This report was prepared for the Hawaii State Legislature, pursuant to Act 1, Session Laws of Hawaii 2008. The contents reflect the views and opinions of the authors. For additional copies of the report, visit http://HawaiiEISstudy.blogspot.com or contact:

Department of Urban and Regional Planning
University of Hawaii
Saunders Hall 107
2424 Maile Way
Honolulu, Hawaii 96822
Telephone: (808) 956-7381
Facsimile: (808) 956-6870

Executive Summary

For forty years, Hawaii's environmental review system has served the State by ensuring public disclosure of environmental impacts prior to agency decision-making on programs and projects. Environmental review has been a valuable and necessary tool for planning and development, and has led to the mitigation of environmental impacts. The system, however, has undergone few changes since its establishment, even as environmental review practice has continued to evolve in other states, at the federal level, and in other countries. Stakeholders of the current system have different views on specific problems and solutions, but there is a shared sense that the system is in need of change.

This report, prepared for the Hawaii State Legislature, constitutes a comprehensive assessment of Hawaii's environmental review system. The report includes background information about the process, including legislative history and a summary of judicial decisions. It includes a description of the study process, analyses of issues with Hawaii's environmental review system, and the study team's recommendations for reform.

The goals of the review system, as identified in Hawaii Revised Statutes Chapter 343 and through this study process, are to protect the environment, to support good decision-making, to enhance public participation, to integrate with planning, and to provide clarity and predictability in how the law is applied. Although stakeholder opinions differ as to how these goals should be implemented, they support the purpose behind each goal. In recent years, the system has focused less on these goals and more on process and litigation. This has resulted in several areas of major concern to stakeholders. The study has developed recommendations to address these concerns and improve the system.

First, the current "applicability," or screening, system no longer constitutes a rational approach to determining which actions are subject to review under Chapter 343. Hawaii uses a "trigger" system that lists specific types of projects or locations, which does not directly link the potential for impacts to decision-making. In contrast, the "discretionary approval" systems used in other U.S. states initially screen all "major" actions (including those requiring discretionary approval), and then exempt those actions that are ministerial or without significant impacts. This report recommends that Hawaii streamline its environmental review system by replacing the current "project triggers" with a "discretionary approval screen." Under this proposal, environmental review would apply to government and private actions tied to an agency discretionary approval process (for example, permits) with a narrowed focus on those that "may have adverse environmental effects." To increase efficiency, the study also recommends streamlining the exemption system and allowing project proponents to bypass the Environmental Assessment (EA) process and proceed to Environmental Impact Statement (EIS) preparation when warranted.

Second, the State's governance system for the environmental review process has become dysfunctional. Under-funded and under-staffed, the Office of Environmental Quality Control (OEQC) is unable to provide needed guidance, training and education. The State Environmental Council has had difficulty updating the administrative rules and reviewing

exemption list requests. The Environmental Center is under-supported. Without effective leadership and support, the system cannot function. Recommendations include clarifying the authority, structure and roles of OEQC, the Environmental Council, the Department of Health, and the Governor with respect to the environmental review system; requiring OEQC to undertake regular outreach, education, and training for both the public and agencies; requiring OEQC to maintain modern communication and information management systems; and establishing a fee system and a temporary special fund to supplement the budget of OEQC to facilitate these changes.

Third, stakeholders are concerned that the late initiation of scoping, consultation, and public participation processes means that the information provided by the public and agencies has less influence on planning decisions. The earlier that participation occurs, the more potential it has to improve the quality of review and to affect decision-making. Early participation and scoping ensures impacts of concern are addressed and minimizes future conflict and litigation. Stakeholders also identified issues with the interagency and public comment-and-response process. Guidance on the process is lacking and document review is inconsistent. More clarity about expectations will help to increase accuracy, objectivity, and quality of information. Recommendations address these issues by clarifying the purpose, process, requirements, and timing for adequate scoping, notification, and commenting. Stakeholder concerns about voluminous and repetitious comments are addressed by allowing consolidation of responses.

Finally, concerns about the required contents of documents and about process issues that have arisen repeatedly are addressed. Concerns about mitigation implementation are addressed by this study's recommendations. Recommended follow-up systems will aid future system assessment and provide information to stakeholders on the effectiveness of mitigations and the accuracy of impact estimation. The implementation of a Record of Decision (ROD) process will provide a framework for tracking proposed mitigation. Other issues are addressed by strengthening rules and guidance, providing more clarity and specificity about the requirements of the process. Content requirements for cumulative effects assessment, climate change issues and cultural impact assessment are discussed. Rules on "shelf life" and supplemental documents are clarified.

Although the State's environmental review system can be substantially improved, it must be understood that even an improved system will be subject to the inherent limitations of environmental review. These limitations include that it is not a substitute for other policy tools aimed more directly at resource management, long-range planning, or policy implementation, and that it is an information disclosure process that does not mandate an agency's ultimate decision. The environmental review system is also unavoidably influenced by the surrounding political climate. However, in conjunction with other planning processes, the environmental review system plays an important role in information disclosure and environmental quality maintenance, and provides many benefits to the public and to government. This study's recommendations will strengthen this role.

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List of Acronyms

BLNR	Board of Land and Natural Resources (State of Hawaii)
CEQ	Council on Environmental Quality (Federal)
CEQA	California Environmental Policy Act
CDUP	Conservation District Use Permit (State of Hawaii)
CIA	Cultural Impact Assessment
CIP	Capital Improvement Project
CMR	Code of Massachusetts Regulations
DEA	Draft Environmental Assessment
DEIS	Draft Environmental Impact Statement
DHHL	Department of Hawaiian Home Lands (State of Hawaii)
DLNR	Department of Land and Natural Resources (State of Hawaii)
DLU	Department of Land Utilization (City and County of Honolulu)
DOH	Department of Health (State of Hawaii)
DOT	Department of Transportation (State of Hawaii)
DPP	Department of Planning and Permitting (City and County of Honolulu)
DURP	Department of Urban and Regional Planning (University of Hawaii)
EA	Environmental Assessment
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
EISPN/PN	Environmental Impact Statement Preparation Notice
ER	Environmental Review
FEA	Final Environmental Assessment
FEIS	Final Environmental Impact Statement
FONSI	Finding of No Significant Impact
HAR	Hawaii Administrative Rules
HB	House Bill (State of Hawaii)
HEPA	Hawaii Environmental Policy Act
HHC	Hawaiian Homes Commission (State of Hawaii)
HRS	Hawaii Revised Statutes
HTA	Hawaii Tourism Authority (State of Hawaii)
ICA	Intermediate Court of Appeals (State of Hawaii)
LRB	Legislative Reference Bureau
LUC	Land Use Commission (State of Hawaii)
MEPA	Massachusetts Environmental Policy Act
ND	Negative Declaration
NELH	Natural Energy Laboratory of Hawaii
NEPA	National Environmental Policy Act
OEQC	Office of Environmental Quality Control (State of Hawaii)
RCW	Revised Code of Washington
ROD	Record of Decision
SB	Senate Bill (State of Hawaii)
SCR	Standing Committee Report (State of Hawaii)
SEA	Supplemental Environmental Assessment

SEIS	Supplemental Environmental Impact Statement
SEPA	State Environmental Policy Act (Washington State)
SEQR	State Environmental Quality Review (New York State)
SMA	Special Management Area (State of Hawaii)
TCEP	Temporary Commission on Statewide Environmental Planning (State of Hawaii)
UH	University of Hawaii
USCLF	Use of State or County Land or Funds
WAC	Washington Administrative Code

Senate Committees, State of Hawaii

ENE	Energy and Environment
JGO	Judiciary and Government Operations
WAM	Ways and Means
WTL	Water, Land, Agriculture, and Hawaiian Affairs

House Committees, State of Hawaii

EBM	Economic Revitalization, Business, and Military Affairs
EEP	Energy and Environmental Protection
FIN	Finance
JUD	Judiciary
WLO	Water, Land, and Ocean Resources

1. Introduction

1.1 Origins of the Study

Four decades ago, the State Legislature created the environmental review system in Hawaii, with the intention of establishing a system that would "ensure that environmental concerns are given appropriate consideration in decision-making along with economic and technical considerations" (HRS, Ch. 343, §1). Hawaii was among the first states to adopt an environmental review law modeled on the National Environmental Policy Act (NEPA) of 1970. After many years of experience with Hawaii's environmental review system, the stakeholders in the system—agencies, consultants, project proponents, community groups, legislators, and ordinary citizens—generally express support for the system and its goals. However, many view the system as outdated compared to the evolution of NEPA practice and the laws of other states. The scope, fairness, and effectiveness of the law have been criticized from different and, at times, conflicting perspectives. To facilitate reform of Hawaii's environmental review law, this report recommends amendments to HRS Chapters 341 and 343 and changes to the Hawaii Administrative Rules that modernize the State's environmental review process.

The University of Hawaii conducted comprehensive reviews of the system and made recommendations for updating it in 1978 (Cox, Rappa & Miller) and in 1991 (Rappa, Miller & Cook). This study is the third review, focusing on the past nineteen years of change in environmental review practice and the evolution of the law. During the 2008 session, the Legislature added Section 10 to the legislative appropriations bill, House Bill (HB) 2688 (Act 1), setting aside funds for the Legislative Reference Bureau to contract with the University of Hawaii to conduct this review of the State's environmental review system (Chapters 341, 343, and 344). Appendix 1 to this report contains the enabling section from Act 1. In requesting this study, the Legislature found that "in recent years, concerns have arisen about the ability of this system to adapt to the modern demands for achieving sustainability in Hawaii in a way that appropriately balances the state economy, environment, and social conditions over the long term" (House Bill 2510, 2008). It further found that "it is vital to ensure that Hawaii has an environmental review system appropriate for the state in the 21st century, which is fully integrated with the state and county permitting system, which examines impacts early in the planning process and which is effective, efficient, and equitable."

Under the auspices of the Legislative Reference Bureau, the two-year study was initiated in 2008 by an interdisciplinary team of faculty, researchers, and students from the University of Hawaii's Department of Urban and Regional Planning (DURP), the Environmental Center, and the Environmental Law Program of the William S. Richardson School of Law. The study team presented an interim report to the Legislature with legislative recommendations in the form of an omnibus bill prior to the convening of the 2010 legislative session. During the session, the study team participated in a working group of stakeholders, tasked to reach consensus on proposed changes to Chapters 341 and 343. This final report builds on previous work, and incorporates feedback received

from stakeholders and legislators during the 2010 session. It expands on the interim report's recommendations for statutory amendments and includes recommendations for changes to the administrative rules and guidance.

1.2 Purposes of the Study

The Legislature commissioned this study to:

1. examine the effectiveness of the current environmental review system created by Chapters 341, 343, and 344, Hawaii Revised Statutes;
2. assess the unique environmental, economic, social, and cultural issues in Hawaii that should be incorporated into an environmental review system;
3. address larger concerns and interests related to sustainable development, global environmental change, and disaster risk reduction; and
4. develop a strategy for modernizing Hawaii's environmental review system so that it meets international and national best practice standards.

1.3 Structure of the Report

The report is organized into ten sections. The first section introduces the study, the structure of the report, and study members. The second section provides context for Hawaii's environmental review system, including an overview of laws and legislative changes since the last review in 1991, intents and goals of the environmental review process, trends, study principles, and analyses of relevant court cases and judicial decisions. The third section describes the study's process of information gathering, stakeholder interaction, analysis, feedback, and development of recommendations. The fourth section covers the study team's refinement of recommendations based on the 2010 legislative session and participation in a working group.

Sections 5 through 9 present issues and recommendations to improve Hawaii's environmental review system, organized into five broad themes: applicability, governance, participation, content, and process. Each theme includes two parts: issue identification and the study's final recommendations. Issue identification is based on analyses of the interview responses, feedback from the Town-Gown workshop, draft recommendations, and feedback on the recommendations in the interim report.

The study's final recommendations build on those presented in the Report to the Legislature, respond to developments during the legislative session, and encompass recommendations for changes to the statutes, administrative rules, guidance, and overall approach to environmental review in Hawaii. Some recommendations are the same as those presented in the January 2010 Report to the Legislature; some are modified to incorporate new information; and some address rules and guidance issues that were not discussed in detail in the earlier report, which focused on statutory changes.

Finally, Section 10 summarizes the study team's conclusions and recommended next steps for improving Hawaii's environmental review system.

1.4 The Study Team

The UH Environmental Review Study Team includes Professor Karl Kim, principal investigator and faculty member of the Department of Urban and Regional Planning (DURP); Professor Denise Antolini, co-principal investigator, faculty member and Director of the Environmental Law Program at the William S. Richardson School of Law; Peter Rappa, faculty member with the Sea Grant College Program and the Environmental Center; and several graduate students and consultants. Dr. Kim studied the environmental review system in the early 1990s and authored several journal articles on the topic. He has also been involved in the preparation, review, and analysis of numerous environmental assessments. Professor Antolini has practiced and taught environmental law since the 1990s and served on the Environmental Council from 2004-2006, including as its Chair from 2005-2006. Peter Rappa has been associated with the Environmental Center since 1977 and participated in the two previous comprehensive reviews of the State's environmental review system in 1978 and 1991. He has reviewed hundreds of Environmental Assessments (EAs) and Environmental Impact Statements (EISs) as a participating faculty member or as the acting Environmental Review Coordinator at the Environmental Center.

The study team hired three consultants for specific tasks. Gary Gill, former Director of the Office of Environmental Quality (OEQC) from 1995 to 1998 and the Deputy Director of Environmental Health from 1998 to 2001, assisted with stakeholder interviews. Dr. John Harrison, former Environmental Coordinator of the Environmental Center, assisted with the preparation of the review of legislative amendments to Chapter 343 from 1991 to the present. Dr. Makena Coffman, DURP faculty member, prepared a white paper on climate change mitigation and the environmental review system.

Several graduate students and law school students made important contributions to the study. Scott Glenn and Nicole Lowen, graduate students in DURP, have worked on the study through each of its phases. Another DURP student, Klouldil Hubbard, participated in the early part of the study. Five law students or law graduates, Lauren Wilcoxon, Everett Ohta, Greg Shimokawa, Anna Fernandez, and Cari Hawthorne, contributed to the legal research and analysis.

Throughout the study, the team has benefited from the advice and counsel of the Office of Environmental Quality Control, the Environmental Council, and the Legislative Reference Bureau's Director Ken Takayama, Charlotte Carter-Yamauchi, and Matthew Coke. Their guidance has been greatly appreciated. Any errors or omissions in this report are the responsibility of the study team.

2. Background and Context

2.1 Environmental Review System in Hawaii

The concerns about environmental protection that led to the passage of the federal National Environmental Policy Act (NEPA) of 1969 also inspired the Hawaii Legislature to enact the Hawaii Environmental Quality Control Act in 1970 in order to "stimulate, expand, and coordinate efforts to determine and maintain the optimum quality of the environment of the state."

To accomplish this purpose, the 1970 act created the Office of Environmental Quality Control (OEQC) within the Office of the Governor; the Environmental Center at the University of Hawaii to facilitate contributions from the University community to state and county agencies in matters dealing with the environment; and the Environmental Council to serve as a liaison between the Director of OEQC and the general public. Each of these entities was to serve, and continues to serve, an important "governance" role in the state environmental review system.

In 1973, the Legislature created the Temporary Commission on Statewide Environmental Planning (TCEP), which proposed recommendations passed by the Legislature in 1974 (Act 246), establishing the current environmental review system (Chapter 343) and creating Hawaii's Environmental Policy Act (Chapter 344) (Temporary Commission on Statewide Planning, 1973). Pursuant to these statutes, there are two sets of administrative rules that regulate the environmental review system: Hawaii Administrative Rules, Title 11, Chapters 200 and 201. Together, these three statutes and two sets of rules, along with the policy guidance documents published by the OEQC and a series of important judicial decisions, form the legal foundation for Hawaii's environmental review system.

2.2 Purpose of the Law

The purpose of Hawaii's environmental review law is clearly expressed in the following passage from HRS § 343-1:

> The legislature finds that the quality of humanity's environment is critical to humanity's well being, that humanity's activities have broad and profound effects upon the interrelations of all components of the environment, and that an environmental review process will integrate the review of environmental concerns with existing state and county planning processes and alert decision makers to significant environmental effects which may result from the implementation of certain actions. The legislature further finds that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.

It is the purpose of this chapter to establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision-making along with economic and technical considerations.

The logic in establishing a process by which actions are systematically evaluated for environmental impacts was to assure that the ramifications of agency and applicant actions would be fully known to the degree possible prior to making decisions to proceed with those actions. Allowing the public to participate in the review process encourages honest data gathering and open disclosure by government, and helps the identification of potential impacts that might be known only to those with intimate experience or knowledge of a particular area. It also promotes transparency, democratic participation in government, and requires agencies to consider public opinion as a source of information.

The environmental review system is a tool for planning and environmental management, but it is not a substitute for other tools and processes within the larger context of environmental planning and resource management. It is a formal legal process for systematically gathering information to support informed decisions and advise decision makers of the consequences of their choices. Environmental review is a disclosure process.

2.3 Goals of the Environmental Review Process

Five fundamental goals of environmental review were identified by this study: (1) to protect the environment, (2) to improve the quality of information and decision-making, (3) to improve public participation, (4) to integrate environmental review with planning, and (5) to increase the efficiency, clarity, and predictability of the process. The first four are all explicitly stated in HRS § 343-1; the goal of efficiency, clarity, and predictability is an implied desired features for any complex governmental process that imposes costs and burdens on a wide range of participants.

The following is a brief description of each goal.

1. Protect the environment. This is the primary purpose for the creation of the environmental review system. The environment is defined broadly to encompass more than the physical and natural processes of a geographic area, but also its social, cultural, and economic aspects. This goal tends to focus on the substantive content of an environmental review document rather than procedure.

2. Improve information quality and decision-making. This is necessary so that agencies and the public are aware of the consequences of their actions. Ensuring quality information is necessary for good decision-making and to effectively compare environmental considerations with economic, social, and technical considerations.

3. Enhance public participation. To better hold decision makers accountable and ensure sufficient and comprehensive consideration of the environment, the

environmental review process strives to be transparent by incorporating public participation. Those affected by proposed projects have the opportunity to ensure agency awareness of the impacts and the opportunity to provide input in determining appropriate mitigation solutions or alternatives.

4. Integrate environmental review with other planning processes. The environmental review system exists within a planning framework involving discretionary and ministerial permits, plans (e.g., land use, regional, master, development, project, and community plans), and other governmental activities (e.g., economic development, social programs, and natural resource management). The strengths and limitations of environment review should be kept in mind. The system functions in conjunction with other planning and regulatory processes, and should not be regarded as substitute for these other processes, but should be integrated with them to support good planning.

5. Increase efficiency, clarity, and predictability of the process. These are the hallmarks of an effective environmental review system. This principle does not apply to outcomes, but to process. Outcomes should depend on the substance of the information and final decision by the decision maker. Certainty and predictability assist the applicant, agency, and the public to know when an action should undergo environmental review or be exempted, how to determine significance, and when a preparer has sufficiently satisfied all requirements.

These five goals address diverse needs and interests in our community. At times, it is necessary to emphasize one goal over another. A balanced approach is necessary. These five goals help clarify the issues and areas of concern and directions for reform.

2.4 Summary of Legislative History Since 1991

The Legislature has amended Chapters 341 and 343 many times since 1970. A description of the original law and amendments from 1979 to 1991 is contained in the two previous reviews of the state system (Cox, et al., 1978; Rappa, et al., 1991). A major structural change was the abolition of the Environmental Quality Commission in 1983 and the transfer of its rulemaking, exemption list, and limited appeal duties to the Environmental Council established under Chapter 341.

Several of the amendments since 1991 have addressed relatively small issues. Act 61 (1996), changed the term "Negative Declaration" to "Finding of No Significant Impact" (FONSI), as used under NEPA, for actions that will not have a significant impact on the environment and will not require an EIS. Act 73 (2003) established the requirement to inform the public of an "application for the registration of land by accretion for land accreted along the ocean."

Several amendments since 1991 have, however, changed the law significantly:

- Act 241 (1992) required that, for EAs for which a FONSI is anticipated, that the Draft EA be made available for public review for a thirty-day period.
- Act 50 (2000) added the requirement to include cultural impact assessments within the EIS.
- Act 55 (2004) added several triggers and required the preparation of an EA for proposed wastewater facilities, except individual wastewater systems, and for waste-to-energy facilities, landfills, oil refineries, and power-generating facilities.
- Act 110 (2008) declared that OEQC should determine jurisdiction when there is a question as to which state or county agency has the responsibility for preparing an EA.
- Act 207 (2008) amended provisions relating to EISs by defining renewable energy facility and required that a Draft EIS be prepared at the earliest practicable time for an action that proposes the establishment of a renewable energy facility.

2.5 Trends in Hawaii's Environmental Review System

Trends in Hawaii's environmental review system can be discerned through OEQC's records of published environmental review documents. The study team reviewed each edition of the OEQC Bulletin/Notice and counted the number of each type of environmental review document published in the last thirty years. Since 1979, when the Environmental Center first began tracking the publication of EAs and EISs, a total of 6,318 final EAs have been prepared (Table 1). Of these, a total of 652, about 10%, proceeded to the full EIS stage. The remaining 5,563, about 90%, stopped at the EA stage with a FONSI. Each year, reviews are withdrawn or not completed, resulting in the discrepancy between the final EA total and the total proceeding to the full EIS stage. Overall, for this 30-year period, the ratio of EAs to EISs was approximately 10 to 1.

The data indicate a decline in the number of environmental review documents prepared in Hawaii over the past three decades (Figure 1). After 1979, the number of EAs and EISs decreased until 1983, when the numbers rose again until the peak in 1990. This peak in 1990 may likely be the result of the State's increased economic activity in the late 1980s. After 1990, the data show a continuous drop in the total number of environmental documents produced through 2009, except for slight increases in 1993 and 2004-2006.

Three general observations can be derived from this analysis. First, the overall statewide trend in Hawaii's environmental review system is toward fewer documents being prepared. The reasons for this decrease may be economically based and its implications deserve further investigation as discussions for reform continue.

Table 1. Environmental Assessment Determinations from 1979 through 2009: The Ratio of EIS Preparation Notices to Environmental Assessment Determinations

Year	Environmental Assessment Determinations[1]	Finding of No Significance (FONSI)/Negative Declaration (ND)[2]	Preparation Notice (PN)[3]	DEA[4]	Ratio PN/EA[5]	Supplemental Documents[6]	Discrepancies[7]
1979	306	267	39	ND	0.127	ND	
1980	272	253	19	ND	0.070	ND	
1981	252	221	31	ND	0.123	ND	
1982	233	208	25	ND	0.107	ND	
1983	221	198	23	ND	0.104	ND	
1984	227	212	15	ND	0.066	ND	
1985	250	231	19	ND	0.076	ND	
1986	298	260	38	ND	0.128	ND	
1987	272	235	37	ND	0.136	ND	
1988	289	254	35	ND	0.121	ND	
1989	284	254	30	ND	0.106	ND	
1990	311	277	34	ND	0.109	ND	
1991	292	261	32	0	0.110	2	-1
1992	231	211	17	2	0.074	2	3
1993	252	213	23	6	0.091	0	16
1994	210	178	19	6	0.090	1	13
1995	189	169	15	7	0.079	0	5
1996	164	144	15	5	0.091	1	5
1997	160	140	14	3	0.088	0	6
1998	162	142	15	1	0.093	0	5
1999	149	132	13	4	0.087	0	4
2000	146	120	11	6	0.075	4	15
2001	132	125	10	4	0.076	0	-3
2002	121	101	15	4	0.124	3	5
2003	115	104	8	1	0.070	5	3
2004	130	104	14	1	0.108	0	12
2005	157	126	24	1	0.153	0	7
2006	142	120	18	0	0.127	0	4
2007	111	88	24	0	0.216	0	-1
2008	122	115	7	0	0.057	2	0
2009	118	100	13	8	0.110	4	5
TOTAL	**6318**	**5563**	**652**	**59**	**0.103**	**24**	**103**
					(AVERAGE)		

Source: OEQC Bulletin

[1]Only Environmental Assessments (EAs).

[2]All negative declarations/finding of no significance.

[3]All preparation notices for draft environmental impact assessments.

[4]All draft environmental assessments withdrawn.

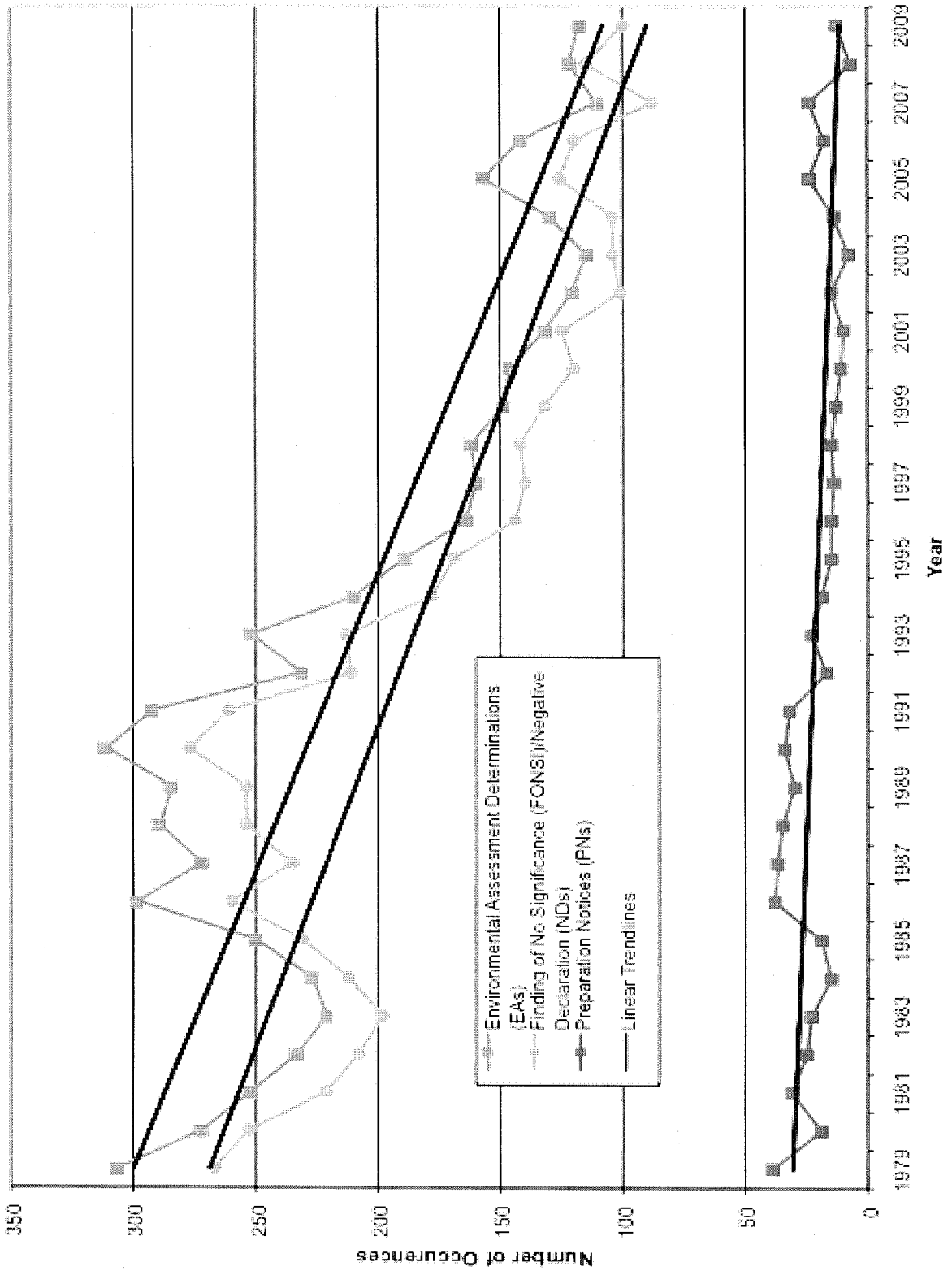
[5]Ratio of preparation notices to environmental assessments.

[6]All environmental impact statement supplemental documents.

[7]Discrepancies can be due to documents informally leaving the process or errors in the publication records. This was calculated by subtracting the number of FONSI/NDs and PNs from the number of EA determinations.

[8]No data collected for these years for these categories.

Figure 1. Environmental Assessment Determinations from 1979-2009: EA Determinations, FONSI/Negative Declarations, and Preparation Notices



Second, the ratio of Preparation Notices (PN) to EAs has generally declined over time, with the relative number of EISs decreasing. This is an indication of how often agencies have determined that project impacts are "significant." The overall mean was about .10, including highs of .136 in 1987, .153 in 2005, and then a bump to .216 in 2007, a historical high; and with lows of .066 in 1984, .070 in 2003, and .057 in 2008. This trend may have several explanations. Agencies may have become less demanding over time in requiring EISs. It may also mean that fewer large impact projects are being proposed over time or, put another way, that the 1980s were the apex of large impact developments in Hawaii. The spike in 2007 was twice the historical mean but in actual numbers involved only six more PNs than required in 2006 and stood out because there was also a large decrease in the number of EAs prepared that year to 111, a historical low. In 2008, the number of EAs reverted to the trend with 122, but only 7 PNs were published, resulting in an unusually low ratio of .057. In 2009, the number of EAs and PNs returned to the long-term trend with a ratio of .110.

Third, the number of documents prepared in the environmental review system, at least since 1990, appears related to economic activity in the State of Hawaii. This relationship between environmental reviews and the economy is not surprising given that the system is triggered by agency and applicant actions that typically are development projects. Although these data give only a macro-level overview of the system, they provide insight into how the State's environmental review system has evolved over time.

2.6 Summary of Judicial Decisions

Since the enactment of Chapter 343 and Chapter 341 in the early 1970s, the Hawaii state courts have played an important role in the environmental review process by interpreting statutes and administrative rules in the context of lawsuits brought by citizens challenging a variety of state and county agency determinations. Chapter 343 is an action-forcing procedure requiring agencies and applicants to consider the environmental effects of certain proposals. In addition to the governance system, Chapter 343 includes judicial review for interpretation enforcement.

In nearly four decades of Chapter 343 litigation in Hawaii, Hawaii courts have issued approximately twenty-three decisions directly interpreting various aspects of Chapter 343: twenty-one by the Hawaii Supreme Court (Court) and two by the Hawaii Intermediate Court of Appeals (ICA). About half of those decisions were issued in the past ten years, impacting both how Chapter 343 is interpreted legally and stakeholder and public perception of the law. Table 2 lists the cases chronologically with a summary of the relevant court holdings of each case as they are discussed in this section. Detailed legal citation information is available on the website.

The Court and ICA have repeatedly referred to, and grounded their decisions in, four of the key goals of the environmental review system that have guided this study: the broad purpose and intent of Chapter 343 to protect environmental quality, the "informational role" of the environmental review process, the value of public participation, and improving the quality of agency decision-making. The last principle of this study—

efficiency, clarity, and predictability—is not derived from the law itself and therefore has not played an explicit role in judicial decisions.

In reviewing judicial decisions, it is important to remember several points. Courts do not themselves choose which aspects of the law to address; they address the issues raised by the parties in particular lawsuits. The appellate courts, in particular, address issues after they have been vetted by the lower and sometimes intermediate court review process. Courts typically interpret state statutes such as Chapter 343 based upon standard methods of plain language, indicia of legislative intent, prior case law, and administrative regulations that interpret the statute. Court decisions, therefore, usually depend directly on the product of the legislative and rulemaking process, reinforcing the primary role of the Legislature in drafting the statute, statements of legislative intent, statutory context, and the Environmental Council's rulemaking role. The reported appellate decisions represent a subset of actual lawsuits filed initially in the state circuit (trial) courts, the filing and decisions of which are not routinely reported and few of which are pursued through the appeal process. Finally, courts will tend to defer to agency decision-making that involves issues of fact, but will review issues of law (such as the legality of an agency's exemption decision) afresh or "de novo."

The range of Chapter 343 issues discussed by the Hawaii Supreme Court and the ICA over the past four decades can be categorized into the study's five themes:

- Applicability involves the applicability of the law, triggers, and exemptions, both for agency- and applicant-initiated projects, including the functional equivalence doctrine.
- Governance includes the Council's rulemaking authority.
- Participation includes the judicial review process, timing and standing, attorney's fees, and the private attorney general theory.
- Content covers the scope of review, secondary impacts, segmentation, content requirements and sufficiency, mitigation measures, and cultural impacts.
- Process arises in cases involving when to prepare review, supplemental EISs, and shelf life.

The twenty-three cases have overlapping relevancy, so discussions of each case are limited to the main ruling relevant to the specific section and do not exhaustively consider every aspect of a given case.

Table 2. Timeline and Summary of Hawaii Environmental Review Judicial Decisions

Year	Case Name	Summary of Relevant Court Holdings
1978	*Life of the Land v. Ariyoshi*, S. Ct.[1] ("*Life of the Land*")	• Chapter 343 is broader in scope than NEPA. • Under the "rule of reason," an EIS need not exhaustively discuss all possible effects; preparation in good faith with sufficient information is adequate.
1981	*Molokai Homesteaders Association v. Cobb*, S. Ct. ("*Molokai Homesteaders*")	• Chapter 343 is broader in scope than NEPA. • Analyze the entire project, including secondary and non-physical effects, socioeconomic consequences, and direct physical impacts.
1981	*McGlone v. Inaba*, S. Ct. ("*McGlone*")	• Upheld BLNR's decision to not require an EA for an underground utility easement through conservation land or an adjacent single-family residence because neither would have significant impacts. • Although significance determinations are subjective, an agency must examine every phase and expected consequence of the proposed action.
1981	*Waikiki Resort Hotel, Inc. v. City and County of Honolulu*, S. Ct.	• The plaintiffs exceeded the (then) 180-day period for challenging the lack of a determination of whether a project requires as EA by nearly five months and after construction commenced.
1981	*Waianae Coast Neighborhood Board v. Hawaiian Electric Company*, S. Ct. ("*Waianae Coast*")	• Honolulu Department of Land Utilization (now the Office of Planning) made a negative declaration that an EA was not needed to approve a permit for a power-generating unit; plaintiffs did not meet the 60-day challenge period, which began from the public notification of the determination, so were barred.
1982	*Pearl Ridge Estates Community Association v. Lear Siegler*, S. Ct. ("*Pearl Ridge*")	• The LUC's reclassification of land from conservation to urban triggered Chapter 343 as a "use" of state land. • While not addressing the functional equivalence doctrine directly, the Court recognized that filing for reclassification with the LUC would allow someone to circumvent the review process, so rejected the LUC process as equivalent.
1990	*Medeiros v. Hawaii County Planning Association*, S. Ct. ("*Medeiros*")	• Plaintiffs challenged the lack of an EIS under the correct section of HRS § 343-7. The plaintiffs were challenging the Hawaii County Planning Commission's approval of a geothermal resource permit and failure to require an EIS instead of just an EA. • The research proposal did not need to analyze the impact of future geothermal energy businesses because the Legislature already did so.
1994	*Mauna Kea Power Co., Inc. v. Board of Land and Natural Resources*, S. CT. ("*Mauna Kea*")	• Chapter 343 review is informational, not substantive.
1996	*Price v. Obayashi Hawaii Corp.*, S. Ct. ("*Price*")	• A proposed project may proceed to the permitting stage only after the accepting authority has accepted the final EIS. • Use the "rule of reason" to determine that the EIS for the proposed development is adequate to make an informed decision.
1997	*Kahana Sunset Owners Association v. County of Maui*, S. Ct. ("*Kahana Sunset*")	• An EA was a condition precedent to the granting of an SMA permit. • Maui County Planning Commission erred in exempting the proposal to build 312 multi-family units with a 36" drainage culvert tunneled under a street and connected to a culvert below a public highway (not a "use issue). • Rejected the County's "functional equivalence" argument that Chapter 343 need not be followed because the contested case hearing it held covered the same issues. Chapter 343 requires a fixed sequence of public notice and the County improperly shifted the burden to the public from the applicant. • Plaintiff properly brought the action within 120 days of the Maui County Planning Commission's decision to approve the SMA. • The lead agency has the responsibility to prepare the EA and cannot defer that process to another agency with downstream authority. • The EA must address the environmental effects of the entire proposal, not only the drainage system, because it is a "necessary precedent" to the development, otherwise it would be "improper segmentation."

Table 2. Timeline and Summary of Hawaii Environmental Review Judicial Decisions

Year	Case Name	Summary of Relevant Court Holdings
1998	*Kepoo v. Watson*, S. Ct. ("*Kepoo I*")	• The State has title and responsibility for Hawaiian Homelands, so they are eligible for Chapter 343 review. • The Hawaiian Homes Commission found that an EIS was not required for a proposed power plant on Hawaiian homelands. Because HHC issued a negative declaration, the challenging party is not required to comment on the draft EIS in order to be adjudged an aggrieved party.
1999	*Citizens for the Protection of the North Kohala Coastline v. County of Hawaii*, S Ct. ("*North Kohala*")	• The application for an SMA permit for a 387-acre resort development triggered Chapter 343 because the project proposed two roadways that would be tunneled under a state highway. • The citizens group had adequately demonstrated standing to challenge the adverse ruling in the contested case hearing regarding the proposal.
2000	*Ka Paakai o Kaaina v. Land Use Commission*, S. Ct. ("*Ka Paakai*")	• Act 50 amended Chapter 343's definitions of "environmental impact statement" and "significant effect" to include consideration of an action's effects on cultural practices. State agencies have an affirmative obligation to protect Native Hawaiian rights in their administrative processes, so must consider "the effects of human activities on native Hawaiian culture."
2001	*Bremner v. City and County of Honolulu*, I.C.A.[2] ("*Bremner*")	• Honolulu City Council's promulgation of ordinances amending the Waikiki development plan and zoning guidelines is not an "action" under HRS § 343-2 because it was not an "agency" or an "applicant." • Plaintiffs claim was barred by failure to file within 120 days.
2002	*Sierra Club v. Hawaii Tourism Authority*, S. Ct. ("*Hawaii Tourism Authority*")	• Rejected the Sierra Club's standing to challenge the HTA's $114 million tourism marketing plan on the basis of a lack of geographic nexus.
2005	*Kepoo v. Kane*, S. Ct. ("*Kepoo II*")	• Lease of state land is a "use"; voided the Department of Hawaiian Home Lands lease for a power plant because it had not completed a final EIS before entering into a lease for construction. • Use of "may" can mean "likely" in common usage, so the proposed power plant required an EIS pursuant to HRS § 343-5(c). • HRS § 343-7(b) was the appropriate statute of limitations to challenge an agency negative declaration. The plaintiffs had filed a timely challenge. • Parties challenging an EIS must have commented on the document but not for challenging a negative declaration. • A voided lease for failure to comply with Chapter 343 did not deprive the leaseholder's property rights. Absent Chapter 343 compliance, DHHL had not issued a valid lease for the project; thus the proponents lacked the requisite property interest to assert a due process claim.
2005	*Morimoto v. Board of Land and Natural Resources*, S. Ct. ("*Morimoto*")	• Mitigation measures identified in an EIS prepared under NEPA and later adopted by a project proponent could be considered by the BLNR in its decision to grant a permit.
2006	*Sierra Club v. State Office of Planning*, S. Ct. ("*Koa Ridge*")	• LUC reclassification of land from agriculture to urban for the "Koa Ridge" development was an appropriate point to require an EA. The "use" of state highways triggered Chapter 343, not the reclassification, but the dispute focused on timing, not use. The LUC was the "receiving" agency and even if the project changed later, the project was neither too "preliminary" nor "conceptual" for Chapter 343. • Rejected an argument by the defendants that Chapter 343 review was not required because it would duplicate the LUCs reclassification process.
2007	*Sierra Club v. Department of Transportation*, S. Ct. ("*Superferry I*")	• DOT erroneously exempted the $40 million state-financed harbor improvements by not taking a "hard look" at secondary impacts. • Found that the plaintiffs had both "group" and "individual" standing, under both the traditional "injury in fact" test and the newer "procedural injury" test. • Rejected the citizen plaintiffs' claim that the project involved "connected actions" because the private Superferry project was not an "action" as defined by Chapter 343, and the plaintiffs had not shown that the ferry required state approval to proceed.

Table 2. Timeline and Summary of Hawaii Environmental Review Judicial Decisions

Year	Case Name	Summary of Relevant Court Holdings
2008	*Nuuanu Valley Association v. City and County of Honolulu*, S. Ct. ("*Nuuanu*")	• Connecting privately owned drainage and sewage lines to a state or county-owned system does not constitute a "use."
2008	*Ohana Pale Ke Eo v. Hawaii Department of Agriculture*, I.C.A. ("*Ohana Pale*")	• DOA's granting of a permit to Mera Pharmaceuticals to import genetically engineered algae for a project at the Natural Energy Laboratory of Hawaii (NELH), a state facility, constituted a "use" of state lands. • Rejected the State Board of Agriculture's argument that its permit review process under Chapter 150A could constitute compliance with Chapter 343, finding that HEPA unambiguously required preparation of an EA before the Board could approve Mera's application.
2009	*Sierra Club v. Department of Transportation*, S. Ct. ("*Superferry II*")	• Plaintiffs were the prevailing parties for purposes of awarding attorney's fees, pursuant to HRS § 607-25 and the private attorney general doctrine. Hawaii Superferry, Inc. was not liable because the statute applied only to private parties undertaking development without obtaining all permits or approvals. • Awarded fees against both the State and Superferry pursuant to the private attorney general doctrine, which had not previously been applied in a Chapter 343 case because the plaintiffs' legal action "vindicated important public rights."
2010	*United Here! v. City and County of Honolulu*, S. Ct. ("*Turtle Bay*," "*Kuilima*")	• Defendants challenged whether plaintiffs had filed their lawsuit seeking a supplemental EIS within the statutory time frame. The Court adopted the 120-day limitation of -7(a) for the case, starting from the date the City and County of Honolulu Department of Planning and Permitting approved the subdivision application. The Court rejected the defendants' arguments that either the 30-day or 60-day time limit applied or that the time frame ran from the date of the plaintiffs' "actual knowledge" of the decision not to require an SEIS. • A SEIS was required under the administrative rules and this interpretation is consistent with public policy and the purpose of Chapter 343. The Court stated that an EIS cannot remain valid "in perpetuity," and that ignoring the implicit time frame in an EIS would allow unlimited delays in projects and permit possible negative impacts on the environment to go unchecked. • Defendants challenged the Council's rules regarding supplemental statements, which are not expressly referred to in Chapter 343. The Court noted that the Legislature gave the Council authority to further interpret the statute. Citing established administrative law principles, agencies have "implied authority" that is "reasonably necessary to carry out the powers expressly granted." The Court found that the Council's SEIS rules were consistent with Chapter 343 and its objectives and upheld the Council's rules.

[1]Hawaii State Supreme Court
[2]Intermediate Court of Appeals

2.6.1. Applicability

The Chapter 343 judicial decisions considered by some stakeholders to be the most controversial have involved the "screen" or initial applicability of the law. Specifically, lawsuits challenging agency decisions regarding the scope of the "use of state or county lands or funds" (USCLF) trigger and the agency exemption process have resulted in twelve decisions discussed here. Of these, one decision (*Superferry I*) involved agency-initiated action, and six decisions (five since the 1991 review) involved situations in which citizens groups sought a judicial interpretation to apply Chapter 343 review to USCLF triggered by private-applicant actions. This latter area has been the focus of conflict and concern among many stakeholders.

Before addressing these decisions in more detail, it is worth making four general notes regarding judicial review and applicability of Chapter 343. First, the Hawaii courts often refer to NEPA case law as persuasive but not controlling authority, emphasizing that Chapter 343 is broader in scope and detail than NEPA. Furthermore, the Hawaii courts recognize that an environmental review document is "merely an informational document," not itself making policy choices for agencies under their various substantive permitting authorities. Second, several Hawaii Supreme Court decisions have also addressed the threshold issue of what *kind* of *state* agency-initiated actions are covered under Section 343-5(a). Third, when the law does apply, the Court has made clear that compliance with Chapter 343 is a "condition precedent" to agency approval or project implementation. Citing HAR § 11-200-5(c) in *Kepoo v. Kane II* (2005), the Court affirmed that "the lease of state land is a use of state land even before construction begins." Fourth, another general aspect of applicability is determining whether an action "may" have a significant effect on the environment. In *Kepoo II* (2005), the Court clarified that "may" means "likely."

The applicability cases focus primarily on whether the proposed action qualifies as a "use" of state or county lands and on whether agencies have made proper exemption determinations. In the first major applicability case, decided in 1981 by the Court, *McGlone v. Inaba*, the Court upheld the Board of Land and Natural Resources' decision not to require an EA for an underground utility easement through conservation land or for an adjacent single-family residence, reasoning that neither the utility easement nor the house would have impacts that rose to the level of significance contemplated by Chapter 343 and, therefore, that they had been properly exempted by the BLNR.

In the second case, *Kahana Sunset Owner's Association v. County of Maui* (1997), the Court agreed with the citizen-plaintiff that the Maui County Planning Commission had erred in not requiring an EA for a proposal to build 312 multi-family units when a 36" drainage culvert would be tunneled under a street and then connect to a culvert under a public highway. The Court found that the agency's decision was not consistent with the larger intent and purpose of Chapter 343 to "exempt only very minor projects" and the "letter and intent of the administrative regulations."

Two years after *Kahana Sunset*, the Supreme Court addressed a similar situation focusing more directly on the meaning of "use of state or county lands or funds" in *Citizens for the Protection of the North Kohala Coastline v. County of Hawaii* (1999). The Court held that the developer's application to the county for a Special Management Area permit for its 387-acre resort development triggered Chapter 343 review because the project proposed two roadways for golf carts and maintenance vehicles that would be tunneled under a state highway. Using *Kahana Sunset* as precedent, the Court reaffirmed that the proposed underpasses constituted "use of state lands" and were "integral" parts of the larger development project.

In *Sierra Club v. State Office of Planning* (2006), commonly referred to as "Koa Ridge," the Court upheld the circuit court's decision that the reclassification by the Land Use Commission (LUC) from agriculture to urban of the 1,274-acre Koa Ridge development

proposed by Castle & Cooke in Central Oahu required an EA because the project required tunneling underneath four state highways for its 36" sewage line and water lines. The application of Chapter 343 was not directly triggered by the reclassification itself, but rather by the "use" of the state highways.

There were two additional major Supreme Court determinations regarding triggers and exemptions in *Sierra Club v. Department of Transportation* (2007), known as the *Superferry I* decision. First, the Court noted that Chapter 343 did "not apply to [private] projects such as this one where government plays a facilitative role for a private project that itself does not constitute an applicant action." Thus, the state harbor project, not the Superferry itself, triggered environmental review. Second, the Court found that the DOT erred by looking at the harbor improvement project "in isolation," and "[p]urposely or not," DOT failed to examine the broader impacts. Because the "DOT did not consider whether its facilitation of the Hawaii Superferry Project will probably have minimal or no significant impacts, both primary and secondary, on the environment," the agency's exemption determination was invalid.

One year later, in *Nuuanu Valley Association v. City and County of Honolulu* (2008), the Court took an expressly restrictive view of the USCLF issue, holding that a proposed utility connection by the 45-acre Laumaka subdivision for nine residential lots on land zoned "residential" did not constitute the use of county lands. The Court rejected the plaintiffs' position that Chapter 343 applied "[s]o long as there is a 'use' of city or state lands," without regard to "the size of the 'use' and comparisons to the scope and size of the overall project." Referring to, and limiting, the reasoning in *Kahana Sunset*, *North Kohala*, and *Koa Ridge*, the Court held that these cases did not reach as far as the plaintiffs suggested. Absent "tunneling or construction" of some significance, the Court concluded, there was no "use." The Court declined to apply the "ordinary meaning" of the word "use," which would have resulted in the state or county lands trigger being applied "no matter what or how benign that 'use may be.'"

Another recent case regarding USCLF comes from the ICA, *Ohana Pale Ke Eo v. Hawaii Department of Agriculture (DOA)* decision in May 2008. The ICA held that Chapter 343 review was required for DOA's granting of a permit to Mera Pharmaceuticals to import genetically engineered algae for a project at the state-run Natural Energy Laboratory of Hawaii (NELH) facility in Kona because the importation proposal constituted "use" of state lands. Therefore, the intermediate court concluded that the importation of the algae required Chapter 343 review.

In summary, the Court's cumulative decisions regarding "use of state or county lands or funds" can be synthesized into this benchmark for applicability determination: whether "use" triggers review is highly contextual, linked to significance, and depends on the extent of the use and its relationship to the project itself. On the one hand, relatively insignificant private utility connections (as in *McGlone* and *Nuuanu*) appear not to meet the benchmark; on the other hand, tunneling under state highways for major developments projects (*Kahana Sunset, North Kohala,* and *Koa Ridge*), importation of

genetically engineered algae for research at state facilities (*Ohana Pale*), and large capital harbor improvements (*Superferry*) do trigger the need for review.

Turning to a related applicability issues, in some reported decisions, agencies have invoked the "functional equivalence" doctrine, arguing that they should not have to comply with Chapter 343 at all because another similar statutory or permitting process involves extensive environmental review of the proposed project. They contend that the parallel process has sufficiently allowed for outside agency and public input, and that the Chapter 343 process would be burdensome and duplicative. This argument is derived from well-accepted NEPA case law, known as the *Portland/Weyerhouser* standard (*Portland Cement Ass'n v. Ruckelshaus*, 1973 & 1974; *Weyerhaeuser Co. v. Costle*, 1978).

So far, in the Hawaii cases where defendants have raised this argument, the courts have rejected the defendants' arguments that a similar statutory review process could substitute for Chapter 343 review. In *Pearl Ridge Estates v. Lear Siegler* (1982), the Court held that the LUC was required to conduct an EA for a boundary amendment to rezone 8.4 acres from conservation to urban, even though the appellant had participated in a contested case hearing. The Court held that a contrary ruling would allow someone to circumvent the environmental review process by simply filing for reclassification with the LUC. However, the Court did not address the functional equivalence doctrine directly.

In *Kahana Sunset* (1997), the County of Maui argued that the Chapter 343 process was unnecessary because the contested case hearing it held to resolve the Chapter 205 challenge covered the same issues, even if the exact procedure was not the same. The Court expressly rejected this functional equivalence argument, finding that Chapter 343 "contains a fixed scheme of public notice" and that the County's argument improperly shifted the burden of conducting required review from the applicant to the public.

The Supreme Court seems to have left the door open, however, to a future case that may satisfy the criteria for functional equivalence. In *Koa Ridge* (2006), the Court rejected an argument by the defendants similar to that in *Pearl Ridge,* i.e. that the Chapter 343 review was not required because it would duplicate the LUC's reclassification process. The Court, however, allowed for the functional equivalence doctrine in a future case: "On the record before us, we cannot accept this 'functional equivalent of a required EA' argument. The LUC did *not* make a finding that the information presented at the contested case hearing was the equivalent of an EA, and we have previously stated 'it would be overly speculative for this court to make [such] a determination.'" Thus, under the appropriate circumstances and with sufficient findings that support equivalence, it is not out of the question that an agency may be able to satisfy Chapter 343 review with a different environmental review procedure.

Even more recently, in *Ohana Pale* (2008), the argument was again rejected. The State Board of Agriculture made a "functional equivalence" argument, although that specific phrase does not appear to have been used by the parties or court. The Board contended

that its process for reviewing importation permits under Chapter 150A "establishes a comprehensive and exclusive process for the issuance of permits for importing microorganisms and vests in the Board the sole authority to regulate the import of microorganisms." The Board claimed that the chapter 150A process included the "essential components of the HEPA review process," that it received substantial input on the application, including from the public, and that it had "thoroughly considered and discussed the risks posed by Mera's importation of the algae and imposed stringent conditions on Mera to minimize any risk." The Court rejected this argument, finding that, even if the Board had exclusive authority under Chapter 150A, "HRS § 343-5 plainly and unambiguously required preparation of an EA before the Board could approve Mera's application" and that "the requirements of Chapter 343 were intended to be 'integrated' with and to supplement decision-making by agencies involved in a permitting process."

The Court addressed the relationship between property rights and the Chapter 343 process in the 2005 *Kepoo II* case. The Court held that a circuit court decision that voided a lease for failure to comply with Chapter 343 did not deprive the leaseholder of a property right. The Hawaiian Homes Commission (HHC) had issued a negative declaration that an EIS was not required for a proposed power plant on Hawaiian homelands. On appeal from the agency decision, the circuit court granted summary judgment for the plaintiff-appellants, ordered that an EIS be prepared and accepted before the proposed power plant could be constructed, and voided the lease issued by the Department of Hawaiian Home Lands (DHHL). In affirming the order to void the lease, the Court rejected the project proponents' argument that voiding a Hawaiian homelands lease deprived them of a vested right in the lease. The Court found that, in absence of Chapter 343 compliance, DHHL had not issued a valid lease for the project and thus the proponents lacked the requisite property interest to assert a due process claim.

2.6.2. Governance

The Court has addressed controversies regarding the authority of the Environmental Council in several decisions. The recent *Turtle Bay* case clarified the authority of the Environmental Council to promulgate rules for supplemental documents. Although prior cases had acknowledged the role of the Environmental Council in promulgating rules for Chapter 343, not until the 2010 *United Here! v. City & County of Honolulu* ("*Turtle Bay*") case did the courts directly address the issue of the scope of the Council's authority to interpret the statute. Defendants challenged the Council's rules regarding supplemental impact statements, which are not expressly referred to in Chapter 343. The Court noted that the Legislature directed the Council to promulgate rules, but also gave it authority to further interpret the statute. Citing established administrative law principles, the Court noted that agencies have "implied authority" that is "reasonably necessary to carry out the powers expressly granted," and found that the Council's SEIS rules were consistent with Chapter 343.

2.6.3. Participation

This section examines cases involving the timing and standing of citizen groups to enforce Chapter 343, and their ability to obtain attorney's fees and costs for successful litigation.

Judicial review of agency decisions, authorized by HRS § 343-7 ("Limitation of actions"), can occur at three stages of the environmental review process:

- An agency's failure to prepare (or require) an EA. When there is a "lack of assessment required under section 343-5," a lawsuit must be filed within 120 days of "the agency's decision to carry out or approve the action" or, if the agency has made no formal determination, within 120 days after the project has started (HRS § 343-7(a)).
- Failure to prepare (or require) an EIS. If an EIS is not prepared when one "is required" but the process stops at only an EA/FONSI, then an action must be brought within 30 days after the public has been informed of that decision (HRS § 343-7(b)).
- An adequacy (or sufficiency) challenge to agency acceptance of an insufficient EIS. A challenge must be brought within 60 days after public notice of the acceptance of an EIS (HRS § 343-7(c)).

These timing restrictions (generally known as "statutes of limitations") on Chapter 343 lawsuits act as an important screen for litigation. Failure to meet these requirements has barred several citizen lawsuits.

In *Waikiki Resort Hotel, Inc., v. City and County of Honolulu* (1981), the Court held that the plaintiffs had exceeded (by nearly five months) the (then) 180-day period for challenging the lack of a determination of whether a project required an EA.

In *Waianae Coast Neighborhood Board v. Hawaiian Electric Co.* (1981), the Court held that compliance with the prior version of HRS § 343-7(b), which requires judicial proceedings be initiated within 60 days of a notice that an EA was or was not required, was "mandatory and jurisdictional" to qualify for judicial review. The Court held that the 60-day period to challenge the declaration began from the time the public received notification of the agency determination to not require an EA. Therefore, because plaintiffs had not met the time frame, their claim was barred.

In *Medeiros v. Hawaii County Planning Association* (1990), the Court followed the general jurisdictional principle that a plaintiff must bring a challenge under the correct section of HRS § 343-7 to complain about the lack of an EIS. The plaintiffs were challenging the Hawaii County Planning Commission's approval of a geothermal resource permit for four exploratory resource wells in Puna and failure to require an EIS instead of just an EA. Plaintiffs did not, however, file an action under HRS 343-7(b) within the time required, and therefore the Court found that any Chapter 343 claims were barred.

In *Kahana Sunset* (1997), the Court again addressed a statute of limitations issue. In that case, the Court found that the plaintiff properly brought the action within 120 days of the Maui County Planning Commission's decision to approve the SMA, rejecting the County's argument that the lawsuit should have been filed earlier, when the Commission had determined an EA was not required.

In contrast, in 2001, the ICA held in *Bremner v. City and County of Honolulu* that the plaintiff's claim was barred by failure to file within 120 days.

Four years later, in *Kepoo v. Kane II* (2005), the Court held that HRS § 343-7(b) was the appropriate statute of limitations to challenge an agency declaration that an EIS was not needed for a proposed power plant. Accordingly, the Court held that the 30-day statute of limitations applied and that the plaintiffs had filed a timely challenge within 30 days from when the public was notified of the negative declaration.

In *United Here! v. City & County of Honolulu* (2010), the Court also addressed the appropriate application of the statute of limitations under Chapter 343. Defendants challenged whether plaintiffs had filed their lawsuit, seeking a supplemental EIS, within the required time frame under HRS § 343-7. Noting that HRS § 343-7 does not expressly address the question of supplemental documents, the Court applied the 120-day limitation of -7(a), running from the date of the City and County of Honolulu Department of Planning and Permitting (DPP) approval of the subdivision application. The Court rejected the defendants' arguments that either the 30-day time limit of -7(b), which would have required that the DPP file a notice with OEQC of a negative declaration, or the 60-day time limit of -7(c), for reviewing a decision to require an EIS, applied. The Court also rejected the defendants' argument that the time frame ran from the date of the plaintiffs' "actual knowledge" of the DPP's decision not to require an SEIS. Because the plaintiffs had filed "well before" the 120-day period after the DPP's formal decision, their lawsuit was not barred.

Another aspect of the judicial review process is "standing," which refers to who can bring a lawsuit under a statute like Chapter 343, which authorizes citizen litigation. In Hawaii, the parties to a Chapter 343 lawsuit are typically citizens groups as the plaintiffs, and agencies as the defendants or intervenors. The language of HRS § 343-7 does not clearly describe who has standing to sue as an "aggrieved party" but a string of Hawaii state court decisions (with the exception of the *Hawaii Tourism Authority* decision) has allowed for broad standing for citizens groups in Hawaii. As of today, plaintiffs in Chapter 343 may also prove standing under either the newer procedural injury test (*Superferry I*) or the traditional "injury in fact" test.

The Court discussed the traditional test for plaintiffs' standing in the *North Kohala* case (1999), where plaintiffs sought declaratory relief. Applying the traditional three-part "injury in fact" test also used at the federal level, the Court found that the citizens group had adequately demonstrated standing to challenge the adverse ruling in the contested case hearing regarding the proposed resort development. Although not a formal analysis

of standing under Chapter 343, the *North Kohala* case reiterated that the Hawaii courts have generally taken a broad view of standing in environmental cases.

Environmental standing arose directly three years later in *Sierra Club v. Hawaii Tourism Authority* (2002). A fractured Court ultimately rejected the Sierra Club's standing to challenge the HTA's $114 million tourism marketing plan, which Sierra Club argued would result in substantial environmental impacts, on the basis of a lack of geographic nexus. A majority of the Court did, however, adopt, in theory, the more flexible "procedural standing" test offered in Justice Nakayama's concurrence, and this later became the prevailing theory in *Superferry I*.

The 2007 *Superferry I* case resolved several major procedural issues. First, the Court fully endorsed the procedural standing doctrine set forth in *HTA* and found that the plaintiffs had both "group" and "individual" standing, under both the traditional "injury in fact" test and the newer "procedural injury" test. The Court also noted that a "less rigorous" standing test in Chapter 343 cases was also grounded in the Hawaii constitutional provision, Art. XI § 9, which guarantees a "clean and healthful environment."

Second, for group standing, the Court explained and embraced the well-accepted federal test that: "[a]n association may sue on behalf of its members – even though it has not itself been injured – when: (a) its members would otherwise have standing to sue in their own right; (b) the interest it seeks to protect are germane to the organization's purpose; (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

Finally, the Court articulated a new, more flexible procedural injury test. To establish a procedural injury, a plaintiff must show: (1) the plaintiff has been accorded a procedural right, which was violated in some way, e.g., a failure to conduct an EA; (2) the procedural right protects the plaintiff's concrete interests; and (3) the procedural violation threatens the plaintiff's concrete interests, thus affecting the plaintiff "personally," which may be demonstrated by showing (a) "geographic nexus" to the site in question and (b) that the procedural violation increases the risk of harm to the plaintiff's concrete interests.

Related to the general standing doctrine addressed in these cases is the unique statutory requirement under HRS § 343-7(c) that parties challenging an EIS must have commented on the document. As explained in *Kepoo II*, this requirement does not apply to challenges to an EA under HRS 343-7(b). Because the Hawaiian Homes Commission ("HHC") had found that an EIS was not required for a proposed power plant on Hawaiian homelands, the Court reviewed the case under HRS § 343-7(b), which, unlike HRS § 343-7(c), did not require a challenging party to submit comments for a draft EIS in order to be adjudged an aggrieved party. Therefore, the comment requirement did not bar the plaintiffs from bringing the lawsuit.

For HRS 343-7(c) challenges, however, not only is standing more limited but the scope of review is limited to the comments made by the plaintiffs. In *Price v. Obayashi Hawaii*

Corp. (1996), the Court concluded that the scope of review of a plaintiff's challenge to the sufficiency of an EIS is limited to the concerns the plaintiff listed in his or her comments on the EIS.

In a non-binding federal case that addressed the same issue, *Sensible Traffic Alternatives & Res. v. Federal Transit Admin.* (D. Haw. 2004), Judge Susan Oki Mollway denied the plaintiffs' challenge to the Governor's acceptance of the EIS because the plaintiffs had failed to raise the issues previously by not submitting comments to the draft EIS, as required by HRS § 343-7(c). In that case, which involved a citizens group challenge to the City and County of Honolulu's plans to begin the Bus Rapid Transit project, the federal district court held HRS § 343-7(c) applicable to any "acceptance" of an EIS.

Once plaintiffs have proven standing, court proceedings typically focus on the merits of the case, such as applicability of the statute, as discussed above. At the end of the judicial proceedings, however, if plaintiffs have prevailed, the issue of attorney's fees and costs arises. Usually, litigants in the American legal system are required to pay their own costs and attorney's fees whether they win or lose. However, in some public interest cases, such as environmental law, Congress or state legislatures have sought to encourage public interest litigation by setting up a system for awarding fees and costs to the prevailing party to counter-balance the high costs of bringing an enforcement action. Hawaii's environmental laws do not have express fee award provisions similar to those common at the federal level. In 1986, however, the Hawaii Legislature enacted what became HRS § 607-25, providing that successful citizen-plaintiffs in some limited situations could seek a reasonable award of attorney's fees from the defendant found to have violated a permitting law.

