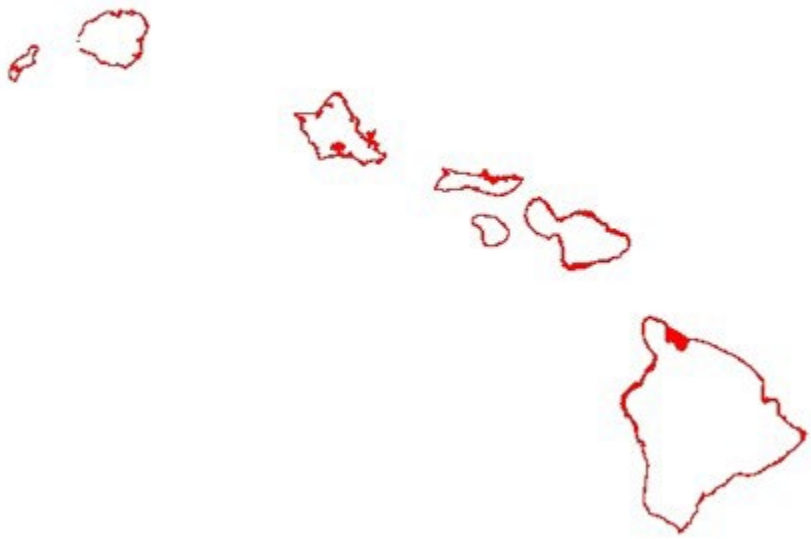
HAWAIʻI COASTAL ZONE MANAGEMENT PROGRAM GUIDANCE IN SPECIAL MANAGEMENT AREA PERMITTING

Hawaiʻi Coastal Zone Management Program

State of Hawaiʻi Office of Planning and Sustainable Development

(808) 587-2846



OFFICE OF PLANNING & SUSTAINABLE DEVELOPMENT
STATE OF HAWAIʻI

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Introduction & Purpose

The Special Management Area (SMA) permit, administered by the respective counties, has become a permanent character of the Hawai‘i Coastal Zone Management (CZM) Program with the adoption of Hawai‘i Revised Statutes (HRS) Chapter 205A. As lead agency of the Hawai‘i CZM Program, the State of Hawai‘i Office of Planning and Sustainable Development (OPSD) provides SMA Permit guidance to the County Planning Departments, and SMA trainings to the County Planning Staff and Commissions.

This document has been developed to consolidate prior guidance(s) issued by the CZM program to facilitate consistent interpretation and application of HRS Chapter 205A to account for turnover of county CZM/SMA planning staff and is intended to be updated to include further guidance that may be developed. Guidance documents **are** specifically provided to the County Planning Departments and County SMA authorities to ensure a consistency of SMA permitting with HRS Chapter 205A, as amended.

Overview

Cumulative Effects/Impacts Assessment Guidance in Special Management Area Permitting
Issued: April 1, 2022

As required by HRS Chapter 205A, the counties are responsible for defending their consideration of cumulative effects/impacts in SMA permitting. According to the National Oceanic and Atmospheric Administration's (NOAA) Office for Coastal Management (OCM) *Evaluation Findings – Hawaii Coastal Zone Management Program August 2008 to August 2018*, both stakeholders and county partners in the State of Hawaii expressed that "[I]t has been extremely hard to determine cumulative impacts in the special management area permitting process, and community members are frustrated, and that refined guidance would be helpful in making decisions." In response to OCM's evaluation findings and recommendations, the OPSD has worked with the County Planning Departments to study cumulative impact assessments for better decisions in SMA permitting.

The OPSD has issued this cumulative effects/impacts assessment guidance to provide policy and implementation support to assist the counties to better assess and determine cumulative effects/impacts in their SMA permitting.

Hawaii Coastal Management Program Guidance for Act 16, Session Laws of Hawaii 2020, Relating to Coastal Zone Management, Hawaii Revised Statutes Chapter 205A
Issued: November 16, 2020

Act 16, Session Laws of Hawaii (SLH) 2020, amended Hawaii CZM law, HRS Chapter 205A, to enhance CZM policies, protect beaches and coastal dunes from shoreline hardening, and reduce the exposure of residential and other developments to coastal hazards.

With the enactment of Act 16, SLH 2020, all county SMA rules and Shoreline Setback rules or ordinances must be amended accordingly to comply with HRS Chapter 205A, as amended.

This guidance aims to establish the Hawaii CZM Program expectations and standards for county implementation of the amendments enacted by Act 16. Prior to adoption of amended rules or ordinances, the provisions of HRS Chapter 205A, as amended, shall prevail. This guidance is for use by the County Planning Departments to ensure consistency in the application of State law.

The Special Management Area Permit Guidance
Issued: April 1, 2013

With an examination on the SMA Use Permits and their conditions issued by the County of Hawaii, County of Kauai, and County of Maui, this SMA Permit Guidance is issue-driven, and aims to explain the SMA permit's purpose, maintain consistency in its application process, and recognize the rational nexus between a CZM context and appropriate SMA permit conditions.

Cumulative Effects/Impacts Assessment Guidance in Special Management Area Permitting

Purpose/Background

Special Management Area (SMA) permit is a discretionary permit, which requires a decision-making body to exercise judgment prior to its approval. Considering potential cumulative effects in SMA permitting is required by the Hawaii Coastal Zone Management (CZM) Law, Hawaii Revised Statutes (HRS) Chapter 205A. Pursuant to HRS §205A-22, the determination of whether an action may have a substantial adverse environmental or ecological effect and therefore require a SMA Use Permit, must take into account potential cumulative effects as one of the key elements. Further, whenever the county authority finds that any excluded use, activity, or operation may have a cumulative impact, or a significant environmental or ecological effect on a SMA, that use, activity, or operation shall be defined as a "development" for the purpose of SMA permitting. For example, as the result of cumulative effects/impacts, repeated improvements to an existing single-family residence on a shoreline parcel could be defined as a "development" and trigger a SMA permit.

The National Oceanic and Atmospheric Administration's (NOAA) Office for Coastal Management (OCM) periodically conducts Section 312 evaluations on the performance of federally approved coastal zone management programs of the states and territories. According to the NOAA OCM *Evaluation Findings – Hawaii Coastal Zone Management Program August 2008 to August 2018,* both stakeholders and county partners in the State of Hawaii expressed that "[I]t has been extremely hard to determine cumulative impacts in the special management area permitting process, and community members are frustrated, and that refined guidance would be helpful in making decisions."

In response to OCM's evaluation findings and recommendations, the State of Hawaii Office of Planning and Sustainable Development[1] (OPSD), the lead agency for the Hawaii CZM Program, has worked with the County Planning Departments to study cumulative impact assessments for better decisions in SMA permitting. The OPSD has applied the following approaches and procedures to conduct this study:

- Review the requirements of cumulative impact assessments and available guidance from the National Environmental Policy Act (NEPA) and Hawaii Environmental Policy Act (HEPA)
- Request for guidance references for cumulative impact assessments from other coastal management programs via the Coastal States Organization
- Research the Final Environmental Assessments (EAs) and Final Environmental Impact Statements (EISs) under the HEPA to review cumulative impact assessments in environmental documents
- Discuss cumulative impact assessments in SMA permitting with the county planning departments for their input

[1] The name of the Office of Planning was changed to the Office of Planning and Sustainable Development, enacted by Act 153, Session Laws of Hawaii (SLH) 2021.

