first request would be to -- to try to exploit these -- these meetings. Um, environmental impacts assessments are extremely important to the inhabitants of this island for a myriad of reasons and so to be able to share that and be more forthcoming and transparent with those meetings and to give those meetings a good social boost so that we're able to participate. I would never even known this existed if I hadn't stumbled across it. Um, and there are many incidences that are going on that had been going on for the past year that, um, bring -- raise our concerns and that's why we do want to participate in this process and be able to help, um, you know, share the information and, um, and the concerns we have with this island and its inhabitants.

Um, I just -- page 27 here. This is 11-20, subsection C. There is a comment here in the amendment deciding whether a written comment is substantive -- substantive the proposing agency or applicant shall give careful consideration to the validity, significance and relevance of the comment of the scope analysis or process of the EA bearing in mind the purpose of this chapter and chapter 343, H.R.S., written comments deemed by the proposing agency or applicant as non-substantive and to which no response was provided shall clearly be indicated.

What this relates to me is that we've got the agency or the applicant determining whether this is valid or not, um, that these comments that are being -- written comments that are being concerned and shared, um, are not deemed necessarily val -- valid by the public but by the applicant or the agency. So the agency in how I'm reading this has the right to say whether the comment is even -- has any substance or not. They can just deem that appropriate or not or just, you know, throw it to the wind.

Now that -- I know a little something about this. I worked as an analyst, a state analyst, for 11 years. I know something about this and there's a lot of hidden language in here that a lawyer could tear to pieces and there's a lot of holes in here that people can call and do all kinds of really creative things with and that's why they have lawyers and teams of lawyers. Right here. It just says right here that they can deem whether anyone's comment here is valid or not and throw it out. Oh, this doesn't relate to us

Public Hearing 6: Kaua'i, 6:00 PM, May 29, 2018

because I see this this way and this is -- so what you're saying has no absolutely no bearing. That to me is extremely inappropriate.

Um, so I think there's a lot of language cleanup that needs to be done in this. Um, we would love to see something like you said besides a PDF so that we can read it. We would love to see it produced and reviewed for the public comment. Maybe have another meeting coming back when there's some revisions and some cleanup work done or maybe they can sit down with the public and we can go over it together as a group and that would be wonderful. Um, or we can even sit down and go step by step and ask the pertinent questions because this is affecting us here.

You know, you might not feel it where you're coming from or someone else is not feeling it, but it's affecting us in dramatic ways. And, you know, we're taxed in so many ways on this island. So all I'm asking is more transparency and cleanup, cleanup, um, because some of this is really scary. And this is just one paragraph. If I'd had two hours to go over this, I'm sure I could have ten -- ten pages written for it so.

HO: Okay.

SS: Thank you very much.

HO: You're welcome. Please understand that there is a written comment period, too, that goes through Tuesday, June 5th.

SS: Yes.

HO: I guess that's next Tuesday of next week at 4:30. It's -- it's in -- it's in the public announcement and that -- those comments can -- if you want -- want to go through and submit written comments, you can certainly do so. Um, --

SS: It's not a lot of time.

HO: -- and the addresses are here -- written in here.

SS: Yes.

HO: There will also be after this next period -- after -- after the OEQC, um, makes another draft and sends it to the Environmental Council, the Environmental Council will also be holding a hearing as I mentioned before. So --

SS: Okay.

HO: -- there --

SS: And we'll be able to share that, too.

HO: -- there are additional opportunities.

Public Hearing 6: Kaua‘i, 6:00 PM, May 29, 2018

SS: Yes, yes. I think that’s very critical. Thank you very much.

HO: Okay, you’re welcome. Um, anyone else? Okay. Thank -- thank to all of you who’ve spo -- spoken. Um, this -- this hearing is from 6:00 to 8:00 p.m. and we will be here until 8:00 p.m. Um, if anyone else comes and wishes to comment or if anyone who wants -- is looking through proposal and would like to make further comments at any point, um, before we -- we leave. So, um, thank you very much for coming. Um, actually, I’ve -- I’ve had some experiences with Kauai hearings. It’s -- it’s -- you -- you are very active community. Um, I’ve been here on open verdict. There’s actually more people here on open verdict, but, you know, um, in fact I had to sit up on the stage for that one which I really didn’t like to do. Um, but, anyway, thank you very much. Thank you and thank you for your interest in the environment. And -- and the hearing is -- the hearing is adjourned, but it will not be concluded until 8:00 p.m., which means just let me know if you want me to un-adjourn it. Thank you.

Public Hearing 7: Lānaʻi, 3:00 PM, May 30, 2018

HO: Hearing Officer Steve Jacobson
LM: Lynn McCrory
MK: Max Kincaid
GJ: Gabe Johnson
RK: Robin Kaye
SG: Scott Glenn

NOTE: Max Kincaid attended part of the hearing and spoke but his comments did not pertain to the proposed HAR 11-200.1 and as such was not identified as a testifier by the public hearings officer.

HO: Okay. Good afternoon everyone. Thank you for coming today. Um, my name is Steve Jacobson. I'm the Hawaii Health Department's hearings officer. Um, this is a matter, um, Health Department docket number R112000518, um, which is one of several -- this is one of nine public hearings on the proposed repeal of Title 11, Chapter 200 of the Hawaii Administrative Rules and the adoption of a new Chapter 200.1, both titled Environmental Impact Statement Rules. I'm going to be reading to make sure I -- some of this because -- to make sure I get to -- to say everything that I need to be saying.

The proposed repeal and adoption will update and substantially advise -- revise the rules regarding the state's system of environmental review at both the state and county levels to ensure that environmental economic and technical concerns are given appropriate consid -- consideration in public decision-making in accordance with H.R.S. Chapter 43. The purpose of Chapter 200.1 was to provide agencies, applicants and the public with environmental review procedures, specify the contents of environmental assessments and environmental impact statements and to set criteria and definitions that applies statewide and -- and at different le -- and different levels of government. Um, the State's Environmental Council urges the public to review the rules and the explanation to proposed changes.

