

STATE OF HAWAII STATE LAND USE COMMISSION MEETING
HYBRID MEETING - SEPTEMBER 25, 2025

DATE: September 25, 2025

TIME: 10:00 a.m.

VIRTUAL: [https://us02web.zoom.us/j/](https://us02web.zoom.us/j/88684965590?pwd=1hMTlyD93s80XL3Ev0bTbXRDxpfoyp.1)

88684965590?pwd=1hMTlyD93s80XL3Ev0bTbXRDxpfoyp.1

LOCATION: Leiopapa A Kamehameha, State Office Tower
235 South Beretania Street, Room 405
Honolulu, HI 96813

FINAL

I. Call to Order

II. Informational Briefing: Environmental Impact Statement ("EIS") Presentation by the State of Hawaii Office of Planning and Sustainable Development ("OPSD"), Environmental Review Program ("ERP") and Ron Terry from Geometrician Associates, ZLLC. Presentation on the State's EIS process, including statutory requirements, review procedures, and the Commission's role in evaluating environmental documents.

III. Adjournment

BEFORE:

PARTICIPANTS

LUC COMMISSIONERS:

Brian Lee

Nancy Carr Smith

Bruce U'u

Mel Kahele

Dan Giovanni (via Zoom)

Myles Miyasato (via Zoom)

LUC STAFF:

Daniel Orodener, Executive Officer

Ariana Kwan, Chief Clerk

John Dubiel, Esq., Deputy Attorney General (Zoom)

OFFICE OF PLANNING AND SUSTAINABLE DEVELOPMENT
("OPSD"):

Mary Alice Evans, Director

Thomas Eisen, Planner

GUEST SPEAKER:

Ron Terry from Geometrician Associates, LLC

HAWAII STATE
LAND USE COMMISSION MEETING
HELD HYBRID ON
THURSDAY, SEPTEMBER 25, 2025
10:00 A.M.

COMMISSIONER LEE: Aloha and good morning everybody. This is the September 25th, 2025, Land Use Commission meeting. This is a hybrid meeting, which is physically being held at the Leiopapa A Kamehameha, State Office Tower, at 235 South Beretania Street, Room 405, Honolulu, Hawaii, 96813. This meeting is also open to the public.

For all meeting participants I would like to stress the importance of speaking slowly, clearly, and directly into the microphone. Before speaking, please state your name and identify yourself for the record.

This is a hybrid meeting, so please be aware that all meeting participants are being recorded on the digital record of this Zoom meeting, which will be posted to YouTube and used for court reporting purposes.

Your continued participation is your implied consent to be part of the public record of

1 this event, so if you do not wish to be part of the
2 public record, you should exit this meeting now.

3 Please note that the question and answer
4 feature on Zoom will only be monitored for signing
5 up for public testimony, and all other
6 communications will not be addressed or part of the
7 meeting record. Communications can be emailed to
8 our office at dbedt.luc.web@hawaii.gov.

9 I will also share with all participants
10 that we will take breaks from time to time. So for
11 the commissioners participating via Zoom, when I
12 call your name, please indicate where you are
13 attending this meeting and if there is anyone else
14 over the age of 18 present with you.

15 And once again, my name is Brian Lee from
16 Hawaii, from Oahu, and I will be serving as Chair
17 today. We currently have nine seated Commissioners,
18 and along with me today are two members from Oahu,
19 Commissioner Mel Kahele, and the other commissioner
20 is not here yet. Commissioner Ku'ike Kamakea-Ohelo
21 is not making it today, I have just been told.

22 Okay. And then we have one member here
23 from Maui, Commissioner Bruce U'u, and one member
24 from Kauai, Commissioner Dan Giovanni. Are you by
25 yourself?

1 COMMISSIONER U'U: By myself, and I'm over
2 18.

3 COMMISSIONER LEE: Oh, that's good. I'm
4 not sure you're able to drink yet, but thanks for
5 confirming you are by yourself.

6 And also we have here one member in person
7 from Hawaii island, Nancy Carr Smith. And let's see
8 if I see Myles Miyasato, yes, he's there virtually
9 from Hawaii Island. Commissioner Miyasato, are you
10 there by yourself?

11 COMMISSIONER MIYASATO: Yes, I am.

12 COMMISSIONER LEE: And I know that he is
13 over 18, and 21, so you're -- later on tonight you
14 can party.

15 Okay. Commissioner Ken Hayashida is
16 absent today, who is from Oahu, and then also absent
17 today and excused is Commissioner Michael Yamane
18 from Kauai. And as earlier indicated, Commissioner
19 Ku'ikeokalani Kamakea-Ohelo is also absent.

20 So besides us in attendance today is the
21 Land Use Commission Executive Officer Daniel
22 Orodenker and LUC Chief Clerk Ariana Kwan, and with
23 us virtually is our Land Use Commission Deputy
24 Attorney General John Dubiel. Thank you for joining
25 us and being with us today.

1 Again, court reporting transcriptions are
2 being done from this Zoom recording.

3 Now we're going to go to agenda item
4 number 2. This is an informational briefing from
5 the Environmental Review Program, ERP, a division of
6 the Office of Planning and Sustainable Development,
7 also known as OPSD. We last heard from OPSD/ERP at
8 our November 7th, 2024, meeting. And today's
9 presentation will serve as a helpful refresher as we
10 prepare to review an upcoming Environmental Impact
11 Statement, also known as EIS.

12 For public testimony, I will now recognize
13 any written public testimony submitted in this
14 matter. Ms. Kwan, has there been any written
15 testimony submitted?

16 MS. KWAN: No, Mr. Chair.

17 COMMISSIONER LEE: Thank you, Ms. Kwan.
18 Are there any members of the public that wish to
19 testify today on this matter?

20 MS. KWAN: Seeing none using the Q&A
21 feature, Chair.

22 COMMISSIONER LEE: Thank you, Ms. Kwan.

23 Okay, we'll now go into our presentations.
24 Can I ask for the staff from ERP to introduce
25 themselves and provide an estimate of the duration

1 of your presentation.

2 MS. EVANS: (Inaudible)

3 THE COURT: Are you --

4 MS. EVANS: Oh, so I didn't have my --
5 didn't have my microphone on, my apologies.

6 I'm Mary Alice Evans, the Director of the
7 Office of Planning and Sustainable Development of
8 which the Environmental Review Program is a key part
9 of our larger program.

10 So first we'll do a little bit of
11 background on ourselves as an introduction, and then
12 we will be going into a PowerPoint presentation,
13 which you have in your Board packets, with
14 additional information on the rules.

15 And the way we'd like to present, with
16 your permission, is that Tom and I will alternate,
17 and then Ron Terry who is a former Environmental
18 Council member of very esteemed standing, and who
19 was very helpful in drafting the rules update that
20 we are now speaking to.

21 So we'll be asking Ron to chime in from
22 time to time, and he can, also on his own behalf,
23 add comments whenever he feels that that would add
24 clarification for your elucidation.

25 Okay? Can I proceed?

1 COMMISSIONER LEE: Thank you, Director
2 Evans. Please proceed with your presentation.

3 MS. EVANS: Okay. A little background
4 about me. I've worked for the State for over 50
5 years as a planner, the State of Hawaii, in a
6 variety of different departments and with different
7 planning missions.

8 I started out working with low income
9 communities, Molokai, Nanakuli, Waimanalo, and Hilo,
10 and had a wonderful opportunity to work with those
11 communities on streamlining some of the state
12 services.

13 This was way back before computers and the
14 opportunity to use automation to make those more
15 accessible to people, so it was a very -- it's a big
16 challenge. It still is, but it's different now.

17 After that, I went to the Office of State
18 Planning, which was created in 1987, and worked on
19 functional plans, and on a team that worked on the
20 Department of Hawaiian Homelands, Land Claim
21 Settlement, and the OHA claims settlement. Did that
22 for about eight years.

23 Then I worked on Special Education Consent
24 Decree and Land Use Planning, and Economic
25 Development. And then I went to DAGS as a deputy

1 comptroller and learned an amazing amount about the
2 State's procedures for ensuring that the work that
3 the public-facing departments can move forward.

4 After that I went to work for the Office
5 of Planning, which by that time was in the
6 Department of Business Economic Development and
7 Tourism. I reported to Abe Mitsuda who was the Land
8 Use Division Administrator who was the key point of
9 contact for the Land Use Commission for those eight
10 years.

11 Then I did a stint as eight years as the
12 DBEDT Deputy Director, and then went back to the
13 Office of Planning as its director. So I'm going to
14 turn that over to Tom Eisen who has an equally
15 interesting career with the State. Go ahead, Tom.

16 MR. EISEN: Thank you. Yes, Tom Eisen,
17 career not only with the State of Hawaii but with
18 some of the counties here also. It's been over 20
19 years of public service, and mostly with the State,
20 although starting with the City and County of
21 Honolulu, processing Special Management Area permits
22 and things like that back in the early 1990s.

23 Relatively soon after that, transferred to
24 the Office of State Planning and actually started
25 working with Mary Alice quite a while ago. I was in

1 the Coastal Zone Management Program at that time.
2 And then actually after a reduction in force, I was
3 transferred over to the Department of Health, and I
4 worked there for a while.

5 And then was picked up by the County of
6 Maui Planning Director who I had been working with
7 in the role of the CZM Program, so I was working
8 there. What happened after that, I went to DLNR for
9 a few years processing Conservation District Use
10 applications.

11 Then went to DBEDT as a Marine Program
12 Specialist in the Ocean Resources Branch. So where
13 else have I been, ended up here. Well, actually,
14 "here" has changed. Initially "here" was the Office
15 of Environmental Quality Control. As I'll explain
16 later, that became the Environmental Review Program
17 of the Office of Planning and Sustainable
18 Development. It's been close to ten years now in
19 this position.

20 And then there was a time when I worked
21 for a fairly large planning firm locally, so I've
22 had a lot of opportunity for different perspectives
23 at the Land Use Planning regime, and that's all
24 helped me still try to figure out what's going on.

25 MS. EVANS: And I'd like to ask Ron Terry

1 to introduce himself to the Commissioners, with your
2 permission.

3 MR. TERRY: Yes. Well, you know, I went
4 to UH Hilo, graduated from there in 19 blah blah
5 blah, and I've prepared about a dozen EISEs and
6 hundreds of EAs over the last 35 years in my
7 profession. I forgot to mention I picked up a Ph.D.
8 at Louisiana State University, and then came back to
9 Hawaii.

10 In addition to that I've served on three
11 different boards and commissions for 24 years total,
12 starting with Marine and Coastal Management Advocacy
13 Council, I can't even say it, it's very long.

14 And then the Mauna Kea Management Board,
15 which is the one that's most similar to what you
16 folks are serving on. We were technically advisory,
17 but advisory in name only. If the board disapproved
18 a project, that project was basically dead. It
19 would not advance to the president and to the
20 regions.

21 And then I got on the Environmental
22 Council in 2014, I believe it was, at the request of
23 Scott Glenn, who many of you know. Scott wanted me
24 to help him re-write the EIS rules, which had not
25 been touched for, at that time, over 20 years and

1 were getting a little stale, and were not addressing
2 -- had systemic problems from long ago. And also
3 had not advanced into the 21st century.

4 So we spent three different years doing
5 that intense public process, and I would say that
6 Scott, Onaona Thoene an attorney, and myself were
7 probably responsible for most of the writing. I
8 give the lion's share credit to Scott, but with
9 enormous help from OEQC staff and the UH Law School.

10 And so I do have background on the current
11 rules. There's only so much one can do by rule to
12 improve and clarify the process. The statute is of
13 course the basis of the rules, and we could not
14 affect that.

15 One of my questions that I sent and is in
16 the agenda here deals with rules, with the statute,
17 and I do have some remarks about that later.

18 COMMISSIONER LEE: Thank you, Director
19 Evans, Mr. Eisen, and Mr. Terry for sharing your
20 vast knowledge and experience with us today. Please
21 proceed.

22 MS. EVANS: May I qualify that on my own
23 behalf, I'm still learning, and I expect to be
24 learning as long as I can still be breathing.

25 So what we've done is we, Tom and I and

1 Ron, have discussed a way of moving through the
2 material so that we have, you'll get to hear more
3 than one voice. So I'll go ahead and start out.

4 In 2021 the legislature decided to move
5 the Office of Environmental Quality Control from the
6 Department of Health where it had been for 50 years,
7 something like that, over into the Office of
8 Planning and Sustainable Development.