- Recommend the parameters and criteria of cumulative impact assessments for SMA permitting

Based on the subject study, the OPSD is issuing this cumulative effects/impacts assessment guidance for use by the County Planning Departments, which includes:

- Cumulative effects/impacts[2]
- Principles of cumulative effects/impacts assessment and analysis
- Spatial and temporal parameters of cumulative effects/impacts assessment in SMA permitting
- **SMA criteria in cumulative effects/impacts assessment** (emphasis added)
- Determining significance of cumulative effects/impacts, and the checklist

The purpose of this guidance is to provide policy and implementation support to assist the counties to better assess and determine cumulative effects/impacts in their SMA permitting. Following this guidance is not mandatory, and this guidance does not have the force and effect of law and shall not supersede state or county laws and rules relating to the CZM. The counties are responsible for defending their consideration of cumulative effects/impacts in SMA permitting.

Cumulative effects/impacts

The Council on Environmental Quality's (CEQ) regulations for implementing the NEPA defined cumulative impact as "the impact on the environment that results from the incremental impact of an action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions." (40 CFR §1508.7). On July 16, 2020, CEQ issued its new rule updating the regulations for federal agencies to implement the NEPA in the first comprehensive update since 1978. "Cumulative impact" defined in 40 CFR §1508.7 was repealed[3], and an agency's analysis of effects shall be consistent with CFR §1508.1 paragraph (g) as follows:

> (g) *Effects or impacts* means changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives, including those effects that occur at the same time and place as the proposed action or alternatives and may include effects that are later in time or farther removed in distance from the proposed action or alternatives. (40 CFR §1508.1)

Hawaii Administrative Rules (HAR) Chapter 11-200.1 under the HEPA, HRS Chapter 343, continues the requirement of cumulative effects/impacts assessment, and defines Cumulative impact as "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 other actions." All EAs/EISs are supposed to provide cumulative impact assessments for their proposed actions.

[2] "Effects" or "impacts" used in this guidance are synonymous, as stated in Hawaii Administrative Rules Chapter 11-200.1.

[3] Cumulative effects analysis is no longer required as part of a NEPA review under CEQ's final rule, issued July 16, 2020. However, as posted by Federal Register on October 7, 2021, CEQ proposes to revise §1508.1(g)(3) by restoring, with minor modifications, the definition of "cumulative impacts" from the 1978 NEPA Regulations and striking the current provision that repealed that definition.

According to the CEQ handbook on *Considering Cumulative Effects under the National Environmental Policy Act* (CEQ, 1997), the primary purpose of cumulative effects/impacts analysis is to determine the magnitude and significance of the environmental consequences of a proposed action in the context of cumulative effects of other past, present, and future actions. Significance of cumulative effects/impacts depends on how they compare with the environmental baseline and relevant resource threshold such as regulatory standards. Cumulative effects are usually categorized into eight scenarios for assessment as follows (CEQ, 1997):

1) time crowding – effects of frequent and repetitive actions on the environment;
2) time lags – delayed effects of a proposed action;
3) space crowding – effects of spatial density on the environment;
4) cross-boundary – effects occurring away from the source;
5) fragmentation – effects or changes in landscape pattern;
6) compounding effects – effects arising from multiple pathways;
7) indirect effects – secondary effects; and
8) triggers or thresholds – effects defined by agency laws, policies or regulations.

Principles of cumulative effects/impacts assessment

Analyzing cumulative effects/impacts is challenging, primarily because of the difficulty of defining the geographic (spatial) and time (temporal) boundaries. No single formula is available for determining an appropriate scope and extent of a cumulative impact analysis. However, *Guidance for Preparers of Cumulative Impact Analysis – Approach and Guidance* (Caltrans, 2005) states that the following principles have gained a general acceptance:

1) Cumulative effects are caused by the aggregate of past, present, and reasonably foreseeable future actions.
2) Cumulative effects are the total effect, including both direct and indirect effects, on a given resource, ecosystem, and human community of all actions taken, no matter who has taken the actions.
3) Cumulative effects need to be analyzed in terms of the specific resource, ecosystem, and human community being affected.
4) It is not practical to analyze the cumulative effects of an action on the universe, and the list of environmental effects must focus on those that are truly meaningful.
5) Cumulative effects analysis on natural systems must use natural ecological boundaries and analysis of human communities must use the actual sociocultural boundaries to ensure including all effects.
6) Cumulative effects may result from the accumulation of similar effects or the synergistic interaction of different effects.
7) Cumulative effects may last for many years beyond the life of the action that caused the effects.
8) Each affected resource, ecosystem, and human community must be analyzed in terms of its capacity to accommodate additional effects, based on its own time and space parameters.

As required by HAR §11-200.1-10, 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 program;
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.

The *Hawaii Environmental Policy Act Citizen's Guide* (2014) recommends that when considering the significance of potential environmental effects, the proposing or approving agency should consider the sum of the effects on the quality of the environment. A proposed action must be described in its entirety, and shall not be broken up into component parts, which if each is taken separately, may have minimal impact on the environment. An action shall be determined to have a significant effect on the environment if it may be individually limited but cumulatively have substantial adverse effect upon the environment or involves a commitment for larger actions. For example, pools or septic tanks or other ancillary or accessory structures/uses to a residence structure should be included in a larger development as a single action.

According to *Stormwater Impact Assessments: connecting primary, secondary and cumulative impacts to Hawaii's Environmental Review process, May 2013*, the methodology of cumulative impact assessments should address the following issues:

1) Cumulative effects need to be analyzed in terms of the specific resource, ecosystem, or human community being affected.
2) Cumulative effects on natural systems must use natural ecological boundaries.
3) Cumulative effects are caused by the aggregate of past, present, and reasonably foreseeable future actions.
4) Each affected resource, ecosystem, and human community must be analyzed in terms of its capacity to accommodate additional effects, based on its own time and space parameters.

Spatial and temporal parameters to scope past, present and future actions in SMA permitting

In accordance with the definition of "cumulative impact*"* previously defined in CEQ's rule *or* in HAR Chapter 11-200.1, and the research on the Final EAs/EISs available from Office of Environmental Quality Control[4] (OEQC) online library, spatial and temporal boundaries are two critical parameters to scope past, present, and reasonably foreseeable future actions that need to be taken into account in cumulative impact assessments. *Principally*, spatial and temporal scopes for assessments depend on the scale of a proposed action, and on target resources and/or environment. Each affected resource, ecosystem, and human community should be analyzed in terms of its capacity to accommodate additional effects, based on its own time and space parameters. *Ideally*, spatial and temporal scopes for cumulative effect/impact assessments should be expanded to the point at which a specific coastal resource is no longer significantly affected, or the impacts are no longer of interest to affected parties. However, categorizing and determining the geographic and temporal scope of cumulative effects/impacts in the SMA permitting process can significantly divert the county planning departments from focusing their

[4] The Office of Environmental Quality Control has been renamed as "Environmental Review Program" within the OPSD, enacted by Act 152, SLH 2021.

time and resources on the most significant effects. Given that existing cumulative effects/impacts analysis guidance from CEQ and HEPA is not provided in the context of the SMA, there remains ambiguity in its application and implementation. This SMA-oriented guidance seeks to narrow down the spatial and temporal scopes of the cumulative effect/impact assessments.

With respect to spatial scope, setting the consideration at an existing defined boundary such as the SMA boundary within the county jurisdiction would reduce uncertainty in assessing an appropriate scope. The SMAs designated by the counties generally begin at the shoreline and extend to the nearest highway or several miles inland. Other factors, such as salinity and tidal influences on bodies of surface water, also affect a SMA boundary. Pursuant to HRS §205A-23, as amended, the SMA in each county shall be as shown on such maps filed with the county authority as of June 8, 1977. To narrow down the scoping to a meaningful assessment and include what counts for cumulative effect/impact assessments in SMA permitting, it would be appropriate and feasible to apply the SMA boundary as a spatial parameter if no critical issues on coastal resources or environment are raised beyond the SMA. The OPSD recommends a geographic radius up to the SMA inland boundary from the shoreline as the minimum spatial scope to assess the incremental impacts of a proposed action on the SMA when added to other past, present, and reasonably foreseeable future actions.