Um, as I indicated, this is the seventh of -- of nine hearings. Um, today is May 30th, 2018. It is approximately 3:06, Hawaii standard time. We're at the Lanai High and Elementary School cafeteria at 555 Fraser Avenue in Lanai City. Um, and there was a public notice announcing it. This is one of the public -- one of the nine hearings announced in the public notice.

Um, the purpose of today's hearings is to receive oral testimony on the reposed rules for members of the public. Written testimony will also be accepted until 3 -- excuse me, 4:30 p.m. on Tuesday, June 5th, 2018 either by mail or hand delivery on South Beretania Street in Honolulu, I have the exact address here, and at the website for the OEQC which is the Office of Environmental Quality Assessment. Okay. Do I have that here? Okay, Office of Environmental Quality Control which is, um, attached to the Department of Health, um, but it's -- has its own -- it's headed by its own, um, separate person appointed by the -- by the governor of our state.

Public Hearing 7: Lānaʻi, 3:00 PM, May 30, 2018

Um, I've been asked to read an -- and additional statement from the envi -- state Environmental Council which is also attached to the Department of Health for, um, administrative purpose, but has -- but whose members are also -- also appointed, um, I think -- I believe is 15 people appointed by the -- the governor, um, and from -- statewide. Um, and it's the request of the Environmental Council, but I'll read this additional background information.

Before releasing the -- this current draft of rules, the -- the Environmental Council prepared four working -- our previous working drafts and received comments on each draft. The first working draft was released in July 2017. After receiving public comments it released a second working draft in September 2017. After more public comments, third working draft October 2017. More comments. Fourth working draft February 2018, um, which the Council received public comma -- comments and then relea -- released the current draft rules which are really the fifth draft and those are the ones this public hearing is being held for. After -- the series of public hearings is being held for. After the completion of these series of public meetings, um, which will conclude tomorrow, and receipt of the written testimony, the Council will review the comments received and consider revisions to the -- these fifth draft rules at pub -- at public meeting of its -- of its own under the Sunshine Act, Sunshine Law, um, before -- um, before promulgating any final -- final rules. To receive updates on what the Council is doing, you can contact the OEQC and whose address I -- information I have here to request to be added to its email list.

All right. Um, does anyone wish to present testimony today? Okay. Um, just be -- before you start, um, let me just explain my role. I -- my role here is as a moderator. I am not part of the decision-making process. I gather comments, um, that -- that are recorded. I'm sort of like an MC for purposes of these hearings, but I don't have input. Later on if -- if contested cases arise within the Health Department that somehow involve these rules, for example, if somebody is cited for doing something in violation of another Health Department regulation and one of the argument is that they should have filed an environmental impact statement and that would have solved all these problems and they wouldn't have had them, I will hear that case and be looking at whether they should have that, um, environmental impact statement. So for that reason, I -- I can't have input into the rules and then -- I can't both be the -- be a co-author and then interpret 'em later on. And what I'm doing, I'm acting on behalf of the Director of Health and my decisions can be directly appealed to the court.

So, anyway, okay. Yes, you would like to testi -- could you -- why don't you -- you can just sit right here, re -- recorder here and if you could state your name for the record at the beginning.

Lynn McCrory, Pulama Lānaʻi

LM: Um, good afternoon.

HO: Good afternoon.

LM: My name is Lynn McCrory. I am the senior vice president of Government Affairs for Pulama Lanai and I am here in support of the rules as they are written. Um, we think that

Public Hearing 7: Lānaʻi, 3:00 PM, May 30, 2018

you have done an incredibly wonderful, transparent and collaborative process, one that I don't think I've ever seen a government agency do. So thank you for that. And, secondly, I just wanted to point out some points and I've given written testimony in --

HO: Okay.

LM: -- that I think are really important and are real positives to what you've done.

So the first one is that you've encouraged and you're inquiring public access and public interaction, greater interaction than it used to be between the applicant and the agencies and the public. Um, we support these types of things. We do monthly community meetings to talk to the community. So we have no issues with greater public participation and processes.

And the second one is the differentiation between a program and a project. That's major. That makes a big difference when we're looking at something that's very small or when we're looking at what could be multiple pieces that really should be a program and not just a project. And it stops you long enough to make you think about it, what it should do and which way should you go.

And then my kind of favorite one is the responding to substantive and non-substantive comments. Um, one of the things that seems to have developed over the last few years is this chain letter that has exactly the same information in it. Everybody sends it and they sign their name. Um, so being able to take all of those and just put them into the draft saves an incredible amount of time and really it's just a one fight and also looking at it and saying I don't have to respond individually to every single comment. Substantive comments, yes. Non-substantive, you can address in the draft.

And, lastly, I just want to comment on the federal entity issuing and exemptional FONSI so that if the federal agency issues the FONSI, the state or the county agency can also look at it and say and include that in your decision whether they provide an exemption or they want a secondary EA or EIS done. That's rather major because the amount of work it takes to do a federal EA or EIS is major. And in most cases it's larger than the state or the county's requirements. So having -- having that bigger picture that have to be done and then letting the other two entities decide which should they do.

So, we thank you. We think the new rules are a wonderful combination of putting the developer and the environmentalist together into something that we both can agree and disagree on. There's parts we like and parts we don't like, but we believe it's a major change and we're supportive of it. So, we must protect our environment for the future generations and I think you've done a good job with these rules.

HO: Okay.

LM: That's my testimony.

HO: Okay. Thank you very much for your testimony.

LM: Thank you.