9 And it seemed like a very logical move to
10 me, and I was very welcoming of it, because it
11 complements work we do in our other programs. But
12 of course it's a big learning curve for me. Not for
13 Tom and not for Ron, but for me.

14 So, next slide. What we're going to do is
15 first do an overview, and we're going to talk about
16 the Environmental Review triggers. Then we're going
17 to go into the levels of review. We'll talk about
18 resources and have time for questions and answers.

19 We've included a slide with questions, but
20 that in no way limits what you might want to ask, so
21 we'll try to move through this quickly to give more
22 time for discussion, if that's your preference.

23 So Tom is going to take on the next slide,
24 good.

25 MR. EISEN: Okay. This slide captures

1 some language from the Findings and Purpose section
2 of Chapter 343, which is the statute that
3 establishes the Environmental Review process.

4 There's a whole lot of words in this whole
5 presentation and we can get bogged down in looking
6 at them in detail, but really the intent here with
7 these two paragraphs is to show that there's two
8 overarching aspects of Chapter 343. The first
9 paragraph speaks to it being a disclosure process to
10 facilitate good land use decision making. And the
11 second paragraph speaks to it being a vehicle to
12 support public participation in environmental
13 consciousness.

14 This was language from the '70s. Maybe
15 different words would be used today if they were
16 establishing the program, but those are two very
17 powerful purposes of Chapter 343 and the
18 Environmental Review process that it speaks to.

19 MS. EVANS: Okay, next slide. We'll be
20 covering today the process, and roles and
21 responsibilities, and public participation and
22 oversight. I'll probably say this about fifty
23 times, so forgive me if I'm repetitive.

24 343 is a disclosure process, not a project
25 decision making process. It's not an approval of a

1 permit. It is a process of disclosure, and
2 therefore it is decided by the Land Use Commissions
3 and other agencies and boards, on a technical review
4 basis rather than the merits of the project itself.

5 It will inform you by the content and you
6 will make a decision, one, on the level of review
7 that the project merits, and we'll go into what you
8 will make that decision on. And you will then make,
9 at the end of your review of the final EIS, usually
10 the final EIS, you will make the decision about
11 whether it meets the criteria in the law and the
12 rules, and meets those acceptability criteria.

13 That only is a review disclosure process.
14 At that point the project applicant may go forward
15 and have a request to the Land Use Commission for a
16 District Boundary Amendment or Special Permit, or
17 other matter that comes before you.

18 At that point it will be your role to make
19 a decision on the merits based on your own rules,
20 your Chapter 205 law and rules. So it's two
21 different, and I think sequential, processes.

22 So going back to our bullet points, a
23 proposed action must hit a trigger in 343, it has to
24 have one to apply before it goes to figure out
25 whether there's a level of review that applies to

1 it.

2 Here's something that I've learned. The
3 word exemption gets thrown around a lot. Some
4 people when they hear it think that an action is
5 exempt from the law 343. No, it's exempt within the
6 law. It's a level of review that an agency and a
7 board such as yourself can determine that something
8 has a minimal, ordinary, everyday impact that is not
9 a significant adverse impact.

10 Agencies do these decisions all the time.
11 They also develop lists of exempt actions that don't
12 have ground disturbance. There is a guidance in the
13 law that tells them what kinds of things can be,
14 types of things, actions that can be exempt within
15 Chapter 343.

16 And then in the rules, there are two
17 levels of exemption. One is they're so ordinary,
18 like buying paper clips or paper for the office,
19 that they don't need to be recorded. And then a
20 second level of an exemption would be one where they
21 want to record it, make it public, send it to the
22 Environmental Notice for publication.

23 And then the second one is an EA. If an
24 agency thinks that an action is significant enough
25 to deserve disclosure, but they anticipate that it

1 will have a finding of not significant impact, a
2 FONSI, then they may choose to do an EA. At the end
3 of that, they may say no, the EA showed that it met
4 one of the criteria for significant adverse impacts,
5 and ask the applicant or the agency to move to an
6 EIS, or they may decide that the EA showed that
7 there was no significant impact and then they're
8 going to accept that.

9 Agencies must apply the significance
10 criteria in determining the level of review, and
11 we've got a list of those in a future slide.

12 The proposing party is either an Agency or
13 an Applicant. Applicants are normally private
14 parties; property owners, land owners, home
15 builders, developers. And agencies, as we'll go
16 into in another, can be executive boards and
17 commissions, state agencies, county agencies.

18 The Land Use Commission can fall under the
19 general term "Agency" for the purposes of 343. And
20 then agencies, but not OPSD, manage the review
21 either as a proposing or determining agency. And
22 the Land Use Commission may serve that role.

23 SPEAKER: Could you speak (inaudible)?

24 MS. EVANS: Oh, certainly. I'm sorry. My
25 voice is a little bit froggy still.

1 So I'm going to let Tom go into the core
2 decisions around public participation and oversight.

3 COMMISSIONER CARR SMITH: Chair, can I
4 interrupt for just a second? Are we going to hold
5 questions or ask questions as we go? Or what's
6 suggested?

7 COMMISSIONER LEE: What would you prefer,
8 Director Evans?

9 MS. EVANS: Commissioner Carr Smith, I
10 think some of your questions might get answered by
11 our further slides, so I think it might be more
12 efficient to have us move quickly through them.

13 COMMISSIONER CARR SMITH: Sounds good,
14 thank you.

15 COMMISSIONER LEE: Could you give us an
16 idea how long your presentation is so that we can
17 hold our breath?

18 MS. EVANS: Less than an hour.

19 MR. EISEN: It could be a whole lot longer
20 if conversation starts happening.

21 MS. EVANS: I would not suggest holding
22 your breath.

23 COMMISSIONER LEE: Okay, thank you.

24 MS. EVANS: You might end up sounding like
25 me.

1 MR. EISEN: So another key aspect of
2 Chapter 343 is it describes responsibilities for our
3 program, the Environmental Review Program, and that
4 really is to promote the public participation in the
5 overall process, and that's by publishing the
6 Environmental Notice, which you may be familiar
7 with.

8 It announces the availability of new
9 documents that are going through the process, and
10 various other things get included in the
11 Environmental Notice also. It's published on the
12 8th and 23rd of every month.

13 We also maintain an online library of all
14 the EAs and EISes, and various other documents and
15 determinations that are sent to us. There's
16 thousands of items in these libraries, so there's a
17 lot of information going back to the '70s. We're
18 updating the GIS aspect of it. Hopefully that will
19 go back online real soon.

20 Public participation in a specific
21 project, going through the process there's a public
22 comment period that follow the publication of the
23 draft document, either a draft EA or a draft EIS.

24 One thing, there is no comment period on
25 final EAs, final EISes, or exemptions. That is an

1 element of the statute and the rules, and it's often
2 news to various people, so we let them know the
3 process has opportunities for comment but those are
4 the opportunities.

5 Another aspect of these comments that are
6 submitted to us is the applicants must prepare a
7 response to the timely submitted substantive
8 comments on EAs and EISEs. That's all described in
9 detail in the rules.

10 There's a statute on the rules, and this
11 presentation kind of talks about the highlights of
12 both the statute and the rules. You can go into a
13 lot of detail, which we'll do as appropriate in this
14 presentation.

15 MS. EVANS: Ron, did you want to chime in
16 on this one?

17 MR. TERRY: You know, I think not. I'll
18 let you know if I want to do that. I think I'll let
19 you guys do your presentation, then I'll do those
20 questions at the end and have you guys chime in.

21 MS. EVANS: All right, it's a deal.
22 Moving on.

23 MR. EISEN: Okay. So there are nine, or
24 thirteen, depending how you count, statutory
25 triggers for initiating that Chapter -- or they're

1 embedded within Chapter 343, and if an action hits
2 one of these triggers, then Chapter 343 applies and,
3 well, depending how it applies, and some agency will
4 be making the determination on how it applies, but
5 various pathways of clearing the responsibilities
6 will come into play.

7 A later slide will demonstrate the
8 pathways that are available, but these nine triggers
9 are key, because if something doesn't hit a trigger,
10 it doesn't go through the EIS process. So that is a
11 fact that is not always widely known in the general
12 public. They think an EIS should just be done for
13 everything or anything, and there are only certain
14 things that essentially can go through the process.

15 The most common trigger is the use of
16 State or County land, or State or County funds.
17 That essentially captures pretty much anything the
18 government does, but also private uses of public
19 lands or funds.

20 And there's another trigger that's
21 highlighted in green. It's here, it's the
22 reclassification of land classified as conservation
23 district. That pretty much only applies to the LUC,
24 so there's a trigger here specifically for you
25 folks, but that doesn't mean that an action, a

1 proposed action could hit a different trigger and
2 still fall on your plate, essentially, for being
3 considered the agency that makes the determinations.

4 MS. EVANS: So we wanted to get an idea of
5 kind of the relative frequency of the different
6 types of review. So the large circle is all
7 projects that have a trigger that makes them subject
8 to Chapter 343. And that includes those exempt
9 actions that I talked about that are minimal in
10 impact, that an agency can make that determination.

11 Then in the middle circle are the ones
12 that an agency determines merit an Environmental
13 Assessment. And you might see some of those, but it
14 would be rare because many of the matters that come
15 before you will have a potential adverse impact.

16 And then finally the smaller circle are
17 those projects requiring an Environmental Impact.
18 And as you look at the numbers for draft EAs, 71
19 draft EAs in 2024, 55 final. Only five EIS prep
20 notices, and only one EIS accepted.

21 So you can see that at this point in time
22 preparation of an EIS is rare. I think that speaks
23 to external conditions that are beyond our control;
24 the economy, the difficulty in cost of doing
25 projects that will have those adverse impacts.

1 MR. EISEN: I think actually Ron spoke to
2 this in his introduction. He said he had written I
3 think a dozen or so EISes and hundreds of EAs. So
4 the level of magnitude for things that go through
5 the EA process compared to the EIS process.

6 And then with exemptions, it's even a
7 whole order of magnitude beyond that. And again, as
8 Mary also said, it's an exemption from the erstwhile
9 requirement of preparing an EA. That's the core
10 thing that you potentially could get exempted from.

11 MS. EVANS: Okay, this is a little dense
12 but I think it applies to the Land Use Commission.
13 The term agency includes commissions of State and
14 County governments. So the Land Use Commission,
15 when you hear agency, you can be deemed an agency
16 for purposes of 343.

17 An applicant is going to be a corporation,
18 a nonprofit, an individual that is going to be
19 anybody that's not a State or County agency. So
20 that will never be the Land Use Commission.

21 The Land Use Commission can serve as the
22 approving agency. Approving agency is a general,
23 broad term that initially receives and agrees to
24 process a request or discretionary permit. And
25 almost all of the things that come before you are

1 discretionary permits, and you're the first
2 commission to which, or decision making body to
3 which, say a DBA or sometimes a special permit over
4 15 acres, are going to come to. So you will serve
5 as that approving agency.

6 And then normally you would not be a
7 proposing or determining agency, because you're not
8 actually carrying out an action. You're making a
9 decision on an action, but you will serve as an
10 accepting authority if an EA is completed based on
11 the level of review that you have determined is
12 appropriate, and when they first apply to have you
13 serve as the accepting agency.

14 And at that point your role will -- so
15 under Action, you'll be looking at projects
16 primarily rather than programs because you're a land
17 use decision making agency, but we've -- including
18 in the definition of action are programs as well.

19 And so when you hear the term programatic
20 EIS, that's where that derives from. And it's
21 generally an EIS that an agency decides to do to
22 cover a broad program of actions.

23 And it has recently been determined by the
24 courts that a program that grants permits for, for
25 instance commercial boat operators, is not exempt

1 from 343. And that means that the agency that does
2 that action will need to comply with 343, starting
3 with a determination of what level of review is
4 required.

5 So I'm going to turn it over to Tom.

6 MR. EISEN: So, yeah, there's a lot of
7 words and detail in the statute, and it matters that
8 we give them to you, but don't want to get too lost
9 in them.

10 These terms, they're more content-related
11 and they are generally considered by the entity
12 that's preparing, let's say, an EIS. It goes into
13 detail on what an effect is, whether it's primary,
14 secondary, cumulative. Because these are all
15 aspects of a proposed action that need to be
16 analyzed in an EA or an EIS.

17 As a reviewer and an essentially decider
18 if the EIS was done adequately, it's good to have a
19 working familiarity with these terms because you
20 need to decide if the EIS was properly prepared.