Besides geographic scope, temporal scale is another crucial parameter to scope past and future actions to assess cumulative effects/impacts resulting from a proposed action. “Reasonably foreseeable” actions are those that are likely to occur, rather than those that are merely possible or subject to speculation. Reasonably foreseeable future actions are those that have the potential to overlap spatially or temporally with a proposed project. It is recognized that a SMA Use Permit is usually granted to complete a proposed development within 5 years from the issued date with potential time extension. In addition to including the effects/impacts that occur at the same time and place as the proposed action, the OPSD suggests that a minimum of 5 years or more as practicable before the application of a proposed action serve as a basic temporal parameter to scope past actions within a SMA for the purpose of cumulative effects/impacts assessment in SMA permitting.

The timeframe of a long-range plan such as the county general plan and/or community plan, or the expected lifespan of a proposed project, whichever is longer, could be utilized as a maximum temporal scale to scope foreseeable future actions. To assess cumulative effects/impacts in a feasible way, the OPSD recommends a range as the temporal scale to scope foreseeable future actions in the SMA permitting process. The range would be from 5 years or more as practicable from the application of a proposed project as the minimum, and up to the lifespan of a structure or the operational life of a proposed project as the maximum.

SMA criteria in cumulative effects/impacts assessment

With spatial and temporal scopes, cumulative effect/impact assessments in the SMA permitting process must be conducted under the provisions of the Hawaii CZM Law. The objectives and policies in the CZM law provide overarching guidance to the counties in their administration of the SMA permit system. These CZM objectives and policies cover:

- Recreational resources
- Coastal hazards

- Historic resources
- Scenic and open space resources
- Coastal ecosystems
- Economic uses
- Managing development
- Public participation
- Beach and coastal dune protection
- Marine and Coastal resources[5]

Under the CZM objectives and policies, the SMA guidelines, articulated in HRS §205A-26, apply specifically to the SMA permitting process. The SMA guidelines must all be factored into the assessment of any development proposed within the SMA. Compliance with the SMA guidelines must be achieved before an SMA permit can be approved.

Therefore, the OPSD recommends that the counties apply temporal and spatial parameters with SMA criteria, as presented in **Table 1**[6], to account for cumulative effects/impacts of a proposed action on a SMA as follows:

- Minimum 5 years or more as practicable before the application to scope past actions
- Minimum 5 years or more as practicable from the application, and up to the lifespan of a proposed project to scope foreseeable future actions
- Extension to SMA inland boundary as a geographic radius to scope other actions
- Extension beyond the SMA boundary for a specific coastal resource, if necessary
- Effects on coastal resources/SMA under the CZM objectives and SMA guidelines

Using the minimum spatial and temporal scales recommended by this document as guidance, the counties may identify and/or apply their own temporal and spatial scales for a specific project, based on available geographic information system (GIS) data layers, site visits, and a history of site. Please keep in mind that a cumulative impact, or a significant environmental or ecological effect on *a special management area* (emphasis added) is required for a SMA assessment pursuant to HRS §205A-22.

This cumulative effect/impact assessment guidance is limited to SMA permitting within the county jurisdiction under the CZM provisions and SMA guidelines. Effects/impacts should not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain.

[5] *Coastal resource* means any coastal wetland, beach, dune, (shoreline), barrier island, reef, estuary, or fish and wildlife habitat, pursuant to the National CZM Act of 1972, as amended.
[6] Each county may further develop its own cumulative effects/impacts assessment template.

Table 1. Criteria of Cumulative Effects/Impacts Assessment in SMA Permitting

CZM Criteria[1]		**Spatial Scope** - minimum radius to SMA inland boundary	**Temporal Scope**[2]			**Effects/ Impacts from the Proposed Action**
			Past actions - minimum 5 years past or more as practicable from the application	Present actions	Future actions - minimum 5 years or more as practicable from the application, and up to the lifespan of the project	
1	Coastal recreational resources					
2	Historic resources					
3	Scenic and open space					
4	Coastal ecosystems					
5	Economic uses					
6	Exposure to coastal hazards					
7	Beach/dune protection					
8	Marine resources					
9	Bay, estuary, salt marsh, river mouth, slough or lagoon					
10	Fishing ground, wildlife habitats, or agricultural uses of land					

[1] Criteria from the CZM objectives HRS Chapter §205A-2 and SMA guidelines HRS §205A-26, as amended.
[2] a) Identify past, present, or foreseeable future actions in the vicinity of a proposed project from the EAs/EISs OEQC's online library by searching for the keyword "island" and "year"; b) Search for available information for past, present and planned actions within the SMA in the vicinity of a proposed project from the respective county planning department, with available GIS data layers; and c) Scope foreseeable future actions from community plans, capital improvement projects, and land use designations as applicable.

Determining "Significant effect" and "Cumulative impact"

Although not defined under HRS Chapter 205A, "Significant effect" and "Cumulative impact" are defined under the Hawaii Environmental Impact Statement law, HRS Chapter 343, and HAR Chapter 11-200.1, Environmental Impact Statement Rules, as follows:

> "Significant effect" means 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).
>
> "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 other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time (HAR §11-200.1-2).

Furthermore, HAR §11-200.1-13 has established significance criteria, including qualitative and quantitative thresholds, for determining whether an action may have a significant effect on the environment. The significance criteria include:

- Irrevocably commit a natural, cultural, or historic resource;
- Curtail the range of beneficial uses of the environment;
- Conflict with the state's environmental policies or long-term environmental goals;
- Have a substantial adverse effect on the economic welfare, social welfare, or cultural practices of the community and state;
- Have a substantial adverse effect on public health;
- Involve adverse secondary impacts, such as population changes or effects on public facilities;
- Involve a substantial degradation of environmental quality;
- Be individually limited but cumulatively have substantial adverse effect upon the environment or involves a commitment for larger actions;
- Have a substantial adverse effect on a rare, threatened, or endangered species, or its habitat;
- Have a substantial adverse effect on air or water quality or ambient noise levels;
- Have a substantial adverse effect on or be 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;
- Have a substantial adverse effect on scenic vistas and viewplanes, during day or night, identified in county or state plans or studies; or
- Require substantial energy consumption or emit substantial greenhouse gases.

The definitions and criteria for determining "significant effect" and "cumulative impact" set forth above are applicable in SMA permitting. The county authorities and county planning departments may apply these definitions and criteria to assess potential effects/impacts resulting from any uses, activities, or operations within a SMA in making determinations relative to SMA

use permits, minor permits, and SMA permit exemptions. However, for the purpose of SMA permit decision-making, application of the significance criteria should be constrained to the CZM objectives and policies and SMA guidelines.

Eligible actions for SMA exemption, or developments that are eligible for the SMA minor permit, based on a valuation of less than $500,000, should be subject to some form of assessment to show that the proposed action has no substantial adverse environmental or ecological effect, taking into account potential cumulative effects on a SMA. County-specific review and assessment protocols are encouraged to support a standardized assessment and reporting process.

If significant cumulative effects/impacts on a SMA resulting from a proposed development are reasonably foreseeable, site-specific mitigation measures in the planning phase, design phase, construction phase, and/or operational phase should be proposed and implemented to mitigate potential incremental impacts added by the proposed development in response to the CZM criteria illustrated in **Table 1**. For example, site-specific mitigation measures in SMA permitting to achieve consistency with the CZM objectives and policies and SMA guidelines may include:

- Provision and maintenance of public shoreline access
- Preservation/protection of archaeological sites, wetlands, and other sensitive areas
- Protection of life and property from coastal hazards as defined in HRS Chapter 205A
- Protection of beach and coastal dunes
- Boundary setbacks and building height restrictions to preserve coastal views
- Drainage improvements to control siltation in coastal waters
- Prohibition of artificial lighting from directly illuminating the shoreline and ocean waters
- Restriction, including frequency and intensity, on the improvements to an existing structure such as a single-family residence, on a shoreline parcel.

