

## Chapter 5: Exemption Declarations

An agency may declare an action exempt from the environmental assessment requirements if it finds, after consulting with relevant agencies/experts, that the action will not have significant environmental effects.<sup>1</sup> The agency that can make such an exemption declaration is the State or County proposing agency (for agency actions), or an approving agency (for applicant actions). The relevant agencies/experts, from which the agency must obtain advice before declaring an action exempt, are “other outside agencies or individuals having jurisdiction or expertise as to the propriety of the exemption.” By rule, there are 11 classes of actions that agencies may use to find, after consultation, that an action is exempt. (See below, Section 11-200-8(a), HAR).

In addition, each agency is required by rule to develop, based on its experience, a list of specific types of actions that fall within the 11 classes. The lists must be consistent with both the letter and intent expressed in the 11 classes and Chapter 343. Each agency must submit such a list, and periodic amendments, to the Environmental Council for review and concurrence. Section 11-200-8(d), HAR. An agency’s exemption list, after concurrence by the Environmental Council, may be a useful tool guiding the agency in deciding whether to declare routine types of actions to be exempt from EA requirements.

By rule, each agency must maintain records of actions that it has found to be exempt from EA requirements and shall produce those records for review upon request. Section 11-200-8(e), HAR.

Additionally, Section 11-200-8(b), HAR, states that:

*“All exemptions under the classes in this section 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 eleven exempt classes of action under HEPA rules are:

- Operations, repairs, or maintenance of existing structure, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing.
- 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.
- Construction and location of single, new, small facilities or structures and the alteration and modification of the same, including, but not limited to:
  - A. Single-family residences less than 3,500 square feet not in conjunction with the building of two or more units;

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<sup>1</sup> The statute defines “significant effect” as “the sum of effects on the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the State’s environmental policies or long-term environmental goals as established by law, or adversely affect the economic welfare, social welfare, or cultural practices of the community and State.” HRS §343-2. The rule provides additional direction for agencies in the “significance criteria.” Section 11-200-12, HAR and Section 1.7, *supra*.

- 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 persons or less 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;
- Minor alterations in the conditions of land, water, or vegetation;
  - Basic data collection, research, experimental management, and resource evaluation activities that do not result in a serious or major disturbance to an environmental resource;
  - Construction or placement of minor structures accessory to existing facilities;
  - Interior alterations involving things such as partitions, plumbing, and electrical conveyances;
  - 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;
  - Zoning variances except shoreline setback variances;
  - Continuing administrative activities including, but not limited to purchase of supplies and personnel-related actions; and
  - 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 that previously existing, and for which the legislature has appropriated or otherwise authorized funding.

An exemption declaration template for both agency and applicant actions can be found in Exhibit 5-1. The proposing agency and the approving agency sign the declaration and keep it on file and when requested makes it available to a requestor. In all cases, each proposed exempted action must be reviewed and analyzed for potential environmental impacts. The exemption, if granted, must be documented and, said documentation made available to the public upon request.

## **5.1 How to Prepare an Agency Exemption List for Review and Concurrence by the Environmental Council**

- A. Reviewing past exemption declarations for routine actions are one source of actions for a proposed list. Proposed lists should first be commented on by appropriate permitting agencies. When this has been done, the agency should submit the proposed list to the Council.
- B. If the agency is submitting a revised list for Council review and concurrence, or a brand new list, a paper copy as well as an electronic copy of the list should be provided to the Council. The agency should also clearly indicate the changes in Ramseyer from the exemption list previously concurred in by the Council.
- C. The Council will review the list and request that the OEQC publish notice in The Environmental Notice of availability for public comment on the list for a period of 30-days. The Environmental Notice will indicate that comments must be sent by postal mail, messenger or electronic mail ([environmental.council@doh.hawaii.gov](mailto:environmental.council@doh.hawaii.gov)) on or before the 30-day deadline. Comments must be addressed to the Chairperson of the Council, with a copy to the OEQC.
- D. After the 30-day public comment period, the agency will be provided a set of comments received on the proposed list and the agency will respond to the public comments and provide copies of the same to the Council. The Council will then schedule a meeting to discuss the proposed list and the agency's response to public comments. This will be an iterative process,

depending on the issues raised and their mutually satisfactory resolution between the agency and the Council. During these meetings, subject to Chapter 92, HRS, requirements (Sunshine Law), an agency representative should be present to discuss the lists with the Council's Standing Committee on Exemption Lists.

- E. When any outstanding issues have been resolved with respect to the language of the list to be concurred in by the Council, the Standing Committee on Exemption Lists will notify the Chairperson of the Council, who in turn will set a date certain for the Council to formally act on the concurrence of the proposed list. The concurrence of the Council will occur during a public meeting subject to Sunshine Law, and eight affirmative votes of the members will be required to concur in the proposed list. If concurred, the agency files the list as concurred in by the Council with OEQC. The OEQC in turn will notify the public of the new agency list by publication of notice in the periodic bulletin. If not concurred, the agency may withdraw its request, or continue successive iterations of the process.

## **5.2 How to Add More Classes of Exempt Action to the Administrative Rules**

Section 11-200-8(c), HAR, states that “[a]ny agency, at any time, may request that a new exemption class 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.”

## **5.3 Gubernatorial Emergency Declarations and HEPA**

Section 11-200-8(f), HAR states that “[i]n the event the governor declares a state of emergency, the governor may exempt any affected program or action from complying with this chapter.”

## **5.4 Judicial Review of HEPA Exemption Declarations**

Section 343-7(a), HRS, authorizes aggrieved parties to complain in court about agency or applicant actions for which no EA was prepared within one-hundred-twenty days of the agency’s decision to carry out or approve the action, or if a proposed action is undertaken without a formal determination by the agency that a statement is or is not required, a judicial proceeding shall be instituted within one-hundred-twenty days after the proposed action is started.

## **5.5 Sample Exemption Declaration**

Refer to Exhibit 5-1.