

**PRE-PUBLIC HEARING
SMALL BUSINESS IMPACT STATEMENT
TO THE
SMALL BUSINESS REGULATORY REVIEW BOARD**
(Hawaii Revised Statutes §201M-2)

Department or Agency: Health/Environmental Council
Administrative Rule Title and Chapter: 11-200 Repeal; 11-200.1 Promulgate
Chapter Name: Environmental Impact Statement Rules
Contact Person/Title: Scott Glenn, Director, Office of Environmental Quality Control
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A. To assist the SBRRB in complying with the meeting notice requirement in HRS §92-7, please attach a statement of the topic of the proposed rules or a general description of the subjects involved.

B. Are the draft rules available for viewing in person and on the Lieutenant Governor's Website pursuant to HRS §92-7? Yes No (If Yes, please provide webpage address and when and where rules may be viewed in person☺)
Rules are available for viewing on the OEQC website: <http://health.hawaii.gov/oeqc/rules-update>
(Please keep the proposed rules on this webpage until after the SBRRB meeting.)

I. Rule Description: New Repeal Amendment Compilation

II. Will the proposed rule(s) affect small business? Yes No (If No, no need to submit this form.)

* "Affect small business" is defined as "any potential or actual requirement imposed upon a small business . . . that will cause a direct and significant economic burden upon a small business, or is directly related to the formation, operation, or expansion of a small business." HRS §201M-1

* "Small business" is defined as a "for-profit corporation, limited liability company, partnership, limited partnership, sole proprietorship, or other legal entity that: (1) Is domiciled and authorized to do business in Hawaii; (2) Is independently owned and operated; and (3) Employs fewer than one hundred full-time or part-time employees in Hawaii." HRS §201M-1

III. Is the proposed rule being adopted to implement a statute or ordinance that does not require the agency to interpret or describe the requirements of the statute or ordinance? Yes No (If Yes, no need to submit this form.)

(e.g., a federally-mandated regulation that does not afford the agency the discretion to consider less restrictive alternatives.) HRS §201M-2(d)

IV. Is the proposed rule being adopted pursuant to emergency rulemaking? (HRS §201M-2(a)) Yes No (If Yes, no need to submit this form.)

* * *

If the proposed rule affects small business and are not exempt as noted above, please provide a reasonable determination of the following:

1. Description of the small businesses that will be required to comply with the proposed rules and how they may be adversely affected.

Please see the attached narrative.

2. In dollar amounts, the increase in the level of direct costs such as fees or fines, and indirect costs such as reporting, recordkeeping, equipment, construction, labor, professional services, revenue loss, or other costs associated with compliance.

Please see the attached narrative.

If the proposed rule imposes a new or increased fee or fine:

- a. Amount of the current fee or fine and the last time it was increased.

No current fee exists nor is one proposed.

- b. Amount of the proposed fee or fine and the percentage increase.

NA

- c. Reason for the new or increased fee or fine.

NA

- d. Criteria or methodology used to determine the amount of the fee or fine (i.e., Consumer Price Index, Inflation rate, etc.).

NA

3. The probable monetary costs and benefits to the agency or other agencies directly affected, including the estimated total amount the agency expects to collect from any additionally imposed fees and the manner in which the moneys will be used.

Please see the attached narrative.

4. The methods the agency considered or used to reduce the impact on small business such as consolidation, simplification, differing compliance or reporting requirements, less stringent deadlines, modification of the fines schedule, performance rather than design standards, exemption, or other mitigating techniques.

Please see the attached narrative.

5. The availability and practicability of less restrictive alternatives that could be implemented in lieu of the proposed rules.

Please see the attached narrative.

6. Consideration of creative, innovative, or flexible methods of compliance for small businesses. The businesses that will be directly affected by, bear the costs of, or directly benefit from the proposed rules.

Please see the attached narrative.

7. How the agency involved small business in the development of the proposed rules.

Please see the attached narrative.

- a. If there were any recommendations made by small business, were the recommendations incorporated into the proposed rule? If yes, explain. If no, why not.

8. Whether the proposed rules include provisions that are more stringent than those mandated by any comparable or related federal, state, or county standards, with an explanation of the reason for imposing the more stringent standard.

Please see the attached narrative.

If yes, please provide information comparing the costs and benefits of the proposed rules to the costs and benefits of the comparable federal, state, or county law, including the following:

- a. Description of the public purposes to be served by the proposed rule.

- b. The text of the related federal, state, or county law, including information about the purposes and applicability of the law.