Cumulative effects/impacts assessment has been required by the NEPA and HEPA for several decades. In accordance with CEQ's new rule issued in 2020 and OPSD's research on EAs/EISs, however, it is noted that both NEPA and HEPA have faced difficulty in providing guidance as to how to conduct cumulative effect/impact assessments to meet the requirement. The lack of feasible spatial and temporal parameters has made assessing cumulative effects/impacts extremely challenging not only in SMA permitting, but also in evaluating EAs and EISs. In response to OCM's evaluation, the OPSD has conducted research on all Final EAs/EISs (1,103 total) from August 2008 to April 2020 via the online EAs/EISs library at https://planning.hawaii.gov/erp/. In very few cases, these Final EAs and EISs specifically discussed or applied spatial and temporal parameters to scope the past, present and foreseeable future actions in cumulative effect/impact assessments. Approximately 96% of Final EAs and EISs simply referred to the definition of cumulative impact, and then made a statement of no adverse cumulative effects/impacts for their proposed projects.

EA/EIS review crosses jurisdictional bounds, and studies all environmental effects/impacts associated with the action. If an EA or EIS serves as a supporting document for a SMA use permit application, the OPSD suggests that the subject EA or EIS specifically include cumulative effects/impacts assessment on the coastal resources/environment under HRS Chapter 205A, and discuss site-specific mitigation measures in design, construction, and operation to mitigate any adverse cumulative effects/impacts from a proposed development.

Recommendation

This guidance is for the counties to consider potential cumulative effects/impacts from a proposed action which may or may not be "development" as defined in HRS §205A-22. To ensure and/or defend a consideration of cumulative effects/impacts in SMA permitting, the OPSD recommends that a SMA use assessment provide:

1. A checklist about the incremental impacts on coastal resources/environment resulting from a proposed action under the SMA criteria as illustrated in **Table 1** provided by this guidance. Counties are encouraged to develop their own implementation policies and tools to further standardize cumulative effects/impacts assessment in SMA permitting.
2. A location map of past, present, and reasonably foreseeable future actions that have been identified under appropriate and feasible spatial and temporal parameters for the purpose of cumulative effects/impacts assessment. Within a spatial and temporal scopes, the location map should also include all repeated repairs and component actions that are phases or increments of a larger action.

References

Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act. Council on Environmental Quality. Final rule. Federal Register / Vol. 85, No. 137 / Thursday, July 16, 2020 / Rules and Regulations, available at https://www.govinfo.gov/content/pkg/FR-2020-07-16/pdf/2020-15179.pdf

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Guidance for Preparers of Cumulative Impact Analysis – Approach and Guidance, Environmental Management Office, California Department of Transportation (Caltrans), June 30, 2005

Stormwater Impact Assessments: connecting primary, secondary and cumulative impacts to Hawaii's Environmental Review process, Hawaii Coastal Zone Management Program, May 2013

Hawaii Environmental Policy Act Citizen's Guide, State of Hawaii Office of Environmental Quality Control, October 2014

Hawaii Coastal Zone Management Program Guidance for Act 16, Session Laws of Hawaii 2020, Relating to Coastal Zone Management, Hawaii Revised Statutes Chapter 205A

Background

Governor David Ige signed SB 2060 SD2 HD2, which took effect on **September 15, 2020**, as Act 16, Session Laws of Hawaii (SLH) 2020.

As the lead agency for the Hawaii Coastal Zone Management (CZM) Program, the State of Hawaii Office of Planning (OP) is issuing this guidance for use by the County Planning Departments to ensure consistency in the application of State law. This guidance aims to establish the Hawaii CZM Program expectations and standards for county implementation of the amendments enacted by Act 16. The following is our interpretation of the three major amendments to Hawaii Revised Statutes (HRS) Chapter 205A enacted by Act 16, SLH 2020 relating to Special Management Area (SMA) uses and shoreline setbacks for County use and reference:

Act 16, SLH 2020, amended the Hawaii CZM law, HRS Chapter 205A, to enhance the CZM policies, protect beaches and coastal dunes from shoreline hardening, and reduce the exposure of residential and other developments to coastal hazards.

A summary of the amendments to HRS Chapter 205A enacted by Act 16, SLH 2020 includes the following:

- Adds sea level rise to the definition of coastal hazards, and adds a definition of beach to enhance beach protection.
- Protects beaches and coastal dunes by restricting and/or prohibiting construction of shoreline hardening structures at sites with beaches and at sites where shoreline hardening structures interfere with existing recreational and waterline activities;
- Increases the minimum shoreline setback from 20 feet to 40 feet.
- Includes as “development” the construction or reconstruction of a single-family residence on a shoreline parcel, or a parcel that is impacted by waves, storm surges, high tide, or shoreline erosion and, therefore, requires a SMA permit.
- Avoids, minimizes or mitigates the impacts of coastal hazards including sea level rise on coastal developments[1].

With the enactment of Act 16, SLH 2020, all county SMA rules and Shoreline Setback rules or ordinances must be amended accordingly to comply with HRS Chapter 205A, as amended. Prior to adoption of amended rules or ordinances, the provisions of HRS Chapter 205A, as amended, shall prevail.

[1] State functional plans, multi-hazard mitigation plans, county general plans, community plans, and land use policies, such as zoning, subdivision and shoreline setbacks, play a crucial role in avoiding, minimizing and mitigating the impacts of coastal hazards including sea level rise on coastal developments.

Pursuant to Section 13 of Act 16, SLH 2020, all applications that were submitted for SMA assessment/permitting or shoreline setbacks, or SMA and shoreline setback determinations prior to the effective date, **September 15, 2020**, should be unaffected by Act 16, SLH 2020.

1. Amendments to the definition of "Development"

Act 16, SLH 2020, Section 4, Page 19, Lines 18-20, provides the following amendment to Chapter 205A, Part II:

HRS § 205A-22 "Development" does not include the following:

(1) Construction or reconstruction of a single-family residence that is less than seven thousand five hundred square feet of floor area, ***is not situated on a shoreline parcel or a parcel that is impacted by waves, storm surges, high tide, or shoreline erosion****, and is not part of a larger development*[2]*;*

The subject amendment in Act 16, SLH 2020 further restricts the exemption of single-family residences from SMA permitting. As a development, SMA permitting is required for a new single-family residence that is situated on a shoreline or a parcel that is impacted by waves, storm surges, high tide, or shoreline erosion. The SMA permitting will mitigate the potential effects of residential development along the shoreline, and reduce future and continuing requests from the construction of shoreline hardening structures that aims to protect shoreline-front residential developments.

What should the County Planning Departments do?

Shoreline Parcel or Parcel Impacted by Waves, Storm Surges, High Tide, or Shoreline Erosion

Construction or reconstruction of a single-family residence, regardless of its size, that is located on a shoreline parcel or a parcel that is impacted by waves, storm surges, high tide, or shoreline erosion, is defined as a "development." Counties should require the landowner to obtain a SMA Use Permit or SMA Minor Permit prior to a building permit. "Parcel" means a tax map key (TMK) parcel established by zoning and subdivision, including Zone, Section, Plat, and Parcel.