HO: Um, is there anyone else who wishes to testify? Okay. Um, so the gentleman

Public Hearing 7: Lānaʻi, 3:00 PM, May 30, 2018

who came in after -- after we started, there is a sign in sheet here if -- if you want to register your presence. Um, we -- this is -- we're taking oral testimony under the proposed rules, new rules for environmental effect statements and environmental assessments. The hearing will be open until 5 o'clock if you, um -- you haven't asked to comment now, but if you -- if you want -- wish to comment any time between now and 5, just let us know. We will be here.

MK: Are you guys going to make any kind of presentation as to what you guys are going to do?

HO: Um, the rules are online. The -- the proposed new rules -- rules are online and -- and -- were presented that way. The function of this meeting is to gather comments on the rules that were published and put out to the public ahead of time.

MK: I wonder if we can make (unintelligible) in the rules, proposed rules?

HO: The -- well, this is -- is -- I went over this a few minutes ago, but this is the fifth draft of rules that have been prepared by the Environmental Council. We're drafting comments -- excuse me, we're holding nine, nine public hearings like this, um, statewide. This is the seventh one. There is -- anyone who wishes to can also send in written comments until Tuesday of next week at an email address or written address that I have, um, and then the comments will go up to the Environmental Council which will hold pub -- public hearing of its own under the Sunshine Law and then -- and do what it -- what it feels is appropriate after seeing all the comments becoming on -- on -- this is the fifth draft. It's the -- it's the fifth or actually the fifth round of -- of drawing public comments.

MK: The only thing I'm really concerned about is whether or not the conservation measures that we put in for Hulopoe Bay are still going to hold true and then, um --

HO: I'm sorry. I -- I couldn't -- I couldn't hear your full sentence. The -- the --

MK: The only thing I'm really concerned about is whether or not all the preservations down at Hulopoe Bay, it's conservation there, all rules that now pertains still go, still fly and not -- we don't want those changed.

HO: Okay. I -- I don't know the answer to that question. My role, again -- my -- my role, again, is as a moderator, but that -- we have your comment and -- and that can be responded to. Um, okay. And if -- but please -- please put your name -- actually, what's your name?

MK: Max.

HO: Max?

MK: Yeah.

Public Hearing 7: Lānaʻi, 3:00 PM, May 30, 2018

HO: Okay. Okay. If you could sign in, too, so -- so that we have your contact information so that -- it's actually -- so the Environmental Council has -- has the, um, um, has your contact information so they can respond to you to that comment, so. Okay.

Max: Yeah.

HO: Okay.

Max: We're just concerned that -- that we're going to be working eight hours maybe. Getting (unintelligible) already established over the years.

HO: Yeah. Okay. Thank you for your testimony.

LM: (Unintelligible) different set of rules and this is not part of it.

MK: Where would I find that? It's online?

HO: Here. Um, the rules -- do you have an extra?

SG: Yeah.

HO: Okay. Mine is kinda marked up at this point. Okay. So there's no -- there's --

SG: Here's a copy of the rules.

HO: Does anyone else wish to comment? Okay. In -- in the absence of anyone else wishing to comment, I'll -- I'll just adjourn the hearing. That means I can turn off the -- um, turn off the recorder subject to being re -- subject to being reopened any time between now and 5 o'clock. We will be here till 5 o'clock, um, but subject to being reopened if someone shows -- someone -- someone else comes and wishes to be heard.

(Break)

HO: Okay. Let's -- let's -- let's start again here.

Gabe Johnson

GJ: Sure.

HO: Okay. The gentleman who just came in the room, your name, please?

GJ: I'm Gabe Johnson. I'm a Lanai resident.

HO: Okay. Did you wish to speak?

GJ: Yes, I would like to speak.

Public Hearing 7: Lānaʻi, 3:00 PM, May 30, 2018

HO: Okay. Please go ahead with your testimony. Say -- say what you want to say.

GJ: Sure.

HO: Testimony is now (unintelligible), so.

GJ: Okay.

HO: Okay.

GJ: So I -- I know that the state is going to do some changes to the, um, to the EIS and all that. I just hope that the changes are helping -- helping us realize the responsibilities for the public trust doctrine that's in our state constitution, that I don't want any of the changes to make -- make a EIS weaker. In fact, I think it has to follow the spirit of the law, the constitution that we -- the public entrust the natural resources in the environment to our state body. So they have to make sure that they're doing what's right and I don't want any of the changes to lessen the effect of the EIS, or make it weaker, or make it, um, make it more easier for those who are applying just out of easiness sake.

Streamlining is not something you want to do for process for EIS because given -- you can look at Big Island right now. I'm sure there's an EIS for their geothermal, you know, and now it's -- we all know what's going on. That's -- that's my statement is I just want to make sure the EIS's are stronger or keeps staying strong and that it doesn't -- any of the changes make it any weaker because there are loops and there -- there's -- there's regulations for a reason. So I think that -- that is the -- um, really important that these regulations were -- were meant for a reason and we don't want it skip over 'em or make 'em weaker. So that's it.

HO: Okay. Thank you. Um, just for the record, it's now 3:45 p.m. in the afternoon now. And, when we -- we reopened the hearing. The -- there is a period -- there's still an open period in which written comments can be submitted.

GJ: Okay.

HO: It's next Tuesday at 4:30. The address is in the announcement.

GJ: Okay.

HO: Uh, I think we have an extra copy where you can write that.

GJ: Okay.

HO: They -- they can be sent in by mail, they can be dropped off, the drop is Honolulu though, or they can be emailed.

GJ: Okay.

Public Hearing 7: Lānaʻi, 3:00 PM, May 30, 2018

HO: And so if you look through -- if -- if you look through the rules and see specific items that you want to comment --

GJ: Sure.

HO: -- that you think that are weakening or do streamlining or -- or whatever -- please get -- please get your comments in so they can be considered. And those will go to the Environmental Council. Um, before we went on the record, you -- you had -- you had concern if this -- where these were coming from. This is the fifth draft that's been prepared by the Environmental Council.