- c. A comparison between the proposed rule and the related federal, state, or county law, including a comparison of their purposes, application, and administration.

- d. A comparison of the monetary costs and benefits of the proposed rule with the costs and benefits of imposing or deferring to the related federal, state, or county law, as well as a description of the manner in which any additional fees from the proposed rule will be used.

- e. A comparison of the adverse effects on small business imposed by the proposed rule with the adverse effects of the related federal, state, or county law.

* * *

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This Statement may be found on the
SBRRB Website at:
<http://dbedt.hawaii.gov/sbrrb/small-business-impact-statements-pre-and-post-public-hearing>

Draft Environmental Impact Statement Rules

Small Business Impact Statement

1) Proposed Repeal of Hawaii Administrative Rules Title 11, Department of Health Chapter 200, “Environmental Impact Statement Rules” and

2) Proposed Promulgation of Hawaii Administrative Rules Title 11, Department of Health Chapter 200.1, “Environmental Impact Statement Rules”

March 21, 2018

Summary

The purpose of Chapter 343, Hawai'i Revised Statutes (HRS), Environmental Impact Statements (EISs), is to balance environmental with economic and technical considerations to inform agency decisions prior to a project's implementation. To do this, Chapter 343, HRS, establishes a process for integrating environmental concerns into existing planning processes to alert agency decision makers to potential significant effects resulting from the implementation of certain projects.

Chapter 343, HRS, authorizes the Environmental Council (“Council”) to adopt, amend, or repeal rules necessary for the purposes of the chapter. The Environmental Council last amended and compiled Title 11, Chapter 200 in 1996 and made a minor amendment without compilation in 2007. The Office of Environmental Quality Control (OEQC) provides administrative support to the Council.

The Council proposes to repeal Chapter 11-200, entitled “Environmental Impact Statement Rules” (the “1996 Rules”), and promulgate Chapter 11-200.1, entitled “Environmental Impact Statement Rules” (the “Proposed Rules”).

The Council proposal is a comprehensive reorganization of the sections and paragraphs of the existing rules as well as substantive changes to the implementation of Chapter 343, HRS. One of the overriding goals of the rule changes is to better align the state process with the federal process so that businesses can more efficiently satisfy both laws when both are applicable. The proposed changes may have an impact on small businesses, among which one is a new requirement that adds a cost element to the process—the proposed requirement to hold public scoping meetings for EISs.

The purpose of a public scoping meeting is to attain public feedback on the proposed action, alternatives to be analyzed in the EIS, and impacts to focus on in the EIS. The current rules state that a public scoping meeting is optional. The federal process requires a public scoping meeting and the Council believes requiring a public scoping meeting better realizes the purpose of Chapter 343, HRS.

This Small Business Impact Statement describes the potential impact of this specific proposed change on small businesses as defined pursuant to Section 201M-1, HRS: “for-profit corporation, limited liability company, partnership, limited partnership, sole proprietorship, or other legal entity that: (1) Is domiciled and authorized to do business in Hawaii; (2) Is independently owned and operated; and (3) Employs fewer than one hundred full-time or part-time employees in Hawaii.”

Background on the Proposed Revision

The EIS law has been in effect since the 1970s. Prior to 2012, the law required that agencies and applicants prepare an environmental assessment (EA) to determine if an EIS is needed, even if an EIS was anticipated already. In 2012, the Legislature amended Chapter 343, HRS, to allow for the direct preparation of an EIS instead of the two-step sequence of EA then EIS. The Legislature recognized that agencies and applicants had sufficient experience with the EIS process to determine that a proposed action was likely to have significant impacts without first requiring the preparation of an EA.

Following the statutory change, implementation was inconsistent. The 1996 Rules presume that an EA is always done before an EIS Preparation Notice. The preparation of an EA served as the means for the public to learn about a project and to provide comments on it in a way that helped to focus the content of an EIS on the most important issues. The requirements for the content of an EIS Preparation Notice without an EA are unclear. Agencies developed their own requirements and provided varying amounts of information, ranging from a short announcement of a few pages to an in-depth assessment (the equivalent of an EA without calling it one). This inconsistency created confusion for the public.

To reduce this confusion, the Proposed Rules standardize the requirement of an EIS Preparation Notice regardless of the pathway to preparing an EIS. Among the changes are to revise the definition of an EIS and to standardize the requirements for content and process at the EIS Preparation Notice stage, including requiring a public scoping meeting.