"Construction or reconstruction of a single-family residence" means a new residential development. HRS Chapter 205A does not provide a definition of reconstruction, and leaves discretion to the counties. Counties may define "reconstruction" through their SMA rules or ordinances. For example, reconstruction could mean construction of a lawfully existing dwelling unit when the construction is valued by a licensed professional engineer or architect at fifty (50%) or more of the current replacement cost of the structure. For other actions to existing single-family residences, please note that "structural and nonstructural improvements to existing

[2] No proposed action shall be broken into component parts, which if each is taken separately, may have minimal impacts on the SMA. OP recommends that the counties apply temporal and spatial parameters to assess potential cumulative impacts in SMA assessments, including: 1) extension to SMA inland boundary from the shoreline as a spatial radius; 2) minimum 5 years prior to proposed action to scope past actions; 3) minimum 5 years forward or up to the lifespan of a proposed project for reasonably foreseeable actions; 4) effects on coastal resources and environment under the CZM objectives and SMA guidelines. A checklist of cumulative impacts and a location map of past, present and reasonably foreseeable future actions identified will be helpful for the purpose of a cumulative impact assessment.

single-family residences, where otherwise permissible" are excluded from "development" as defined in HRS § 205A-22.

The subject amendment to HRS § 205A-22 was enacted specifically for single-family residence development that is located on a shoreline parcel or on a parcel that is impacted by waves, storm surges, high tide or shoreline erosion. Coastal hazards such as hurricane, tsunami, sea level rise and flooding are not on the list under this amendment. The conjunction "or" between the two categories of parcels indicates that an inland parcel that is impacted by waves, storm surges, high tide or shoreline erosion is comparable to a shoreline parcel that is impacted by these four types of coastal hazards. For the purposes of determination triggers for SMA permitting, counties should assess whether a parcel: (i) is a shoreline parcel or (ii) is impacted by waves, storm surges, high tide, or shoreline erosion. Sea level rise projections, for example, the sea level rise exposure areas (SLR-XA[3]) combined from future passive flooding, annual high wave flooding and coastal erosion, are not applicable triggers for SMA permitting under the provisions of this amendment. For purposes of assessment, the following should be used:

(i) A shoreline parcel is a parcel that abuts the shoreline, which is defined in HRS § 205A-1, and determined under Hawaii Administrative Rules (HAR) Chapter 13-222 pursuant to HRS § 205A-42. A parcel that abuts a cliff could be a shoreline parcel pursuant to HAR § 13-222-16.

(ii) Parcel impacted by waves, storm surges, high tide, or shoreline erosion. Assessments for whether a parcel falls into this category can be based on current and historical facts or record, and can be traced back to 10 years ago, 25 years ago, and even longer as required.

Examples of such parcels may be the parcels that are located on the mauka side of a shoreline parcel or a shoreline-fronting road, but are still impacted by waves, storm surges, high tide, or shoreline erosion. Through daily practices, site inspections, and historical events, the counties may identify the "hot spots" of these parcels at the local level. In absence of specific map resources identifying all impacts, the SLR-XA from 0.5 foot SLR scenario, in particular when searchable TMKs and/or addresses are available for parcels, from the Hawaii Sea Level Viewer at http://www.pacioos.hawaii.edu/shoreline/slr-hawaii/ is recommended as a reference

3 The SLR-XA from the Hawaii Sea Level Rise Viewer at http://www.pacioos.hawaii.edu/shoreline/slr-hawaii/ combines three chronic flooding hazards as follows from future sea level rise scenarios such as 0.5 foot, 1.1 foot, 2.0 feet and 3.2 feet:

a) *Passive flooding*, which was modeled by the Coastal Geology Group at the University of Hawaii using a modified "bathtub" approach that provides an initial assessment of lowly-lying areas susceptible to flooding by sea level rise;
b) *Annual high wave flooding*, which was based on the modeling that covered wave-exposed coasts with low-lying development on Maui, Oahu and Kauai. Annual high wave flooding is not available for the islands of Hawaii, Molokai and Lanai. Changes in shoreline location due to coastal erosion are not included in this modeling; and
c) *Coastal erosion*, which was modeled by using historical shoreline change data and beach profiles that are available only for sandy shores of Kauai, Oahu and Maui.

map to identify potential current impacts, and further examine and confirm whether a non-shoreline parcel is impacted by waves, storm surges, high tide or shoreline erosion.

Under the provisions of this amendment, mitigation measures, including elevation, setbacks from the impacts, project design and layout, and preservation of natural barriers, in SMA permitting should include consideration of the continuous impacts of waves, storm surges, high tide, or shoreline erosion during the lifespan of a proposed single-family residence.

Cost Threshold

Given that the cost threshold between the SMA Use Permit and SMA Minor Permit is $500,000, if the valuation of a proposed single-family residence that is a development as defined in HRS § 205A-22 is more than $500,000, it will trigger a SMA Use Permit.

County Planning Departments should assess all proposed construction or reconstruction of a single-family residence within a SMA, and provide a written determination on whether a SMA permit shall be required. OP recommends that the counties develop procedures and/or short-form assessments specifically to assess and process the SMA Permit applications for construction or reconstruction of single-family residences along the shoreline and parcels that are impacted by waves, storm surges, high tide, or shoreline erosion.

Acknowledgement

The SMA permit is a management tool to assure that uses, activities, or operations on land or in or under water within an SMA are designed and carried out in compliance with the CZM objectives and policies and SMA guidelines. The SMA permitting required for single-family residences along the shoreline is not to stop the residential developments that are allowed by the county land use policies such as zoning and subdivision, but to require mitigation measures to mitigate the potential impacts of residential developments adjacent to the shoreline area, and reduce exposure and vulnerability to the risks of shoreline erosion, waves, storm surges, and high tide.

2. Amendments to "Shoreline setbacks”

Act 16, SLH 2020, Section 8, Page 28, Line 17, provides the following amendment to Chapter 205A, Part III:

HRS § 205A-43(a) *Setbacks along shorelines are established of not less than [~~twenty feet and not more than~~] forty feet inland from the shoreline. The department shall adopt rules pursuant to chapter 91, and shall enforce the shoreline setbacks and rules pertaining thereto.*

What should the County Planning Departments do?

The amendments to this provision help to shift new development away from exposure to coastal hazards. Specifically, actions that are amended include the following:

- Counties no longer allow the reduction of the shoreline setback to less than 40 feet for existing shallow shoreline lots, where the buildable area of the parcel will be less than 50% of the parcel after applying the setback.

- The requirement for a minimum 40-foot shoreline setback triggers a SMA permit and shoreline setback variance for a structure located even partially within the shoreline area that is not a minor structure permitted under the county shoreline rules or ordinances. A "Minor structure" within the shoreline area must not affect beach processes, artificially fix the shoreline, or interfere with public access or public views to and along the shoreline.
- Hardship for the reasonable use of the land may be allowed on an existing shallow lot, which resulted from a final subdivision approval or a legal lot of record prior to the effective date of this bill, to apply for a shoreline setback variance.

Counties are still allowed discretion in granting approvals for a structure, including a single-family residence partially located within the shoreline area under the hardship criteria. However, OP recommends that this discretion should be applied judiciously to ensure consistency with the intent of this legislation to reduce exposure and risk of development to coastal hazards and to protect beach areas.

3. Amendments to "Shoreline hardening"

Act 16, SLH 2020, Section 11, Page 33, Lines 4-18, provides the following amendment to Chapter 205A, Part III:

HRS § 205A-46(a)(9) *Private facilities or improvements that may artificially fix the shoreline; provided that the authority [~~also finds that shoreline erosion is likely to cause~~] may consider hardship to the applicant if the facilities or improvements are not allowed within the shoreline area [~~, and the authority imposes conditions to prohibit any structure seaward of the existing shoreline unless it is clearly in the public interest; or~~]; provided further that a variance to artificially fix the shoreline shall not be granted in areas with sand beaches or where artificially fixing the shoreline may interfere with existing recreational and waterline activities[4] unless the granting of the variance is clearly demonstrated to be in the interest of the general public; or*

What should the County Planning Departments do?

