This document contains written comments submitted on Public Notice Docket NO. R11-200-05-18 HAWAII DEPARTMENT OF HEALTH. The 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.

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

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

The Nature Conservancy
Hawai'i

The Nature Conservancy, Hawai'i Program
923 Nu'uanu Avenue
Honolulu, HI 96817

Tel (808) 537-4508
Fax (808) 545-2019
nature.org/hawaii

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.

UNITE HERE! LOCAL 5 HAWAII
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.*

Norenberg, May 22, 2018, via CiviComment

§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

Norenberg, May 22, 2018, via CiviComment

#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.

Norenberg, May 22, 2018, via CiviComment

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

Norenberg, May 22, 2018, via CiviComment

#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, Hawai'i 96813
Via Email: oeqchawaii@doh.hawaii.gov

Re: Hawai'i Administrative Rules governing Environmental Impact Statements

Dear Environmental Council,

The Surfrider Foundation appreciates this opportunity to comment on the proposed revisions on the Hawai'i 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 Hawai'i – the Hilo, Kaua'i, Kona Kai Ea, Maui, and Oahu Chapters. We submit these comments on behalf of the five Hawai'i 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 Hawai'i 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

Pūlama Lānaʻi

May 30, 2018

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...*

Susan Strom, June 1, 2018

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

Susan Strom, June 1, 2018

(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

Susan Strom, June 1, 2018

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)

Susan Strom, June 1, 2018

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

Susan Strom, June 1, 2018

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

Susan Strom, June 1, 2018

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.

Susan Strom, June 1, 2018

*** 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 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, 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 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, 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~~ ~~A~~pproving 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.

LURF Comments to
Proposed EIS Rules Update Version 1.0 Draft
June 1, 2018

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.

LURF Comments to
Proposed EIS Rules Update Version 1.0 Draft
June 1, 2018

- **§ 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

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

DAVID Y. IGE
GOVERNOR

LEO R. ASUNCION
DIRECTOR
OFFICE OF PLANNING

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

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

18-620

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

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.

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

FILE COPY

MUNEKIYO HIRAGA
Planning · Project Management · Sustainable Solutions

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

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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

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

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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

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

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:

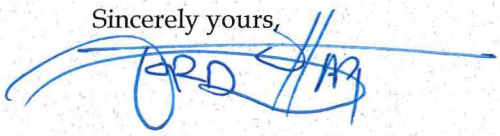
- **Cumulative impacts:**
  - Specific guidance on the necessary analysis of cumulative impacts required for any proposed action should be provided to an applicant by a responsible party (accepting agency, approving authority or OEQC).
  - When other projects or actions in various stages of development 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?

- **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)

Chamber of Commerce HAWAII
The Voice of Business

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.

Chamber of Commerce HAWAII
The Voice of Business

- *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.

Chamber of Commerce HAWAII
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- 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;

(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

Comment [Public36]: Jennifer A. Lim.

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

(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;

(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.

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.

(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.

(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 [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.

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.

(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~~;

(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

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.

Comment [Public48]: Jennifer A. Lim.

Why would there be an accepting authority when the determination is a FONSI?

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.

(c) The level of detail in a draft EIS may be more

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.

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.

(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

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.

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);

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.

(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

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)

§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.

(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

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.

Comment [Public59]: Jennifer A. Lim.

See comment above regarding the obligation of commenters to submit comments to the applicant.

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

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[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.

PBR HAWAII
& ASSOCIATES, INC.

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).

HONOLULU OFFICE
1001 Bishop Street, Suite 650
Honolulu, Hawai‘i 96813-3484
Tel: (808) 521-5631
Fax: (808) 523-1402
E-mail: sysadmin@pbrhawaii.com

Mr. Scott Glenn
SUBJECT: PUBLIC NOTICE DOCKET NO. R11-200-05-18 HAWAI‘I DEPARTMENT OF HEALTH
June 4, 2018

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?

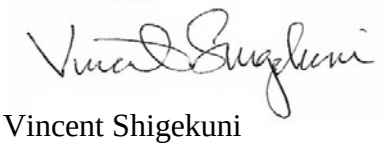
6) In regard to 11-200.1-23 (d), please clarify if the EIS public scoping meeting must be limited to a “public hearing format.” In practice, we find many residents prefer to provide oral public comments, one-on-one, to avoid “public speaking” before an audience.

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

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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

Marine and Coastal Zone Advocacy Council
Ke Kahu O Na Kumu Wai

MACZAC

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

Marine and Coastal Zone Advocacy Council (MACZAC), Hawaii Coastal Zone Management Program, Office of Planning
235 S. Beretania Street, 6th Floor, Honolulu, Hawaii 96813 Mailing Address: PO Box 2359, Honolulu, HI 96804
Phone: 808-587-2800 Fax: 808-587-2424 Email: info@maczac.org website www.maczac.org

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.

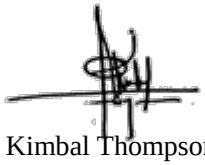
MACZAC also strongly supports the addition of sea level rise exposure areas to the list of areas that could be considered environmentally sensitive (Subchapter 7, Determination of Significance). Data and maps are available to identify many future inundation areas, and research continues to update and 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

Marine and Coastal Zone Advocacy Council (MACZAC), Hawaii Coastal Zone Management Program, Office of Planning 235 S. Beretania Street, 6th Floor, Honolulu, Hawaii 96813 Mailing Address: PO Box 2359, Honolulu, HI 96804 Phone: 808-587-2800 Fax: 808-587-2424 Email: info@maczac.org website www.maczac.org

MAUI CHAMBER OF COMMERCE
VOICE OF BUSINESS

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."

MAUI CHAMBER OF COMMERCE
VOICE OF BUSINESS

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.

Lee Sichter LLC
45024 Malulani Street #1, Kaneohe, Hawaii 96744
Ph. (808) 382-3836; Fax. (808) 234-0872; Web. www.leesichter.com

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.

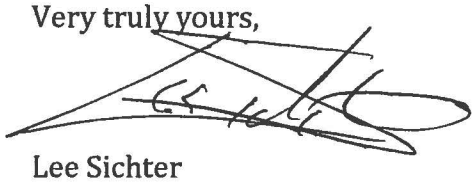
   A key element of the planning profession is the ability to evaluate the impacts of a proposed plan to determine its success. I propose that the Council take its lead from this philosophy and add to the term "substantial" the word "measurable". Thus, every time the word "substantial" is used in Section 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

ATTN: EIS RULES

18-630

96813-450335

SIERRA CLUB OF HAWAIʻI
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

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West Hawai'i Office
74-5044 Ane Keohokalole Hwy
Kailua-Kona, Hawai'i 96740
Phone (808) 323-4770
Fax (808) 327-3563

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

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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.

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- 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

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County of Hawai'i
PLANNING DEPARTMENT
101 Pauahi Street, Suite 3
Hilo, Hawai'i 96720-4224

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Ms. Puananionaona P. Thoene, Chair
State of Hawai'i, Department of Health
Environmental Council
235 South Beretania Street, Suite 702,
Honolulu, HI 96813

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96813@2419 C032

FILED

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. §11-200.1-23 Consultation Prior to Filing a Draft Environmental Impact Statement (Public Scoping Meeting).
   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
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CONSERVATION AND COASTAL LANDS
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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

§11-200.1-8 Applicability of chapter 343, HRS, to agency actions

- 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

§11-200.1-12 Consideration of previous determinations and accepted statements

- 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".