There have been prior hear -- it's gotten prior public input on four prior drafts. Now it's going to be on the fifth draft using -- and more formal process of public hearings on all islands. There's going to be nine and this is the seventh of nine.

GJ: Okay.

HO: And then we'll put all the comments that are coming in from the nine hearings and the written comments will be submitted to the Environmental Council, um, which is the one who actually promulgates the -- the rules. And then they will evaluate them and -- and -- and do what they believe is appropriate in light of all the comments.

GJ: Yeah.

HO: Like I said, this is the fifth draft that's opened, bunch of revisions.

GJ: Yeah.

HO: But there's still -- still open to comment.

GJ: Okay.

HO: Okay. And they will hold public hearings.

GJ: Okay.

HO: All right. Anybody else wish to say anything? Okay. We'll adjourn again at this point, but we will still be here till 5 o'clock. Any more comments or anyone else (unintelligible) -- anyone who's already here wishes to say more or whatever? Okay. Okay. Thank you.

Public Hearing 9: Maui, 5:00 PM, May 31, 2018

HO: Hearing Officer Steve Jacobson
TP: Tamara Paltin
JB: James Buika
KF: Karlynn Fukuda

HO: My name is Steve Jacobson. I'm the Hawaii Health Department's, um, hearings officer. Basically I conduct public hearings and -- and handle contested cases for the Department on all subject matter within the -- within the ambit of the Health Department, um, which includes environmental laws since we don't have a state DA here.

Today is the 31st day of May, 2018. It's approximately 5 o'clock in the afternoon. We're at Kahului, Hawaii in the school cafeteria of the Maui Waena -- Intermediate -- Intermediate School in -- in Kahului as I mentioned before. Um, this is the ninth of -- ninth of last of nine public hearings on the, um, under docket number R11200518 of Hawaii Department of Health which is invol -- which is -- involve public hearings on the proposed repeal of the Hawaii Administrative Rules Chapter 200 of Title 11 and the adoption of a Chapter 200.1 in its place, both to be titled "Environmental Impact Statement Rules". Please excuse me for reading some of this, but I've got the record settled.

Um, the proposed repeal and adoption are to update and substantially revise the rules, um, as to the system of economic review at -- at the levels of state and county government, um, which, in order to ensure that environmental economic and technical concerns are given appropriate consideration in decision-making imposed with H -- H -- Hawaii Revised State Chapter 343.

The purpose of the rule is to provide agencies, applicants and the public with procedures for environmental review, specifi -- specif -- specify what's required in contents of environmental assessments and environmental impact statements to both and to, um, to provide criteria and definitions that apply statewide at the state and county level.

Um, the proposed amendments are available online at the website that's, um, listed in the -- that's shown in the, um, in the notes of this hearing that was -- was published in -- published statewide, I -- I -- last -- last month. Um, oral testimony isn't the only way to testify to provide testimony. Written testimony will also be received up through next Tuesday, June 5th, 2018, at 4:30 p.m., um, at the, um, on the web, at a email address for the, um, Office of Enviro -- Environmental Quality Control. And, again, I have -- I have that email address and -- and we -- we have that here and we have the address which, um, such, um, testimony can be done both, um, either hand delivered or mailed on Beretania Street, Honolulu, again, in the notice.

At the request of the State Environmental Council, which is the ultimate rule-making body before the governor on the -- on these rules, I've been requested to read and provide to those attending these hearings at some additional background information. This is actually the fifth draft of these proposed rules. There was a first working draft

Public Hearing 9: Maui, 5:00 PM, May 31, 2018

released in July 2017. The Environmental Council received public comments on that. Released the second working draft September 2017. More pub -- more public comments. Um, another working draft. Um, the (unintelligible). The next working draft, it was the fourth working draft that came out in February 2018 after more comments. Since February, the Council's received public comments and released these draft rules which have been -- been made available at which it was subject -- subject to a public notice of hearing.

Following the completion of these public hearings and the period of time within which testimony, written testimony, can be turned in, the Council will review comments received and consider draft and further revisions of the draft rules at its public meetings under the Sunshine Law. Um, there -- there's a little bit of a gap, probably not very much, um, but there is a transcription service that has been -– has been hired to go through the record for all of these and that will probably take a few days to get it. So whether we're talking July -- June -- June or July Council meeting, we just don't know. Um, to receive updates on the Council's progress, um, it's possible to contact the Office of Environmental Quality Control and be requested to add -- added to its email list dealing with these rules.

Okay. Um, does anyone wish to testify? Okay.

Tamara Paltin

TP: I'll go.

HO: To testify -- what? Excuse me?

TP: I'll testify.

HO: Okay. Go ahead, please. And if you could -- I'm sorry?

TP: Who do I testify to?

HO: Um, okay. What -- what I'm doing is I'm receiving testimony. So you would sort of sit and give a testimony looking in my direction. The testimony will be recorded and the recording will be transcribed and provided to the Environmental Council.

It -- I, in fact, more like -- more like an MC or a moderator tonight. I have no input into the rules. It's the Environmental Council that does that, but I'm here to -- to -- to ask people with their testimony and make sure everyone has -- who wishes to speak has an opportunity and is aware also of the -- of the -- their ability to turn in -- turn in written comments by next Tuesday.

Okay, so, yeah. Sit this way. The recorder is there.

TP: Is there a time limit.

HO: Well, it's -- you want to -- if you want to sit over there and talk to everybody that's fine, too. Yeah.

Public Hearing 9: Maui, 5:00 PM, May 31, 2018

TP: Is there a time limit?

HO: Um, well, in the public announcement we said 3 minutes, but in fact, we have -- going to be here for 2 hours no matter whether anybody talks or not. So feel free to, you know, to say what you -- you -- you think is appropriate to say and -- and if -- if you want to even for supplement and say either in writing or, you know, if you stick around and -- and look through the rules and see something else, as long as you (unintelligible) if you want to say -- if you want to say more by 7:30, that's fine, too.