This amendment restricts activities for private facilities from artificially fixing the shoreline. Counties shall not grant variances for shoreline hardening structures in areas with sand beaches, unless the granting of such variance is clearly demonstrated to be in the interest of the general public. The interest of the general public means a benefit from a proposed action for public safety and/or public health, for the protection of public infrastructure in response to risk of coastal hazards, or for beach protection/sand retention for public use and recreation or coastal ecosystems.

- Pursuant to the definition of "beach"[5] added to HRS § 205A-1, "beach" includes sand deposits in nearshore submerged areas, or sand dunes or upland beach deposits landward of the shoreline, that provide benefits for public use and recreation, for coastal ecosystems, and as a natural buffer against coastal hazards.

[4] Pursuant to Act 258, SLH 1993, which amended HRS § 205A-2(c) by adding HRS § 205A-2(c)(9) for beach protection, existing recreational and waterline activities likely occur seaward of the shoreline.
[5] "Beach" is defined for the first time in Hawaii Statute Law.

Counties and local communities are most familiar with their beaches. Counties should assess and decide whether beaches, as defined in HRS § 205A-1, exist in the areas where the proposed facilities or improvements are located. To protect beaches from shoreline hardening, counties should consult with other agencies and institutions including the Office of Conservation and Coastal Lands, Department of Land and Natural Resources, Hawaii Sea Grant, and the University of Hawaii Coastal Geology Group, and with site-specific analysis investigations. Prohibition of shoreline hardening in areas with beaches encourages the state and counties to work together to restore and protect Hawaii's beaches at a regional scale.

The assessment and determination on a shoreline setback variance request to artificially fix the shoreline pursuant to HRS § 205A-46(a)(9) should be justified by whether the prohibition of shoreline hardening structures will comply with the objectives and implement the policies of beach protection set forth in HRS §§ 205A-2(b)(9) and 205A-2(c)(9), as amended, including beach and coastal dune protection for (i) public use and recreation; (ii) the benefit of coastal ecosystems; and (iii) use as natural buffers against coastal hazards.

Special Management Area Permit Guidance

The Special Management Area (SMA) Permit Guidance is intended to:

- Explain the purpose of the SMA permit;
- Maintain consistency in the application of the SMA permit process; and
- Emphasize the need for an essential nexus and rough proportionality between (1) development impacts within the coastal zone management area addressed under the Coastal Zone Management (CZM) law, and (2) SMA permit conditions.

The purpose of this document is to provide SMA permit decision-making guidance for county planning departments and the county SMA authorities (Honolulu City Council and planning commissions in the counties of Maui, Hawaii, and Kauai).

This guidance does not cover other aspects of the CZM Program such as the federal consistency requirement. This guidance does not have the force and effect of law, and does not supersede state or county laws and rules related to the CZM Program.

Office of Planning's Role in SMA Permitting

The U.S. Congress recognized the importance of meeting the challenge of continued growth in the coastal zone by passing the Coastal Zone Management Act (CZMA) in 1972. The CZMA, administered by National Oceanic and Atmospheric Administration's (NOAA) Office of Ocean and Coastal Resource Management (OCRM), provides for management of the nation's coastal resources, including the Great Lakes, and balances economic development with environmental conservation.

The National CZM Program is one of the two national programs outlined in the CZMA (the second being the National Estuarine Research Reserve System or NEERS). Funding and support for managing coastal areas, including federal activities and federally supported activities, under the CZMA was delegated to states with approved CZM programs. Hawaii's CZM Program was approved in 1978 by the U.S. Department of Commerce, and the Office of Planning was designated by the Legislature as the "lead agency."

The CZM Program includes the SMA permitting system. The authority for issuing SMA permits was granted by the Legislature to the county authorities, as described below. Although the Office of Planning does not directly review and grant SMA permits within the counties (with few exceptions[1]), the CZM Program is responsible for, among other things, the following:

- Receiving, disbursing, using, expending, and accounting for all funds that are made available by the United States and the State for the CZM Program;
- Providing support and assistance in the administration of the CZM Program;
- Consulting with the counties and the public in preparing guidelines to further specify and clarify CZM objectives and policies;

[1] The Legislature granted SMA review and approval for lands under the jurisdiction of the Hawaii Community Development Authority (HCDA), which includes the Kakaako Community Development District and the Kalaeloa Community Development District to the Office of Planning.

- Conducting a continuing review of the administration of the coastal zone management program and of the compliance of state and county agencies; and
- Monitoring the coastal zone management-related enforcement activities of the state and county agencies responsible for the administration of CZM objectives and policies.

Each year the Office of Planning passes approximately one million dollars in federal CZMA monies on to the counties to support their work in the areas of coastal zone management and SMA permitting, a major component of the CZM Program.

Purpose of the SMA Permit

The SMA permit was established in 1975 with the enactment of Act 176, known as the Shoreline Protection Act. The Legislature in enacting Part II of Hawaii Revised Statutes (HRS) Chapter 205A (Special Management Areas) found that:

> . . . special controls on developments within an area along the shoreline are necessary to avoid permanent losses of valuable resources and the foreclosure of management options, and to ensure that adequate access, by dedication or other means, to public owned or used beaches, recreation areas, and natural reserves is provided.

The legislature further found and declared that it is state policy to preserve, protect, and where possible, to restore the natural resources of the coastal zone of Hawaii. Pursuant to HRS Section 205A-5, all state and county agencies shall enforce the CZM objectives and policies.

The SMA permit is a coastal zone management tool to assure that uses, activities, or operations on land or in or under water within an SMA are designed and carried out in compliance with the CZM objectives and policies, and the SMA guidelines.

The SMA permit regulates permissible land uses that are already allowed by land use policies including zoning designations, county general plans, and community development plans. The SMA permitting system does not establish land use policies and does not determine land uses. Land use policies and plans determine where various types of land uses are permissible in the counties, including within county SMAs. Denying such land use can rarely be justified based on the SMA guidelines enumerated under HRS Section 205A-26. In rare instances, when mitigation measures cannot achieve consistency with CZM objectives and policies, and SMA guidelines, the SMA permit would be denied, and the proposed development would not be permitted.

Statutory and Policy Basis for Issuing SMA Permits

When HRS Chapter 205A, Coastal Zone Management, first became law in 1975, the Legislature established the SMA regulatory function at the county level. The county authorities administer SMA permits and shoreline setback provisions. The authorities in the respective counties are as follows:

- City and County of Honolulu: Honolulu City Council;
- County of Hawaii: Windward or Leeward Planning Commissions;
- County of Maui: Maui, Molokai, or Lanai Planning Commissions; and
- County of Kauai: Kauai Planning Commission.

The authority may amend its county SMA boundaries as necessary provided that any contraction of the SMA boundaries shall be subject to Office of Planning's review and determination.

The objectives and policies in the CZM law provide overarching guidance to the counties in their administration of the SMA permit system. These objectives and policies cover:

- Recreational Resources
- Historic Resources
- Scenic and Open Space Resources
- Coastal Ecosystems
- Economic Uses
- Coastal Hazards
- Managing Development
- Public Participation
- Beach Protection
- Marine Resources

Under the umbrella of CZM objectives and policies, the SMA guidelines, articulated in HRS Section 205A-26, apply specifically to the SMA permit process. Compliance with the SMA guidelines must be achieved before an SMA permit can be approved. The SMA guidelines must all be factored into the assessment of any development proposed within the SMA.