21 So these terms are here. They're in the
22 rules. They're in the statute. So we offer them as
23 something to get familiar with, but we don't want to
24 get bogged down in a detailed discussion of all of
25 those right now.

1 MS. EVANS: So in your role as an
2 approving agency, when you determine what level of
3 review is appropriate, when a petition comes to you
4 by an applicant saying, "we want to," you will be
5 the first discretionary permit.

6 So we now want to find out what level of
7 disclosure we need to do. You're going to look at
8 the criteria for significance that we've listed on
9 this slide and that are also in the rules.

10 And you'll notice that they focus on
11 adverse and negative impacts. Before this was
12 included in the rules, there wasn't a distinction
13 between positive and beneficial impacts and adverse
14 impacts, and sometimes that caused some confusion.

15 But you'll see that these are, because
16 they're listed you'll be able to work through them
17 as a checklist and decide whether, if any of them
18 are relevant to the petition before you to determine
19 the level of review, that then they must do an EIS.

20 Is that correct, Tom?

21 MR. EISEN: Yes.

22 MS. EVANS: Yes, okay. So this is your
23 first set of review comments.

24 MR. EISEN: And they're written in a way
25 that can be interpreted, and that ability to

1 interpret was intentional for the agencies to make
2 when they are analyzing whether a proposed action is
3 likely to have a significant impact or not.

4 And being able to be interpreted makes it
5 subjective, so a lot of effort should go into it to
6 be sure it's done well.

7 Okay, next. We have this flow chart on
8 our website of the process. It looks a little
9 intimidating, and we're not going to go step by step
10 into it all, but right now the intent is to show
11 that there's some questions at the beginning part
12 with kind of this white background, that are
13 intended to tease out, is the proposed action
14 properly in Chapter 343. And if so, which of the
15 three levels of review are appropriate.

16 There's the exemption level which is the
17 lightest gray and the fewer steps. There's the
18 environmental assessment level which is in the
19 middle. And then across the bottom is the
20 Environmental Impact Statement level of review with
21 more steps, more detail, because it's intended to do
22 a deeper dive into more significant actions.

23 Ron, you certainly can chime in on these
24 process-related things, because you interact with
25 it, as you see fit.

1 MR. TERRY: I don't know if I can read
2 this, Tom.

3 MR. EISEN: Yeah, it's really not meant to
4 read. It's just meant to show that there is a
5 process. There's a method to the madness.

6 And at some point if it's appropriate we
7 can do a deeper dive, but we can get really lost in
8 the detail, and that's not the point for here.

9 Next one. Again, just for initial
10 considerations, it is important to make sure that a
11 proposed action is properly going through 343. So
12 these, there are some questions here, again to tease
13 out. Does this proposal meet the definition of an
14 action, and if so, is a trigger hit.

15 And then an interesting aspect is for
16 applicant actions, there needs to be a discretionary
17 approval. And often that just happens without any
18 thought and pretty much any approval request that
19 would come to the Land Use Commission. There is a
20 discretionary consent involved.

21 But we do get cases, and a lot of people
22 come to us to ask us questions when you get novel
23 cases where it's hard to figure out some of these
24 questions. So we sit and help agencies figure out
25 what might be the case.

1 We at the Environmental Review Program do
2 not have the authority to make any determination,
3 but we can support agency, agency staff, as they
4 ponder the ideas, when things are -- there's often a
5 lot of grayness involved and they have to make
6 decisions.

7 But the outcome of this initial
8 consideration is really to determine if Chapter 343
9 applies, and if so, which pathway to clear the
10 requirements; exemption, do an EA, or do an EIS.

11 And this next slide again just shows that
12 there are these pathways for an exemption and for an
13 Environmental Assessment. There is some detail to
14 it, but not as much detail as to the EIS process,
15 which is on the bottom here.

16 And certainly my general understanding is
17 that most of the actions that have gone to the Land
18 Use Commission have gone through the EIS process.
19 It's not mandated that that has to be the EIS, but
20 that often has been the decision.

21 So the focus probably should be on EISes
22 here, but it is certainly possible that an action
23 could be presented to you and you could determine
24 that an EA is the appropriate level of review.

25 Again, that's all decided on an individual

1 basis, and we're available to help agencies sort
2 through this, but we don't have the authority to
3 make any determination.

4 MS. EVANS: Tom, before you move on, I
5 want you guys to note that at the end of each one of
6 these pathways, there is a small hexagon in dotted
7 lines, and it says "judicial challenge period."

8 And so that means that an opponent of a
9 project who feels that either the level of review
10 was wrongly selected, or that the acceptability of
11 the document was wrongly determined, has the ability
12 to challenge the agency, and that could include the
13 LUC and it does from time to time, in the courts.

14 And I think at this point that often goes
15 to the Environmental Court which is a special panel
16 of judges that have volunteered within the judiciary
17 to specialize in this area in addition to their
18 other judicial duties.

19 And so Scott Glenn and I were invited to
20 provide this training that Tom helped us with, in
21 June to the Environmental Court judges, focusing for
22 them on that end point where there's judicial
23 challenge.

24 And as a side note, opponents of projects
25 often will try to utilize this option when they are

1 concerned that a disclosure process, if determined
2 to be acceptable, might set up a project they're
3 strongly opposed to, for a positive decision on the
4 first discretionary permit.

5 So we are seeing more and more legal
6 challenges posed to this process, the 343 process.
7 And so they're now setting a fair body of legal
8 precedents and decisions that also apply to 343 as
9 well.

10 MR. EISEN: A similar point on the flow
11 chart, the heavy black circles denote agency
12 determinations. So at the beginning and the end of
13 every pathway is an agency determination. And all
14 agency determinations are legally challengeable.

15 So I guess the idea is to use proper
16 judgment and don't spend too much time in court.

17 MS. EVANS: Getting close to our last
18 slide. Okay. This is really important for you.
19 These are the three areas of technical review that
20 the Land Use Commissioners should apply to a final
21 EIS that comes before you as part of a petition.

22 The first one you will be looking at is
23 whether the EIS, I'm going to use the term EIS
24 because you're not likely to see EAs, has followed
25 the procedures in the law and the rules.

1 That's kind of a checklist thing, because
2 they either followed them or they didn't. And
3 you'll be able to determine that fairly quickly.

4 The content requirements are also spelled
5 out. And here's a point I want to make. Your
6 content requirements for your DBA petitions follow
7 205. The content requirements for an EIS may be
8 similar and overlapping, but they come from a
9 different statutory authority.

10 And you're going to have to apply the 343
11 content requirements when you're looking at the
12 acceptability of an EIS, and then pivot to the 205
13 content requirements when you are looking at the
14 actual petition for a decision on your part. So
15 that's a tricky one, because there's considerable
16 overlap as far as I can tell.

17 Then the third one is the one where I
18 think Ron, Tom, and I all agree is where there can
19 be gray area and has a lot of potential for legal
20 challenges. And that is, the law requires that all
21 comments received in the comment periods must be
22 responded to in appropriate and --

23 MR. EISEN: Satisfactory.

24 MS. EVANS: -- satisfactory to the
25 accepting authority.

1 So prior to the updated rules, sometimes
2 opponents of projects, when the project was still in
3 the disclosure process, would send in 400 comments
4 that were essentially identical or similar with
5 different signatures. And it got its own name,
6 comment bombing, because it then added time and cost
7 to completing this criteria for acceptability.

8 Ron, I think, was instrumental in getting
9 a streamlined way to respond to identical or similar
10 comments so that they can now be -- it is acceptable
11 for an applicant to combine and have the same
12 response to the same comment.

13 MR. EISEN: A batched response.

14 MS. EVANS: Yeah. So again --

15 MR. EISEN: I believe your Board packet
16 has the content requirements, which is pages and
17 pages from the rules. I think there are 16 specific
18 paragraphs that indicate a section if an EIS needs
19 to be there, so there's a lot of detail in your
20 Board packet.

21 MS. EVANS: That's going to be more of a
22 checklist, I think, in terms of legal challenges.
23 Because you can link to where in the document that
24 content requirement has been met.

25 But that's not to say that, as my

1 supervising AG always told me, if somebody wants to
2 sue, they will. So it doesn't mean that, you know,
3 you won't see challenges to content and/or
4 procedures.

5 MR. EISEN: Mary Alice spoke to this
6 before, but there are -- it's possible to legally
7 challenge agency determinations, and there's time
8 periods. This is all in the statute, but
9 essentially EISes, the acceptance of it is the
10 biggest thing, can be challenged. And also the
11 decision that an EIS is not required, that
12 determination can be challenged.

13 So there's a lot of opportunities for
14 legal challenge so the Deputy Attorney Generals can
15 be kept busy with this stuff.

16 MS. EVANS: And now, these discussion
17 questions came from Ron Terry, and they're --
18 actually I think, Ron, would you agree that these
19 are thought experiments that can be answered in
20 different ways?

21 Would you like to take over from here on
22 the discussion questions?

23 MR. TERRY: Yeah, I've prepared a little
24 bit of thoughts about each one of them. And then I
25 kind of wanted to open up it one after another, to

1 discussion, and so we'll have a kind of discussion
2 after each one of these, and hopefully we can get to
3 it.

4 I guess I have two questions to start
5 with, is would the Commissioners want to ask about
6 you folks' presentation at this point? And is there
7 a need for a break? I see Dan yawning and I'm --

8 COMMISSIONER LEE: I don't think you were
9 supposed to see that, but we'll take a break at
10 11:00. So is that a good time for you, or should we
11 take the break now? Ron?

12 MR. TERRY: For me, it's great, yeah. Any
13 time you guys want.

14 COMMISSIONER LEE: Okay. Please go ahead,
15 and I think we should ask -- we should take a little
16 bit of time to ask some questions of the
17 presentation, which I want to remind everyone can be
18 found at the Land Use Commission website at
19 LUC.Hawaii.gov, and it will be archived in the
20 Agendas and Minutes link for the public to see.

21 So at this time I want to open it up to
22 any questions from Commissioners from what was
23 presented so far. Commissioner Carr Smith, did you
24 have something, or has it been answered?

25 COMMISSIONER CARR SMITH: I do have some

1 questions. I wonder if we could drop the Question
2 screen so we can see the other commissioners. Thank
3 you.

4 Okay. If you want me to start, what
5 determines who reviews an EIS? Which agency?

6 MR. EISEN: The way the law is written,
7 it's the first agency that agrees to take on an
8 application is considered the approving agency. So
9 oftentimes there may only be one agency involved,
10 and then it's just that agency.

11 But in a case where there's multiple
12 potential agencies, it's the first agency that
13 basically agrees to be involved. And the rules also
14 provide a rare opportunity for us to do some things.
15 If there cannot be a decision of which agency that
16 is, then we can help influence the decision, but the
17 idea is that the agencies would sort it out for
18 themselves.

19 And the whole point is the EIS -- or the
20 Environmental Review Process should happen early in
21 the decision making process so it's available for
22 all the decision making that follows.

23 So that's why the idea is it's the first
24 agency that will be making a discretionary consent.

25 MS. EVANS: Commissioner Carr Smith, I

1 actually had an opportunity to have an operational
2 role in where there were four agencies that could
3 potentially have served as the approving agency, and
4 they couldn't make up their minds.

5 And they went back and forth, and none of
6 them wanted to do it. And so it went to the
7 Director of the Office of Planning and Sustainable
8 Development to make that decision, and I did. And
9 it worked out well.

10 It was a Hawaii Island action from an
11 applicant, and so the law and the rules have
12 provided a way to resolve that if no agency is
13 initially willing, and there are several agencies
14 that could serve.

15 MR. ORODENKER: If I may, Dan Orodenker,
16 Executive Officer. One of the things that, I mean,
17 we're talking about the way the rules work, but from
18 a practical standpoint, very often what happens is
19 that the petitioner determines which discretionary
20 permit that they want to get first. And that
21 results in that particular agency being the
22 accepting authority.

23 You may have seen in the newspaper about
24 the Maui project where the City and County has
25 decided not to be the accepting authority for a

1 project. That was because the petitioner made the
2 decision that the first permit that they were going
3 to come for was the District Boundary Amendment
4 rather than the re-zoning.

5 COMMISSIONER CARR SMITH: Okay. That
6 makes sense. I'm not sure I totally understand yet,
7 hopefully I will. On the trigger slide that you
8 had, it said Triggers for EIS. Are those also
9 triggers for EA, and then you go through the EA
10 process and then if there's all those yeses, then it
11 drops down into the EIS?