Until recently, that attorney's fees provision was not successfully used in Chapter 343 lawsuits. The Court's second decision in the *Superferry* case, however, substantially changed the landscape with respect to attorney's fees in Chapter 343 and other public interest cases. At issue in *Sierra Club v. Department of Transportation* ("*Superferry II*") (2009), in addition to the constitutionality of Act 2, was the availability of attorney's fees as requested by the three plaintiff groups who had sued for injunctive relief against the DOT's decision to exempt from review the harbor improvements that would facilitate operation of the private inter-island ferry service.

The Court held that the plaintiffs were the prevailing parties for purposes of awarding attorney's fees, pursuant to HRS § 607-25 *and* the private attorney general doctrine. The Court agreed with the circuit court that the plaintiffs groups were the prevailing parties because they had succeeded on their Chapter 343 claim that an EA was needed for the DOT's harbor improvements related to the ferry service. Although the passage of Act 2, which allowed the ferry service to operate without following Chapter 343, initially resulted in a final *judgment* by the circuit court in favor of the defendants, the Court found that the law did not result in a change to the final *decision* in the same case.

In granting attorney's fees to plaintiffs against the State of Hawaii, the Court partially relied on HRS § 607-25. The Court held, however, that Hawaii Superferry, Inc. was not

liable for attorney's fees pursuant to HRS § 607-25 because the statute applied only to private parties "who [have] been or [are] undertaking any *development* without obtaining all permits or approvals required by law from government agencies," and Superferry had not been undertaking a development.

In addition, the Court held that HRS § 607-25 was not the exclusive means for awarding attorney's fees for violations of Chapter 343 and awarded fees against *both* the State and Superferry pursuant to the private attorney general's doctrine, which had not previously been applied in a Chapter 343 case. The Court applied the private attorney general doctrine to the plaintiff groups' request for reimbursement of attorney's fees because their legal action "vindicated important public rights" (*Maui Tomorrow v. Bd. of Land & Natural Res.* 2006). Although the Court recognized that plaintiffs in previous environmental cases had failed to meet the requirements for attorney's fees, the *Superferry II* Court held that the plaintiffs' case had satisfied all three prongs of the test for the private attorney general doctrine: (1) the "strength or societal importance of the public policy vindicated by the litigation," (2) "the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff," and (3) "the number of people standing to benefit from the decision." The Court determined the private attorney general doctrine could be used to award attorney's fees against a private party and against the State where sovereign immunity has been waived. The Superferry II decision will likely encourage future citizens groups to seek attorney's fees awards under both of these theories in the future.

2.6.4. Content

Chapter 343 requires an environmental review to examine a proposal according to criteria laid out in the statute and administrative rules. The Hawaii courts have addressed many of these criteria, including the scope of review for secondary impacts and project segmentation, content sufficiency, the role of mitigation measures, and cultural impact analysis requirements.

Judicial review confirms that the scope of the review under Chapter 343 is broad, covering the entire project and secondary and indirect impacts. As the Court concluded in the 1981 *Molokai Homesteaders* case, once a project falls within Chapter 343, the entire scope of the project must be analyzed in the review process. The Court stated that a broad view of the project's impacts was required because the private use of the water for a large resort complex in another area of the island could impact water quality, commit "prime natural resources" to a new purpose, and have "substantial social and economic consequences."

In *McGlone* (1981), the Court held that "significant effect" is a "relative concept" and that any determination of significant effect is "highly subjective." At the same time, an agency "must consider every phase and every expected consequence of the proposed action" when assessing potential significant effects.

In the 1997 *Kahana Sunset* case, the Court once again emphasized that a broad scope was required for Chapter 343 review, concluding that the County's EA had to "address the environmental effects of the entire proposed development, not just the drainage system" because to do otherwise would be "improper segmentation."

Most recently, in *Superferry I* (2007), although the Court rejected the citizen-plaintiffs' alternative claim that the project involved "connected actions," the Court found that, in making its exemption determination, DOT was required nonetheless to consider the secondary impacts of the harbor improvements, which included the Superferry project. DOT's error was viewing the harbor improvements "in isolation" rather than considering how its "facilitation of the Hawaii Superferry Project" would have primary and secondary environmental impacts.

For content requirements and sufficiency, Hawaii courts determine whether an EIS contains sufficient information by employing the "rule of reason" (*Life of the Land v. Ariyoshi*, 1978). Under the "rule of reason," an EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action, but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

The Hawaii courts have often upheld EISs in light of sufficiency challenges. In *Life of the Land*, plaintiffs asked the court for an injunction to halt construction of the Central Maui Water Transmission System asserting that the EIS for the project was inadequate under Chapter 343. The Court held that the plaintiffs' claim that an EIS was inadequate lacked support in the administrative record.

In *Medeiros v. Hawaii County Planning Commission* (1990), the ICA stated in dicta that an EA for a proposed geothermal research project, involving four exploratory wells, did not need to analyze the impact of future geothermal energy businesses on the environment. Although the plaintiffs had missed their time period for a judicial challenge, the ICA stated that the Legislature had already balanced the negative environmental effects of geothermal energy development with the "long-range benefits" of geothermal exploration in the East Rift zone, and therefore information gained about the effect of private businesses would be of little use.

In *Price* (1996), the Court clarified that the adequacy of an EIS is a question of law. Citing federal NEPA cases, the Court reasoned that because an EIS provides information to a reviewing agency, the conflicting expert testimony over the sufficiency of an EIS did not create an issue of material fact. Citing *Life of the Land*, the Court applied the "rule of reason" to determine that the EIS for the proposed development "adequately disclos[ed] facts to enable a decision-making body to render an informed decision." The Court adopted this narrow review for compliance with statutory

requirements because "[t]he statute and rules were designed to give latitude to the accepting agency as to the content of each EIS."

The role of mitigation measures discussed in an EA or EIS continues to be a subject of great interest among stakeholders. The Hawaii appellate courts have addressed the issue only once, and only indirectly. In *Morimoto v. Board of Land and Natural Resources* (2005), the Court held that mitigation measures, as identified in an EIS prepared under NEPA and later adopted by the project proponent, could be considered by the BLNR in its decision to grant a permit for activities on conservation land. The Court rejected an interpretation of HAR § 13-5-30(c) that *all* "standard conditions" needed to be considered in a conservation district use permit (CDUP) application review because conservation district rules made mitigation an automatic condition of a CDUP and because the project proponents were legally bound to implement mitigation measures in the EIS and biological opinion. Accordingly, the Court held that BLNR did not need to institute rulemaking procedures before it could consider mitigation measures in evaluating a CDUP application. No Hawaii judicial decision has yet addressed the more direct questions of concern to most stakeholders, which are the specificity and enforceability of mitigation measures.

The last content issue raised in judicial decisions involves cultural impact analysis. In 2000, the Hawaii Legislature enacted Act 50, which added "cultural practices of the state" to the "significance" definition in Chapter 343. Essentially, the amendment created a new "cultural impact analysis" requirement. Although the issue has not yet been litigated directly in the Hawaii appellate courts, a related case has emphasized the act's intent to protect Native Hawaiian rights.

In *Ka Paakai o Kaaina v. Land Use Commission* (2000), Chapter 343 came up indirectly on an appeal of an LUC decision to reclassify land from a conservation district to an urban district, an action requiring an EIS. The Court noted that Act 50 had amended Chapter 343 to include consideration of an action's effects on cultural practices. The Court focused on changes to the statutory language of HRS § 343-2, specifically "environmental impact statement" and "significant effect," which reflected this interpretation of an EIS's scope. In finding that state agencies have an affirmative obligation to protect Native Hawaiian rights in their administrative processes, the Court referenced legislative statements related to Act 50 that "due consideration of the effects of human activities on native Hawaiian culture and the exercise thereof is necessary to ensure the continued existence, development, and exercise of native Hawaiian culture." This landmark Native Hawaiian rights decision will likely influence any future judicial consideration of cultural impact assessment requirements under Chapter 343.

2.6.5. Process

Chapter 343 is fundamentally a procedural requirement. Hawaii courts have issued two decisions relating to when to prepare the review document, as well as one on supplemental documents and, indirectly, one on "tiering" earlier and later documents.

The Hawaii courts have consistently interpreted Chapter 343 to require environmental review at the "earliest practicable time." In *Kahana Sunset* (1997), the Court emphasized that the agency "receiving the project," as specified in Section 343-5(c), has the responsibility to prepare the EA and cannot defer that process to another agency with downstream authority.

In *Koa Ridge* (2006), the developer argued that the reclassification petition to the LUC was too early to start the environmental review process. To the contrary, the Court found that early environmental review was consistent with the purpose of Chapter 343, concluding that the LUC was the "receiving" agency with substantial authority over the entire project, and whose discretionary approval was required for the project to move forward, even if it did not have final approval authority.

In 2010, the Supreme Court addressed the parameters of the supplemental EIS requirement of the administrative rules under Chapter 343 for the first time in the "Turtle Bay" case (*United Here! v. City and County of Honolulu*, 2010). The lawsuit, filed initially by a union and then two citizens groups, focused on whether Kuilima's 2005 subdivision application to the City's Department of Planning and Permitting (DPP) for the expansion project triggered the need for a Supplemental EIS (SEIS), pursuant to HAR § 11-200-26 and -27. In 1985, the City and County of Honolulu's then-Department of Land Utilization had accepted an EIS for the Kuilima resort expansion. Plaintiffs argued that a supplemental analysis was required to update the twenty-year-old document because the initial time frame for the project and EIS analysis had been exceeded and new information had emerged about impacts of the resort expansion on traffic and the increase in green sea turtle and monk seal use of the resort coastline.

The Court engaged in a two-step inquiry: (1) due to the change in timing, was there essentially a different action under consideration, and (2) if so, was the change in the project "significant"? It answered both questions in the affirmative. The Court stated that an EIS cannot remain valid "in perpetuity," and that ignoring the implicit time frame in an EIS would allow unlimited delays in projects and permit possible negative impacts on the environment to go unchecked, which "directly undermines HEPA's purpose."

Examining DPP's review process, applying the "rule of reason" and "hard look" doctrines, the Court concluded that DPP had acted arbitrarily and capriciously. It has "ignored the most obvious fact that the 1985 EIS was based on detailed information current as of 1985, i.e., that the conditions upon which the 1985 EIS was based were over twenty years old." In his concurring opinion, Justice Acoba emphasized that "the DPP had a duty to make an independent determination as to whether the EIS contained sufficient information to enable it to make an informed decision regarding the subdivision application." On July 20, 2010, the Court denied a motion for reconsideration by defendants. The majority reaffirmed the earlier decision, tersely ordering the supplemental review, in spite of a dissent by Justice Acoba, where he argued that the DPP should be given the opportunity to make a new determination on requiring the SEIS.

Although not directly a "supplemental" case, the ICA decision in *Ohana Pale* (2008) addressed a related issue of the role of initial and subsequent environmental review (which is called "programmatic" and "tiering" in the federal NEPA system). NELH prepared EISs during its early years about the state research facility itself, and had anticipated that more specific review of particular research projects would follow. Essentially, by ordering the EA on Mera's proposed biopharm-algae project, the court was requiring a "tiered" EA, where the project-specific impacts would be addressed in the framework of the overall impacts of the state facility, which had previously been addressed in EISs.

2.6.6 Conclusion: Judicial Review and Public Perception

The Hawaii appellate courts have often interpreted the laws related to applicability, governance, participation, content, and process aspects of Hawaii's environmental review process. There are (at least) two sides to the perception of the importance of this series of rulings. On the one hand, some private applicants, agencies, legislators, consultants, and others perceive that the courts have gone too far in interpreting the scope of Chapter 343. On the other hand, some citizens, environmental groups, consultants, legislators, and others perceive that the courts have only enforced the law and that such lawsuits would be unnecessary if agencies would more proactively conform with the letter and intent of Chapter 343 instead of trying to avoid the review process.

This study recommends that those interested in this debate engage in a closer reading of the judicial decisions so that any policy changes are based on actual rather than perceived rulings by the courts. For example, a close reading of the seven major USCLF cases does not support the perception among some stakeholders that the Hawaii courts have interpreted Chapter 343 beyond its letter or intent. In two cases, the agency seeking to limit the scope of Chapter 343 prevailed (*McGlone*, *Nuuanu*); in four of the cases, the courts deliberately circumscribed the scope of their rulings (*Kahana Sunset*, *North Kohala*, *Koa Ridge*, *Nuuanu*). Nonetheless, the *Kahana Sunset*, *North Kohala*, and *Koa Ridge* decisions, followed by *Superferry I*, have caused agencies to become more cautious about, or perhaps even embrace extreme interpretations of, the scope of Chapter 343 and use of exemptions. The ICA's decision in *Ohana Pale* has, in particular, generated a broad range of concerns among agency and private applicants, particularly regarding research permits at state and University of Hawaii facilities. Community perception of judicial decisions, even if inaccurate, can sometimes become more important than the precise legal rulings and can generate what is called a "shadow" impact by causing agencies or applicants, or even the Legislature, to over-react or react defensively to various rulings. Although critical review of judicial decisions by the public, stakeholders, and the Legislature is important, the *Superferry* case also demonstrates that the Legislature can, in turn, overreact to judicial rulings. Changes in the law should be deliberate, not reactionary.

Although some stakeholders disagree with certain judicial decision, this study does not propose any major changes to the current system of judicial review in HRS § 343-7. Judicial review is a necessary check on agency decision-making under Chapter 343.

Even stakeholders who were critical of the judicial review approach were unable to suggest a better alternative to the current system of court appeals. A few stakeholders suggested the creation of an administrative appeal process within the Environmental Council, but many rejected that idea as duplicative and unworkable. Many of the study team's recommendations seek to provide greater clarity and more detailed guidance on some of these issues that have been litigated in the past. The study team's recommendations for expanding and frontloading public participation in the review process, and for stronger OEQC training, education, and guidance for stakeholders are likely the best way of minimizing agency or applicant errors and latent citizen concerns that lead to judicial intervention in the review process.

3. UH Study Process

The study team used multiple methods to gather information about the State's environmental review system. These included statewide stakeholder interviews, focus group meetings, a stakeholder workshop, a review of the trends in environmental assessment and environmental impact statement determinations since 1979, analysis of relevant court decisions, a comparative analysis of federal and selected state environmental review systems, and research on international and national "best practices." The study focused on the process mandated by the State's statutes, rules, official and unofficial guidance, and established and emerging practices. By interviewing those individuals, agencies, and organizations most involved in the daily functions of the review system, and by observation of certain outcomes of the system, the study team developed a broader and deeper understanding of problems and potential solutions. The study team maintained an open, participatory, and transparent process with multiple opportunities for stakeholders to review and comment on the study. The extensive participation and comments of stakeholders over many months has both challenged and strengthened the study.

The research design of the study included five methods to examine Hawaii's system and compare Hawaii's practices to others in the U.S. These included: 1) stakeholder interviews and /workshops, 2) a literature review, 3) legal analysis of cases in Hawaii that affect the review system, 4) an international survey of best practices, and 5) a comparative review of other states.

The most important method was the stakeholder process. During 2009 and 2010, the team spent over 2400 hours interviewing over 170 people during approximately 100 interview sessions, transcribing and summarizing each session, arranging the information into a database, and compiling the results into categories of responses. The responses were used to frame the issues for a workshop held on June 3, 2009. Nearly 100 stakeholders, including some Legislators, were presented with the results of all the interviews and given a chance to combine and rank issues and solutions. The workshop results aided the development of a preliminary set of recommendations for changes to the environmental review system. These recommendations were then sent to the stakeholders for review. The study team received approximately 50 email or written responses to its preliminary recommendations which were used to craft the January 2010 recommendations to the Legislature. This information was shared with stakeholders through the study's website. Although the method was time intensive, it allowed for a great deal of interaction while making the study's deliberative process open and transparent. Additional stakeholder input later in the process came out of the study team's participation in the Environmental Review Working Group established during the 2010 legislative session by Senator Mike Gabbard, Chair of the Senate Energy and Environment Committee (ENE). This working group provided an opportunity to discuss the recommendations proposed in the Report to the Legislature in depth with a diverse group of expert stakeholders.

The review of judicial decisions and the comparative look at other states' systems also yielded ideas for reform. The judicial review examined all Chapter 343-related Court and ICA opinions since the state environmental review law was passed. The study also examined environmental review laws from 16 states and territories and from NEPA. The study examined in-depth the environmental review laws of California, Massachusetts, New York, Washington, and NEPA.

For the stakeholder interviews, the study team identified 16 issues of concern. Based on the interviews, these topics were organized into five overarching themes: Applicability, Governance, Participation, Content, and Process. For each of these areas, the study team developed problem statements and a set of recommendations to address the problems raised by stakeholders.

3.1 Review of Literature and Best Practices

As a preliminary step, the study team prepared a comprehensive review of the literature related to environmental impact assessment. The review identified themes, issues, trends, strengths, and weaknesses of environmental impact assessment. The literature review helped frame the national and international context for reforming Hawaii's environmental review system. This larger context was helpful in identifying model systems and trends in other jurisdictions that are worthy of consideration in Hawaii.

Primary journal sources include the *Environmental Impact Assessment Review*, *Environmental Management*, *Environmental Science & Policy*, *Impact Assessment & Project Appraisal*, *Journal of Applied Ecology*, *Journal of Environmental Planning and Management*, *Journal of the American Planning Association*, *Journal of Urban Planning and Development*, *Land Use Policy*, and *Trends in Ecology and Evolution*. A copy of this literature review is available on the study website and is appended to this report (Appendix 13).

The study also examined state, federal, and other countries' guidance documents; national and international reports on EIA by government organizations and non-governmental organizations; and professional documents by organizations such as the National Association of Environmental Professionals and the International Association of Impact Assessment.

3.2 Review of Legal Aspects of the Environmental Review System

The study analyzed certain aspects of Hawaii's environmental review system by preparing legal background materials, including:

- a comparative analysis of EIA laws in other jurisdictions (e.g., NEPA, California, Washington State, and New York);
- a digest of judicial decisions related to Chapter 343, presented according to how the cases interpret various statutory sections;

- a flow chart, based on the OEQC Guidebook chart, that indicates how legal decisions intersect with key points in the EIS process;
- a review of formal written Attorney General opinions related to Chapter 343;
- a collection of all law review articles relevant to Chapter 343;
- a cross-agency analysis of agency exemption lists and the exemption classes in the Hawaii Administrative Rules; and
- an analysis of the governance structure and legal authorities of OEQC and the Environmental Council.

These documents examine how legal decisions intersect with the environmental review process, and enable identification of legal issues of particular importance to the study.

3.3 Interviews

During the stakeholder interview stage, the study team interviewed 176 individuals in 106 interviews. Interviews were grouped into ten broad categories based on sector and interaction with the environmental review system. Table 3 lists the interview categories, the number of interviews, and the number of interviewees for each category. More than one person participated in many interviews. Appendix 2 includes a complete list of interview participants.

Table 3. Interviews

Stakeholder Group	Number of Interviews	Number of Persons
Federal agencies	3	3
State agencies	20	41
County offices	15	40
Consulting firms	17	23
Public interest groups	13	17
Industry groups	5	9
UH faculty	12	13
State legislators	9	9
Attorneys	10	12
Governance	2	9
TOTAL	**106**	**176**[1]

[1]One interview may contain multiple interviewees.

To make initial contact with government stakeholders on behalf of the study team, the Office of Environmental Quality Control distributed a letter requesting agency cooperation with the study. The study then contacted decision makers in the respective government office to set up an interview. Typically, the director or deputy director would meet or assign a group of staff members to meet with the study team. For non-governmental stakeholders, the study directly contacted the relevant organizations or individuals. In some cases, individuals, organizations, or staff declined to be interviewed, or schedule conflicts prevented the interview.

During the stakeholder interview process, the study team was invited by some stakeholders to meet with small groups to discuss sector-specific issues. These groups included the Land Use Research Foundation, the Hawaii Developers' Council, the Building Industry Association, the American Planning Association, the Department of Transportation Statewide Transportation Program, and the Hawaii State Bar Association Natural Resources Section. At these meetings, stakeholders presented sector-based issues on specific aspects of the process, rather than individual viewpoints on each specific interview question.

Interviews were conducted and recorded by Karl Kim, Denise Antolini, Peter Rappa, Gary Gill, Scott Glenn, and Nicole Lowen. Typically, two or more study team members attended an interview. Study team members and graduate assistants transcribed the audio recordings of the interviews.

The interview instrument consisted of 16 questions and a final open-ended, general question (Appendix 3). The study team developed the questions based on the mandate of the study in Act 1, environmental review issues and trends identified in the literature, early consultation with key stakeholders, and the team's experience with Hawaii's system.

The interview questions (Table 4) are structured into two broad parts that examine the framework of the environmental review process and the content of environmental review documents. Questions 1-10 examine the environmental review process sequentially, mirroring the progress of a proposal: the applicability of Chapter 343, exemptions, public notice, environmental assessments and determinations of significance or FONSI, EIS preparation, draft document review, acceptability determinations, mitigation measures, "shelf life," and the involvement of the statutory-mandated entities OEQC, the Environmental Council, and the Environmental Center in the overall process.

Questions 11-16 examine the content of environmental review documents: cumulative impacts, cultural impacts, best practices, climate change, disaster management, and economic development. Question 17 is an open-ended question that allowed the interviewee to raise any topics not discussed in the previous questions.

Each interview covered the same questions; however, the breadth and depth of each interview varied. Some interviewees opted not to answer some questions and others gave detailed responses to only selected questions. The process of summarizing the interviews attempted to focus on the intent and key content of each response provided. One of the major challenges of the statewide interview process was achieving both a comprehensive as well as comprehensible compendium of stakeholder responses.

Interview transcriptions were imported into NVivo software to assist the analysis of the information. NVivo is a qualitative analysis software that helps researchers identify concerns that intersect multiple topics as well as create a more nuanced picture of which stakeholder groups hold which concerns and to what degree. Appendix 4, Suggested Triggers by Stakeholder Category, contains the NVivo analysis.

Responses were grouped by stakeholder and by topic, then summarized into comments, recommendations, and examples regarding each of the topic questions. Each response was summarized for main points and combined with similar responses. In turn, these were grouped into themes that captured similar responses. This analysis formed the basis for the next round of stakeholder interaction.

Table 4. UH Environmental Review Study Questions

	Topic	Context	Questions
1	Applicability of the Law	Chapter 343 outlines the conditions under which the state EIS process is "triggered." Are the criteria for including or excluding actions too narrow or too broad?	• Does the process capture all the major actions that may have an impact on the environment, or are some projects being bypassed? • Are we capturing projects that should not be subject to law? • What constitutes the use of state or county lands or funds? • Should other triggers be included?
2	Exemptions	Some actions because of their nature do not require impact assessment. Have exemptions been appropriately declared?	• Have exemptions been appropriately declared under the environmental review process? • Are exemptions too narrowly or too broadly defined? • How should exemption lists and exemption declarations best be administered by the Environmental Council and OEQC respectively?
3	Public Notice	An important part of the EIS process is agency, stakeholders, and public participation. The study is reviewing the present notification process.	• Are agencies, stakeholders, and the public being adequately notified of environmental review opportunities under Chapter 343? • Are there other actions that can be taken to improve the notification process?
4	Environmental Assessment and Determinations	An important decision for each action that is subject to Chapter 343 is whether it may have significant effects. Based on the judgment of the lead agency, an action's proponent may conduct only an environmental assessment instead of an environmental impact statement.	• Are agencies making a proper finding of no significant impact? • Are agencies properly applying the term "significant effect" to determine whether an EIS should be prepared?
5	Environmental Impact Statement Preparation	Chapter 343 requires that the proponent of an action prepare the required EIS.	• Should someone other than the project's proponents prepare an EIS? • If yes, who should be responsible for the preparation of the EIS?
6	Review of Draft Documents	An important feature of Chapter 343 is that documents are made available for comment and review by agencies and the public.	• Are agencies actively participating in reviewing draft and final environmental documents produced by other agencies and applicants? • Are there ways to improve the interagency review process? • Can the present system for comment and response be improved?
7	Acceptability Determinations	At the end of the EA and EIS process agencies usually make the determination whether the document(s) adequately conform to Chapter 343. Sometimes an agency is in a position to accept a document that is has prepared.	• Should the acceptance process be modified to prevent an agency from accepting a document it has prepared? • Should there be further administrative oversight over the acceptability determination by an agency's environmental review process?
8	Mitigation Measures	Chapter 343 requires the identification of mitigation measures in the preparation of EAs and EISs, yet there is no requirement that the mitigation measures be actually implemented.	• Should mitigation measured discussed in the environmental impact assessment document be required by law?
9	Shelf Life of Environmental Documents	There is no expiration date on accepted EAs and EISs. In some cases an action for which a document has been prepared and accepted is not immediately implemented.	• Should there be a shelf life (time limit) for environmental review documents? • What should be the standard for reviewing the adequacy of information contained in an environmental document when a project is postponed or delayed?

Table 4. UH Environmental Review Study Questions

Topic	Context	Questions
10 Administration of the Environmental Review Process	By law, the Office of Environmental Quality Control administers the environmental impact assessment process, the Environmental Council issues the rules, and the Environmental Center offers expertise from the University of Hawaii.	• What is your assessment of OEQC's current functioning and whether its effectiveness can be improved? • What is your assessment of the Environmental Council's current functioning and whether its effectiveness can be improved? • What is your assessment of the Environmental Center's current functioning and whether its effectiveness can be improved?
11 Cumulative Impacts	Chapter 343 requires that cumulative impacts be addressed in EISs. The review is researching the best way to assess cumulative impacts, their significance, and how to mitigate them.	• Does current EIS practice in Hawaii effectively address cumulative impacts? • How can the EIS system be improved to effectively assess cumulative impacts, their significance, and how to mitigate them?
12 Cultural Impacts	Since 2000, cultural impacts are required to be discussed in EISs.	• Is the cultural impact assessment process working well or could it be improved?
13 Best Practices	Best practices have been developed for many areas of environmental management.	• Are you aware of any best practices (industry standards) for preparing environmental review documents? • Does current practice for preparing environmental review documents in Hawaii reflect those best practices?
14 Climate Change	Climate change will cause some impacts to Hawaii's environment. For example, seal level rise may threaten coastal infrastructure.	• Are climate change issues, such as carbon emissions, coastal zone management, and sea level rise, adequately addressed in the current EIS system? • How best can climate change impacts to Hawaii's environment be incorporated into the environmental impact statement process?
15 Disaster Management	Resiliency and rapid response to disasters are aided by development that is built with disaster management in mind.	• Should the EIS process examine whether applicant or agency actions adequately address disaster resiliency? • In particular, should an assessment document discuss its impact on response, recovery, and preparedness? • Should the EIS process be modified in the event of a state-declared emergency or disaster?
16 Economic Impact	EAs and EISs impose a certain cost in terms of money and time.	• From the perspective of affected industries and businesses, are there other issues and concerns that should be addressed by this study?
17 Other Issues	This list is not comprehensive. We would like to give you the opportunity to discuss concerns with the environmental impact assessment process that we have not covered.	• Are there any further comments you would like to add?

3.4 Statewide Town-Gown Workshop

Following the eight months of stakeholder interviews, the study hosted a Town-Gown Workshop on June 3, 2009 at the William S. Richardson School of Law. The intent was to determine whether the study's initial findings were a good reflection of stakeholder views and to provide an opportunity for additional suggestions for improving the environmental review system.

Table 5. Town-Gown Workshops Consolidated by Interview Questions

Workshop	Consolidated Topic	Interview Question	
1	Triggers and Exemptions	1	Applicability of the Law
		2	Exemptions
2	Public Notice, Review, Comment, and Response, and Shelf Life	3	Public Notice
		6	Review of Draft Documents
		9	Shelf Life of Environmental Documents
3	Governance and Management	5	Environmental Impact Statement Preparation
		10	Administration of the Environmental Review Process
4	Determinations and Acceptability	4	Environmental Assessment and Determinations
		7	Acceptability Determinations
5	Mitigation and Cumulative Impacts	8	Mitigation Measures
		11	Cumulative Impacts
6	Cultural Impacts	12	Cultural Impacts
7	Climate Change, Disaster Management, and Best Practices	13	Best Practices
		14	Climate Change
		15	Disaster Management
8	The Big Picture	16	Economic Impact
		17	Other Issues

More than 100 individuals participated in the workshop. Several legislators as well as appointed officials and staff from state and county government attended. Environmental groups as well as representatives of the business community, utilities, consultants, and other key private sector stakeholders were represented at the event. Participants came from across the state, including Kaui, Maui, Oahu, and Hawaii Islands. The all-day workshop was divided into two sessions. Following a presentation of key preliminary findings, the first session provided participants an opportunity to review the collective responses from each of the 16 interview questions, to confirm the accuracy of the study team's analysis of interview results, and to aid prioritization of the identified issues.

The second session organized participants into small groups on specific topics led by professional facilitators. To accommodate the large number of participants and breadth of material, the 16 interview questions were consolidated into eight topics (Table 5). Discussion groups were encouraged to use the results of Session 1 to guide areas of discussion, and to focus on possible solutions to problems identified in the environmental review system based on potential changes in legislation, administrative rules, agency guidance, or other solutions.

The participants provided feedback on recommendations for improvement in Hawaii's environmental review system. These results directly informed the study team's choices in developing its draft and final recommendations. The original workshop materials are included in Appendix 5.

3.5 Draft Recommendations and Report to the Legislature

Following the Town-Gown Workshop, the study team prepared a set of draft recommendations and policy options based on the interview analysis, feedback from the Town-Gown Workshop, and the review of literature and practice.

The draft recommendations (Appendix 6) were organized into the five themes of applicability, governance, participation, content, and process. Each theme involved a range of alternative recommendations for addressing issues identified through the stakeholder process, including components that helped to explain the recommendation or a possible implementation strategy. The study team received a broad range of feedback both supporting and opposing individual recommendations, or seeking clarification of particular recommendations.

Act 1 (2007) mandated a report to the Legislature for its 2010 session. The feedback on the draft recommendations informed the study's Report to the Legislature, submitted in January 2010. The report presented a summary of the study process, history of environmental review in Hawaii, and recommendations for statutory changes to Chapters 341 and 343, organized into the five themes developed for the Draft Recommendations. The Report also included a draft omnibus bill, drafted with the assistance of the Legislative Reference Bureau (LRB), that proposed comprehensive amendments to Chapters 341 and 343.

4. The 2010 Legislative Session

Act 1 (2008) required the study to submit recommendations to the 2010 Legislature for modernizing Hawaii's environmental review system. In fulfillment of that mandate, the study team submitted a report to the Legislature in January 2010 and a draft omnibus bill that included amendments to Chapters 341 and 343. This section summarizes the omnibus bill, alternative legislative recommendations considered, and the results of the 2010 Legislative Session, including the Environmental Review Working Group and its agreements on revisions to SB 2818, the version of the omnibus bill that received extensive committee hearings.

4.1 Summary of Recommendations to the Legislature

The study's omnibus bill recommended amendments to HRS Chapters 341 and 343, including: transferring OEQC and the Environmental Council from DOH to DLNR; reducing the membership of the Environmental Council from 15 to 7; establishing the environmental review special fund; adopting a discretionary approval screen; and revising the environmental assessment and environmental impact statement process to create a more streamlined, transparent, and consistent process.

A list of the 2010 Report to the Legislature's findings and recommendations is presented below. The full report is available on the study website. The omnibus bill, as presented in the Report to the Legislature, is also included in this report as Appendix 7.

4.1.1. Applicability

Issues:

- Some large-impact projects do not undergo review or undergo review too late.
- Some small- or no-impact projects undergo review.
- The "trigger" approach does not account for unanticipated project types, even if these warrant review.
- EAs, meant to be precursors to an EIS, are increasingly long and resemble EISs.
- Agency exemption lists are outdated, inconsistent, and lack transparency.

Recommendations:

- Adopt an "earliest discretionary approval" screen in place of the existing "trigger" approach.
- Encourage review of programs and plans.
- Clarify that review is not required for the use of land solely for connections to utilities and rights-of-way.

- Streamline the exemption process to increase transparency, to consolidate exemptions lists, and to allow agencies to cross-reference their lists.

4.1.2. Governance

Issues:

- The authority, organizational structure, and responsibilities of OEQC and the Environmental Council are unclear.
- Their offices are under-funded and under-staffed.
- The environmental review system overall lacks efficient modern communication and information technology.

Recommendations:

- Raise the profile of the Council by making it advisory to the Governor and by having OEQC become the staff to the Council.
- Streamline the Council from 15 to 7 members to make it less unwieldy and expensive to hold meetings while still maintaining a diversity of viewpoints.
- Move OEQC and the Council to the DLNR from the DOH.
- Create a pay-as-you go process for reasonable document filing fees to ensure adequate funding for administration of the process.
- Require OEQC and the Council to conduct regular outreach and training, and to prepare an annual report on the effectiveness of the environmental review process.
- Develop an information management and electronic communication system.

4.1.3. Participation

Issues:

- It is unclear what constitutes adequate public notice.
- Comment periods can be too short or public participation occurs too late, especially for complex or controversial projects.
- Repetitious or voluminous comments slow down the review process.
- Interagency review of documents needs improvement.

Recommendations:

- Reinforce the principle of participation in the statute.
- Permit agencies to extend the period for public comment.
- Adopt in the rules example of "reasonable methods" of public notification.
- Develop rules, based on NEPA, to address repetitious and voluminous comments.
- Improve agency participation by clarifying in the rules agency duty to comment and mandating the designation of an environmental review coordinator within each agency.

4.1.4. Content

Issues:

- Documents are too long, repetitive and contain too much boilerplate language that does not support effective decision-making.
- Consistent guidance and training on the environmental review process is lacking.
- Mitigation measures lack transparency and follow-up.
- Cumulative impacts assessment is not done well and is not integrated with planning processes.
- Climate change is not addressed in the law or in guidance.

Recommendations:

- Establish maximum page limits for environmental review documents.
- Require OEQC to create guidance and conduct regular training.
- Adopt NEPA's Record of Decision (ROD) process for mitigation measures in EISs.
- Add a statutory definition of "cumulative effects."
- Require OEQC to establish a database for cumulative impacts assessment that document preparers can utilize.
- Amend the significance criteria to clarify that climate change must be covered in environmental review documents.

4.1.5. Process

Issues:

- Preparing an EA for those projects likely to require an EIS is time consuming and burdensome.
- The "shelf life" of environmental review documents is unclear.
- The perception of bias in preparation and acceptance of environmental review documents undermines public confidence in the system.

Recommendations:

- Allow project proponents, with agency consultation, to bypass the EA stage and proceed directly to an EIS.
- Address the issue of supplemental EISs in the statute and require the Council to clarify its rules regarding supplemental EISs. The report recommended that an EA or EIS for a project that has not been completed within seven years of receiving all its discretionary permits have its EA or EIS reviewed for adequacy.
- Emphasize enhanced public and interagency review through more requirements, guidance, and training to address bias, rather than changing the system.

4.2 Alternative Draft Legislation

While preparing the Report to the Legislature and draft omnibus bill, the study team recognized that alternative approaches for applicability and governance were also viable and deserved further review by stakeholders. The study team prepared two complete alternative bill versions as part of the study's background documents to facilitate a more complete and balanced discussion of these important issues.

For Chapter 341, instead of elevating the role of the Environmental Council, an alternative approach would amend Chapter 341 to significantly expand the role and authority of OEQC, transform the Environmental Council into a smaller advisory body to advise OEQC and retain only their "liaison to the public" function, and shift to OEQC the Council's current duties of rulemaking, exemption lists, and the annual report (see Appendix 8).

For Chapter 343, instead of a new "discretionary approval" and "probable, significant, and adverse environmental effects" screen, an alternative approach would make various modifications to the existing trigger system. The primary difference is seen in various amendments to HRS § 343-5(a) (see Appendix 9).

Some of the report's recommendations are common to both the omnibus bill and to the alternative approaches. In the alternative versions of Chapters 341 and 343, the common recommendations are noted in italics. Amendments are underlined; deletions are in strikethrough and brackets. The footnotes provide brief explanations and reference the numbered recommendations in the Report to the Legislature.

To avoid confusion with the proposed omnibus bill, a formal bill format was not provided for the alternative approaches to governance and applicability, although the Legislative Reference Bureau did generously assist the study team with drafting these versions.

4.3 2010 Legislative Session

Following the study's submission of the report and draft omnibus bill to the 2010 Legislature, four bills based on the study's recommendations were introduced: two in the House and two in the Senate. Senate President Hanabusa introduced the omnibus bill as Senate Bill (SB) 2185. House Speaker Say introduced the omnibus bill as House Bill (HB) 2398, a companion to SB 2185. Senators Gabbard, Kidani, Kokubun, Espero, Hee, Nishihara, Sakamoto, and Takamine introduced SB 2818. Representatives Morita, Belatti, Coffman, Hanohano, Ito, C. Lee, Luke, B. Oshiro, Thielen, Cabanilla, Carroll, Chong, Evans, Keith-Agaran, M. Lee, McKelvey, Rhoads, Sagum, Say, Souki, Wakai, and Yamashita introduced its companion bill HB 2322.

SB 2185 passed its first reading and was referred to the Senate Committees on Energy and Environment (ENE), Judiciary and Government Operations (JGO), Ways and Means (WAM). It did not proceed further. Similarly, HB 2389 and HB 2322 passed first reading but were referred to committees that did not hold further hearings on them.

The first hearing for SB 2818 was before the Senate Committees on Energy and Environment (ENE) and Water, Land, Agriculture, and Hawaiian Affairs (WTL). According to the Standing Committee Report No. 2333, "testimony in support of this measure was submitted by one organization and one organization supports the intent. Three organizations submitted comments. Testimony in opposition was submitted by three state agencies, two county agencies, seven organizations, and one individual."

The Committees amended SB 2818 in the following ways to create SD 1:

- removed the transfer of OEQC and EC to DLNR, leaving OEQC and EC in the DOH;
- increased the EC membership to nine from seven;
- clarified that present EC members shall serve through June 30, 2010 or until new members are appointed and confirmed;
- clarified requirements for an EA;
- clarified requirements for the mitigation monitoring report to be a disclosure document that reports on mitigation monitoring five and ten years after the proposed Record of Decision;
- defined "significant adverse environmental effect";
- increased the "shelf life" of an EA or EIS from seven to ten years;
- changed the effective date for amendments to Chapter 341 and 343-6 to July 1, 2010 and kept the effective date of July 1, 2012 for the remaining amendments; and
- made technical, non-substantive changes for style, clarity, and consistency.

Furthermore, the Committees found that "additional scrutiny and review" were needed and therefore invited "the University of Hawaii study team, the Director of the Office of Environmental Quality Control, the Chair of the Environmental Council, a member of the Environmental Council with a background in planning, and representatives of the Building Industry Association Hawaii, Sierra Club Hawaii Chapter, the Land Use Research Foundation, Earthjustice, Belt Collins, and the Nature Conservancy to participate in a working group to develop further recommendations." This group is discussed further in the next section.

SB 2818 SD 1 then proceeded to the Committee on Ways and Means (WAM), which amended it and recommended that it pass its third reading. WAM amended SB 2818 as SD 2 in the following ways:

- clarified that the Director of OEQC submit the annual report to the Legislature and the Governor;
- clarified that OEQC is allowed to charge reasonable fees for printed copies of records;
- changed the effective date to July 1, 2050, to facilitate further discussion; and
- made technical, non-substantive changes for style, clarity, and consistency (SCR 2621, 2010).

Following passage of the third reading in the Senate, SB 2818 SD 2 crossed over to the House, where it passed first reading and was referred to the Committees on Energy & Environmental Protection (EEP), Water, Land & Ocean Resources (WLO) and Economic Revitalization, Business & Military Affairs (EBM), then the Committee on Judiciary (JUD), and finally the Committee on Finance (FIN).

The joint hearing of EEP/WLO/EBM reported receiving testimony "in support of this measure from the Sierra Club Hawaii Chapter . . . testimony opposed to this measure from the Attorney General, Department of Health, City and County of Honolulu Department of Planning and Permitting, Alexander and Baldwin, Inc., Building Industry Association Hawaii, Chamber of Commerce Hawaii, Hawaii Association of Realtors, Hawaii Developers Council, Hawaii Island Chamber of Commerce, Hawaii Leeward Planning Conference, Hawaii's Thousand Friends, Land Use Research Foundation of Hawaii, and The Outdoor Circle." The UH Environmental Center, Earthjustice, Historic Hawaii Foundation, and The Nature Conservancy submitted comments on the bill.

Because of the "lack of consensus among the various stakeholders and the ongoing Working Group process," the joint committee recommended passage, but amended the measure in the following ways as HD1 to focus only on Chapter 341:

- deleted all amendments relating to Chapter 343;
- changed the effective date to July 1, 2010; and
- made technical, non-substantive changes (SCR 713, 2010).

SB 2818 SD 2 HD 1, amending only Chapter 341, passed its second reading and was referred to the Committee on Judiciary (JUD). JUD received testimony from the Water Resources Research Center and Environmental Center of the University of Hawaii in support of the bill. Testimony from the Office of Hawaiian Affairs and Nature Conservancy of Hawaii expressed support for the intent of this measure. The Department of the Attorney General, The Chamber of Commerce of Hawaii, Building Industry Association of Hawaii, Outdoor Circle, Land Use Research Foundation of Hawaii, and a concerned individual testified in opposition to this measure. The Department of Budget and Finance and Department of Planning and Permitting of the City and County of Honolulu provided comments. JUD noted the Working Group process was ongoing, and therefore recommended passing the bill with only one amendment changing the effective date to December 21, 2058 (SCR 903, 2010).

SB 2818 SD 2 HD 2 passed its third reading and was referred to the Committee on Finance (FIN). FIN heard the bill on March 25, 2010, considered the results of the Working Group's process, and deferred the bill, ending its consideration for the session. Table 6 reproduces the record of events as recorded on the measure's profile page from the Legislature's website. See Appendix 10 for the final version of SB 2818.

Table 6. Legislative History of Senate Bill (SB) 2818

Date	Chamber	Status of SB 2818
1/25/2010	S	Introduced.
1/27/2010	S	Passed First Reading.
1/27/2010	S	Referred to ENE/WTL, WAM.
1/29/2010	S	ENE/WTL added the measure to the public hearing scheduled on 2/2/2010 2:45:00 PM in conference room 225.
2/2/2010	S	ENE deferred the measure until 02-04-10 2:45pm in conference room 225.
2/2/2010	S	WTL deferred the measure until 02-10-10 2:45pm in conference room 229.
2/4/2010	S	ENE deferred the measure until 02-09-10 2:45pm in conference room 225.
2/9/2010	S	ENE recommends that the measure be PASSED, WITH AMENDMENTS. Voting as follows: 6 Ayes: Senators Gabbard, English, Green, Hooser, Kokubun, Hemmings; 0 Ayes with reservations; 0 Noes; and 1 Excused: Senator Ihara.
2/10/2010	S	WTL recommends that the measure be PASSED, WITH AMENDMENTS. Voting as follows: 4 Ayes: Senators Hee, Bunda, Kokubun, Hemmings; 0 Ayes with reservations; 0 Noes; and 3 Excused: Senators Tokuda, Fukunaga, Takamine.
2/12/2010	S	Reported from ENE/WTL (Stand. Com. Rep. No. 2333) with recommendation of passage on Second Reading, as amended (SD 1) and referral to WAM.
2/12/2010	S	Report adopted; Passed Second Reading, as amended (SD 1) and referred to WAM.
2/17/2010	S	WAM will hold a public decision-making on 02-22-10 10:10AM in conference room 211.
2/22/2010	S	WAM recommends that the measure be PASSED, WITH AMENDMENTS. Voting as follows: 10 Ayes: Senators Kim, Tsutsui, Chun Oakland, English, Fukunaga, Galuteria, Hooser, Kidani, Kokubun, Tokuda; 0 Ayes with reservations; 0 Noes; and 2 Excused: Senators Hee, Hemmings.
2/26/2010	S	Reported from WAM (Stand. Com. Rep. No. 2621) with recommendation of passage on Third Reading, as amended (SD 2).
2/26/2010	S	48 Hrs. Notice 03-02-10.
3/2/2010	S	Report adopted; Passed Third Reading, as amended (SD 2). Voting as follows: 21 Ayes; 0 Ayes with reservations; 1 No: Senator Slom; and 3 Excused: Senators Bunda, Hee, Nishihara. Transmitted to House.
3/2/2010	H	Received from Senate (Sen. Com. No. 282) in amended form (SD 2).
3/3/2010	H	Pass First Reading
3/4/2010	H	Referred to EEP/WLO/EBM, JUD, FIN, referral sheet 37
3/5/2010	H	Bill scheduled to be heard by EEP/WLO/EBM on Tuesday, 03-09-10 11:15AM in House conference room 325.
3/9/2010	H	The committees recommend that the measure be deferred until 03-11-10 at 11:05am.
3/11/2010	H	EEP recommends that the measure be PASSED, WITH AMENDMENTS. Voting as follows: 12 Ayes: Representatives Morita, Coffman, Cabanilla, Chang, Chong, Har, C. Lee, Luke, Ching, Thielen; 2 Ayes with reservations: Representatives Herkes, Sagum; 0 Noes; and 1 Excused: Representative Ito.
3/11/2010	H	WLO recommends that the measure be PASSED, WITH AMENDMENTS. Voting as follows: 12 Ayes: Representatives Har, Cabanilla, Chang, Chong, Coffman, C. Lee, Luke, Morita, Ching, Thielen; 2 Ayes with reservations: Representatives Herkes, Sagum; 0 Noes; and 1 Excused: Representatives Ito.
3/11/2010	H	EBM recommends that the measure be PASSED, WITH AMENDMENTS. Voting as follows: 6 Ayes: Representatives McKelvey, Choy, Evans, Tokioka, Tsuji, Ward; 0 Ayes with reservations; 0 Noes; and 5 Excused: Representatives Berg, Manahan, Takai, Wakai, Wooley.

Table 6. Legislative History of Senate Bill (SB) 2818

Date	Chamber	Status of SB 2818
3/12/2010	H	Reported from EEP/WLO/EBM (Stand. Com. Rep. No. 713-10) as amended in HD 1, recommending passage on Second Reading and referral to JUD.
3/12/2010	H	Passed Second Reading as amended in HD 1 and referred to JUD with none voting no (0) and Berg, Keith-Agaran, Manahan, Takumi, Thielen excused (5).
3/12/2010	H	Bill scheduled to be heard by JUD on Tuesday, 03-16-10 2:15PM in House conference room 325.
3/16/2010	H	JUD recommends that the measure be PASSED, WITH AMENDMENTS. Voting as follows: 12 Ayes: Representatives Karamatsu, Ito, Belatti, Herkes, Luke, McKelvey, Mizuno, Morita, B. Oshiro, Souki, Tsuji, Thielen; 0 Ayes with reservations; 1 Noes: Representatives Marumoto; and 3 Excused: Representatives Cabanilla, Carroll, Wakai.
3/19/2010	H	Reported from JUD (Stand. Com. Rep. No. 903-10) as amended in HD 2, recommending referral to FIN.
3/19/2010	H	Report adopted. Referred to FIN as amended in HD 2 with Representative Marumoto voting no and Representatives Carroll, Chang, Har, Manahan, Morita, M. Oshiro, Tokioka, Ward excused.
3/22/2010	H	Bill scheduled to be heard by FIN on Thursday, 03-25-10 10:00AM in House conference room 308.
3/25/2010	H	The committee recommends that the measure be deferred.

Source: Hawaii State Legislature

4.4 The Environmental Review Working Group

Following the Senate ENE/WTL Committee hearing, ENE Committee Chair Senator Mike Gabbard convened a working group ("the Working Group"), which met nine times, and held additional subgroup meetings, from February through April to review and revise SB 2818. From the outset, Senator Gabbard noted that participation in the Working Group was a privilege, not a right. He stated that he did not expect unanimous consent, although it was preferred where possible, and that no one individual would have veto power over the process. He expected everyone to come to the working group in the spirit of compromise and noted that anyone who disrupted the process could be removed or replaced at the Senator's discretion. An independent professional facilitator, Lily Bloom Domingo, was retained to assist the working group using funds from the study budget. Working Group members signed a "Participants' Agreement," a standard document used in facilitated meetings that establishes ground rules for participation. For the Working Group, these ground rules were to:

- seek common ground with others to formulate revisions to SB 2818;
- show respect for other participants;
- listen to understand, and avoid interrupting others;
- not use cell phones or electronic devices during discussion;
- recommend specific alternative language to improve SB 2818;
- not disclose to the media or use for public advocacy events the content of group discussions nor judge other participants in public;

- seek agreements on revisions that everyone can live with, agreeing to recommended changed being determined by majority vote when necessary; and
- to commit to a good faith collaborative process.

The twelve members of the Working Group, chosen among stakeholder groups as directed by the committees, invested substantial time and energy over the following six weeks in a series of nine half-day meetings and many subgroup meetings, to develop a set of comprehensive amendments that could be supported across diverse stakeholder groups. With the support of Senator Gabbard's office, particularly Carlton Saito, and the professional assistance of facilitator Lily Bloom Domingo, the Working Group discussions were spirited and candid, yet collaborative and constructive. Table 7 summarizes points of unanimous, high, majority, and low consensus on specific measures proposed in the omnibus bill.

For Chapter 341, the Working Group reached near-unanimous agreement on recommendations for improvements, focusing on how to strengthen the key components of effective governance of the state environmental review system. The Working Group produced a recommended redraft of SB 2818's proposed amendments of Chapter 341 – Proposed SB 2818 SD 2 HD 3 – for the consideration of the House and Senate Committees (see Appendix 10). The Working Group's four major areas of recommended changes to Chapter 341 were as follows: strengthen OEQC, modernize OEQC abilities and functions, streamline the Environmental Council and ensure its close coordination with OEQC, and provide critical support for modernizing OEQC through a special fund and temporary fees.

For Chapter 343, the Working Group reached substantial but not complete agreement on a number of important recommendations regarding improvements to Chapter 343. On many issues, most or all of the members of the Working Group supported or "could live with" the proposed amendments. The Working Group's recommended changes to Chapter 343 were largely in the order presented in the draft bill but with some areas rearranged by topic. On several issues, however, some members of the Working Group had strong objections. Working Group recommendation details, including proposed language, are in Appendix 11.

Table 7. Environmental Review Working Group Agreements

Level of Consensus	Measure
Unanimous[1]	Allow agencies and applicants to directly prepare an EIS and bypass the EA stage.
	Support OEQC's duties to conduct regular training for agencies and the public, advise stakeholders, conduct annual statewide workshops, and publish an annual guidebook.
	Reduce the EC from 15 to 9 members.
	Move the significance criteria from the administrative rules to Chapter 343.
	Add a definition to Chapter 343 for "environmental review."
High[2]	Remodel OEQC and the EC to resemble the Board of Land and Natural Resources, where OEQC administers the environmental review process and assumes rulemaking duties, while the EC advises the Director on policy and proposed rules.
	Restore OEQC's budget and enable the Director to budget and hire staff.
	Create an environmental review fund and temporary modernization fee.
	Authorize OEQC to establish fees to support management functions.
	Replace the existing trigger approach with a discretionary approval screen.
	Amend "USCLF" to "use of state or county lands or funds by an agency."
	Adopt guidance on what constitutes a discretionary approval.
	Amend significance criterion #13 to include greenhouse gas emissions.
	Add a new significance criterion (#14) to address climate change adaptation.
	Require OEQC to develop guidance for interpreting the significance criteria.
	Add a definition for supplemental documents based on the existing administrative rules and incorporate language from NEPA.
	Supplemental documents should only apply to remaining discretionary approvals.
	Allow for a NEPA-like process to respond to voluminous and repetitious comments.
	Require an annual report on the effectiveness of the environmental review process.
	Require guidance for programmatic documents and tiering.
	Oppose interim rules for implementing the statutory changes.
	Include in the statute encouragement for early public participation.
Majority[3]	Move OEQC and EC from DOH to the Office of the Governor.
	Add a Record of Decision (ROD) for EAs and EISs and implementing rules.
	Allow judicial review for the preparation or lack of preparation of a ROD.
	Adopt a 3-class system for discretionary approvals.
	Allow agencies and applicants to prepare programmatic EAs or EISs.
	Allow agencies to extend the public comment period upon good cause shown.
	Amend judicial challenge period from 60 to 120 days for a determination to prepare an EIS or to challenge an EIS acceptance.
	Amend judicial challenge period from 30 days to 120 days for a determination not to prepare an EIS.
	Allow the court to determine standing for EIS challenges, as in other parts of Chapter 343.
	Require agencies to review and update exemption lists not less than every three years.
	Require rules prescribing best practices, including for EA and EIS document length.
Low[4]	Agencies can exempt proposals to protect or enhance the natural environment.
	Review and update the administrative rules every three years.

[1] Unanimous includes all 12 members present and voting.
[2] High includes unanimous votes with 2 or less absentees, or more than ¾ votes in favor.
[3] Majority includes unanimous votes with 3 or more absentees, or a majority vote in favor.
[4] Low includes votes with less than 7 in favor, or high levels of abstention.

The following sections, 5 through 9, contain the final recommendations of this report, taking into consideration every aspect of the study's research and process to date. These sections are organized into the study's five themes —Applicability, Governance, Participation, Content and Process—and each of these sections is subdivided into analysis of issues followed by discussion of recommendations.

5. Applicability

An important challenge of the environmental review system is to ensure the right actions undergo review. "Applicability" refers to the process by which both inclusion under and exemption from Chapter 343 is determined. Hawaii's current system has specific criteria (or "triggers") for inclusion that attempt to anticipate the type and nature of certain actions likely to have a significant impact. Exemptions apply where impacts on the environment are expected to not be significant or for actions that are removed from the purview of the law through statute or rule. Together, systems for inclusions and exclusion define which actions should undergo review. This section identifies problems with the current system of applicability of Hawaii's environmental review system and presents the study's final recommendations.

5.1 Issue Identification

5.1.1 The existing trigger system does not directly link discretionary decision-making with potentially significant environmental impacts.

The study found that the existing trigger process does not sufficiently link discretionary government decision-making with potentially significant environmental impacts. The current system lists specific actions, mainly locations and certain types of projects, for consideration of environmental review. Originally, this approach was considered proactive and focused on the most important actions, but over time it has evolved into a laundry list of actions that many stakeholders regard as reactive and inadequate. Stakeholders reported that the present process "captures" too many "small-impact" projects with little or no significant effects on the environment while some "major-impact" projects with likely significant effects can "escape" the process. Stakeholders are in agreement that projects with no or unlikely impacts should be exempted. Small-impact projects are sometimes captured because their type was identified in the statute, involved connections to state or county lands (e.g., solely by utilities or rights-of-way), or due to fear of litigation. The inappropriate "capture" of small-impact projects such as repaving an existing parking lot in a fully developed urban zone does not aid the quality of agency decision-making and results in unnecessary administrative costs and delays.

Similarly, the omission of some major-impact projects has promoted a sense that the environmental review system does not work well. Some projects have not undergone review because their type of action was not defined in the statute clearly or because they were inappropriately exempted. Four examples stakeholders suggested were the Mahukona subdivision, Wailuku Country Estates, the Waipouli timeshare project, and the East Maui stream diversions.

Mahukona on Hawaii Island was a proposed 53-lot subdivision with a 14.3-acre resort in the SMA, in an area containing numerous archaeological sites and cultural practices. Despite the potential for significant environmental impacts, no EA was required.

Agricultural subdivisions not in the SMA, such as Wailuku Country Estates, are not required to undergo environmental review, regardless of the potential for impacts. The project included 184 mostly 2-acre lots with potentially significant impacts on infrastructure and county services.

Waipouli was a two-resort timeshare project on Kauai encompassing 547 units in the SMA. The development requires infrastructure to handle the additional sewage generated by the project development, impacting the wastewater treatment facilities in the area and the environment, as well as have significant impacts on regional traffic on Kuhio Highway. EAs have been prepared for expanded highway capacity and a bike path, both anticipating approximately 525 multi-family units and hotel rooms and nearly 1,000 parking stalls, but the development itself was not required to undergo environmental review.

For the East Maui stream diversions, DLNR authorized the diversion of millions of gallons of waters from streams—some up to 100% of surface flow—without the preparation of an EA. In 2003, the Circuit Court on Maui held that BLNR must prepare an EA for the project (*Maui Tomorrow v. BLNR*, 2006). Despite this finding, the water diversion continues.

Another stakeholder concern is the interpretation of the USCLF trigger. Stakeholders disagree on what constitutes "use of state or county land or funds." As discussed in section 3.2, while several court cases have addressed this issue, state and county agencies have sometimes interpreted these rulings, not always accurately, to expand the coverage of the process. For example, the County of Hawaii initially found that the resort development at issue in the *North Kohala* case did not require environmental review using the project-based triggers. Opponents of the project sued (and won) based on the partial connection of the project to state lands (the construction of two access underpasses under a state highway), and therefore used the "use of state or county lands or funds" trigger to obtain further environmental review of the project. Some stakeholders found this to be an abuse of the environmental review process; others felt the decision appropriately interpreted the law and resulted in a needed environmental review process; some regarded the technical language of "use of state or county lands or

funds" to encompass everything government does, including ministerial actions. Many stakeholders expressed concern that certain state and county agencies were over-reacting to the *North Kohala* and *Koa Ridge* decisions in an extreme way that generated gridlock, confusion and a calculated backlash against the environmental review system. The study team proposes to clarify this area and increase predictability with a "discretionary approval screen" and a three-tiered list of approvals subject to review or exemption.

Over time, the Legislature has added or proposed adding many triggers to Chapter 343 in response to public controversy over unanticipated projects not being subject to review (e.g., helicopter pads). The trigger list approach invites band-aid solutions to topical problems. The purpose of environmental review is to ensure that discretionary agency decision-making sufficiently considers environmental issues. Having triggers that mainly focus on a predetermined set of actions disconnects the trigger from discretionary decision-making over actions that may have significant environmental effects.

5.1.2 *The environmental review process sometimes occurs too late in the project planning cycle.*

The existing trigger system, focusing largely on projects, sometimes applies too late in the project planning process. Applicants and agencies, after receiving discretionary approval for actions such as rezoning, Special Management Area permits, special use permits, or subdivision permits, may be required to prepare an EA due to triggers that do not become apparent until later in the discretionary approval process. Some projects, such as the proposed North Kohala development, are captured late in the development process because of the partial or secondary use of state lands, and not in the earliest stages of planning review. Late review creates uncertainty, increases costs, involves the public too late in the process, and makes changes to project design identified through the review process more difficult to accommodate.

5.1.3 *Ministerial actions such as rights-of-way and utility connections are now sometimes required to undergo environmental review.*

Ministerial actions are those where the government is constrained to make a decision based on established criteria or standards without an exercise of judgment. Recent court cases regarding what some consider ministerial actions have generated confusion about the scope of Chapter 343 regarding the USCLF trigger. Some agencies have interpreted three court decisions—*Kahana Sunset, North Kohala,* and *Koa Ridge*—to include actions that have been exempted in the past, such as rights-of-way connections and utility hook-ups. This approach fails to consider the boundaries set by the Court for similar facts in *McGlone* and *Nuuanu.* The overreaction has resulted in undue costs and burdens for small projects, a waste of government resources on projects with no likely significant

impacts, and unnecessary frustration with the environmental review process. Seeking exemptions solely for connecting utility hook-ups or rights-of-way can be as difficult as preparing an EA. Stakeholders affected by this issue include businesses, not-for-profit organizations, educational institutions, and households.

5.1.4 EAs increasingly resemble EISs as the distinction between EAs and EISs is becoming blurred.

Stakeholders report that EAs are approaching the size, complexity, and cost of EISs. Applicants and agencies include more content in EAs to minimize the risk of lawsuits and to avoid an EIS. This is sometimes due to the two-step requirement of conducting an EA to determine whether an EIS is needed. Applicants also report that agencies are requiring studies in EAs that are more appropriate for EISs, which increase project costs and cause project delay.

5.1.5 Exemption lists are outdated, difficult to update, and are applied inconsistently.

Exemption lists have not been updated for many years for some agencies and counties. Agencies report that exemption lists are difficult to update because of issues with the current rules process and the inability of the Environmental Council to perform its duties. Lists are inconsistent and unevenly applied. The same actions appear on different agency lists and actions exempted by one agency may require an EA in another agency. Actions may have different thresholds for exemption, depending on the agency. Also, agencies are perceived to have different standards for exempting agency projects versus applicant projects. For example, a county-proposed comfort station in the SMA may be exempted, while an applicant-proposed comfort station is not. Agency exemption declarations are not transparent or readily accessible, making access to such decision-making difficult for agency and non-agency stakeholders to find and assess.

5.2 Recommendations

5.2.1 Adopt a "discretionary approval" screen.

A "discretionary approval" screen should be adopted and substituted for the existing triggers in HRS § 343-5. The purpose of Chapter 343 is to "establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision-making along with economic and technical considerations" (HRS § 343-1). Because a fundamental purpose of Chapter 343 is to inform government decision-makers about environmental impacts, the initial basis for the applicability of Chapter 343 should be the requirement for discretionary government decision-making.

During the stakeholder process, a minority of stakeholders was comfortable with the existing system and recommended no changes. A majority of stakeholders, while satisfied with the overall trigger approach, desired to add, remove, or modify triggers. The existing system has developed over the past forty years, and interviews revealed that stakeholders are comfortable with this familiar system and apprehensive of change. An industry focused on navigating this complex system has emerged. Some firms engaged in these activities resist significant change to the system. Stakeholders and many non-governmental public service organizations are experienced with the existing system and what types of actions should undergo environmental review. These stakeholders believe the existing system to be adequate at capturing the majority of actions but recommended one or two changes to the list.

In aggregate, stakeholders suggested 48 additional triggers, which were grouped into five categories: government decision-making, location, project, impact, and development (Table 8). Appendix 4 includes the complete list of triggers suggested by stakeholder category. The Town-Gown Workshop confirmed this lack of agreement on possible new triggers. Asked whether other triggers should be included, some participants chose 17 of 21 suggestions, but no suggestion had a high degree of consensus. This reveals structural flaws with the triggers approach, underscoring its limitations. Many other participants in the interviews, Town-Gown workshop, and presentations recommended a discretionary approval approach based on NEPA or on other states, often mentioning California.

Table 8. Additional Trigger Category Suggestions by Stakeholder Group

Suggested Additional Trigger Categories	Frequency Suggested
Government decision-making	30
Location	29
Project	25
Impact	22
Development	9
TOTAL	115

[1]Interviewees did not always explain how the recommended trigger would be implemented.
[2]Frequency is based on number of interviews in which that someone specifically stated the trigger; it does not count individual persons. One interview may recommend multiple triggers.