TP: Okay.

HO: Okay.

TP: Start?

HO: Start. Yeah.

TP: Okay. Um, I --

HO: And if you could identify yourself so it's -- that's on the record to the hearing.

TP: Okay. My name is Tamara Paltin. I live in west Maui.

HO: That's good.

TP: So, um, I'd like the -- the rules to, um, define mitigation and add requirements to make sure that the mitigation works. I'd like to, um, require use of prior exemptions to go through public notice and comment processes. I don't want to see, um, the exemption of reconstruction or renovation of grandfathered structures. For example, sea walls. Um, I'd like to limit unit in exemption for affordable housing, require substantive responses to each substantive comment. Um, make new information about the impacts of an action into a trigger for supplemental review. And I think we need to give EIS a five-year shelf life if no construction is begun or completed. Also, remove the standard requiring that significant impacts be likely to occur. That's all I got right now.

HO: Okay. Thank you for your testimony. And as I said, you know, if you want to (unintelligible) say something and before 7:30 that's fine, too.

TP: Okay.

HO: Okay.

TP: Thank you.

HO: You're welcome. Um, so we'll -- we -- we will adjourn at this point, um, with -- so we can turn off the tape recorder.

Public Hearing 9: Maui, 5:00 PM, May 31, 2018

(Break)

HO: It's about 5:37 p.m. and it's now May 31st, and we've reopened the hearing. Did you have some additional testimony wish to make?

TP: Yes, please.

HO: Okay. Please go ahead.

TP: Miscellaneous.

HO: Yeah. Yeah, please state your name again. That's fine.

TP: Um, my name is Tamara Paltin. Um, just looking over -- I'd like the Council or the governor or somebody to make it clear when this, um, if it's accepted, when these rules will take effect and the old rules will no longer be what EA's or EIS's are, um, process they go through and what happens to EA's or EIS's that are partially done when the switchover takes effect.

Also, um, on the exemption lists, um, in determining whether or not they're going to exempt something, um, if they could include consideration of sea level rise based upon the best available scientific data regarding sea level rise, if it's a good idea or not to exempt it or to relook at it based on that information.

Thank you.

HO: Okay. Thank you. Anyone else wish to speak at this point? Okay. We'll go back.

JB: How are you doing? Jim Buika. So I should -- I should speak as quickly as possible so you don't waste any space.

Well, my general comment is --

HO: Oh, okay. Let's -- let's get -- are we on? Okay, let me -- okay, the hearing -- we are reopening the --

JB: Okay.

HO: -- resealing the hearing again. It is approximately 6:06 p.m. on May -- um, May 31st. Sir, you wish to speak and please state your name for the record first.

Jim Buika

JB: Sure. My name is Jim Buika. I am a shoreline planner with Maui County.

HO: Okay.

JB: And I've been there for 11 years and I know our staff is going to meet tomorrow morning

Public Hearing 9: Maui, 5:00 PM, May 31, 2018

to talk about this and come up with comments, but I live close by so I wanted to come by. And Laura is good friend and an amazing bureaucrat and has her kid in an amazing school. I'd like to hear about how Nor -- how Northeastern is when I haven't seen her while I -- I -- and part of the ocean resource management plan. Anyway, that's all peripheral, but I have a lot of -- of experience here in Maui with all this and my main point is you're missing the whole boat on this.

We have page after page after page after page of procedure. Procedure this, procedure that. Every time I've taken a EIS training, its procedure, how to file things, this and that. And then when you come to the content of this, it's a half a page because nothing is defined and what you need is a prescriptive analysis of the environmental process drainage, what do you need, how do you do it, check box after check box after check.

Archaeology, you can't just say culture resources and you have archaeology, you have to go SHPD, long checkli -- I want two, three pages of -- of checklist on that.

Shoreline, the views, how -- analysis, what -- what you need because what you're inviting with this is the same old thing, what happens over and over and over. Karlynn, tell me what happens. You file one of these, what happens, lawsuit. They didn't do this, they didn't do that, they didn't complete this because it's amorphous. There's no guidance whatsoever.

Proposed mitigation measures. I want five pages of proposed mitigation measures. What do you mean by mitigation measures? Summary description of affected environment including suitable adequate regional location maps, blah, blah, blah. I don't want a summary description of affected. I want a detail, detail and give me every single step. You know, identify the agencies, citizens groups, individuals, consultant in preparation of this. You can do that, but, oh, I missed Maui tomorrow or I missed Sierra Group. Give me a list of every certified citizen group in the state of -- you know, have the counties, who's here, who is registered. Give them a list of every single citizen group.

You know, agency comments. Who am I supposed to go to? Give me a list of every single agency regulatory, eve -- everybody out there. I can list them all for you and -- and all their regulations, where to find their regulation, where to go to, who to contact. I mean, maybe not -- you know, it could be de -- obviously that changes over time, but I think you get my point. It's like, you know, the last thing a developer doing $300 million project wants is five years of lawsuits, right.

In this thing, this thing is great at how to file it and who to file it with. It's 50 pages of procedural stuff and nothing on the guts. One page, give me a summary. I don't want a su -- a general description of the actions, technical, economic, social, culture and environmental cha -- characteristics. I don't want a general description. I want a detailed description and what should be in that description, right. You get my point. It's like you're like -- you're like going around the periphery and you're not getting to the guts.

The guts is, right, Karlyn knows how to do this stuff, right. And not only that, these consultants know how to play the game. If you don't make it prescriptive, they know how to get through the process. Oh, it may take us two or three years and whatever, but we'll get what we want because there's no guidelines on any of this stuff and that's what gets the ire of the environmental groups because it's not prescriptive. If they're prescriptive, the content, right, the meat on the bones, what are you looking for,

Public Hearing 9: Maui, 5:00 PM, May 31, 2018

right. Last thing you want to do is to a shoreline EIS, do some general fish study for NOA, file the whole thing, it goes in to NOA and they say the state is no good cause you only did like four lines on two days. I need twenty lines in this area, profiles over four-week period, right. Something substantive. Boom, you lose six months, you lose nine months.