The 1996 Rules allow for the option to hold a public scoping meeting. If one is held, then oral comments must be written down and responded to as if they were written comments in the draft EIS. Applicants have been reluctant to conduct public scoping meetings because the requirement to write down all oral comments and respond to them as written comments required transcription and interpretation of the oral comment while exposing the applicant to legal action for inaccurately transcribing or insufficiently responding to the comment.

Not having a public scoping meeting often results in dissatisfaction from the public because people do not have sufficient information about a project and the only opportunity to participate is through writing. Hawai'i is a Polynesian culture with a strong oral tradition, whose people may feel more comfortable expressing concerns orally. Moreover, approximately 1 in 6 adults in Hawai'i struggle with reading and writing, according to the Hawai'i Literacy organization. The public scoping meeting is a critical opportunity for these populations to participate in the process and have their views heard.

The Proposed Rules would make the public scoping meeting mandatory instead of optional but no longer require writing down oral comments and responding to them as if they were written. Instead, the Proposed Rules require a set portion of the public scoping meeting be for oral comments, which are audio recorded, and summarized in writing in the draft EIS. The audio recording would be provided to OEQC for retention and availability to the public.

Q1. Description of the Small Businesses Potentially Affected

Chapter 343, HRS, applies to businesses (“applicants” in the language of the statute) who propose certain types of programs or projects only in the following circumstances:

1. The program or project involves a “trigger” as identified in Section 343-5(a)
 - Examples: the use of state or county lands or funds; any use within any land classified as a conservation district; any use within a shoreline area; proposing a landfill; and
2. The program or project requires an approval from a state or county agency, where an “approval” is a discretionary consent like a Special Management Area permit.

If a business does not meet all three of these requirements, then Chapter 343, HRS, does not apply.

The agency issuing the approval is required by Chapter 343, HRS, to decide the appropriate level of environmental review: exemption, environmental assessment (EA), or environmental impact statement (EIS). An agency requires an EIS when the proposed action is likely to have a significant effect.

Since the Legislature amended the statute in 2012 to allow for the direct preparation of an EIS, 71 projects have published some stage of an EIS in the OEQC *Environmental Notice*. Over the period of 2012 through 2017, applicants published 28 EIS Preparation Notices.

Table 1. EIS Preparation Notices, 2012-2017

Year	Applicant Action	Agency Action
2012	1	2
2013	5	4
2014	5	3
2015	4	3
2016	4	8
2017	9	10
Total	28	30

Note: Includes Direct-to-EISPN, Final EA to EISPN, and Republished EISPNs

Table 1 lists the number of applicant and agency EIS Preparation Notices published each year. Table 2 (next page) is a list of all applicants who have prepared an EIS from 2012 through 2017.

These companies are a mix of small businesses as defined pursuant to Section 201M-1 or almost meet the definition. Often, companies form limited liability companies that are subsidiaries or exist solely for the execution of the proposed project.

These companies represent the types of businesses the Council anticipates preparing EISs in the future and being required to hold an EIS public scoping meeting as part of any EIS.

Q2. Dollar Amount Increases for Businesses Affected

No fee exists for filing or publication of an EA or EIS and none is proposed.

Knowledge of the cost of undergoing environmental review is largely anecdotal and specific to the proposed project. Typical ranges are \$20,000 to \$100,000+ for EAs and \$100,000 to \$500,000+ for EISs.

With the statutory change to allow for the direct preparation of an EIS and to no longer prepare an EA, an applicant no longer pays the cost of the EA. The estimated cost of an EIS public scoping meeting is

\$5,000 to \$10,000. The cost varies based on venue, staff labor, travel, and support materials. Other cost factors are the expected number of attendees, meeting location, and potential controversy of the proposed action.

The Council anticipates that small businesses will also benefit from this requirement. Typically, agencies and applicants hire small businesses to prepare EAs and EISs and to conduct meetings on their behalf. These small businesses are usually planning/consulting firms who have experience working with the affected communities. Even when a large business is hired to do the EIS, the large business will subcontract a small business to do public outreach and engagement.