The study team considered three alternative approaches for determining applicability of environmental review: modifying the existing "triggers" list, adopting a "major action" discretionary approval screen modeled on NEPA, or adopting a discretionary approval screen modeled on a combination of various states. Modifying the existing triggers list would not resolve the underlying structural issues identified in section 5.1. The environmental review process would continue to be reactive, project-focused, and disconnected from agency decision-making, environmental impacts, and the overall planning process. Of the latter two alternatives, the study team found the NEPA "major action" approach to be more difficult to define in a state or county context, where the scale of development and environmental sensitivity varies considerably and is not easily transferrable to private projects. Therefore, the study team proposes to adopt a discretionary approval screen that is partially based on New York State's review law and also has elements from other states.

Stakeholder feedback on the study's draft recommendations highlighted concerns about the scope of a new discretionary permitting approach. Many questioned whether this would include actions not traditionally subject to environmental review in Hawaii. Others expressed concern that projects at the design permit stage (e.g., building permits) would be required to undergo review, noting that by the time a project reaches that stage, government decision-making is circumscribed and public participation has little meaning. Others noted a lack of agreement among agencies on what constitutes a discretionary approval.

A discretionary approval screen may appear to be a fundamental change to Hawaii's environmental review process, but as Rappa et al. (1991) noted, discretionary decision-making underlies the rationale for the original triggers and additions prior to 1991. Both previous comprehensive reviews of Hawaii's environmental review system recommended a broad discretionary approval trigger accompanied by robust exemptions. The discretionary approval screen is a more direct means to determine applicability and fulfill the purpose and intent of Hawaii's environmental review process. Particularly if, as recommended by this study, a clear list of discretionary versus ministerial approvals exists, applicants and agencies will be more certain than under the current system about when review is required.

One of the principles of good EIA practice is institutional adaptability, which a discretionary screen achieves because it is systematic, transparent, and predictable (IAIA, 1999). A discretionary approval screen integrates environmental review with planning by explicitly linking Chapter 343 to agency decision-making rather than to a predetermined list of projects. Agencies, relying on forty years of experience with environmental review, can gauge the correlation between a proposed action and its probable environmental effects. They can determine which proposed actions requiring discretionary agency action approval might have adverse environmental effects and therefore require environmental review to examine the potential effects of the proposal. The proposed discretionary approval screen also clarifies uncertainty regarding the "use of state or county lands or funds" by narrowing "use" to agency actions and clarifying the distinction between discretionary versus ministerial approvals. It allows flexibility for addressing unanticipated and innovative projects by focusing on agency review of a proposal rather than on specific types of projects. Furthermore, ministerial actions or actions that do not require government involvement would not undergo environmental review.

This approach would align Hawaii's environmental review system with the well-developed approaches of NEPA, California, Massachusetts, New York, and Washington. These systems each apply environmental review based on similar definitions of "action," either in their statutes or rules. According to NEPA's regulations, actions are "major federal actions" that "may be major and which are potentially subject to Federal control or responsibility," where "major" does not have a "meaning independent of significantly." Actions also include "new and

continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies" (CEQ Regulations, 40 C.F.R. § 1508.18). This extends to new or revised agency rules, regulations, plans, policies, or procedures, but does not include general revenue funding that has no federal control, or judicial or administrative civil or criminal enforcement. Based on this definition, NEPA provides that federal actions tend to occur within one of four categories: official policy, formal plans, programs, or specific projects. Although the study team does not recommend adopting the term "major," it embraces the limitation of environmental review to government involvement of a discretionary nature.

In California law, "project" is a subset of the term "action," and has an approach similar to NEPA. A "project" is defined as "an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change." A project can be an activity directly undertaken by an agency, by "a person supported in whole or in part through public agency contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies," or involving "the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more agencies." A project does not include legislative proposals, "continuing administrative or maintenance activities, such as purchases for supplies" or personnel, referenda, government funding mechanisms that do not involve commitment to specific projects "which may result in a potentially significant physical impact," or administrative activities "that will not result in direct or indirect physical changes" (CEQA Regulations § 15378).

The Massachusetts Environmental Policy Act (MEPA) "establishes jurisdiction over: a Project undertaken by an Agency; those aspects of a Project within which the subject matter of any required Permit; a Project involving Financial Assistance; and those aspects of a Project within the area of any Land Transfer" (Code of Massachusetts Regulations (CMR) § 11.01(2)(a)(1)). MEPA jurisdiction is interpreted broadly for agency Projects to apply to all aspects that are likely to directly or indirectly harm the environment, and narrowly for applicant Projects to the subject matter relevant to the needed approval (CMR § 11.01(2)(a)(1)-(2)). Where a "Project" is "any work or activity that is undertaken by (a) an Agency; or (b) a Person and requires a Permit or involves Financial Assistance or a Land Transfer" (CMR § 11.00(2)).

In New York's State Environmental Quality Review (SEQR) Regulations, an "action" includes "projects or activities directly undertaken by any agency" or "projects or activities supported in whole or part through contracts, grants, subsidies loans, or other forms of funding assistance from one or more agencies," or "projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies." "Action" also includes "policy, regulations, and procedure-making." It does not include enforcement, "acts of a ministerial nature, involving no

exercise of discretion," or "maintenance or repair involving no substantial changes" in existing structures (SEQR Regulations § 617.2).

In the Washington Administrative Code (WAC), which contains the regulations for Washington's State Environmental Policy Act (SEPA), the definition of "action" includes "new and continuing activities (including projects and programs) entirely or partly financed, assisted, conducted, regulated, licensed, or approved by agencies," "new or revised agency rules, regulations, plans, policies, or procedures," and legislative proposals (WAC § 197-11-704). Actions are one of two categories: project actions or non-project actions. Project actions involve decisions on specific projects, including and limited to "agency decisions to: license, fund, or undertake any activity that will directly modify the environment, whether the activity will be conducted by the agency, an applicant, or under contract" or the "purchase, sell, lease, transfer or exchange natural resources, including publicly owned land, whether or not the environment is directly modified." Non-project actions involve "decisions on policies, plans, or programs," such as:

- the adoption or amendment of legislation, ordinances, rules;
- the adoption or amendment of land use plans or zoning ordinances;
- the adoption of any policy, plan, or program that will govern the development of a series of connected actions;
- creation of a district or annexations to any city, town or district;
- capital budgets; and
- road, street, and highway plans."

For Washington, "action" does not include any above activities "when an agency is not involved," nor does it include "civil or criminal enforcement."

Drawing on the approach in other states, the study team proposed in its January 2010 Report to the Legislature that the definition of action be amended to clarify which government action might be considered eligible for environmental review. The proposed definition of action for HRS § 343-2, included in the omnibus bill, focused environmental review on government action and included applicant action in so far as it requires government involvement through the granting of contracts, issuance of leases, permits, licenses, certificates, or other entitlements for use or permission to act by one or more agencies. This proposal drew on similar language already present as explanatory text in HAR § 11-200-5(C) for agency actions regarding the use of state or county lands or funds which "includes any use (title, lease, permit, easement, licenses, etc.) or entitlement to those lands." The proposed definition specifically excluded ministerial actions that involve no exercise of government discretion. For actions that did not require discretionary government consent, environmental review would not apply. Thus, the proposed definition sought to narrow the applicability of Chapter 343 compared to the existing trigger-based screen.

In response to concerns about the potential overreach of a discretionary approval approach, the study team suggests that Chapter 343 be restricted to discretionary actions that have a "probable, significant, and adverse" environmental effect. This language seeks to avoid the ambiguity of the federal language in NEPA ("major actions") and to eliminate minor or unrelated discretionary approvals from environmental review. This language excluded, by definition, ministerial permits and such minor permits as "off-site" parking or granting of operator licenses, even if technically discretionary.

During the Working Group process, another approach emerged that had a high degree of consensus (see Table 7). The Working Group agreed to a discretionary approval screen that did not change the definition of action, but changed HRS § 343-5(a) to require an environmental assessment for actions that "propose the use of state or county lands by an agency" or "the issuance of a discretionary approval to an agency or a person for an action that may have adverse environmental effects, including but not limited to discretionary approvals for the use of state or county lands or funds." This language mirrors language found in the definition of "action" in NEPA, California, Massachusetts, New York, and Washington laws by covering all state and county agency actions, and applicant actions only when they involve government discretionary decision-making. Participants also desired to narrow the definition of use from its current meaning to apply only to agency-initiated use of state or county lands or funds.

The Working Group proposed that OEQC develop guidance to classify discretionary approvals that would be subject to environmental review and ministerial approvals that would not be. The approvals would be grouped into three classes: Class 1 includes discretionary approvals for which the action may have adverse environmental effects, Class 2 includes discretionary approvals for which the action has no likely adverse environmental effects, and Class 3 includes ministerial approvals (Table 9).

Under the existing approach, a project could have multiple triggers that require environmental review. Under the discretionary approval approach, the process would more resemble NEPA in that the early document (EA or EIS) would be the foundation for each subsequent discretionary approval, with narrower tiered documents or supplementation as required.

Table 9. Proposed Classification of Agency Approvals by Class

Class One: Environmental Review	Class Two: Case-by-Case	Class Three: Ministerial
• Change of Zone*	• Conditional Use Permit - Major	• Zoning Adjustment
• Special Management Area Use Permit - Major*	• Special Management Area Use Permit - Minor	• Country Cluster
• Chapter 201H-38 Affordable Housing Exemption	• Housing Site Development Plan Permit	• Modification or Deletion of Condition
• General Plan Amendment*	• Waiver	• Temporary Use Approval
• Zoning Variance	• Downtown Height Excess of 350 Feet	• Minor Modifications
• Special Use Permit	• Planned Development Resort	• Special District Permit - Minor
• Plan Review Use	• Surface Encroachment Variance	• Agricultural Cluster
• Shoreline Setback Variance*	• Conditional Use Permit - Minor	• Declaratory Ruling
• Flood Hazard Variance	• Existing Use Permit	• Building Permit
• Development Plan Amendment	• Minor Shoreline Structure Permit	• Home Occupational Approval
• Special District Permit - Major*	• Class I Zoning Permit	• County Special Accessory Use Approval
• Planned Development Housing	• Class II Zoning Permit	• Archaeological Inventory Survey Approval
• Waikiki Special District Planned Development Permit*	• County Town Design Review Approval	• Coastal Zone Management Certification
• Project District Approval	• Historic District Approval	• State Highway Drainage System Connection Permit
• Kailua Village Special District Approval	• Wastewater Treatment Plant Approval*	• State Highway Drainage System Discharge Permit
• Conservation District Management Plan Approval*	• Well Construction/Pump Installation Permit	• Fire Contingency Plan Approval
• Class III Zoning Permit	• Underground Injection Control Permit	• Section 401 Water Quality Certification
• Class IV Zoning Permit	• Group Living Facility Approval	• Community Noise Permit
• Community Plan Amendment	• NPDES Permit	• Heating Ventilation Air Conditioning Permit
• SLUD Boundary Amendment	• Cluster Housing Permit	• Site Preservation Plan Approval
• Conservation District Use Permit*	• Cluster Plan Approval	• SLUC Boundary Interpretation
• Revocable Permit for Use of State Lands	• Care Home Permit	• Subzone Boundary Amendment
• Air Quality Certification	• Subdivision[1]	• Data Recovery Plan Approval
• Underground Storage Tank Permit		• Burial Treatment Plan Approval
• Certificate of Need		
• Stream Channel Alteration Permit		
• Covered Source Permit		
• Project District Development Approval		

* Explicitly required in HRS § 343-5

[1]The Working Group considered subdivisions as either a case-by-case or ministerial approval, but could not agree on which was preferable.

Transitioning to a "discretionary approval" screen from a trigger system includes a set of three integrated changes. First, add and clarify statutory definitions in HRS § 343-2:

- "agency": amend to include county councils and update language,
- "approval": replace "a discretionary consent" with "an approval" for consistency,
- "discretionary approval": change "consent" to "approval" for consistency, and
- "ministerial approval": add a definition meaning "an agency decision involving no exercise of judgment or free will by the issuing agency, as distinguished from a discretionary approval."

Second, delete the existing triggers and definitions because the "discretionary approval screen" no longer requires the existing statutory triggers. Amend HRS § 343-5(a) to delete all of the existing triggers, HRS § 343-5(a)(1)-(9). In their place, insert the following language:

> (a) Except as otherwise provided, an environmental assessment shall be required for actions that propose:
>
> (1) the use of state or county lands or funds by an agency; or
>
> (2) the issuance of a discretionary approval to an agency or a person for an action that may have adverse environmental effects, including but not limited to discretionary approvals for the use of state or county lands or funds.

Also, delete definitions in HRS § 343-2 that were inserted into the statute because of triggers that are to be deleted: "helicopter facility," "power generating facility," "renewable energy facility," and "wastewater treatment unit."

Third, develop agency guidance for ministerial versus discretionary approvals. Require by statute that OEQC develop guidance lists regarding which approvals may have adverse environmental effects, which ministerial actions do not require environmental review, and which actions likely to require case-by-base determinations. Amend HRS § 343-5 to require OEQC to consult with relevant state and county agencies and the public to develop this guidance to classify discretionary approvals subject to an environmental assessment based on the following three classes:

- Class 1: Discretionary approvals for which the action may have adverse environmental effects and therefore requires an environmental assessment or statement, unless exempt pursuant to section 343-6(a)(2);
- Class 2: Discretionary approvals for which the action has no likely adverse environmental effects; and
- Class 3: ministerial approvals.

5.2.2 Streamline the exemption process, increase transparency, consolidate exemptions lists, and require periodic updates of exemption lists.

The exemptions process is a key step in the process of determining which projects should undergo review, thereby focusing resources on the most important actions, while exempting insignificant ones. The exemption process encompasses two similar concepts: exclusion and exemption. Exclusion refers to those actions that do not need environmental review because they are not included in the definition of "action," or lack a triggering event. Exemptions are for those actions that meet the criteria for requiring environmental review, but because of the nature of the action, are subsequently not required to undergo review. In Hawaii, it is required that this be confirmed by an agency written "declaration" of exemption.

For example, CEQA has a hierarchy of five types of exemptions:

1. The action is not a "project";
2. The action is ministerial;
3. The action has no possible significant effect;
4. The action is statutorily exempt; or
5. The action is categorically exempt.

As noted above, California law defines a "project" as a subset of actions "which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change." If an action does not meet the criteria for a "project," it does not enter environmental review. This is an exclusion that shapes the overall applicability of the entire process.

If an action is determined to be a "project," but involves only ministerial decision-making, it is excluded from environmental review. CEQA defines a ministerial approval as a "governmental decision involving little or no personal judgment by the public official . . . [and] involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out" (CEQA Regulations §15369). Examples include automobile registrations, marriage licenses, and most building permits.

If the action is deemed a "project," and involves governmental discretionary decision-making, it may be of a nature, or based on experience with previous, similar proposals, to have no possible significant effect. In such a case, the project is exempted from environmental review.

Even if a project may have the potential for significant effects, it may still be exempted in statute or regulation. The exemptions can be complete or partial exemptions, and can make no exceptions.

Categorical exemptions, in contrast, are like those that the California Resources Agency, a cabinet-level entity with jurisdiction for the environmental review system, determines to not usually have a significant effect on the environment. There are approximately 30 categories in California. Categorical exemptions may have exceptions based on the nature or location of the project (CEQA Regulations § 15354).

In Hawaii, the current approach first limits applicability by specifically defining "action," then uses statutory and categorical exemptions, which combines exclusions and exemptions, and includes ministerial actions. As defined in HRS § 343-3 and HAR § 11-200-2, an action is "any program or project to be initiated by any agency or applicant." This definition excludes plans or policies; if an activity is neither a program nor a project, it does not enter environmental review. Categorical exemptions are provided for in HRS § 343-6, which describes specific types of actions to be exempted because they will probably have minimal or no significant effects on the environment. The administrative rules list 10 classes of exempt actions, with a clause that all exemptions have exceptions (referred to as "exclusions to the exemptions" in OEQC guidance) in the case of significant cumulative impacts or in the case of an action that is "normally insignificant may be significant in a particularly sensitive environment" (HAR § 11-200-8). (This specific "exclusions to the exemptions" was the central issue in *Superferry*.)

For each categorical exemption, Hawaii agencies are required to develop specific lists of projects that are exempted from environmental review because the projects will not have a significant effect, subject to the exclusion of exemptions clause. These lists are in the form of guidance, not regulation, and are reviewed by the Environmental Council. Only those projects included on each agency's list are exempted. Exempted projects must be on that agency list for that agency to consider the project exempt from review. An agency making a determination on whether a project is exempt cannot default to another agency's list if the other agency exempts that type of project but the determining agency does not have that project on their list.

Currently, a proposed agency or applicant activity is determined to be an "action" as defined by HRS § 343-2 and HAR § 11-200-2. For agencies, if it is a program or a project, it is next considered for exemption on the agency exemption list, which is based on the above 10 classes in the regulations. If it is not exempt, then the agency must assess the significance of the potential effects based on triggers or the use of state or county lands or funds (HAR § 11-200-5). For applicants, if the proposal is considered an action, and it not on the determining agency's exemption list, then environmental review applies if the applicant proposing an action that meets any of the applicability criteria in HRS § 343-5.

Each state or county agency in Hawaii maintains its own exemption list (as guidance not as administrative rules) based on the 10 regulatory classes, is required to maintain records of actions found to be exempt, also called

"declarations" (HAR § 11-200-8(E)), and is required to produce such records upon request (HAR § 11-200-8(D)). The purpose of this requirement is to safeguard against abuse of the exemption process and to aid evaluation and improvement of the exemption system. Agencies may amend their list at any time by proposing amendments to the Environmental Council for review and concurrence (HAR § 11-200-8(C)).

A majority of stakeholders agreed that exemption lists needed revision, updating, and consolidation. Applicants stated that exemption lists should be applied more equitably to agency and applicant actions. All participants desired greater transparency of the exemption process and more guidance on how to apply exemptions. A number of stakeholders desired public review of exemption declarations before final approval of an action while others believed projects that directly benefit the physical environment or local ecology should not be required to undergo review at all. Participants identified the exemption process as a critical point in environmental review; they also agreed that the exemption system in Hawaii has become confusing, inconsistent, and inefficient.

To improve the exemption declaration process, the study team makes six recommendations:

- Adopt a ministerial approval exclusion in HRS § 343-5. Ministerial actions would be listed as Class III on the guidance lists to be issued by OEQC. This would reduce the need for agencies to include these actions on agency exemption lists.
- Consolidate state and county agency exemptions lists into one integrated list per agency at the state level and one per county, where possible.
- Sunset exemption lists to encourage that agencies update them periodically. After adoption of this recommendation, existing lists should sunset within two years, and then every five years thereafter.
- Increase exemption declaration transparency by amending HRS § 343-6(a)(2) to add to the rules a requirement that an electronic system be developed to submit exemption declarations to OEQC and to maintain a searchable archive of exemption declarations accessible to the public. This could be done via an online checklist or fillable form that could be submitted and archived automatically. A modernized electronic system would reduce workload and allow agencies to meet this requirement. Current rules already require that agencies maintain a record of exemptions (HAR § 11-200-8(E)) but do not address accessibility. To further increase transparency and accountability in the exemption process, adopt a comment period for exemption declarations for borderline cases or cases of considerable public interest. These cases should be identified by the exempting agency or the OEQC Director.
- Encourage OEQC to expand training and education about the exemption process and to provide guidance on determining exemptions and interpreting borderline cases. OEQC should advise a precautionary

approach to exemptions; if a decision-maker is in doubt about the potential for impacts, including cumulative impacts, an action should not be exempted. Guidance should ensure that exemption declarations are applied consistently for agencies and applicants; if an agency can exempt a given action, then a private applicant should receive an exemption for an identical proposal.

- Exempt projects designed to improve the local physical environment or ecology of a specified region, below a certain threshold. The definition would require consultations with affected stakeholders of what actions should be exempt if they have no or little possibility of an adverse significant impact. This should apply to agency and private applicants, and could include the restoration or conservation of native species or habitat, *heiau* (Hawaiian temple), or *loko i'a* (fishponds).

5.2.3 Encourage early programmatic environmental review for large-scale programs and plans and narrower tiered review of later, site-specific projects.

Encourage early programmatic environmental review for large-scale programs and plans by agencies and a complementary and narrower subsequent "tiering" process to promote an integrated consideration of environmental effects and greater efficiency in the later project-specific environmental review documents. Programmatic and tiered documents are a common "best practice" used by federal agencies under NEPA. After determining that a proposed action is not covered by a categorical exclusion, a federal agency under NEPA determines whether the proposed action is sufficiently addressed in a programmatic EA or EIS. If it is, and a site-specific EA or EIS is not needed, the agency may proceed with planning process. If a site-specific EA or EIS were still needed, then the new document would draw extensively on the more general prior programmatic review for context and such issues as cumulative impacts. Tiering documents to prior reviews can create process efficiencies.

To introduce the concepts of programmatic and tiered documents to Hawaii but to avoid the difficulties that might arise from a mandatory approach, the study team recommends four changes to the statutes and rules to allow and encourage programmatic environmental review:

- Add definitions to HRS § 343-2 for "programmatic environmental assessment" and "programmatic environmental impact statement" to mean "a comprehensive environmental assessment or environmental impact statement, respectively, of a program, policy, plan, or master plan." Also, add a definition for "tiering" to mean "the process of addressing general matters in broader environmental assessments or environmental impact statements with subsequent narrower environmental assessments or environmental impact statements that incorporate by reference the general discussions and concentrate solely on the issue specific to the

environmental assessments or environmental impact statements subsequently prepared."

- Add references to "programmatic" EAs or EISs in HRS § 343-5(c) & (d) that allow an agency or applicant, when required to prepare an environmental assessment, to choose to prepare a programmatic environmental assessment, based on its discretion, for the action at the earliest practicable time. Master plans, community or general plans, or similar actions that prepare a programmatic EA or EIS may then prepare abbreviated documents for subsequent actions because the majority of the information may be "tiered" to the programmatic document, requiring the document to only address site-specific impacts. This streamlines both the overall planning process and the project planning process by informing decision makers of large-scale actions and provide context for later actions that stem from the former action.
- Require the Environmental Council to prescribe rules for programmatic EAs and EISs. Add to the Council's rulemaking duties, HRS § 343-6, the duty to promulgate rules that prescribe procedures and guidance for the preparation of programmatic EAs or EISs and the tiering of project-specific EAs or EISs.
- Amend HRS § 343-5(e) to allow for tiering along with incorporation by reference to encourage and provide for tiering of subsequent documents to programmatic environmental review documents.

5.2.4 *Clarify that environmental review is not required for the use of land solely for connections to utilities or rights-of-way.*

The study team proposes to expressly exclude "the use of land solely for connection to utilities or rights-of-way" from environmental review (EA or EIS). This clarifies and reinforces the purpose of environmental review linked to agencies' discretionary processes, and distinguishes those situations involving only connections to utilities or rights-of-way, which are considered ministerial actions. This specific exclusion is reinforced by the clarified definition of "discretionary approval" and the new definition of "ministerial" in HRS § 343-2, which together ensure that ministerial actions are excluded from the environmental review system, eliminating the need for these kinds of exemptions. This approach is reinforced in the proposed three-class scheme for discretionary approvals (Table 9).

5.2.5 *Move the significance criteria from the administrative rules to Chapter 343 to clarify the distinction between EAs and EISs.*

To clarify the distinction between EAs and EISs, the study team recommends moving the "significance criteria" from the administrative rules, HAR § 11-200-12, to the statute, in a new section temporarily designated HRS § 343-A. This hardens the criteria based on well-understood rules largely in place since 1985, as

amended in 1996, and provides predictability about circumstances under which an EA should proceed to an EIS. Although not directly addressed during the stakeholder process, the study team proposed this in its January 2010 Report and the Working Group unanimously supported it. The study team also recommends adding two new significance criteria to encourage consideration of climate change impacts. This is addressed further in section 8.2.8.

To improve interpretation of the significance criteria, the study team recommends adding a subsection (c) requiring the Director to "provide guidance to agencies on the application of this section," and to require the Council to develop guidance for the interpretation and application of the significance criteria in a proposed HRS § 343-6(a)(12).

6. Governance

The "governance" or administrative framework for Hawaii's environmental review laws is comprised of three entities established in the 1970s and authorized by Chapter 341: the Office of Environmental Quality Control (OEQC), the Environmental Council, and the University of Hawaii Environmental Center. The duties of these entities are described in Chapter 341, except for the rulemaking authority of the Council, which is described in Chapter 343.

OEQC (referred to in the statute as the "office") is headed by a director, appointed by the Governor and confirmed by the Senate, and placed within the Department of Health "for administrative purposes." The duties under Chapter 341 include serving the Governor in an advisory capacity "on all matters relating to environmental quality control." The Director is also tasked with adopting rules for implementing Chapter 341 (but not Chapter 343).

The Environmental Council is a citizen-advisory body, broadly representative of the educational, business, and environmental sectors, of up to fifteen members, appointed by the Governor, who serve four-year terms, without compensation except for reimbursement of expenses. The Council is attached to the Department of Health "for administrative purposes." The functions of the Council include: serving as a liaison between the Director and the general public, making recommendations to the Director, monitoring "the progress of state, county, and federal agencies in achieving the State's environmental goals and policies," and working with the Director to publish an annual report. The Council also has broad rule-making authority for implementing Chapter 343, and is by statute directed to prescribe rules in several specific areas. The only explicit quasi-judicial "appeal" authority given to the Council is in the event of the "non-acceptance" of an environmental impact statement for applicant actions. The Council does not appear to have declaratory order authority, but has stated its position on various issues through informal letters.

Until 2006, the duties of the University of Hawaii Environmental Center were described in Chapter 341, but that section was repealed and moved to Chapter 304A-1551 as part of a consolidation of University of Hawaii statutes. Currently, HRS § 341(b) has only a one-sentence cross-referencing provision that the Center "shall be as established under section 304A-1551." The functions of the Center are to contribute the expertise of the university to addressing problems of environmental quality and "to stimulate, expand, and coordinate education, research, and service efforts of the university related to ecological relationships, natural resources, and environmental quality, with special relation to human needs and social institutions, particularly with regard to the State."

For decades, OEQC, the Environmental Council, and the Center have been effective because of their many dedicated and experienced administrators, professional staff, stakeholder support, and citizen involvement. With regard to OEQC in particular,

stakeholders indicate a strong consensus about the actual and potential positive value of the office's services for the statewide environmental review system.

Yet, all three entities have each experienced highs and lows in their authority, budgets, staffing, and relationships with the stakeholders in the environmental review system. Despite their diverse and essential missions, all three are currently experiencing major challenges with reduced authority, budgets, and staffing, stemming from waning support from their parent institutions.

6.1 Issue Identification

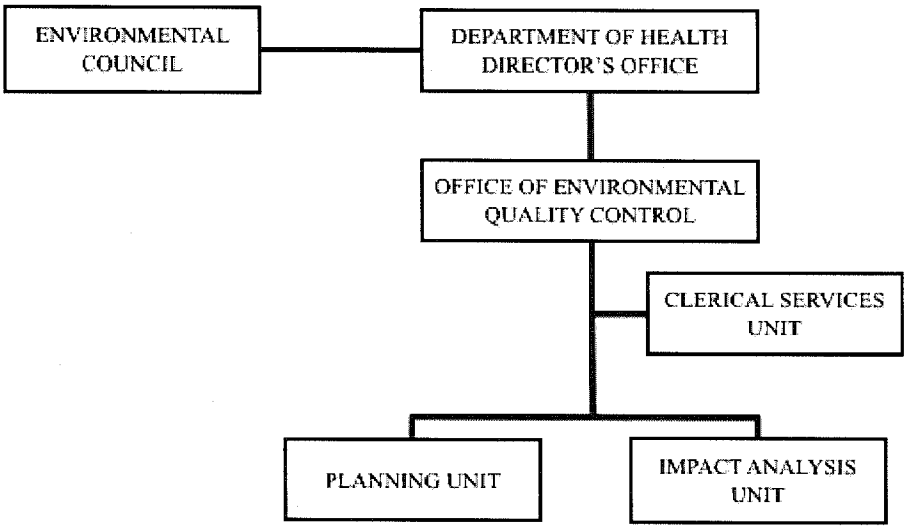
6.1.1 Authority, organizational structure, responsibilities, and roles of OEQC, Environmental Council, Department of Health, and the Governor with respect to environmental review are unclear.

According to the structure described in Chapter 341, OEQC has the primary broad advisory role to the Governor on matters of environmental quality. The Council's more limited advisory role to the Governor is through advising the Director of OEQC and through the annual report on environmental quality. Both entities are placed "for administrative purposes" within the DOH. According to a DOH organizational chart dated June 2007, OEQC and the Environmental Council both *independently* report to the Department of Health Director's office, with no organizational connection between the two entities (Figure 2).

The lack of organizational connection between OEQC and the Council in the DOH hierarchy has confused the public, as well as OEQC and the Council, given the historically close relationship between the two entities. This has created two primary governance problems.

First, OEQC has become a less effective entity due to multiple stresses that have increased in recent years. Despite strong leadership and dedicated staff, the office has often experienced challenges keeping apace of the workload and demands from stakeholders as changes occur in the review system, administrative support wanes, personnel changes, and budgets decline. OEQC staffing is at a historical low, with only three specialists and one administrative assistant, and with staff frequently on leave. It does not provide a level of advisory support and educational outreach and training desired by stakeholders and needed for an efficient system. OEQC can no longer provide staff support for the Environmental Council, such as staff time for rule processing or to regularly take meeting minutes. OEQC has expressed the need for at least three additional staff; in 2008, the Director was promised three interagency staff loans that never materialized.

Figure 2. Organizational Relationship of the Environmental Council and OEQC within the Department of Health



OEQC is positively viewed as a keystone of the environmental review system because of its role in maintaining an effective advisory function for stakeholders, a system for publication and legally required notice of the various documents required under Chapter 343, and a widely used website. Despite its critical role and the goodwill toward OEQC from stakeholders, OEQC is not functioning at an adequate level; it is has chronic staffing issues, is under-funded, and is not sufficiently supported by its parent agency.

Second, the Environmental Council has become dysfunctional, despite its dedicated members who commit substantial time and energy. From July 2009 to August 2010 the Council suspended all Council meetings due to a lack of support from its parent agency. The disconnection of a historically supportive relationship between OEQC and the Council has resulted in a number of problems, including that the OEQC Director was informed that she could no longer provide any staff support for the Council. The Council has experienced many problems with holding meetings, including the lack of staff support, the lack of a budget for travel from neighbor islands, and the lack of reliable access to technological resources such as video-conferencing equipment. In September 2010, the Council was able to reconvene, but expressed frustration with the lack of support. The Council also expressed doubt about its ability to commit to future meetings and to catch up with a backlog of work. The risk of a lack of quorum and sufficient members to do the work needed has added to frustrations.

The council also continues to express concern about the package of proposed HAR amendments, passed by the Council in April 2006, the first such amendments since the Council revised the rules in 1985. This rules package has

stalled in the administrative review process for the past five years. The approval of the Council's 2008 Annual Report, focused on the theme of food security, was also stalled without explanation until it was approved in 2009, without notice to the Council. Three Council members resigned in 2009, undermining the ability of the Council to make quorum. Since then, the terms of two more Council members have expired. For more than a year, several open Council seats have been awaiting appointments; only recently was one new council member appointed, but that member was not presented in a timely manner to the Senate and is therefore only an interim appointment.

The Council is without sufficient staff support for the conduct of its business, including rulemaking and exemption list review. Several attempts to obtain support directly from DOH and the Governor's Office—for its rulemaking package, its annual reports, daily functioning (particularly for its meetings), and for replacement of members—have not been successful. The Council has still attempted to meet its responsibilities. It is unclear, however, whether the Council's efforts will be sustainable without additional departmental-level clarity and substantive organizational support.

6.1.2 *The environmental review system lacks cumulative information, flexibility, and modern communication systems to effectively conduct environmental review.*

The need for better electronic and communications technology to improve Hawaii's review system was one of the areas of highest agreement among stakeholders in the study. Although OEQC has improved the system over the years, despite a limited budget—such as an electronic version of the *Environmental Notice*, use of PDF versions of documents, and an online environmental review document archive—the system has not optimally integrated new technologies and communication systems. For example, many stakeholders complained about the unwieldy nature of the OEQC website. Stakeholders desired more easily searchable document archives. Many stakeholders asked for an ability to follow, via an electronic system, project proposals for a particular geographic area or substantive topic (similar to the RSS feed and hearing notice system utilized now on the Legislature's website). With better technology, exemption lists could be more efficiently cross-checked and declarations could be routinely and simply submitted and archived with a form template. Better technology could also facilitate improved cumulative impact analysis and information sharing among agencies, applicants, and the public. Additional benefits of better integrating current technology into the system include increased transparency and reduced costs in document reproduction and distribution.

6.1.3 *Stakeholders do not understand nor are they aware of the role of the Environmental Council or Environmental Center.*

The Environmental Council suffers from a lack of stakeholder awareness about its functions. Few stakeholders engage in direct contact with the Council or regularly attend Council meetings, which are open and subject to Hawaii's "Sunshine law." Each year, state and county agency staff members interact with the Council with regard to updating agency exemption lists. This process can typically take several months to complete. Stakeholders who knew members of the Council expressed strong support for their credibility, diversity, and commitment. Overall, however, almost all stakeholders expressed a lack of knowledge about the Council's functions and membership.

The Environmental Center is even less known than the Council. Now a unit of the Water Resources Research Center of the University of Hawaii at Manoa, the Center does not receive direct support from OEQC, the Council, DOH, or the Governor. Its current function is primarily to review and provide comments on environmental review documents, drawing from University expertise. Due to the decline in support from the University of Hawaii, and a decline in participation of University faculty and staff in providing comments to the Environmental Center, it has become less active in the state review system. The majority of stakeholders interviewed were unaware of the role of the Center. Stakeholders who did have experience with the Center had mixed impressions of the quality and neutrality of the Center's reviews. Although stakeholders recognized the importance of the Center as a consolidator of University expertise and a valuable voice in the review process, the decreasing participation of University faculty, the lack of support from within the University, and the lack of consistency or neutrality perceived by stakeholders undermine the "outside expert" role of the Center.

6.2 Recommendations

6.2.1 *Clarify the authority, organizational structure, responsibilities, and roles of OEQC, Environmental Council, Department of Health, and the Governor.*

The Environmental Council embodies the spirit of environmental review: informed public and expert participation guiding decision-making. The study team recommends that the Legislature elevate the Environmental Council to be equivalent to similar boards and commissions of statewide importance, with OEQC serving as staff to the Council. The Working Group unanimously endorsed modeling OEQC and the Environmental Council on the State Board of Land and Natural Resources (BLNR), but the BLNR alternative, where the Environmental Council advises the Director, who in turn advises the Governor directly, removes the Governor from hearing independent and diverse voices about the environmental review process. The study team instead recommends models such as the federal Council on Environmental Quality (CEQ) or the

Hawaii State Land Use Commission, which better exemplify environmental review principles. The Environmental Council, composed of knowledgeable citizens from a variety of backgrounds and experience, would be better able to guide environmental protection policy with the expertise of OEQC to support their decision-making.

Maintaining a strong Council would also make the review system less susceptible to political influence, one reason why the Council is currently marginalized and severed from OEQC. The Council, instead of the Director, should be made the primary advisor to the Governor on environmental quality in HRS § 341-6(a)(1), similar to the CEQ, which is advisory to the President of the U.S. Changes to HRS § 341-6(a)(2), (3), & (b) could strengthen the role of the Council as the liaison between the Governor and the public, and changes to HRS § 341-6(e) could give the Council comprehensive authority for rulemaking for Chapter 341 as well as 343. Streamlining the membership of the Environmental Council from fifteen to seven members with four members nominated by the Legislature would reduce the administrative burden and cost of maintaining a large council. To ensure diversity and independence, require in HRS § 341-3(c) that a total of four of the seven members be selected from lists prepared by the House and Senate (two each).

There are several other ways to clarify the roles of each agency. Adding "through the Council" in subsections HRS § 341-4(b)(1), (3), (4), (5) & (8) would adjust the Director's powers and duties toward supporting the Council's authority. The study team also recommends that OEQC be required to ensure adequate budgeting and staff support for the Council in HRS § 341-4(b)(9). OEQC and the Council could be further separated by removing the Director as an ex officio member of the Council, and authorizing the Council to appoint the Director in HRS § 341-3(c).

Finally, the study team recommends moving OEQC and the Council from the DOH to an independent position within the Governor's Office.

6.2.2 *Modernize OEQC through a special fund and temporary fees.*

To address the chronic budgetary problems of OEQC and the Environmental Council, the study team recommends creating a new section in Chapter 341 that provides for dedicated supplemental funding through an Environmental Review Special Fund and use it to improve administration, outreach, and modernization of the environmental review process. The study team endorses the unanimous agreement reached by the Working Group on the need for a dedicated special fund to provide for the modernization of the environmental review process.

The study team proposes that the fund shall consist of monies from: filing fees and other administrative fees collected by OEQC, monies collected pursuant to the temporary modernization fee, all accrued interest from the special fund, and

monies appropriated to the special fund by the Legislature. The special fund should not replace the existing OEQC budget and should be used to fund improved OEQC and EC activities, including administrative and office expenses related to capital improvement projects; better outreach, training, education, and research; and modernized technology and development of training programs.

Furthermore, the Environmental Council, working with OEQC and stakeholders, should adopt administrative rules to establish the fees necessary for the proper administrative and management of OEQC and the Environmental Council.

To ensure that an appropriate portion of the special fund is supported by agencies who are "heavy users" of the environmental review system, provide that, for a five-year period beginning July 1, 2011, 0.1 per cent of all state appropriations for CIP supported by general obligation bonds be used to support the environmental review special fund. This small fee would internalize the cost of state environmental review process into the cost of CIP projects, and would be a minimal charge compared to the normal costs incurred by these proponent agencies in the EA or EIS process itself. To ensure, however, that the fees are not excessive, the total amount of transfers over the five-year period should not exceed $1,250,000. On average, about $250,000 would be collected per year.

As a match to the fees for the fund from state agencies proposing CIP projects, a similar amount should be raised from county and private applicants related to their project proposals. The study team proposes the creation, through rulemaking, of a temporary environmental review modernization fee to be collected from county agencies and private applicants based on publication in the OEQC bulletin of certain environmental review documents, with fees capped at:

- $1500 for a Draft Environmental Assessment (DEA);
- $1000 for a Final Environmental Assessment (FEA);
- $500 for an Environmental Impact Statement Preparation Notice (EISPN);
- $4000 for a Draft Environmental Impact Statement (DEIS);
- $3000 for a Final Environmental Impact Statement (FEIS);
- $500 for any Supplemental Environmental Assessment (SEA); and
- $1000 for any Supplemental Environmental Impact Statement (SEIS).

The total amount of these temporary fees collected over the five years is not to exceed $1,250,000, with an estimated $250,000 collected per year. Once this amount is reached, the temporary fee is discontinued.

Under these twin approaches, the anticipated additional support for OEQC and the Council is $500,000 per year for a five-year period of rehabilitation and modernization. This should cover the backlogged duties and the recommended reforms discussed in this report. After that period, the progress of OEQC and the Council should be reassessed for financial and organizational needs.

6.2.3 Require OEQC and the Environmental Council to conduct regular outreach and training, annual workshops, publish an annual guidebook, and prepare an annual report on the effectiveness of the environmental review process.

OEQC has made an excellent effort to conduct outreach and provide guidance despite budgetary constraints; however, much more support is needed. For example, the much-used Guidebook is now six years out of date and is currently de-published. This recommendation expands services to a level comparable to other states, through specific statutory directives and increased budgetary and staff support.

The study team recommends adding to OEQC's duties the following requirements:

- conduct regular outreach and training for state and county agencies, HRS § 341-4(b)(6);
- offer advice to non-governmental organizations, state residents, private industry, agencies, and others, HRS § 341-4(b)(7);
- conduct annual statewide workshops in cooperation with stakeholders;
- publish an annual state environmental review guidebook that includes guidance for preparing, processing, and reviewing documents; information on judicial decisions, administrative rules, and other relevant changes to the law; and other information that would improve efficient implementation of the system; and
- prepare an annual report that analyzes the effectiveness of the State's environmental review system, including an assessment of a sample of EAs and EISs for completed projects, HRS § 341-4(a). Amend HRS § 341-6(c) to allow the council to combine its annual report with OEQC's new annual report.

Also, the study team recommends that OEQC be required to create and maintain an improved electronic database and communication system. OEQC does maintain a basic website that is essential to the current environmental review process and has made improvements to its information system in recent years, but a modernized system could bring much needed efficiencies and added value to the review process for a wide variety of stakeholders. These amendments are intended to support and encourage more rapid development in these areas and promote efficiency for all stakeholders. The Working Group unanimously supported this recommendation.

OEQC should create and maintain an electronic communication system, such as a website and searchable digital archives that meet best practices and allow efficient, comprehensive tracking of environmental review documents relating to actions for which environmental review documents are completed or pending, and (for the purpose of creating an accessible "tracking" system for projects) any related or subsequent permits, approvals, updates, and mitigation information.

OEQC should improve access to environmental review documents via electronic communication systems and minimize use of paper copies. The use of an electronic *Environmental Notice* should be supported, as well as integrating new technology into systems for transmission of documents, storage of exemption declarations, and the comment and response process. California has a similar requirement for its Office of Planning and Research to "establish and maintain a database for the collection, storage, retrieval, and dissemination of notices of exemption, notices of preparation, notices of preparation, notices of determination, and notices of completion provided to the office." The database must also be available through the Internet (CEQA Regulations § 15023).

Finally, the Legislature should provide greater staff and funding support to OEQC. Adequate staffing for OEQC is critical to the functioning of the entire environmental review system. Currently, OEQC is severely under-staffed, creating inefficiencies for all stakeholders. The study's primary non-statutory recommendations are that the Legislature add at least three additional staff members to OEQC, and pass a supplemental budget for OEQC until the special fund is established. The latter is to ensure adequate functioning and support for OEQC and the Council and continued improvements to the electronic communication and archiving system.

6.2.4 *Require regular updating of the administrative rules to maintain an effective state environmental review process.*

The administrative rules have not been amended for over ten years, despite the Council and the OEQC's periodic efforts to do so. Additional staffing and support from the Governor's Office are essential to keeping the administrative rules current. To maintain correspondence between the statute and the rules, the study team recommends that the appropriate support be mandated to ensure that the administrative rules for Chapter 341 and 343 are reviewed and updated as necessary no less than every three years. The Working Group also unanimously supported this recommendation.

6.2.5 *Encourage the University of Hawaii to support the functioning of the Environmental Center.*

Regarding the Environmental Center, the study team recognizes University autonomy with respect to the Center and that the Center has an important neutral expertise role. The study team therefore encourages the University to: (1) increase financial support and staffing for this unit, (2) appoint a new full-time coordinator with expertise in environmental review, (3) increase routine, active participation by a greater diversity of faculty members, and (4) ensure better coordination to minimize overlap between the resources and libraries of OEQC and the Center.

7. Participation

Participation is an essential component of any environmental review system. Participation refers to the processes for notification, review, comment and response, scoping, outreach, education, and training. The process involves agencies, private parties and the public at many levels of the environmental review process. Chapter 343 emphasizes the importance of participation. As stated by the Legislature in the first section of Chapter 343, "the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole" (HRS § 343-1).

The benefits of public and agency participation in environmental review include:

- increasing awareness of and raising consciousness about environmental issues;
- educating the public about and involving them in the development of their communities and the preservation of natural and cultural resources;
- encouraging adequate public and agency consultation to ensure that potential impacts are identified and included in the analysis; and
- providing a check on the system and encouraging that information is presented objectively and accurately.

Other U.S. states and NEPA address participation through laws, regulations, and guidance with specific examples on how to fulfill participation requirements. Practices promoted in other states include early scoping, robust notification, and regular training and education about the environmental review process. Other key components include accessible information and documents, and clear, specific guidance on appropriate comments and responses. Studies bear out that "substantive, early investments in public participation can benefit the project proponent, the public, and the final plan" (Shepherd and Bowler, 1997). Drawing from data gathered through the stakeholder process, research into other states' and NEPA's environmental review laws, and a survey of relevant literature, the study team developed the following problem statements and recommendations for issues in the area of "participation."

7.1 Issue Identification

7.1.1 The current system could be improved to support broad, early, and sufficient public participation.

The results of the stakeholder interviews and workshop indicated that many felt the system for public notice can be improved. The most common observation regarding public notice was that agencies and groups are adequately notified of the key step in the review process and opportunities for participation, but the

general public is not. Many stakeholders reported that the public often finds out about opportunities to participate too late in the process. Insufficient early public participation makes the public more inclined to resort to judicial challenge, or to engage in tactics such as voluminous commenting (discussed below). Conversely, others expressed that the notification process is sufficient and that if the public is unaware, it may be due to factors such as a lack of civic involvement. These stakeholders stated that it is not reasonable to expect agencies or private project proponents to "spoon feed" information to the public. On the other hand, some viewed this lack of awareness about the environmental review process as an indication that there is a need for increased public education. One interviewee stated, "the process mystifies the public," while another expressed that "there will always be people who say they didn't know about it, but people have to be a little proactive too." One suggestion was to allow the public more time to participate in the environmental review system; for example, by allowing agencies more flexibility to extend comment periods when warranted.

7.1.2 *Repetitious and voluminous comments can consume applicant and agency resources without contributing meaningful or original information.*

A concern identified in stakeholder interviews was that interest groups opposed to a project sometimes organize a campaign to submit large numbers of similar or identical comments. Because of the existing requirement in the administrative rules that document preparers respond to each individual comment in writing and reproduce each individual comment and response in the final document, this can add significant cost and time to a project. Furthermore, voluminous commenting, even if it does not happen often, is perceived as a deliberate attempt to impede projects through the environmental review process, which is viewed as an abuse of the system. On the other hand, some stakeholders viewed voluminous commenting as a necessary opportunity to express widespread public concerns that were not adequately identified or considered earlier in the process, particularly when other avenues for public input are not available.

7.1.3 *The review process needs more substantial guidance to support better interagency review and public comment.*

The quality of public and agency comments on review documents was a concern raised by many stakeholders. The interview and workshop results indicated that the quality of interagency review varies by agency. Agency comments can be cursory or boilerplate and may not provide useful feedback. Agencies sometimes comment outside of their particular jurisdiction, or request additional studies that are perceived as unreasonable when the additional review is only marginally related to the project. Under-staffed and under-funded agencies reported difficulty finding the time to properly review documents. Stakeholders also suggested that comments from the public could be more focused on relevant issues, stating that the public's comments are at times simply expressing

opposition to a project and are not focused on the information contained in documents. More substantial guidance and training are needed to improve the quality of interagency and public comments and responses.

7.1.4 Communication and information sharing systems are outdated, and guidance on new communication methods is lacking.

The environmental review system in Hawaii has not been adequately updated to account for the use of email, the Internet, or other advances in communication technology. The way that stakeholders communicate has undergone a fundamental change since the last review of the system in 1991, and since the last time the rules were updated in 1996. Rules and guidance address only non-electronic modes of communication, so it is unclear how to appropriately integrate the use of newer communication methods. The statute, rules, and guidance that create the framework of the environmental review system need a re-evaluation focused on advances in communication technology. Although care must be taken to ensure continued services to those without easy access to technology, the use of more technologically sophisticated systems could substantially reduce the cost and burden of environmental review, as well as improve the quality of participation.

7.1.5 Public and agency consultation and scoping could be better integrated at the early stages of the planning process.

Early identification of areas of concern to the public and other agencies will help to ensure their due consideration, and can also help to resolve issues early, avoiding conflict and litigation later in the process. Throughout the stakeholder process, participants indicated that scoping practices could be stronger, and they frequently suggested that pre-consultation and scoping are a good way of making the process more efficient in the long run. Weak rules and guidance surrounding scoping practices in Hawaii's system were identified as a contributing factor to concerns about public notice, review, and document quality.

7.2 Recommendations

7.2.1 Encourage broad, early, and effective public participation by adding supporting language to the statute and by allowing agencies to extend the period for public comment.

To encourage early and effective public participation, the study team developed three recommendations. First, to address concerns that public participation is not sufficient, add a specific policy goal to the statute to reinforce the important principle that applicants and agencies should provide notice to the public of actions under review and encourage and facilitate public involvement throughout

the environmental review process. This would clearly state that, "applicants and agencies, at the earliest practicable time, shall provide early and effective notice to the public and state and county agencies that an action is subject to review under Chapter 343, and shall encourage and facilitate public involvement throughout the environmental review process." This suggestion, proposed in the study's original omnibus bill, was supported by the members of the Environmental Review Working Group (see Table 7).

Second, the study team recommends adopting rules that provide guidance about public notice. These should include specific examples of "reasonable methods" to inform the public about opportunities to participate in the environmental review process. Similar regulations are included in both NEPA and other states' laws and can provide a model for these rule changes. Although this will not add a new legal requirement, it will encourage more diligent efforts to provide effective notice. It will also reduce uncertainty for project proponents and agencies regarding what constitutes "effective notice" and "reasonable methods."

Good examples of how this has been integrated in federal and other states' laws include NEPA which addresses public involvement (CEQ Regulations, 40 C.F.R. § 1506.6), the Washington Administrative Code, section 197-11-510, addressing public notice, and California's CEQA Regulations, section 15201 addressing public participation. Question #38 from "NEPA's Forty Most Asked Questions," which addresses how documents should be made available to the public, provides an example of clear guidance, stating that, "a combination of methods may be used to give notice, and the methods should be tailored to the particular needs of the cases . . . the objective, however, is to notify all interested or affected parties. If this is not being achieved, then the methods should be reevaluated and changed. Repeated failure to reach the interested or affected public would be interpreted as a violation of the regulations" (CEQ, 1981). Provided below is the study team's suggestion for language to be added to the Hawaii Administrative Rules to address this issue, adapted from the examples above, but tailored to address concerns and suggestions that arose through this study's stakeholder process. The suggested language for the rules is:

> (a) Effective and early public and agency notice and involvement can assist agencies and applicants with early issue identification and help to avoid undue community concerns at later stages in the review process. The lead agency or applicant shall make diligent efforts to involve and inform the public and other agencies in implementing Chapter 343 procedures.
>
> (b) When public notice is required, the lead agency or applicant shall use reasonable methods to inform the public and other agencies that an environmental document is being prepared or is available for comment or that public meetings or hearings, if any, will be held. Examples of reasonable methods to inform the public include, but are not limited to:

1. posting signs on the property, for site-specific proposals;
2. publishing a notice in a local newspaper of general circulation;
3. notice through other local media, such as radio or community newsletters;
4. notice in electronic format, on the Internet, on a website maintained or utilized by a public agency or project proponent;
5. notice to potentially interested community organizations, or other public or private groups with known interest in the proposal or type of proposal being considered;
6. directly contacting (for example, via mailings, telephone calls, or electronic communication) owners and occupants of nearby or affected properties;
7. notice to neighborhood boards or county advisory groups, where applicable;
8. directly notifying those who have requested it on an individual action; and
9. holding or sponsoring public meetings.

(c) Publication of the availability of documents in the OEQC *Environmental Notice* also constitutes a necessary form of public notice. However, publication in the *Environmental Notice* shall not, in itself, constitute compliance with this section.

The study team's third recommendation is to allow approving agencies or accepting authorities legal authority and flexibility to extend the period for public comment for a maximum of thirty days for draft EAs and forty-five days for draft EISs. This addresses concerns that there is not sufficient time for review in cases where projects are controversial, draft documents are voluminous, or where public involvement occurs late in the process. This change clarifies that, when good cause is shown, an agency shall extend the comment period to allow the public more time to review and comment. At the same time, it imposes limits on the length of these extensions, so that they are not extended beyond a reasonable additional amount of time. Therefore, the study team proposes to add a new subsection, HRS § 343-5(h), to allow agencies, for good cause, to extend the public comment period on draft EAs and draft EISs. Extension requests must be submitted within the time frame of the original comment period. Suggested language for this subsection is:

(h) Upon receipt of a written request and for good cause shown, an approving agency or accepting authority shall extend the public review and comment period under this section as follows:

(1) For environmental assessments: no more than thirty additional days beyond the public review and comment period required in section (c)(1)(A) or (d)(1); and

(2) For environmental impact statements: no more than forty-five additional days beyond the public review and comment period required in subsection (c) or (d) relating to draft statements.

The study's original recommendation proposed in the omnibus bill suggested an extension of no more than fifteen days for either a draft EA or EIS; however, following discussions with the Working Group, it was determined that fifteen days may not allow sufficient additional time to address concerns raised by stakeholders. The Working Group members reached some consensus regarding a thirty-day extension, but some members had concerns that a forty-five-day extension would be too long, slowing down what some perceive to be an already lengthy process. In other states examined, and in NEPA, only minimum lengths for comment periods are mandated, leaving extensions open to agency discretion. Massachusetts law states that if a proponent fails to meet public notice or document circulation requirements, then the review period may be extended (CMR § 11.06). This demonstrates an important connection between public notice and the need for comment period extension; if sufficient notification is achieved, there should be no need for comment period extensions.

7.2.2 Develop rules to address repetitious and voluminous comments.

The study team recommends the creation of new rules to allow for a more efficient way to respond to voluminous and repetitious comments. This new approach, similar to that in NEPA, will allow decision-makers to consider large volumes of comments, but will not require that repetitious comments be responded to individually or that each one be included in the document. The Working Group supported this change. The study team recommends that a new subsection be added to HRS § 343-6(a), requiring that the Environmental Council issue rules addressing this issue. The following language is suggested:

(10) prescribe procedures for the public comment and response process, including but not limited to the allowed use of electronic technology and the issuance of one comprehensive response to multiple or repetitious comments that are substantially similar in content.

These proposed rules would allow preparers to consolidate similar comments and no longer require an individual response to each comment. Additional recommended guidance language, adapted from Question #29 from "NEPA's Forty Most Asked Questions" (CEQ, 1981), is:

an agency or applicant preparing a final EA or EIS shall assess and consider comments both individually and collectively. If a number of comments are identical or very similar, agencies or applicants may group the comments and prepare a single answer for each group. Comments may be summarized if they are repetitive and voluminous, including through use of a digest or matrix that identifies the nature or number of comments.

When revising the rules, the Environmental Council should also consider how to integrate new communication technology into the system to help track and respond to repetitious and voluminous comments. Discussions of the Working Group indicated high consensus around implementation of this recommendation.

7.2.3 Improve the quality of review by clarifying agency duty to comment and providing guidance about comment and response specificity.

Strengthening the review system will ensure that documents are evaluated critically from multiple perspectives. Bolstering rules and guidance relating to review can address the issue of how to reduce bias, increase accountability, and improve information quality so that decision-makers are provided the best and most accurate information possible. The following three recommendations for changes to the Hawaii Administrative Rules should apply to both EAs and EISs.

First, clarify that agencies have a duty to provide comment on documents within their jurisdiction. NEPA addresses this issue, and the following suggested language for HAR §11-200-4 is adapted from CEQ Regulations section 1503.2:

> Agencies with jurisdiction by law or special expertise with respect to any environmental impact involved, and agencies which are authorized to develop and enforce environmental standards, shall comment on environmental review documents within their jurisdiction, expertise, or authority. Agencies shall comment within the time period specified, or may reply that they have no comment.

Second, increase the quality and relevance of comments submitted on environmental review documents by including rules that address the specificity of comments. This rule should apply to EAs and EISs, as well as any other relevant documents. CEQ Regulations, section 1503.3, the Washington Administrative Code, section 197-11-550, and California's CEQA Regulations, section 15204 address the issue of specificity of comments and the need for focus in the review process. New York's handbook for SEQR also provides guidance on how the public and interested agencies can best be involved in the SEQR process (SEQR Handbook, chapter 3, section G). The following suggested language is adapted from these examples:

- Comments shall be as specific as possible and may address either the adequacy of the environmental review document or the merits of the alternatives discussed, or both.
- Commenters shall briefly describe the nature of any documents referenced in their comments, indicating the material's relevance, and should indicate where the material can be reviewed or obtained.
- Methods, models and data. When an agency criticizes a lead agency's methods, models, or data, the commenting agency shall describe, when

possible, the alternative methods, models, or data which it prefers and why.

- Additional information. A consulted agency shall specify in its comments whether it needs additional information to fulfill other applicable environmental reviews or consultation requirements and what information it needs, to the extent permitted by the details available on the proposal.
- Mitigation measures. When an agency with jurisdiction objects to or expresses concerns about a proposal, it shall specify the mitigation measures, if any are possible, it considers necessary to allow an agency to grant or approve applicable licenses.
- Comments by other agencies. Commenting agencies that are not consulted agencies shall specify any additional information or mitigation measures the commenting agency believes are necessary or desirable to satisfy its concerns.
- Public comments. Recognizing their generally more limited resources, members of the public shall make their comments as specific as possible and are encouraged to comment on methodology needed, additional information, and mitigation measures in the manner indicated in this section.
- This section shall not be used to restrict the ability of reviewers to comment on the general adequacy of a document or of the lead agency to reject comments not focused as recommended by this section.

Third, increase the quality and relevance of response by adding administrative rules relating to the specificity of response. Amend rules for EAs and EISs, and any other relevant documents, to improve the specificity of responses. This issue is addressed in CEQ Regulations section 1503.4, and the Washington Administrative Code section 197-11-560. The following suggested language is adapted from these examples:

(1) An agency or applicant preparing a final EA or EIS shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final document:

(a) modify alternatives, including the proposed action;
(b) develop and evaluate alternatives not previously given serious consideration by the agency or applicant;
(c) supplement, improve, or modify its analyses;
(d) make factual corrections; and
(e) explain why the comments do not warrant further response, citing the sources, authorities, or reasons that support the agency or applicant's position and, if appropriate, indicate those circumstances that would trigger agency or applicant reappraisal or further response.

(2) All substantive comments received on the draft statement shall be appended to the final statement; when comments are repetitive and voluminous, the comments may be summarized and appended in full or made readily accessible in electronic format. If a summary of the comments is used, the names of the commenters shall be included.

(3) An addendum or appendix in the final EA or EIS document containing comments and response to comments shall refer to the relevant pages in the FEA or FEIS, but shall not include reproductions of large sections of duplicative text.

7.2.4 Integrate new communication technology into the system.

Stakeholders often mentioned the need to better integrate newer modes of communication and information sharing into the environmental review system. Requiring by statute that the Environmental Council issue rules to address this (mentioned in 6.2.3), and creating a better system to fund the initial costs and long-term maintenance (discussed in 6.2.2) are steps towards meeting these needs. The study team also recommends that OEQC consider and develop guidance on the use of electronic communication in the environmental review system. Both stakeholder interviews and the Working Group strongly supported integration of the Internet and electronic communication into the review system. Additionally, although OEQC has an existing website, it could be substantially improved in terms of the ease of use, accessibility, and the quality and quantity of content. Washington State[1] and New York State[2] provide examples of websites that are particularly effective at using modern information technology. Suggestions for integrating electronic communication into the system include:

- allowing documents to be distributed electronically and clarifing the process for doing this;
- requiring that documents in PDF format have searchable text;
- creating an online comment and response system, and accompanying guidance for an Internet-based comment and response process;
- improving the OEQC website to improve access to information about the process, including access to current statutes, rules, guidebook, and pertinent judicial decisions;
- improving the OEQC website to improve access to documents including an EA/EIS database, exemption declarations, and other public records relating to the process;
- establishing a notification system whereby users can sign up for an email listserv or RSS feed to receive notification of actions subject to Chapter 343, within a specific geographic district or by project type or name, including links to online documents and project-specific websites; and

[1] Washington State SEPA website: http://www.ecy.wa.gov/programs/sea/sepa/e-review.html
[2] New York State SEQR website: http://www.dec.ny.gov/permits/357.html

- ensuring that individuals and communities with a lack of technological resources and limited Internet access still receive adequate notice of and access to relevant opportunities to participate in the review process.

7.2.5 *Integrate interagency and public scoping and consultation at the early stages of the planning process and provide more detail as to what constitutes adequate scoping.*

To support interagency and public scoping and consultation, the study team developed three recommendations. First, clarify in the rules for both EAs and EISs the purpose and importance of early public consultation and scoping. Early consultation and scoping help to identify significant environmental issues, as well as issues that are less important, focusing the scope of review. Public involvement should begin before project planning and decision-making are too far along to be influenced; otherwise, "public participation become a procedural exercise rather than a substantive democratic process" (Shepherd and Bowler, 1997). Early initiation of these processes better ensures due consideration of important issues, and helps to avoid conflict, including litigation, later in the process. NEPA and other states' laws provide examples of incorporating a statement of purpose on this issue into the law. For example, CEQA addresses early public consultation, encouraging but not mandating public scoping, noting that, "many public agencies have found that early consultation solves many potential problems that would arise in more serious forms later in the review process" (CEQA Regulations § 15083). NEPA also emphasizes the importance of early scoping and consultation (CEQ Regulations, 40 C.F.R. § 1501). Hawaii's administrative rules should clarify the purpose of early scoping, including:

- integrating the environmental review process into early planning to ensure appropriate consideration of policies and to eliminate delay;
- emphasizing cooperative consultation among agencies before a document is prepared, helping to avoid adversarial comments later in the process; and
- identifying at an early stage the significant environmental issues deserving of study and de-emphasizing insignificant issues, narrowing the scope of the review document accordingly.

Additionally, better developed rules and guidance on scoping practice will help to encourage more thorough scoping. CEQ Regulations state that "there shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action" (CEQ Regulations, 40 C.F.R. § 1501.7). The regulations also detail what a lead agency is required to do as part of the scoping process, including a requirement to invite the participation of affected agencies and other interested persons, "including those who might not be in accord with the action on environmental grounds."

Washington State's process for scoping under SEPA includes both required scoping (WAC § 197-11-408) and optional "expanded" scoping (WAC § 197-11-410), the use of which is encouraged for promoting interagency cooperation, public participation, and innovative ways to streamline the process. The structure of these regulations clarifies the required aspects of scoping but also encourages expanded scoping and provides clear examples of what approaches are available to agencies and applicants.