12 MR. EISEN: Correct. It's the trigger for
13 the whole process.

14 COMMISSIONER CARR SMITH: The whole
15 process, not just --

16 MR. EISEN: To get you in the door --

17 COMMISSIONER CARR SMITH: -- the EIS.

18 MR. EISEN: -- if one of the -- and then
19 once you're in the door, you decide whether --
20 actually, whether an EA is required or an exemption
21 or an EIS. But yeah, those are triggers to go into
22 the process.

23 COMMISSIONER CARR SMITH: Okay. So the
24 triggers and the exemption are the same for an EA
25 and an EIS.

1 MR. EISEN: Yeah, to get into
2 consideration, it's those triggers --

3 COMMISSIONER CARR SMITH: The process,
4 yeah.

5 MR. EISEN: -- are the ones, correct.

6 COMMISSIONER CARR SMITH: Okay. I was
7 curious how often at LUC and the Environmental
8 Review Program -- Program work together, just since
9 that's what we're doing.

10 MR. EISEN: We are very reactive. Things
11 get sent to us for publication. That's generally
12 our involvement with an actual project going through
13 the process. There's not a lot.

14 I would say that in the scheme of things,
15 there's other agencies that have a lot more business
16 going on that relates to Chapter 343. There's some
17 agencies that hardly ever do it. So you guys do
18 some, but not a lot --

19 COMMISSIONER CARR SMITH: Right, right.

20 MR. EISEN: -- that's kind of in the
21 relative sense.

22 COMMISSIONER CARR SMITH: Right.

23 MR. EISEN: How it seems to be.

24 COMMISSIONER CARR SMITH: So I guess if I
25 may, I could ask the Executive Officer when an EIA

1 (sic) is before us to approve or to consider, do you
2 go to the ERP agency to get their input?

3 MR. ORODENKER: I'm not sure what you mean
4 by input. It's up to the Commission to make a
5 determination on the sufficiency of the EA or the
6 EIS.

7 If we have questions with regard to
8 technical aspects or whether or not anything, we
9 usually call ERP and -- I mean Environmental
10 Protection Office, and ask Tom in particular, you
11 know, how do we handle this particular situation.

12 That doesn't happen very often, but there
13 are situations where strange things occur. And the
14 biggest problem that we usually have that results in
15 us calling Tom is if there is a question with regard
16 to publication or whether or not, for instance, what
17 happens if somebody doesn't get their letter
18 responded to or what happens if someone requests an
19 extension of time to respond to a document.

20 Then we would look to Tom for advice.

21 MR. EISEN: Yes. Most agencies, when they
22 interact with us, it's actually not asking us
23 questions or asking us for comment on the action.
24 It's they're just submitting it to us for routine
25 publication, and there's an interaction process for

1 that, but it's very perfunctory, as often we don't
2 -- we're a very small program and we don't have the
3 capability to review and comment on all the EAs and
4 EISEs that are happening out there.

5 It would be great if we did, but with the
6 current limitations, we don't typically give
7 substantive comments on them. But if an agency has
8 questions about a quirk of the process, we will help
9 them figure that out.

10 But most agencies that have experience
11 with the process have figured out how it works for
12 them. And just only strange cases, so I only hear
13 about the outliers.

14 COMMISSIONER CARR SMITH: Right, right.
15 Okay. Thank you. I was just trying to get a sense
16 on how we tap into people that are experts in the
17 field and what that looks like. So I'm good for
18 now. Thank you.

19 COMMISSIONER LEE: Okay. Before
20 Commissioner Kahele, I see Commissioner Giovanni's
21 hand held, so we're going to take his question, and
22 then we'll take a 10-minute break as soon as
23 possible. Thank you.

24 Commissioner Giovanni.

25 COMMISSIONER GIOVANNI: Thank you, Chair.

1 I think I've unmuted myself. So I have a two-
2 parter. I'd like first to ask Mary Alice and the
3 team to elaborate on one of the triggers.

4 I think it's number 8, which is if the
5 project proposed is a wastewater treatment facility,
6 a waste energy facility, an oil refinery, or a power
7 generation facility including renewable energy
8 greater than 5 megawatts.

9 Could you -- I don't know if I quoted that
10 correctly, but could you elaborate on how -- what
11 the, you know, characterize that trigger for me a
12 little bit. Then I have a question about it.

13 MS. EVANS: Thank you, Commissioner
14 Giovanni. Let me frame it a little bit. These
15 specific triggers were added because the public felt
16 that these types of projects were especially at
17 potential for adverse environmental impacts.

18 And so even though they don't hit any of
19 the other triggers. There's no State or County
20 lands or State or County monies involved, or any of
21 the others, these ones that -- a wastewater
22 treatment plan, waste energy, landfill, oil
23 refinery, or an electrical generating facility
24 automatically are a trigger.

25 These projects have to go through the 343

1 process, so that's just framing it. Did I answer
2 the first half?

3 COMMISSIONER GIOVANNI: Yeah, I think you
4 did. So let me ask you my second follow-on
5 question, which is a hypothetical. So if a proposed
6 project is -- I'm going to be specific here. It
7 might be helpful, it might not be, so you can
8 generalize it if I'm too specific.

9 But if a proposed project is for a
10 renewable energy solar -- a solar power plant that
11 is large and would require hundreds of acres and
12 produce tens of megawatts of power, and they require
13 -- and they want to put it on agricultural land.

14 And so they want to come to the Land Use
15 Commission for a Special Use Permit to do that.
16 Would that trigger the need for an EIS?

17 MS. EVANS: I believe it would.

18 MR. EISEN: Let me say that, so the words
19 that are written down here, they don't include the
20 asterisks, and in the statute and the rules there's
21 language that can further refine this, and
22 specifically with the electric generating facility.

23 It has to be a fossil-fueled plant over 5
24 megawatts. So if it's a pure solar plant, it --

25 MS. EVANS: I learned something.

1 MR. EISEN: It presumably wouldn't meet
2 the definition that is here and may not have any
3 other triggers.

4 COMMISSIONER GIOVANNI: That's the heart
5 -- that's the heart of my question, whether it's --
6 is there a distinction between a fossil plant and a
7 renewable plant that would exempt consideration of
8 the trigger?

9 MR. EISEN: Yeah, well, the statute has
10 this language that further refines this. So it does
11 specify it has to be fossil fueled for this trigger
12 to apply.

13 COMMISSIONER GIOVANNI: Thank you very
14 much. Nothing further.

15 COMMISSIONER LEE: Thank you. We'll now
16 take a 10-minute break and we'll come back roughly
17 around 11:10. So thank you, everybody.

18 (WHEREUPON, a recess was taken.)

19 COMMISSIONER LEE: All right. It's 11:11
20 a.m. and we will be reconvening. And I believe that
21 the ERP Branch has an update and clarification.

22 MS. EVANS: Thank you, Commissioner.
23 Thank you. Commissioner Giovanni, during the break
24 we were able to look up the actual definition in the
25 statute that answers your question. And I thought

1 it would be helpful to read it out. It's very
2 short. Would you mind?

3 COMMISSIONER GIOVANNI: Do it.

4 MS. EVANS: Okay. In Chapter 343-2,
5 definitions, the definition of a power generating
6 facility means a new fossil-fueled electricity
7 generating facility, where the electrical output
8 rating of the new equipment exceeds 5.0 megawatts;
9 or, and here's number 2, an expansion in generating
10 capacity of an existing fossil-fueled electricity
11 generating facility where the incremental electrical
12 output rating of the new equipment exceeds 5.0
13 megawatts. Thank you.

14 COMMISSIONER LEE: Commissioner Giovanni,
15 is that helpful?

16 COMMISSIONER GIOVANNI: Get my mute off
17 here. Yeah, that's helpful. Thank you.

18 COMMISSIONER LEE: Thank you, Director
19 Evans.

20 And now we'll take Commissioner Kahele's
21 question.

22 COMMISSIONER KAHELE: Thank you, Chair. I
23 have a question on -- well, actually I may need some
24 clarification first. So not all projects require an
25 Environmental Impact Statement. There may be

1 projects that just may need an Environmental
2 Assessment. Is that -- is that accurate?

3 MS. EVANS: That is accurate.

4 COMMISSIONER KAHELE: So you've got to go
5 through the Environmental Assessment process before
6 they determine whether you do an EIS?

7 MS. EVANS: That used to be the process
8 before the update in the rules. And that led to
9 considerable duplication of effort, and additional
10 time and cost.

11 So the rules were amended, and Ron Terry
12 can chime in on this one, especially --

13 MR. EISEN: Actually, that took a
14 statutory amendment to add the Direct to EIS clause.

15 MS. EVANS: Okay. Do you want to expand
16 on that, Tom, and then Ron can jump?

17 MR. EISEN: In 2012 the legislature
18 provided a Direct to EIS channel so that an
19 applicant did not have to first prepare an EA. And
20 if essentially both parties agreed that an EIS was
21 likely to happen, they could go directly to EIS and
22 bypass the EA process.

23 So the agency can -- the strange language
24 in the rules, but the agency can allow the applicant
25 to go direct to EIS, if they figure that's the right

1 thing to do.

2 COMMISSIONER KAHELE: And, I'm sorry, when
3 you refer to both parties, you're referring to?

4 MR. EISEN: The applicant and the agent --
5 and the commission.

6 COMMISSIONER KAHELE: One more question.
7 On your criteria of significance, when is the -- or
8 all of the EIS that's filed is required to do Ka
9 Pa'akai analysis, or only when there is an issue
10 raised, whether there's sacred ground or whether
11 it's going to have a significant impact to the
12 Native Hawaiian's rights?

13 MS. EVANS: Commissioner Kahele, that is
14 an excellent question.

15 COMMISSIONER KAHELE: Thank you.

16 MS. EVANS: And it's certainly the subject
17 of lots of confusion I think at this point. And I'm
18 going to start, and then Tom and Ron can correct me.

19 So the Ka Pa'akai was a court decision
20 that requires an analysis with three tests made by
21 the decision making agency in a decision making
22 proceeding. And it is not required in Chapter 343.

23 Chapter 343, as a content requirement,
24 requires a Cultural Impact Assessment. Is that
25 correct, Tom?

1 MR. EISEN: It actually doesn't even
2 require that. It just requires consideration of
3 whether cultural resources are being impacted, and
4 if so, then present information speaking to that in
5 the EA or EIS.

6 MS. EVANS: Ron, do you want to add to
7 that?

8 MR. TERRY: Yeah. I would agree with Tom
9 there. I'll add that there's been a number of
10 attempts, legislative attempts through the last 30
11 years to require a Cultural Impact Assessment in
12 each and every EA and EIS.

13 And for practical purposes, most
14 legislatures have felt this was not necessary.
15 Because some EAs, I mean, it can literally be a
16 parking lot in front of a 7-Eleven in Waikiki.

17 And the EA can be a short process that
18 takes, you know, six months and \$20,000. If you add
19 a Cultural Impact Assessment component with what, at
20 least the bills have included in it, you'd be adding
21 another couple hundred thousand dollars to that
22 \$20,000 EA, and a couple years of research.

23 And people have felt that for major
24 projects, you absolutely need to do that. For
25 smaller projects that are sometimes the subject of

1 an EA, that's an extraordinary burden to put on an
2 applicant or agency.

3 And now, you folks mainly deal with
4 applicants. You're dealing with corporations, with
5 individuals, with other entities. But the large
6 majority of 343 applies to agency actions. And so
7 you're talking about agencies doing, you know, small
8 -- relatively small things.

9 And the laws and rules that help with
10 those have been designed to make them flexible. And
11 there's a word in NEPA that we don't use in, you
12 know, that's the federal law on EISEs. We don't use
13 this in 343, but I love it, it's very short. It
14 says, count what counts, okay.

15 So don't expend enormous effort on things
16 where there's a consensus that there's no impact.
17 Should you do a multi-year bird study for your
18 parking lot in Waikiki? Probably not. But there
19 are parties out there who would say, oh, you should
20 always do a big long, you know, longitudinally
21 appropriate study of birds in the area.

22 So one-size-fits-all solutions are
23 probably not appropriate for something that has such
24 breadth of scope as 343.

25 MR. ORODENKER: Mr. Chair, if I may. This

1 was actually a question that came up in my law class
2 when I was teaching last semester.

3 A Ka Pa'akai analysis is something that
4 the agency itself does. If you go back to what was
5 said at the beginning about the EIS being a
6 disclosure document, the applicant or petitioner
7 needs to put in all of the information with regard
8 to environmental impacts, which include Cultural
9 Impact Assessment, if there are cultural either
10 activities or actual archeological components
11 involved.