Table 2. Applicant Projects Publishing an EISPN, 2012-2017

Applicant	Project
A&B	East Maui Water Lease
Auwahi Wind	Auwahi Wind Project
Best Hospitality	Park Kalia Waikiki Condo-Hotel
Champlin Hawaii Wind Holdings	Na Pua Makani Wind Project
Dillingham Ranch Aina	Dillingham Ranch Agricultural Subdivision
Haseko (Ewa)	Hoakalei Master Plan Update
Hawaii Dairy Farms	Hawaii Dairy Farms
Hawaiian Electric	Schofield Generating Station Project
Hawaiian Memorial Life Plan	Hawaiian Memorial Park Cemetery Expansion
HG Kauai Joint Venture	HoKua Place
Kaheawa Wind Power II	Kaheawa Wind Power II Habitat Conservation Plan Amendment
Kauai Island Utility Cooperative	KIUC System Long-Term Habitat Conservation Plan
Kealia Properties	Kealia Mauka Homesites
Lowe Enterprises Investors	Kaanapali Golf Courses Revitalization
Makila Land	Makila Rural Community
Maui All Natural Alternative	Renewable Energy Conversion and Sludge Processing for the Wailuku Kahului Wastewater Reclamation Facility
Maui Electric Company	Central Maui Transmission and Distribution Project
MVI	Maalaea Plantation Subdivision
Ohana Hanalei	Hanalei Plantation Resort
Ormat Technologies	Ulupalakua Geothermal Lease & Subzone Modification
Outrigger Enterprises	Waikiki Beach Walk
Piilani Promenade North and Piilani Promenade South	Piilani Promenade
PVT Land	PVT Integrated Solid Waste Management Facility
Sugar Cove AOA	Sugar Cove Berm Maintenance Program
Towne Development of Hawaii	Puunani Subdivision Project
Waikapu Properties	Waikapu Country Town

Q3. Probably Monetary Costs and Benefits to Agencies Directly Affected

No agency receives the funds spent on conducting an EIS public scoping meeting. Benefits are that the public is better able to participate in the process and the EIS focuses on the most important issues.

Q4. Methods the Agency Used to Reduce Impacts on Small Businesses

The Proposed Rules include other provisions that it anticipates would reduce cost or legal risk for small businesses. Among these are:

- Revising the exemption process to emphasize that projects for repair and maintenance and ongoing administrative activities are basically *de minimis* activities that do not require documentation. These are often the kinds of services that agencies will contract small business to undertake (e.g., facility maintenance).
- Allowing for grouping similar comments and providing one response that addresses all the issues raised in the grouped comments, instead of each comment receiving an individual response, even if the comments are substantially similar. Further, the Proposed Rules remove the obligation to mail the individual response to the commenter. The Proposed Rules allow for one representative copy of a petition or form letter to be responded to in the document.
- Making documents electronic to reduce the printing and mailing of documents for submittal and distribution. Paper copies can still be used upon request but the default is electronic.
- Aligning the federal and state processes to increase the possibility of having one document and one process to satisfy both laws.

Q5. Availability and Practicability of Less Restrictive Alternatives

The EIS process is scaled to the potential for significant impacts. If a project's impacts are uncertain, then an EA would be prepared and no EIS public scoping meeting would be required. The scoping meeting is only required for projects that anticipate having significant impacts. For this reason, the requirement for the public scoping meeting is proposed as a requirement for anyone undertaking an EIS.

The public scoping meeting, like all other aspects of the process, scales with the potential impact of the project. The agency overseeing the project, working with the applicant, decides what is suitable for a meeting to satisfy the requirements of Chapter 343, HRS, and the Proposed Rules.

Q6. Consideration of Creative, Innovative, or Flexible Methods of Compliance for Small Businesses

The Council considered ways to reduce the cost resulting from making an EIS public scoping meeting a requirement. As noted above, the obligations to transcribe oral comments and respond to them as written comments have been a deterrent to holding public scoping meetings. To balance the requirement and value of public engagement with the EIS being primarily a written document, the Council proposes to require an audio recording of the oral comments. The Council views this as a flexible, low-cost means to make the oral comments available to the agency and public without the complication of transcription and interpretation.

Q7. Involvement of Small Businesses in Developing the Proposed Rules

The Council has 15 members, 14 of whom the Governor appoints directly (the OEQC Director serves as an *ex officio* voting member of the Council). Among the 14 appointees, four (4) are small business owners, two (2) work for companies that are occasionally required to prepare EAs and EISs, and one (1) is a land use attorney hired by companies that are required to prepare EAs and EISs.

In addition to the perspective of the Council members engaged in small business, the Council members and the OEQC met with stakeholders, including organizations that represent small businesses, to discuss the proposed requirement of the public scoping meeting. The language as proposed incorporates feedback from these stakeholders.

Q8. Proposed Rules Comparison to Other Standards

One of the Council's goals, as stated above, is to align the State's EIS process with the federal process by incorporating many of the procedures and methods that the federal process uses so that one document and process can satisfy both laws. The federal law requires public scoping meetings for EISs. In addition, the Proposed Rules provide more direction on undertaking EAs and EISs that are required under both federal and state law.