Under New York law, although scoping is not mandated for all environmental reviews under SEQR, its regulations address, in more detail than in Hawaii's laws or rules, what shall be included in scoping if it is conducted, including an opportunity for public participation (SEQR Regulations § 617.8). The SEQR Handbook, a guidance document, also discusses scoping. Despite the lack of a formal requirement, SEQR regulations and guidance state that scoping is preferred in most cases, and will ultimately streamline the process for all involved. The scoping process is intended to ensure public participation in the environmental review process, to allow open discussion of issues of public concern, and to permit inclusion of relevant, substantive public issues in the final written scope (SEQR handbook, p.102). The Handbook also explains that, among other things, one of the advantages of scoping is to "help reduce criticisms that an EIS is inadequate and reduce future challenges to EIS adequacy by involving the public in developing the specifications for the content of the EIS" (SEQR Handbook, p. 103). On the other hand, a lack of public scoping might lead to "not discovering issues or resources of local importance, or overlooking sources of information and local or site history" (SEQR Handbook, p.104).

The second recommendation to support scoping and consultation is to require public meetings for projects in which "substantial public interest is anticipated." In response stakeholder concerns, the study team recommends adding to the rules a requirement that public meetings be required for projects in which substantial public interest is anticipated. Furthermore, these meetings should be held in the locality in which the need for a public meeting or hearing exists, rather than on other islands or in other localities. The suggested language is:

> For actions in which substantial public interest is anticipated, the proposing agency or applicant shall hold a public scoping meeting to receive comments on the proposed environmental review at the earliest practicable time. If a proposed action generates substantial public interest on a particular island, the approving agency shall ensure that a public hearing is held, at minimum, at a convenient location and times on that island and, if there are statewide or other-island impacts, at convenient locations and times on other appropriate islands.

8. Content

Content refers to the body of information contained in environmental review documents that discusses the extent of environmental impacts and proposed mitigations. This represents the actual product of the environmental review process. Through the stakeholder process and other research efforts, the study specifically addressed cumulative impacts, mitigation measures, cultural impacts, climate change issues, and disaster management. Additionally, the study identified elements that improve content quality, such as encouraging an objective representation of information; concise, readable documents; and a strong review system.

8.1 Issue Identification

8.1.1 Documents are at times overly technical and lengthy, making it more difficult for agencies and the public to review documents.

Documents are at times longer and more technical than they need to be, and contain repetitive, boilerplate language. This makes it difficult for reviewers to digest the information and provide timely and thoughtful comments.

8.1.2 Documents can reflect the bias of the project proponent and do not always objectively present information.

Stakeholders expressed concern that environmental review documents can be, in the words of one interviewee, "marketing tools" for project proponents. Although this may be true only in some cases, it is important to encourage objectivity in the review process. Some of this perceived bias may be unintentional and the lack of clear guidance on how impacts should be presented contributes to this issue.

8.1.3 Mitigation measures proposed in review documents may not always be implemented.

A major issue with environmental review practice is that there is "little attention to what happens after the review is completed and the implementation of mitigation measures begins" (Slotterback, 2008). Proposed mitigation measures are not explicitly required even though documents are often approved under the assumption that the proposed mitigations or comparable alternatives will be implemented. In the current system, mitigation measures are sometimes, but not always, incorporated into permitting. This has led to a concern that some measures are not being implemented. Furthermore, because environmental review documents are not enforceable, some stakeholders expressed concern that measures proposed in documents are not given serious and realistic consideration.

8.1.4 There is lack of follow up in the environmental review system, both in regard to mitigation measures and in general, as a means of feedback.

There is no follow-up on the implementation of mitigation measures built into the environmental review process. As a result, there is no way of knowing if mitigation measures are implemented, and, if they are, if they have had the predicted mitigating effect reported in the environmental review document. The issue of lack of follow-up relates to mitigation measures, but also to the system overall, which would benefit from systematic feedback. Increased follow-up would help to determine if mitigation measures are effective and if predictions made in review documents are accurate.

8.1.5 Cumulative effects assessment is neither well understood nor well implemented and is not integrated with the planning process.

Cumulative effect assessment in Hawaii is lacking. It is often cursory, and one stakeholder reported that preparers tend to "gloss over this section." Preparers reported difficulty addressing cumulative effects due to a lack of data, lack of clear guidance, and lack of policy goals against which to determine thresholds for these impacts. Addressing cumulative effects at the project level can be "too little, too late" because some aspects of cumulative effects can be effectively addressed only well in advance of the point at which the environmental review process begins. Project-level assessments can address cumulative impacts to a limited extent, after which there is a need for regional studies and long-range planning. Programmatic review can capture potential cumulative issues earlier, and should be encouraged, but is complementary to other planning processes and not a substitute for them. Cumulative effects on environmental resources are best addressed and managed upstream through government policy, planning and land use programs, natural resource management programs, and environmental regulation. Environmental review is "unusually weak as an environmental management tool, in that it does not impose any particular environmental standards or targets on decision-makers" (Jay et al., 2007). Without this higher level of involvement in cumulative effects assessment and management, project-level analysis is severely limited in both accuracy and thoroughness, and the fundamental goal of environmental protection may not be achieved.

8.1.6 Cultural impact assessment is inconsistent.

Cultural impact assessment (CIA) in Hawaii is inconsistent and lacks clarity about its appropriate scope. There is much uncertainty regarding what is required, who is an "expert," which cultural traditions merit consideration in environmental review documents, and how to effectively address non-physical cultural impacts. Many of the experts interviewed for CIA have become overburdened by repeated requests for interviews, while some preparers expressed concern that information received in interviews is not always accurate or unbiased. Agency jurisdiction

over cultural impact assessment is also unclear and has created some confusion over what aspects of the process an agency exerts authority.

8.1.7 Methods of and requirements for addressing developing concerns such as climate change are unclear.

Climate change is a significant and relatively recent international, national, and local policy issue. Hawaii's environmental review laws do not yet explicitly require addressing this issue, and existing guidance does not discuss how to address climate change impacts, which are likely to be significant in Hawaii. In the U.S., local government is leading the response to climate change. Over 1,000 mayors have signed the Kyoto Protocol, including the mayors of Kauai, Maui, Honolulu, and Hawaii counties (The United States Conference of Mayors, 2009.) California, Washington, Massachusetts, and New York have all begun to develop guidance for incorporating climate change into their environmental review systems because they recognize that climate change impacts will be local and that local government decision-making influences climate change outcomes. Like these states, Hawaii has established policy goals to decrease dependence on fossil fuels and to reduce greenhouse gas emissions. Environmental review documents should provide information to support these goals. Stakeholders cautioned that, for some climate change impacts, impacts assessment with certainty is difficult, though many agreed that the most relevant issues—sea level rise and greenhouse gas emissions—can and should be addressed. Currently, guidance on how to best address these issues does not exist for Hawaii.

8.1.8 There is need for more clarity about the link between actions undertaken during a state of emergency and environmental review.

Stakeholders generally agreed that, during an emergency, immediate actions taken to ensure human health and safety and prevent loss of life should not be required to undergo environmental review. However, there is a concern that without some checks and balances, the declaration of an emergency may be taken advantage of and result in damage to the environment that could have been avoided.

8.2 Recommendations

8.2.1 Implement maximum page limits and plain language requirements for environmental review documents.

Establishing page limits for environmental review documents, to be determined through the rulemaking process, will encourage concise discussion of relevant impacts and greater focus on significant impacts. For projects determined to be of substantial size and scope, this limit could be longer. The rules could also, for example, provide flexibility through archiving appendices electronically. This

will make the process more efficient for document preparers, ease the review process, and make documents more accessible for the public. NEPA and several other states, including Washington and California, impose page limits and can serve as examples. The intent is not to limit information, but to encourage the focus to remain on truly relevant issues, and to prevent excessively large documents from hindering the decision-making process. The current rules do address plain language requirements; however, this could be reinforced by additional guidance.

8.2.2 Encourage objectivity in documents through rules and guidance.

The Hawaii Administrative Rules state that "an EIS is meaningless without the conscientious application of the EIS process as a whole, and shall not be merely a self-serving recitation of benefits and rationalization of the project" (HAR § 11-200-14). The study team recommends strengthening this statement by providing clear guidelines as to how impacts should be presented, especially in cases where there is uncertainty about the potential level of an impact. For example, guidance can encourage preparers to discuss the worst-case scenario when there is substantial uncertainty, or to clearly disclose uncertainty and the probable range of impacts. Under SEPA, it is required that, in the case of incomplete or unavailable information, the preparer default to presenting the worst-case scenario (WAC § 197-11-080). A survey of EIS professionals could help to identify additional guidance from OEQC that would encourage objectivity in the EIS process.

8.2.3 Adopt a Record of Decision (ROD) requirement for EISs.

To clarify the record of agency decision-making, the study team recommends adopting a Record of Decision (ROD) process similar to that in NEPA. The ROD will be a short document (typically only a few pages under NEPA practice) that includes a clear summary of the agency's decision, choice among alternatives, impacts, mitigation measures, the related permits required, and the agency review process that follows. Under NEPA, agencies are required to include the appropriate conditions identified in a ROD in grants, permits, or other approvals (CEQ Regulations, 40 C.F.R. § 1505.3). RODs clarify the boundaries of an agency's decision and facilitate follow-up on mitigation measures but do not create a binding mitigation document. California's system follows a similar process, where the lead agency must file a notice of determination following the decision, and indicate whether mitigation measures were made a condition of permitting, and whether a mitigation monitoring plan was adopted. This measure would address concerns raised repeatedly throughout the stakeholder process that, if documents are accepted and projects subsequently approved on the basis of the information represented in these documents, then it is important that mitigation measures are implemented. To ensure follow-through on mitigation, this recommendation would provide a needed means to translate "vague conditions

from review documents into enforceable outcomes" (Slotterback, 2008), and would provide a format accessible to the public and to permitting agencies for ensuring mitigation implementation over the long-term.

Some members of the Working Group voiced concern that implementing this recommendation might transform Chapter 343 into a regulatory review process as opposed to one focused only on information disclosure; others supported this measure. The proposed amendment balances these concerns. The Working Group discussions also led to a new recommendation to add judicial review to the new ROD requirement, consistent with other provisions for review under HRS § 343-7, whereby "any judicial proceeding, the subject of which is failure to prepare a record of decision that is required . . . shall be initiated within one hundred twenty days after the expiration of the ninety-day review period for preparation of the record of decision. The Council shall be an aggrieved party for the purposes of bringing judicial action under this subsection. Others, by court action, may be adjudged aggrieved."

8.2.4 Allow for flexibility within the Record of Decision process.

Require that the Environmental Council develop rules to address the need for flexibility within the Record of Decision process. Many stakeholders expressed the concern that there is a need for some flexibility in regard to mitigation measures. As time passes and project details change, new and possibly better alternatives for mitigation may arise, and sometimes it is necessary to change mitigation measures to alternatives not preferred or explored in review documents. California law addresses this possibility by clarifying that agencies may substitute mitigation measures described in the document for other measures which the agency determines to be "equivalent or more effective" (CEQA § 15074.1). However, the agency is then required to hold a public hearing and adopt a written finding that the new measure is equal to or better than the one originally described. This measure would allow for changes when needed, but also would ensure that mitigation measures proposed in the original document are given careful and serious consideration. CEQA Regulations, section 15126.4, provide a good example of guidance on how discussion of mitigation can be included in documents and in the permitting process.

8.2.5 Prescribe procedures for implementing the ROD requirement, monitoring, and mitigation.

Require that the OEQC or the Environmental Council develop procedures to ensure that agencies follow up on mitigation measures that are imposed during the permitting process, to assess the effectiveness of mitigation measures, and to provide feedback for the environmental review process. For example, California law requires agencies to adopt mitigation monitoring or reporting plans.

Authority for this can be delegated, but until mitigation measures are completed, the lead agency remains responsible.

Follow-up not only ensures implementation, but also helps to determine if the forecasted benefits of mitigation have been achieved during project implementation and management. Furthermore, follow-up provides feedback to the environmental review system that can improve future practice (Morrison-Saunders et al., 2001). One way to do this might be to adopt a requirement for OEQC or the Environmental Center to conduct ongoing reviews of completed projects to determine if mitigation measures have been implemented, and if they have been effective. Although it would not be feasible to look at every completed project, one approach is to adopt a screening process where a set of criteria can be used to determine which projects most warrant follow-up. For example, criteria might include projects in sensitive areas, using new or unproven mitigation measures, or projects associated with considerable public concern. The information would be used as an "adaptive management" feedback loop to improve the effectiveness of the review system.

8.2.6 *Add a statutory definition of "cumulative effects" and establish a database for cumulative effects assessment.*

Although little can be done within the environmental review system to address shortfalls that occur at other levels of planning, measures can be taken to strengthen cumulative effects assessment at the project level of review and through programmatic review. The study team recommends adding a statutory definition to HRS §343-2 of cumulative effects that is based on NEPA. Add a definition of "secondary effects" and "indirect effects" to clarify the difference between these effects and cumulative effects. To further support cumulative effects assessment, require that OEQC establish a database to track environmental data over time, providing guidance to promote uniformity in reporting data so that cross-study comparisons and assessments can be done. Additionally, through the rulemaking process, a set of key environmental indicators to be assessed for cumulative impacts should be established. The study team further recommends that government take a more active role in this arena, by supporting cumulative effects assessment in non-Chapter 343 planning documents and mandating that planning agencies to establish baselines and thresholds for cumulative effects. This will place cumulative effects assessment in a more meaningful context and give cumulative effect assessment under Chapter 343 assessment more value. Despite the limitation of project-level cumulative effects assessment, the CEQ provides guidelines on how to best address cumulative effects within these limitations. CEQ provides what is recognized in the U.S. as the best existing guidance on addressing cumulative impacts in a document entitled *Considering Cumulative Effects Under the National Environmental Policy Act* (CEQ, 1997). CEQ's guidelines include discussion of (1) the identification of the range of resources, (2) the spatial boundaries of each resource to be examined, (3) temporal boundaries of each resource to be examined, (4) resource and impact

interactions, and (5) models, methods, and tools for effective evaluation. Adopting similar guidelines would improve cumulative effects assessment in Hawaii, although this kind of big-picture review would ideally be embedded in more active efforts by the State at the broad planning level to quantify cumulative effects through establishment of spatial and temporal boundaries, baseline conditions, and thresholds.

8.2.7 *Define important terms related to cultural impact assessment, clarify the role of cultural experts, and establish clear rules and guidance to standardize the cultural impact assessment process.*

Cultural impacts in Hawaii are a sensitive and important issue. Established ten years ago, the requirement to include CIA in the environmental review process in Hawaii is relatively new and there is still substantial uncertainty surrounding how it should best be implemented. Stakeholders identified a need to develop more robust guidance for all aspects of cultural impact assessment, including expected scope, best practices for methodology, and agency authority. To do this, the study team recommends OEQC continue its efforts at establishing an advisory review body to bring more cohesion to CIA. Any advisory group should include cultural experts, including some members of the native Hawaiian community, and a set of diverse and knowledgeable stakeholders, and be linked to the Environmental Council to ensure coordination and cooperation. Ultimately, revisions to the current guidance documents or administrative rules may be required to clarify review standards for CIA.

8.2.8 *Amend significance criteria to address climate change mitigation and adaptation.*

Include specific references to climate change hazards and greenhouse gas emissions in the significance criteria to clarify that these impacts are considered significant and that they should be addressed in environmental review documents. The study team proposes modifying the significance criteria, which the Working Group endorsed. First, add to the existing criterion #13 the phrase "or emits substantial quantities of greenhouse gases" to require consideration of large project emissions. Second, add a new criterion (#14) to address climate change hazards, with language: "Increases the scope or intensity of hazards to the public, such as increased coastal inundation, flooding, or erosion that may occur as a result of climate change anticipated during the life-time of the project." The study team also recommends that the Environmental Council or OEQC develop guidance for the interpretation and application of these new criteria.

8.2.9 Ensure, to the extent possible, that environmental impacts are taken into account during emergency action.

The study recommends that the Environmental Council adopt rules addressing emergency situations to encourage that reasonable efforts are made to avoid or minimize environmental impacts during emergency action. An example of this can be found in Massachusetts law, which requires that "the proponent shall limit any emergency action taken . . . to the minimum action necessary to avoid or eliminate imminent threat," and that the "proponent shall file an Environmental Notification Form (ENF) with as much detail as is then known about the project within 10 days" (CMR § 11:13). Washington law also addresses this issue, clarifying that agencies can specify emergency actions in their agency rules (WAC § 197-11-880).

9. Process

Specific process questions examined in this study are significance determination, document preparation, acceptability, and longevity. The following discussion focuses on the identified major problems and recommendations for changes to the statute. Other process problems identified through the stakeholder process are addressed through recommended changes to rules and guidance.

9.1 Issue Identification

9.1.1 Requiring an EA for projects likely to require an EIS is time consuming and burdensome.

The two-step requirement of the EA screen to determine if an EIS is needed can be unnecessarily burdensome and costly for applicants and agencies with projects likely to have significant impacts. Applicants and agencies are frustrated with the rigidity of the two-step approach because it does not allow agencies to exercise discretion for determining the appropriate level of review based on agency experience with similar actions. Often, agencies and applicants now circumvent the need to produce a separate EA by designating an EIS Preparation Notice as the EA, calling it an EA/EISPN. This approach is not clearly allowed under current law.

9.1.2 The shelf life of environmental review documents is unclear.

Chapter 343 does not discuss supplemental EISs, causing confusion about their role in the environmental review process. The administrative rules provide for supplemental EISs, but the criteria became the center of the dispute in the *Turtle Bay* case. Stakeholders do not agree whether: 1) supplemental EISs should even be required, 2) supplemental EISs should be required only for changes in project conditions after a given time, or 3) supplemental EISs should be required for changes in project conditions or the surrounding environment, after a given time. Many stakeholders referred to the "significant new information" approach in NEPA regulations and guidance as a better and familiar alternative approach. The Hawaii Supreme Court's *Turtle Bay* decision clarifies the scope and authority of the current administrative rules and provides a strong endorsement of supplementation for certain long-pending projects, but does not resolve all of the confusion on this issue.

An indefinite lifespan of an approved EA or EIS complicates the planning and public participation processes when a project is not completed in the anticipated time frame and discretionary approvals are spread out over time. The *Turtle Bay*

case was not the only example raised by stakeholders. Two other examples stakeholders indicated of projects that conducted environmental review early, but then waited to pursue construction are the Wal-Mart super block project near Ala Moana shopping center in urban Honolulu and Makena Resort on Maui.

Wal-Mart increased traffic in an area that was already prone to heavy traffic, a public road was closed and put into the superblock property, and burials were discovered on the property once construction began. Many participants in the study process cited Wal-Mart as an example of a project that was not required to undergo environmental review. However, although Wal-Mart did not prepare an EA or EIS for its project, one was prepared earlier by the previous property owner for a proposed "super block shopping center" that was triggered by the conversion of a segment of Rycroft Street to private property. This document, prepared in 1990, identified potential impacts, explored alternatives, and included public review. The length of time between the preparation and acceptance of the proposed "super block" and the actual construction of the Wal-Mart resulted in changed environmental circumstances and a substantial loss of public memory of the process. During the intervening years, new residents moved into the area, new businesses developed, and traffic, among other effects, changed. Thus, the perception among many that Wal-Mart did not undergo environmental review may be technically incorrect, but the timing of the review and the lack of a supplemental review created problems for the public and the proponent.

Makena Resort conducted an EIS in 1974 for a 1000-acre development. Since then, the resort added 800 acres, a portion (200 + acres) of which received partial urbanization approval without any environmental or cultural review. Not only have the additional acres not undergone review, the original proposal has not performed a supplemental review, despite changes in available information, the environment, and the project. Since the original EIS, an additional 300 archaeological sites have been documented on the 1000 acres. Other impacts and conditions in this sensitive cultural and biological area have emerged that were unknown during the original Chapter 343 review and various rezonings have been sought with no updated review. Thus, Makena Resort is another example where the lack of a supplemental document is considered by some stakeholders to have undermined the quality of decision-making and adequacy of public participation, fundamental goals of environmental review.

9.1.3 *A perception of bias undermines public confidence in the integrity of environmental reviews prepared or contracted by applicants or agencies for their own projects.*

The purpose of environmental review is to provide objective information about significant impacts to the environment. However, some stakeholders perceive a bias or conflict of interest when applicants or agencies prepare or contract the preparation of their own environmental review documents. Applicants may "downplay" impacts in documents that they prepare to avoid agency denial, and

agencies may have difficulty being objective about impacts if they are also proposing the project.

9.2 Recommendations

9.2.1 Allow agencies and applicants, at the lead agency's discretion, to proceed directly to an EIS.

Allow agencies to determine, based on their judgment and experience, that an EIS is likely to be required and to choose not to prepare an EA, but to proceed directly to EIS preparation, with adequate notice to the public and interested parties. This amendment would be added to HRS § 343-5(a) (agency actions) & -5(b) (applicant actions). Many stakeholders support this approach because it reduces duplication, preparation time, and cost. On the other hand, it also reduces opportunities for public participation and creates incentives for proponents to "just do the EIS" instead of the more measured process.

Under NEPA, if the agency determines that significant effects may or will occur, the action can bypass the EA step and directly prepare an EIS (CEQ Regulations, 40 C.F.R. § 1508). Similarly, in Hawaii, agencies that are experienced with environmental review should be provided the discretion to determine which projects are likely to require full environmental review and should be allowed to proceed directly to the preparation of an EIS. The additional measures for public participation recommended by the study should balance concerns that this amendment might unduly narrow public participation.

9.2.2 Clarify rules regarding supplemental documents and "shelf life."

The study recommends that the Environmental Council revise rules regarding supplemental EAs and EISs by amending HRS § 343-6(a)(14). Revisions to the rules should address the long-standing "shelf life" issue with a clear numerical limit (or presumption) on the validity of environmental documents until discretionary approvals are completed. Alternatively, or in addition, the Council would prescribe narrative criteria for the applicability, acceptance, and publication of supplemental EAs and EISs when one of the following conditions are met: substantial changes in the proposed action, significant new circumstances or information relevant to environmental effects bearing on the proposed action or its impacts, or a substantial delay in the implementation of the proposed action beyond what was disclosed in the original EA or EIS.

These three conditions are common in other jurisdictions' environmental review processes. NEPA requires agencies to prepare supplemental statements if "the agency makes substantial changes in the proposed action that are relevant to environmental concerns" or "there are significant new circumstances or

information relevant to environmental concerns and bearing on the proposed action or its impact" and supplemental statements follow the same public notice and review procedures (CEQ Regulations, 40 C.F.R. § 1502.9). Agencies may also prepare supplements if they further the purpose of NEPA review. In "NEPA's 40 Most Asked Questions," CEQ sets out a clear time presumption and advises that proposals that are "more than 5 years old" and not yet implemented or are ongoing should be reexamined carefully (CEQ, 1981).

California provides for both a subsequent and a supplemental document. A "subsequent" document shall not be prepared unless "substantial changes are proposed in the project" or "occur with respect to the circumstances under which a project is undertaken" due to "new significant environmental effects or a substantial increase in the severity of previously identified significant effects"; or if new information that was unknown or unknowable at the time of preparation reveals that the project will have significant effects not discussed in the previous document, significant effects in the previous document will be more severe, mitigation measures or alternatives thought to be unfeasible become feasible but the project declines to implement it, or if the project declines to implement mitigation measures or alternatives that are considerably different from the previous document but would substantially reduce significant effects (CEQA Regulations § 15162). Information applies only to remaining approvals. Subsequent documents require the same public notice and review process as other environmental review documents. "Supplements" may be prepared if the above conditions are met but only minor additions are needed, then the supplement need only include the information necessary to make the document adequate. This still requires public notice and review, but only for the additional material.

Massachusetts requires proponents to file a "Notice of Project Change" if there is "any material change in a Project prior to the taking of all Agency actions" or if "more than three years have elapsed since between the publication" of the EA and publication of the notice of the draft EIS (CMR § 11.10(1) & (2)). A material change includes the adoption of a mitigation measure or alternative not reviewed in the original document. If more than five years elapses between the publication of the notice of availability of a final EIS and either the notification of the commencement of construction or the commencement of non-construction related activity (such as expending funds for property acquisition or final design), then the Project must restart the environmental review process from the beginning (CMR § 11.10(3)). After the "Notice of Change" publication, the overseeing agency must determine whether the project change is significant, based on a set of criteria that include changes in the nature of the project, required approvals, project completion timeline, the surrounding environment, and the generation of further impacts (CMR § 11.10(6)). If the overseeing agency determines there to be significant impacts, a notice is published to receive comments on whether more review is needed, and the agency makes a determination whether the change or lapse in time warrants further MEPA review (CMR § 11.10(8)).

New York allows lead agencies to require supplemental EISs that are limited to "specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS" based on changes proposed for the project, newly discovered information, or changes in the circumstances of the project. The requirement must be based on "the importance and relevance of the information" and the "present state of the information in the EIS." Supplemental EISs must follow the same public notice and review process as draft and final EISs (SEQR Regulations, § 617.9(7)).

Washington requires a supplemental EIS if there are "substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts" or "significant new information indicating, or on, a proposal's probable significant adverse environmental impacts" (WAC § 197-11-405). The supplemental EIS process must also undergo public notice and review, except that scoping is optional and no duplicate information should be included (WAC § 197-11-620). The SEPA Handbook further explains that an SEIS may be appropriate when there is a project change or new information that indicate new or increased significant environmental impacts; the lead agency determines that additional alternatives or mitigations should be included or that another period of public comment would be beneficial; or when an original or prior document for a different but related proposal is being adapted to the current proposal. In the case of new, but minor information, or changes that will not result in new or increased significant environmental impacts, the proponent may issue an addendum (WAC § 197-11-600(4)(c) and 625).

Drawing on the above examples, the study team recommends amending the statute to include references to supplemental EISs—HRS § 343-2 (included in definition of "environmental review"), HRS § 343-5(g) (add "other than a supplement"), and HRS § 343-7(a) (judicial review)—to provide greater clarity for stakeholders and the courts on the intention and criteria for requiring supplemental EISs. Also, language should be added in HRS 343-5(c) and (d) to focus supplemental documents only on "those elements of the proposed action for which one or more discretionary approvals, modifications, or revocations remain, or to the extent that an agency has retained discretion to modify or revoke any prior approval." HRS § 343-7 should be amended to include supplemental EISs in the limitations of action on an agency determination that a supplemental document is or is not required. The criteria for when an EIS needs supplementation should be clarified in the rules to ensure recognition of the decision of the Hawaii Supreme Court in *Turtle Bay*.

9.2.3 *Enhance public and interagency review and strengthen the role of governance to reduce perceptions of bias.*

The encouragement of more robust public and interagency review will ensure greater objectivity in documents where the preparer is also the approving authority or financial beneficiary of the approval. Other recommendations such

as improved public notice practices, comment period flexibility, exemption declaration publication, and strengthening content requirements will make the process more transparent and reduce bias. Although actual and perceived biases in the review system are problematic, some solutions adopted in other jurisdictions and recommended by some stakeholders are not feasible for Hawaii's situation. For example, a preparation process using third-party preparers requires a large consultancy market that currently does not exist in Hawaii and would involve a complicated administrative mechanism for contracting with independent or certified preparers.

10. Conclusion

Environmental review is broadly supported and has been beneficial to Hawaii. The study team found widespread support for Hawaii's environmental review system across stakeholder groups and in agencies and communities across the state. The benefits and purposes of environmental review are widely accepted. The goals of the system, as expressed in the law and identified in this study—to protect the environment, to support good decision-making, to enhance public participation, to integrate with planning, and to provide clarity and predictability in how the law is applied—are supported by stakeholders.

The existence of an environmental review system in Hawaii has led to deeper awareness and consideration of environmental issues. The system has led to more environmental project designs, impact mitigation that may not have occurred without the system, and has likely acted as a deterrent for environmentally harmful projects that may have been implemented were disclosure of impacts not required. In these ways, the system has been effective over the years.

As time has passed, however, Hawaii's environmental review system, conceived in the 1970s, has undergone little change. New methods, knowledge and communication systems now exist that have not been integrated into the system. Additionally, environmental issues and concerns have fundamentally changed, raising the question of whether Hawaii's outdated system is equipped to address 21st century environmental concerns. This report outlines the UH study team's recommendations for improving the State's environmental review system.

10.1 Major Concerns and Recommendations

The two-year study process has revealed some significant problems in the current system and has identified opportunities for improvement. Most stakeholders recognize a need for change, although some are comfortable with and invested in the current system, and are concerned that changes would disadvantage their current role. One major concern is that the screening system (applicability) does not directly link the need for review with the level of impacts. This has led to a system in which it is possible for projects with significant environmental impacts to avoid environmental review, and for time and money to be unnecessarily expended on projects that do not have significant impacts. The implementation of a new "discretionary approval screen" would better link applicability to discretionary decision-making and ensure that only projects with significant impacts undergo full review. This approach is more transparent, systematic, predictable, and rational than the current system. A discretionary approval screen would eliminate the need for the Legislature to be involved in refining the list of specific projects covered by the law. It would cover potential future projects that may have significant impacts, but may be missed by the current list of "triggers." The study team's recommendations for changes to the exemption system would ensure that projects that do

not need review are appropriately and efficiently exempted. This recommended approach to applicability will focus the limited resources of all stakeholders on the discretionary actions that can benefit from environmental review and public participation.

The report also recommends repairing the State's environmental governance system, which has become dysfunctional. Without an effective OEQC and Environmental Council supported by strong parent agency leadership, and without sufficient staffing and an adequate budget, the system cannot perform to its potential. The study team recommends restructuring the governance system, and establishing a temporary fee system to provide needed resources for OEQC and the Council. Stronger governance and additional funding will enable OEQC to holistically update the environmental review system and to provide guidance, outreach, and education to agencies and the public.

Early and robust involvement of the public and other agencies greatly increases the effectiveness of the environmental review system. When participation processes such as scoping, notification, and review occur too late, they have less effect on review and decision-making. Early participation also helps to minimize later conflict and litigation, saving time and money for all involved. More participation from both the public and agencies will lead to documents receiving more thorough review, encouraging preparers to provide better quality information. Recommendations in this report seek to implement aspects of participation earlier in the process. Other recommendations include more detailed guidance, so that agencies, applicants, preparers, reviewers, and the public have a better understanding of their roles and responsibilities in the process.

The lack of follow-up and feedback in Hawaii's environmental review system pose another concern identified by this study. Without follow-up, there is no systematic way to know if appropriate mitigation measures have been implemented, if mitigation measures are effective, or if the estimation of impacts is accurate over time. Without information on the effectiveness of mitigation and on the accuracy of impact estimation, it is difficult to determine the best ways to improve environmental review. The study team's recommendations include on-going review and follow-up by OEQC, and a new Record of Decision process to increase accountability of approving agencies.

Compared to other states, the level of detail in the rules and guidance for the environmental review system is lacking in Hawaii. There is a need for more clarity, understanding of expectations, and predictability. More detailed rules and guidance can also help to streamline the process and reduce costs by making clear not only what is required, but also what is not required. Less detail in the law, rules and guidance leads to unclear expectations and invites creative interpretations of the law that may cause conflict or litigation, adding time and cost to the process. Recommendations presented in this study address this issue by strengthening and clarifying rules and guidance for the process and content requirements of environmental review.

10.2 Limitations of Environmental Review

The recommendations in this report address many issues with Hawaii's environmental review system. This report proposes ways to change and improve the system so it can better achieve its goals of supporting decision-making, protecting the environment, enhancing public participation, working in conjunction with good planning, and providing a clear and predictable process. Understanding the limitations of any environmental review system, however, and what can and cannot be accomplished through environmental review is critical to a realistic assessment of the benefits of recommended reforms.

First, Hawaii's environmental review system exists within a greater political system. Although steps can be taken to make the system as independent and objective as possible, it is difficult to create a process of environmental review that is divorced from the larger political context within which it exists. Thus, the system's effectiveness will always depend to an extent on political leadership and on the political atmosphere surrounding it. A well-designed environmental review system will support providing the best available information to decision makers, increasing transparency, and integrating checks and balances throughout the system. However, decision-making is ultimately a discretionary action that cannot be controlled by prescribed processes, and the system cannot substitute law for political will.

Second, the question of how environmental review in Hawaii should best intersect with long-term planning and resource management remains unanswered. It is questionable, for example, whether cumulative effects assessment within an environmental review system does much to contribute to real-world management of cumulative environmental effects (Gunn and Noble, 2010). This is an issue not just in Hawaii, but in other U.S. states and other nations. Studies show that there is a "relatively weak degree of influence on planning decisions that is being exerted by EIA" (Jay et al., 2007). Most environmental reviews occur at the project level and begin far too late, chronologically, for the information provided in these documents to impact long-range planning decisions. The focus of project-level review and the focus of cumulative effects assessment are two fundamentally different things; although the environmental review process works well at the project level, it does a poor job of assessing cross-project cumulative impacts. This issue is reflected both in the study's interviews and in environmental review literature. The environmental review system is not a substitute for good planning, and reform of other planning processes in Hawaii may be more effective for considering the incremental impacts of development over time than revisions to Chapter 343 alone.

Third, in Hawaii, environmental review and planning are not well connected. Environmental review should be part of an overall program of neighborhood, community, regional, and state planning. Encouraging early programmatic review will help address this gap. Without clearly articulated planning and policy goals for the community, the process of balancing diverse environmental, economic, social, cultural, and community goals will be impeded. Environmental review cannot substitute for planning processes, which need to be ongoing, coordinated, interdisciplinary, and community-based.

Environmental review and planning are interdependent systems, especially for managing cumulative impacts and for realizing established policy goals. Changes to both sides of the system need to be considered holistically.

10.3 Concluding Comments

This report contains a summary of the key findings of the UH study conducted for the Legislature. It identifies issues and concerns with Hawaii's current system and recommends changes to relevant statutes, rules, and guidance to address these issues. The authors express appreciation to the hundreds of individuals who participated in this two-year study. The support, input, advice, and guidance the study team received from stakeholders were essential to the dynamic study and legislative process and are greatly appreciated. The study team looks forward to continuing to work with the Legislature and stakeholders in the future to ensure that Hawaii's environmental review system is the best possible for our unique islands.

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Appendix 1. Act 1 (2008)

HOUSE OF REPRESENTATIVES
TWENTY-FIFTH LEGISLATURE, 2008
STATE OF HAWAII

H.B. NO.

2688
H.D. 1

A BILL FOR AN ACT

Making appropriations to provide for the expenses of the Legislature, the auditor, the legislative reference bureau, and the ombudsman.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:
[Edited to show only Section 10, the enabling language for the Study]

SECTION 10. Notwithstanding chapter 103D, Hawaii Revised Statutes, the legislative reference bureau shall contract with the University of Hawaii to conduct a study of the State's environmental review process. The study shall:

(1) Examine the effectiveness of the current environmental review system created by chapters 341, 343, and 344, Hawaii Revised Statutes;

(2) Assess the unique environmental, economic, social, and cultural issues in Hawaii that should be incorporated into an environmental review system;

(3) Address the larger concerns and interests related to sustainable development, global environmental change, and disaster-risk reduction; and

(4) Develop a strategy, including legislative recommendations, for modernizing Hawaii's environmental review system so that it meets international and national best-practice standards.

In addition, the study shall be conducted in accordance with the provisions of any other act that address the comprehensive study of the environmental review process described in this section.

The study shall be submitted to the legislature no later than twenty days prior to the convening of the regular session of 2010 or by an earlier date expressly set by any other relevant Act.

There is appropriated out of the general revenues of the State of Hawaii the sum of $300,000, or so much thereof as may be necessary to the legislative reference bureau during fiscal year 2008-2009 to contract with the University of Hawaii to conduct the study required by this section.

The sum appropriated shall be expended by the legislative reference bureau for the purposes of this section.

Appendix 2. Final List of Stakeholder Interview Participants

This list includes individuals who participated in the formal interview process. It does not include everyone who participated in the study's extensive stakeholder process, attended the Town-Gown Workshop, attended other meetings, or offered input in other ways. The list reflects those who responded to the study's invitation to be interviewed, but does not include others who were contacted but chose not to or were unable to participate.

Federal Agencies

Federal Aviation Administration
Steve Wong

Federal Highway Administration
Jodi Chew

Natural Resources Conservation Service
Michael Robotham

State of Hawaii Agencies

Department of Health
Larry Lau
Kelvin Sunada

Department of Land and Natural Resources
Christen Mitchell
Nelson Ayers

DLNR – Office of Conservation and Coastal Lands
Sam Lemmo

DLNR – State Historic Preservation Division
Pua Aiu

DLNR – Land Division
Morris Atta

Department of Accounting and General Services
Ralph Morita
Chris Kinimaka
Joseph Earing
Bruce Bennett
Jeyan Thirugnanum

Department of Agriculture
Brian Kau
Robert Boesch

Department of Business, Economic Development and Tourism

DBEDT - Office of Planning
Scott Derrickson

DBEDT - Strategic Industries Office
Joshua Strickler

DBEDT – Coastal Zone Management
Douglas Tom
John Nakagawa
Ann Ogata-Deal

DBEDT – Land Use Commission
Orlando Davidson

Hawaii Department of Transportation
Brennon Morioka

HDOT - Harbors Division
Fred Nunes
Fred Pascua
Marshall Ando
Dean Watase

HDOT – Highways Division
Jiro Sumada
Scot Urada
Ken Tatsugucih
Doug Meller
Darell Young
Robert Miyasaki

HDOT – Support Services
Glenn Soma
Mike Murphy
David Shimokawa
Susan Papuga

Department of Hawaiian Homelands
Darrell Yagodich

Office of Hawaiian Affairs
Jonathan Scheuer
Heidi Guth

Hawaii Community Development Authority
Anthony Ching, Executive Director

Office of Environmental Quality Control
Katherine Kealoha

Hawaii Public Housing Authority
Marcel Audant
Edmund Morimoto

Hawaii Housing and Finance Development Corporation
Janice Takahashi

Department of the Attorney General
Bill Wynhoff

City and County of Honolulu

Department of Planning and Permitting
James Peirson
Art Challacombe
Mario Sui-Li

Department of Transportation Services
Wayne Yoshioka
Faith Miyamoto
Brian Suzuki

Department of Design and Construction
Terry Hildebrand
Dennis Kodama
Russell Takara

Department of Environmental Services
Jack Pobuk
Gerry Takayesu
Wilma Namumnart
Lisa Kimura

Maui County

Department of Planning
Jeff Hunt
Jeff Dack
Kathleen Aoki
Ann Cua
Thorne Abbott
Joe Prutch
Robyn Loudermilk

Department of Environmental Management
Cheryl Okuma
Dave Taylor
Gregg Kresge

Department of Public Works
Milton Arakawa
Joe Krueger
Wendy Kobashigawa

Hawaii County

Department of Planning
Daryn Arai
Chris Yuen (Former Director)

Department of Environmental Management
Bobby Jean Leithead-Todd

Brad Kurokawa (Former Deputy Director, Dept. of Planning)

Kauai County

Department of Planning
Ian Costa
Bryan Mamaclay
LisaEllen Smith
Mike Laureta
Myles Hironaka

Department of Public Works
Donald Fujimoto
Ed Renaud
Wallace Kudo
Doug Haigh

Nadine Nakamura

Barbara Robeson

Consultants

Belt Collins Hawaii, Ltd.
Sue Sakai
Lee Sichter

PBR Hawaii and Associates, Inc.
Tom Schnell

Group 70 International, Inc
Jeff Overton

R.M. Towill Corporation
Chester Koga

Aecos Incorporated
Eric Guither

Wilson Okamoto Corporation
Earl Matsukawa

Tetra Tech
George Redpath

Helber, Hastert and Fee
Gail Renard
Scott Ezer

Plan Pacific, Inc.
John Whalen

Oceanit
Joanne Hiramatsu

Wil Chee Planning
Richard Stook

Townscape, Inc.
Bruce Tsuchida
Sherri Hiraoka

Parsons Brickerhoff
James Hayes

Chris Hart and Partners
Chris Hart
Michael Summers
Jason Medema

Munekiyo and Hiraga, Inc.
Michael Munekiyo
Mich Hirano

Marine and Coastal Solutions International, Inc
David Tarnas

Geometrician Associates
Ron Terry

Public Interest Groups

Hawaii's Thousand Friends
Carl Christensen

Sierra Club Hawaii Chapter
Robert Harris

Conservation Council of Hawaii
Marjorie Ziegler

KAHEA: The Hawaiian-Environmental Alliance
Marti Townsend
Miwa Tamanaha

Hawaii Audobon Society
John Harrison

The Nature Conservancy
Mark Fox
Stephanie Liu
Jason Sumiye

Maui Tomorrow
Irene Bowie

Earthjustice
Isaac Moriwake

Native Hawaiian Legal Corporation
David Frankel

The Outdoor Circle
Mary Steiner
Bob Loy

Blue Planet Foundation
Jeff Mikulina

Sierra Club, Maui Group
Lucienne de Naie

Kohala Center
Maralyn Herkes

Industry Groups

Chamber of Commerce of Hawaii
Dean Uchida
Sherry Menor

National Association of Industrial and Office Properties, Hawaii
Serge Krivatsy

Land Use Research Foundation
David Arakawa

Hawaii Electric Industries, Inc.
Steven Oppenheimer
Sherri-Ann Loo
Ken Morikami
Rouen Liu

Hawaii Leeward Planning Conference
Jacqui Hoover

University of Hawaii Faculty

Kem Lowry, Department of Urban and Regional Planning

Brian Szuster, Department of Geography

Jackie Miller, Environmental Center (retired)

Casey Jarman, William S. Richardson School of Law

David Callies, William S. Richardson School of Law

Jon Van Dyke, William S. Richardson School of Law

Carlos Andrade, Kamakakuokalani Center for Hawaiian Studies

Luciano Minerbi, Department of Urban and Regional Planning

Jon Matsuoka, School of Social Work

Davianna McGregor, Ethnic Studies Department

Panos Prevadouros, Department of Civil and Environmental Engineering

Frank Perkins, Chancellor's Office

Kevin Kelly, Center for Marine Microbial Ecology and Diversity

State Legislature

Senate President Colleen Hanabusa

Senate Majority Leader Gary Hooser

Senate Majority Policy Leader Les Ihara

Senator Carol Fukunaga

Minority Leader Fred Hemmings

Speaker of the House Calvin Say

House Majority Leader Blake Oshiro

Representative Cynthia Thielen

Representative Mina Morita

Attorneys

Bill Tam, Alston Hunt Floyd & Ing

Elijah Yip, Cades Schutte

Lisa Munger, Goodsill Anderson Quinn & Stifel

Lisa Bail, Goodsill Anderson Quinn & Stifel

Isaac Hall

Lorraine Akiba, McCorriston Miller Mukai MacKinnon LLP

Sharon Lovejoy, Starn O'toole Marcus & Fisher

Tom Pierce

Doug Codiga, Schlack Ito Lockwood Piper & Elkind

Michael Matsukawa

Governance

Environmental Council (group meeting)

Genevieve Salmonson (Former Director, OEQC)

Appendix 3. Interview Questionnaire

Stakeholder Interview Questions
University of Hawaii Environmental Impact Statement Study

Karl Kim
Denise Antolini
Peter Rappa
Gary Gill

Introduction

In accordance with Act 1 HB No. 2688 HD l, Section 10, the Legislative Reference Bureau has contracted with the University of Hawaii to conduct a study of the State's environmental review process. The Study shall:

(1) Examine the effectiveness of the current environmental review system created by Chapters 341, 343, and 344, Hawaii Revised Statutes;

(2) Assess the unique environmental, economic, social, and cultural issues in Hawaii that should be incorporated into an environmental review system;

(3) Address larger concerns and interests related to sustainable development, global environmental change, and disaster-risk reduction; and

(4) Develop a strategy, including legislative recommendations, for modernizing Hawaii's environmental review system so that it meets international and national best-practices standards.

In order to fully address these four points, the Study is conducting stakeholder interviews. For these interviews, we will interview each stakeholder individually. We have grouped the various stakeholders into broad, generic categories (e.g., state agency, private firm) to develop perspectives while still preserving individual stakeholder anonymity.

For the interviews, we have developed a list of questions to cover some of the major concerns regarding the state environmental review process. This is not a comprehensive list, but is intended to ensure certain topics are addressed. We would like you to review the list of concerns and to prepare your responses to these questions prior to our conducting the interview.

During the interview, the interviewer will briefly review the purpose of the study and interview, provide a general timeline of the project, and read the questions. The interviewer will seek to maintain a neutral role throughout the interview, asking for further clarification or follow up questions. You may not agree with the inclusion of every issue on our list. In that case, you may address only those issues you feel are major concerns of the impact assessment process and skip the other issues.

After completing the first round of interviews, we will summarize the responses and group them according to category. This summary batch will be made available for your review to ensure accuracy.

Should you wish to add follow up comments after the interview, please contact within one week of interview Nicole Lowen at 956-3974 or by email at nicoleel@hawaii.edu or Karl Kim at 956-6865 (email at karlk@hawaii.edu).

Issues

1. Applicability of the Law. Chapter 343 outlines the conditions under which the state EIS process is "triggered." This study is analyzing if the criteria for including or excluding actions are too narrow or too broad.
    a. Does the process capture all the major actions that may have an impact on the environment, or are some projects being bypassed?
    b. Are we capturing actions that should not be subject to law?
    c. What constitutes the use of state or county lands or funds?
    d. Are there other triggers that should be included?

2. Exemptions. Some actions because of their nature do not require impact assessment. Chapter 343 deals with these cases by allowing for exemption.
    a. Have exemptions been appropriately declared under the environmental review process?
    b. Are exemptions being too narrowly or too broadly defined?
    c. How should exemption lists and exemption declarations best be administered by the Environmental Council and OEQC respectively?

3. Public Notice. An important part of the EIS process is agency, stakeholders, and public participation. The study is reviewing the present notification process.
    a. Are the agencies, stakeholders, and the public being adequately notified of environmental review opportunities under Chapter 343?
    b. Are there other actions that can be taken to improve the notification process?

4. Environmental Assessment and Determinations. An important decision for each action that is subject to Chapter 343 is whether it may have significant effects.

Based on the judgment of the lead agency, an action's proponent may conduct only an environmental assessment instead of an environmental impact statement.

   a. Are agencies making a proper finding of no significant impact?
   b. Are agencies properly applying the term "significant effect" to determine whether an EIS should be prepared?

5. EIS Preparation. Chapter 343 requires that the proponent of an action prepare the required EIS.
   a. Should someone other than the projects' proponent prepare an EIS?
   b. If yes, who should be responsible for the preparation of the EIS?

6. Review of Draft Documents. An important feature of Chapter 343 is that documents are made available for comment and review by agencies and the public.
   a. Are agencies actively participating in reviewing draft and final environmental documents produced by other agencies and applicants?
   b. Are there ways to improve the interagency review process?
   c. Can the present system for comment and response be improved?

7. Acceptability Determinations. At the end of the EA and EIS process agencies usually make the determination whether the document(s) adequately conform to Chapter 343. Sometimes an agency is in the position to accept a document that it has prepared.
   a. Should the acceptance process be modified to prevent an agency from accepting a document it has prepared?
   b. Should there be further administrative oversight over the acceptability determination by an agency's environmental review process?

8. Mitigation Measures. Chapter 343 requires identification of mitigation measures in the preparation of EAs and EISs, yet there is no requirement that the mitigation measures be actually implemented.
   a. Should mitigation measures discussed in the environmental impact assessment document be required by law?

9. Shelf Life of Environmental Documents. There is no expiration date on accepted EAs and EISs. In some cases an action for which a document has been prepared and accepted is not immediately implemented.
   a. Should there be a shelf life (time limit) for environmental review documents?

b. What should be the standard for reviewing the adequacy of information contained in an environmental document when a project is postponed or delayed?

10. Administration of the Environmental Impact Assessment Process. By law, the Office of Environmental Quality Control administers the environmental impact assessment process, the Environmental Council issues the rules, and the Environmental Center offers expertise from the University of Hawaii.
    a. What is your assessment of the OEQC's current functioning and whether its effectiveness can be improved?
    b. What is your assessment of the Environmental Council's current functioning and whether its effectiveness can be improved?
    c. What is your assessment of Environmental Center's current functioning and whether its effectiveness can be improved?

11. Cumulative Impacts. Chapter 343 requires that cumulative impacts be addressed in EISs. The review is researching the best way to assess cumulative impacts, their significance, and how to mitigate them.
    a. Does current EIS practice in Hawaii effectively address cumulative impacts?
    b. How can the EIS system be improved to effectively assess cumulative impacts, their significance, and how to mitigate them?

12. Cultural Impacts. Since 2000, cultural impacts are required to be discussed in EISs.
    a. Is the cultural impact assessment process working well or could it be improved?

13. Best Practices. Best practices have been developed for many areas of environmental management.
    a. Are you aware of any best practices (industry standards) for preparing environmental review documents?
    b. Does current practice for preparing environmental review documents in Hawaii reflect those best practices?

14. Climate Change. Climate change will cause some impacts to Hawaii's environment. For example, sea level rise may threaten coastal infrastructure.
    a. Are climate changes issues, such as carbon emissions, coastal zone management, and sea level rise, adequately addressed in the current EIS system?

b. How best can climate change impacts to Hawaii's environment be incorporated into the environmental impact statement process?

15. Disaster Management. Resiliency and rapid response to disasters are aided by development that is built with disaster management in mind.
    a. Should the EIS process examine whether applicant or agency actions adequately address disaster resiliency?
    b. In particular, should an assessment document discuss its impact on response, recovery, and preparedness?
    c. Should the EIS process be modified in the event of a state-declared emergency or disaster?

16. Business Concerns. From the perspective of affected industries and businesses, are there other issues and concerns that should be addressed by this study?

17. Other Issues. We would like to give you the opportunity to discuss concerns with the environmental impact assessment process that we have not covered. Are there any further comments you would like to add?

Appendix 4. NVivo Analysis of Suggested Triggers

During the stakeholder interview stage, the study team questioned[3] more than 170 people over 106 interviews whether additional (or alternative) triggers were needed for Chapter 343 (see Table 3 Stakeholder Interviews in section 3.3). Interviews were grouped into broad categories based on sector and interaction with the environmental review system. Many interviews included more than one person, so the number of interviews in a category represents a minimum number of individuals. Because of this, the number of interviews where participants suggest an additional trigger does not reflect the degree of suggestions for additional triggers. Similarly, it is difficult to count how many specific individuals suggested additional triggers, so the analysis focused on the number of instances individual triggers were suggested. Additional triggers were suggested 115 times and interviewees suggested no change 32 times. In 13 interviews, participants did not respond to the question.

Table 1 lists the suggested triggers by stakeholder group. Interviewees suggested 48 distinct additions or subtractions to the triggers list. The table groups the suggestions by theme and provides suggestion frequency by respective stakeholder group and overall total. Numbers in parentheses indicate the frequency of the suggestion. The two most frequently suggested additions to the triggers were agricultural land development (10) and Special Management Areas (SMA) (9). The next most frequently suggested additions were endangered species (7) and cultural impacts (6), "any discretionary action," (6) and NEPA's "major federal action" (6).

Distribution of suggestions among stakeholders varies greatly. Public interest groups (E) suggested the most additional or alternative triggers (42), followed by consulting firms (D) with 20 suggestions and attorneys with 15 suggestions. The governance category (J) suggested no additional triggers, while among federal agencies (A), adopting NEPA's "major federal action" approach was suggested once.

The suggested triggers are grouped into five categories: government decision-making, location, project, impacts, and development. Government-based trigger suggestions focus applicability on state or county decision-making, planning, policy; or the federal NEPA process. Of these, twelve distinct suggestions were made a combined 29 times. The most frequent were adopting a discretionary approval trigger (6) and NEPA's "major

[3] Question 1: Applicability of the Law. Chapter 343 outlines the conditions under which the state EIS process is "triggered." This study is analyzing if the criteria for including or excluding actions are too narrow or too broad.

a. Does the process capture all the major actions that may have an impact on the environment, or are some projects being bypassed?
b. Are we capturing actions that should not be subject to law?
c. What constitutes the use of state or county lands or funds?
d. Are there other triggers that should be included?

federal action" language (6), major public or private actions or projects (5), and a general trigger for any undertaking (4), totaling 20 of the 29 suggestions.

Location-based triggers are triggers based on land use or geography. Ten distinct triggers were suggested a total of 29 times, including agricultural land (10), and the SMA (9). One interviewee suggested sites eligible for historic designation for inclusion. Six water-related triggers were suggested seven times: shoreline areas (2), Marine Life Conservation Districts (1), ocean uses (1), sanctuaries (1), special streams (1), and wetlands (1). One generic trigger based on "areas of specific concern" was also suggested. The interviewee suggested various means such as public controversy, public policy, or scientific research as sources for the concern.

For the project-based triggers, 12 suggestions were made a total of 27 times, focusing on project characteristics or specific project types. Project characteristics include: project size or acreage (4), certain types of private projects (3), controversial projects (3), project value or cost (3), projects requiring new or upgraded infrastructure (2), projects with obvious environmental impacts (2), and projects impacting adjacent communities. Specific projects suggested as additional triggers include: desalination plants (1), individual waste treatment systems within the immediate coastal zone (1), logging operations (1), and private water systems (1). Five interviewees suggested "certain private actions" for inclusion, but declined to elaborate.

The fourth major category, impact-based triggers, includes nine suggestions a combined 22 times. These include: endangered species (7), cultural impacts (6), native species (2), water quality (2), coastal resources (1), electricity usage above a certain threshold (1), major utilities (1), significant archaeological resources (1), and traffic (1). Notably, each of these suggestions is included explicitly or indirectly as significance criteria for determining when a proposal should move from an EA to an EIS.

Development-based triggers were suggested a combined nine times: subdivision of land (3), land development on a certain slope angle (2), infrastructure in ecologically-sensitive or important areas (2), alterations of the land form (1), and rapid development (1).

The high number but varied types of trigger suggestions indicate a general sense among interviewees that the trigger approach works well from the individual point of view but requires minor adjustments. However, the lack of agreement on which adjustments are needed indicates that from a system-wide perspective, the cumulative impact of each of these additions indicates an overall lack of flexibility and adaptiveness of the trigger-based approach to the changing needs of environmental review. In debating whether to recommend the "discretionary approval screen" approach or additional triggers, the study team found a low degree of consensus for which triggers should be added while a high degree of support for discretionary government decision-making initiating environmental review.

Appendix 4 Table 1. Suggested Triggers by Stakeholder Category

	Coding Frequency by Stakeholder Category[1]										
Suggested Trigger Nodes	**A**	**B**	**C**	**D**	**E**	**F**	**G**	**H**	**I**	**J**	**Total**
Government Decision-making											
1. Discretionary approval trigger	-	-	-	-	2	2	-	1	1	-	6
2. NEPA's "major federal action"	1	-	-	-	2	-	-	2	1	-	6
3. Major actions or projects, private or public	-	-	-	1	-	1	-	2	1	-	5
4. General trigger	-	1	-	-	2	-	-	1	-	-	4
5. General plan amendments	-	-	-	1	-	-	1	-	-	-	2
6. Any state or county discretionary permit	-	-	-	-	1	-	-	-	-	-	1
7. Based on risk assessment or uncertainty	-	-	-	1	-	-	-	-	-	-	1
8. County-based triggers	-	-	-	1	-	-	-	-	-	-	1
9. Land Use Commission decisions	-	-	-	-	-	-	1	-	-	-	1
10. Major permits	-	-	-	-	-	-	1	-	-	-	1
11. New uses or actions	-	1	-	-	-	-	-	-	-	-	1
12. Rulemaking	-	-	-	-	1	-	-	-	-	-	1
Subtotal	*1*	*2*	*0*	*4*	*8*	*3*	*3*	*6*	*3*	*0*	*30*
Location											
13. Agricultural land development	-	2	-	1	4	-	3	-	-	-	10
14. SMA	-	-	1	2	4	-	1	-	1	-	9
15. Shoreline areas (inundation zones)	-	-	-	-	2	-	-	-	-	-	2
16. Ocean uses	-	-	-	-	-	-	1	-	1	-	2
17. Areas of specific concern (e.g., specific beaches)	-	-	-	-	1	-	-	-	-	-	1
18. Marine Life Conservation Districts	-	-	-	-	1	-	-	-	-	-	1
19. Sanctuaries	-	-	-	-	1	-	-	-	-	-	1
20. Sites eligible for historic designation	-	-	-	-	1	-	-	-	-	-	1
21. Special streams	-	-	-	-	1	-	-	-	-	-	1
22. Wetlands	-	-	-	-	1	-	-	-	-	-	1
Subtotal	*0*	*2*	*1*	*3*	*16*	*0*	*5*	*0*	*2*	*0*	*29*
Project											
23. Certain private actions	-	1	-	1	1	-	1	1	-	-	5
24. Controversial projects	-	-	-	2	1	-	-	-	-	-	3
25. Project size or acreage	-	1	2	-	-	-	-	-	-	-	3
26. Project value or cost threshold	-	-	1	1	-	-	-	-	1	-	3
27. Projects requiring new or upgraded infrastructure	-	-	-	2	-	-	-	-	-	-	2
28. Projects with obvious environmental impacts	-	-	-	1	1	-	-	-	-	-	2
29. Projects with significant externalities	-	-	-	-	1	-	-	1	-	-	2
30. Desalination plants	-	-	-	-	1	-	-	-	-	-	1

Appendix 4 Table 1. Suggested Triggers by Stakeholder Category

	Coding Frequency by Stakeholder Category[1]										
Suggested Trigger Nodes	**A**	**B**	**C**	**D**	**E**	**F**	**G**	**H**	**I**	**J**	**Total**
31. Individual wastewater treatment systems in the immediate coastal zone	-	-	-	-	1	-	-	-	-	-	1
32. Logging operations	-	-	-	-	-	-	1	-	-	-	1
33. Private water systems	-	-	-	-	1	-	-	-	-	-	1
34. Projects impacting adjacent communities	-	-	-	-	1	-	-	-	-	-	1
Subtotal	*0*	*2*	*3*	*7*	*8*	*0*	*2*	*2*	*1*	*0*	*25*
Impacts											
35. Endangered species	-	2	-	3	1	-	1	-	-	-	7
36. Cultural impacts	-	2	-	1	2	-	1	-	-	-	6
37. Native species	-	1	-	-	1	-	-	-	-	-	2
38. Water quality	-	-	-	2	-	-	-	-	-	-	2
39. Coastal resources	-	-	-	-	-	-	1	-	-	-	1
40. Electricity usage over a certain threshold	-	-	-	-	-	1	-	-	-	-	1
41. Major utilities	-	-	-	-	-	-	1	-	-	-	1
42. Significant archaeological resources	-	-	-	-	1	-	-	-	-	-	1
43. Traffic	-	-	-	-	1	-	-	-	-	-	1
Subtotal	*0*	*5*	*0*	*6*	*6*	*1*	*4*	*0*	*0*	*0*	*22*
Development											
44. Subdivision of land	-	-	1	-	2	-	-	-	-	-	3
45. Development on land on a certain slope angle	-	-	1	-	1	-	-	-	-	-	2
46. Infrastructure in ecologically sensitive or important areas	-	-	-	-	-	-	1	1	-	-	2
47. Alteration of the land form (e.g., grading)	-	-	-	-	1	-	-	-	-	-	1
48. Rapid development	-	1	-	-	-	-	-	-	-	-	1
Subtotal	*0*	*1*	*2*	*0*	*4*	*0*	*1*	*1*	*0*	*0*	*9*
Total by Stakeholder Category	**1**	**12**	**6**	**20**	**42**	**4**	**15**	**9**	**6**	**0**	**115**

[1] A = Federal Agency, B = State Agency, C = County Office, D = Consulting Firm, E = Public Interest Group, F = Industry Group, G = UH Faculty, H = State Legislature, I = Attorneys, J = Governance

Appendix 5. Town-Gown Materials

The UH EIS study team has conducted an extensive process of stakeholder involvement. Over 100 different agencies, organizations, and individuals were interviewed. Following this, a stakeholder workshop was held on June 3rd, 2009 from 9:00 a.m. to 3:00 p.m. Over 100 individuals were present at the workshop, including stakeholders, the study team, and professional facilitators.

Appendix 5 reproduces the Town-Gown Stakeholder Workshop booklet and workshop attendees.

UNIVERSITY of HAWAI'I
MĀNOA

UH EIS Study

Town-Gown Stakeholder Workshop

Workshop materials

University of Hawaii EIS Study
Town and Gown Stakeholder Workshop

Wednesday, June 3, 2009
9:00 a.m. – 3:00 p.m.
William S. Richardson School of Law
University of Hawaii at Manoa

Agenda

9:00-9:30	Arrival and Check-in (Courtyard)
9:30-9:45	Opening and Introduction (Classroom 2)
9:45 – 10:15	Presentation of Initial Findings (Classroom 2)
10:15-10:30	Q & A (Classroom 2)
10:30-12:15	Workshop Session 1 – ***Rotational Review of Results***
12:15	***Pick-up box lunch*** (Courtyard) Go to assigned workshop group Room Assignments: Workshop 1: Classroom 1 Workshop 2: Classroom 2 Workshop 3: Classroom 3 Workshop 4: Classroom 5 Workshop 5: Seminar Room 1 Workshop 6: Seminar Room 2 Workshop 7: Seminar Room 3 Workshop 8: Seminar Room 4
12:15-2:00	Workshop Session 2 – ***Facilitated Finding of Fixes*** (assigned rooms)
2:00-2:45	***Report-back of Recommendations*** (Classroom 2) 4 minutes per group
2:45-3:00	Next Steps, Closing (Classroom 2)

Session 1: *Rotational Review of Results* (10:30-12:15)

Workshop Session 1 is your opportunity to tell us if you think the results of the interviews accurately express your concerns regarding the EIS process in Hawaii. You can also help us to determine what the most critical issues are. The results of this workshop session will help to guide the discussions in the second workshop session in the afternoon.

The workshop write-ups represent the range of responses heard during the interviews. The responses that were expressed most frequently and other unique or interesting ideas that arose are included. The statements on them are often direct quotes or paraphrases from these interviews, and do not represent the conclusions of the study.

You will receive 25 stickers that you can use to "vote" for the ideas that you believe are the most critical or interesting, and that should be addressed in the afternoon discussions. You can also use the post-it notes provided to add comments or ideas that you think are missing. A vote for one of the "big" ideas in bold print does not necessarily mean that you are voting for every bullet point included beneath it. If you vote for a bullet point, it means you agree with that point *and* the big idea it is under.

Session 2: *Facilitated Finding of Fixes* (12:15-2:00)

For Workshop Session 2, smaller break-out groups will engage in facilitated discussions of the workshop topics. This will be an opportunity to explore specific issues in more depth. The feedback from session 1 will help to guide these discussions. Afternoon discussions should focus on fixes, or solutions, to identified problems.

Workshop time should be used to identify solutions and come up with some concrete suggestions about what might be done to improve Hawaii's environmental review system. You are asked to spend some time discussing:

- potential changes in legislation,
- potential changes to administrative rules,
- guidance,
- other fixes/solutions. (be creative!)