HRS Section 205A-26, SMA guidelines, consists of the following three parts:

(1) All development in the special management area shall be subject to reasonable terms and conditions set by the authority in order to ensure:

   (A) Adequate access, by dedication or other means, to publicly owned or used beaches, recreation areas, and natural reserves is provided to the extent consistent with sound conservation principles;
   (B) Adequate and properly located public recreation areas and wildlife preserves are reserved;
   (C) Provisions are made for solid and liquid waste treatment, disposition, and management which will minimize adverse effects upon special management area resources; and
   (D) Alterations to existing land forms and vegetation, except crops, and construction of structures shall cause minimum adverse effect to water resources and scenic and recreational amenities and minimum danger of floods, wind damage, storm surge, landslides, erosion, siltation, or failure in the event of earthquake.

(2) No development shall be approved unless the authority has first found:

   (A) That the development will not have any substantial adverse environmental or ecological effect, except as such adverse effect is minimized to the extent practicable and clearly outweighed by public health, safety, or compelling public interests. Such adverse effects shall include, but not be limited to, the potential cumulative impact of individual developments, each one of which taken in itself might not have a substantial adverse effect, and the elimination of planning options;
   (B) That the development is consistent with the objectives, policies, and special management area guidelines of this chapter and any guidelines enacted by the legislature; and

(C) That the development is consistent with the county general plan and zoning. Such a finding of consistency does not preclude concurrent processing where a general plan or zoning amendment may also be required.

(3) The authority shall seek to minimize, where reasonable:

(A) Dredging, filling or otherwise altering any bay, estuary, salt marsh, river mouth, slough or lagoon;
(B) Any development which would reduce the size of any beach or other area usable for public recreation;
(C) Any development which would reduce or impose restrictions upon public access to tidal and submerged lands, beaches, portions of rivers and streams within the special management areas and the mean high tide line where there is no beach;
(D) Any development which would substantially interfere with or detract from the line of sight toward the sea from the state highway nearest the coast; and
(E) Any development which would adversely affect water quality, existing areas of open water free of visible structures, existing and potential fisheries and fishing grounds, wildlife habitats, or potential or existing agricultural uses of land.

Essential Nexus and Rough Proportionality between the CZM Law's Provisions and SMA Permit Conditions

The SMA permitting system includes discretionary approvals by decision makers, who may require conditions of approval to ensure the CZM objectives are met. However, there must be an "essential nexus"[2] and "rough proportionality"[3] between SMA permit conditions and the CZM law's substantive and legal provisions to withstand judicial scrutiny. Mitigation measures to achieve consistency with the CZM objectives and policies and SMA guidelines may include:

- Provision and maintenance of public beach access;
- Preservation of archaeological sites;
- Protection of life and property from coastal hazards;
- Boundary setbacks and building height restrictions to preserve coastal views; or
- Drainage improvements to control siltation in coastal waters.

The SMA permit is a limited review and approval process, which assures that developments within the SMA are in compliance with the CZM objectives and policies and SMA guidelines. Non-CZM issues associated with developments should be dealt with through other regulatory mechanisms. At times, SMA permit conditions extend into the areas of land use policy, traffic control, or social welfare. These conditions lack a rational nexus to the CZM objectives and

[2] *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). The court held that when granting a land use permit is conditioned upon a physical invasion of private property (e.g., dedication of easement), the condition must substantially advance the same governmental purpose as the asserted justification for that condition. In the Court's words, there must be a logical "nexus" between the negative impact of the project and the need for a public easement across the owners' property. In *Nollan*, the Court rejected the exaction of an easement along the beach, even though the Nollans' new beachfront house would make it more difficult for passersby to see the ocean from the road, because allowing people to walk on the beach was not related to restoration of the view from the road.

[3] *See Dolan v. City of Tigard*, 512 U.S. 374 (1994). In this case, the city conditioned a permit approval on the dedication of property for storm drainage and for a pedestrian/bicycle pathway. The Court held that a dedication of property as a condition of development permit approval must be "roughly proportional" to the impact of a proposed development. The exactions by the City were not proportional to the impacts of the proposed development.

policies and are outside the mandates of the CZM law. They are not enforceable under the CZM law and undermine the integrity of the SMA permitting system.

The following are examples of questionable SMA permit conditions. Consider whether these SMA permit conditions (1) have an essential nexus with the SMA guidelines and CZM objectives and policies, and (2) are roughly proportional to impacts of a proposed development:

Example 1: In accordance with Section XYZ of the County Plan, the proposed activity shall incorporate crime prevention elements in the design and building of structures, landscaping and lighting.

Example 2: According to Section XYZ of the zoning code, the proposed activity shall incorporate acceptable energy conservation measures in the design, construction, and management of the development.

Example 3: Appropriate measures shall be taken during construction to mitigate the short-term impacts of the project relative to ambient noise levels and traffic disruptions.

The first example requires crime prevention elements for building design. However, crime prevention measures are outside of the scope of CZM objectives and policies. Public safety required by the SMA guidelines is related to protection of life and property from coastal hazards rather than social crimes.

The second example calls for energy conservation measures to be incorporated into the proposed project. Although energy conservation measures may be important criteria according to the county zoning code, they lack a CZM connection and do not have an essential nexus with CZM objectives and policies and SMA guidelines.

The third example requires appropriate measures during construction to mitigate short-term impacts relative to ambient noise levels and traffic disruptions. However, the impacts upon which the conditions are predicated are not directly addressed in the CZM objectives and policies. Unless there are impacts on public access to recreation areas, or publicly owned or used beaches, traffic issues should be dealt with through land use policies, zoning, and other county regulatory mechanisms.

Determining “Significant Effect” and “Cumulative Impact”

Pursuant to HRS Section 205A-22, whenever the authority finds that any excluded use, activity, or operation may have a cumulative impact, or a significant environmental or ecological effect within the SMA, that use, activity, or operation shall be defined as a “development.” Whether or not an action may have a substantial adverse environmental or ecological effect, taking into account potential cumulative effects is a key element for determining whether that action shall require an SMA use permit.

Although not defined under HRS Chapter 205A, “significant effect” and “cumulative impact” are defined under the Hawaii Environmental Impact Statement law, HRS Chapter 343, and Hawaii Administrative Rules (HAR) Chapter 11-200, Environmental Impact Statement Rules.

> “Significant effect” means 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 Section 343-2].
>
> "Cumulative impact" means the impact on the environment which 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 such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time [HAR Section 11-200-2].

Furthermore, HAR Section 11-200-12 has established significance criteria for determining whether an action may have a significant effect on the environment.

The definitions and criteria for determining "significant effect" and "cumulative impact" are set forth above are acceptable to the Office of Planning when considering their meaning in the context of SMA permitting. The county authorities and county planning departments may apply these definitions and criteria to assess potential affects resulting from any uses, activities, or operations within an SMA in making determinations relative to SMA use permits, minor permits, and SMA permit exemptions. However, application of the significance criteria for SMA permit decision-making should be limited to the CZM objectives and policies and SMA guidelines.

Determining SMA Major Permits, Minor Permits, and Exemptions

Pursuant to HRS Section 205A-28, no development shall be allowed in any county within the SMA without obtaining an SMA permit. All proposed actions within an SMA shall be subject to assessment and determination made by the director of the respective county planning department about whether the proposal:

1) Is exempt from the requirements of SMA permit;
2) Requires an SMA minor permit; or
3) Requires an SMA use permit (also called SMA major permit).

When evaluating a proposed use within the SMA, the first point of inquiry is whether the proposed use, activity, or operation is on the list of developments included or excluded from the definition of "development" under HRS Section 205A-22. If the proposed use, activity, or operation is specifically excluded from the definition of "development," the second point of inquiry is whether the excluded use, activity, or operation may have a cumulative impact, or a significant environmental or ecological effect on the SMA.