The EIS process is killing the environment. It is -- it is destroying our eco system because you can't do anything especially on the shoreline from my point of view. We've got condos falling in the Kahana Bay right now and we've got -- we have -- we're just starting an EIS. Who should I go to, what agency, what do they need, you know, what -- what should be in a report? All that stuff has got to be here. It's got to be so prescriptive so that there is no way anybody can challenge it in court.

It's just -- it's lawsuit after lawsuit. I mean, you guys know. It's horrific. Archaeology, right. And then what happens is you get some gobbly goo compromise, you know. We're going to build this thing down in Makena, 200 foot long, 80 foot story buildings on Makena Ala Nui with the most magical view. They come to the commission, no alternatives, no alternatives. Oh, don't worry, this is Karlyn's company, you know, that did this, sorry to say, but, oh, don't worry, we'll nickel and dime to death, death wolf, we'll give -- we'll take out a building here, we'll take out a building here, go back, no, not good enough. Okay, we'll go back another six months, we'll take another building out. And then we'll say, you know, hey, we can't do this forever. Yeah, we'll -- we'll lose 80 percent of our unobstructed, 180-degree panoramic, ocean views and we'll sell it to somebody from the mainland who has this vision of what they think Hawaii is, private golf course and beach club, discovery land, you know.

I mean, I don't know if I'm getting off track, but -- but you get what I'm saying, right. It's got to be prescriptive in detail. You've got to get, you know, archaeology, drainage, view plane, shoreline access. These things have all got to be where's the closest shoreline access.

Big -- big thing in here is view plane. We're sel -- we're -- we're selling all -- I was just on a -- on a lot down in Keawakapu. You know me, Lauren, so don't, you know. But I was just down there. Some buyer bought a lot for 8 million bucks. He's building this big massive thing right in the ocean, 5 feet elevation that, you know, is totally at risk down there walking through with the architect who -- who did it in -- anyway, what's my point. Oh, anyway, the shoreline property has become so expensive here, 8 million bucks for a 100-foot shoreline, 300-foot thing, depth lot, 8 million bucks and he's building this big massive 6, 7 thousand foot thing out there.

But -- so we're losing -- we're losing all our shoreline. We're losing our access here. The only thing that we have left or we will have left that I believe in the future, the only thing we have hope to have here on Maui anyway and all the islands is our view plane, right.

What makes Maui magical is seeing Haleakala or west Maui mountains, Puu Kukui, Puu Kolekole, Molikini, Kahoolawe off there, you know. It's -- it's magical, right. It's just -- it's just magical and we're selling it. But, you know, and -- and we -- we -- we will not be able to afford the shoreline properties that's -- that's all been sold to the mainlanders and the Hawaiian -- the local Hawaiians can't pay $30,000 a year taxes and they just divide up where they live when the parents leave. So it's all -- it's all mainlanders. There's no shoreline anymore that's local here.

Public Hearing 9: Maui, 5:00 PM, May 31, 2018

To me the only thing we have -- we will have left when all is said and done hopefully is some view planes, some remaining views and we're losing, we've lost -- we've lost amazing views on this island because of stupid development, a shopping center. It was the most beautiful.

And then, oh, the next guy over, yeah, no higher than the shopping center over here that, you know, they build -- developed these four story apartments on lots that were graded for single story -- single family homes. Poof! Totally gone this magical view at the end of Piilani Highway going down to -- down to Shops at Wailea. Totally gone. Coming up that was like my favorite view.

Hotel -- it's just like Honolulu going down the highway, nothing but a wall. We can't do that anymore. We need -- so we need -- I think we need prescriptive view plane regulations in here even on a highway. I mean, you did strengthen it with county maps, scenic view, stuff that scenic view reports or anything that is county or state. So that -- that puts it on us to improve those -- those products and in our community plans we could put in in there not only state and county plans, but community plans also because a community, you know, everything now is community base. It's all social media, you know. So many locks or gate going to the shoreline. It -- you know, Facebook close up or whatever, close up, our phone rings, it's -- it's all that stuff.

Vegetation block views. Even -- I think they should be allowed to -- to improve. You know, it's like preserve, protect and where possible restore public views, where possible restore public views. So you're going on -- on a highway, you've got a berm that's 15 feet high. There should be some -- allow some grading so that you can bring it down so that you can open up the view. In Makena, we lost all this view because I think somewhere in the HR -- HAR 200 rules is so -- set the existing view so the applicant argued, well, it's got to kiawe forest there. You know, if you cut out the native vegetation, you've got this magnificent view. Well, the existing view, there's no view, right, so we're not taking any view away from people so we'll put a building there instead, right. It should -- so you should take out any vegetation. So preserve, protect and where possible restore public views should be a criteria and how to do that, right. The problem is, view planes is in the eye of the view older. I mean, you can't really, right. It's kinda --

I lost views. I testified against my own department because they didn't protect the views. They didn't even talk about the views on this project, and as soon as I talked about the views, all of the applicant pulled out of his back pocket 25 slide view plane analysis, take out buildings, add 'em in, take, you know, the whole thing. They don't even bring it up.

Views is huge. The social impacts. You know, define social impacts. What are social impacts? Traffic jams are mile long, right. We're all experiencing it. Maui is experiencing it now, you know. Social -- you know, so it's really getting into the environmental impact. I mean, what are the reefs offshore, what water shed are they in, right. Define the water shed, how big is that water shed, what is the -- the storms, you know, the drainage, how is the drainage going to be. I mean, obviously if you have alternatives you're going to -- you can't get down to a super duper low detail engineering analysis, but you can estimate those kind of things, you know. What are the -- you know, just then -- you know, and -- you know.