If you finish early, please feel free to use the remaining time to tackle other topics. At 2:00 p.m., everyone will reconvene in Classroom 2, and each break-out group will be asked to share a brief 4 minute presentation of their key findings.

Next Steps

Visit the EIS Study blog at: http://hawaiiEISstudy.blogspot.com

Please visit the blog and continue these discussions online! We welcome further comments.

Workshop Assignments

Workshop 1: Triggers and Exemptions
Classroom 1
Facilitator: Bruce Barnes

1. Jamie Peirson
2. Mark Fox
3. Dean Watase
4. Lucienne De Naie
5. Ron Terry
6. Lisa Ferentinos
7. Darell Young
8. Edward Bohlen
9. Dean Uchida
10. Gail Grabowsky
11. Frank Perkins
12. Chris Yuen

Workshop 2: Public Notice, Review, Comment and Response, and Shelf Life
Classroom 2
Facilitator: Tracy Janowicz

1. Tom Schnell
2. Carl Christensen
3. Beth McDermott
4. Ken Morikami
5. Fred Pascua
6. George Redpath
7. Michael Matsukawa
8. Jodi Chew
9. Les Ihara
10. Lindsey Kasperowicz
11. Gerald Takayesu

Workshop 3: Governance and Management
Classroom 3
Facilitator: Jessica Stabile

1. Eric Guinther
2. Marjorie Ziegler
3. Robert Miyasaki
4. Tony Ching
5. Genevieve Salmonson
6. Gill Berger
7. Cynthia Thielen
8. Jon Matsuoka
9. Ka'aina Hull
10. Lorraine Akiba
11. Milton Arakawa

Workshop 4: Determinations and Acceptability
Classroom 5
Facilitator: Bruce McEwan

1. Jeff Hunt
2. Steve Oppenheimer
3. Jeff Overton
4. Isaac Moriwake
5. Sue Sakai
6. Ken Tatsuguchi
7. Bruce Bennett
8. Jackie Miller
9. Jack Pobuk
10. Ann Cua
11. Terry Hildebrand
12. Lee Sichter

Workshop 5: Mitigation and Cumulative Impacts
Seminar Room 1
Facilitator: Lauren Cooper

1. David Tarnas
2. Scott Derrickson
3. Graceson Ghen
4. Bob Loy
5. Maralyn Herkes
6. Scott Ezer
7. Douglas Meller
8. Brian Kau
9. Lisa Bail
10. Alvin Char
11. Wilma Namumnart

Workshop 6: Cultural Impacts
Seminar Room 2
Facilitator: Grant Chartrand

1. Marti Townsend
2. Heidi Guth
3. Morris Atta
4. David Frankel
5. Joanne Hiramatsu
6. Darrell Yagodich
7. Kelley Uyeoka
8. Rouen Liu
9. Luciano Minerbi
10. Kevin Kelly
11. Dick Mayer

Workshop 7: Climate Change, Disaster Management, and Best Practices
Seminar Room 3
Facilitator: Makena Coffman

1. Joshua Strickler
2. Robert Harris
3. Douglas Tom
4. Kelvin Sunada
5. Irene Bowie
6. John Whalen
7. Susan Papuga
8. Hermina Morita
9. David Atkin
10. Joe Krueger
11. Patricia Billington

Workshop 8: The Big Picture
Seminar Room 4
Facilitator: Dolores Foley

1. Jacqui Hoover
2. Earl Matsukawa
3. Mary Steiner
4. David Arakawa
5. Vince Shigekuni
6. David Shimokawa
7. Christine Kinimaka
8. Doug Codiga
9. James Sullivan
10. Dave Taylor
11. Dennis Kodama
12. Kathy Kealoha

TRIGGERS

Does the process capture what it should?

Some projects are bypassed.

- Private projects.
- Projects in developed urban areas. (i.e. WalMart , Kapahulu Safeway)
- Private development of Ag land.

The process captures what it should.

No actions are captured that should not be subject to the law.

- There is a misdirected focus on the triggers; use exemption lists to let things out.
- We should have more oversight, not less.

Actions are captured that should not be subject to the law or should be exempt

- Connection to roads (right of ways) and utility hook-ups.
- "use of state or county lands or funds" trigger is too broad.
- Beneficial projects: conservation, small schools.
- Small projects; there should be a size threshold.
- Organisms imported for research.
- Projects that are captured in permitting: helicopters, wastewater.

Ways to improve the process:

Triggers should be very broad and capture everything.

- Exemptions should be the mechanism for letting things out.
- Narrow, specific triggers won't capture future actions we haven't thought of.
- There could be a broad trigger at the discretionary permit level and a few more to close any loopholes.
- All major projects should do a review. Adding a trigger that captures this at the earliest practicable time would be better.

Other triggers should be included:

- Any project over a certain size threshold
- Any major project that requires upgrades to infrastructure
- Controversy
- Obvious environmental impacts
- Any large land use reclassification
- Development of Agricultural land
- Historic and cultural sites or "any site eligible for such designation"/cultural landscapes
- SMAs
- Ceded lands
- Suggestions in the 1991 study (marine life conservation districts, special streams, sanctuaries, wetlands, etc.)
- Areas of rapid development ("hot spots")
- Development in disaster-prone areas
- DLNR game management plans
- Desalinization plants
- Steep slopes
- Human issues/social impacts
- Traffic
- Fundamental alterations of land form
- Any evidence of rockwork or terracing

- Use of state waters / ocean resources
- Rulemaking (like NEPA)

No new triggers should be added.
- The existing system works well.
- The process is already too onerous

What constitutes the use of state or county lands or funds?

The definition should be broad.
- Coverage for government actions should be expansive.
- It may not always seem like a sensible definition of use, but this captures projects that should be subject to the law but would not be captured otherwise. (i.e. Koa Ridge)

The definition needs clarification.
- Need clear threshold of "use." Currently this is a moving target.
- Clarify if tax credits trigger the law.
- Clarify if federal funds passed through the state trigger the law.

Comments and Concerns:
- We should not have to do an EA for every little thing. It is a waste of taxpayer money.
- Should do more programmatic and strategic EAs/EISs.
- What is really needed is guidance and a way to look at things more qualitatively.

EXEMPTIONS

Have exemptions been appropriately declared?

It varies by agency.

There is not much documentation of exemptions, so it's hard to know.
- "If an exemption happens in the forest, does anybody hear it?"

Exemptions have not been appropriately declared.
- Connecting to roads and utilities should be exempt.
- Some agencies are under pressure to implement projects; exemptions are misused to escape the system.
- Agencies are scared to use exemptions; they don't want to get sued.

Exemptions are usually appropriately declared.
- To my knowledge yes, but there is opportunity for abuse.
- Mistakes are made, but there is no malfeasance.
- It's a judgment call.

Are exemptions too narrowly or too broadly defined?

It depends on the interpretation of the law; it varies.
- "Just because a project is on the exemption list does not mean it is exempt."
- There is no way to resolve questions without going to court.
- Some exemptions are too broad; some are too narrow.
- There should be some common sense and reasonableness in deciding what is exempt.

Too broadly.
- Utility hook-ups and connection to right of ways should be exempt.

- Broad exemptions are too open to interpretation; narrower is clearer.

Too narrowly.
- We feel we can only exempt the specific projects listed.
- Exemptions need some flexibility.
- Agency-based exemption lists should be abolished.
- Exemption lists should be standardized with categories that apply to all agencies.

Ways to improve the process:

More guidance and clarification on how to apply the existing law
- The problem is not with the law but with how it is being interpreted.
- Have a standard/consistent way to record exemptions.
- Clarify if agencies can use each others' exemption lists.
- Clarify if agencies can declare exemptions not specifically on lists.
- Clarify who makes the final determination between state and county.

More transparency and oversight
- The process is political so there should be public oversight.
- Use OEQC website to post exemption declarations and exemption lists; be a clearinghouse.
- Have a window for public notice/objection of exemptions.
- Have a quick administrative or judicial review of declarations.
- A hidden exemption is the use of functional equivalence.

Require that exemption lists be updated periodically.
- Concerns change over time; some things exempted in the past shouldn't be now.
- The process for doing this should be clear and reasonable.
- Lists should expire/have sunset dates.

Follow the NEPA or CEQA approach of statutory or regulatory categorical exemptions. OEQC would be better-suited to help update lists.
- The Environmental council is not good at administering exemption lists.
- Exemption lists are subject to different levels of specificity based on who is on the Council.
- It is too hard to get 15 people to agree.
- Council members should know their role and not micro-manage lists.
- The perception is that its very difficult to get lists approved/updated.

Comments and Concerns:
- The law could be amended to provide for more agency discretion for projects "commonly considered exempt."
- Agencies need more self-determination, not more clarity
- Having an outside agency decide on exemption declarations would take too long. There should not be another level of review.
- There should be a threshold for requiring written declaration (i.e. not for changing a light bulb)
- Conservation projects should be exempt.
- We should not have site/location specific exemptions.
- Make state and county processes more consistent. The same actions should be exempt.

PUBLIC NOTICE

Are agencies, stakeholders and the public adequately notified under 343?

Agencies, stakeholders and the public are adequately notified.

- People should be proactive and not expect to be spoon-fed information.
- There will always be people who say they did not hear about a project.
- The current system works well; usually works well; does not need to be changed.

Agencies and NGOs are adequately notified, but the public and individuals are not.

- The public finds out late and has to scramble to keep up.
- Environmental justice is an issue – those with the least resources are the least informed.
- People do not know there is a process to participate in; the process mystifies the public.

Budget and staffing constraints limit how much can be done.

The process can be improved by:

Better use of the internet/website

- Use listserve/email; allow sign-up for notification of actions in areas of interest (judicial districts, geographic areas, types of projects).
- Include link to online document in email notice.

Increased outreach

- Post signs on property.
- Notify neighbors (calls, postcards).
- Community meetings.
- Ads (newspaper, radio).
- Circulate the OEQC bulletin more widely; use libraries.

Have more public education about the process.

- Agencies, organizations, and the public would all benefit from better understanding the process.

Guidance.

- How much/what kind of notice is "adequate"?
- Make the process more consistent across agency, state, county, federal levels.

Do more pre-consultation and scoping

- Figuring out what the issues are in advance makes the process more efficient.

Comments and Concerns:

- Notify relevant agencies directly instead of relying on the OEQC Bulletin.
- The public is notified by activists, not through the system.
- Making the system user-friendly for the public will avoid a lot of frustration and anger. When people have to look too hard to find something they feel excluded.
- We should be careful about legislating this because people will sue over the manini details.
- It would be onerous to requires a meeting by law for every project.
- EISs are too lengthy and technical for most people to read; provide plain-language, summary documents that are user-friendly.

REVIEW

Are agencies actively participating in reviewing documents?

Amount/quality of participation varies by agency.

- Comments are cursory, boiler plate.
- Comments should represent agency's agenda/expertise.
- Some agencies make unreasonable requests for studies marginally related to project.

Yes, agencies are actively participating.

- Agencies are active on relevant documents.

There is not enough time.

- 30 days is too short.
- documents are lengthy .
- there are many projects, we can't get to them all; we have to prioritize.

Is the comment and response process working well?

"comment bombing" is an issue.

- Not every comment deserves an individual response.
- Comment bombing is an issue, but everyone deserves the right to comment.
- Documents become too long when we have to reproduce every letter

Response to comments is sometimes inadequate.

- There is no recourse if response to comments is inadequate and concerns are not addressed.
- It is not adequate to respond to a comment by referring back to the document section.

Ways to improve the review process:

Improve quality of review:

- Create incentives for review (for agencies, UH faculty).
- A body of paid experts to conduct review
- An independent government agency to conduct review

More pre-consultation and scoping.

- Better quality documents would minimize need for review.

More education about the process for the public and agency staff .

Lengthen the public review period or extend it if necessary, be lenient for public comment.

Have a dedicated staff person in each agency; have a single point of contact.

More guidance to determine adequacy of responses.

Do not require individual response to comments that do not warrant it.

Comments and Concerns:

- The process doesn't yield meaningful results.
- Comments are very technical and miss the big picture the community is concerned with.
- Personal attacks and grievances are not about the impacts.
- The Governor's Office can help understaffed agencies.

SHELF LIFE

Should there be a shelf life for environmental review documents?

Documents should have a shelf life

- After a time deadline there should be a procedure in place to determine if a new or supplemental document is needed. (after 3/5/7/10/15 years)
- A 5/10/20 year document should no longer be valid.
- There should be a sunset clause; a 20-year old document cannot accurately reflect current impacts.
- 2 years after final permit is issued.
- Only if there are significant change to the project or circumstances.

This is a valid concern but there are reservations because:

- Projects take a long time to complete, we don't want them further delayed
- An arbitrary drop-dead date would be punitive
- Zoning or permit should expire; this should not be in 343
- Requiring a new EIS might cause projects to miss funding window, especially for federal matching funds.
- If there is no finality to the process, financing will suffer and lawsuits will be more difficult to resolve. Things done in the past will always be insufficient.

What should be the standard for review to determine if new or updated document is needed?

Resubmit the document for public review

- If new issues have arisen they will be revealed through this process.

Assess documents on a case-by-case basis.

- Review based on significant change in: environment, project, traffic, population, land use, economy, public concern, noise, pollution.
- Review based on criteria (might look at NEPA's "40 questions").
- Review based on certain % change in criteria, allow 10% margin of error.
- OEQC or overseeing agency should do review.

Clarify existing rules for supplemental EISs

Comments and Concerns:

- Should be able to do a targeted study that only addresses changes.
- The time frame for government should be longer than for private sector.
- The time frame for rapidly developing areas should be shorter.
- If a project has already begun, it should not be required to update.
- We need an information system/data base to detect and record changes so we have something to do assessment with.

EIS PREPARATION

Should someone other than the project proponent prepare an EIS?

The project proponent should do this.

- The proponent is best suited to do this—there is a stake in a speedy process, more accountability, knowledge of the project, and inclusion of mitigation measures.
- There are enough checks and transparency already.

- A 3rd party would not be knowledgeable enough and still have conflicts of interest.
- Consultants are ethical and do their best; they are a good use of government time and money.

Someone other than the proponent should prepare the EIS.
- Incentives are against finding significant impact.
- "It is like Dracula guarding the blood bank." There is a conflict of interest.
- It is contrary to objective social science.

How can the system be improved?

The existing system works.

The proponent pays into a fund that supports a third party preparer.
- OEQC should administer the process or pick a preparer/auditor.

Preparers should be certified and independent.
- Sometimes proponents override consultants.
- Randomly chose consultants from a revolving list.
- Preparers should cite qualifications in documents.
- Establish certification and decertification requirements.

Comments and Concerns
- A government agency preparing all EAs/EISs would be overwhelmed by all the projects.
- The EIS is more like a marketing document, designed to shed a positive light on the project.
- The costs of the process are not proportional to the benefits.

ADMINISTRATION OF THE EIS PROCESS

How effective is OEQC?

OEQC is effective.
- They are a great consultation resource for agencies and should remain so.
- The website and digitizing of documents are very helpful.
- The training workshops are excellent.
- The green list is good.
- They focus more on process than content.

OEQC does what it can with what it's got.
- They lack resources and staffing.
- They give conflicting information to different agencies.
- They are too political and not very objective.
- Reviewing secondary impacts has backlogged the agency.
- "They mostly shuffle and process paper."

What are ways to improve OEQC's effectiveness?

Increase resources and staffing.
- Increase funding for more outreach and digitizing documents and the website.

Provide better guidance and training.
- Require legal challenges EAs/EISs to go to OEQC; it then notifies relevant agencies.
- Provide guidelines for process and content of EAs/EISs.

Expand/Change OEQC's role in the EIS process.

- Strengthen legal role – make determinations and review legally binding; declare exemptions.
- Do EAs/EISs/FONSIs for everyone.
- Move OEQC directly beneath the Governor or to another agency.
- Consolidate with Environmental Council.

How effective is the Environmental Council?

I'm not very familiar with it.

The Environmental Council does not fulfill its role.

- They are volunteers. There is not much they can do.
- "They are defunct, ineffective, muzzled by the AG, and usurped by OEQC."
- They over-step their role and represent personal interests.

The Environmental Council is useful.

- They do a good job reviewing studies.

What are ways to improve the Environmental Council's effectiveness?

Improve funding, staff, and increase existing authority.

- Help agencies manage and update exemption lists.
- Reviews should carry more weight.

The Environmental Council's role should be changed.

- Move it directly beneath the Governor or to another agency.
- Create local Councils for neighbor islands.
- Change to hear appeals and oversee administrative actions.
- Eliminate them and transfer functions to OEQC.

How effective is the Environmental Center?

I'm not very familiar with it.

They play an important role in the environmental review process.

- The need for outside review is essential and the University is a good place for that.
- They raise awareness of issues that no one else considers.
- They provide useful advice to OEQC and consultants.

It does not fulfill its role.

- Comments are inconsistent, contradictory, impractical, and vary in quality.
- Comments often focus on rules and neglect the larger context.
- Sometimes they advocate too much.

What are ways to improve the Environmental Council's effectiveness?

Increase resources, training of staff, and clarify role in the review process.

- The Center has an unfunded mandate. They should assert their prerogatives more.
- Issue opinions to decision-makers and share expertise with the community
- Increase awareness of Center's role through public outreach.

The Environmental Center should better engage the University and faculty.

- The University does not appreciate the Center's role, legal mandate, and independence.

- Incentivize faculty to comment on EISs.
- Make EIS commenting a public service requirement for faculty.
- Draw on faculty research to recommend best practices in comments.

Comments and Concerns

- OEQC doesn't have enough expertise or resources to oversee the entire EIS process.
- All three entities' effectiveness is very dependent on the directors and staff at any given time.
- "Too many chefs spoil the broth." Consolidate these entities to improve governance.
- The interplay between these entities could have checks and balances. OEQC=administrative, Environmental Council=legislative, Environmental Center=judicial.
- The State should create an Environmental Protection Agency to house these entities.
- The Environmental Council should be an independent agency that advises policy-makers without "an axe to grind."

EA DETERMINATIONS

Are agencies making a proper finding of no significant impact?

Agencies are making a proper finding of no significant impact.

- Agencies are sensitive to controversy and try to err on the side of caution.
- Agencies act in good faith; mistakes are unintended.
- Usually, except when under political pressure.

Agencies are not making a proper finding.

- Incentives are against finding significant impacts.
- Agencies attempt to segment projects to get FONSIs.
- Agencies "mitigate down" to a FONSI.
- Impacts (cumulative, visual) are not properly considered in determinations.

How can the system be improved?

OEQC should play a stronger role.

- Define 'significance.'
- Develop criteria for agencies and train staff.
- Publish best practices.
- Do 5-year audit of agency determinations.

Allow proponents to go to EISs directly (skip EA).

- If there is controversy or obvious significant impacts, an EA wastes time.
- Most agencies think they already know if a project requires an EA or EIS.
- EAs look more like EISs to avoid re-contracting and save time/money.

Offer alternative dispute resolution instead of court challenge.

- If a FONSI is improperly issued, then the burden is on the public to take it to court.
- "An army of lawyers" is necessary to resolve these challenges.
- Offer more than choices than FONSI or full EIS.

Increase transparency and oversight.

- Allow community more time to review documents.
- Educate political appointees and stakeholders about the process.

- Allow for 3rd party oversight (e.g., OEQC).

Comments and Concerns

- The burden is on the public to challenge improper actions by government agencies.
- "The public thinks an EA is nothing, do not trust FONSIs, and believe an EIS is the only way to address impacts or influence project development."
- Not all significant impacts can be mitigated. People want projects stopped, not mitigated.
- Agencies have a double standard for agency actions versus private ones.
- Screen out temporary impacts.
- The Land Use Commission, agencies, and consultants do not follow the law, only past practice.

ACCEPTABILITY DETERMINATIONS

Should an agency accept its own document?

Yes, agencies are responsible and accountable.

- The accepting authority is still accountable after making a determination.
- Acceptability is more about process than content.
- Agencies are very aware of a perceived conflict of interest.
- It is unlikely a perceived conflict of interest can be removed entirely.
- Public challenge and judicial review make the process transparent.

No, agencies should not accept documents they prepare.

- The perception of conflict of interest is too great.
- There is a real conflict of interest.
- An agency is not rigorous enough for its own documents.

This is only an issue for EAs.

- The Governor or Mayor accepts EISs; it is within their authority to delegate acceptance to whomever he or she deems appropriate.

What are ways to improve the acceptance process?

The system works well as it is.

Increase the role of OEQC to monitor the process, accept documents, make binding recommendations, or be able to veto determinations.

Adopt NEPA or other States practices.

Should there be further administrative oversight?

No, further oversight is not needed.

- The process will become more onerous and create confusions.
- There is enough transparency and oversight already.
- It will create perverse incentives.

Yes, more oversight improves agency acceptance practices.

- Allow 3rd party review (OEQC, the Auditor's Office, UH, peer).
- Adopt a model similar to California or NEPA.
- Have a checklist to consult with other agencies beyond the comment/response process.

Comments and Concerns

- OEQC doesn't have enough expertise to review all agencies' documents.
- 3rd parties do not have the expertise and will meddle with agency missions.
- One agency shouldn't have too much power or it becomes political.
- Involve more partnerships between public, private, and community stakeholders.

MITIGATION MEASURES

Should mitigation measures be required by law?

Mitigation measures are captured in permitting and do not need to be required by law.

- Use permitting or another regulatory mechanism.
- The current system usually works. It could be modified to ensure that all mitigation measures are written into conditional permits.
- Mitigation measures have to be flexible because they can and should change over time.
- The process is about disclosure; it should stay that way.

Yes, mitigation measures in the EA/EIS should be required by law.

- Model Hawaii's system on NEPA's "Record of Decision" process.
- If there is no legal requirement, then mitigation should not be used to avoid an EIS/get a FONSI
- Yes, but updating to equal or better measures should be allowable.
- The document could include a "mitigation monitoring plan", a spreadsheet written in a way that is enforceable and could become binding in acceptance statement.
- Mitigation measures should be given more thoughtful, focused and realistic consideration.

Comments and Concerns:

- It seems like 99% of the time this is covered in permits. Has a study been done to determine if this is a real problem or just a perceived one?
- There is no enforcement or overseeing agency. How would this be monitored?
- Mitigation is often complaint driven, not agency initiated. (reactive not proactive)
- Some things cannot be mitigated. There should be thresholds for impacts. If these are exceeded, the project should not be approved.
- What else is the point of mentioning them? Citizens expect these to mean something.

CUMULATIVE IMPACTS

Does current EIS practice in Hawaii effectively address cumulative impacts?

Current practice in Hawaii does not effectively address cumulative impacts.

- "we are at a loss for what to do."
- It's lip service/cursory/glossed over
- Impacts are separated and downplayed.
- There is not a good framework to consider this. A project-by-project approach doesn't work.

Cumulative impacts are addressed in some ways, but it could be done better

- It's thoroughly addressed for traffic, but not anything else
- Its inconsistent; some types of impacts are easier to address than others.
- Good consultants do this.

How can the system be improved to better address cumulative impacts?

Cumulative impacts would be better addressed on a planning level

- Without long-term planning, there is nothing to refer to.
- Cumulative impacts should be looked at earlier. Waiting until the EIS is too late.
- The process should be more tied to zoning/land use/development plans/community plans/general plan.
- A planning agency should oversee this. It shouldn't fall to individuals. Take the requirement out of the law.

To better address cumulative impacts, we need: more guidance, a checklist, better definition, understanding of expectations, and good examples.

Create a consistent system for measuring/collecting/reporting data. Develop baselines or thresholds that can make cumulative impact analysis meaningful.

- Develop baselines for quantifiable impacts; assess how projects affect baseline.
- Create database for long term data on measurable impacts (i.e. water quality and air quality)
- Standardized methodology/protocols for data collection.
- Without data, there cannot be any meaningful scientific debate about cumulative impacts.

Comments and Concerns:

- It's a lot to expect the private sector to contribute to a solution for a problem that was ignored by the public agency responsible for it.
- This is an important issue but should be kept practical; if you take it too far it becomes ridiculous.
- All impacts are cumulative on some level. The process looks at impacts in a piecemeal, fragmented way that doesn't reflect this, and that leads to impacts being downplayed.
- The army does a good job of looking at cumulative impacts, NEPA is stronger on this than 343.
- We are about 25 years behind. The state doesn't understand the magnitude of the problem.
- There should be a carrying capacity study for the islands.
- Address cumulative impacts with strategic EAs/EISs.
- Part of the analysis of cumulative impacts should include considering alternative actions.
- Cumulative impacts should be a significance criterion.
- The planning office is too influenced by political goals.
- Large projects are sometimes broken up into smaller ones to avoid having to do an EIS.

CULTURAL IMPACTS

Is the cultural impact assessment process working well?

The process is still new, but working relatively well.

- The requirement emphasizes the importance of traditional culture.
- OEQC guidelines are useful.
- Best practices have been developed.
- Gathering of information good, but analysis can be superficial.

There is a lot of inconsistently.

- Cultural impacts and traditional practice are difficult to define. Whose culture is eligible?

- Agencies have conflicting roles, process requirements, and comments.
- Comments generally only focus on native rights and property/shoreline access.
- Cultural impacts are often conflated with archaeology.
- It is busy work to employ consultants and "cultural experts."
- Lack of confidentiality inhibits the sharing of some important cultural knowledge and impacts.

The role of cultural experts is unclear.
- Cultural experts are few and over-burdened by this requirement.
- Provided information can be contradictory or focused on the project rather than culture.
- "Experts" tend to be people part of the system, not part of the culture; preparers will not pick someone who says, "My ancestors bones are there, don't do it."
- Are short forms or checklists permissible? Are consultants always required?

How can the system be improved?

The State should define 'cultural impacts' and 'traditional cultural practice.'
- The definition should include resources used in subsistence and religious practice.
- Emphasize purpose for decision-making, not just information gathering.

Clarify role of 'cultural expert.'
- Cultural experts should have a certification requirement.
- Establish a contact list of cultural experts by area and ahupuaa / have blind reviewers.
- Create a mechanism for clarifying conflicting/disputed information from cultural experts.

Establish better guidelines / standardize the process.
- Clarify content and process.
- The guidelines should be requirements.
- Each County should have its own archaeologist to perform the assessment.
- Requirements should be relative to the scale or impact of the project.

Resolve agency roles in process.
- Clarify roles of SHPD, OHA, Burial Councils in commenting, reviewing, and acceptability determinations.
- Rename it to "ethnographic assessments" and put under SHPD jurisdiction.
- Distinguish from archaeology reports.

Comments and Concerns
- Current OEQC guidelines are onerous.
- Studies are expensive and not always of clear benefit to the community.
- This should not be a requirement.
- Integrate into project planning, not just 343.

BEST PRACTICES

Does current practice in Hawaii reflect best practices?

Current practice in Hawaii does not reflect best practices.
- Consultants needlessly bulk up documents "to be thorough."
- Agencies, preparers in general, do only what is required.
- Documents are recycled for different projects. "Just change the title and you're good to go."

Current practice has lost some best practices of the past.

- Point-by-point comparison of project with various existing plans (development, community).

What are best practices for preparing environmental review documents?

Clarify rules, guidelines, process, and content requirements.

- The greater the ambiguity, the more likely the process will be manipulated.
- The general public should understand the process and information.
- Consistency in standards for review, determinations, and acceptance by all agencies.
- Clarify through case law, much like NEPA and CEQA.

Make OEQC's Guidebook the best practices standard for Hawaii.

- It is already the standard resource for most preparers.
- Regularly update the Guidebook to standardize best/latest methods and content.
- It should include a standard outline for EAs/EISs and examples of preferred methods.
- Checklists for impacts, significance, and environmental justice would be useful.

Consult with the community before starting a project.

- Do a thorough process and avoid controversy.

Adopt federal government established best practices and guidance.

- The federal level requires "reader friendly" documents.
- For NEPA, each federal agency has its own manual, some with good technical guidance.
- Make a State version of CEQ's "40 Most Asked Questions."

Look to other countries and States for examples of good and bad practices.

Certify preparers for EIS work. People should lose their license if they misrepresent information in the EIS process.

Comments and Concerns

- It is hard to imagine best practices that would fit all circumstances.
- Mainland best practices may not be appropriate for Hawaii.
- Manuals inhibit the evolution of higher and better standards.

CLIMATE CHANGE

Are climate changes issues adequately addressed in the current EIS system?

Uncertainty and lack of methodology prevent addressing climate change.

- No agreement exists on what the impacts will be.
- Research exists, but decision-makers do not use it.
- Standard indicators, baselines, and metrics are necessary to measure impacts.
- The precautionary principle should guide our actions when knowledge is insufficient.
- The State and Counties should establish a database of likely climate change impacts and make this available to EA/EIS preparers.

Climate change is addressed in the current system.

- The coastal zone management (CZM) process is effective.
- Experienced consultants understand the issue and address it appropriately.

The EIS is not the appropriate tool for addressing climate change.

- It will just be another barrier to prevent development.
- It would just add cost to the project.
- Do not add another layer. If there are no consequences for not doing it, why require it?
- The EIS process is too late. It should be addressed in master planning.
- Is it fair or practical to ask developers to evaluate these issues?
- This should be addressed through strategic environmental assessment (SEA).

How best can climate change impacts to Hawaii be incorporated into the EIS process?

The best way to address climate change is still undetermined.

- The science exists, but it is not widely accepted by the public.
- Change the rules to be more specific about what should be addressed.
- Approach the EIS through the lens of sustainability.
- The 2050 plan should be a template for addressing climate change.
- Address how a project will affect climate change; and how climate change will affect a project.
- California is currently addressing this. Hawaii should look there for guidance.

Climate change is a cumulative impact issue, which must be resolved first.

Climate change in Hawaii is best addressed another way, not through EIS.

- Assess climate change through established agency policies and guidelines.
- The State and local levels are too small scale. Leave this to NEPA to address.
- It should be addressed at the long-range planning level.

Comments and Concerns

- Should secondary and tertiary impacts be considered?
- Agencies, developers, and the public do not want to acknowledge it.
- Global warming will be a boilerplate statement stuck into the EA/EIS.

DISASTER MANAGEMENT

Should the EIS process examine whether actions adequately address disaster resiliency?

Addressing disaster resiliency in the EIS process is unnecessary.

- It is a permit issue and should be subject to a strategic environmental assessment (SEA).
- This would duplicate Civil Defense, Disaster Management, and Planning responsibilities.
- Solutions and mitigation are beyond the scope of the EIS or the project.
- It is not the developer's responsibility to build a new road or hospital.

Addressing disaster resiliency may be necessary sometimes.

- To justify the purpose and need for a project.
- For projects greater than a certain threshold or in certain areas/zones.
- It would be too onerous for every small project to address this.
- Guidelines and standards must be developed.
- It should only address certain impacts and evacuation procedures.

The EIS should examine this for projects in relation to existing plans.

- Including this in EISs creates political continuity and ensures consideration in decision-making.
- After Iniki, plans were prepared but put on a shelf and no lessons learned.

- Include resiliency in mitigation measures for likely hazards.

Should the EIS discuss impacts on response, recovery, and preparedness?

EIS documents should discuss project impacts on these when appropriate (scale, type and significance of impact of project).

- Do scenario analysis of certain events (hurricane, tsunami, earthquake).
- The discussion should be for information, not regulation.
- Fit the project into existing emergency plans.
- Government should establish standards and do risk assessments for preparers to use.

Response, recovery, and preparedness should be addressed in other ways.

- The consultation process (e.g. with fire and emergency) already gets comments as needed.
- Disaster planning changes too rapidly to discuss the relationship to a project in an EIS.
- These are not environmental issues.
- This is an unnecessary burden (time, cost) on the proponent.

Civil Defense, Planning, and the Counties are responsible for this.

- It should be part of a strategic environmental assessment (SEA).

Every large project should contribute to mitigating disaster risk. "We need some truth serum here, not pat phrases to underplay impacts."

Should the EIS process be modified in the event of a state-declared emergency or disaster?

The Governor should be able to suspend it for an emergency.

- The system must have flexibility for rapid action when necessary.
- Public health and safety must not be delayed or compromised.
- Agencies are conscientious of environmental impacts and act appropriately.
- An emergency justifies suspension for repair, recovery, and reconstruction.
- Disaster management plans should already be in place and subject to a programmatic EA.

Some type of environmental review is necessary so that it is not a free-for -all.

- The federal system has an emergency response program permitting restoration of access and roads, but permanent fixes still need NEPA clearance.
- After-the-fact review for action during an emergency would be good.
- OEQC should have an oversight role during an emergency.
- The distinction between emergency response and recovery is blurred in emergencies. Recovery actions should be subject to 343, but not response.

The definition of 'state-declared emergency' needs more clarity.

- Emergency declarations should have a high threshold—only for health and safety.
- Limits on the duration or scope of state-declared emergencies are necessary.
- Declarations have a history of misuse ("disaster capitalism").
- The definition should include economic cycles, not just natural disasters.

Comments and Concerns

- Add disaster management aspects to the list of significant effects.
- "Today people are allowed to build anything they want anywhere they want and then throw the disaster management problem to the municipality."

- Past attempts at emergency oversight (i.e. the Office of Emergency Permitting) did not work.

BIG IDEAS

Intent of the law:

- "We need to review the original intent of the law to see if it is still valid. If it is, change the process to reflect this. If not, then change the intent."
- Does the process work / have the intended effect?
- Are EISs relevant to decision-making, or have they become routine?
- Should it be more than a disclosure / information document?
- State constitution guarantees rights to a clean and healthful environment. Environmental policy should be enforceable.

Business Concerns:

- Businesses want more clarity of the law, predictability, consistency and certainty.
- The process is prohibitive for small businesses.
    - Small businesses are scrutinized more because they cannot afford fancy documents.
    - There should not be a one-size-fits-all approach.
    - Mom-and-pops, small businesses, churches, and those with fewer resources suffer.
- Beneficial projects like affordable housing and renewable/alternative energy are discouraged. What are the cumulative impacts of these lost opportunities?
- There is confusion surrounding utility hook-ups and right of ways that needs resolution.
- Responsible businesses understand the need for the process.
- The EIS process is perceived negatively in the business community as a regulatory mechanism.
- Documents are costly and time-consuming. We should strive for a process that is both protective and efficient.

The process should be more holistic.

- It approaches issues in a fragmented, piecemeal way.
- The process is too focused on procedural issues.
- It is not good at balancing competing disciplines – agencies, non-profits and private groups are all too singularly focused on their own missions and miss the big picture.
- It does not strike the right balance between environment and economy.
- It is not good at scoping.
- Should address sustainability.

Planning should be better integrated into the process.

- "The EIS process should be more about getting things right up front."
- Should approach issues with the goal of fulfilling state plans.
- It is too regulatory. It needs incentives, goals, positive guidelines and a more proactive, long-term approach.
- It doesn't address how communities/the public would like to see things done. It sets up barriers rather than partnerships.
- A focus on planning could change the adversarial relationship between developers and the community.

The EIS process is used to stop projects.

- The process raises false expectations.
- The public does not understand the process well.
- This is not how the law was intended.
- If not through this process, then what is the appropriate venue for the public to voice concern about development they don't want?

The process has become too complicated.

- The process has evolved over time to address changing standards and concerns, but this has been done in an overlay fashion that has made it too complicated.
- Is the EIS process an appropriate way to address the universe of issues?
- Things change and what we think is appropriate changes over time. The law should be flexible to accommodate changes in underlying values.
- Documents are too long and cumbersome to publish and read. They are costly and counter-productive.
- In trying to accomplish too much, the process loses something, is too onerous, and the original intent is not served.
- Sometimes only a focused study should be required, if only certain impacts are of interest.
- Adding more requirements negatively impacts research and development opportunities.

There should a better balance of power between State and County

- More consistency between state and county processes.
- Local authorities know better about local conditions and impacts.
- The same projects on different islands have different impacts.

There should be more consistency between the state and federal processes

- The two processes can be redundant.
- Need more training/guidance from OEQC on integrating processes.
- Currently, it is very cumbersome to do a joint state/federal EIS.
- 343 should be more like NEPA. (this would resolve inconsistency issues of going directly to doing EISs, scoping, comment periods)

The alternatives analysis process could be improved.

- It should be more than action/no action.
- It should address alternative technologies, etc. and not just alternative sites.
- It should go into more depth about why alternatives were not chosen.
- Need better guidance about how this should be done.
- Proponents are not open to options, the attitude is "take it or leave it"
- If this analysis does not serve a purpose, it should not be required.

There will always be opportunities for abuse.

- Everything cannot be legislated.

Acronyms found in the workshop write-ups

EIS	Environmental Impact Statement
EA	Environmental Assessment
SEA	Strategic Environmental Assessment
FONSI	Finding of No Significant Impact
NEPA	National Environmental Policy Act
CEQA	California Environmental Quality Act
OEQC	Office of Environmental Quality Control
OHA	Office of Hawaiian Affairs
SHPD	State Historic Preservation Division
DLNR	Department of Land and Natural Resources
NGO	Non-Governmental Organization
UH	University of Hawaii
AG	Attorney General

NOTES

Appendix 5 Table 1. Town-Gown Workshop Participants

First Name	Last Name	Agency/Business/Organization Name	Stakeholder Group
Jodi	Chew	Federal Highway Administration	A – Federal
Alvin	Char	US Army / Environmental Council	A – Federal
Patricia	Billington	USACE	A – Federal
Lindsey	Kasperowicz	USACE	A – Federal
Bruce	Bennett	DAGS	B – State
Christine	Kinimaka	DAGS	B – State
Scott	Derrickson	DBEDT – Office of Planning	B – State
Joshua	Strickler	DBEDT – Strategic Industries Office	B – State
Brian	Kua	Dept. of Agriculture	B – State
Douglas	Tom	DLNR – CZM	B – State
Lisa	Ferentinos	DLNR – DOFAW	B – State
Morris	Atta	DLNR – Land Division	B – State
Genevieve	Salmonson	DOH	B – State
Kelvin	Sunada	DOH – Environmental Planning Office	B – State
Anthony	Ching	Hawaii Community Development Authority	B – State
Edmund	Morimoto	Hawaii Public Housing Authority	B – State
Robert	Miyasaki	HDOT	B – State
Darell	Young	HDOT	B – State
Fred	Pascua	HDOT – Harbors Division	B – State
Dean	Watase	HDOT – Harbors Division	B – State
Douglas	Meller	HDOT – Highways Division	B – State
Susan	Papuga	HDOT – STP Office	B – State
David	Shimokawa	HDOT – STP Office	B – State
Katherine	Kealoha	OEQC	B – State
Heidi	Guth	OHA	B – State
Chris	Yuen	Former Director, Dept. of Planning	C – County – Hawaii
Terry	Hildebrand	Dept. of Design and Construction	C – County – Honolulu
Jack	Pobuk	Dept. of Environmental Services	C – County – Honolulu
Gerald	Takayesu	Dept. of Environmental Services	C – County – Honolulu
Wilma	Namumnart	Dept. of Environmental Services – Refuse Division	C – County – Honolulu
Kaaina	Hull	Planning Dept.	C – County – Kauai
David	Taylor	Dept. of Environmental Management	C – County – Maui
Milton	Arakawa	Dept. of Public Works	C – County – Maui
Joe	Krueger	Dept. of Public Works	C – County – Maui
Ann	Cua	Planning Dept.	C – County – Maui
Jeff	Hunt	Planning Dept.	C – County – Maui
Eric	Guinther	AECOS Inc.	D – Consultant
Sue	Sakai	Belt Collins Hawaii	D – Consultant
Lee	Sichter	Belt Collins Hawaii	D – Consultant
Ron	Terry	Geometrician Associates	D – Consultant
Jeffrey	Overton	Group 70 International, Inc.	D – Consultant
Scott	Ezer	Helber Hastert & Fee	D – Consultant
David	Tarnas	Marine and Coastal Solutions International, Inc.	D – Consultant
Joanne	Hiramatsu	Oceanit	D – Consultant
Tom	Schnell	PBR Hawaii	D – Consultant
Vincent	Shigekuni	PBR Hawaii	D – Consultant
George	Redpath	Tetra Tech, Inc.	D – Consultant

Appendix 5 Table 1. Town-Gown Workshop Participants

First Name	Last Name	Agency/Business/Organization Name	Stakeholder Group
Earl	Matsukawa	Wilson Okamoto Corporation	D – Consultant
Beth	McDermott	Conservation Council for Hawaii	E – Public Interest
Marjorie	Ziegler	Conservation Council for Hawaii	E – Public Interest
Isaac	Moriwake	Earthjustice	E – Public Interest
Carl	Christensen	Hawaii's Thousand Friends	E – Public Interest
Marti	Townsend	Kahea	E – Public Interest
Maralyn	Herkes	Kohala Center	E – Public Interest
Irene	Bowie	Maui Tomorrow Foundation	E – Public Interest
David	Frankel	Native Hawaiian Legal Corp.	E – Public Interest
Lucienne	De Naie	Sierra Club Maui	E – Public Interest
Robert	Harris	Sierra Club, Hawaii Chapter	E – Public Interest
Mark	Fox	The Nature Conservancy	E – Public Interest
Bob	Loy	The Outdoor Circle	E – Public Interest
Mary	Steiner	The Outdoor Circle	E – Public Interest
Dick	Mayer		E – Public Interest
Dean	Uchida	Chamber of Commerce Hawaii	F – Industry
Jacqui	Hoover	Hawaii Leeward Planning Conference / Hawaii Island Economic Development Board	F – Industry
Rouen	Liu	Hawaiian Electric Company	F – Industry
Ken	Morikami	Hawaiian Electric Company	F – Industry
Steve	Oppenheimer	Hawaiian Electric Company	F – Industry
David	Arakawa	Land Use Research Foundation of Hawaii	F – Industry
Graceson	Ghen	UH	G – UH
Kevin	Kelly	UH	G – UH
Jon	Matsuoka	UH	G – UH
Jackie	Miller	UH	G – UH
Luciano	Minerbi	UH	G – UH
Frank	Perkins	UH	G – UH
Kelley	Uyeoka	UH	G – UH
Hermina	Morita	State House of Representatives	H – Legislature
Cynthia	Thielen	State House of Representatives	H – Legislature
Edward	Bohlen	Hawaii Attorney General	I – Attorney
Lorraine	Akiba	McCorriston Miller Mukai & MacKinnon	I – Attorney
Michael	Matsukawa	Private practice attorney	I – Attorney
Gill	Berger	Environmental Council	J – Governance
Gail	Grabowsky	Environmental Council	J – Governance
James	Sullivan	Environmental Council	J – Governance
Charlotte	Carter-Yamauchi	Legislative Reference Bureau	LRB
Matt	Coke	Legislative Reference Bureau	LRB
Ken	Takayama	Legislative Reference Bureau	LRB
Denise	Antolini	UH	Study Team
Scott	Glenn	UH	Study Team
Karl	Kim	UH	Study Team
Nicole	Lowen	UH	Study Team
Anna	Fernandez	UH	Study Team
Bruce	Barnes	Workshop 1	Facilitator
Tracy	Janowicz	Workshop 2	Facilitator

Appendix 5 Table 1. Town-Gown Workshop Participants

First Name	Last Name	Agency/Business/Organization Name	Stakeholder Group
Jessica	Stabile	Workshop 3	Facilitator
Bruce	McEwan	Workshop 4	Facilitator
Lauren	Cooper	Workshop 5	Facilitator
Grant	Chartrand	Workshop 6	Facilitator
Makena	Coffman	Workshop 7	Facilitator
Dolores	Foley	Workshop 8	Facilitator
Ryan	Riddle	Workshop 1	Recorder
Padmendra	Shrestha	Workshop 2	Recorder
Everett	Ohta	Workshop 3	Recorder
Sara	Bolduc	Workshop 4	Recorder
Greg	Shimokawa	Workshop 5	Recorder
Ashley	Muraoka	Workshop 6	Recorder
Mele	Chillingworth	Workshop 7	Recorder
Katie	Ersbak	Workshop 8	Recorder
Made	Brunner		Volunteer
Pradip	Pant		Volunteer
Irene	Takata		Volunteer

Appendix 6. Draft Recommendations

Draft Recommendations

Draft Recommendations of the

University of Hawaii Environmental Impact Statement Study

Karl Kim, Denise Antolini, Peter Rappa, Nicole Lowen, Scott Glenn

Prepared for the
Legislative Reference Bureau, Hawai'i State Government

October 2009

Introduction

The draft recommendations are organized into five themes: Applicability, Governance, Participation, Content, and Process. Applicability refers to the screening process used to determine which projects and actions should be subject to environmental review, and which should be exempted from the process. Governance recommendations discuss how best to allocate management, oversight, and support for the environmental review (ER) system. Participation focuses on recommendations for improving participation by both the public and agencies. Content includes recommendations for improving the substance of environmental review documents. Process addresses issues identified with how the process is implemented, including who should prepare and accept documents and shelf life.

Below each theme is a set of recommendations. A particular recommendation may have sub-points, which are components that help explain the recommendation or a possible implementation strategy. The components are considered *optional* aspects of the recommendation and a combination of the components are possible to achieve the desired outcome. Several recommendations feature a set of alternative implementations to achieve the recommendation. In these cases, the alternatives may be mutually exclusive, but components of one alternative may be applicable to another alternative.

I. Applicability

One pressing concern for Hawaii's ER system is how best to use resources to focus on projects that should be undergoing ER, while not wasting resources on small projects that do not warrant the process. Hawaii's current system of triggers and exemptions too often results in small projects having relatively insignificant impacts undergoing review, while some major private development projects escape the system. Furthermore, the existing system has accreted new triggers to meet evolving public needs without addressing the rationality of the system as a whole. Exemptions are often outdated, inconsistent among agencies, and lack transparency. In response to these identified issues, the Study recommends adopting a new screening system.

A. Triggers

1. Environmental assessment should occur at the earliest practicable time.

2. Allow applicants to proceed directly to conducting an Environmental Impact Statement when significant impacts are clearly present.

3. For determining the eligibility of an action for HRS 343, three alternatives are proposed (see p. 14-16 for general process flow charts).

A. Alternative A: Modify Existing Trigger System

i. Triggers to remain as is

1. General plan (#6)
2. Reclassification of any land from preservation (#7)
3. Waste-to-power (#9B)
4. Landfill (#9C)
5. Oil refinery (#9D)

ii. Triggers to be clarified

1. Use of State or County lands or funds (#1)
2. Any use within a shoreline area as defined in HRS 205A-21
    a. Shoreline setback
3. Power generation facility (#9E)
    a. Relating to biofuels
    b. Relating to solar/wind power

iii. Triggers to be added

1. SMAs (under shoreline setback or as own trigger)
2. Size threshold
3. Protected/sensitive areas
4. Rapid development
5. Use of state waters and ocean resources
6. Large land use reclassifications

iv. Triggers to be removed

1. Wastewater (#9A)

2. Heliport (#8)

3. Waikiki (#5)

v. Reorganize existing exemption system (see Exemptions below)

B. Alternative B: Discretionary Approval Screen

i. Define "action" similar to NEPA

1. "Major" federal action - may have a significant affect on the quality of the human environment

ii. HRS 343 should apply to all State/County actions and all private actions that require discretionary approval

iii. Include master plans, programmatic EAs, and tiering (where smaller project-focused EAs reference a master plan or programmatic EISs for general discussions)

iv. Use threshold determinations for non-exempt projects to determine whether to prepare EA or EIS

v. Move HAR 11-200-12 into the statute as a framework for determining significance

vi. State/County and private actions that require discretionary approval, such as that by the Land Use Commission, the Board of Land and Natural Resources, or other decision-making bodies involving discretionary consent, would enter 343 at earliest discretionary permit hearing

vii. If an EIS is required, it would be submitted at the last discretionary permit hearing

viii. Incorporate public participation elements of HRS into the discretionary hearing process

ix. Reorganize existing exemption system (see Exemptions below)

C. Alternative C: Categorical Inclusion Screen

i. "Inclusion" refers to initial premise that actions should be *included* in ER

1. In contrast to current system where focus is on which projects should be excluded from environmental review

ii. Two lists

1. Type 1 - presumption of projects having significant impacts; proceed directly to preparing EIS document

2. Type 2 - presumption of projects not having significant impacts (exempt)

iii. Unlisted projects default into the system; use threshold determinations or other criteria to determine whether to prepare EA or go directly to EIS

iv. Each agency is required to create a list through the rulemaking process

1. Requires public participation in determining which actions belong on which lists

2. Determine relevant thresholds

v. Public has right to judicial appeal if a listing is unacceptable

B. Exemptions

1. Consolidate agency lists into one shared list available to all agencies.

A. One list for State agencies and one list for each County

B. Require periodic updating of shared exemption list; apply sunset date to exemption lists

C. Using existing 10 categories to create single categorical exemption list

D. Allow public comment on proposed new exemptions

2. Update the exemption lists to reflect existing knowledge of significant environmental impacts, such as exempting

A. Projects that have a beneficial impact on the ecology of the immediate surrounding environment

B. Actions below a to-be-determined size threshold

C. Small, local power generating projects

D. Renovation of existing facilities on developed land

3. Require exemptions above a certain threshold to be published on the OEQC website.

A. Include in the OEQC Bulletin

B. Threshold should be based on size or cost

C. Provide for a limited period of public notice

D. Allow for administrative or judicial review of exemption declarations

4. Allow agencies greater discretion in declaring exemptions.

II. Governance

Stakeholders in interviews and the Town-Gown workshop recognize that effective governance is necessary for a functioning environmental review system. Concern has been expressed regarding the ineffectiveness of the Environmental Council, the lack of staffing and resources for OEQC to fulfill its statutory duties, and the marginalization of the Environmental Center. The Study recommends the following for improving the effectiveness of Hawaii's governance system.

1. Clarify lines of authority and duties for governance agencies (OEQC, Environmental Council, Environmental Center).

2. Provide more funding, staff, and administrative support for governance agencies.

3. Reallocate governance duties, responsibilities, and organizational relationships among the three entities.

A. Alternative A: clarify roles and responsibilities within the existing system and provide greater institutional support

B. Alternative B: Adopt a governance model based on the Council for Environmental Quality (CEQ): the Environmental Council advises the Governor directly; OEQC becomes staff for the Environmental Council

C. Alternative C: Transfer some authority to the Counties

i. County governments designate a county department to oversee County-level ER

ii. Create local Environmental Councils for each County

D. Alternative D: Create a new, independent agency tasked with environmental stewardship and overseeing the environmental review process

III. Participation

Both public and agency participation are essential to an effective environmental review system. Courts are hesitant to rule on the content of ER documents, tending to focus more on procedural issues. Thus, it is necessary to have well-informed reviewers and robust public participation to ensure that environmental impacts, mitigation proposals, and alternatives analyses are given appropriate consideration. Capacity building through public and agency education and training will help to increase transparency and accountability, while decreasing potential bias in documents. Furthermore, project proponents should seek input from stakeholders as early as possible in order to identify and address potential issues in advance. Electronic communications and internet-based participation should be incorporated in the EIS process to further these goals.

1. Use the internet / electronic communication to increase accessibility and efficiency. OEQC should provide guidance on integrating electronic communication into the process.

    A. Clarify if documents can be distributed in PDF format rather than as a paper document

    B. Require searchable PDFs

2. Improve OEQC (or new dept.) website.

    A. Create email lists/RSS feeds for notification of actions based on district or type

    B. Establish online comment and response submission process

    C. Develop a centralized information management system (database) under OEQC

    D. Model website design on successful designs of other states (e.g. WA, NY)

3. Improve consultation with both agencies and the public through early scoping in EAs.

4. Amend HRS 343-5(b) to allow flexibility to extend the public comment/agency review period for EAs and EISs.

A. Allow more flexibility at the lead agency's discretion to extend the period for public comment.

5. Amend the statute to adopt the NEPA process for responding to public comments.

    A. NEPA 1503.4 - agency response to public comments

    B. CEQ 40 Questions, #29A guidance for responding to comments

6. Enhance the quality of interagency participation in review of documents.

    A. Require regular agency staff training

        i. Develop certification process for staff, including preparers and reviewers

    B. Appoint a lead/dedicated staff member to oversee quality of commenting and facilitate interagency/internal processes

    C. Require agencies to develop internet tools for the ER process

    D. Improve OEQC website (see above #2)

7. Develop guidance on more effective public outreach based on NEPA 1506.6.

8. Recognize central role of the Bulletin and encourage its wider distribution.

IV. Content

While the focus of environmental review often is on procedural issues, the original intent of the law is to disclose objective information for public consideration and to assist government decision-making. Standards of quality for content vary within documents and among jurisdictions. The Study recommends the following in order to further fulfill the original intent of Environmental Review and better standardize content requirements and quality.

1. Improve quality of review and provide better guidance to improve quality of content (see: participation and governance).

2. Link to State, County, and community level plans, policies, and regulations to better situate the EIS process in a meaningful and useful context.

3. Clarify that the goal of impact assessment is to encourage project and plan designs that results in no net increase in negative impacts.

A. Cumulative Impacts

1. Strengthen HRS 343 to require cumulative impact assessment for significant actions including plans and programs to encourage greater efficiency such as through tiering.

    A. Redefine "action" in the statute and rules to include master plans, statewide or regional programs, development plans, and multi-phase development projects

    B. Continue to exempt feasibility studies

    C. Add to HRS 343 Findings and Purposes, "One of the purposes of this chapter is to better integrate with planning"

    D. Write into the statute the goal of cumulative impacts assessment is to provide sufficient information to the regulatory agency so that the end result is no net increase of negative impacts

    E. Write into rules: "When conducting cumulative impact assessment, refer to the OEQC guidance document on conducting CIA"

    F. Develop guidance on assessing priority environmental indicators for cumulative impacts

        i. Water quantity

        ii. Water quality

        iii. Traffic

        iv. iv. Energy

        v. Solid waste

        vi. Sewage

        vii. Endemic, threatened, and endangered species

2. Establish best practices for content and methodology through guidance.

    A. Establish standard methodology for data collection

    B. OEQC, UH, and/or private consultants develop protocols for measurements in certain key areas

3. Create state and/or regional online database for EIS data to enhance cumulative impacts assessment and track changes in environmental quality over time.

B. Mitigation Measures

1. Do not allow mitigated FONSIs unless an enforcement system is in place.

2. Require a summary of impacts, proposed mitigation, feasibility & associated permits in the EIS.

    A. Encourage incorporation by reference for mitigations required by State/County law or regulation

3. Implement post-EIS reporting and monitoring.

    A. Alternative A: Use a Record of Decision process similar to NEPA to require implementation and require all EISs do annual reports

    B. Alternative B: All EISs have to do annual reports plus random/screen-based auditing of mitigation

    C. Alternative C: No annual reports, random audits

C. Cultural Impact Assessment

1. Cultural impact assessment is a broadly supported element of the HRS 343 process.

2. OEQC should provide guidance on clearer definition of "cultural impact" and "traditional cultural practice"

3. OEQC must establish a database for cultural impact assessment; allow reports/interviews to be reused in different documents. (See: cumulative impacts)

4. OEQC create checklists for both preparers and reviews; should be general enough to apply to multiple geographic areas and address natural resources as cultural resources.

5. OEQC re-examine the list of cultural experts and collaborate with OHA, SHPD, and other relevant agencies to clarify to determine who qualifies as a cultural expert and what that expert's role is.

6. Encourage more guidance on further defining cultural practices of the State.

D. Climate Change

1. Alternative A: Incorporate climate change into the current EIS system.

    A. Require analysis by certain projects having known significant contributions to greenhouse gas emissions

    B. Starting with sea level rise, create zones based on identified climate change impacts

        i. Require scenario analysis of likelihood of impacts

        ii. Address likely impacts in both mitigation measures and alternatives analysis

    C. Use zones to require resiliency/vulnerability analysis

2. Alternative B: Do not require addressing climate change in EIS; address through planning and policy.

E. Disaster Management

1. Disaster management should be addressed in EISs.

    A. Alternative A: Require OEQC to develop guidance for additional environmental review for disaster recovery actions

    B. Alternative B: Do not require addressing more disaster management issues in an EIS than is already addressed

2. OEQC develop guidance for and encourage conducting a rapid environmental assessment for projects related to state declared emergencies.

3. A concern identified through the stakeholder interviews was the absence of environmental oversight during emergency declarations; clarification of the length of time and degree of the Governor's authority was desired.

V. Process

Many issues have been identified linked to procedural aspects of the ER process. This study examined "shelf life", or how long an EIS remains valid, acceptability, EA determinations, and preparation. One clear theme that emerged was a need to reduce potential bias in the ER process. Bias can occur both in document preparation when impacts are not objectively presented and through the acceptance process when an agency can accept their own document or issue their own FONSI. An examination of shelf life revealed a broad agreement that documents cannot remain valid indefinitely. Concern

also was expressed about the efficiency of the process, and the perception that it is overly complex and takes considerable time and money to complete. Recommendations focus on trying to strike a balance between these concerns.

A. Preparation

1. Improve the preparation process by increasing review and minimizing real or perceived conflicts of interest.

    A. Alternative A: Strengthen the EA and EIS content requirements under the rules 11-200-10 and 11-200-17 to require a more comprehensive analysis

        i. Strengthen the role of the Environmental Center as a commenter

        ii. Encourage agencies to be stricter of the documents they review by providing clear guidance on reviewing requirements

    B. Alternative B: Create an independent system by either having a third party chosen or an agency that prepares all environmental documents, proponent pays for preparation.

B. Shelf Life

1. EISs should have a review for validity after a period of time or significant change in project or environment.

    A. Alternative A: Adopt NEPA regulation 1502.9c and CEQ Question #32, which leaves the decision to prepare a supplemental document in the discretion of the agencies and documents are presumed stale after 5 years

    B. Alternative B: Require a supplemental EA/EIS focusing on significant changes to the project or impacts every 3 years until the project is completed

    C. Alternative C: Clarify existing law on supplemental EISs

C. Determinations and Acceptability

1. Improve the quality of agency review of EA determinations and expand oversight role of governance for EIS acceptability.

    A. Random audits of agency determinations of EAs by OEQC

    B. Concurrence on acceptability decisions by OEQC or designated county agency

C. Establish a pre-judicial administrative review process for challenges to EA determination and EISs acceptance decisions (e.g. hearing officer)

2. Provide better guidance to agencies on application of significance criteria for making determinations and acceptance decisions.

3. Adopt a Record of Decision (ROD) requirement similar to NEPA.

Appendix 7. Omnibus Bill

HOUSE OF REPRESENTATIVES
TWENTY-FIFTH LEGISLATURE, 2010
STATE OF HAWAII

H.B. NO.

A BILL FOR AN ACT

RELATING TO ENVIRONMENTAL PROTECTION

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

PART I.

SECTION 1. Chapter 341, Hawaii Revised Statutes, is amended to read as follows:

"[~~[~~]**CHAPTER 341**[~~]~~]

ENVIRONMENTAL QUALITY CONTROL

[~~[~~]**§341-1**[~~]~~] **Findings and purpose.** The legislature finds that the quality of the environment is as important to the welfare of the people of Hawaii as is the economy of the State. The legislature further finds that the determination of an optimum balance between economic development and environmental quality deserves the most thoughtful consideration, and that the maintenance of the optimum quality of the environment deserves the most intensive care.

The purpose of this chapter is to stimulate, expand, and coordinate efforts to determine and maintain the optimum quality of the environment of the State.

§341-2 Definitions. As used in this chapter, unless the context otherwise requires:

"Center" means the University of Hawaii [~~ecology or~~] environmental center established in section [~~,~~]304A-1551[~~,~~].

"Council" means the environmental council established in section 341-3(c).

"Director" means the director of the office of environmental quality control.

"Office" means the office of environmental quality control established in section 341-3(a).

"University" means the University of Hawaii.

§341-3 Office of environmental quality control; environmental center; environmental council. (a) There is created an office of environmental quality control that shall be headed by a single executive to be known as the director of the office of environmental quality control who shall be appointed by the governor as provided in section 26-34. This office shall implement this chapter and shall be placed within the department of [~~health~~] land and natural resources for administrative purposes. The office

shall perform [~~its~~] the duties prescribed to it under chapter 343 [~~and shall serve the governor in an advisory capacity on all matters relating to environmental quality control~~].

(b) The environmental center within the University of Hawaii shall be as established under section [~~,~~]304A-1551[~~,~~].

(c) There is created an environmental council not to exceed [~~fifteen~~] seven members. [~~Except for the director, members~~] The council shall include one member from each county and no more than three at-large members. The director may not serve as a member of the council. Members of the environmental council shall be appointed by the governor as provided in section 26-34, provided that two of the seven members shall be appointed from a list of persons nominated by the speaker of the house of representatives and two members shall be appointed from a list of persons nominated by the senate president. The council shall be attached to the [~~department of health~~] office for administrative purposes. [~~Except for the director, the~~] The term of each member shall be four years; provided that, of the members initially appointed, [~~five~~] three members shall serve for four years, [~~five~~] two members shall serve for three years, and the remaining [~~four~~] two members shall

serve for two years. Vacancies shall be filled for the remainder of any unexpired term in the same manner as original appointments. [~~The director shall be an ex officio voting member of the council.~~] The council chairperson shall be elected by the council from among the [~~appointed~~] members of the council.

Members shall be appointed to [~~assure~~] ensure a broad and balanced representation of educational, business, and environmentally pertinent disciplines and professions[~~, such as the natural and social sciences, the humanities, architecture, engineering, environmental consulting, public health, and planning; educational and research institutions with environmental competence; agriculture, real estate, visitor industry, construction, media, and voluntary community and environmental groups~~]. The members of the council shall serve without compensation but shall be reimbursed for expenses, including travel expenses, incurred in the discharge of their duties.

§341-4 Powers and duties of the director. (a) The director shall have [~~such~~] powers delegated by the governor as are necessary to coordinate and, when requested by the governor, to direct, pursuant to chapter 91, all state governmental agencies in matters concerning environmental quality.