12 Now, that being said, you don't
13 necessarily do a Ka Pa'akai analysis when you're
14 accepting an EIS. But, when the project then comes
15 to you for actual review, you need to do a Ka
16 Pa'akai analysis.

17 And what I have, in my role as Executive
18 Officer, told petitioners is that they should
19 provide -- the best thing to do is to do a Cultural
20 Impact Assessment that covers all the information
21 that you would -- that the agency would be required
22 to look at to do a Ka Pa'akai analysis so that it
23 doesn't have to to do another Cultural Impact
24 Assessment when it comes in for the project.

25 So the Ka Pa'akai analysis is done at the

1 project level, not at the EIS level. Although the
2 EIS can be, I mean, you could actually say the EIS
3 could be rejected if the information that you need
4 to do the Ka Pa'akai analysis is not contained in
5 the document. Because then it would not be a full
6 disclosure document.

7 COMMISSIONER KAHELE: So Dan, what -- and
8 I'm sorry, are you done? So, what are you saying,
9 Dan, is that you need to do a Cultural Impact
10 Assessment. Is that --

11 MR. ORODENKER: If there are cultural --

12 COMMISSIONER KAHELE: -- with the EA or is
13 that with the EIS?

14 MR. ORODENKER: It's, well, with an EA
15 you're looking for a finding of no significant
16 impact. So your analysis would be that there is
17 nothing culturally significant on the -- as a result
18 of the project that's being impacted. If you're
19 moving into the EIS stage, you're going to have to
20 do a Cultural Impact Assessment, even if it's to say
21 there's nothing here.

22 COMMISSIONER KAHELE: I've got one
23 question for Mary Alice. So if there's a
24 disagreement, whether there is, well, an example an
25 iwi that may have been overlooked, is that when the

1 process regarding a judiciary challenge kicks in?
2 Or -- I'm not sure.

3 MS. EVANS: It sounds like, Commissioner
4 Kahele, so SHPD itself, that's the State Historic
5 Preservation Division, has its own role. And it --
6 after a disclosure process and the applicant moves
7 to get its discretionary permits, then it's going to
8 go to the State Historic Preservation Division and
9 ask for -- it provides them information on whether
10 this is an area that has historically had iwi
11 burials and other archeological or even if there's
12 structures that are historic, architectural
13 resources.

14 So I think a Cultural Impact Assessment
15 probably should touch on the historic uses of the
16 property in the disclosure process, but it doesn't
17 necessarily have to do that grid pattern
18 archeological inventory that SHPD requires.

19 Tom and Ron, do you have any, you know,
20 want to correct that if I've got that wrong?

21 MR. EISEN: In an optimal situation,
22 everything is known and disclosed as they're
23 preparing the EIS. Now, whether that in fact is
24 reality, is a whole different question, and often
25 things come to light, besides fact of a great effort

1 to try to find out, things pop up later.

2 An EIS is essentially a snapshot in time
3 when it was done, a state of knowledge. And
4 sometimes things come in to view after the EIS has
5 been finished and accepted.

6 So when the project is being analyzed for
7 an approval, that is when kind of the I's have to be
8 dotted and the T's crossed, and everything, make
9 sure represents, you know, the full body of
10 knowledge that's known.

11 COMMISSIONER KAHELE: Okay. Oh, I'm
12 sorry, Dan. You done?

13 MR. ORODENKER: Well, what I wanted to say
14 is that we actually have a project where we kind of
15 ran into this problem.

16 When you're doing the EIS, you do your
17 archeological and Cultural Impact Assessment based
18 on the information you have. You're supposed to go
19 out to the community to find out if anybody knows
20 anything, and all the rest.

21 If you're in, say, Central Maui where
22 there is a lot of sand and there are probably a lot
23 of burials, then you're going to have to recognize
24 that you're probably going to find -- you're
25 probably going to find something. And that, if you

1 fail to recognize that, then the EIS is probably
2 flawed, and that's different from the project being
3 flawed, okay.

4 But it's interesting the way the law
5 works, because if you recognize that you're probably
6 going to find something, then what happens is that
7 we will, or the County will, put a requirement on
8 the petitioner that there be an archeologist or
9 Cultural Resource person on site to watch what's
10 happening.

11 If, and then if they find something, the
12 Burial Council gets involved with what you do, where
13 you either re-inter them or do whatever.

14 On the other hand, if you don't believe
15 you're going to find anything and that's what your
16 EA or EIS says, and then all of the sudden you come
17 across something, then it's the Historic
18 Preservation Division that decides what you do.

19 And that can stop a project because it
20 takes a while for the Historic Preservation Division
21 to decide what kind of further analysis needs to be
22 done, what kind of mitigation measures need to be
23 taken, and all the rest.

24 COMMISSIONER KAHELE: Dan, that was the
25 next point I was going to bring up. Because there's

1 projects out there, construction projects out there
2 that apparently after starting it, they realized,
3 oh, there's an iwi here, you know, after being told
4 maybe at Neighborhood Board meetings, claim was oh,
5 we couldn't find anything.

6 And now the project gets stalled.
7 Project, the real project, you know, it got stalled
8 and only because they didn't do a great job in going
9 out there and meeting with the community, meeting
10 with the kupuna out there, and finding out whether
11 there was anything out there.

12 And projects get stalled because there's
13 -- and if it's done at the project level, then at
14 that level they don't want to spend the money in
15 doing one Ka Pa'akai analysis.

16 But anyway -- you can't hear me? Oh,
17 okay. So that's the reason why I brought up this
18 issue about the Ka Pa'akai analysis. Projects get
19 stalled, and later on finding out that there's some
20 significance out there, whether the Hawaiians are
21 getting impacted, whether there's iwis there.

22 So anyway, thank you very much. Dan, you
23 hit the nail right on the head. Projects get
24 stalled, we don't work, and projects get delayed out
25 there, cost goes up.

1 But anyway, just wanted to share that.

2 Thank you. Thank you, Chair.

3 COMMISSIONER LEE: Thank you. Any other
4 questions from Commissioners? Commissioner U'u.

5 COMMISSIONER U'U: Thank you. You know,
6 Hawaiians never put headstones where they was
7 buried, so it's a guess, obviously. And it's a
8 calculated guess to a degree, right.

9 So I know for a fact in Kahului they found
10 burials a bunch, but the right next subdivision that
11 built 50 homes on the 15 acres found none. So there
12 is historical evidence that points that yes and no.

13 But I get what the Chair's Director is
14 saying. It's a high probability, but I understand
15 one to the next project right next found none, and
16 you know, again, I guess in a general area you would
17 say yes, I would agree hundred percent.

18 Cost comes into play, and somebody brought
19 up the cost difference between EA and EIS. The
20 question I would have, I've heard that, and maybe
21 it's changed and maybe I need clarity, that, you
22 know, I heard public say, you might as well just do
23 an EIS.

24 He had suggested that strongly many times,
25 and I had no idea that you can be specific to an EA

1 for the triggers that would constitute an EA, and
2 it's separated by an EIS. And that way after
3 hearing the cost portion that was mentioned prior, I
4 can see there is a burden.

5 It's never talked about, right. Oh, the
6 burden, you should just do it to be the -- you
7 should do it as a, you know, as a responsible
8 builder or owner, you should just build it. And I
9 think we're facing part of the consequences when
10 we're not receiving.

11 I hope we spend time reviewing one EIS.
12 And if we don't, we all in trouble right now. But
13 after looking and reading, and you guys going
14 through the process, I would not want to do one when
15 it's open to constant questions that you got to have
16 to respond to.

17 And I like that you put it in buckets, but
18 to be fair, it should be, if you get significant
19 questions, you should get significant responses.
20 Not when you get questions and then you got to get
21 significant responses.

22 I think the table is turned not in
23 fairness to the applicant. It's not, because they
24 burden all the costs. They burden, everything
25 that's needed to a degree, and when it's written.

1 Here's my question, here's my question.
2 In the process of creating the EA/EIS and the
3 protection of the environment, we seem to separate
4 it from being humans. There's a human element and
5 there's the environmental element, yeah?

6 So we cannot include the human portion of
7 it with the environmental portion, or is that
8 inclusion or not? And if the intent of creating
9 this EA process was to protect the environment,
10 which we're all for, and how is it working now? You
11 think it's successful in creating -- protecting the
12 environment? And how has it adversely impacted the
13 human part, the human component?

14 Is there a designation between the two?
15 Or maybe we're just looking at one and, you know, as
16 we move off island, we get off of this island,
17 because we're looking here because we kind of never
18 include everything, right, because the impact, the
19 negative impact.

20 But I'm just trying to say, is it where we
21 want it to be, the intent of this right now? If we
22 looked at it when we created this process, as to
23 where we are now?

24 When you say we bombing comments, is it
25 where we want to be, is my question. And I would

1 like to get you guys' personal answer from this.

2 MS. EVANS: Commissioner U'u, that does
3 call for a subjective philosophical answer as
4 opposed to a legal technical one, of course.

5 Ron, do you want to go first on that?

6 MR. TERRY: That's what I'm here for,
7 Nancy, is philosophical, off-the-cuff opinions.

8 You know, I -- are we on -- we're not on
9 my discussion questions. We don't have them put up
10 there yet. I just generated those based on -- but
11 if you guys have, do you have it in a handout or
12 something? Can you see them?

13 MS. EVANS: Yes, they do.

14 MR. TERRY: Okay, great.

15 MS. EVANS: They do have it.

16 COMMISSIONER LEE: Sorry, Ron, if we're
17 stealing some of your discussion questions.

18 MR. TERRY: No, that's the whole point, I
19 think, is that this is perfect. I based these
20 questions on what I've heard from Land Use
21 Commissioners, Planning Commissioners, board
22 members, Land Board members, and other folks that
23 had to make a decision about land projects.

24 And what I'm seeing is that all these
25 questions are coming up in this discussion right

1 here before we've really even had a chance to do it.

2 And Commissioner U'u, I'm not sure that
3 I'd be answering your question exactly how you meant
4 it, but our law is modeled on the federal law.
5 Federal law was first. NEPA was first, and then 343
6 shortly after.

7 We were one of the first states to do it.
8 Not every state has done it. And, you know, NEPA
9 considers the environment to include humans, and so
10 we are an integral part of the environment. And
11 anything that affects us is an environmental impact.

12 So for example, pollution, air pollution
13 into human lungs, economics, cultural and historical
14 legacy. So that should all be considered in the EA
15 and EIS. So I think you raise a really good
16 question about have we done too much, have we done
17 too little, how is it going.

18 My personal opinion, which I'm being
19 allowed to express at this point, is that it has
20 functioned well. And we've prevented a lot of
21 horrible things from happening by having this
22 process.

23 But it's not a perfect process, and it --
24 everyone wants to tweak it. Problem is, someone
25 will tweak it one way, some tweak it the other. But

1 that's a question that I have had come up. And I
2 got some comments about that that I could raise
3 later, and I hope that we can get into that.

4 COMMISSIONER LEE: Thank you, Mr. Terry.
5 Some more comments or questions,
6 Commissioner U'u?

7 COMMISSIONER U'U: And I want to thank you
8 for your honest opinion, and just, and I love open
9 green pastures. I love Maui, right, I just want to
10 be clear on that. The open space is something that
11 I cherish, but at the same time, you know, there
12 could be some consequences when we got all the open
13 spaces and we don't have enough space for humans.

14 MR. TERRY: Absolutely.

15 COMMISSIONER U'U: And it's just my
16 mana'o.

17 COMMISSIONER LEE: Thank you.

18 So Commissioner Carr Smith, and then
19 Commissioner Giovanni.

20 COMMISSIONER CARR SMITH: Thank you,
21 Chair. I was going back to something the Executive
22 Officer said about Ka Pa'akai and that we are the
23 agency that needs to review and see whether it's
24 been adequately addressed or not. Is that what you
25 said?

1 And the reason I'm asking, just to
2 clarify, is because I remember petitions in the past
3 that we heard, and commissioners who were attorneys,
4 insisted that the petitioner's go and do a Ka
5 Pa'akai.

6 MR. ORODENKER: I'm -- I'm not -- I think
7 that what those commissioners were saying was that
8 the petitioners need to do the -- provide the
9 information necessary for them to do a Ka Pa'akai
10 analysis.

11 The Supreme Court is very clear that the
12 Ka Pa'akai analysis, and the decision on Ka Pa'akai
13 cannot be abdicated to a petitioner. It has to be
14 done by the agency itself.