Then seven, identification and analysis of impacts and alternatives considered.

Public Hearing 9: Maui, 5:00 PM, May 31, 2018

That shouldn't be a one liner, man. That should have pages and pages after that. What kinds of impacts are we -- are in this typical products and what type in -- in these things and -- and what -- what are -- what are examples of impacts or, you know, lead people down the path. Our SMA permit has zillion checked boxes. Are there taro patches nearby? Is there a heiau nearby? Is -- is there a wetland nearby? Yes, no. You know, you go through all this stuff. So all of those things, anything that would, you know, be -- be affected should be in that.

So, bottom line, I think you should have -- when someone wants to do an EIS or an EA, this thing should be the guide. You begin, page one is this, page two and go through the whole thing. This thing is totally -- it's pro -- it's all process oriented, right. It's like -- it's -- it's where you submit it, when you submit it, how do you submit it.

So, anyway, define social welfare. Huge. Social welfare is huge, right. That means me and you and our kids, the next generation, right, seven generations. Define it. You've got to define. Every single one of these terms in here.

Cultural practice. What is a culture? I don't know if that's defined in here. What are -- list the definition of cultural practices. That should be examined, right. So -- so these people know, hey, we have covered -- we have covered every single thing that this EIS guidance document, HAR, has asked me to do, what more else do you want me to do. Every single thing on archaeology has been covered in here and that prevents lawsuits, right. I see it's tried, you know, might be complaint to -- to Tom (unintelligible) was, you know, a substantial impact was cultural.

Cumulative impact. You've got to define that, you know, do a better job at that even and here you're trying. You know, it's good, but it's got to be more and more prescriptive.

Anyhow, what else. Briefs, water sheds or things. Yeah. You know, checklist -- list -- list all registered community groups. You know, I know we're doing that. Melanie from ORNB has got -- is putting a list of all community groups. You should put that notice on the -- each county, what are your community groups, reference the county some list, right. So, boom, you can go through every -- go through all those things, you know. So anything, every agency, citizens groups, you know, general description of actions, technical, economics, social, culture, environmental characteristics, you know, that -- you've got to -- it's got to be detailed and you've got to -- that's got to be prescriptive.

So, anyway, you get my frustration of the whole process. So we need a prescriptive analysis process that's equivalent to all this other stuff here, right, the --

What else do I got here. What else have I (unintelligible). So, anyway, that's just -- I haven't looked at it in super duper detail, but, you know, for filing requirement, for publication withdrawal, land within -- when withdrawal you've got page after page, all right. You've got all this stuff. Woah, it goes on four entire pages, all right. You know, I mean, you're good at that stuff. It's the -- it's the -- it's the nitty gritty that the people really need. They need something in the rules that is full proof, lawsuit proof. That's what you need. I mean, I'm an environmentalist for sure, but if you work with the environmental groups to get what they want into these rules, then you're on the right track and they know it's going to be covered and then they'll be happy. Otherwise, if it ain't, poof, lawsuit, you know. Lawsuit after lawsuit after lawsuit after lawsuit.

And on the shoreline, when we got sandbags and condos falling in the ocean, we can't afford to miss the citizen group, can't afford to miss prescriptive NOA stuff

Public Hearing 9: Maui, 5:00 PM, May 31, 2018

offshore, Department of Health, all that stuff. We've got to -- we've got to get it right the first time. It's got to be complete. It cannot miss a beat because it's just impact.

Our rules, not only do our EIS rules a barrier and create ecological degradation because we can't move forward, all of our permitting regulations need to change. We've got something offshore, that's five years. It's a million dollars in five years for a condo to do something. It's just absurd. We need a e-permit system, transparent. These consultants they go to Board of Land and Natural Resources. They come very stand offshore. They (unintelligible) no, they -- these -- you know, then they go over to the Maui Planning Commission. They go here and they get their permits in an opaque system. We need an e-permit system JARPA, J-A-R-P, Washington State Joint Aquatics Resource Permit Application. You have a kid in college, Lau -- Laura. You know how the common application works, right. You fill out your propo -- your -- all this stuff once, contact instead of 18 permits, there are 18 regulations of permits, you fill it out once, you hit the radio button stuff, Harvard, Northeastern, Amherst, boom, boom, boom, right. You go through the system. We need an e-permit system that is transparent, not opaque because the permit system is based on the information in this EIS so every permit needs to be looked at. Every -- every jurisdiction, federal, state and county permits need to be analyzed so that in those permits you need to make sure you're gathering all the data in this EIS so this EIS is complete.

And then when we do one permit, I'd come in, I'm the applicant or Karlyn is representing me, we have one room just like the California Coastal Commission or whatever, every single regulator or they're represented in there so there's crosstalk, hey, you don't -- you didn't -- you didn't check out this or, hey, I want this or, you know, whatever, so everybody, so it's transparent instead of opaque. It goes way beyond the EIS system. It goes toward our permit regulatory system, right. DOH is the worse, right, and state -- SHPD. You know, I'm not telling anybody anything new, right. I mean, it's not that you guys are worse. It's terribly underfunded, overworked. I mean, Laura, you do a great job. I know you usually do a great job, but, you know, it's -- we -- you know, we have to match our regulatory requirements with staffing, man. I mean, you know, it's easy for me to say, you know, but it's just -- it's a -- it's a systemic problem especially at the state and then the feds are overbearing, but we can work with the core of engineers so we need -- so we then, you know, okay, well, it's missing this so that first board is missing this, one, two, three, go back. Three months later fill it all in, come back, hey, we got all this, everything okay, take that -- take that -- that -- all the -- all the 18 permits, get one stamp, you may want to go around the room, poof, they're off.