(b) To further the objective of subsection (a), the director shall:

(1) [~~Direct~~] Through the council, direct the attention of [~~the university community~~] state agencies and the residents of the State [~~in general~~] to [~~ecological and~~] environmental problems [~~through~~], in cooperation with the center [~~and the council, respectively, and through public education programs~~];

(2) Conduct research or arrange for [~~the conduct of~~] research through contractual relations with the center, state agencies, or other persons with competence in [~~the field of ecology and~~] environmental quality;

(3) [~~Encourage~~] Through the council, encourage public acceptance of proposed legislative and administrative actions concerning [~~ecology and~~] environmental quality, and receive notice of any private or public complaints concerning [~~ecology and~~] environmental quality [~~through the council~~];

(4) Recommend to the council programs for long-range implementation of environmental quality control;

(5) Submit [~~direct~~] to the council for its review and recommendation to the governor [~~and to the~~

~~legislature such~~] legislative bills and administrative policies, objectives, and actions, as are necessary to preserve and enhance the environmental quality of the State;

(6) Conduct regular outreach and training for state and county agencies on the environmental review process and conduct other public educational programs; [~~and~~]

(7) Offer advice and assistance to private industry, governmental agencies, non-governmental organizations, state residents, or other persons upon request[~~.~~];

(8) Obtain advice from the environmental council on any matters concerning environmental quality;

(9) Perform budgeting and hiring in a manner that ensures adequate funding and staff support for the council to carry out its duties under this chapter and chapter 343; and

(10) With the cooperation of private industry, governmental agencies, non-governmental organizations, state residents, and other interested persons in fulfilling the requirements of this subsection, conduct annual statewide workshops and publish an annual state

environmental review guidebook or supplement to assist persons in complying with this chapter, chapter 343, and administrative rules adopted thereunder; provided that workshops, guidebooks, and supplements shall include:

(A) Assistance for the preparation, processing, and review of environmental review documents;

(B) Review of relevant court decisions affecting this chapter, chapter 343, and administrative rules adopted thereunder;

(C) Review of amendments to this chapter; chapter 343, other relevant laws, and administrative rules adopted thereunder; and

(D) Any other information that may facilitate the efficient implementation of this chapter, chapter 343, and administrative rules adopted thereunder.

(c) [~~The director shall adopt rules pursuant to chapter 91 necessary for the purposes of implementing this chapter.~~] To facilitate agency and public participation in the review process, the office shall create and maintain an electronic communication system, such as a website, to meet

best practices of environmental review, as determined by the director.

§341-4.A Annual report. No later than January 31 of each year, at the direction of the council, the director shall prepare a report that analyzes the effectiveness of the State's environmental review system during the prior year. The report shall include an assessment of a sample of environmental assessments and environmental impact statements for completed projects.

At the request of the director or the council, state and county agencies shall provide information to assist in the preparation of the annual report.

§341-6 [~~Functions~~] Duties of the environmental council. (a) The council shall [~~serve~~]:

(1) Serve the governor in an advisory capacity on all matters relating to environmental quality;

(2) Serve as a liaison between the [~~director~~] governor and the general public by soliciting information, opinions, complaints, recommendations, and advice concerning [~~ecology and~~] environmental quality through public hearings or any other means and by publicizing [~~such~~] these matters as requested by the

[~~director pursuant to section 341-4(b)(3).~~]

governor; and

(3) Meet at the call of the council chairperson or the governor upon notice to the council chairperson.

(b) The council may make recommendations concerning [~~ecology and~~] environmental quality to the [~~director~~] governor [~~and shall meet at the call of the council chairperson or the director upon notifying the council chairperson~~].

(c) The council shall monitor the progress of state, county, and federal agencies in achieving the State's environmental goals and policies [~~and~~]. No later than January 31 of each year, the council, with the assistance of the director, shall make an annual report with recommendations for improvement to the governor, the legislature, and the public [~~no later than January 31 of each year~~]. [~~All~~] At the request of the council, state and county agencies shall [~~cooperate with the council and~~] provide information to assist in the preparation of [~~such a~~] the report [~~by responding to requests for information made by the council~~]. The council may combine its annual report with the annual report prepared by the director pursuant to section 341-A.

(d) The council may delegate to any person [~~such~~] the power or authority vested in the council as it deems reasonable and proper for the effective administration of this section and chapter 343, except the power to make, amend, or repeal rules.

(e) The council shall adopt rules pursuant to chapter 91 necessary for the purposes of implementing this chapter and chapter 343.

§341-B Environmental review special fund; use of funds. (a) There is established in the state treasury the environmental review special fund, into which shall be deposited:

(1) All filing fees and other administrative fees collected by the office;

(2) All accrued interest from the special fund; and

(3) Moneys appropriated to the special fund by the legislature.

(b) Moneys in the environmental review special fund shall be supplemental to, and not a replacement for, the office budget base and be used to:

(1) Fund the activities of the office and the council in fulfillment of their duties pursuant to this chapter and chapter 343, including administrative and office expenses; and

(2) Support outreach, training, education, and research programs pursuant to section 341-4.

§341-C Fees. The director shall adopt rules, pursuant to chapter 91, that establish reasonable fees for filing, publication, and other administrative services of the office or council pursuant to this chapter and chapter 343."

SECTION 2. All rules, policies, procedures, orders, guidelines, and other material adopted, issued, or developed by the office of environmental quality control or the environmental council within the department of health to implement provisions of the Hawaii Revised Statutes shall remain in full force and effect until amended or repealed by the office of environmental quality control or the environmental council within the department of land and natural resources.

SECTION 3. All appropriations, records, equipment, machines, files, supplies, contracts, books, papers, documents, maps, and other personal property heretofore made, used, acquired, or held by the office of environmental quality control or the environmental council within the department of health relating to the functions transferred to the department of land and natural resources

shall be transferred with the functions to which they relate.

SECTION 4. All rights, powers, functions, and duties of the office of environmental quality control or the environmental council within the department of health are transferred to the office of environmental quality control or the environmental council within the department of land and natural resources.

All officers and employees whose functions are transferred by this Act shall be transferred with their functions and shall continue to perform their regular duties upon their transfer, subject to the state personnel laws and this Act.

No officer or employee of the State having tenure shall suffer any loss of salary, seniority, prior service credit, vacation, sick leave, or other employee benefit or privilege as a consequence of this Act, and such officer or employee may be transferred or appointed to a civil service position without the necessity of examination; provided that the officer or employee possesses the minimum qualifications for the position to which transferred or appointed; and provided that subsequent changes in status may be made pursuant to applicable civil service and compensation laws.

An officer or employee of the State who does not have tenure and who may be transferred or appointed to a civil service position as a consequence of this Act shall become a civil service employee without the loss of salary, seniority, prior service credit, vacation, sick leave, or other employee benefits or privileges and without the necessity of examination; provided that such officer or employee possesses the minimum qualifications for the position to which transferred or appointed.

If an office or position held by an officer or employee having tenure is abolished, the officer or employee shall not thereby be separated from public employment, but shall remain in the employment of the State with the same pay and classification and shall be transferred to some other office or position for which the officer or employee is eligible under the personnel laws of the State as determined by the head of the department or the governor.

PART II.

SECTION 5. Chapter 343, Hawaii Revised Statutes, is amended by adding three new sections to be appropriately designated and to read as follows:

"**§343-A Significance criteria.** (a) In determining whether a proposed action may have a significant adverse effect on the environment, an agency shall consider:

(1) Every phase of the proposed action;

(2) Expected primary and secondary effects of the proposed action; and

(3) The overall and cumulative effects of the proposed action, including short-term and long-term effects.

(b) A proposed action shall be determined to have a significant effect on the environment if it:

(1) Involves an irrevocable commitment to loss or destruction of any natural or cultural resource;

(2) Curtails the range of beneficial uses of the environment;

(3) Conflicts with the State's long-term environmental policies, guidelines, or goals, as expressed in chapter 344, and any revisions thereof and amendments thereto, court decisions, or executive orders;

(4) Substantially adversely affects the economic welfare, social welfare, or cultural practices of the community or State;

(5) Substantially adversely affects public health;

(6) Involves substantial adverse secondary impacts, such as population changes or effects on public facilities;

(7) Involves a substantial degradation of environmental quality;

(8) Is individually limited but cumulatively has considerable adverse effect upon the environment or involves a commitment to related or future actions;

(9) Substantially adversely affects a rare, threatened, or endangered species or its habitat;

(10) Detrimentally affects air or water quality or ambient noise levels;

(11) Affects or is likely to suffer present or future damage by being located in an environmentally sensitive area, such as a flood plain, tsunami zone, beach, erosion-prone area, geologically hazardous land, estuary, fresh water, or coastal waters;

(12) Substantially adversely affects scenic vistas and viewplanes identified in county or state plans or studies;

(13) Requires substantial energy consumption or emits substantial quantities of greenhouse gases, or

(14) Increases the scope or intensity of hazards to the public, such as increased coastal inundation, flooding, or erosion that may occur as a result of climate change anticipated during the lifetime of the project.

(c) The director of the office of environmental quality control shall provide guidance to agencies on the application of this section.

§343-B Applicability. Except as otherwise provided, an environmental assessment shall be required for actions that require discretionary approval from an agency and that may have a probable, significant, and adverse environmental effect, including:

(1) Any new county general or development plans or amendments to existing county general or development plans; or

(2) Any reclassification of any land classified as a conservation district or important agricultural lands.

(b) Notwithstanding any other provision, the use of land solely for connection to utilities or rights-of-way shall not require an environmental assessment or an environmental impact statement.

§343-C Record of decision; mitigation. (a) At the time of the acceptance or nonacceptance of a final statement, the accepting authority or agency shall prepare a concise public record of decision that:

(1) States its decision;

(2) Identifies all alternatives considered by the accepting authority or agency in reaching its decision, including:

(A) Alternatives that were considered to be environmentally preferable; and

(B) Preferences among those alternatives based upon relevant factors, including economic and technical considerations and agency statutory mission; and

(3) States whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted and, if not, why they were not adopted.

(b) Agencies shall provide for monitoring to ensure that their decisions are carried out and that any other conditions established in the environmental impact statement or during its review and committed to as part of the accepting authority or agency's decision are

implemented by the lead agency or other appropriate agency. Where applicable, a lead agency shall:

(1) Include conditions on grants, permits, or other approvals to ensure mitigation;

(2) Condition the funding of actions on mitigation; and

(3) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures that they proposed during the environmental review process and that were adopted by the accepting authority or agency in making its decision.

(c) Results of monitoring pursuant to this section shall be made available periodically to the public through the bulletin."

SECTION 6. Section 183-44, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) For the purposes of this section:

(1) "Emergency repairs" means that work necessary to repair damages to fishponds arising from natural forces or events of human creation not due to the willful neglect of the owner, of such a character that the efficiency, esthetic character or health of the fishpond, neighboring activities of

persons, or existing flora or fauna will be endangered in the absence of correction of existing conditions by repair, strengthening, reinforcement, or maintenance.

(2) "Repairs and maintenance" of fishponds means any work performed relative to the walls, floor, or other traditional natural feature of the fishpond and its appurtenances, the purposes of which are to maintain the fishpond in its natural state and safeguard it from damage from environmental and natural forces.

Repairs, strengthening, reinforcement, and maintenance and emergency repair of fishponds shall not be construed as actions [~~"proposing any use"~~] requiring an environmental assessment or an environmental impact statement within the context of section [~~343-5.~~] 343-B."

SECTION 7. Section 343-2, Hawaii Revised Statutes, is amended to read as follows:

"**§343-2 Definitions.** As used in this chapter unless the context otherwise requires:

"Acceptance" means a formal determination that the document required to be filed pursuant to section 343-5 fulfills the definition of an environmental impact statement, adequately describes identifiable environmental

impacts, and satisfactorily responds to comments received during the review of the statement.

"Action" means any program or project to be initiated by any agency or applicant[~~.~~] that:

(1) Is directly undertaken by any agency;

(2) Is supported in whole or in part by contracts, grants, subsidies, or loans from one or more agencies; or

(3) Involves the issuance to a person of a discretionary approval, such as a permit by one or more agencies.

The term "action" shall not include official acts of a ministerial nature that involve no exercise of discretion.

"Agency" means any department, office, board, or commission of the state or county government that [~~which~~] is a part of the executive branch of that government.

"Applicant" means any person who, pursuant to statute, ordinance, or rule, officially requests approval for a proposed action.

"Approval" means a discretionary approval [~~consent~~] required from an agency prior to actual implementation of an action.

"Council" means the environmental council.

"Cumulative effects" means the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (county, state, or federal) or person undertakes those actions; cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.

"Discretionary approval[~~consent~~]" means an approval, consent, sanction, or recommendation from an agency for which judgment and free will may be exercised by the issuing agency, as distinguished from a ministerial approval [~~consent~~].

"Environmental assessment" means a written evaluation to determine whether an action may have a significant effect.

"Environmental impact statement" or "statement" means an informational document prepared in compliance with the rules adopted under section 343-6 and [~~which~~] that discloses the:

(1) [~~environmental~~] Environmental effects of a proposed action[~~,~~];

(2) [~~effects~~] Effects of a proposed action on the economic welfare, social welfare, and cultural practices of the community and State[~~,~~];

(3) [~~effects~~] Effects of the economic activities arising out of the proposed action[~~,~~];

(4) [~~measures~~] Measures proposed to minimize adverse effects[~~,~~]; and

(5) [~~alternatives~~] Alternatives to the action and their environmental effects.

The initial statement filed for public review shall be referred to as the draft statement and shall be distinguished from the final statement, which is the document that has incorporated the public's comments and the responses to those comments. The final statement is the document that shall be evaluated for acceptability by the respective accepting authority.

"Environmental review" refers broadly to the entire process prescribed by chapter 341 and this chapter, applicable to applicants, agencies, and the public, of scoping, reviewing, publishing, commenting on, finalizing, accepting, and appealing required documents such as environmental assessments and environmental impact statements; any variations of these documents such as preparation notices, findings of no significant impact,

programmatic reviews, and supplemental documents; any exemptions thereto; and any decisions not to prepare these documents.

"Finding of no significant impact" means a determination based on an environmental assessment that the subject action will not have a significant effect and, therefore, will not require the preparation of an environmental impact statement.

[~~"Helicopter facility" means any area of land or water which is used, or intended for use for the landing or takeoff of helicopters; and any appurtenant areas which are used, or intended for use for helicopter related activities or rights-of-way.~~]

"Ministerial approval" means a governmental decision involving little or no personal judgment by the public official and involving only the use of fixed standards or objective measurements.

"Office" means the office of environmental quality control.

"Permit" means a determination, order, or other documentation of approval, including the issuance of a lease, license, certificate, variance, approval, or other entitlement for use or permission to act, granted to any person by an agency for an action.

"Person" includes any individual, partnership, firm, association, trust, estate, private corporation, or other legal entity other than an agency.

"Primary effect" or "direct effect" means effects that are caused by the action and occur at the same time and place.

[~~"Power-generating facility" means:~~

~~(1) A new, fossil-fueled, electricity-generating facility, where the electrical output rating of the new equipment exceeds 5.0 megawatts; or~~

~~(2) An expansion in generating capacity of an existing, fossil-fueled, electricity-generating facility, where the incremental electrical output rating of the new equipment exceeds 5.0 megawatts.~~]

"Program" means a systemic, connected, or concerted applicant or discretionary agency action to implement a specific policy, plan, or master plan.

"Programmatic" means a comprehensive environmental review of a program, policy, plan, or master plan.

"Project" means an activity that may cause either a direct or indirect physical effect on the environment, such as construction or management activities located in a defined geographic area.

[~~"Renewable energy facility" has the same meaning as defined in section 201N-1.~~]

"Secondary effects" or "indirect effect" means effects that are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air, water, and other natural systems, including ecosystems.

"Significant effect" means the sum of effects on the quality of the environment[~~, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the State's environmental policies or long-term environmental goals as established by law, or adversely affect the economic welfare, social welfare, or cultural practices of the community and State~~].

"Tiering" means the incorporation by reference in a project-specific environmental assessment or environmental impact statement to a previously conducted programmatic environmental assessment or environmental impact statement for the purposes of showing the connections between the project-specific document and the earlier programmatic

review, avoiding unnecessary duplication, and concentrating the analysis on the project-specific issues that were not previously reviewed in detail at the programmatic level.

[~~"Wastewater treatment unit" means any plant or facility used in the treatment of wastewater.~~]"

SECTION 8. Section 343-3, Hawaii Revised Statutes is amended to read as follows:

"**§343-3 Public participation, records, and notice.** (a) All statements, environmental assessments, and other documents prepared under this chapter shall be made available for inspection by the public at minimum through the electronic communication system maintained by the office and, if specifically requested due to lack of electronic access, also through printed copies available through the office ~~during established office hours~~.

(b) The office shall inform the public of notices filed by agencies of the availability of environmental assessments for review and comments, of determinations that statements are required or not required, of the availability of statements for review and comments, and of the acceptance or nonacceptance of statements.

(c) The office shall inform the public of:

(1) A public comment process or public hearing if a state or federal agency provides for the public

comment process or public hearing to process a habitat conservation plan, safe harbor agreement, or incidental take license pursuant to the state or federal Endangered Species Act;

(2) A proposed habitat conservation plan or proposed safe harbor agreement, and availability for inspection of the proposed agreement, plan, and application to enter into a planning process for the preparation and implementation of the habitat conservation plan for public review and comment;

(3) A proposed incidental take license as part of a habitat conservation plan or safe harbor agreement; and

(4) An application for the registration of land by accretion pursuant to section 501-33 or 669-1(e) for any land accreted along the ocean.

(d) The office shall inform the public by the publication of a periodic bulletin to be available to persons requesting this information. The bulletin shall be available through the office, [~~and~~] public libraries, and in electronic format.

(e) At the earliest practicable time, applicants and the relevant agencies shall:

(1) Provide notice to the public and to state and county agencies that an action is subject to review under to this chapter; and

(2) Encourage and facilitate public involvement throughout the environmental review process as provided for in this chapter, chapter 341, and the relevant administrative rules."

SECTION 9. Section 343-5, Hawaii Revised Statutes, is amended to read as follows:

"**§343-5 [~~Applicability and~~] Agency and applicant requirements.** [~~(a) Except as otherwise provided, an environmental assessment shall be required for actions that:~~

~~(1) Propose the use of state or county lands or the use of state or county funds, other than funds to be used for feasibility or planning studies for possible future programs or projects that the agency has not approved, adopted, or funded, or funds to be used for the acquisition of unimproved real property; provided that the agency shall consider environmental factors and available alternatives in its feasibility or planning studies; provided further that an environmental assessment for proposed uses under~~

~~section 205-2(d)(11) or 205-4.5(a)(13) shall only be required pursuant to section 205-5(b);~~

~~(2) Propose any use within any land classified as a conservation district by the state land use commission under chapter 205;~~

~~(3) Propose any use within a shoreline area as defined in section 205A-41;~~

~~(4) Propose any use within any historic site as designated in the National Register or Hawaii Register, as provided for in the Historic Preservation Act of 1966, Public Law 89-665, or chapter 6E;~~

~~(5) Propose any use within the Waikiki area of Oahu, the boundaries of which are delineated in the land use ordinance as amended, establishing the "Waikiki Special District";~~

~~(6) Propose any amendments to existing county general plans where the amendment would result in designations other than agriculture, conservation, or preservation, except actions proposing any new county general plan or amendments to any existing county general plan initiated by a county;~~

~~(7) Propose any reclassification of any land classified as a conservation district by the state land use commission under chapter 205;~~

~~(8) Propose the construction of new or the expansion or modification of existing helicopter facilities within the State, that by way of their activities, may affect:~~

~~(A) Any land classified as a conservation district by the state land use commission under chapter 205;~~

~~(B) A shoreline area as defined in section 205A-41; or~~

~~(C) Any historic site as designated in the National Register or Hawaii Register, as provided for in the Historic Preservation Act of 1966, Public Law 89-665, or chapter 6E; or until the statewide historic places inventory is completed, any historic site that is found by a field reconnaissance of the area affected by the helicopter facility and is under consideration for placement on the National Register or the Hawaii Register of Historic Places; and~~

~~(9) Propose any:~~

~~(A) Wastewater treatment unit, except an individual wastewater system or a wastewater treatment unit serving fewer than fifty single-family dwellings or the equivalent;~~

~~(B) Waste-to-energy facility;~~

~~(C) Landfill;~~

~~(D) Oil refinery; or~~

~~(E) Power-generating facility.]~~

[~~(b)~~] (a) Whenever an agency proposes an action in [~~subsection (a), other than feasibility or planning studies for possible future programs or projects that the agency has not approved, adopted, or funded, or other than the use of state or county funds for the acquisition of unimproved real property that is not a specific type of action declared exempt under section 343-6,~~] section 343-B, the agency shall prepare an environmental assessment, or, based on its discretion, may choose to prepare for a program, a programmatic environmental assessment, for [~~such~~] the action at the earliest practicable time to determine whether an environmental impact statement shall be required[~~.~~]; provided that if the agency determines, through its judgment and experience, that an environmental impact statement is likely to be required, then the agency may choose not to prepare an environmental assessment and

instead shall prepare an environmental impact statement following adequate notice to the public and all interested parties.

(1) For environmental assessments for which a finding of no significant impact is anticipated:

(A) A draft environmental assessment shall be made available for public review and comment for a period of thirty days;

(B) The office shall inform the public of the availability of the draft environmental assessment for public review and comment pursuant to section 343-3;

(C) The agency shall respond in writing to comments received during the review and prepare a final environmental assessment to determine whether an environmental impact statement shall be required;

(D) A statement shall be required if the agency finds that the proposed action may have a significant effect on the environment; and

(E) The agency shall file notice of [~~such~~] the determination with the office. When a conflict of interest may exist because the proposing agency and the agency making the

determination are the same, the office may review the agency's determination, consult the agency, and advise the agency of potential conflicts, to comply with this section. The office shall publish the final determination for the public's information pursuant to section 343-3.

The draft and final statements, if required, shall be prepared by the agency and submitted to the office. The draft statement shall be made available for public review and comment through the office for a period of forty-five days. The office shall inform the public of the availability of the draft statement for public review and comment pursuant to section 343-3. The agency shall respond in writing to comments received during the review and prepare a final statement.

The office, when requested by the agency, may make a recommendation as to the acceptability of the final statement.

(2) The final authority to accept a final statement shall rest with:

(A) The governor, or the governor's authorized representative, whenever an action proposes the use of state lands or the use of state

funds, or whenever a state agency proposes an action within the categories in subsection (a); or

(B) The mayor, or the mayor's authorized representative, of the respective county whenever an action proposes only the use of county lands or county funds.

Acceptance of a required final statement shall be a condition precedent to implementation of the proposed action. Upon acceptance or nonacceptance of the final statement, the governor or mayor, or the governor's or mayor's authorized representative, shall file notice of such determination with the office. The office, in turn, shall publish the determination of acceptance or nonacceptance pursuant to section 343-3.

[~~(c)~~] (b) Whenever an applicant proposes an action specified by [~~subsection (a)~~] section 343-B that requires approval of an agency and that is not a specific type of action declared exempt under that section or section 343-6, the agency initially receiving and agreeing to process the request for approval shall prepare an environmental assessment, or, based on its discretion, may choose to prepare for a program, a programmatic environmental assessment, of the proposed action at the earliest

practicable time to determine whether an environmental impact statement shall be required; provided that if the agency determines, through its judgment and experience, that an environmental impact statement is likely to be required, then the agency may choose not to prepare an environmental assessment and instead shall prepare an environmental impact statement following adequate notice to the public and all interested parties[~~; provided further that, for an action that proposes the establishment of a renewable energy facility, a draft environmental impact statement shall be prepared at the earliest practicable time~~]. The final approving agency for the request for approval is not required to be the accepting authority.

For environmental assessments for which a finding of no significant impact is anticipated:

(1) A draft environmental assessment shall be made available for public review and comment for a period of thirty days;

(2) The office shall inform the public of the availability of the draft environmental assessment for public review and comment pursuant to section 343-3; and

(3) The applicant shall respond in writing to comments received during the review, and the

agency shall prepare a final environmental assessment to determine whether an environmental impact statement shall be required. A statement shall be required if the agency finds that the proposed action may have a significant effect on the environment. The agency shall file notice of the agency's determination with the office, which, in turn, shall publish the agency's determination for the public's information pursuant to section 343-3.

The draft and final statements, if required, shall be prepared by the applicant, who shall file these statements with the office.

The draft statement shall be made available for public review and comment through the office for a period of forty-five days. The office shall inform the public of the availability of the draft statement for public review and comment pursuant to section 343-3.

The applicant shall respond in writing to comments received during the review and prepare a final statement. The office, when requested by the applicant or agency, may make a recommendation as to the acceptability of the final statement.

The authority to accept a final statement shall rest with the agency initially receiving and agreeing to process the request for approval. The final decision-making body or approving agency for the request for approval is not required to be the accepting authority. The planning department for the county in which the proposed action will occur shall be a permissible accepting authority for the final statement.

Acceptance of a required final statement shall be a condition precedent to approval of the request and commencement of the proposed action. Upon acceptance or nonacceptance of the final statement, the agency shall file notice of such determination with the office. The office, in turn, shall publish the determination of acceptance or nonacceptance of the final statement pursuant to section 343-3.

The agency receiving the request, within thirty days of receipt of the final statement, shall notify the applicant and the office of the acceptance or nonacceptance of the final statement. The final statement shall be deemed to be accepted if the agency fails to accept or not accept the final statement within thirty days after receipt of the final statement; provided that the thirty-day period

may be extended at the request of the applicant for a period not to exceed fifteen days.

In any acceptance or nonacceptance, the agency shall provide the applicant with the specific findings and reasons for its determination. An applicant, within sixty days after nonacceptance of a final statement by an agency, may appeal the nonacceptance to the environmental council, which, within thirty days of receipt of the appeal, shall notify the applicant of the council's determination. In any affirmation or reversal of an appealed nonacceptance, the council shall provide the applicant and agency with specific findings and reasons for its determination. The agency shall abide by the council's decision.

[~~(d)~~] (c) Whenever an applicant requests approval for a proposed action and there is a question as to which of two or more state or county agencies with jurisdiction has the responsibility of preparing the environmental assessment, the office, after consultation with and assistance from the affected state or county agencies, shall determine which agency shall prepare the assessment.

[~~(e)~~] (d) In preparing an environmental [~~assessment,~~] review document, an agency or applicant may consider and, where applicable and appropriate, incorporate by reference, in whole or in part, previous [~~determinations of whether a~~

~~statement is required and previously accepted statements.~~] review documents. The council, by rule, shall establish criteria and procedures for the use of previous determinations and statements.

[~~(f)~~] (e) Whenever an action is subject to both the National Environmental Policy Act of 1969 (Public Law 91-190) and the requirements of this chapter, the office and agencies shall cooperate with federal agencies to the fullest extent possible to reduce duplication between federal and state requirements. Such cooperation, to the fullest extent possible, shall include joint environmental impact statements with concurrent public review and processing at both levels of government. Where federal law has environmental impact statement requirements in addition to but not in conflict with this chapter, the office and agencies shall cooperate in fulfilling these requirements so that one document shall comply with all applicable laws.

(f) Upon receipt of a timely written request and good cause shown, a lead agency, approving agency, or accepting authority may extend a public review and comment period required under this section one time only, up to fifteen days. To be considered a timely request, the request for an extension shall be made before the end of the public review and comment period. An extension of a public review

and comment period shall be communicated by the lead agency in a timely manner to all interested parties.

(g) A statement that is accepted with respect to a particular action shall satisfy the requirements of this chapter, and no other statement for the proposed action, other than a supplement to that statement, shall be required."

SECTION 10. Section 343-6, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) After consultation with the affected agencies, the council shall adopt, amend, or repeal necessary rules for the purposes of this chapter. Any such rules may be issued as interim rules by adoption and filing with the lieutenant governor, and by posting the interim rules on the lieutenant governor's website. Interim rules adopted pursuant to this Act shall be exempt from the public notice, public hearing, and gubernatorial approval requirements of chapter 91 and the requirements of chapter 201M, Hawaii Revised Statutes, and shall take effect upon filing with the lieutenant governor. All interim rules adopted pursuant to this section shall be effective only through June 30, 2014. For any new or expanded programs, services, or benefits that have been implemented under interim rules to continue in effect beyond June 30, 2014,

the environmental council shall adopt rules in conformance with all the requirements of chapter 91 and chapter 201M, Hawaii Revised Statutes. Such rules shall include but not be limited to rules that shall [~~in accordance with chapter 91 including, but not limited to, rules that shall~~]:

(1) Prescribe the procedures whereby a group of proposed actions may be treated by a single environmental assessment or statement;

(2) Establish procedures whereby specific types of actions, because they will probably have minimal or no significant effects on the environment, are declared exempt from the preparation of an environmental assessment, and ensuring that the declaration is simultaneously transmitted electronically to the office and is readily available as a public record in a searchable electronic database;

(3) Prescribe procedures for the preparation of an environmental assessment;

(4) Prescribe the contents of, and page limits for, an environmental assessment;

(5) Prescribe procedures for informing the public of determinations that a statement is either required or not required, for informing the

public of the availability of draft environmental impact statements for review and comments, and for informing the public of the acceptance or nonacceptance of the final environmental statement;

(6) Prescribe the contents of, and page limits for, an environmental impact statement;

(7) Prescribe procedures for the submission, distribution, review, acceptance or nonacceptance, and withdrawal of an environmental impact statement;

(8) Establish criteria to determine whether an environmental impact statement is acceptable or not; [~~and~~]

(9) Prescribe procedures to appeal the nonacceptance of an environmental impact statement to the environmental council[~~.~~];

(10) Prescribe procedures, including use of electronic technology for the comment and response process, including procedures for issuing one comprehensive response to multiple or repetitious comments that are substantially similar in content;

(11) Prescribe procedures for implementing the requirement for records of decision, monitoring, and mitigation;

(12) Develop guidance for the application and interpretation of the significance criteria under chapter 343-A;

(13) Prescribe procedures and guidance for the preparation of programmatic environmental assessments or impact statements and the tiering of project-specific environmental assessments or impact statements;

(14) Prescribe:

(A) Procedures for the applicability, preparation, acceptance, and publication of supplemental environmental assessments and supplemental environmental impact statements when there are substantial changes in the proposed action or significant new circumstances or information relevant to environment effects and bearing on the proposed action and its impacts;

(B) Procedures for limiting the duration of the validity of environmental assessments and environmental impact statements, or if an

environmental assessment led to the preparation of an environmental impact statement, then of the later-prepared statement, to seven years or less from the date of acceptance of the document until all state and county discretionary approvals are fully completed for the action; and

(C) Procedures for an agency or applicant to seek a timely determination from the council that a prior environmental assessment or environmental impact statement contains sufficiently current information such that a supplemental document is not warranted despite the passage of the prescribed time period; and

(15) To provide guidance to agencies and applicants about the applicability of the environmental review system, establish procedures whereby each state and county agency shall maintain lists of (a) specific types of discretionary approvals that may have probable, significant, and adverse environmental effects, (b) ministerial actions that do not require environmental review, and (c)

those actions that require a case-by-case determination of applicability."

(b) Except for the promulgation of interim rules pursuant to subsection (a) of this section, at least one public hearing shall be held in each county prior to the final adoption, amendment, or repeal of any rule.

SECTION 11. Section 343-7, Hawaii Revised Statutes, is amended to read as follows:

"**§343-7 Limitation of actions.** (a) Any judicial proceeding, the subject of which is the lack of an environmental assessment required under section 343-B or 343-5, or the lack of a supplemental environmental assessment or supplemental impact statement, shall be initiated within one hundred twenty days of the agency's decision to carry out or approve the action, or, if a proposed action is undertaken without a formal determination by the agency that an assessment, supplement, or statement is or is not required, a judicial proceeding shall be instituted within one hundred twenty days after the proposed action is started. The council or office, any agency responsible for approval of the action, or the applicant shall be adjudged an aggrieved party for the purposes of bringing judicial action under this subsection. Others, by court action, may be adjudged aggrieved.

(b) Any judicial proceeding, the subject of which is the determination that a statement is required for a proposed action, shall be initiated within sixty days after the public has been informed of [~~such~~] the determination pursuant to section 343-3. Any judicial proceeding, the subject of which is the determination that a statement is not required for a proposed action, shall be initiated within thirty days after the public has been informed of [~~such~~] the determination pursuant to section 343-3. The council or the applicant shall be adjudged an aggrieved party for the purposes of bringing judicial action under this subsection. Others, by court action, may be adjudged aggrieved. Affected agencies and persons who provided written comment to the assessment during the designated review period shall be judged aggrieved parties for the purpose of bringing judicial action under this subsection; provided that the contestable issues shall be limited to issues identified and discussed in the written comment.

(c) Any judicial proceeding, the subject of which is the acceptance of an environmental impact statement required under section 343-B or 343-5, shall be initiated within sixty days after the public has been informed pursuant to section 343-3 of the acceptance of [~~such~~] the statement. The council shall be adjudged an aggrieved

party for the purpose of bringing judicial action under this subsection. Affected agencies and persons who provided written comment to [~~such~~] the statement during the designated review period shall be adjudged aggrieved parties for the purpose of bringing judicial action under this subsection; provided that the contestable issues shall be limited to issues identified and discussed in the written comment."

SECTION 12. Section 353-16.35, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) Notwithstanding any other law to the contrary, the governor, with the assistance of the director, may negotiate with any person for the development or expansion of private in-state correctional facilities or public in-state turnkey correctional facilities to reduce prison overcrowding; provided that if an environmental assessment or environmental impact statement is required for a proposed site or for the expansion of an existing correctional facility under section 343-B or 343-5, then notwithstanding the time periods specified for public review and comments under section 343-5, the governor shall accept public comments for a period of sixty days following

public notification of either an environmental assessment or an environmental impact statement."

PART III.

SECTION 13. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date, and does not affect the rights and duties related to any environmental assessment or environmental impact statement for which a draft has been prepared and public notice thereof published by the office before the effective date of the act.

SECTION 14. In codifying the new sections added by section 1 and section 5 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

SECTION 15. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 16. This Act shall take effect on July 1, 2012.

INTRODUCED BY: _____

Report Title:
Environmental Protection

Description:
Transfers the office of environmental quality control and the environmental council from the department of health to the department of land and natural resources. Reduces the membership of the environmental council from 15 to 7. Requires the director of the office of environmental quality control to seek advice from and assist the council on environmental quality matters and to perform environmental outreach and education. Requires the office of environmental quality control to maintain an electronic communication system. Delegates all rulemaking authority to the environmental council. Requires the director of the office of environmental quality control to prepare an annual report assessing system effectiveness. Requires the environmental council to serve in advisory capacity to the governor. Creates the environmental review special fund. Directs the director of the office of environmental quality control to establish reasonable administrative fees for the environmental review process.

Requires an environmental review for actions that require a discretionary approval. Excludes actions solely for utility or right-of-way connections from environmental assessment requirement. Prescribes what types of activities have a significant effect on the environment. Requires agencies to prepare a record of decision and monitor mitigation measures. Allows agencies to extend notice and comment periods. Directs the environmental council to adopt rules for: (1) Determining significant effects; (2) Responding to repetitious comments; (3) preparing programmatic and tiered reviews; (4) Prescribing conditions under which supplemental assessments and statements must be prepared; and (5) Establishing procedures for state and county agencies to maintain guidance lists of approvals that are a) discretionary and require review, (b) ministerial and do not require review, and (c) those actions to be determined on a case-by-case basis.

Appendix 8. Alternate 341

An Alternative Approach to Governance:
Amendments to Chapter 341 Different Than Those
Proposed in the Omnibus Bill

This background document presents an alternative approach to governance that was carefully considered but not preferred by the UH Environmental Review Study. The purpose of providing this alternative approach as part of the study's background documents on the study website is to facilitate transparency about the study's deliberative process and to facilitate further discussion of these important issues.

Instead of elevating the role of the Environmental Council, as proposed in the study's Omnibus Bill (attached as Appendix 3 to the Jan. 1, 2010 Report), this alternative approach would amend Chapter 341 to significantly expand the role and authority of OEQC, transform the Environmental Council into a smaller advisory body to advise to OEQC and retain only their "liaison to the public" function, and shift to OEQC the Council's current duties of rulemaking, exemption lists, and the annual report.

Some of the study team's recommendations are common to both the Omnibus Bill and to this alternative approach. In this "full text" version of Chapter 341,[4] the common recommendations are noted in *italics*. Amendments are underlined; deletions are in ~~strikethrough~~ and brackets. The footnotes provide brief explanations as well as links to the (common) numbered recommendations in the January 2010 Report to the Legislature.

Chapter 341 - Environmental Quality Control.

HRS § 341-1 - Findings and purpose. The legislature finds that the quality of the environment is as important to the welfare of the people of Hawaii as is the economy of the State. The legislature further finds that the determination of an optimum balance between economic development and environmental quality deserves the most

[4] To avoid confusion with the proposed omnibus bill, a bill format is not provided for this alternative approach to governance although the Legislative Reference Bureau did generously assist the study team with preliminary drafting of this alternative in bill format. Furthermore, this document is current with the January 2010 report submitted to the legislature and was not be updated to reflect any changes to the omnibus bill as it moved through the legislative process.

thoughtful consideration, and that the maintenance of the optimum quality of the environment deserves the most intensive care.

The purpose of this chapter is to stimulate, expand and coordinate efforts to determine and maintain the optimum quality of the environment of the State.

HRS § 341-2 - Definitions. As used in this chapter, unless the context otherwise requires:

"Center" means the University of Hawaii [~~*ecology or*~~][5] environmental center established in section 304A-1551.

"Council" means the environmental council established in section 341-3(C).

"Director" means the director *of the office*[6] of environmental quality control.

"Office" means the office of environmental quality control established in section 341-3(A).

"University" means the University of Hawaii.

HRS § 341-3 - Office of environmental quality control; environmental center; environmental council. (a) There is created an office of environmental quality control that shall be headed by a single executive to be known as the

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[5] Deletes "ecology" as duplicative, archaic, and uses actual name of center.

[6] Minor housekeeping change for consistency with other sections of the statute.

director of *the office of*[7] environmental quality control who shall be appointed by the governor as provided in section 26-34. This office shall implement this chapter and shall be placed within the department of [~~*health*~~] *land and natural resources,*[8] for administrative purposes. The office shall perform [~~*its*~~] *the* duties *prescribed to it* under chapter 343 and shall serve the governor in an advisory capacity on all matters relating to environmental quality control.

(b) The environmental center within the University of Hawaii shall be as established under section [~~+~~]304A-1551[~~+~~].[9]

(c) There is created an environmental council not to exceed [~~fifteen~~] seven[10] members. [~~Except for the director, members~~] The council shall include one member from each county and no more than three at-large members. The

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[7] Housekeeping change for consistency.

[8] See Rec. 4.2.1.b. Because of the steep decline in financial and staff support for the council and the office over the past several years, OEQC should be moved from the Department of Health to another agency that is more aligned with and supportive of its mission. DLNR is the best option because of its environmental protection mission and expertise in natural resources.

[9] Note that the UH Environmental Center is no longer in Chapter 341 but moved to HRS § 304A-1551 (in 2006) because it is a unit of the University; this was part of a legislative recognition and shift toward autonomy for the University. While recognizing the University's autonomy, the study believes the center plays a valuable role in the environmental review process and urges the University to support the Center.

[10] See Rec. 4.2.1.a.

director may not serve as a member of the council.[11] Members[12] of the environmental council shall be appointed by the governor, as provided in section 26-34, provided that two of the seven members shall be appointed from a list of persons *nominated* by the speaker of the *house* of representatives and two members shall be appointed from a list of persons *nominated* by the *senate* president[13]. The council shall be attached to the [~~department of health~~] office[14] for administrative purposes[15]. [~~Except for the director, the~~] The term of each member shall be four years; provided that, of the members initially appointed, [~~five~~] three members shall serve for four years, [~~five~~] two members shall serve for three years, and the remaining [~~four~~] two members shall serve for two years. Vacancies shall be filled for the

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[11] See Rec. 4.2.1.a.

[12] See Rec. 4.2.1.a. This change streamlines the Council membership from fifteen to seven, and reduces overall costs, by reducing the number of members while still maintaining statewide representation. Explicitly attaches the Council to OEQC to clarify that it does not report to the Deputy Director of DOH and can receive support from OEQC, which is currently not the case (according to DOH).

[13] See Rec. 4.2.1.a. This amendment ensures that the Council is an independent body from the Governor's office and provides input from the House and Senate on four of the seven members. This split nomination process is based on similar procedures in other Hawaii statutes, such as HRS § 6E-44 (Veterans Memorial Commission).

[14] See Rec. 4.2.1.a.

[15] "For administrative purposes" (in existing law) should mean for line item, fiscal, and staff support, not for control over the substance of the Council's work.

remainder of any unexpired term in the same manner as original appointments. [~~The director shall be an ex officio voting member of the council.~~][16] The council chairperson shall be elected by the council from among the [~~appointed~~][17] members of the council.

Members shall be appointed to [~~assure~~] ensure a broad and balanced representation of educational, business, and environmentally pertinent disciplines and professions[~~, such as the natural and social sciences, the humanities, architecture, engineering, environmental consulting, public health, and planning; educational and research institutions with environmental competence; agriculture, real estate, visitor industry, construction, media, and voluntary community and environmental groups~~].[18] The members of the council shall serve without compensation but shall be reimbursed for expenses, including travel expenses,

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[16] See Rec. 4.2.1.a. This amendment recognizes the Council's clarified role as an independent advisor to the Governor, and that OEQC staffs but does not direct the Council; the Director should no longer be a member of the Council (similar to the Land Use Commission, where the Executive Director is not on the LUC).

[17] See Rec. 4.2.1.a. Same purpose as noted above, to ensure independence.

[18] See Rec. 4.2.1.a. Representativeness of Council members is desirable but given the reduced size of the Council, a strict and detailed list of categories does not make sense; the prior sentence already directs representativeness. The Governor's nomination process, the Senate and House nomination lists, and the Senate's confirmation role are an adequate check on the quality and diversity of the Council appointments by the Governor.

incurred in the discharge of their duties.

HRS § 341-4 - Powers and duties of the director

(a) The director shall have *[~~such~~]* powers delegated by the governor as are necessary to coordinate and, when requested by the governor, to direct, pursuant to chapter 91, all state governmental agencies in matters concerning environmental quality.

(b) To further the objective of subsection (a), the director shall:

(1) Direct the attention of *[~~the university community~~]* *state agencies* and the residents of the State *[~~in general~~]* to *[~~ecological and~~]* environmental problems *[~~through~~]*, *in cooperation with* the center and the council*[~~, respectively, and through public education programs~~]*;

(2) Conduct research or arrange for *[~~the conduct of~~]* research through contractual relations with the center, state agencies, or other persons with competence in *[~~the field of ecology and~~]* environmental quality;

(3) Encourage public acceptance of proposed legislative and administrative actions concerning *[~~ecology and~~]* environmental quality, and receive notice of any private or public complaints

concerning *[~~ecology and~~]* environmental quality through the council;

(4) Recommend programs for long-range implementation of environmental quality control;

(5) Submit directly to the governor and *[~~to~~]* the legislature [*~~such legislative~~*] bills and administrative policies, objectives, and actions, as are necessary to preserve and enhance the environmental quality of the State;

(6) Conduct *regular outreach and training*[19] *for state and county agencies on the environmental review process and conduct other* public educational programs; *[~~and~~]*

(7) Offer advice and assistance to private industry, governmental agencies, *non-governmental organizations, state residents,*[20] or other persons upon request*[~~.~~];*

(8) Obtain advice from the environmental council[21] *on any matters concerning environmental quality;*

(9) Perform budgeting and hiring in a manner that ensures adequate funding and staff support for

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[19] See Rec. 4.2.2.a.

[20] See Rec. 4.2.2.a.

[21] See Rec. 4.2.1.a.

the council[22] *to carry out its duties under this chapter and chapter 343; and*

(10) With the cooperation of private industry, governmental agencies, non-governmental organizations, state residents, and other interested persons in fulfilling the requirements of this subsection, conduct annual statewide workshops and publish an annual state environmental review guidebook or supplement to assist persons in complying with this chapter, chapter 343, and administrative rules adopted thereunder; provided that workshops, guidebooks, and supplements shall include:[23]

(A) Assistance for the preparation, processing, and review of environmental review documents;

(B) Review of relevant court decisions affecting this chapter, chapter 343, and administrative rules adopted thereunder;

(C) Review of amendments to this chapter; chapter 343, other relevant laws, and administrative rules adopted thereunder; and

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[22] See Rec. 4.2.1.a.

[23] See Rec. 4.2.2.a.

(D) Any other information that may facilitate the efficient implementation of this chapter, chapter 343, and administrative rules adopted thereunder.

(c) The director shall adopt rules pursuant to chapter 91 necessary for the purposes of implementing this chapter[~~.~~] and chapter 343[24]; and

(d) To facilitate agency and public participation in the review process, the office shall create and maintain an electronic communication system, such as a website, to meet best practices of environmental review, as determined by the director.[25]

§341-4.A Annual report.[26] *No later than January 31 of each year, at the direction of the council, the director shall prepare a report that analyzes the effectiveness of the State's environmental review system during the prior year. The report shall include an assessment of a sample of environmental assessments and environmental impact statements for completed projects. At the request of the director or the council, state and county agencies shall*

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[24] This would be a major shift in rulemaking responsibilities, from the Council to OEQC.

[25] See Rec. 4.2.2.b. In the omnibus bill, this amendment is added to (c) not as a new (d) but is otherwise the same.

[26] See Rec. 4.2.2.a.

provide information to assist in the preparation of the annual report.

HRS § 341-5 - Repealed

HRS § 341-6 - *[~~Functions~~] Duties* of the environmental council[27]

(a) The council shall serve as a liaison between the director and the general public by soliciting information, opinions, complaints, recommendations, and advice concerning *[~~ecology and~~]* environmental quality through public hearings or any other means and by publicizing *[~~such~~] these* matters as requested by the director pursuant to section 341-4(b)(3).

(b) The council may make recommendations concerning *[~~ecology and~~]* environmental quality to the director and shall meet at the call of the council chairperson or the director upon notifying the council chairperson. [~~The council shall monitor the progress of state, county, and federal agencies in achieving the State's environmental goals and policies with the assistance of the director shall make an annual report with recommendations for improvement to the governor, the legislature, and the public no later than January 31 of each year. All state~~

[27] Adopted LRB's proposed structure and format for revisions to this section.

~~and county agencies shall cooperate with the council and assist in the preparation of such a report by responding to requests for information made by the council. The council may delegate to any person such power or authority vested in the council as it deems reasonable and proper for the effective administration of this section and chapter 343, except the power to make, amend, or repeal rules.~~][28]

§341-B Environmental review special fund; use of funds.[29]

(a) There is established in the state treasury the environmental review special fund, into which shall be deposited:

(1) All filing fees and other administrative fees collected by the office;

(2) All accrued interest from the special fund; and

(3) Moneys appropriated to the special fund by the legislature.

(b) Moneys in the environmental review special fund shall be supplemental to, and not a replacement for, the office budget base[30] *and be used to:*

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[28] This amendment would reduce significantly the duties of the Environmental Council by eliminating the current annual report. OEQC would be required to prepare a new kind of annual report (see 341-4.A).

[29] See Rec. 4.2.1.c.

[30] See Rec. 4.2.1.c.

(1) Fund the activities of the office and the council in fulfillment of their duties pursuant to this chapter and chapter 343, including administrative and office expenses; and

(2) Support outreach, training, education, and research programs pursuant to section 341-4.

§341-C Fees. *The director shall adopt rules, pursuant to chapter 91, that establish reasonable fees for filing, publication, and other administrative services of the office or council pursuant to this chapter and chapter 343.*[31]

Note: cross-amendment to 343-6 Rules would amend (a) to read: "After consultation with the affected agencies, the [~~council~~] director[32] shall adopt, amend, or repeal necessary rules for the purposes of this chapter . . ."

[Note: Additional "standard" provisions in the proposed bill:]

SECTION 2. All rules, policies, procedures, orders, guidelines, and other material adopted, issued, or developed by the office of environmental quality control

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[31] See Rec. 4.2.1.c.

[32] This would expressly shift the rulemaking authority from the Council to OEQC.

within the department of health to implement provisions of the Hawaii Revised Statutes shall remain in full force and effect until amended or repealed by the office of environmental quality control or the environmental council within the department of land and natural resources.[33]

SECTION 3. All appropriations, records, equipment, machines, files, supplies, contracts, books, papers, documents, maps, and other personal property heretofore made, used, acquired, or held by the office of environmental quality control or the environmental council within the department of health relating to the functions transferred to the department of land and natural resources[34] *shall be transferred with the functions to which they relate.*

SECTION 4. All rights, powers, functions, and duties of the office of environmental quality control or the environmental council within the department of health are transferred to the office of environmental quality control or the environmental council within the department of land and natural resources.[35]

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[33] See Rec. 4.2.1.b.

[34] See Rec. 4.2.1.b.

[35] See Rec. 4.2.1.b.

All officers and employees whose functions are transferred by this Act shall be transferred with their functions and shall continue to perform their regular duties upon their transfer, subject to the state personnel laws and this Act.

No officer or employee of the State having tenure shall suffer any loss of salary, seniority, prior service credit, vacation, sick leave, or other employee benefit or privilege as a consequence of this Act, and such officer or employee may be transferred or appointed to a civil service position without the necessity of examination; provided that the officer or employee possesses the minimum qualifications for the position to which transferred or appointed; and provided that subsequent changes in status may be made pursuant to applicable civil service and compensation laws.

An officer or employee of the State who does not have tenure and who may be transferred or appointed to a civil service position as a consequence of this Act shall become a civil service employee without the loss of salary, seniority, prior service credit, vacation, sick leave, or other employee benefits or privileges and without the necessity of examination; provided that such officer or

employee possesses the minimum qualifications for the position to which transferred or appointed.

If an office or position held by an officer or employee having tenure is abolished, the officer or employee shall not thereby be separated from public employment, but shall remain in the employment of the State with the same pay and classification and shall be transferred to some other office or position for which the officer or employee is eligible under the personnel laws of the State as determined by the head of the department or the governor.

SECTION 5. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 6. This Act shall take effect on July 1, 2012.[36]

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[36] The effective date of 2012 is to facilitate an appropriate transition time for the changes proposed in the bill and for the transfer of functions, departments, and expanded duties of OEQC and the Council.

Appendix 9. Alternate 343

An Alternative Approach to Applicability:
Amendments to Chapter 343 Different Than Those
Proposed in the Omnibus Bill

This background document presents an alternative approach to applicability that was carefully considered but not preferred by the UH Environmental Review Study. The purpose of providing this alternative approach as part of the study's background documents on the study website is to facilitate transparency about the study's deliberative process and further discussion of these important issues.

Instead of a new "discretionary approval" and "probable, significant, and adverse environmental effects" screen proposed in the Omnibus Bill, this alternative approach would have made various modifications to the existing trigger system. The primary difference is seen in various amendments to HRS § 343-5(a) below.

Many of the study team's recommendations are common to both the Omnibus Bill and to this alternative approach. In this "full text" version of Chapter 343,[37] the common recommendations are noted in *italics*. Amendments are underlined; deletions are in ~~strikethrough~~ and brackets. The footnotes provide brief explanations as well as links to the (common) numbered recommendations in the January 2010 Report to the Legislature.

[37] To avoid confusion with the proposed omnibus bill, a bill format is not provided for this alternative approach to applicability although the Legislative Reference Bureau did generously assist the study team with preliminary drafting of this alternative in bill format. Furthermore, this document is current with the January 2010 report submitted to the legislature and was not be updated to reflect any changes to the omnibus bill as it moved through the legislative process.

Chapter 343 - Environmental Impact Statements[38]

§343-1 Findings and purpose. The legislature finds that the quality of humanity's environment is critical to humanity's well being, that humanity's activities have broad and profound effects upon the interrelations of all components of the environment, and that an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects *that* ~~*which*~~ may result from the implementation of certain actions. The legislature further finds that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.

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[38] One major type of stylistic amendment not discussed in the report but considered desirable would be to rewrite Sections 343-5(b) and (c) to consolidate the duplicative sections in the applicant and agency action sections, then indicate in another section the distinctive language. For clarity and ease of reference, these sections could also be numbered separately from the trigger section 343-5(a). Currently § 343-5 is long, duplicative, and rambling. This kind of stylistic change may, however, cause some confusion and should be done only after the substantive changes are finalized and after an assessment of whether the reordering would, on balance, aid or hinder clarity for those involved in the environmental review system. Other stylistic amendments are suggested to modernize language or improve the organization of the statute.

It is the purpose of this chapter to establish a system of environmental review *that* *[~~which~~]* will ensure that environmental concerns are given appropriate consideration in decision-making along with economic and technical considerations.

§343-2 Definitions. As used in this chapter unless the context otherwise requires:

"Acceptance" means a formal determination that the document required to be filed pursuant to section 343-5 fulfills the definition of an environmental impact statement, adequately describes identifiable environmental impacts, and satisfactorily responds to comments received during the review of the statement.

"Action" means any program or project to be initiated by any agency or applicant*[~~.~~]* *that:*

(1) Is directly undertaken by any agency;

(2) Is supported in whole or in party by contracts, grants, subsidies, or loans from one or more agencies; or

(3) Involves the issuance to a person of a discretionary approval, such as a permit, by one or more agencies.[39]

[39] See Rec. 4.1.1.a.

The term "action" shall not include official acts of a ministerial nature that involve no exercise of discretion.[40]

"Agency" means any department, office, board, or commission of the state or county government *that* *[~~which~~]* is a part of the executive branch of that government.

"Applicant" means any person who, pursuant to statute, ordinance, or rule, officially requests approval for a proposed action.

"Approval" means a discretionary *approval* *[~~consent~~]*[41] required from an agency prior to actual implementation of an action.

"Council" means the environmental council.

"Cumulative effects" means the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (county, state, or federal) takes those actions; cumulative

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[40] See Rec. 4.1.1.a. This definition is derived from New York's State Environmental Quality Review (SEQR) law, 6 NYCRR § 617.2(w) ("Ministerial act means an action performed upon a given state of facts in a prescribed manner imposed by law without the exercise of any judgment or discretion as to the propriety of the act, such as the granting of a hunting or fishing license."); see also id. § 617.5(c)(19) (exempting from review "official acts of a ministerial nature involving no exercise of discretion, including building permits and historic preservation permits where issuance is predicated solely on the applicant's compliance or noncompliance with the relevant local building or preservation code(s)").

[41] This amendment is not intended to change the meaning, but to update the terminology, the same as the proposed amendment to "Discretionary consent," below.

effects can result from individually minor but collectively significant actions taking place over a period of time.[42]

"Discretionary *approval*"[43] *[~~consent~~]* means *an approval,* consent, sanction, or recommendation from an agency for which judgment and free will may be exercised by the issuing agency, as distinguished from a ministerial *approval [~~consent~~]*.[44]

"Environmental assessment" means a written evaluation to determine whether an action may have a significant effect.

"Environmental impact statement" or "statement" means an informational document prepared in compliance with the

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[42] See Rec. 4.1.1.b. & Rec. 4.4.3. This definition is added at the suggestion of LRB because of the amendment moving the "significance criteria" from the rules to the statute. This definition is derived from HAR § 11-200-2 (definition of "cumulative impact"), which is based on NEPA's CEQ Regulations, 40 C.F.R. § 1508.7 "Cumulative Impact." The term "cumulative effects" is used here instead of "cumulative impact," but there is not a distinction in Hawaii and NEPA between the terms "effect" and "impact"; see HAR § 11-200-2 ("effects" or "impacts" have the same meaning); "effect" is preferred here to keep the reference and abbreviation of this term distinct (as "CE" instead of "CI") from Hawaii's cultural impact analysis requirement (sometimes also called by the short hand "CI" or "CIA."

[43] See Rec. 4.1.1.b. This amendment is not intended to change the meaning of this definition but to update the terminology in light of current environmental review practice; the term "discretionary approval" is more commonly used than "discretionary consent," which seems to be used only in Hawaii. See California's CEQA regulations, 14 Cal. Code Regs. Art. 20 (Definitions), § 15377 ("Private Project") and § 15381 ("Responsible Agency"). The term "consent" is maintained here as part of the definition for continuity with existing law and to indicate no change in the meaning.

[44] See prior note re updating terminology from "consent" to "approval."

rules adopted under section 343-6 and *[~~which~~]* *that* discloses the*:*

(1)[45] *[~~environmental~~]* *Environmental* effects of a proposed action*~~,~~;*

(2) *[~~effects~~]* *Effects* of a proposed action on the economic welfare, social welfare, and cultural practices of the community and State*~~,~~;*

(3) *[~~effects~~]* *Effects* of the economic activities arising out of the proposed action*~~,~~;*

(4) *[~~measures~~]* *Measures* proposed to minimize adverse effects*~~,~~;* and

(5) *[~~alternatives~~]* *Alternatives* to the action and their environmental effects.

The initial statement filed for public review shall be referred to as the draft statement and shall be distinguished from the final statement*,* which is the document that has incorporated the public's comments and the responses to those comments. The final statement is the document that shall be evaluated for acceptability by the respective accepting authority.

"Environmental review" refers broadly to the entire process prescribed by chapter 341 and this chapter,

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[45] No substantive change intended; numbered for clarity at the suggestion of LRB.

applicable to applicants, agencies, and the public, of scoping, reviewing, publishing, commenting on, finalizing, accepting, and appealing required documents such as environmental assessments and environmental impact statements; any variations of these documents such as preparation notices, findings of no significant impact, programmatic reviews,[46] *and supplemental*[47] *documents; any exemptions thereto; and any decisions not to prepare these documents.*

"Finding of no significant impact" means a determination based on an environmental assessment that the subject action will not have a significant effect and, therefore, will not require the preparation of an environmental impact statement.

[~~"Helicopter facility" means any area of land or water which is used, or intended for use for the landing or takeoff of helicopters; and any appurtenant areas which are used, or intended for use for helicopter related activities or rights-of-way.~~][48]

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[46] See Rec. 4.1.2.

[47] See Rec. 4.5.2.

[48] This definition is no longer necessary because the heliport trigger is removed from the statute under this modified trigger approach (as well as the "discretionary approval" approach. See Rec. 4.1.1.c.)

"Ministerial approval" means a governmental decision involving little or no personal judgment by the public official and involving only the use of fixed standards or objective measurements.[49]

"Office" means the office of environmental quality control.

"Permit" means a determination, order, or other documentation of approval, including the issuance of a lease, license, permit, certificate, variance, approval, or other entitlement for use, granted to any person by an agency for an action.[50]

"Person" includes any individual, partnership, firm, association, trust, estate, private corporation, or other legal entity other than an agency.

"Primary effect" or "direct effect" means effects that are caused by the action and occur at the same time and place.[51]

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[49] See Rec. 4.1.1.b. Defines "ministerial" to distinguish it more clearly from "discretionary." See definition above of "discretionary action," which attempts to distinguish "ministerial" but no definition is provided of "ministerial." This definition is derived from California's CEQA regulations 14 Cal. Code Regs. § 15369 ("Ministerial").

[50] See Rec. 4.1.1.b. This definition of "permit" is needed for clarity and cross-referencing with the ROD amendment, Rec. 4.4.1. The proposed definition is derived from Massachusetts's statute (MEPA), Mass. Gen. Laws ch. 30 § 62 (Definitions).

[51] See Rec. 4.1.1.b. This definition is added at the suggestion of LRB, because of the amendment moving the "significance criteria" from

"Power-generating facility" means:

(1) A new, fossil-fueled, electricity-generating facility, where the electrical output rating of the new equipment exceeds 5.0 megawatts; or

(2) An expansion in generating capacity of an existing, fossil-fueled, electricity-generating facility, where the incremental electrical output rating of the new equipment exceeds 5.0 megawatts.[52]

"Program" means a systematic, connected, or concerted applicant or discretionary agency action to implement a specific policy, plan, or master plan.[53]

"Programmatic" means a comprehensive environmental review of a program, policy, plan or master plan.[54]

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the rules to the statute. The definition is derived from existing Council rules, HAR § 11-200-2 ("'Primary impact' or 'primary effect' or 'direct impact' or 'direct effect' means effects which are caused by the action and occur at the same time and place.").

[52] See Rec. 4.1.1.c. This specific trigger is no longer necessary if discretionary approval review is adopted.

[53] See Rec. 4.1.1.b. This definition is derived from the NEPA/CEQ Regulations, 40 C.F.R. § 1508.18(b)(4).

[54] See Rec. 4.1.2. This new definition complements the new definition of "program" and seeks to encourage but not require, through an express definition, the practice of preparing programmatic environmental reviews, which are common at the federal level under NEPA, are familiar to Hawaii practitioners who work on NEPA documents, and often used in other states (see, e.g., California's CEQA regulations, 14 Regs. § 15168,"Program EIR"). Some "master plan" reviews are currently conducted in Hawaii, see, e.g., State Department of Transportation Oahu Commercial Harbors 2020 Master Plan EIS (Sept. 1999), but the term "programmatic" is not in common use. Programmatic reviews serve the

"Project" means an activity that may cause either a direct or indirect physical effect on the environment, such as construction or management activities located in a defined geographic area.[55]

"Renewable energy facility" has the same meaning as defined in section 201N-1.

"Secondary effects" or "indirect effect" means effects that are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air, water, and other natural systems, including ecosystems.[56]

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purpose of "front loading" the review of environmental impacts at the broadest level and at the earliest practicable stage, better integrate environmental review with the planning process and decreasing the scope and burden for the later-tiered project-specific documents. See, e.g., California's CEQA regulations, 14 Cal. Code Regs. § 15168(b) (describing the advantages of a program EIR).

[55] See Rec. 4.1.1.b. This definition is derived from California's CEQA regulations, 14 Cal. Code Regs. § 15257 ("Discretionary Project"), § 15369 ("Ministerial"), and § 15378 ("Project") ("'Project' means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . .").

[56] See Rec. 4.4.3. This definition is added at the suggestion of LRB, because of the amendment moving the "significance criteria" from the rules to the statute. The definition is derived from existing Council rules, HAR § 11-200-2 ("Secondary impact" or "secondary effect" or "indirect impact" or "indirect effect" means [definition continues as indicated in the proposed rule].)"

"Significant effect" means the sum of effects on the quality of the environment[~~, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the State's environmental policies or long-term environmental goals as established by law, or adversely affect the economic welfare, social welfare, or cultural practices of the community and State~~].[57]

"Tiering" means the incorporation by reference in a project-specific environmental assessment or environmental impact statement to a previously conducted programmatic environmental assessment or environmental impact statement for the purposes of showing the connections between the project-specific document and the earlier programmatic review, avoiding unnecessary duplication, and concentrating the analysis on the project-specific issues that were not previously reviewed in detail at the programmatic level.[58]

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[57] See Rec. 4.1.4. This proposed deletion does *not* signify a change in intent or meaning; rather, *assuming* that the significant criteria, which are currently in the rules, *are added* to the statute (see below), this long definition becomes duplicative here.

[58] See Rec. 4.1.2. This definition of "tiering" is a twin to the definition of "programmatic." Tiering a project-specific EA (or EIS) "into" a previously prepared programmatic EA (or EIS) can be very efficient (particularly for private applicants) because it reduces the size and scope of the later-prepared document (typically prepared by agencies). The tiered EA/EIS can be more narrowly focused on the project specific issues and incorporate (that is, refer to) but no duplicate the broader reviews to the earlier document. Definition does not have a specific source. The CEQ definition of "tiering" is:

"Wastewater treatment unit" means any plant or facility used in the treatment of wastewater.