15 But the agency needs to have all of the
16 information necessary, and we've had a couple of
17 instances where public testimony has indicated that
18 there may be cultural impacts that have not been
19 analyzed or disclosed. And it is in those
20 instances, as far as I can recall, that the
21 commissioners have said to the petitioner, you need
22 to go and provide us, do an analysis on the cultural
23 impacts so that we can complete our Ka Pa'akai
24 analysis.

25 COMMISSIONER CARR SMITH: I'll accept that

1 for now. Thank you.

2 COMMISSIONER LEE: Thank you.

3 Commissioner Giovanni.

4 COMMISSIONER GIOVANNI: Yeah. My question
5 is about the expression of an EIS being stale.

6 Hypothetically we've seen instances where a project
7 originally was approved or had -- even before it was
8 approved, it had an EIS that was done 15, 20, 30
9 years ago.

10 And then they want to propose a new
11 project and say, well we did the EIS already. And
12 then there's some discussion about whether or not
13 it's stale and needs to be updated, or re-done.
14 What's the guidance that you can provide about how a
15 commission can act when there's the potential for an
16 EIS being old and stale?

17 MS. EVANS: Commissioner Giovanni, I'm
18 going to ask our staff to answer that one. And then
19 Ron, after Tom answers.

20 MR. EISEN: Yes. Well, the legislature
21 has considered that question numerous times, and
22 they've never come up with a definition. So there's
23 nothing in the statute or the rules that says a
24 specific EIS technically goes stale or expires or
25 something to that effect.

1 So it's really up to the agency that has
2 the current question at hand, to determine if that
3 old EIS is adequate or not. Does it address the
4 current context of the situation? Has the project
5 changed?

6 So these are things that the agency needs
7 to consider as far as the guidance that's very
8 specific to the situation, but just really ponder
9 the question heavily. Does this 30-year-old
10 analysis really relate to today's world or not.

11 MR. TERRY: Yeah, I just wanted to add a
12 little bit of context to that. The Turtle Bay
13 decision some 15, 20 years ago, whenever that was,
14 really added some clarity about that. Not only if a
15 project is significantly changed, but also if the
16 environment around it has significantly changed,
17 such that even if a project doesn't change
18 dramatically, the environment has changed so much
19 that the impacts are distinct, different, more
20 severe, than they were before. Which -- which
21 renders the EIS no longer the same project, in a
22 sense, you know.

23 It has to be re-done. We, in the rules --
24 well, the statute allows for supplemental EISEs to
25 take care of this. By the way, it doesn't allow for

1 supplemental EAs. And that's something Scott and I
2 used to argue about constantly.

3 I said, if you interpret it in a certain
4 way, if you look at it through this lens, maybe it
5 does say that, but Scott said absolutely not. He
6 uses the word statement, only supplemental
7 statements. This makes it hard to supplement an EA,
8 and therefore people are really reluctant to do it.

9 Again, I want to go to NEPA, our federal
10 law on this. They're much more explicit about this.
11 They allow both supplemental EISEs and supplemental
12 EAs, and they encourage them. There's quite a few
13 NEPA supplemental EISEs. Agency by agency, they
14 have their own policies.

15 We have one overarching set of rules,
16 Chapter 11-200.1, that administers our EIS process.
17 The federal government has a whole panoply of EIS
18 rules, one for each agency.

19 I've worked a lot with the Department of
20 Transportation, Saddle Road EIS, I wrote those, and
21 in fact we did a supplemental. They have a policy
22 that after two years if you haven't started the
23 project, and they have a definition for start that's
24 real specific, if you haven't started the project
25 you need to do what's called a re-evaluation.

1 And that -- it's a very systematic
2 process. If they don't do the re-evaluation, if it
3 shows that there are some changes then you have to
4 supplement. And I introduced this as a proposal
5 during the update to the rules in 2016 to 2019. I
6 lost. That wasn't wanted by the majority of people.
7 People felt that it might engender an endless series
8 of documents, and I get that.

9 At the same time there's a lot of
10 dissatisfaction with stale documents. I would
11 expect this to come up in the future.

12 COMMISSIONER GIOVANNI: Yeah, thank you
13 for that. I think, you know, particularly on the
14 Island of Kauai, we see in some cases, environmental
15 impacts statements or even EAs that were done years
16 ago.

17 And a key element of those analyses were
18 the traffic impacts. Well, you go to today and the
19 traffic is a considerably different scenario than it
20 was at the time that that original assessment was
21 done.

22 So are you suggesting that in a case such
23 as that, hypothetically again, it would be up to the
24 agency to make a determination whether or not that
25 has to be re-evaluated?

1 MR. TERRY: Yeah. I'll give you a
2 specific example. You folks don't know Hilo
3 probably very well, but there's an intersection of
4 Kowailani Street and Iwalei Street, okay. It's
5 a place in Hilo.

6 And we got a federal aid grant, DPW got a
7 federal aid grant to improve this intersection. We
8 did an EA for it. It was all good. Did Traffic
9 Impact Analysis. Two years later they didn't have
10 the money. They did a re-eval. Traffic wasn't that
11 different.

12 Four years later they still didn't have
13 the money. They did a re-eval. You know what?
14 Traffic was different. So we had to do a new TIAR
15 for it. And that resulted in different turn signal
16 or turn lane lengths and other features for the
17 intersection that would more appropriately handle
18 traffic for the next 20 years.

19 COMMISSIONER GIOVANNI: Thank you. I'm
20 good.

21 MR. EISEN: I'd just like to comment that
22 it is possible that a study like a TIAR can be done
23 outside of the EA or EIS, can just be requested by
24 the agency without needing the EA to be re-done.

25 So there's the opportunity for the agency

1 to get the right information either within or
2 without external of an existing EA or EIS.

3 COMMISSIONER LEE: Thank you.

4 Commissioner Miyasato, did you have a
5 question?

6 COMMISSIONER MIYASATO: I have, but thank
7 you, Mary Alice, Tom, and Ron for taking the time
8 out to put on this presentation.

9 I had a question, but it was answered by
10 Ron. I guess, while I have the floor, you know,
11 Director came on and had made a comment, or I guess
12 additional comments toward the Ka Pa'akai. Could
13 either Mary Alice or Ron or Tom kind of fall back
14 here? Because it seemed like it was kind of
15 contradicting what was presented at first, so could
16 we get a little bit more clarification from your
17 end?

18 MS. EVANS: Yeah. I think I might have a
19 slightly different opinion than your Executive
20 Officer on the LUC's role in your determining the
21 acceptability of an EIS, not your role as a decision
22 maker on a petition for a DBA. And that is that
23 statutorily you are not required to find that an EIS
24 is deficient or unacceptable if there isn't a Ka
25 Pa'akai analysis in that disclosure document.

1 However, when it moves to your rules under
2 205 and it's your call as to what -- you do have to
3 do a Ka Pa'akai analysis, and you do have to get the
4 information you need to make that analysis.

5 So at that point you want the petition,
6 that's not the disclosure document, the petition to
7 have that information in it.

8 MR. ORODENKER: I don't disagree with that
9 statement. I think we're saying the same thing. I
10 just said it differently.

11 COMMISSIONER LEE: Okay, thank you. I'm
12 going to ask a couple of questions, and then I want
13 us to move on so that we can cover Mr. Terry's
14 questions, and then that way we can have further
15 questions, but at least we can move on a little bit.

16 My first question is, this should be a
17 quick one. So unlike SMAs or Conditional Use
18 Permits, there's no hard dollar trigger for an EA or
19 an EIS. Is that correct?

20 MR. EISEN: Correct. There's no trigger
21 that's related to a dollar figure.

22 COMMISSIONER LEE: So it could be under
23 500,000 yet might require an EA or an EIS?

24 MR. EISEN: Yes.

25 COMMISSIONER LEE: Okay. And then my

1 second question is, and this is just my civilian
2 understanding of this confusing process. The
3 compiling of the EIS must follow pretty strict
4 statutory requirements on disclosure, but once
5 that's been completed satisfactorily, the acceptance
6 is somewhat of a more subjective judgmental call.
7 Would that be almost a correct statement?

8 MS. EVANS: I hope not, and that's a
9 personal view. I hope we were able to convey that
10 you, as a --

11 MR. EISEN: Accepting authority.

12 MS. EVANS: Accepting authority, when you
13 have a final EIS in front of you, you are going to
14 look at the three areas that the statute and rules
15 require you to look at.

16 Whether the procedures were followed, and
17 that means that there was a prep notice that was
18 published. A public hearing?

19 MR. EISEN: A comment period.

20 MS. EVANS: Comment period. Then when
21 there was a draft EIS published, that that comment
22 period extended for the appropriate period of time,
23 45 days. That in other words, those are the
24 procedures.

25 I think those are fairly objective and I

1 don't think you, you know, if at the -- they
2 actually will know if they missed and they'll
3 probably withdraw and try to cure that.

4 The contents, perhaps a little more
5 subjective because of the broad nature of those
6 definitions that do include human impacts as well
7 as, you know, birds and sphinx moths, and et cetera.
8 But there are, you can use kind of a checklist to go
9 through whether they've met the contents.

10 And I believe we now -- do we now require
11 a table of contents in the EISes to annotate where
12 in that thousand-page document you're going to find
13 each content?

14 MR. EISEN: In the next iteration of the
15 rules, we're talking about including a checklist to
16 show, that the preparer of the document shows where
17 in the document these items, these required items
18 contain.

19 Right now we ask the consultant to tell us
20 where it is so it's easier to perform this criteria.

21 MS. EVANS: Yeah, when you've got to, you
22 know, literally a 1200-page EIS, you know, it's
23 helpful to have a guide to where you're going to
24 find those content requirements by page number, et
25 cetera.

1 Yeah, I will say we are looking at doing
2 an update of the rules. We have not completed our
3 draft. We have not submitted it to the
4 Environmental Advisory Council. They have a
5 statutory role in consultation of looking at any
6 draft rules that we're contemplating for adoption.

7 So more to come, but that's one area that
8 we thought would be helpful in making it easier for
9 agencies, including the Commission, to be able to
10 determine that middle, second one.

11 The one on whether the comments have been
12 substantially and appropriately responded to is the
13 area that I think is subjective, and I think that
14 commenters often feel that they did not get a
15 satisfactory response because the response, say
16 they're opposed to the project, and they've put
17 those, you know, their views in their comment.

18 And the planning firm that's drafting the
19 comments, the agency that's drafting the comments,
20 responds to their concern acknowledging it, but
21 doesn't say, we're going to cancel the project. You
22 know, that -- a commenter might feel that that was a
23 -- didn't respond to their comment. So that's -- I
24 think there's a lot of room for subjectivity in that
25 one.

1 MR. ORODENKER: If I can add to that. I
2 agree with everything that Mary Alice just said. I
3 think the other area where there's subjectivity is,
4 and this has happened in front of the Commission
5 several times, where someone comes in and says, you
6 know, you did do a Traffic Impact Analysis, but you
7 didn't take into account this other road that comes
8 down. Or you did an environmental study, a run-off
9 study, but it doesn't take into account the fact
10 that there's a nursery reef off the coast.

11 And then the Commission has to decide
12 whether or not that testimony is enough or that
13 information that's been provided is enough to put
14 the sufficiency of the analysis into question. And
15 that's where the discretion comes in.

16 COMMISSIONER LEE: Thank you. We're going
17 to move on, because I know there's more questions,
18 but we still have to move on and save them for
19 later. But while uncertainty really is a huge
20 factor in cost and risk, and so this is a very
21 important subject.

22 So are we at Mr. Terry goes over his
23 discussion questions at this point?

24 MR. EISEN: Yeah, we can move on to that
25 point if Ron is ready to guide that.

1 MS. EVANS: Sure.

2 MR. TERRY: Yeah.

3 COMMISSIONER LEE: Okay, hang on.

4 Commissioner Carr Smith, did you have a question?

5 COMMISSIONER CARR SMITH: I just wondered
6 if Ariana would perhaps do a split screen so we can
7 see the questions and still see the -- see Ron and
8 the AG and the two Commissioners?

9 MS. KWAN: I'll be right back.

10 COMMISSIONER CARR SMITH: Thank you.

11 COMMISSIONER LEE: Okay, we'll work on
12 that. And let's try and proceed.

13 MR. TERRY: Okay, I think that was my cue.

14 COMMISSIONER LEE: That's correct.

15 MR. TERRY: Yeah, I came up with this list
16 of seven questions. I think in the interest of time
17 we're going to go to 4, 6, and 7, although the other
18 questions have come up a bit.