In the 2011 Legislative Session, the Legislature amended the definition of development to exclude "[c]onstruction or reconstruction of a single-family residence that is less than seven thousand five hundred square feet of floor area and is not part of a larger development[.]" *See* 2011 Haw. Sess. Laws Act 153. The Legislature did not provide guidance on how to measure floor area. Since SMA permitting authority is with the counties and the CZM Program is a network managed regulatory scheme, the Office of Planning defers to the counties on how it measures floor area. However, the Office of Planning advises that counties follow their existing ordinances that define floor area for guidance to remain consistent under each counties land use regulatory scheme.

For a proposed use, activity, or operation that is a "development," third point of inquiry is whether the proposed development requires a "special management area minor permit" or a "special management area use permit." These terms are defined as follows under HRS Section 205A-22:

> "Special management area minor permit" means an action by the authority authorizing development the valuation of which is not in excess of $500,000 and which has no substantial adverse environmental or ecological effect, taking into account potential cumulative effects.
>
> "Special management area use permit" means an action by the authority authorizing development the valuation of which exceeds $500,000 or which may have a substantial adverse environmental or ecological effect, taking into account potential cumulative effects.

Developments that are eligible for the SMA minor permit, based on a valuation of less than $500,000, should be subject to some form of assessment to show that the authority made a determination that the proposed development will have no substantial adverse environmental or ecological effect, taking into account potential cumulative effects.

Note that the valuation threshold was increased by the legislature in the 2011 session. *See* 2011 Haw. Sess. Laws Act 153. The initial project cost trigger for an SMA major permit was $25,000. In 1982, it was raised to $65,000 and in 1991 to $125,000. On several occasions, the Office of Planning sought its repeal on the basis that the key factor in determining a major or minor permit is the potential for adverse ecological and environmental impacts, and that cost does not necessarily measure the level of impact.

Enforcement of SMA Permit Conditions

Enforcement of the SMA permit requires the county planning departments to monitor permitted activities, operations, and uses in the SMAs, and coordinate corrective actions to ensure compliance with the CZM objectives and policies and the SMA guidelines. An essential nexus between SMA permit conditions and CZM objectives and policies makes these conditions enforceable under the CZM law. In contrast, inappropriate or unenforceable permit conditions put the SMA permitting system at high risk of being judicially challenged by affected groups or individuals. This can waste taxpayers' money, strain government resources, and detract the CZM objectives and policies.

The County Planning Departments are authorized to impose civil fines for any SMA violations pursuant to HRS Section 205A-32. Any individual, corporation, partnership, organization or association who violates any SMA provision (HRS Chapter 205A, Part II) or shoreline setback provision (HRS Chapter 205A, Part III) shall be liable for the cost of returning the affected environment or ecology within the coastal management area to the condition existing before the violation. SMA violations will result in a civil fine up to $100,000 with a civil fine up to $10,000 a day for each day in which such violation persists pursuant to HRS Section 205A-32.

The following are examples of tools that can be applied to monitor and enforce SMA permit conditions:

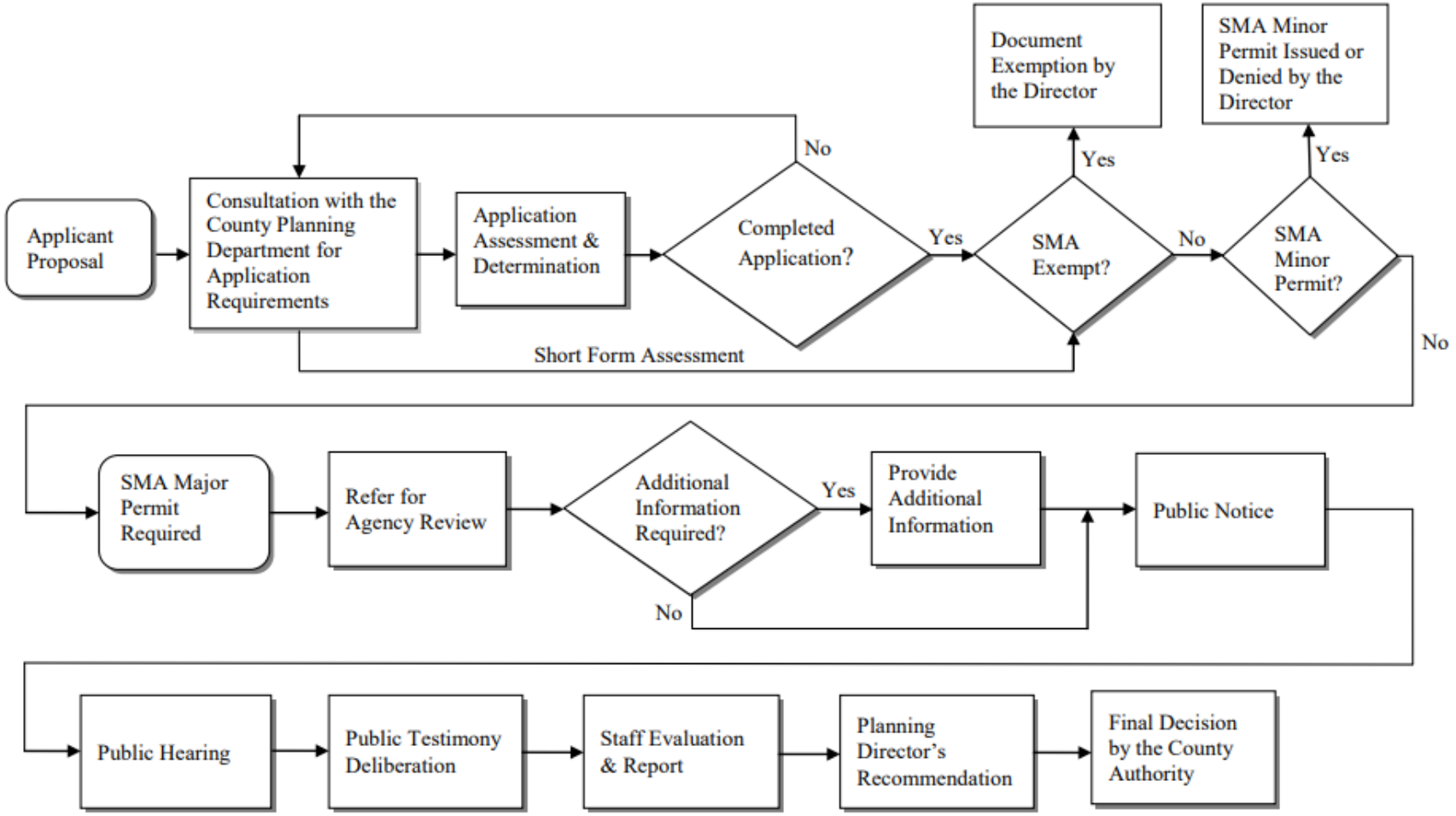
1) Site visit and inspection;

2) Liability of applicant and landowner;
3) Periodic status reports from applicants as an ongoing condition;
4) Cross-review of other permit or approval applications under the county planning departments;
5) Time limits to the granted SMA permit, with additional approval required for time extensions;
6) Additional review and approval for any modifications to the original proposal or plans;
7) Civil fines and/or revocation of SMA permit for failure of complying with the foregoing conditions; and
8) Responses to complaints by the public or by affected individuals or groups.

SMA Permitting Process Overview

Following flowchart diagram illustrates the sequence and decision-making process for the SMA permitting process.

SMA Permitting Process Overview



Source: *Special Management Area (SMA) Permit System Project - Final Assessment Report*, 2005