§343-3 Public *participation*,[59] records, and notice.

(a) All statements, environmental assessments, and other documents prepared under this chapter shall be made available for inspection by the public *at minimum through the electronic communication system maintained by the office*[60] *and, if specifically requested due to lack of electronic access, also through printed copies available through the office ~~during established office hours~~.*[61]

"refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basin-wide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:
(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis or lesser scope or to a site-specific statement or analysis.
(b) From an environmental impact statement on a specific action at an early state (such as need or site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe."). 40 C.F.R. § 508.28.

[59] See Rec. 4.3.1.a. This amendment emphasizes the importance of "public participation," as opposed to mere "notice." This heading change and the addition of a general policy goal, below, should encourage agencies to facilitate public involvement throughout the environmental review process, which is a stated goal of Chapter 343 (see § 343-1 Findings and purpose: "public participation during the review process benefits all parties involved and society as a whole").

[60] See Rec. 4.2.2.b.

[61] See Rec. 4.2.2.b. This proposed amendment is not a significant change and merely reflects the proposed change to § 341-4 that supports

(b) The office shall inform the public of notices filed by agencies of the availability of environmental assessments for review and comments, of determinations that statements are required or not required, of the availability of statements for review and comments, and of the acceptance or nonacceptance of statements.

(c) The office shall inform the public of:

(1) A public comment process or public hearing if a *state or*[62] federal agency provides for the public comment process or public hearing to process a habitat conservation plan, safe harbor agreement, or incidental take license pursuant to the *state or* federal Endangered Species Act;

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the important existing practice of OEQC to make documents easily available through the electronic means such as the website. The existing term "office hours" is fairly archaic given modern technology but is not deleted because some access to documents still needs to be in person.

[62] This proposed amendment is housekeeping and does not represent a significant change in the law that added this original provision. It clarifies that similar notice of state hearings is also provided for such actions under the authority of the *state* ESA, which is already expressly noted in H.R.S. Chapter 195D-4(i), which provides that DLNR "shall work cooperatively with federal agencies in concurrently processing habitat conservation plans, safe harbor agreements, and incidental take licenses pursuant to the Endangered Species Act. After notice in the periodic bulletin of the office of environmental quality control and a public hearing on the islands affected, which shall be held jointly with the federal agency, if feasible, whenever a landowner seeks both a federal and a state safe harbor agreement, habitat conservation plan, or incidental take license, the board, by a two-thirds majority vote, may approve the federal agreement, plan, or license without requiring a separate state agreement, plan, or license if the federal agreement, plan, or license satisfies, or is amended to satisfy, all the criteria of this chapter."

(2) A proposed habitat conservation plan or proposed safe harbor agreement, and availability for inspection of the proposed agreement, plan, and application to enter into a planning process for the preparation and implementation of the habitat conservation plan for public review and comment;

(3) A proposed incidental take license as part of a habitat conservation plan or safe harbor agreement; and

(4) An application for the registration of land by accretion pursuant to section 501-33 or 669-1(e) for any land accreted along the ocean.

(d) The office shall inform the public by the publication of a periodic bulletin to be available to persons requesting this information. The bulletin shall be available through the office*, [~~and~~]* public libraries*, and in electronic format.*[63]

[63] See Rec. 4.2.2.b. This proposed amendment merely reflects the proposed change to § 341-4 that supports and emphasizes the important existing practice of OEQC to make documents easily available through the electronic means such as the website.

(e) At the earliest practicable time[64]*, applicants and the relevant agencies shall:*

(1) Provide notice to the public and to state and county agencies that an action is subject to review under this chapter; and

(2) Encourage and facilitate public involvement throughout the environmental review process as provided for in this chapter, chapter 341, and the relevant administrative rules.[65]

§343-4 REPEALED. L 1983, c 140, §7.

§343-A[66] ***Significance criteria.***[67] *(a) In determining whether a proposed action may have a significant adverse*[68] *effect on the environment, an agency shall consider:*

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[64] The "earliest practicable time" language is derived from HRS § 343-5(b) and (c), and the Council rules; see, e.g., HAR § 11-200-5.

[65] See Rec. 4.3.1.a. This amendment emphasizes the obligation of agencies and applicants to actively engage the public in the review process.

[66] Temporarily renumbered 343-A in format suggested by LRB for HB.

[67] See Rec. 4.1.4. This new section pulls the "significance criteria" from the administrative rules, H.A.R. § 11-200-12, and (with a few modifications) places them directly in the statute for clarity. These criteria have withstood the test of time, are well accepted, and have not been controversial. Putting them in the statute makes chapter 343 more clear and comprehensive. The only aspects of the proposed modifications to this criteria, which may be controversial, are: (1) the addition of the term "adversely" in several places, however this term is already in the statutory definition of "significance" and is meant to narrow the application of the statute and avoid review of environmentally beneficial projects, (2) the addition of greenhouse gas emissions to subsection (13), which now addresses energy consumption; and (3) the addition of subsection (14), which adds language focusing on climate-change hazards that are amplified by a project.

(1) Every phase of the proposed action;

(2) Expected primary and secondary[69] effects of the proposed action; and

(3) The overall and cumulative[70] effects of the proposed action, including short-term and long-term effects.

(b) A proposed action shall be determined to have a significant effect on the environment if it:

(1) Involves an irrevocable commitment to loss or destruction of any natural or cultural resource;

(2) Curtails the range of beneficial uses of the environment;

(3) Conflicts with the State's long-term environmental policies, guidelines, or goals, as expressed in chapter 344, and any revisions thereof and amendments thereto, court decisions, or executive orders;

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[68] See Rec. 4.1.4. The term "adverse" is added here and in other subsections to narrow the range of actions covered by chapter 343 to those with the most negative impacts. This would reduce review of projects that have a beneficial environmental impact. Some effects, however, will be viewed by some as beneficial and by others as adverse; in such cases, it would be up to the earliest agency review to make the judgment call on this line-drawing, in the overall context of the action.

[69] See Rec. 4.4.3.

[70] See Rec. 4.4.3.

(4) *Substantially adversely*[71] *affects the economic welfare, social welfare, or cultural practices of the community or State;*

(5) *Substantially adversely*[72] *affects public health;*

(6) *Involves substantial adverse secondary*[73] *impacts, such as population changes or effects on public facilities;*

(7) *Involves a substantial degradation of environmental quality;*

(8) *Is individually limited but cumulatively*[74] *has considerable adverse*[75] *effect upon the environment or involves a commitment to related or future actions;*

(9) *Substantially adversely affects a rare, threatened, or endangered species or its habitat;*

(10) *Detrimentally affects air or water quality or ambient noise levels;*

(11) *Affects or is likely to suffer present or future damage by being located in an environmentally*

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[71] See Rec. 4.1.4.

[72] See Rec. 4.1.4.

[73] See Rec. 4.4.3.

[74] See Rec. 4.4.3.

[75] See Rec. 4.1.4.

sensitive area, such as a flood plain, tsunami zone, beach, erosion-prone area, geologically hazardous land, estuary, fresh water, or coastal waters;

(12) Substantially adversely[76] *affects scenic vistas and viewplanes identified in county or state plans or studies;*

(13) Requires substantial energy consumption or emits substantial quantities of greenhouse gases[77]*; or*

*(14) Increases the scope or intensity of natural hazards to the public, such as increased coastal inundation, flooding, or erosion that may occur as a result of climate change anticipated during the life-time of the project.*78

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[76] See Rec. 4.1.4.

[77] See Rec. 4.1.4. & Rec. 4.4.2. This amendment adds greenhouse gas emissions to the significance criteria alongside the existing criteria of "energy consumption." The policy basis for this addition includes Act 234 (2007), which stated a state policy of 1990-level of greenhouse gas emissions by 2020. For example, if an agency were reviewing a proposed landfill that emitted methane, the agency would consider the emission of greenhouse gases from the project as among the criteria that would move the review from the EA to the EIS phase. The interpretation of the term "substantial" can be assisted through the development of guidance from OEQC. The threshold will be determined over time from experience with various project reviews.

[78] See Rec. 4.1.4. & Rec. 4.4.2. This amendment adds a new section addressing the potential amplification of project-created public hazards that are related to anticipated climate change impacts during the life-time of the project. For example, with the prospect of sea-level rise from climate change, areas subject to likely future inundation would be considered potentially significant; a project

(c) The director of the office of environmental quality control shall provide guidance to agencies on the application of this section.[79]

§343-5 *~~[Applicability and]~~* *Agency and applicant* requirements. (a) Except as otherwise provided, an environmental assessment shall be required for actions that:

(1) Propose the major[80] use of state or county lands or the major[81] *use* of state or county funds; an environmental assessment shall not be required for:

(a)[82] *the use of land solely for connection to utilities or rights-of-way;*[83]

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proposing to locate vital public infrastructure in such an area might be required to move to the EIS phase.

[79] See Rec. 4.1.4.

[80] This addition of the term "major" is intended to explicitly narrow the "funnel" that screens projects coming into the chapter 343 review system. This should mean that "minor" projects do not undergo 343 review. The word "major" is drawn from NEPA, Section 102 and reflects "significance." "Major" is defined in the CEQ regulations, but in a circular way: "Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly." § 1508.18. "Significantly" is defined to include "context" and "intensity." § 1508.27.

[81] See prior footnote.

[82] Adds new letter subsections for clarity of reference.

[83] See Rec. 4.1.1. & Rec. 4.1.3. This proposed amendment seeks to resolve a major current controversy over small projects getting unfairly "trapped" in the environmental review system by clarifying that use of land solely for utility connections or uses of rights-of-

(b) [~~other than~~] funds to be used for feasibility or planning studies for possible future programs or projects that the agency has not approved, adopted, or funded, or

(c) funds to be used for the acquisition of unimproved real property; [~~provided that the agency shall consider environmental factors and available alternatives in its feasibility or planning studies~~][84];

(d) purchase of office supplies and personnel decisions[85];

(e) provided further that an environmental assessment for proposed uses under section 205-2(d)(11) or 205-4.5(a)(13)

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way are not covered by the EA requirement. A major project like a sewage pipeline for a large project would itself involve construction, tunneling, and disruption of the environment, not be a "mere connection," and thus would get captured.

[84] Requirement seems unenforceable given the exemption of these studies from 343's review system under subsection (b).

[85] To clarify as excluded, by statute, an agency action area frequently raised by stakeholders as a concern (sometimes called the "paperclips" issue) - that the current use of state or county lands or funds trigger might cover minor agency actions such as purchase of office supplies or personnel decisions. By excluding it from the statute, a declaration of an exemption (through the operation of the exemption rules) is not needed.

shall only be required pursuant to section 205-5(b);

(2) Propose any use within any land classified as a conservation district by the state land use commission under chapter 205;

(3) Propose any use within a shoreline area as defined in section 205A-41;

(4) Propose any use within any historic site as designated in or eligible for[86] the National Register or Hawaii Register, as provided for in the Historic Preservation Act of 1966, Public Law 89-665, or chapter 6E;

(5) [~~Propose any use within the Waikiki area of Oahu, the boundaries of which are delineated in the land use ordinance as amended, establishing the "Waikiki Special District";~~][87] Propose any use that

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[86] Slightly expands the scope of trigger (4) to include "eligible" sites, similar to CEQ regulations. Sec. 1508.27(b)(8) ("listed or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.")

[87] Historically, Waikiki was included because it was the economic engine of the State and the Legislature wanted to ensure development was not adverse in this area; now, however, there are many similar special "resort development" areas that are economic engines of the various islands - therefore, designating Waikiki only raises an equitable treatment issue; moreover, many observers feel that the reason for Waikiki's special treatment in 343 has lost its justification because of the high level of development in the area.

may cause loss of significant scientific, historical, or cultural resources;[88]

(6) Propose any new or amendments to existing county general or development plans where the plan or amendment may have a significant effect on the environment[89] [~~amendment would result in designations other than agriculture, conservation, or preservation, except actions proposing any new county general plan or amendments to any existing county general plan initiated by a county~~];

(7) Propose any reclassification of any land classified as a conservation district by the

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[88] This amendment is taken directly from the CEQ regulation defining "significance" and, in turn, "intensity." Sec. 1508.27(b)(8) ("listed or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.") This expands the scope of chapter 343 because, in the view of many stakeholders, there are many significant scientific, cultural, or historic sites that are not receiving adequate protection because they are not among the narrow range of archaeological sites listed on the state or national register.

[89] The rationale for this amendment is that requiring counties to do EAs for new general plans or amendments will encourage up front planning and programmatic review; this will ultimately reduce cost and burden for projects that "tier" into the county general plan. By phrasing the scope in terms of environmental impact not category, the amendment is closer to the purpose of 343, that is, to require full review of the larger planning changes that do impact the environment, whether initiated by a private applicant or by the county.

state land use commission under chapter 205 or prime agricultural land[90];

[~~(8) Propose the construction of new or the expansion or modification of existing helicopter facilities within the State, that by way of their activities, may affect:~~

~~(A) Any land classified as a conservation district by the state land use commission under chapter 205;~~

~~(B) A shoreline area as defined in section 205A-41; or~~

~~(C) Any historic site as designated in the National Register or Hawaii Register, as provided for in the Historic Preservation Act of 1966, Public Law 89-665, or chapter 6E; or until the statewide historic places inventory is completed, any historic site that is found by a field reconnaissance of the area affected by the helicopter facility and is under consideration for placement on~~

[90] The protection of "prime" agricultural land is a state priority and reclassification or use of such lands was mentioned by make stakeholders as needing careful review under chapter 343.

~~the National Register or the Hawaii Register of Historic Places~~][91]; ~~and~~]

(9) Propose any:

(A) Wastewater treatment unit, except an individual wastewater system or a wastewater treatment unit serving fewer than fifty single-family dwellings or the equivalent;

(B) Waste-to-energy facility;

(C) Landfill;

(D) Oil refinery; or

(E) Power-generating facility[~~.~~] And

(10) Propose or facilitates a large-capacity ferry or cruise ships designed to transport 500 or more passengers[92]; or

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[91] Since this trigger was passed, the regulation of helicopters has changed to require, inter alia, minimum flight altitudes (SFARs) of 1500 feet by the Federal FAA. If the state wants to limit helicopter facilities on private land, it should do so directly not via 343. Stakeholders interviewed about this trigger did not understand its current rationale. Excising this from the list of triggers also removes questions about equitable treatment and streamlines this list.

[92] This amendment is based on the lessons of the Superferry case and Act 2, the Legislature's requirement of an EIS for large capacity ferry vessels; it adds cruise ships, both for equitable reasons, and because this has also been a longstanding concern of some community stakeholders due to the large population surges, wastewater, and other impacts, on the neighbor islands, in particular, caused by large cruise ships. Cargo ships are not included here because of their historical operations and because, arguably according to stakeholders, the major impacts from large inter-island vessels are from human usage not cargo on- and off-loading.

(11) Subdivisions of fifty or more single-family dwellings, condominium units, hotel rooms, or the equivalent[93];

(b)[94] Whenever an agency proposes an action in subsection (a), other than feasibility or planning studies for possible future programs or projects that the agency has not approved, adopted, or funded, or other than the use of state or county funds for the acquisition of unimproved real property that is not a specific type of action declared exempt under section 343-6, the agency shall prepare an environmental assessment, *or, based on its discretion, may choose to prepare for a program, a programmatic environmental assessment,*[95] for *[~~such~~]* *the* action at the earliest practicable time to determine whether an environmental impact statement shall be required*[~~.~~]*; *provided that if the agency determines, through its judgment and experience, that an environmental impact statement is likely to be required, then the agency may choose not to prepare an environmental assessment and*

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[93] This amendment is intended to capture large subdivision projects and to clarify the current controversy about whether subdivisions are discretionary permits. The threshold of fifty comes from the wastewater system trigger (9) ("except . . . serving fewer than fifty single-family dwellings or the equivalent").

[94] This amendment breaks § 343-5 into two subsections for clarity.

[95] See Rec. 4.1.2.

instead shall prepare an environmental impact statement following adequate notice to the public and all interested parties.[96]

(1) For environmental assessments for which a finding of no significant impact is anticipated:

(A) A draft environmental assessment shall be made available for public review and comment for a period of thirty days;

(B) The office shall inform the public of the availability of the draft environmental assessment for public review and comment pursuant to section 343-3;

(C) The agency shall respond in writing to comments received during the review and prepare a final environmental assessment to determine whether an environmental impact statement shall be required;

(D) A statement shall be required if the agency finds that the proposed action may have a significant effect on the environment; and

[96] See Rec. 4.5.1. To improve efficiency, this amendment allows an agency or applicant to go "straight to the EIS" and avoid the duplicative EA process in situations where the significance of the impacts is evident from the beginning of the review process.

(E) The agency shall file notice of *[~~such~~]* *the* determination with the office. When a conflict of interest may exist because the proposing agency and the agency making the determination are the same, the office may review the agency's determination, consult the agency, and advise the agency of potential conflicts, to comply with this section. The office shall publish the final determination for the public's information pursuant to section 343-3.

The draft and final statements, if required, shall be prepared by the agency and submitted to the office. The draft statement shall be made available for public review and comment through the office for a period of forty-five days. The office shall inform the public of the availability of the draft statement for public review and comment pursuant to section 343-3. The agency shall respond in writing to comments received during the review and prepare a final statement.

The office, when requested by the agency, may make a recommendation as to the acceptability of the final statement.

(2) The final authority to accept a final statement shall rest with:

(A) The governor, or the governor's authorized representative, whenever an action proposes the use of state lands or the use of state funds, or whenever a state agency proposes an action within the categories in subsection (a); or

(B) The mayor, or the mayor's authorized representative, of the respective county whenever an action proposes only the use of county lands or county funds.

Acceptance of a required final statement shall be a condition precedent to implementation of the proposed action. Upon acceptance or nonacceptance of the final statement, the governor or mayor, or the governor's or mayor's authorized representative, shall file notice of such determination with the office. The office, in turn, shall publish the determination of acceptance or nonacceptance pursuant to section 343-3.

(c) Whenever an applicant proposes an action specified by subsection (a) that requires approval of an agency and that is not a specific type of action declared exempt under *that section or* section 343-6, the agency initially

receiving and agreeing to process the request for approval shall prepare an environmental assessment*, or, based on its discretion, may choose to prepare for a program, a programmatic environmental assessment,*[97] of the proposed action at the earliest practicable time to determine whether an environmental impact statement shall be required; *provided that if the agency determines, through its judgment and experience*[98]*, that an environmental impact statement is likely to be required, then the agency may choose not to prepare an environmental assessment and instead shall prepare an environmental impact statement following adequate notice to the public and all interested parties*[~~; provided further that, for an action that proposes the establishment of a renewable energy facility, a draft environmental impact statement shall be prepared at the earliest practicable time~~][99]. The final approving agency for the request for approval is not required to be the accepting authority.

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[97] See Rec. 4.1.2. Same as above for agency applicants.

[98] See Rec. 4.5.1.

[99] Proposed for deletion; while desirable, a general "earliest practicable time" requirement is already in the statute for agency and applicant actions, HRS § 343-5(b) and (c), and in the rules, see HAR § 11-200-5 and § 11-200-9(A)(1) and -9(B)(1); singling out renewable energy facilities does not seem necessary; the goal of allowing these kinds of projects to start with the draft EIS, instead of having to go through a potentially duplicative EA step, would be met by the proposed amendment allowing agencies to use their discretion to "go direct" to the EIS for all types of projects.

For environmental assessments for which a finding of no significant impact is anticipated:

(1) A draft environmental assessment shall be made available for public review and comment for a period of thirty days;

(2) The office shall inform the public of the availability of the draft environmental assessment for public review and comment pursuant to section 343-3; and

(3) The applicant shall respond in writing to comments received during the review, and the agency shall prepare a final environmental assessment to determine whether an environmental impact statement shall be required. A statement shall be required if the agency finds that the proposed action may have a significant effect on the environment. The agency shall file notice of the agency's determination with the office, which, in turn, shall publish the agency's determination for the public's information pursuant to section 343-3.

The draft and final statements, if required, shall be prepared by the applicant, who shall file these statements with the office.

The draft statement shall be made available for public review and comment through the office for a period of forty-five days. The office shall inform the public of the availability of the draft statement for public review and comment pursuant to section 343-3.

The applicant shall respond in writing to comments received during the review and prepare a final statement. The office, when requested by the applicant or agency, may make a recommendation as to the acceptability of the final statement.

The authority to accept a final statement shall rest with the agency initially receiving and agreeing to process the request for approval. The final decision-making body or approving agency for the request for approval is not required to be the accepting authority. The planning department for the county in which the proposed action will occur shall be a permissible accepting authority for the final statement.

Acceptance of a required final statement shall be a condition precedent to approval of the request and commencement of the proposed action. Upon acceptance or nonacceptance of the final statement, the agency shall file notice of such determination with the office. The office, in turn, shall publish the determination of acceptance or

nonacceptance of the final statement pursuant to section 343-3.

The agency receiving the request, within thirty days of receipt of the final statement, shall notify the applicant and the office of the acceptance or nonacceptance of the final statement. The final statement shall be deemed to be accepted if the agency fails to accept or not accept the final statement within thirty days after receipt of the final statement; provided that the thirty-day period may be extended at the request of the applicant for a period not to exceed fifteen days.

In any acceptance or nonacceptance, the agency shall provide the applicant with the specific findings and reasons for its determination. An applicant, within sixty days after nonacceptance of a final statement by an agency, may appeal the nonacceptance to the environmental council, which, within thirty days of receipt of the appeal, shall notify the applicant of the council's determination. In any affirmation or reversal of an appealed nonacceptance, the council shall provide the applicant and agency with specific findings and reasons for its determination. The agency shall abide by the council's decision.

(d) Whenever an applicant requests approval for a proposed action and there is a question as to which of two

or more state or county agencies with jurisdiction has the responsibility of preparing the environmental assessment, the office, after consultation with and assistance from the affected state or county agencies, shall determine which agency shall prepare the assessment.

(e) In preparing an environmental *[~~assessment~~]* *review document,*[100] an agency *or applicant* may consider and, where applicable and appropriate, incorporate by reference, in whole or in part, previous *[~~determinations of whether a statement is required and previously accepted statements~~] review documents.*[101] The council, by rule, shall establish criteria and procedures for the use of previous determinations and statements.

(f) Whenever an action is subject to both the National Environmental Policy Act of 1969 (Public Law 91-190) and the requirements of this chapter, the office and agencies shall cooperate with federal agencies to the fullest extent possible to reduce duplication between federal and state requirements. Such cooperation, to the fullest extent possible, shall include joint environmental impact statements with concurrent public review and processing at

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[100] This amendment clarifies that the practice of "incorporation by reference" should apply to both EAs and EISs.

[101] See Rec. 4.1.2. (programmatic). Clarifies the intent and streamlines the language.

both levels of government. Where federal law has environmental impact statement requirements in addition to but not in conflict with this chapter, the office and agencies shall cooperate in fulfilling these requirements so that one document shall comply with *all applicable laws.*

(g) Upon receipt of a timely written request and good cause shown, a lead agency, approving agency, or accepting authority may extend a public review and comment period required under this section one time only, up to fifteen days. To be considered a timely request, the request for an extension shall be made before the end of the public review and comment period. An extension of a public review and comment period shall be communicated by the lead agency in a timely manner to all interested parties.[102]

[~~(g)~~) (h) A statement that is accepted with respect to a particular action shall satisfy the requirements of this chapter, and no other statement for the proposed action*, other than a supplement to that statement,*[103] shall be required.

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[102] See Rec. 4.3.1.b.

[103] See Rec. 4.5.2. This amendment clarifies that this section does not conflict with the requirement in the existing HAR for "supplemental statements," H.A.R. § 11-200-26 & -27. The meaning of this section as it relates to supplemental EISs is currently a controversial issue before the Hawaii Supreme Court in the Turtle Bay case, argued on Dec. 17, 2009. The proposed amendment should *not* be construed by anyone, including a party or amicus to the Turtle Bay lawsuit or the media or

§343-C[104] Record of decision[105]; mitigation[106]. *(a) At the time of the acceptance or nonacceptance of a final statement, the accepting authority or agency shall prepare a concise public record of decision that:*

(1) States its decision;

(2) Identifies all alternatives considered by the accepting authority or agency in reaching its decision, including:

(A) Alternatives that were considered to be environmentally preferable; and

(B) Preferences among those alternatives based on relevant factors, including economic and

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public, to mean that the study believes that the current statute does not support the rules that require supplemental environmental assessments or supplemental impact statements. The position of the study is that, as with NEPA, the statute need not expressly mention supplemental EAs or EISs for such documents to be legally required by the Environmental Council rules. However, this proposed amendment would be a helpful clarification of legislative intent for the future.

[104] This adopts the temporary numbering proposed by LRB in the HB.

[105] See Rec. 4.4.1. Records of Decision (RODs) are required under the NEPA regulations, 40 C.F.R. § 1505.2. RODs, which are usually only a few pages long, serve to clarify the end-result of the environmental review process and provide a concise summary of the agency's decision, including the selection of the preferred alternative and the proposed mitigation measures. This language is based on CEQ regulations, 40 C.F.R. §§ 1505.2 and 1505.3.

[106] See Rec. 4.4.1. Concerns about the lack of specificity of mitigation and the lack of post-review enforceability were frequently raised by stakeholders in the study review. The ROD requirement largely enforces what agencies already do, that is, incorporate mitigation measures into the substantive permitting process, but makes this a clearer requirement and transparent process.

technical considerations and agency statutory mission; and

(3) States whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted and, if not, why they were not adopted.

(b) Agencies shall provide for monitoring to ensure that their decisions are carried out and that any other conditions established in the environmental impact statement or during its review and committed as part of the accepting authority or agency's decision are implemented by the lead agency or other appropriate agency. Where applicable, a lead agency shall:

(1) Include conditions on grants, permits, or other approvals to ensure mitigation;

(2) Condition the funding of actions on mitigation; and

(3) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures that they proposed during the environmental review process and that were adopted by the accepting authority or agency in making its decision.

(c) Results of monitoring pursuant to this section shall be made available periodically to the public through the bulletin.[107]

§343-6 Rules. (a) After consultation with the affected agencies, the council[108] shall adopt, amend, or repeal necessary rules for the purposes of this chapter. Any such rules may be issued as interim rules by adoption and filing with the lieutenant governor, and by posting the interim rules on the lieutenant governor's website. Interim rules adopted pursuant to this Act shall be exempt from the public notice, public hearing, and gubernatorial approval requirements of chapter 91 and the requirements of chapter 201M, Hawaii Revised Statutes, and shall take effect upon filing with the lieutenant governor. All interim rules adopted pursuant to this section shall be effective only through June 30, 2014. For any new or expanded programs, services, or benefits that have been implemented under interim rules to continue in effect beyond June 30, 2014, the environmental council shall adopt rules in conformance

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[107] Added language "periodically through the bulletin" so agencies will pro-actively provide the information to the public, as opposed to only provide the information when asked; the frequency ("periodically") is up the agency's sound discretion and will depend greatly on the nature of the project and mitigation required.

[108] Would change to "director" under the alternative approach to governance.

with all the requirements of chapter 91 and chapter 201M, Hawaii Revised Statutes. Such rules shall include but not be limited to rules that shall[109] [~~in accordance with chapter 91 including, but not limited to, rules that shall~~]:

(1) Prescribe the procedures whereby a group of proposed actions may be treated by a single environmental assessment or statement;

(2) Establish procedures whereby specific types of actions, because they will probably have minimal or no significant effects on the environment, are declared exempt from the preparation of an environmental assessment, *and ensuring that the declaration is simultaneously transmitted electronically to the office and is readily available as a public record in a searchable electronic database*[110];

(3) Prescribe procedures for the preparation of an environmental assessment;

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[109] Expedite interim rulemaking authority is authorized to ensure that appropriate temporary rules are in place to effectuate legislative intent without unnecessary delay.

[110] See Rec. 4.1.5 & Rec. 4.2.2.b. This amendment addresses a major gap in the existing system of declarations by agencies, which is their timely transmission to OEQC and timely (and searchable) accessibility to the public, other agencies, and all stakeholders. This amendment requires the Council to create an efficient system for addressing this problem. An electronic database of declarations would substantially improve the long-term efficiency of the exemptions list and declaration process.

(4) Prescribe the contents of*, and page limits for,*[111] an environmental assessment;

(5) Prescribe procedures for informing the public of determinations that a statement is either required or not required, for informing the public of the availability of draft environmental impact statements for review and comments, and for informing the public of the acceptance or nonacceptance of the final environmental statement;

(6) Prescribe the contents of*, and page limits for,*[112] an environmental impact statement;

(7) Prescribe procedures for the submission, distribution, review, acceptance or nonacceptance, and withdrawal of an environmental impact statement;

(8) Establish criteria to determine whether an environmental impact statement is acceptable or not;

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[111] See Rec. 4.4.4.

[112] See Rec. 4.4.4.

(9) Prescribe procedures to appeal the nonacceptance of an environmental impact statement to the environmental council *[~~.~~]* ;

(10) Prescribe procedures, including use of electronic technology for the comment and response process, including procedures for issuing one comprehensive response to multiple or repetitious comments that are substantially similar in content;[113]

(11) Prescribe procedures for implementing the requirement for records of decision, monitoring, and mitigation[114]*;*

(12) Develop guidance for the application and interpretation of the significance criteria under chapter 343-A[115]*;*

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[113] See Rec. 4.2.2.b. & Rec. 4.3.2. This amendment addresses the issue of repetitious, voluminous comments by making clear the legislative intent to allow a consolidated response by leaving the details to the council to make rules.

[114] This section is recommended by the LRB and requires the Council to write supporting rules for the proposed ROD, monitoring, and mitigation requirements (see proposed § 343-C in HB), which are new concepts for Hawaii law but familiar to stakeholders of the federal NEPA process and some other states. See, e.g., California's CEQA statute, Cal. Pub. Res. Code § 21081 (requiring "findings" that minimize impacts).

[115] See Rec. 4.4.2. The interviews indicated significant concern that the criteria for significance are vague and that this requires more guidance from OEQC; OEQC has experience with these issues but there is not sufficient useful guidance; this amendment will require the preparation of the necessary guidance that will help all stakeholders.

(13) Prescribe procedures and guidance for the preparation of programmatic environmental assessments or impact statements and the tiering of project-specific environmental assessments or impact statements[116]*;* and

(14) Prescribe:

(A) Procedures for the applicability, preparation, acceptance, and publication of supplemental environmental assessments and supplemental environmental impact statements when there are substantial changes in the proposed action or significant new circumstances or information relevant to environment effects and bearing on the proposed action and its impacts;[117]

(B) Procedures for limiting the duration of the validity of environmental assessments and environmental impact statements, or if an environmental assessment led to the preparation of an environmental impact statement, then of the later-prepared

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[116] See Rec. 4.1.2. This amendment requires the Council to provide support through the rules for the practice of programmatic and tiered EAs and EISs.

[117] See Rec. 4.5.2.

statement, to seven years or less from the date of acceptance of the document until all state and county discretionary approvals are fully completed for the action;[118] *and*

(C) Procedures for an agency or applicant to seek a timely determination from the council that a prior environmental assessment or environmental impact statement contains sufficiently current information such that a supplemental document is not warranted despite the passage of the prescribed time period.[119]

(b) Except for the promulgation of interim rules pursuant to subsection (a) of this section, a[~~A~~]t least one public hearing shall be held in each county prior to the final adoption, amendment, or repeal of any rule.

[§343-6.5] Waiahole water system; exemption. The purchase of the assets of the Waiahole water system shall

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[118] See Rec. 4.5.2.

[119] See Rec. 4.5.2. This amendment clarifies that the Council has authority for its rules regarding "supplemental statements," clarifying that this applies to EAs as well as EISs. (See H.A.R. § 11-200-26 & -27.) See explanation, supra note 108. Part of the proposed language (from "when there are" on) is derived from the CEQ regulations, 40 C.F.R. § 1502.9 ("Draft, final, and supplemental statements"), subsection (c)(1)(i) and (ii).

be specifically exempt from the requirements of chapter 343.

§343-7 Limitation of actions. (a) Any judicial proceeding, the subject of which is the lack of *an environmental*[120] assessment required under section 343-5, *or the lack of a supplemental environmental assessment or supplemental impact statement*[121], shall be initiated within one hundred twenty days of the agency's decision to carry out or approve the action, or, if a proposed action is undertaken without a formal determination by the agency that *an assessment, supplement, or*[122] statement is or is not required, a judicial proceeding shall be instituted within one hundred twenty days after the proposed action is started. The council or office, any agency responsible for approval of the action, or the applicant shall be adjudged an aggrieved party for the purposes of bringing judicial

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[120] This is a technical amendment for clarification to make phrasing consistent with the rest of the chapter.

[121] See Rec. 4.5.2. This would clarify an ambiguity raised in the Turtle Bay case; that is, the appropriate statute of limitations for a failure to prepare a supplemental EA or EIS. The proposed amendment should *not* be construed by anyone, including a party or amicus to the Turtle Bay lawsuit or the media or public, to mean that the study believes that the current statute does not support the application of the 120-day provision to challenges to agency failure to require supplemental environmental assessments or supplemental impact statements.

[122] This continues to clarify the prior amendments proposed for this section.

action under this subsection. Others, by court action, may be adjudged aggrieved.

(b) Any judicial proceeding, the subject of which is the determination that a statement is required for a proposed action, shall be initiated within sixty days after the public has been informed of *[~~such~~]* *the* determination pursuant to section 343-3. Any judicial proceeding, the subject of which is the determination that a statement is not required for a proposed action, shall be initiated within thirty days after the public has been informed of *[~~such~~]* *the* determination pursuant to section 343-3. The council or the applicant shall be adjudged an aggrieved party for the purposes of bringing judicial action under this subsection. Others, by court action, may be adjudged aggrieved. *Affected agencies and persons who provided written comment to such assessment during the designated review period shall be adjudged aggrieved parties for the purpose of bringing judicial action under this subsection; provided that the contestable issues shall be limited to issues identified and discussed in the written comment.*[123]

(c) Any judicial proceeding, the subject of which is the acceptance of an environmental impact statement

[123] See Rec. 4.3.1.a. Inserts the same language for standing derived from comment on EAs as for EISs.

required under section 343-5, shall be initiated within sixty days after the public has been informed pursuant to section 343-3 of the acceptance of *[~~such~~]* *the* statement. The council shall be adjudged an aggrieved party for the purpose of bringing judicial action under this subsection. Affected agencies and persons who provided written comment to *[~~such~~]* *the* statement during the designated review period shall be adjudged aggrieved parties for the purpose of bringing judicial action under this subsection; provided that the contestable issues shall be limited to issues identified and discussed in the written comment.

§343-8 Severability. If any provision of this chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application; and to this end, the provisions of this chapter are declared to be severable.

Other Comments on Proposed Statutory Amendments Related to Chapter 343:

(1) The House Bill includes an effective date of July, 2012 to allow affected agencies and stakeholders time to prepare for changes in the review system.

(2) The HB draft contains cross-referenced amendments to HRS § 183-44 (fishpond EA exemption) and § 353-16.35 (correctional facilities) to change the cross references to reflect the amendments to Ch. 343. (HRS § 353-16.35 provides: "a) Notwithstanding any other law to the contrary, the governor, with the assistance of the director, may negotiate with any person for the development or expansion of private in-state correctional facilities or public in-state turnkey correctional facilities to reduce prison overcrowding; provided that if an environmental assessment or environmental impact statement is required for a proposed site or for the expansion of an existing correctional facility under section 343-5, then notwithstanding the time periods specified for public review and comments under section 343-5, the governor shall accept public comments for a period of sixty days following public notification of either an environmental assessment or an environmental impact statement.")

Appendix 10. Working Group Proposed SB 2818 (Chapter 341)

THE SENATE
TWENTY-FIFTH LEGISLATURE, 2010
STATE OF HAWAII

S.B. NO. 2818 S.D. 2 H.D. 3 Proposed

A BILL FOR AN ACT

RELATING TO ENVIRONMENTAL PROTECTION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Chapter 341, Hawaii Revised Statutes, is amended to read as follows:

"[~~+~~]**CHAPTER 341**[~~+~~]

ENVIRONMENTAL QUALITY CONTROL

[~~+~~]**§341-1**[~~+~~] **Findings and purpose.** The legislature finds that the quality of the environment is as important to the welfare of the people of Hawaii as is the economy of the State. The legislature further finds that the determination of an optimum balance between economic development and environmental quality deserves the most thoughtful consideration, and that the maintenance of the optimum quality of the environment deserves the most intensive care.

The legislature finds that the office of environmental quality control, established pursuant to this chapter, is

intended to provide a centralized, statewide environmental review service, through which the State's environmental review system can be effectively managed and administered, and through which agencies, applicants, and the public can coordinate and contribute to an effective environmental review process.

The purpose of this chapter is to stimulate, expand, and coordinate efforts to determine and maintain the optimum quality of the environment of the State.

§341-2 Definitions. As used in this chapter, unless the context otherwise requires:

"Center" means the University of Hawaii environmental center established in section [~~,~~]304A-1551[~~,~~].

"Council" means the environmental council established in section 341-3(c).

"Director" means the director of the office of environmental quality control.

"Office" means the office of environmental quality control established in section 341-3(a).

"University" means the University of Hawaii.

§341-3 Office of environmental quality control; environmental center; environmental council. (a) There is created an office of environmental quality control that shall be headed by a single executive to be known as the

director of the office of environmental quality control who shall be appointed by the governor as provided in section 26-34. The director shall be responsible for directing the office in implementing this chapter and chapter 343. This office and the council shall implement this chapter and shall be placed within the [~~department of health~~] office of the governor for administrative purposes. [~~The office shall perform its duties under chapter 343 and shall serve the governor in an advisory capacity on all matters relating to environmental quality control.~~]

(b) The environmental center within the University of Hawaii shall be as established under section [~~,~~]304A-1551[~~,~~].

(c) There is created an environmental council not to exceed [~~fifteen~~] nine members[~~,~~] and the director. [~~Except for the director, members~~] The council shall include one member from each county and no more than five at-large members. Members of the environmental council shall be appointed by the governor as provided in section 26-34[~~,~~]; provided that three members shall be appointed from a list of persons nominated by the speaker of the house of representatives and three members shall be appointed from a list of persons nominated by the senate president. The council shall be attached to the [~~department of health~~] office of

the governor for administrative purposes. [~~Except for the director, the~~] The term of each member shall be four years; provided that, of the members initially appointed, [~~five~~] three members shall serve for four years, [~~five~~] three members shall serve for three years, and the remaining [~~four~~] three members shall serve for two years. Vacancies shall be filled for the remainder of any unexpired term in the same manner as original appointments. The director shall be an ex officio voting member of the council. The council chairperson shall be elected by the council from among the appointed members of the council[~~.~~], provided that the director shall not serve as the chairperson.

Members shall be appointed to [~~assure~~] ensure a broad and balanced representation of educational, business, and [~~environmentally pertinent~~] environmental disciplines and professions, such as the natural and social sciences, the humanities, architecture, engineering, environmental consulting, public health, and planning; educational and research institutions with environmental competence; agriculture, real estate, visitor industry, construction, media, and voluntary community and environmental groups. The members of the council shall serve without compensation, but shall be reimbursed for expenses,

including travel expenses, incurred in the discharge of their duties.

§341-4 Powers and duties of the director[~~.~~] and the office. (a) The director shall have [~~such~~] powers delegated by the governor as [~~are~~] necessary to coordinate and, when requested by the governor, to direct, pursuant to chapter 91, all state governmental agencies in matters concerning environmental quality. The director shall also be responsible for administration and leadership of the office, including but not limited to performing budgeting and hiring staff in a manner that ensures adequate funding and staff support for the office and the council to carry out duties under this chapter and chapter 343. The director may appoint personnel exempt from chapters 76 and 89.

(b) To further the [~~objective of subsection (a),~~] objectives of this chapter and chapter 343, the [~~director~~] office shall:

(1) [~~Direct~~] In cooperation with the council, direct the attention of [~~the university community~~] state agencies and the residents of the State [~~in general~~] to [~~ecological and~~] environmental problems [~~through the center and, respectively, and through public education programs~~];

(2) Conduct research or arrange for [~~the conduct of~~] research through contractual relations with the center, state agencies, or other persons with competence in [~~the field of ecology and~~] issues relating to environmental quality;

(3) [~~Encourage~~] In cooperation with the council, encourage public acceptance of proposed legislative and administrative actions concerning [~~ecology and~~] environmental quality, and receive notice of any private or public complaints concerning [~~ecology and~~] environmental quality [~~through the council~~];

(4) Recommend programs for long-range implementation of environmental quality control;

(5) [~~Submit direct~~] In consultation with the council, submit to the governor [~~and to the legislature such~~] legislative bills and administrative policies, objectives, and actions[~~,~~] as are necessary to preserve and enhance the environmental quality of the State;

(6) Conduct regular outreach and training for state and county agencies on the environmental review process and conduct other public educational programs[~~; and~~] that provide information

concerning the environmental review systems and related services provided under this chapter and chapter 343;

(7) Offer advice and assistance to private industry, governmental agencies, non-governmental organizations, state residents, or other persons upon request[~~.~~];

(8) Obtain advice from the council on any matters concerning environmental quality;

(9) With the cooperation of the council, private industry, governmental agencies, non-governmental organizations, state residents, and other interested persons in fulfilling the requirements of this subsection, conduct annual statewide workshops and publish an annual state environmental review guidebook or supplement to assist persons in complying with this chapter, chapter 343, and rules adopted thereunder; provided that workshops, guidebooks, and supplements shall include:

(A) Assistance for the preparation, processing, and review of environmental review documents;

(B) A review of relevant court decisions affecting this chapter, chapter 343, and rules adopted thereunder;

(C) A review of amendments to this chapter, chapter 343, other relevant laws, and rules adopted thereunder; and

(D) Any other information that may facilitate the efficient implementation of this chapter, chapter 343, and rules adopted thereunder;

(10) Provide advisory opinions to agencies, applicants, and the public concerning the environmental review system and related services provided under this chapter and chapter 343;

(11) Maintain an effective state environmental review process by:

(A) Reviewing, and updating as necessary, in consultation with the council, administrative rules adopted pursuant to this chapter and chapter 343 no less than every three years; and

(B) Developing guidance for agencies, applicants, and the public that encourages innovative best practices to ensure greater

certainty in the statewide environmental review system;

(12) To facilitate agency, applicant, and public participation in the state environmental review process, the office shall create and maintain an effective information technology system, including a website and searchable digital archives, that meets best practices and allows for efficient, comprehensive tracking of environmental review documents relating to actions and projects for which environmental documents are completed or pending and any related or subsequent permits, approvals, updates, and mitigation information.

(c) The [~~director~~] office, in consultation with the council, shall adopt rules, pursuant to chapter 91, necessary for the purposes of implementing this chapter[~~.~~] and chapter 343.

§341-A Annual report. No later than January 31 of each year, the director shall submit a report to the governor and the legislature that analyzes the effectiveness of the State's environmental review system during the prior year.

At the request of the director or the council, state and county agencies shall provide information to assist in the preparation of the annual report.

§341-6 [~~Functions~~] Duties of the environmental council. (a) The council shall [~~serve~~]:

(1) Serve the governor in an advisory capacity on all matters relating to environmental quality;

(2) Consult with the office on proposed changes to statutes, rules, and guidance;

(3) Serve as a liaison between the [~~director~~] governor and the general public by soliciting information, opinions, complaints, recommendations, and advice concerning [~~ecology and~~] environmental quality through public hearings or any other means and by publicizing [~~such~~] these matters as requested by the [~~director pursuant to section 341-4(b)(3).~~] governor; and

(4) Meet at the call of the council chairperson or by a quorum of council members.

[~~The council may make recommendations concerning ecology and environmental quality to the director and shall meet at the call of the council chairperson or the director upon notifying the council chairperson.~~]

(b) The council shall monitor the progress of state, county, and federal agencies in achieving the State's environmental goals and policies [~~and~~]. No later than January 31 of each year, the council, with the assistance of the director, as necessary, shall make an annual report with recommendations for improvement to the governor, the legislature, and the public [~~no later than January 31 of each year. All~~]. At the request of the council, state and county agencies shall [~~cooperate with the council and~~] provide information to assist in the preparation of [~~such a~~] the report [~~by responding to requests for information made by the council~~]. The council may combine its annual report with the annual report prepared by the director pursuant to section 341-A.

(c) The council may delegate to any person [~~such~~] the power or authority vested in the council as it deems reasonable and proper for the effective administration of this section and chapter 343[~~, except the power to make, amend, or repeal rules~~].

§341-B Environmental review special fund; use of funds. (a) There is established in the state treasury the environmental review special fund, into which shall be deposited:

(1) All filing fees and other administrative fees collected by the office;

(2) Moneys collected pursuant to section 341-D;

(2) All accrued interest from the special fund; and

(3) Moneys appropriated to the special fund by the legislature.

(b) Moneys in the environmental review special fund shall not supplant the office budget base and shall be used to:

(1) Fund the activities of the office and the council in fulfillment of their duties pursuant to this chapter and chapter 343, including administrative and office expenses and servicing of agency documents relating to the environmental review process for capital improvement projects;

(2) Support outreach, training, education, and research programs pursuant to section 341-4; and

(3) Modernize technology, maintain technology systems, and develop technology training programs within the limits established by section 341-D.

§341-C Fees. The office, in consultation with the council, shall adopt rules pursuant to chapter 91 to establish any fees necessary for the administration and management of the office and the council.

§341-D Temporary environmental review modernization moneys. (a) Between July 1, 2011, and June 30, 2016, 0.1 per cent of all state fund appropriations for capital improvements to be supported by general obligation bonds shall be transferred to the environmental review special fund. The 0.1 per cent amount, which is included in all capital improvement appropriations, shall be calculated at the time the appropriation bills are signed into law. The moneys shall be transferred into the environmental review special fund upon availability of moneys from the appropriations. Each agency receiving capital improvement appropriations shall calculate the 0.1 per cent amount and transfer the moneys into the environmental review special fund.

(b) The comptroller and the director shall track amounts due from each agency under the 0.1 per cent requirement as provided in subsection (a). In addition, the comptroller shall:

(1) Provide each agency receiving capital improvement appropriations with information regarding items that shall be included and excluded from the 0.1 per cent amount;

(2) Ensure that each agency calculates its 0.1 per cent amount correctly; and

(3) Ensure that each agency transfers the correct amount to the environmental review special fund in a timely manner.

(c) No later than July 1, 2011, the office, in consultation with the council, shall adopt rules pursuant to chapter 91 to establish temporary environmental review modernization fees, to be collected, in addition to any other administrative fees pursuant to section 341-C, from applicants other than state agencies for publication of environmental review documents in the bulletin pursuant to section 343-3(d). Temporary environmental review modernization fees shall not exceed:

(1) $1,500 for a draft environmental assessment;

(2) $1,000 for a final environmental assessment;

(3) $500 for an environmental impact statement publication notice;

(4) $4,000 for a draft environmental impact statement;

(5) $3,000 for a final environmental impact statement;

(6) $500 for any supplemental environmental assessment; and

(7) $1,000 for any supplemental environmental impact statement.

(d) The total amount of transfers made pursuant to subsection (a) shall not exceed $1,250,000, between July 1, 2011, and June 30, 2016. The total amount of temporary environmental review modernization fees collected pursuant to subsection (c) shall not exceed $1,250,000 between July 1, 2011, and June 30, 2016. If these amounts are exceeded, then the collection of those respective moneys shall be discontinued.

(e) Moneys collected pursuant to this section shall be used by the office solely for the purposes of:

(1) Modernizing and updating its technology used to meet the requirements of this chapter and chapter 343;

(2) Creating and providing training programs for its updated technologies; and

(3) Maintaining its technology systems.

SECTION 2. Notwithstanding the original terms of appointment of the members of the environmental council, the terms of all members of the environmental council serving as of the effective date of this Act shall be extended through June 30, 2012. The members shall continue in their appointment until the nine members of the environmental council, not including the director, are

appointed or re-appointed in accordance with section 341-3, Hawaii Revised Statutes, as amended by this Act.

SECTION 3. All rules, policies, procedures, orders, guidelines, and other material adopted, issued, or developed by the office of environmental quality control or the environmental council, respectively, within the department of health to implement provisions of the Hawaii Revised Statutes shall remain in full force and effect until amended or repealed by the office of environmental quality control or the environmental council, respectively, within the office of the governor.

SECTION 4. All appropriations, records, equipment, machines, files, supplies, contracts, books, papers, documents, maps, and other personal property heretofore made, used, acquired, or held by the office of environmental quality control or the environmental council within the department of health relating to the functions transferred to the office of the governor shall be transferred with the functions to which they relate.

SECTION 5. All rights, powers, functions, and duties of the office of environmental quality control or the environmental council within the department of health are transferred to the office of environmental quality control

or the environmental council within the office of the governor.

All officers and employees whose functions are transferred by this Act shall be transferred with their functions and shall continue to perform their regular duties upon their transfer, subject to the state personnel laws and this Act.

No officer or employee of the State having tenure shall suffer any loss of salary, seniority, prior service credit, vacation, sick leave, or other employee benefit or privilege as a consequence of this Act, and the officer or employee may be transferred or appointed to a civil service position without the necessity of examination; provided that the officer or employee possesses the minimum qualifications for the position to which transferred or appointed; and provided that subsequent changes in status may be made pursuant to applicable civil service and compensation laws.

An officer or employee of the State who does not have tenure and who may be transferred or appointed to a civil service position as a consequence of this Act shall become a civil service employee without the loss of salary, seniority, prior service credit, vacation, sick leave, or other employee benefits or privileges and without the

necessity of examination; provided that the officer or employee possesses the minimum qualifications for the position to which transferred or appointed.

If an office or position held by an officer or employee having tenure is abolished, the officer or employee shall not thereby be separated from public employment, but shall remain in the employment of the State with the same pay and classification and shall be transferred to some other office or position for which the officer or employee is eligible under the personnel laws of the State as determined by the head of the department or the governor.

SECTION 6. In codifying the new sections added by section 1 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

SECTION 7. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 8. This Act shall take effect on July 1, 2010.

Report Title:
Environmental Protection

Description:
Transfers the office of environmental quality control and the environmental council to the office of the governor for administrative purposes. Reduces the appointed membership of the environmental council from 15 to 9. Clarifies the duties of the office, director, and environmental council. Establishes the environmental review special fund. Establishes temporary environmental review modernization fees and capital improvement transfers effective through from 7/1/11 to 6/30/16 to fund technology modernization.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

Appendix 11. Working Group Proposed SB 2957 (Chapter 343)

THE SENATE
TWENTY-FIFTH LEGISLATURE, 2010
STATE OF HAWAII

S.B. NO. 2957 S.D. 1 H.D. 2 Proposed

A BILL FOR AN ACT

RELATING TO THE ENVIRONMENT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Chapter 343, Hawaii Revised Statutes, is amended by adding two new sections to be appropriately designated and to read as follows:

"**§343-A Significance criteria.** (a) In determining whether a proposed action may have a significant adverse environmental effect, an agency shall consider:

(1) Every phase of the proposed action;

(2) Any expected primary and secondary effects of the proposed action; and

(3) The overall and cumulative effects of the proposed action, including short-term and long-term effects.

(b) A proposed action shall be determined to have a significant effect on the environment if it:

(1) Involves an irrevocable commitment to the loss or destruction of any natural or cultural resource;

(2) Curtails the range of beneficial uses of the environment;

(3) Conflicts with the State's long-term environmental policies, guidelines, or goals, as expressed in chapter 344, and any revisions or amendments thereto, court decisions, or executive orders;

(4) Substantially adversely affects the economic welfare, social welfare, or cultural practices of the community or State;

(5) Substantially adversely affects public health;

(6) Involves substantial adverse secondary impacts, such as population changes or effects on public facilities;

(7) Involves a substantial degradation of environmental quality;

(8) Is individually limited but cumulatively has considerable adverse effects upon the environment or involves a commitment to related or future actions;

(9) Substantially adversely affects a rare, threatened, or endangered species or its habitat;

(10) Detrimentally affects air or water quality or ambient noise levels;

(11) Affects, or is likely to cause present or future damage by being located in, an environmentally sensitive area, such as a flood plain, tsunami zone, beach, erosion-prone area, geologically hazardous land, estuary, fresh water, or coastal waters;

(12) Substantially adversely affects scenic vistas and viewplanes identified in county or state plans or studies;

(13) Requires substantial energy consumption or emits substantial quantities of greenhouse gases; or

(14) Increases the scope or intensity of hazards to the public, such as increased coastal inundation, flooding, or erosion that may occur as a result of climate change anticipated during the lifetime of the project.

(c) The office shall provide guidance to agencies on the application of this section.

§343-B Record of decision. (a) No later than ninety days following the acceptance of a final statement, the accepting authority or agency shall prepare a public record of decision that:

(1) States its decision;

(2) Identifies all alternatives considered by the accepting authority or agency in reaching its decision, including:

(A) Alternatives that were considered to be environmentally preferable; and

(B) Preferences among those alternatives based upon relevant factors, including economic and technical considerations and agency statutory mission; and

(3) States whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted and, if not, why they were not adopted.

(b) This section shall not be deemed to create any cause of action or judicial remedy in addition those available under section 343-7."

SECTION 2. Section 183-44, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) For the purposes of this section:

(1) "Emergency repairs" means that work necessary to repair damages to fishponds arising from natural forces or events of human creation not due to the wilful neglect of the owner, of such a character

that the efficiency, esthetic character or health of the fishpond, neighboring activities of persons, or existing flora or fauna will be endangered in the absence of correction of existing conditions by repair, strengthening, reinforcement, or maintenance.

(2) "Repairs and maintenance" of fishponds means any work performed relative to the walls, floor, or other traditional natural feature of the fishpond and its appurtenances, the purposes of which are to maintain the fishpond in its natural state and safeguard it from damage from environmental and natural forces.

Repairs, strengthening, reinforcement, and maintenance and emergency repair of fishponds shall not be construed as actions [~~"proposing any use"~~] requiring an environmental assessment or an environmental impact statement within the context of [~~section 343-5.~~] chapter 343."

SECTION 3. Section 343-2, Hawaii Revised Statutes, is amended to read as follows:

"**§343-2 Definitions.** As used in this chapter unless the context otherwise requires:

"Acceptance" means a formal determination that the document required to be filed pursuant to section 343-5

fulfills the definition of an environmental impact statement, adequately describes identifiable environmental impacts, and satisfactorily responds to comments received during the review of the statement.

"Action" means any program or project to be initiated by any agency or applicant.

"Agency" means any [~~department,~~]:

(1) Department, office, board, or commission of the state or county government [~~which~~] that is a part of the executive branch of that government[~~.~~]; or

(2) County council.

"Applicant" means any person who, pursuant to statute, ordinance, or rule, officially requests approval for a proposed action.

"Approval" means [~~a discretionary consent~~] an approval required from an agency prior to actual implementation of an action.

"Bulletin" means the publication required under section 343-3(d).

"Council" means the environmental council.

"Cumulative effect" means the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency,

whether county, state, or federal, or person undertakes those actions; the cumulative effect can result from individually minor but collectively significant actions taking place over a period of time.

"Discretionary [~~consent~~] approval" means [~~a consent, sanction, or recommendation~~] an approval from an agency for which judgment and free will may be exercised by the issuing agency, as distinguished from a ministerial [~~consent.~~] approval.

"Environmental assessment" means a written evaluation to determine whether an action may have a significant effect.

"Environmental impact statement" or "statement" means an informational document prepared in compliance with the rules adopted under section 343-6 and [~~which~~] that discloses the [~~environmental~~]:

(1) Environmental effects of a proposed action[~~, effects~~];

(2) Effects of a proposed action on the economic welfare, social welfare, and cultural practices of the community and State[~~, effects~~];

(3) Effects of the economic activities arising out of the proposed action[~~, measures~~];

(4) Measures proposed to minimize adverse effects[~~,~~]; and [~~alternatives~~]

(5) Alternatives to the proposed action and their [~~environmental~~] effects.

The initial statement filed for public review shall be referred to as the draft statement and shall be distinguished from the final statement, which is the document that has incorporated the public's comments and the responses to those comments. The final statement is the document that shall be evaluated for acceptability by the respective accepting authority.

"Environmental review" refers broadly to the entire process prescribed by chapter 341 and this chapter, applicable to applicants, agencies, and the public, of scoping, reviewing, publishing, commenting on, finalizing, and accepting required documents, including environmental assessments and environmental impact statements; any variations of these documents, such as preparation notices, findings of no significant impact, programmatic reviews, and supplemental documents; any exemptions thereto; any decisions not to prepare these documents; and any appeal related to any of the foregoing.

"Finding of no significant impact" means a determination based on an environmental assessment that the

subject action will not have a significant effect and, therefore, will not require the preparation of an environmental impact statement.

[~~"Helicopter facility" means any area of land or water which is used, or intended for use for the landing or takeoff of helicopters; and any appurtenant areas which are used, or intended for use for helicopter related activities or rights-of-way.~~]

"Ministerial approval" means an agency decision involving no exercise of judgment or free will by the issuing agency, as distinguished from a discretionary approval.

"Office" means the office of environmental quality control.

"Person" includes any individual, partnership, firm, association, trust, estate, private corporation, or other legal entity other than an agency.

"Primary effect" means effects that are caused by the action and occur at the same time and place.

[~~"Power-generating facility" means:~~

~~(1) A new, fossil-fueled, electricity-generating facility, where the electrical output rating of the new equipment exceeds 5.0 megawatts; or~~

~~(2) An expansion in generating capacity of an existing, fossil-fueled, electricity-generating facility, where the incremental electrical output rating of the new equipment exceeds 5.0 megawatts.~~]

"Programmatic environmental assessment" and "programmatic environmental impact statement" mean a comprehensive environmental assessment or environmental impact statement, respectively, of a program, policy, plan, or master plan.

[~~"Renewable energy facility" has the same meaning as defined in section 201N-1.~~]

"Secondary effects" means effects that are caused by an action and are later in time or farther removed in distance, but are still reasonably foreseeable. Secondary effects may include growth-inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air, water, and other natural systems including ecosystems.

"Significant effect" means the sum of effects on the quality of the environment[~~, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the~~

~~State's environmental policies or long-term environmental goals as established by law, or adversely affect the economic welfare, social welfare, or cultural practices of the community and State.~~], as set forth in section 343-A.

"Supplemental document" means an addendum to an environmental assessment or statement, made for the purpose of disclosure, when there are:

(1) Substantial changes in the proposed action;

(2) Significant new circumstances or information relevant to environmental effects bearing on the proposed action or its impacts; or

(3) Substantial delay in the implementation of the proposed action beyond what was disclosed in the original environmental assessment or statement.

"Tiering" refers to the process of addressing general matters in broader environmental assessments or environmental impact statements with subsequent narrower environmental assessments or environmental impact statements that incorporate by reference the general discussions and concentrate solely on the issues specific to the environmental assessments or environmental impact statements subsequently prepared.

[~~"Wastewater treatment unit" means any plant or facility used in the treatment of wastewater.~~]"

SECTION 4. Section 343-3, Hawaii Revised Statutes, is amended to read as follows:

"**§343-3 Public participation, records, and notice.** (a) All statements, environmental assessments, and other documents prepared under this chapter shall be made available for inspection by the public [~~during established office hours.~~] at minimum through the electronic communication system maintained by the office and, if specifically requested due to lack of electronic access, also through printed copies available through the office.

(b) The office shall inform the public of notices filed by agencies of the availability of environmental assessments for review and comments, of determinations that statements are required or not required, of the availability of statements for review and comments, and of the acceptance or nonacceptance of statements.

(c) The office shall inform the public of:

(1) A public comment process or public hearing if a state or federal agency provides for the public comment process or public hearing to process a habitat conservation plan, safe harbor agreement, or incidental take license pursuant to chapter 195D or the federal Endangered Species Act;

(2) A proposed habitat conservation plan or proposed safe harbor agreement, and availability for inspection of the proposed agreement, plan, and application to enter into a planning process for the preparation and implementation of the habitat conservation plan for public review and comment;

(3) A proposed incidental take license as part of a habitat conservation plan or safe harbor agreement; and

(4) An application for the registration of land by accretion pursuant to section 501-33 or 669-1(e) for any land accreted along the ocean.

(d) The office shall inform the public by the publication of a periodic bulletin to be available to persons requesting this information. The bulletin shall be available through the office, [~~and~~] public libraries[~~.~~], and in electronic format.

(e) At the earliest practicable time, applicants and the relevant agencies shall:

(1) Provide notice to the public and to state and county agencies that an action is subject to review under this chapter; and

(2) Encourage and facilitate public involvement throughout the environmental review process, as

provided for in this chapter, chapter 341, and the relevant rules."

SECTION 5. Section 343-5, Hawaii Revised Statutes, is amended to read as follows:

"**§343-5 [~~Applicability and~~] Agency and applicant requirements.** [~~(a) Except as otherwise provided, an environmental assessment shall be required for actions that:~~

~~(1) Propose the use of state or county lands or the use of state or county funds, other than funds to be used for feasibility or planning studies for possible future programs or projects that the agency has not approved, adopted, or funded, or funds to be used for the acquisition of unimproved real property; provided that the agency shall consider environmental factors and available alternatives in its feasibility or planning studies; provided further that an environmental assessment for proposed uses under section 205-2(d)(11) or 205-4.5(a)(13) shall only be required pursuant to section 205-5(b);~~

~~(2) Propose any use within any land classified as a conservation district by the state land use commission under chapter 205;~~

~~(3) Propose any use within a shoreline area as defined in section 205A-41;~~

~~(4) Propose any use within any historic site as designated in the National Register or Hawaii Register, as provided for in the Historic Preservation Act of 1966, Public Law 89-665, or chapter 6E;~~

~~(5) Propose any use within the Waikiki area of Oahu, the boundaries of which are delineated in the land use ordinance as amended, establishing the "Waikiki Special District";~~

~~(6) Propose any amendments to existing county general plans where the amendment would result in designations other than agriculture, conservation, or preservation, except actions proposing any new county general plan or amendments to any existing county general plan initiated by a county;~~

~~(7) Propose any reclassification of any land classified as a conservation district by the state land use commission under chapter 205;~~

~~(8) Propose the construction of new or the expansion or modification of existing helicopter facilities~~

~~within the State, that by way of their activities, may affect:~~

~~(A) Any land classified as a conservation district by the state land use commission under chapter 205;~~

~~(B) A shoreline area as defined in section 205A-41; or~~

~~(C) Any historic site as designated in the National Register or Hawaii Register, as provided for in the Historic Preservation Act of 1966, Public Law 89-665, or chapter 6E; or until the statewide historic places inventory is completed, any historic site that is found by a field reconnaissance of the area affected by the helicopter facility and is under consideration for placement on the National Register or the Hawaii Register of Historic Places; and~~

~~(9) Propose any:~~

~~(A) Wastewater treatment unit, except an individual wastewater system or a wastewater treatment unit serving fewer than fifty single-family dwellings or the equivalent;~~

~~(B) Waste-to-energy facility;~~

~~(C) Landfill;~~

~~(D) Oil refinery; or~~

~~(E) Power-generating facility.~~]

(a) Except as otherwise provided, an environmental assessment shall be required for actions that propose:

(1) The use of state or county lands or funds by an agency; or

(2) The issuance of a discretionary approval to an agency or a person for an action that may have adverse environmental effects, including but not limited to discretionary approvals for the use of state or county lands or funds.