19 I want to first acknowledge, thank you
20 guys for serving on this commission. I know it's
21 not easy, having been on commissions before. And
22 yours is one of the hardest ones. I was never on
23 one this hard, so thank you for what you're doing.
24 And I understand that this is one small part of your
25 work, EISes, and yet it causes a lot of problems.

1 So I hope this ends up being helpful.

2 Before I get into questions 4, 6, and 7, I
3 want to kind of answer Myles a little bit about what
4 he asked about the Cultural Impact Assessment, and
5 I'll elaborate on what Dan and Mary Alice said.

6 But as the preparer of an EIS, I -- I've
7 had to contract to a lot of Cultural Impact
8 Assessment specialists, and I've worked with some of
9 the best in the business. Kepa Maly, Pualani
10 Kanaka'ole Kanahele, Ed Kanahele, Keha Watson,
11 Lokelani Brandt, some really great people. And they
12 have written some wonderful materials.

13 One thing that I've sometimes struggled
14 with with each of these is getting them to sort of
15 go beyond an ethnography, which is the primary --
16 their primary work, into an Impact Analysis. And in
17 cases where it's necessary to address the Ka Pa'akai
18 findings. And in contrast to maybe what Mary Alice
19 and Dan said, I think it's important for the EIS
20 preparer at the very least to draft some Ka Pa'akai
21 findings.

22 I understand that in some senses these are
23 premature, and Dan wisely said, you know, these
24 shouldn't be, you know, just brought to the
25 commission all like a meal and you guys eat it, you

1 know. You -- you have to make your own findings,
2 but I think it's helpful to have somebody draft
3 those.

4 And you can -- you're free to disagree
5 with them, or modify them, but without something as
6 a basis that's been done through the Cultural Impact
7 Assessment preparer and then through the EIS
8 preparer, it makes your job a lot harder. And I'll
9 leave that up to you how you want to do it.

10 Now I want to kind of move on to question
11 4, because this has come up a lot. How do you --
12 how do you know whether you need to do more work on
13 an EIS, right. People saying, hey, that's not
14 enough, that's not enough, you guys haven't really
15 answered the question. There's not enough science
16 on this.

17 And I want to walk you through some
18 experiences I had, and then discuss a legal
19 background, and I know your AG might want to cut my
20 mic. Mr. AG, I'm not a lawyer, I'm not giving legal
21 advice, and my legal review may be somewhat
22 juvenile, but feel free to step in.

23 But I have studied this quite a bit, and I
24 know you've had to face this recently with regard to
25 the Keauhou aquifer. There are folks that say

1 there's just not enough information about that
2 aquifer. You're asking us to make decisions, and we
3 feel like we don't have enough information. The EIS
4 didn't provide it.

5 Well, I just want to say you're not alone.
6 In my EIS process, we came up on this with the
7 Saddle Road. There was the issue that some of you
8 may remember of depleted uranium, some of the shells
9 that were used in -- on the range they discovered
10 had this uranium. It's a very weak form of uranium.
11 It's about like all depleted. It's not highly
12 toxic. But if it gets pulverized all over the place
13 and you breathe it, it is very much not good for
14 you.

15 And we were proceeding to finalizing the
16 EIS and we didn't have information about this. So
17 we commissioned a study that was, you know, frankly
18 quite expensive and it took quite a while to get, to
19 see if there was any traces of depleted uranium
20 anywhere outside Pohakuloa training area where this
21 road would go through.

22 And after a year study, we said no, we
23 can't pick up one trace of it anywhere in Kona or
24 Kohala. And if it blew there, it's in the
25 quantities that are so small that they're

1 undetectable.

2 And we got comments on the EIS that said,
3 that's not enough. You need to do it different
4 places and with different methodologies and that
5 sort of thing. So we had to face that. We had to
6 -- we had to make a decision about, did we have
7 enough information or not.

8 I've had other projects where our traffic
9 models were questioned. Did you study enough
10 intersections at enough times at enough places in
11 the future under enough scenarios, or not? And we,
12 you know, we're faced with this conundrum.

13 As a commissioner, I have faced this
14 problem myself on Mauna Kea with questions about the
15 deep hydrology of Mauna Kea. If any of you guys
16 have followed that, it's wild. The underground
17 Mauna Kea is insanely complicated. Nothing like
18 what we had ever envisioned before.

19 But we only have a glimpse of this from
20 some sort of seismic type studies. And people would
21 say, well, do you have enough information to allow
22 the 30 meter telescope to be built if you don't know
23 exactly what the inside of Mauna Kea looks like. So
24 we had that.

25 And I think Tom went well, and Mary Alice

1 went over the acceptance criteria in any EIS really
2 well, and I'm not going to belabor what it says in
3 Chapter 343, but I think there's still a lot of gray
4 areas.

5 And I want to again go to NEPA and both
6 technical guidance and case law, which provides some
7 guidance on this, paralleling an EA, and I think the
8 HRS 343. And they talk about things like a full and
9 fair discussion, analytic but not encyclopedic.
10 Presented in plain language. Proportionate to the
11 impact. Supported by evidence. Prepared with
12 scientific integrity, and disclosing responsible
13 opposing views. Supported by credible -- when they
14 are supported by credible scientific evidence.

15 And I think the key that NEPA says is,
16 you've got to summarize existing credible scientific
17 evidence, and the best available scientific
18 information, and it should not be speculative.
19 Okay, and but sometimes that information isn't out
20 there.

21 When there's not enough information
22 relevant to reasonably foreseeable significant
23 impacts, the Council on Environmental Quality
24 Regulations, in other words NEPA's equivalent to our
25 regulations, says this, that the agency must either,

1 one, determine that the cost of obtaining such
2 information is exorbitant or the means to obtain it
3 are not known, or you need to obtain that
4 information and put it in the EIS.

5 And I postulate that maybe that's the
6 requirement that you poor commissioners and staff at
7 LUC sort of have to meet too. If somebody's telling
8 you that, we just can't get this information, it's
9 just not out there, you have to say -- you have to
10 do a little bit of a cost analysis. Well, is it
11 impractical? Is it impossible? Is it exorbitant in
12 cost? If not, you need to require it.

13 The federal courts were really clear up
14 until about 2000 that you didn't do an EIS to get a
15 bunch of extraneous background data, and that if it
16 was -- this other data was just too expensive or
17 infeasible, you could forego its collection in the
18 EIS. But you needed to make a statement that the
19 information was incomplete or unavailable, and a
20 statement of the relevant existing credible
21 scientific evidence.

22 And after about 2000, I looked at a 2017
23 professional legal review of case law, it said the
24 courts were kind of not putting up with that
25 anymore, they weren't having it. They weren't all

1 about that. They wanted to see -- they were, in
2 fact, sometimes saying we want to see a fresh
3 statement of scientific evidence.

4 And judges, rather than scientists or
5 agency officials, were saying, we need a crack at it
6 too. And if we don't think that there's enough
7 information, we're going to ask for it. There was a
8 lot of concern among jurists that this exceeded the
9 court's, you know, substituting their opinion for
10 that of the agency was really exceeding their
11 authority.

12 In about 2017, and I think you can do the
13 math and figure out why I'm saying that, that trend
14 seems to be reversing, and courts are less and less,
15 you know, second guessing agencies on this. And so,
16 you know, there's sort of a ping-pong through
17 history of how hard you have to look. Is it hard,
18 or harder, or impossible, at this information.

19 So, you know, in my judgment, should an
20 EIS be normally expected to do a multi-year, multi-
21 million dollar ground breaking scientific study if
22 there are opposing views as to impacts? I don't
23 think it's generally supported by NEPA or by Chapter
24 343, but each individual case is unique. And legal
25 review, and even court decisions are going to be

1 necessary to determine that, even here in Hawaii.

2 So I know that was kind of a long comment.
3 My others aren't so long, but I wonder if there's
4 any questions about that.

5 COMMISSIONER LEE: Mr. Terry, please
6 proceed. We're probably going to take break at
7 12:15, and Commissioner Giovanni will have to excuse
8 himself as well, but we'll see how much we can
9 accomplish in 15 minutes, and then we'll take a 10-
10 minute break.

11 MR. EISEN: I'll just add very quickly
12 that the EIS process does have a place to address
13 unresolved concerns.

14 MR. TERRY: That's right.

15 MR. EISEN: And so these things are
16 supposed to be discussed, the fact that you don't
17 know or that it's not resolved, so it's not
18 completely left as a void. It has to be discussed
19 in an EIS.

20 MR. TERRY: Oh, no, absolutely. And also
21 responsible opposing views. The things that NEPA
22 said, many of them are in 343.

23 Another question I got is that, you know,
24 someone has said, you know, what is it, here, number
25 6. These rules, even though they've been amended,

1 in the law are 50 years old, and have they met their
2 original intent. I think we answered some of that.
3 Or has the purpose been frustrated and coopted, and
4 how have they evolved, and how could they evolve
5 better to function.

6 And I just want to say, stress again, I
7 think there's significant room for improvement. And
8 hey, we tried in the 2019 update. We really -- we
9 did a lot of tweaks, and I think -- I want to say
10 that our process with public engagement was so
11 robust, that by the end of the rules we had both
12 sides of the aisle agreeing on the rule changes.

13 We had very little pushback from the final
14 version rules. We left a lot of good stuff out.
15 Like I said, the supplemental EAs I wanted, we left
16 that out, but I think we made a lot of tweaks.

17 And now I just want to mention, we have
18 the de minimis exemption, which I think Tom just
19 maybe barely mentioned, but you don't have -- an
20 agency doesn't have to do anything if it's a super
21 minor project.

22 We took care of comment bombing by having
23 a different way to address them. We don't have to
24 write 1,000 or 3,000 individual letters back.

25 We said that draft EISes must have a

1 public meeting. We felt that was really important,
2 and the public was asking us for more engagement,
3 and so that's now a requirement. One public meeting
4 for a draft EIS. They're pretty infrequent. I
5 don't think it's too much.

6 We also said, you must accept oral
7 testimony at the meeting, you know, and you must be
8 sure to address oral testimony because in Hawaii we
9 have an oral tradition, and we wanted to respect
10 that.

11 We also did an affordable housing
12 exemption. I think I'll get into that a little bit
13 later, but I think the statute needs to be changed,
14 and in my humble opinion we need to allow
15 supplemental EAs.

16 And we need to change the definition of
17 action to narrow the scope of 343. Right now it is
18 so broad, it literally covers, if you take the rules
19 at face value, it covers buying a box of paper
20 clips. It covers promoting someone from clerk
21 typist I to clerk typist II. It covers fixing a
22 pothole.

23 And I think those types of things should
24 be excluded. Not exempt, because as Mary Alice
25 points out, exemption means you're in the law but

1 there are some procedures. But they should be
2 excluded, that's my opinion.

3 And also we should require a record of
4 decision at the end of every federal EIS. Right now
5 EISes contain mitigation that is not always captured
6 in the end. I look at projects I worked on and I
7 go, you know, where is the Endangered Species
8 Exclosure? I thought we were going to do that? No,
9 no, they value engineered that out.

10 I commend the Land Use Commission for your
11 process that takes mitigation from the EIS and
12 incorporates it in conditions. And you're one of
13 the agencies that does this. Not every agency, not
14 even most agencies do this. Most mitigation in EAs
15 and EISes somehow doesn't get accomplished. So
16 that's my thought about that.

17 Is there time for questions, Brian, or
18 should we move on?

19 COMMISSIONER LEE: We're at 12:08. We
20 want to go to 12:15. And then I don't think there's
21 much more after that, other than questions. So see
22 what you can do until 12:15 and then we'll take a
23 10-minute break, and we'll try to plow through as
24 quickly after that as we can.

25 MR. TERRY: Okay, I hope you can remember

1 if you have any questions, you can remember them
2 after the break, but, yeah.

3 The last one I want to cover is question
4 7. And this is, you know, a shot across the bow of
5 the whole EIS process, you know. Is it basically
6 just a road block to solutions? And should there be
7 some types of projects, even if they use State and
8 County land or funds, or even if they're in the
9 conservation district, or even if they're in
10 Waikiki, whatever, shoreline setback, that should be
11 just excluded from Chapter 343.

12 It's a very provocative question. I think
13 it's a really interesting one. And the first thing
14 that comes to mind, of course, is housing. How do
15 we create more housing? An EIS can take three
16 years, and it can cost a million dollars. What an
17 obstacle that can be to housing.