Permits for a project cost a million bucks. It should be 250,000. We've got to reduce it by 75 percent. And the time can take two, three, four years to get permits after the EIS which can take who knows how long. They vary, right. Long, long time. So we need to reduce the time by 75 percent and -- and the cost. Cost is absurd. Who can pay a million bucks, right? It's just absurd and nobody can navigate it except highly paid consultants and not everyone can afford highly paid consultants. It's a cottage industry because we've created it because it's the bur -- bureaucracy is horrific, so.

Joint Aquatics Resource Permit Application developed in the State of Washington under the governor's innovated and efficiency of government initiative. Randy McIntosh (phonetic), you know Randy. NOAA, you say, Jim, man, great idea, they're doing it in Washington, (unintelligible), Google Jarka (phonetic). It's beautiful. That's what we

Public Hearing 9: Maui, 5:00 PM, May 31, 2018

need, right. And the EIS, how do we -- how do we make it transparent and efficient and have people maybe interactive, something, you know.

Anyway, you get my drift. It's a huge opportunity for you guys, huge, huge opportunity to get it right the first time, but we can't just say list the mitigation. That's like those two thing, you know, alternatives, impacts and mitigation. That's where this thing needs to go, right. That's -- you know what's all about, right. What is a permit? What is a permit?

I mean, I know Karlynn knows. All you guys know what a permit is. It's nothing but being in peace, right. It's me as a regulator telling this applicant who knows nothing here's how you do it. When you put sand back on the beach, you know, fish and wildlife, they want you to run that tractor over the same exact tracks back and forth all the time, not all over the place so you don't crush turtles, you don't kill biology, whatever. I mean, it's simple, right. It's being in peace to protect our water, class A water, right, water quality.

We've got a big hurdle because of our water quality. Back East they can do anything cause my daughter is in San Diego. I say, go Loya (phonetic), go swimming this week. You kidding me, dad, this water is junk. I'm not going in the ocean here. I lived in Venice, California for years. I swam all the time, you know, but you know how beautiful our water is here and we have reefs out here. We've got to protect the reefs, you know. What do we do about the reefs, right? Every one of these things, man, water shed, runoff sediment reefs, you know. What do these people need, what they want, you know. That's all got to be addressed in here, all right, so -- so that the people know exactly what all these groups need.

You know, now it's -- it's age of social media. You can't do anything, you know. Our phone rings off the hook daily because it's just a whole network out there. They're all watching. They know exactly what's going on, man, you know. So it's -- we just need to become more transparent, you know, and this can do it, checklist, you know, and how to do it, you know, I think is really important.

Anyway, I'd rather have it on tape with me talking in a short amount of time rather than me have to write all this out cause I don't have the time. I hope you get my drift. I don't know who's on the environmental team. Karlyn, what are you doing? Are you just --

KF: I just monitor.

JB: Pardon?

KF: I'm just monitoring.

JB: Oh, you're just here?

KF: Yup.

JB: Taking notes?

KF: (Unintelligible)

Public Hearing 9: Maui, 5:00 PM, May 31, 2018

JB: Okay.

KF: Rob Parsons.

JB: I love your agency. I love your -- I love your organization. You -- you could work. Who?

KF: Rob Parsons. He's the -- I think he's the Maui Environmental Council representative.

JB: Right.

KF: He was here earlier.

JB: Oh, he was. Okay.

KF: Yeah.

JB: Yeah. Okay.

HO: Okay. You're being recorded and it's -- it's -- you can --

JB: That's it?

HO: No, no, no. Let me --

JB: Okay.

HO: You're being recorded. The, um -- when these hearings are done and this is the ninth of nine, they're -- they're being actually already trans -- started transcribing the early ones. Written comments will be due by Tuesday of next week. Those comments and the transcriptions will be go -- go to the Environmental Council. This is actually a fifth draft so just -- see whether they want to make any additional changes or --

JB: They got a long way to go.

HO: With -- and --

JB: In my opinion.

HO: And they'll -- they'll do censoring out hearings and decide what they -- what they want.

JB: Okay. No, I -- I know it's been floating around for a while and -- and I -- I know there's been draft, but -- but, see, where you guys -- what I printed out here, what I told you today is the exact same thing that happens over and over and over. I'm in environmental group. You have a completed EIS. Boom, I walk in. Boom, boom, boom, boom, boom,

Public Hearing 9: Maui, 5:00 PM, May 31, 2018

boom, boom. None of this is done. How can you say this is an environmental impact statement? None of this stuff that my organization represents is even in here. I'm going to file a lawsuit on you guys to stop you guys from publishing this thing. That's our life over here. You've got to change it. It's got to go from opaque to transparent. Anybody. You guys cannot have stuff left up to the imagination. It's got to be prescriptive just as prescriptive as all your procedural stuff. Count the lines of procedure in here and content. I bet you it's 250 to 1, right. Just like -- I -- I love NOA, they do a lot of great work, just like NOA, five-step planning process. Step one, identify your stakeholders, identify your goals and objectives, figure out your communities at risk, hold community meetings, develop a strategy and -- or plan and then implement the plan. It's like NOA because they're scientists, they spend 95 percent of their money on understanding the risk because that's what they do, they're scientists. We know where the sea level rise exposure area is to the enth degree. Chip Fletcher (phonetic) has 150 references about it in his little thing. When we get down to implementing the plan, you look at the EPA water shed guidance. We got -- look at the pages and con -- look at the physical content. I know (unintelligible) did it with you guys. Down to implementing the plan is down to six bullets and couple of those bullets are like monitor the -- monitor the results. It's like, you know, where the rubber meets the road we're not very good at, you know. That's -- doesn't need to be transcribed or recorded, but, anyway, Lauren knows me anyway. I -- we miss you. We haven't seen you around anyway. So that's it.

HO: Okay. Thank you. Thank you for your testimony.

JB: Okay.