18 Certainly we want to protect the
19 environment. It's not like that's not a priority,
20 but is there something that we should exclude from
21 this and just make it easier? And I want to say
22 that that's a political decision that's kind of
23 outside of Chapter 343.

24 If you want to say some projects that
25 significantly impact the environment don't get a

1 very hard look, you know, that's a significant
2 political decision to make. It may be necessary,
3 but it is that.

4 I want to point out that the 2019 rules
5 did exactly that for affordable housing projects
6 that met certain criteria. And not projects that
7 come before you, because they had to be in the State
8 Land Use urban district, and they had to meet zoning
9 requirements that at least allowed some type of
10 housing.

11 You want a multi-family in a single family
12 zone? Fine. That's fine. You don't have to do an
13 EA for that. It also had to make sure there was no
14 archeological -- significant archeological
15 resources, no iwi, no cultural practices that were
16 going to get harmed, and no endangered species, and
17 it wasn't in a super hazardous area subject to
18 natural hazards.

19 So it kind of developed this concept of a
20 super exemption. You couldn't just exempt something
21 with just a signature on a paper. You had to do
22 some research on it. You had to go out there and do
23 an archeological survey, do a botanical survey, and
24 bring it all into the exemption process.

25 But that could be done in a matter of 30

1 days for a minimal cost, rather than an EA that
2 might cost a hundred grand and take six months, or
3 an EIS that could go longer. And that is in the
4 law. That provides a template for future actions if
5 people are willing to go there.

6 I've got to say that I generally feel that
7 excluding certain types of activities from the
8 requirement for an EIS is a bad road to follow.
9 Because, it's a slippery slope. But on the other
10 hand, I think that the affordable housing exemption
11 worked out well. I have no objections, as a strong
12 environmentalist, to it. I think it's okay, and I
13 think people need to be thinking creatively in the
14 future about that.

15 That's it.

16 COMMISSIONER LEE: Are you going to pass
17 on number 8, or you want to save that until after
18 the break?

19 MR. TERRY: This is really just a question
20 for you. I wasn't going to say anything. I've
21 talked enough. So I'd love to take that up after
22 the break, if you like.

23 COMMISSIONER LEE: Great. Okay, we'll
24 take a 10-minute break, and then I think we'll have
25 a few short closing comments after that, and I think

1 we'll be almost done. Thank you. Okay, we'll come
2 back at 12:25. Thank you everyone.

3 (WHEREUPON, a recess was taken.)

4 COMMISSIONER LEE: Okay, we're going to be
5 back, and we are going to continue with Mr. Terry
6 for question number 8, I believe.

7 MR. TERRY: Yeah. Well, again, this was
8 just a kind of open-ended question to you folks. I
9 don't know if you want to start with that.

10 I guess, I think Tom went over really well
11 the requirement for the difference between an EA and
12 an EIS, you know. You have to have these
13 significant impacts. You can jump straight ahead to
14 an EIS if you so choose because you think there's
15 likely to be significant impacts. But if there's no
16 significant impacts, if you're pretty sure of it,
17 then you can just stick with an EA.

18 Are there any circumstances where you
19 folks feel that, hey, maybe this is just an EA?
20 Most of them are EISEs, but this is just an EA,
21 making it simpler.

22 And do you do a systematic analysis of
23 significance of impacts? And I think, I don't know
24 if that's a staff or a commissioner question.

25 MR. ORODENKER: I mean, from the staff

1 standpoint, we do an analysis based on the factual
2 information that's been provided to us. And we do
3 make a recommendation with regard to whether or not
4 an EA or EIS is required, but it's up to the
5 commissioners to make that determination.

6 We've actually never gotten into that
7 situation. Usually most developers or petitioners
8 will recognize that under current law they may have
9 to do an EIS. You know, for having been on both
10 sides of the table on this when I was working for
11 developers, sometimes it's just a risk analysis.

12 In other words, you're looking at whether
13 or not you can get away with an EA or an EIS, and
14 you may, the developer may make a determination that
15 even though they might be able to get away with it,
16 it's not worth the time that would result from an
17 appeal if there are other people out there
18 questioning it.

19 And it would be more efficient, even
20 though it's more expensive, to do the EIS. It's
21 almost a cost/benefit analysis that these developers
22 do. And very often a developer will come in and
23 talk to staff to see what we think about their
24 chances of getting away with an EA.

25 We never give them a definitive answer

1 because it's always up to them to make the decision,
2 but we do point out the risks.

3 MR. TERRY: Yeah, well that's --

4 MR. ORODENKER: The Office of Planning
5 does the same thing, right? You have developers
6 come in and talk to you about how they should
7 proceed?

8 MR. EISEN: Yes, occasionally and in a
9 general way, but we probably are even --

10 MR. ORODENKER: Not you, Tom, but the Land
11 Use Division at OPSD.

12 MS. EVANS: You know, I don't think that
13 question comes up. Because when we're talking to
14 developers, normally it is when they're
15 contemplating putting a petition in for a DBA, which
16 would be after they have completed their disclosure
17 process.

18 MR. ORODENKER: So they don't always
19 listen to us and go and talk to you when they have
20 questions.

21 COMMISSIONER LEE: Mr. Terry, did you have
22 some more comments about that?

23 MR. TERRY: Just a little bit, yeah. I
24 mean, I understand the risk analysis part, and I've
25 engaged in that myself. We did an EIS for a

1 transfer station in Kau because we felt that the
2 opponents would sue for an EIS. We already knew
3 that. They had already said that.

4 And it's one of the easiest lawsuits to
5 win, at least in federal court. Judges will almost
6 always say, well, you know, where there's smoke
7 there's fire. If everybody feels that strongly
8 about it, why don't you guys just do an EIS.

9 And so, you know, so it was an agency
10 project and we made that choice to go that way, the
11 agency did. But it does have a lot of high cost
12 implications, and, you know, adds to the price of
13 things. I think it's nearly always appropriate for
14 the projects that you have.

15 I mean, some of the big ones I see come
16 in, my goodness, I can't see how there would not be
17 an EIS, but I can envision a 20-acre charter school
18 where they're going to do, you know, a whole bunch
19 of things on the school property in an old nursery
20 that has already been fully impacted, where there's
21 no traffic impacts, there's no endangered species,
22 there's no archeology.

23 And if that situation came up, I would
24 hope that the automatic answer wouldn't be, eh, tell
25 them they probably need to do an EIS. Because that

1 would be someone with limited funds, clearly limited
2 impacts, and maybe a lot of support in the
3 community.

4 But, you know, I think there's some
5 projects in between there, some housing projects
6 that might be over 15 acres. It's funny, all my
7 land owner friends seem to have 14.99-acre
8 properties. It's kind of weird.

9 But, there might be some, you know, 20,
10 25-acre housing projects that don't bump into
11 significance. Although I realize that NIMBYs can be
12 extremely effective in their legal challenges.

13 COMMISSIONER LEE: Thank you. So I'm
14 going to turn it back to Director Evans. If you
15 have, I think one final slide or any other closing
16 comments, and then we'll have time for some very
17 quick brief questions. Thank you.

18 MS. EVANS: Thank you, Chair. Actually, I
19 just want to say thank you for inviting us. We
20 welcome this kind of an opportunity to present the
21 Chapter 343. Since the Land Use Commission has
22 several significant roles in the Chapter 343, you
23 get petitions to serve as the approving agency. You
24 make a decision, determine what level of review that
25 applicant needs to go through.

1 And then when you get the final EA or EIS,
2 most likely an EIS, you make a decision about the
3 acceptability of the final EIS. And I understand
4 how challenging that is, because the public often
5 wants to stop projects that they don't like at the
6 environmental review step.

7 And they, you know, and because every
8 single one of those pathways, including exemptions,
9 has the opportunity for a judicial challenge once a
10 decision has been made about acceptability.

11 Your decision does have to have some basis
12 in the Chapter and the rules, in order that when
13 it's challenged, sometimes as a way to slow down a
14 project that an opponent doesn't want, that, you
15 know, you can point to your basis for making that
16 decision.

17 We would be happy to come back again at
18 some point if the Commission wants to review this.
19 We'd be happy to bring back our draft rules when
20 they've gone to our Environmental Advisory Council.
21 And this would be after the Environmental Advisory
22 Council has provided their input on that.

23 I don't think it will be significant
24 changes because we started out thinking of it as
25 housekeeping to bring the rules into compliance with

1 Act 152 --

2 MR. EISEN: 2.

3 MS. EVANS: 2, Session Laws of Hawaii
4 2021. So we're a little overdue in doing that, but
5 we are taking that opportunity to try to clarify
6 things that may have generated questions since the
7 new rules were adopted in 2019.

8 COMMISSIONER LEE: Director Evans, I
9 appreciate that offer very much. And with that
10 comment in mind, are there any brief questions,
11 noting that they will be able to come back at some
12 later date, but for now are there any brief
13 questions from Commissioners?

14 Okay, seeing none, and I don't --

15 SPEAKER: (Inaudible)

16 COMMISSIONER LEE: Yes, I have -- I tried
17 to contact Myles. Myles, do you have any follow-up
18 questions, because I can't see you on the screen?
19 Oh, there you go.

20 COMMISSIONER MIYASATO: No, I'm fine,
21 thank you. And thank you for the presentation.

22 COMMISSIONER LEE: Director Evans, Mr.
23 Eisen, Mr. Terry, we really appreciate what you have
24 presented to us today. It was very important, very
25 enlightening, and very fascinating. And thank you

1 for helping enlighten us with your vast experience.
2 We really appreciate it. And also members of the
3 public that did watch, we appreciate that.

4 And at this time, I'm going to once again
5 ask, are there any members of the public who wish to
6 provide new or additional testimony on this matter?

7 MS. KWAN: Seeing none using the Q&A
8 feature, Chair.

9 COMMISSIONER LEE: Thank you, Ms. Kwan.
10 Are there any members of the public here in person
11 who wish to provide new testimony on this matter?

12 MS. KWAN: Seeing none raising their hand,
13 Chair.

14 COMMISSIONER LEE: Thank you. This now
15 concludes our meeting. Is there any further
16 business to discuss?

17 MS. KWAN: Chair, one other brief comment.

18 COMMISSIONER LEE: Yes, please proceed.

19 MS. KWAN: Okay. On behalf of the LUC
20 staff, I'd like to recognize our Executive Officer
21 Daniel Orodenker. He was recently honored with the
22 Manager of the Year Award at the DBEDT Service
23 Awards on August 5th.

24 We're proud to see his leadership and
25 dedication recognized, and we truly believe that LUC

1 would not be where it is today without his guidance
2 and hard work.

3 Thank you, Dan.

4 COMMISSIONER LEE: Thank you, Ms. Kwan.
5 Congratulations, Mr. Orodenker. Do you want to make
6 some comments?

7 MR. ORODENKER: (Inaudible)

8 MS. KWAN: Microphone.

9 MR. ORODENKER: I've said this many times.
10 I would be nothing without my staff, and I truly
11 appreciate them. Thank you.

12 COMMISSIONER LEE: Thank you, Ms. Kwan.
13 Thank you, Mr. Orodenker. There being no further
14 business to discuss, this meeting --

15 COMMISSIONER CARR SMITH: Sorry, sorry,
16 sorry, sorry, sorry.

17 COMMISSIONER LEE: Go ahead.

18 COMMISSIONER CARR SMITH: I just, I wanted
19 to ask a procedural question about future agenda
20 items. How far in advance does a commissioner have
21 to ask the Chair to add an item to the next agenda?

22 COMMISSIONER LEE: Mr. Orodenker?

23 MR. ORODENKER: It takes us about a week
24 to get our agendas written and approved, and then we
25 have to post them within six or seven working -- six

1 working days, so you're probably talking about at
2 least two weeks.

3 COMMISSIONER LEE: Okay. Thank you
4 everyone.

5 This meeting is now adjourned.

6 (WHEREUPON, the Hawaii Land Use Commission
7 Meeting adjourned.)

CERTIFICATE

I, Michelle Breezee, do hereby certify that the proceeding named herein was professionally transcribed on the date set forth in the certificate herein; that I transcribed all testimony adduced and other oral proceedings had in the foregoing matter; and that the foregoing transcript pages constitute a full, true, and correct record of such testimony adduced and oral proceeding had and of the whole thereof.

IN WITNESS HEREOF, I have hereunto set my hand this 15th day of October, 2025.



Michelle Breezee