(b) To encourage greater certainty and transparency in the environmental review process, in consultation with relevant state and county agencies and the public, the office shall develop guidance to classify discretionary approvals that are subject to an environmental assessment pursuant to subsection (a)(2) and ministerial approvals as follows:

(1) Class 1: Discretionary approvals for which the action may have adverse environmental effects and therefore requires an environmental assessment or statement, unless exempt pursuant to section 343-6(a)(2);

(2) Class 2: Discretionary approvals for which the action has no likely adverse environmental effects; and

(3) Class 3: Ministerial approvals.

(c) Whenever an agency proposes an action described in subsection (a)(1) or (a)(2) [~~, other than feasibility or planning studies for possible future programs or projects that the agency has not approved, adopted, or funded, or other than the use of state or county funds for the acquisition of unimproved real property~~] that is not a specific type of action declared exempt under section 343-6, the agency shall prepare an environmental assessment, or based upon its discretion, may choose to prepare a programmatic environmental assessment, for [~~such~~] the action at the earliest practicable time to determine whether an environmental impact statement shall be required[~~.~~]; provided that if the agency determines, through its judgment and experience, that an environmental impact statement is likely to be required, the agency may choose not to prepare an environmental assessment and instead shall prepare an environmental impact statement, following adequate notice to the public and all interested parties.

(1) For environmental assessments for which a finding of no significant impact is anticipated:

(A) A draft environmental assessment shall be made available for public review and comment for a period of thirty days;

(B) The office shall inform the public of the availability of the draft environmental assessment for public review and comment pursuant to section 343-3;

(C) The agency shall respond in writing to comments received during the review and prepare a final environmental assessment to determine whether an environmental impact statement shall be required;

(D) A statement shall be required if the agency finds that the proposed action may have a significant adverse effect on the environment; and

(E) The agency shall file notice of [~~such~~] the determination with the office. When a conflict of interest may exist because the proposing agency and the agency making the determination are the same, the office may review the agency's determination, consult

the agency, and advise the agency of potential conflicts, to comply with this section. The office shall publish the final determination for the public's information pursuant to section 343-3.

The draft and final statements, if required, shall be prepared by the agency and submitted to the office. The draft statement shall be made available for public review and comment through the office for a period of forty-five days. The office shall inform the public of the availability of the draft statement for public review and comment pursuant to section 343-3. The agency shall respond in writing to comments received during the review and prepare a final statement.

The office, when requested by the agency, may make a recommendation as to the acceptability of the final statement.

(2) The final authority to accept a final statement shall rest with:

(A) The governor, or the governor's authorized representative, whenever an action proposes the use of state lands or the use of state funds, or whenever a state agency proposes an action [~~within the categories in~~

~~subsection (a);~~] as described in subsection (a)(2); or

(B) The mayor, or the mayor's authorized representative, of the respective county whenever an action proposes only the use of county lands or county funds[~~.~~], or when a county proposes an action as described in subsection (a)(2).

Acceptance of a required final statement shall be a condition precedent to implementation of the proposed action[~~.~~]; provided that in circumstances when a supplemental document is required, its acceptance shall be a condition precedent only to implementation of those elements of the proposed action for which one or more discretionary approvals, modifications, or revocations remain, or to the extent that an agency has retained discretion to modify or revoke any prior approval. Upon acceptance or nonacceptance of the final statement, the governor or mayor, or the governor's or mayor's authorized representative, shall file notice of [~~such~~] the determination with the office. The office, in turn, shall publish the determination of acceptance or nonacceptance pursuant to section 343-3.

[~~(c)~~] (d) Whenever an applicant proposes an action specified by subsection (a)(2) [~~that requires approval of an agency and~~] that is not a specific type of action declared exempt under section 343-6, the agency initially receiving and agreeing to process the request for approval shall prepare an environmental assessment, or based upon its discretion, may choose to prepare a programmatic environmental assessment, of the proposed action at the earliest practicable time to determine whether an environmental impact statement shall be required; [~~provided that, for an action that proposes the establishment of a renewable energy facility, a draft environmental impact statement shall be prepared at the earliest practicable time.~~] provided that if the agency determines, through its judgment and experience, that an environmental impact statement is likely to be required, the agency may choose not to prepare an environmental assessment and instead shall require an environmental impact statement, following adequate notice to the public and all interested parties. The final approving agency for the request for approval is not required to be the accepting authority.

For environmental assessments for which a finding of no significant impact is anticipated:

(1) A draft environmental assessment shall be made available for public review and comment for a period of thirty days;

(2) The office shall inform the public of the availability of the draft environmental assessment for public review and comment pursuant to section 343-3; and

(3) The applicant shall respond in writing to comments received during the review, and the agency shall prepare a final environmental assessment to determine whether an environmental impact statement shall be required. A statement shall be required if the agency finds that the proposed action may have a significant adverse effect on the environment. The agency shall file notice of the agency's determination with the office, which, in turn, shall publish the agency's determination for the public's information pursuant to section 343-3.

The draft and final statements, if required, shall be prepared by the applicant, who shall file these statements with the office.

The draft statement shall be made available for public review and comment through the office for a period of

forty-five days. The office shall inform the public of the availability of the draft statement for public review and comment pursuant to section 343-3.

The applicant shall respond in writing to comments received during the review and prepare a final statement. The office, when requested by the applicant or agency, may make a recommendation as to the acceptability of the final statement.

The authority to accept a final statement shall rest with the agency initially receiving and agreeing to process the request for approval. The final decision-making body or approving agency for the request for approval is not required to be the accepting authority. The planning department for the county in which the proposed action will occur shall be a permissible accepting authority for the final statement.

Acceptance of a required final statement shall be a condition precedent to approval of the request and commencement of the proposed action[~~.~~]; provided that in circumstances when a supplemental document is required, its acceptance shall be a condition precedent only to approval and commencement of those elements of the proposed action for which one or more discretionary approvals, modifications, or revocations remain or to the extent that

an agency has retained discretion to modify or revoke any prior approval. Upon acceptance or nonacceptance of the final statement, the agency shall file notice of [~~such~~] the determination with the office. The office, in turn, shall publish the determination of acceptance or nonacceptance of the final statement pursuant to section 343-3.

The agency receiving the request, within thirty days of receipt of the final statement, shall notify the applicant and the office of the acceptance or nonacceptance of the final statement. The final statement shall be deemed to be accepted if the agency fails to accept or not accept the final statement within thirty days after receipt of the final statement; provided that the thirty-day period may be extended at the request of the applicant for a period not to exceed fifteen days.

In any acceptance or nonacceptance, the agency shall provide the applicant with the specific findings and reasons for its determination. An applicant, within sixty days after nonacceptance of a final statement by an agency, may appeal the nonacceptance to the environmental council, which, within thirty days of receipt of the appeal, shall notify the applicant of the council's determination. In any affirmation or reversal of an appealed nonacceptance, the council shall provide the applicant and agency with

specific findings and reasons for its determination. The agency shall abide by the council's decision.

[~~(d)~~] (e) Whenever an applicant requests approval for a proposed action and there is a question as to which of two or more state or county agencies with jurisdiction has the responsibility of preparing the environmental assessment[~~,~~] or the statement, the office, after consultation with and assistance from the affected state or county agencies, shall determine which agency shall prepare the environmental assessment[~~.~~] or statement.

[~~(e)~~] (f) In preparing an environmental [~~assessment,~~] review document, an agency or applicant may consider and, where applicable and appropriate, incorporate by reference, in whole or in part, previous [~~determinations of whether a statement is required and previously accepted statements.~~] environmental review documents. The council, by rule, shall establish criteria and procedures for the use of previous determinations and statements.

[~~(f)~~] (g) Whenever an action is subject to both the National Environmental Policy Act of 1969 (Public Law 91-190) and the requirements of this chapter, the office and agencies shall cooperate with federal agencies to the fullest extent possible to reduce duplication between federal and state requirements. [~~Such~~] This cooperation,

to the fullest extent possible, shall include joint environmental impact statements with concurrent public review and processing at both levels of government. Where federal law has environmental impact statement requirements in addition to but not in conflict with this chapter, the office and agencies shall cooperate in fulfilling these requirements so that one document shall comply with all applicable laws.

(h) Upon receipt of a written request and for good cause shown, an approving agency or accepting authority shall extend the public review and comment period required under this section as follows:

(1) For environmental assessments: No more than thirty additional days beyond the public review and comment period required in subsection (c)(1)(A) or (d)(1); and

(2) For environmental impact statements: No more than forty-five additional days beyond the public review and comment period required in subsection (c) or (d) relating to draft statements.

[~~(g)~~] (i) A statement that is accepted with respect to a particular action shall satisfy the requirements of this chapter, and no other statement for the proposed

action, other than a supplemental document to that statement, shall be required."

SECTION 6. Section 343-7, Hawaii Revised Statutes, is amended to read as follows:

"**§343-7 Limitation of actions.** (a) Any judicial proceeding, the subject of which is the lack of an environmental assessment required under section 343-5, or the lack of a supplemental environmental assessment or supplemental environmental impact statement, shall be initiated within one hundred twenty days of the agency's decision to carry out or approve the action, or, if a proposed action is undertaken without a formal determination by the agency that [~~a~~] an environmental assessment, supplemental document, or statement is or is not required, a judicial proceeding shall be instituted within one hundred twenty days after the proposed action is started. The council or office, any agency responsible for approval of the action, or the applicant shall be adjudged an aggrieved party for the purposes of bringing judicial action under this subsection. Others, by court action, may be adjudged aggrieved.

(b) Any judicial proceeding, the subject of which is the determination that a statement is required for a proposed action, shall be initiated within [~~sixty~~] one

hundred twenty days after the public has been informed of [~~such~~] the determination pursuant to section 343-3. Any judicial proceeding, the subject of which is the determination that a statement is not required for a proposed action, shall be initiated within [~~thirty~~] one hundred twenty days after the public has been informed of [~~such~~] the determination pursuant to section 343-3. The council or the applicant shall be adjudged an aggrieved party for the purposes of bringing judicial action under this subsection. Others, by court action, may be adjudged aggrieved.

(c) Any judicial proceeding, the subject of which is the acceptance of an environmental impact statement required under section 343-5, shall be initiated within [~~sixty~~] one hundred twenty days after the public has been informed pursuant to section 343-3 of the acceptance of [~~such~~] the statement. The council shall be adjudged an aggrieved party for the purpose of bringing judicial action under this subsection. [~~Affected agencies and persons who provided written comment to such statement during the designated review period shall be adjudged aggrieved parties for the purpose of bringing judicial action under this subsection; provided that the contestable issues shall be limited to issues identified and discussed in the~~

~~written comment.~~] Others, by court action, may be adjudged aggrieved.

(d) Any judicial proceeding, the subject of which is the failure to prepare a record of decision that is required under section 343-B, shall be initiated within one hundred twenty days after the expiration of the ninety-day period for preparation of the record of decision. The council shall be adjudged an aggrieved party for the purposes of bringing judicial action under this subsection. Others, by court action, may be adjudged aggrieved."

SECTION 7. Section 353-16.35, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) Notwithstanding any other law to the contrary, the governor, with the assistance of the director, may negotiate with any person for the development or expansion of private in-state correctional facilities or public in-state turnkey correctional facilities to reduce prison overcrowding; provided that if an environmental assessment or environmental impact statement is required for a proposed site or for the expansion of an existing correctional facility under [~~section 343-5,~~] chapter 343, then notwithstanding the time periods specified for public review and comments under section 343-5, the governor shall

accept public comments for a period of sixty days following public notification of either an environmental assessment or an environmental impact statement."

SECTION 8. Section 343-6, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) After consultation with the affected agencies[~~,~~] and the council, the [~~council~~] office shall adopt, amend, or repeal necessary rules for the purposes of this chapter in accordance with chapter 91 including, but not limited to, rules that shall:

(1) Prescribe the procedures whereby a group of proposed actions may be treated by a single environmental assessment or statement;

(2) Establish procedures whereby specific types of actions, because they will probably have minimal or no significant effects on the environment, are declared exempt from the preparation of an environmental assessment; provided that the procedures shall ensure that the declaration is simultaneously transmitted electronically to the office and made readily available as a public record in a searchable electronic database; provided further that the office, in consultation with the affected agencies, shall review and, if

necessary, update lists or categories of actions declared exempt pursuant to this paragraph no less than every three years;

(3) Prescribe procedures for the preparation of an environmental assessment;

(4) Prescribe the contents of and best practices, including document length, for an environmental assessment;

(5) Prescribe procedures for informing the public of: determinations that a statement is either required or not required[~~, for informing the public of~~]; the availability of draft environmental impact statements for review and comments[~~,~~]; and [~~for informing the public of~~] the acceptance or nonacceptance of the final environmental statement;

(6) Prescribe the contents of and best practices, including document length, for an environmental impact statement;

(7) Prescribe procedures for the submission, distribution, review, acceptance or nonacceptance, and withdrawal of an environmental impact statement;

(8) Establish criteria to determine whether an environmental impact statement is acceptable or not; [~~and~~]

(9) Prescribe procedures to appeal the nonacceptance of an environmental impact statement to the [~~environmental~~] council[~~.~~];

(10) Prescribe procedures for the public comment and response process, including but not limited to the allowed use of electronic technology and the issuance of one comprehensive response to multiple or repetitious comments that are substantially similar in content;

(11) Prescribe procedures for implementing the requirements for records of decision;

(12) Develop guidance for the application and interpretation of the significance criteria under section 343-A;

(13) Prescribe procedures and guidance for the preparation of programmatic environmental assessments or programmatic environmental impact statements and the tiering of project-specific environmental assessments or statements; and

(14) Prescribe procedures for the applicability, preparation, acceptance, and publication of

supplemental environmental assessments and supplemental environmental impact statements when there are:

(A) Substantial changes in the proposed action; or

(B) Significant new circumstances or information relevant to environmental effects bearing on the proposed action or its impacts; or

(C) Substantial delay in the implementation of the proposed action beyond what was disclosed in the original environmental assessment or statement;

provided that the supplemental documents are limited to the impacts of the changed action, new circumstances, or new information."

SECTION 9. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before the effective dates, and does not affect the rights and duties related to any environmental assessment or environmental impact statement for which a draft has been prepared and public notice thereof published by the office of environmental quality control before the effective date of this Act.

SECTION 10. In codifying the new sections added by section 1 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

SECTION 11. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 12. This Act shall take effect on July 1, 2012.

Report Title:
Environmental Impact Statements

Description:
Makes numerous revisions to the environmental assessment and environmental impact statement process to create a more streamlined, transparent, and consistent process. Effective 7/1/12.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

Appendix 12. GHG White Paper

Climate Change Mitigation and the Environmental Review System

An appropriate mechanism for greenhouse gas emissions reporting?

A White Paper for the Hawaii EIS Study

Makena Coffman
Assistant Professor
Department of Urban and Regional Planning
University of Hawaii at Manoa
makena.coffman@hawaii.edu
(808) 956-2890

Summary

This paper assesses the use of the Environmental Review (ER) system in Hawaii, as a process to disclose information on environmental impacts in order to aid in the State's goals to substantially reduce greenhouse gas emissions. This paper provides a review of other jurisdictions currently considering and/or implementing greenhouse gas reduction measures into the ER system as well as provides an assessment of the recent Honolulu Rail Transit Draft EIS in terms of including greenhouse gas emissions.

Other jurisdictions considering the inclusion of greenhouse gas emissions within the ER system are grappling with issues of scope, accounting tools, and accepted thresholds of emissions. While the ER system is generally meant as a means of disclosing environmental impacts to the public, in several reviewed cases, projects could be required to adopt mitigation techniques including offset projects depending on accepted threshold standards.

The experiences of other jurisdictions are insightful while assessing the benefits to greenhouse gas reductions at the project level. The Honolulu Rail Transit Project will be amongst the largest public infrastructure initiatives in Hawaii. By comparing techniques used elsewhere to the Draft Project EIS, it is clear that the inclusion of greenhouse gas emissions would be helpful to decision-makers. For example, due to the State's aggressive renewable energy goals for electricity, the EIS estimation that the Project could reduce energy consumption by 2% would likely be made more compelling if greenhouse gas emissions were included because the margin of benefit would likely be greater. In addition, life-cycle impacts should be considered because there will be substantial greenhouse gas emissions resulting from the construction phase of the Project, particularly for the import and use of cement.

Regardless whether mitigation measures are required to be adopted based on an accepted threshold, a full discussion of mitigation options would be useful in better planning for

walking, biking, and integration with existing bus transit systems. A full review of possible renewable energy systems and their integration on-site would demonstrate ways in which the Project itself might be used to improve environmental outcomes.

I. Introduction

The question of how issues of global climate change should be incorporated into policy and governance is at the forefront of debate in federal, state and local jurisdictions. At the national level, large-scale, cap-and-trade programs are currently being considered in the Senate as part of the American Clean Energy and Security Act (ACES). In the previous absence of federal action, states pioneered the adoption of binding greenhouse gas emissions commitments. Cities, counties, and communities have joined the effort in understanding and estimating their carbon impact and creating reduction plans. Regional trading schemes, state emission reduction plans, and GHG inventory techniques are becoming mainstream components of policy and planning.

With many levels of government in the scoping and planning stages for greenhouse gas emissions reduction implementation, there is considerable debate about which level of government should be the primary policeman for greenhouse gas emissions. More specifically, the challenge is to define the appropriate and complementary role of each level of government.

While many states have adopted binding greenhouse gas emissions reduction targets, they face the challenge of calculating a greenhouse gas emission baseline, developing a work plan for reduction, and tracking progress over time. The State of Hawaii was the second state after California to adopt legally binding greenhouse gas emissions reduction targets - to reach 1990 levels of greenhouse gas emissions by the year 2020. The Hawaii Climate Change Solutions Act of 2007, Act 234, established the greenhouse gas target as well as created a 10-member Task Force to develop the work plan to achieve the target. The work plan is due to the State in the 2010 legislative session. While Act 234 emphasized the use of market-based mechanisms (i.e. carbon tax or cap-and-trade) to meet its stated goals, there is growing evidence that suggests project-level information could serve as a complementary monitoring mechanism.

This paper assesses the use of the Environmental Review (ER) system in Hawaii as a process to disclose information on environmental impacts in order to aid in the State's goals to substantially reduce greenhouse gas emissions.

The paper is organized as follows. Section II provides a background on Hawaii's Climate Change Solutions Act and possible integration with federal policies. Section III presents greenhouse gas emission reporting standards in developing project-level emissions estimates. Section IV provides a review of other jurisdiction's use of the ER process to address greenhouse gas emissions. Section V provides a case study of a recent high-profile Environmental Impact Study (EIS) done for the city and county of Honolulu's proposed light rail system. Because climate change is not currently required as part of an EIS, the study does not take in this dimension of analysis. This work assesses how a large project EIS like this could include climate change considerations and why it might

be beneficial to policy-makers and the public to do so. Section VI provides concluding remarks.

Many projects are affected by climate change (like sea level rise). For purposes of scope and manageability, however, this paper solely focuses on greenhouse gas emissions impacts. Adaptation is another way in which the ER system could address climate change and is an area of future inquiry.

II. Hawaii's Greenhouse Gas Emission Reduction Effort

The Hawaii Climate Change Solutions Act (Act 234) was passed into law in 2007 and the work plan to reach 1990 levels of greenhouse gas emissions by 2020 will be implemented in 2012. A 10-member Task Force is currently developing a work plan (due in December 2009) to achieve the emissions target. In addition, complementary efforts of the State include a federal-State partnership between the U.S. Department of Energy and the Governor's office called the Hawaii Clean Energy Initiative (HCEI). HCEI focuses on renewable energy penetration for both electricity and ground transportation purposes, with the goal of reaching 70% clean energy by the year 2050.

Although the language of Act 234 emphasizes the use of market-based mechanisms, there are several emerging impediments to successful local implementation. Namely, 1) small market structure likely precludes a carbon trading scheme, 2) lacking political will to increase the price of fossil fuels, and 3) pending federal legislation increases uncertainty of state action and preemption.

As a small island state, the market for energy products in Hawaii is quite narrow. There are two petroleum refineries, two electric utilities (one substantially larger than the other), and a limited number of independent power providers. The two petroleum refineries, Chevron and Tesoro, both operate at Barbers Point on the island of Oahu and provide the majority of finished petroleum products including jet fuel, gasoline and diesel for the State. Residual fuel oil (a byproduct of production) is sold to the electric utilities. The Hawaiian Electric Industries, Inc. (HEI) provides electricity via the Hawaiian Electric Company (HECO) on Oahu, Hawaii Electric Light Company (HELCO) on Hawaii Island, and Maui Electric Company (MECO) on Maui County. The island of Kauai operates with a separate utility cooperative. On Oahu, the largest consumer of electricity, there is one coal producer, AES, and a waste-to-power operation, H-Power. Given there are a limited number of upstream energy industries (the refineries and IPP's, depending on how the policy is structured), developing a trading scheme would be very difficult.

The other market-based option, a carbon tax, is likely to be politically difficult. In the 2009 legislative session, a $1 tax per barrel of imported petroleum was passed. It was introduced as a substantially larger tax and was subsequently reduced throughout the legislative session. In the end, however, the Governor vetoed the bill and the legislature failed to override the veto. Given the obvious failure of this initiative, heftier fossil fuel taxation seems unlikely in the near future.

Part of the difficulty in creating a state-level plan to reduce carbon emissions is that the federal government is simultaneously developing its own policies. Most recently, the Waxman-Markey bill, or ACES, has moved from the House to the Senate. The legislation aims to cut greenhouse gas emissions by 17% compared to 2005 levels by 2020, 42% by 2030, and 83% by 2050. The primary mechanism to achieve this target would be a cap-and-trade system. The bill currently contains language that would preclude states from participating in cap-and-trade programs other than at the national level.

Through another vein of federal policy-making, the Environmental Protection Agency (EPA) is increasingly taking steps to regulate greenhouse gas emissions under the Clean Air Act. In 2006, a number of states sued the EPA for failing to regulate greenhouse gas emissions from the transportation sector. U.S. Supreme Court Case Massachusetts V. EPA made it possible for the EPA to regulate tailpipe emissions under the Clean Air Act. Most recently, the EPA released their draft guidelines for mandatory reporting for greenhouse gas emissions sources larger than 25 thousand metric tons of emissions annually as well as a few targeted sectors. The reporting mechanism does not necessarily provide a means to reduce greenhouse gas emissions but rather a means of monitoring emissions by source over time. Thus this reporting system could well-complement emissions reductions schemes. Moreover, EPA's ability to regulate and monitor greenhouse gas emissions could provide substantial support to states in their effort to meet emissions targets. The proposed reporting initiative is currently undergoing final rulemaking after the recent closure of the 60-day comment period through the Federal Register.

The question of how Hawaii's effort to reduce greenhouse gas emissions integrates with those of the federal government is pressing. Currently under ACES, only regional and state-level cap-and-trade initiatives would face federal preemption. This means that a local carbon-tax could theoretically be implemented in conjunction with federal legislation (as it currently stands). If the federal program is deemed to be stringent enough, then it is more likely for pioneering states to willingly participate. Nonetheless, there is also a growing body of evidence that suggests market-based mechanisms alone will not solve the problem particularly in the near-term. For example, the progress of the European Trading Scheme demonstrates that it may take several iterations to trading policy (particularly in the allocation of allowances) to "get the price right" for carbon. The experience of the European Union suggests that to count on market interactions alone means that we could be missing other opportunities to reach emissions reduction targets. Thus there could be complementary efforts such as increased transparency and information, and improved physical and land-use planning including housing developments and transportation systems. Bringing transparency and information down to a project level (most notably for transportation and large development projects) could greatly increase decision-making capacity and, at a minimum, allow policy-makers and the public to achieve greater understanding of contributions and solutions to greenhouse gas emissions.

III. Standards for Greenhouse Gas Emissions Accounting and Reporting

There are several emerging greenhouse gas emissions accounting and reporting protocols. The World Resources Institute (WRI), the Intergovernmental Panel on Climate Change (IPCC) and The Climate Registry (TCR) provide guidance on acceptable methods of greenhouse gas accounting. They are largely complementary and cover different levels of entities (for example, countries, states, cities, corporations). Most applicable to the needs of the ER system, WRI developed guidelines on greenhouse gas emissions accounting at the project level and for corporate entities. On the reporting side, the Environmental Protection Agency (EPA) is currently undergoing a process to require mandatory reporting of all facilities responsible for 25 thousand metric tons or more of carbon dioxide equivalent annually.

Greenhouse Gas Emissions Accounting

The WRI GHG Protocol for Project Accounting (2003) was primarily designed to quantify greenhouse gas emissions reductions from relevant offset projects, such as the Clean Development Mechanism within the Kyoto Framework (WRI, 2003, 11). As such, it focuses specifically on greenhouse gas reducing projects. Nonetheless, the accounting methods are generally applicable regardless of whether the project is net greenhouse gas reducing or emitting.

The WRI Corporate Accounting and Reporting Standard (Revised Edition, 2004), while less relevant to project-level accounting, provides often-used guidance on "scope" for greenhouse gas emissions reporting. This reporting tool is often referred to in the decision of which greenhouse gas emissions to cover and thus will be presented in brief.

WRI GHG Protocol for Project Accounting

Baseline Emissions

For any project-level greenhouse gas inventory, it is first important to estimate emissions under a baseline scenario, or business as usual. For example, for a wind installation project, what would be the greenhouse gas emissions impacts of consuming energy without the project? Because the scenario often needs to be projected into the future, as construction projects often last over a specified time-horizon, it often becomes necessary to use a model to estimate baseline conditions. Thus it is important to posit a credible scenario of "what would happen in the future if no action is taken now." There are numerous models that can be utilized to estimate baseline emissions and are often case-specific. Examples of identified models for types of projects will be discussed in the case studies presented in the next section.

The primary purpose of developing a baseline scenario is to determine whether changes to emissions from the project are "additional," meaning it would not have happened without project implementation. WRI fully acknowledges that there is considerable uncertainty in developing baseline scenarios, particularly as the estimate projects forward in time. As such, the WRI recommends erring on the side of caution with conservative

assumptions, meaning that greenhouse gas reductions should not be overestimated (WRI, 2003, 24).

Primary and Secondary Effects

The distinction between primary and secondary effects, and whether to include secondary effects within the regulatory process, is important in determining the scope of project-related emissions. Within the greenhouse gas "assessment boundary," WRI suggests that project analysis be taken in these steps: 1) identify each project activity, 2) identify all primary effects, 3) consider all secondary effects, 4) estimate the relative magnitude of all secondary effects, 5) assess the significance of all secondary effects. A primary effect would include any direct impact that the project has on greenhouse gas emissions. For example, for a wind power project, the primary effect would be the reduction in combustion emissions from generating electricity from fossil fuel sources (WRI, 2003, 31). Secondary effects, on the other hand, are more complicated. They can be divided into one-time effects, upstream and downstream effects. One-time effects include emissions that occur during "construction, installation, and establishment or the decommissioning and termination of the project activity" (WRI, 2003, 31). Upstream and downstream effects are "recurring secondary effects associated with the operating phase of a project activity and related to either the inputs used (upstream) or the products produced (downstream) by a project activity" (WRI, 2003, 32). Examples given include project activities that: involve transportation of materials, employees, products or waste; rely on fossil or biomass fuels; or cause a change in the use of input materials. Within the WRI Corporate Protocol, such impacts are further defined into Scope 1, 2, and 3 emissions and are more often referred to in this manner (see section below). Determining the significance of secondary effects is subjective and thus should be guided by relevant policy. In the case of the ER system, this would be relevant for determining a threshold of significance that would then trigger a full EIS.

Baseline Candidates

Baseline candidates are "alternative technologies or practices within a specified geographic area and temporal range that could provide the same product or service as the project activity" (WRI, 2003, 38). They are "alternative scenarios," a further mechanism by which to compare the proposed benefits of the project. In order to do this, WRI suggests to 1) define the product or service provided by the project activity, 2) identify possible types of baseline candidates, 3) define and justify the geographic area and the temporal range, 4) define and justify any other criteria used to identify baseline candidates, 5) identify a final list, and 6) identify baseline candidates that are representative of common practice (WRI, 2003, 39). For example, a wind power project's product and/or service would be the provision of kilowatt-hours of electricity from greenhouse gas reducing technology. Assuming that they are also viable within the project area, a baseline candidate might be solar photovoltaic arrays.

Greenhouse Gas Impact Assessment

There are two methods outlined by the WRI in which to estimate project-level greenhouse gas emissions: project-specific estimation or with a performance standard.

The project-specific procedure "produces an estimate on baseline emissions for a project activity's primary effect through the identification of a baseline scenario linked to the specific circumstances surrounding the project activity" (WRI, 2003, 48). In this case, project-related emissions can be compared to that of the determined baseline scenario as well as baseline candidates, through both quantitative and qualitative methods.

The adoption of a performance standard creates a more standard and quantifiable method of project-level accounting. For the purposes of a greenhouse gas emissions offset project, as is the WRI GHG Protocol for Project Accounting, a greenhouse gas emissions reducing project could be implemented if it complied with the adopted performance standard relative to the baseline scenario and baseline candidates. For example, a stringent performance standard would require implementation of the best-performing baseline candidate. A more lenient standard would be allowing adoption of a project that exceeds the median greenhouse gas emission rate of all considered scenarios (WRI, 2003, 63). For the purposes of the ER system, this would translate into adopting a performance standard for project-level greenhouse gas emissions such that projects would have to mitigate emissions exceeding the adopted standard, for example through greenhouse gas offset projects.

The WRI GHG Protocol for Project Accounting provides specific guidance on accounting for greenhouse gas emissions in cement projects and compressor station efficiency improvements. Although not necessarily designed for projects within the ER system, it provides a useful framework for project-level emissions that can be easily adapted for various policy needs.

WRI Corporate Accounting and Reporting Standard

The WRI Corporate Accounting and Reporting Standard categorizes emissions from corporate entities into Scope 1, 2, and 3 sources. This has become a common way in which to think about emissions categories. It is described here in brief due to its relevance to the ways in which the case studies discussed below categorize emissions.

Scope 1 emissions are direct greenhouse gas emissions over which the entity has control. For example, on-site fuel combustion and company owned vehicles. Scope 2 emissions are indirect emissions from the purchase of electricity. Scope 3, which is optional, includes all other indirect emissions. This includes emissions from the production of purchased materials, product use, outsourced activities, contractor-owned vehicles, waste disposal, and employee travel.

For the purposes of the ER process, at the project level, the most important point here is the distinction between direct and indirect emissions: emissions over which the entity has immediate control (i.e. ownership of the process) versus emissions over which the entity does not (i.e. occurs either upstream or downstream). Scope 3 suggests that life-cycle

emissions should be accounted for in order to have a complete greenhouse gas inventory. This includes construction-related and operational emissions impacts. In addition, Scope 3 suggests that transportation-related emissions, in terms of transportation to and from the project should be considered. This easily relates to the WRI GHG Protocol for Project Accounting through its discussion of, one-time and reoccurring, primary and secondary effects.

Greenhouse Gas Emissions Reporting

In April 2009 the EPA published draft mandatory reporting guidelines in the Federal Register. The public comment period ended in June, 2009, and the agency is currently in the final rulemaking process. This is an enormous step in terms of the Federal government pursuing reporting mechanisms at a sub-national level.

The draft reporting guidelines proposed that all suppliers of fossil fuels or industrial greenhouse gases, manufacturers of vehicles and engines, and facilities that emit 25 thousand metric tons or more per year be required to submit annual reports to the EPA (EPA, 2009). The proposed rule covers all major sources of greenhouse gases, which include carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride, nitrogen trifluoride and hydrofluorinated ethers.

There are several voluntary reporting frameworks, both at the State and regional levels. For example, The Climate Registry provides accounting guidelines and reporting services for various types of entities in order to track and verify greenhouse gas emissions over time. It has yet to be determined how the EPA reporting guidelines will support or replace previous reporting frameworks.

IV. The Environmental Review System and Climate Change Mitigation

Several states and local governments have begun to address the use of the environmental review system as a means of disclosing greenhouse gas emissions impacts for proposed projects. Moreover, several states have had litigation cases where climate change was not addressed in relevant environmental review processes. For example, a Minnesota-based environmental organization brought a case against the State Department of Natural Resources (DNR) for failing to address greenhouse gas emissions in the EIS of a proposed large-scale steel mining operation (State of Minnesota District Court, 2007). The DNR maintained that there was no requirement to include greenhouse gas emissions and the court supported the agency. It is, however, currently in appeal. Some states, such as Washington, are being proactive in order to avoid "policy by litigation" (State of Washington, 2009). The following review provides brief case studies of Washington State, California, and Massachusetts. This is not an exhaustive list of state efforts to include climate change in State and Environmental Policy Act (SEPA) but rather illustrative case studies of the issues, benefits and barriers to doing so.

Washington State

Washington State Department of Ecology "feels it is in [their] best interest to act now to clarify our SEPA rules, and prepare guidance regarding climate" (State of Washington, 2009). The State underwent a stakeholder process to develop recommendations on how climate change considerations should be included in SEPA processes. Specifically, the resulting report outlines the importance of including climate change mitigation within the SEPA process, ways to determine threshold emissions both quantitatively and qualitatively, and relevant project exemptions. It also highlights difficulties of the task, particularly in the inclusion of indirect emissions impacts (State of Washington, 2008).

The SEPA Implementation Working Group (IWG) determined, as the outcome of a participatory planning process, that it is sub-optimal to allow climate change considerations to occur ad hoc within environmental review processes. Ad hoc policy making, resulting from individual lawsuits, does not lead to "consistency or predictability." In addition, the IWG recognized that greenhouse gas mitigation resulting from SEPA processes play only a part in meeting Washington State's greenhouse gas reduction targets. Other policy tools, including multi-state, national or international market-based approaches will primarily drive the mitigation effort. Climate change considerations within SEPA, however, will "play an important role in filling the gaps in existing regulations" (State of Washington, 2008).

The IWG developed a set of 11 recommendations on how to incorporate climate change considerations into SEPA. They include:

1) The need for clear guidance on how to evaluate greenhouse gas emissions from both projects and non-project proposals;

2) Regular updates of relevant materials including assessment tools and mitigation options;

3) Development of quantitative emissions calculations tools, specifically for transportation (vehicle miles traveled forecasting), embodied emissions, loss of greenhouse gas emissions sinks (for example, deforestation), reduction in space heating and electricity use, and mitigation effectiveness;

4) Provide guidelines for qualitative assessment of emissions reductions when quantitative tools are inadequate;

5) Provide guidance regarding standards and strategies for mitigation, including cost effectiveness of strategies and criteria for assessing "new" methods;

6) Development of an approach for threshold determinations, meaning that lead agencies need to establish a significance standard or similarly adopt a standard;

7) Provide ways of "leveraging" SEPA to promote climate-friendly development, including integrating project-level planning with regional planning, and providing exemptions for communities that are pursuing sustainable development in a variety of

ways and for projects that can show with certainty that it reduces greenhouse gas emissions;

8) Assess future vulnerabilities relating to climate change adaptation;

9) Take into account lead agency resources and constraints;

10) Provide adequate training to implement the plan;

11) Form an Advisory Committee to prioritize and act upon the above recommendations.

While all of these recommendations are likely to be relevant to any state assessing the capacity of the ER system to include climate change mitigation analysis, recommendations 1, 3, 4, and 6 are likely the largest looming issues. These relate to the practical considerations of developing calculation tools (both numeric and descriptive) and adopting threshold levels of emissions by which to trigger further analysis.

Regarding measurement of greenhouse gas emissions at the project level, there was considerable debate amongst the IWG on whether to include indirect emissions and, if so, what scope of emissions is included within this category. There was particular concern about what types of indirect emissions would be accounted for at the project-level within the SEPA process. Some IWG members suggested narrowing the list of emissions such that only items that that were categorized as Scope 1 and Scope 2 by WRI were considered for SEPA purposes. This would narrow the focus to direct emissions (i.e. occurring within the site of the project) and indirect emissions limited to the purchase of electricity. This would preclude emissions from vehicle miles traveled. There was no conclusion on this issue.

The question of determining threshold emissions is also instrumental in putting a greenhouse gas emissions reporting mechanism into practice. The IWG recommended that a "threshold of significance" standard be created such that if the proposed action exceeds it then the applicant can either 1) offer voluntary mitigation measures and thereby avoid the need for an EIS or 2) prepare an EIS that fully discloses emissions impacts. The IWG also notes that at this point the lead agency "may use its SEPA substantive authority to require mitigation." Thus the EIS would not only be utilized as a disclosure document, but also as a mechanism to force mitigation.

It was also noted by the IWG the importance of creating user-friendly toolkits to measure greenhouse gas emissions. While WRI accounting protocols provide a clear starting point for emissions calculations, they were not specifically created for project-by-project analysis (other than greenhouse gas offset projects). Thus it was determined that the measurement tools for construction emissions related to transportation projects, loss of sinks, and indirect and cumulative effects at the project level were currently inadequate.

The 2008 Washington State Legislature passed climate change legislation capping greenhouse gas emissions to 1990 levels by 2020 and 50% below 1990 levels by 2050, or

70% below the state's expected emissions that year (Washington State, 2008). It also included mandatory greenhouse gas reporting requirements for owners or operators of: 1) On-road vehicle fleets emitting at least 2,500 metric tons of greenhouse gases annually within the state; and 2) Sources emitting at least 10,000 metric tons of greenhouse gases annually within the state (Washington State Department of Ecology, 2008).

In 2009, the Governor of Washington State signed Executive Order 09-05 that, amongst others, calls for the determination of facilities responsible for at least 25,000 metric tons of greenhouse gas emissions annually. This is presumably to jump-start compliance with the EPA's mandatory reporting guidelines.

King County, Washington

King County, Washington, is the first local government in the country to include greenhouse gas emissions of construction projects to their ER system. Their law includes projects undergoing review as part of Washington's SEPA process, King County developments, as well as projects where King County is the lead permitting agency (King County, 2009). An assessment of greenhouse gas emissions is required for projects relating to:

1) The extraction, processing, transportation, construction and disposal of building materials;

2) Landscape disturbance;

3) Energy demands created by the development after it is completed;

4) Transportation demands created by the development after it is completed (King County, 2009).

Related specifically to construction projects, consideration of Scopes 1, 2, and 3 of the WRI accounting protocol are mandated within King County's policy. To create ease for compliances, King County developed a greenhouse gas emissions worksheet. The worksheet is available in a fill-in Excel spreadsheet and aims to estimate greenhouse gas emissions created over the lifespan of a building project. It provides general conversions for greenhouse gas emissions from obtaining construction materials, fuel used during construction, energy consumed during the building operation (Scopes 1 & 2), and transportation by building occupants (Scope 3).

Washington State Department of Transportation

The Washington State Department of Transportation (WSDOT) completed a greenhouse gas emissions inventory of all agency operations for 2007. WSDOT emissions were found to be above the thresholds set forth in the State's 2008 reporting requirement. As such, the inventory was the "agency's first step in establishing the internal processes needed to meet upcoming reporting requirements" (WSDOT, 2009). The inventory

covered the agency's ferry fleet, vehicle fleet, facilities, ferry shore-side operations, and traffic services. The operations of the ferry fleet comprised 69% of total agency emissions. In conjunction with their review of agency-related transportation emissions, the WSDOT recommended that greenhouse gas emissions be addressed at the transportation project level in SEPA review process. In particular, emissions should be addressed as a cumulative impact (as opposed to an air quality concern).

California

California has been a leader in pushing forward the nation's greenhouse gas emissions reduction agenda. In 2006 it became the first state to adopt legally binding greenhouse gas targets of 1990 levels by 2020 (AB32). Senate Bill 97, signed in August 2007, states that climate change "is an important environmental issue that requires analysis under CEQA" (CAPCOA, 2008, 9). The bill requires that guidelines for the "feasible mitigation of [greenhouse gas] emissions" be sent to the Resources Agency by July 1, 2009. From this, the Resources Agency is required to certify or adopt the guidelines by January 1, 2010. In the mean time, the bill protects projects funded by the Highway Safety, Traffic Reduction, Air Quality and Port Security Bond Act of 2006 or the Disaster Preparedness and Flood Protection Bond Act of 2006 from claims of "inadequate analysis" of greenhouse gas emissions within the CEQA process. Once the guidelines are enacted in 2010, however, the protection from litigation ceases (CAPCOA, 2008, 9).

In January 2008, the California Air Pollution Control Officers Association (CAPCOA) completed a preliminary analysis on the inclusion of climate change mitigation measures within the California Environmental Quality Act (CEQA). The document outlines the pros and cons regarding three variations in which greenhouse gas emissions could be included: 1) with no threshold, 2) with a zero-threshold, and 3) with a non-zero threshold. Within this analysis, various accounting methodologies are considered and examples of greenhouse gas mitigation measures are presented.

CEQA does not require that agencies establish a threshold level of pollutant in order to determine significance. Thus it is possible for greenhouse gas emissions to be assessed under CEQA without an adopted threshold or trigger. Nonetheless, "the absence of a threshold does not in any way relieve agencies of their obligations to address [greenhouse gas] emissions from projects under CEQA" (CAPCOA, 2008, 23). In addition, it also does not prevent local governments from establishing their own thresholds. Under the "no threshold" scenario, the lead agency would have to conduct some level of analysis on every single project under CEQA's jurisdiction in order to make an assessment of whether an EIS is needed. CAPCOA's report states there are three fundamental approaches to this case-by-case analysis: 1) the agency can presume projects have significant greenhouse gas emissions impacts until the case-specific finding shows otherwise; 2) the agency can presume projects do not have significant greenhouse gas emissions impacts until the case-specific finding shows otherwise; and 3) the lead agency can have no presupposition on greenhouse gas impacts but rather have the determination of significance made by the specific context of the project. The result would be that under scenario 1, many projects would proceed to an EIS; under scenario 2, fewer projects might proceed to an EIS; and

scenario 3, due to the more ad hoc nature of decision-making, is likely to be more vulnerable to challenges from either opponents or proponents of the project. Regardless, without a threshold of significance, agencies have more latitude by which to determine whether a project should proceed to an EIS. This provides both flexibility as well as vulnerability to criticism.

If a threshold of significance at the level of zero is chosen, any project with positive greenhouse gas emissions impacts will proceed to a full EIS. It requires all projects to quantify their greenhouse gas emissions impacts and mitigate emissions in order to avoid an EIS. Projects that could not meet the zero-emission threshold would have to justify their positive emissions within their EIS. In addition, because CEQA requires mitigation to a less than significant level, it is likely that offsite reductions will become prevalent. Thus this policy is contingent on the assumption that quality offset projects are available and beneficial (which although likely, should not be taken for granted). This is the most stringent way in which to incorporate greenhouse gas emissions into the ER process. The logic behind this level of exactitude is that all positive greenhouse gas emissions impacts are significant and, moreover, by not mitigating the multitude of small sources neglects to address a major portion of greenhouse gas emissions (CAPCOA, 2008, 27).

A non-zero threshold of significance level could serve to limit the number of projects that proceed to a full EIS - depending on the magnitude of the adopted threshold. This would allow projects with relatively small (determined by the adopted threshold) greenhouse gas impacts to circumvent further ER as well as the need to mitigate net positive emissions (CAPCOA, 2008, 31). There would be less reliance on offset programs for small impact projects.

There are two identified ways within the CAPCOA report in which to adopt positive thresholds of significance: 1) a Statute and Executive-order based threshold; and 2) a tiered threshold. Approach 1 could establish a threshold level to be consistent with larger greenhouse gas emissions reduction targets (i.e. consistent with AB32). AB32 does not specify whether emissions reductions should be achieved uniformly between geographic locations or by industry sources. Thus there is flexibility in establishing thresholds both by location and source such that compliance is consistent with the goals of AB32.

Approach 2, on the other hand, seeks to achieve reductions while minimizing costs. This would be accomplished by identifying mitigation measures for categories of projects and project sizes. This approach may also "require inclusion in a General Plan, or adoption of specific rules or ordinances in order to fully and effectively implement it" (CAPCOA, 2008, 36). The generalized framework for a tiered threshold approach would include: 1) disclosure of greenhouse gas emissions for all projects; 2) support for city/county/regional greenhouse gas emissions reduction planning; 3) creation and use of a "green list" to promote the construction of projects that have desirable greenhouse gas emissions characteristics; 4) a list of mitigation measures; 5) a decision tree approach to tiering; and 5) quantitative or qualitative thresholds (CAPCOA, 2008, 37).

Within Approach 2, a series of exemptions could be created: 1) compliance with General or Regional Plans that are also consistent with AB32; 2) based on Senate Bill 97; 3) based on the compilation of a "green list"; and 4) based on a threshold of significance for identified project types and size. For example, projects might be considered exempt from a full ER if it is shown to be consistent or in compliance with the General Plan or Regional Plan. This requires Plans to be updated and revised such that they are consistent with the State's greenhouse gas emissions reduction target over time. In addition, the compilation of a "green list" makes it possible to exempt identified projects based on the presupposition that certain projects have positive and acceptable environmental outcomes. Examples of such projects include: wind farms for electricity, high-density infill development projects, increasing public transit systems, and expansion of recycling programs. The "green list" should be updated every 6 months or as major policy changes occur.

In order to estimate greenhouse gas emissions at the project level, CAPCOA suggests the use of a specific modeling platform called URBEMIS. URBEMIS is "designed to model emissions associated with development of urban land uses" (CAPCOA, 2008, 59). It is limited, however, because it does not contain greenhouse gases other than carbon dioxide and it also does not calculate offsite waste disposal, wastewater treatment, or transportation emissions of residents or workers supported by the project. As such, "there is currently not one model that is capable of estimating all of a project's direct and indirect greenhouse gas emissions" (CAPCOA, 2008, 59). Thus there is great need to develop estimation tools. Particularly, tools that are user-friendly and transparent.

Similar to Washington State, the California Air Resources Board (CARB) requires mandatory reporting of emissions from cement plants, oil refineries, hydrogen plants, electric generating facilities and retailers, cogeneration facilities, and stationary combustion sources exceeding 25,000 metric tons of carbon dioxide annually. California is well-situated to comply with the EPA mandatory reporting guidelines, as currently written, as the EPA guidelines were largely modeled after CARB's mandatory reporting laws.

Sacramento, California

In 2007, the Sacramento Metropolitan Air Quality Management District released interim guidelines on how to address climate change within CEQA. The District "recommends that CEQA environmental documents include anticipated [greenhouse gas] emissions during both the construction and operation phases of the project" (CAPCOA, 2008, 87). If a project is determined to have a significant impact, then the District recommends assessing relevant mitigation measures and a justification of why compliance is infeasible.

Mendocino, California

Also in 2007, the Mendocino Air Quality Management District updated its "Guidelines for Use During Preparation of Air Quality Impacts in EIRs or Mitigated Negative

Declarations" to include greenhouse gas emissions for projects. The guidelines for significance of greenhouse gas emissions correspond to relative levels of carbon monoxide emissions.

Massachusetts

In 2008, Massachusetts adopted binding greenhouse gas reduction targets of between 10 and 25 percent below 1990 levels by 2020, and 80 percent below 1990 levels by 2050. A year earlier, in October 2007, the Massachusetts Executive Office of Energy and Environmental Affairs (EEA) adopted a greenhouse gas emissions policy that requires project-level emissions to be reported and mitigated under the Massachusetts Environmental Policy Act (MEPA). The policy was updated in February 2009. The EEA "determined that the phrase 'damage to the environment' as used in the Massachusetts Environmental Policy Act (MEPA) includes the emission of greenhouse gases caused by Projects subject to MEPA review" (EEA, 2007, 1). The policy applies to all new projects that file an Environmental Notification Form for MEPA review. The emissions reporting guidelines focus on direct emissions from stationary sources as well as indirect sources such as energy consumption and transportation impacts (based on vehicle miles traveled). Accounting protocols are to follow WRI standards for direct and indirect emissions. Construction period impacts are not included within reporting requirements.

Within the updated MEPA process, no thresholds of significance were adopted nor quantifiable limits on greenhouse gas emissions imposed at the project level. The emphasis was on generating sound estimates of greenhouse gas emissions as well as a reasonable determination of mitigation alternatives. The policy seems to be at a very general level of guidance and compliance is tailored to specific project needs. For example, the policy suggests the primary focus remain on carbon dioxide emissions for the vast majority of projects. In the case of landfill projects, however, then methane emissions should be considered and "in these instances, the MEPA office and EEA will provide guidance on quantification and analysis" (EEA, 2009, 3). For estimating emissions from projected energy consumption, EEA reviewed and recommended several modeling tools: EQUEST, Energy-10, Visual DOE, and DOE2. In addition, guidelines for calculating transportation-related emissions are provided within the guidelines. EEA does not, however, require the use of specific models.

In a review of recently filed Environmental Notification Forms, a wastewater management plan was decided as needing an Environmental Impact Report. Within this review, the project was identified as subject to the requirements of the MEPA Greenhouse Gas Emissions Policy and Protocol. Demonstrating the case-by-case nature of Massachusetts approach, the report says that, "the MEPA Office and the Department of Energy Resources (DOER) routinely schedules pre-filing meetings to provide technical assistance to proponents in the development of the [greenhouse gas] analyses" (EEA Environmental Notification Form, 2009, 10). This method, characterized by being very hands-on at the agency level, is indicative of the nascent state of standardized and commonly accepted greenhouse gas accounting methodologies for a large variety of proposed projects.

Discussion

Massachusetts is the only State that requires incorporating greenhouse gas emissions within the ER process. It's guidance on compliance, however, is quite general and rather takes a case-by-case approach. The only other jurisdiction to require greenhouse gas emissions reporting at the proposed project-level is King County, Washington. King County has taken a much different approach, creating a checklist and user-friendly emissions reporting tool. Both the States of Washington and California have put forth substantial resources to assessing the practicalities of incorporating greenhouse gas emissions within the ER process, although neither have taken legally binding action at the State level.

Within all the reviewed jurisdictions considering (or already taken steps in) incorporating greenhouse gas emissions within the ER system, related documents are careful to specify that this policy would be in support, not in lieu, of larger greenhouse gas mitigation goals and policies such as state, regional, national cap-and-trade programs. In addition, the inclusion of greenhouse gas emissions within the ER process is to disclose possible impacts and not meant to circumvent the permitting process. In several reviewed cases, under specified circumstances, projects could be forced to adopt mitigation techniques including offset projects depending on accepted threshold standards.

In addition, all case studies suggested that better estimation tools are needed in order to quantify emissions for proposed projects. Therefore additional flexibility is important, particularly in creating guidelines for descriptive analysis.

V. Case Study

How might the Honolulu Transit EIS Have Included GHG Emissions?

The island of Oahu, particularly the heavily populated corridor from the West-end of the island to downtown Honolulu, has suffered from heavy traffic congestion. Daily commutes from Waianae to downtown Honolulu exceed two hours for only a thirty-mile travel distance. This travel corridor also contains a substantial subset of lower-income households on the island. To address both congestion and to provide more reliable public transit for limited income groups, the City and County of Honolulu is planning to build an electric steel-wheel train system that integrates with the current bus transit. The Honolulu High-Capacity Transit Corridor Project (hereby called the Project) is proposed to operate over a 20-mile area between Kapolei and the University of Hawaii at Manoa.

The idea of rail has long been considered on the island of Oahu and has also long-been contended. The continuance of the Project was posed as a question on the November 2008 statewide ballot and won favor with a slight margin with 52% of the vote. The Draft EIS (hereby the EIS) for the Project was also released in late 2008. While the EIS largely focuses on congestion and equity benefits, scenarios for energy consumption are also considered. Greenhouse gas emissions, however, are not explicitly discussed.

As a long-term development project with enormous implications for transportation patterns on Oahu, this is an ideal type of project in which to consider greenhouse gas emissions impacts. For heuristic purposes, this section considers the various ways in which the EIS could have considered greenhouse gas emissions (or would have needed to incorporate greenhouse gases if it were required) and implications thereof. Building on the insight provided by the case studies, the EIS is examined in terms of 1) primary effects, 2) secondary effects including construction impacts, surrounding development, and travel to rail stations, 3) potential mitigation measures, and 4) cumulative impacts.

To begin, a general background on the Project EIS and factors relating to greenhouse gas emissions is provided.

Overview

The EIS assesses impacts of the Project on: 1) transportation patterns (i.e. traffic flow and congestion), 2) environmental effects including air quality and energy consumption and 3) construction impacts. Similar to the WRI's GHG Protocol for Project Accounting methodology, several alternatives were assessed in contrast to the proposed project as well as the baseline scenario. During a scoping process, consideration was given to light-rail rapid transit, rapid-rail transit, rubber-tired guided vehicles, magnetic levitation system, and monorail system. A panel of technical experts was assembled to provide the city guidance on best technologies and, from this, a steel-on-steel rail was chosen (not necessarily with energy or greenhouse gas emissions as the optimizing variable). Within the EIS, four alternative scenarios were evaluated: 1) no build alternative, 2) fixed guideway transit alternative via Salt Lake Boulevard, 3) fixed guideway transit alternative via the Airport, and 4) fixed guideway transit alternative via the Airport and Salt Lake. The fixed guideway scenarios are all posited on steel-on-steel technology as the type of rail was pre-determined within the November 2008 election.

Among the identified benefits of the proposed Project, there is found to be a reduction in transportation-related energy use (EIS Summary Sheet, 2008). The existing transportation system and its relevant indicators from travel time, congestion, and energy use, were projected into the future to the year 2030 using the Oahu Metropolitan Planning Organization (OMPO) travel demand forecasting model (EIS, 2008, 3-2). OMPO's model uses "a sequential approach to travel forecasting, in which travel is assumed to be the product of a sequence of individual decisions" including: 1) the number of trips that a household will make; 2) the destination of these trips; 3) the form of transportation that will be used for travel; and 4) the paths on the transportation network that the trips will take. Simulations were also run in order to better understand the impacts of each rail transit scenario.

Primary Effects

Given the nature of the Project, there are no readily identifiable direct emissions (Scope 1). The primary effect, however, is the substitution of travel via internal combustion engine vehicles (including private vehicles and bus transit) to travel via electrified rail.

The resulting greenhouse gas emissions due to the purchase of electricity by the rail system are classified as Scope 2 emissions. Within the Project EIS, average daily energy demand in million British thermal units (MBTUs) is projected for the year 2030 under the four alternatives. The results are reproduced in Table 1 below. For each rail Project alternative, total average daily energy demand is expected to reduce by 2% relative to the No Build scenario.

Table 1. 2030 Summary of Average Daily Transportation Energy Demand by Alternative, reproduced from Table 4-18 in Project EIS

Alternative	Roadway and Bus Energy Consumption (MBTUs)	Fixed Guideway Vehicle Energy Consumption (MBTUs)	Total Energy Consumption (MBTUs)	Percent Change from No Build
No Build	94,610	0	94,610	n/a
Salt Lake	91,082	1,163	92,245	-2%
Airport	91,013	1,224	92,237	-2%
Airport & Salt Lake	91,132	1,194	92,326	-2%

The finding of a 2% reduction in net energy consumption for all transportation within the region is quite small. If greenhouse gas emissions had been accounted for within the EIS, it is possible that the greenhouse gas emissions impacts would be substantially larger. The State is aggressively pursuing renewable energy technologies with the goal of reaching 70% clean energy by the year 2050 and results to date show more penetration within the electric sector rather than in fuel-switching for ground transportation. In the effort to achieve cleaner electricity sources, HECO and the State have signed a memorandum of understanding that outlines future renewable energy projects such as large-scale wind and solar photovoltaic. The provision of clean electricity to the rail system would substantially reduce associated greenhouse gas emissions.

There is considerable uncertainty in projecting future scenarios, both for the baseline (No Build) and Project scenarios (under the three route alternatives). This understandably becomes increasingly difficult as more variables are placed within the analysis, i.e. future electricity generation. Nonetheless, a quantification of emissions is clearly possible given the stated and public goals of the electric utility, provided that private vehicles may also be run on electricity in the future (the cost of private electric vehicles is currently quite high, however, so the affected population of public transit riders and electric vehicle owners are likely to be different). This type of analysis is being undertaken in the modeling of baseline greenhouse gas emissions statewide. Moreover, a qualitative description of this benefit would be quite straightforward and help to create the distinction between current transportation patterns with the opportunity provided by the Project as an electrified transportation source. Currently within the EIS, the possibility of generating electricity from clean sources is mentioned but not described in any detail. In particular, the EIS states that, "the Project would consume approximately 1 to 2 percent of the total projected electricity generated on Oahu in 2030. The planned electricity

generation capacity on Oahu would be sufficient to support the transit system, but the electricity distribution system would require various upgrades to support the system" (EIS, 2008, 4-108). No description of the upgrades required is provided.

Indicators of energy use in transportation are often given in energy units (BTUs) per passenger. Thus estimating the number of passengers per vehicle (or rail line) is incredibly important when creating projections of future energy use. Although projections for ridership are provided for the year 2030, no discussion is provided on how energy scenarios (and implicitly greenhouse gas emissions impacts) change with ridership. This discussion would be crucial to understanding the uncertainty involved in having a fixed transit system from an energy and greenhouse gas perspective in comparison to a "do nothing" scenario. A presentation of assumptions of ridership within the model as well as scenarios of uncertainty would be prudent based on WRI's guidelines to take conservative measures in estimating greenhouse gas emissions impacts at the project-level.

Secondary Effects

There are numerous secondary effects in the construction and operation of a rail transit system that can be divided into construction and operational impacts. Construction impacts are a one-time event and thus any upstream or downstream impacts relating to construction will be short-lived relative to the lifetime of the Project (but possibly over ten years long). Operation of the rail presumably will last for decades and thus it is imperative to consider upstream and downstream impacts.

Construction Impacts

Construction of the rail is a large one-time effect that is expected to have substantial greenhouse gas emissions associated with cement and other construction material, running heavy equipment, and worker commuting trips. The use of large amounts of cement to build the rail line and nearby infrastructure is likely to have substantial greenhouse gas emission impacts that are entirely neglected within the Project EIS. Life-cycle analysis of production inputs, from cradle-to-grave, is of crucial importance to understanding the human-environment interaction. Otherwise, segmented inquiry into environmental impacts lead to incomplete conclusions and uninformed decision-making regarding large public works projects. The processes for cement manufacturing and subsequent greenhouse gas emissions are well documented and provided as an example in WRI's GHG Protocol for Project Accounting.

Greenhouse gas emissions resulting from construction activities could be discussed, both quantitatively and qualitative in Section 4.17 of the Project EIS, where an inventory Construction Phase Effects is provided.

Operational Impacts: Transportation Networks

The Project will substantially alter transportation networks in the Honolulu corridor. Within the EIS there is a meager description of park-n-ride lots that are to be built near transit centers. In addition, a brief discussion is provided on the effects to existing bicycle networks. If greenhouse gas emissions were a consideration within the Project EIS, a discussion of how rail riders get to the rail line would need to be more prominent within the analysis. Specifically, there would be more consideration to how 1) walking and bicycle use could be integrated and promoted, 2) the current bus transit system could be integrated and promoted and 3) park-n-ride stations (that promote auto-use) affect total commute energy consumption particularly on auxiliary roads.

Mitigation Measures

As currently written, the Project EIS does not fully consider mitigation scenarios because it was not required. In the section for Energy/Electric and Magnetic fields, the proposed mitigation measure reads: "none required" (EIS, 2008, 4-8). Nonetheless, a possible mitigation measure is offered: "Integration with photovoltaic cells into stations and other project features could reduce net project electricity demand" (EIS, 2008, 4-108). As this was not a requirement of the EIS, it is not discussed in any detail. If full disclosure of all possible mitigation measures was required, this suggestion would have to be assessed in terms of 1) scope (i.e. how many panels and where?), 2) technology (i.e. with battery capabilities or tied to the electric grid), 3) greenhouse gas reduction impacts, and 4) cost of implementation. In addition, other mitigation measures should be posited and compared to one another. This would include an analysis of walking, biking, and bus transportation integration in order to produce more positive secondary effects.

Depending on the accepted threshold of greenhouse gas emissions, projects may be required to reduce or offset their greenhouse gas emissions. According to the California case study, three possible scenarios for mitigation are possible: 1) no threshold of significance, 2) zero threshold of significance, and 3) positive threshold of significance criteria. These thresholds are primarily used to trigger whether a full EIS need be completed but can also be used to force mitigation above the adopted threshold.

Under a "no threshold" scenario, any resulting EIS would be used as a purely disclosure document supporting both quantitative and qualitative assessments of greenhouse gas emissions impacts. Mitigation scenarios could be presented, both on a voluntary or required basis. Under a "zero threshold" scenario, all projects with positive net greenhouse gas emissions would undergo an EIS and mitigation scenarios would need to be presented and possibly adopted. Under a "positive threshold" scenario, all projects with net greenhouse gas emissions above the adopted threshold would undergo an EIS and mitigation scenarios would also need to be presented and possibly adopted.

If a threshold of acceptable emissions is adopted (either zero or positive) with the stipulation that emissions in excess of that amount need to be mitigated or offset, mitigation measures need not only be described but also practically implemented. In addition, offset measures may need to be adopted. Currently, Hawaii has no formal greenhouse gas offset projects or market. Although there are a number of voluntary

carbon offset companies, none have been regulated and certified. Thus compliance with offset provisions for projects would require the development of in-state certification of projects as well as possible acceptance of out-of-state offset initiatives.

Cumulative Effects

Greenhouse gas emissions are a global pollutant and thus, while they do have cumulative impacts over time, they do not necessarily occur in one location. This is the primary distinction between greenhouse gas pollutants and other air pollutants like particulate matter. Nonetheless, within the review of other jurisdictions there was one view that greenhouse gas emissions be addressed as a cumulative effect.

Within the EIS, cumulative effects are defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such actions. Cumulative impacts can result from individually minor, but collectively significant actions taking place over a period of time" (EIS, 2008, 4-164). For example, the most notable "past action" identified within the EIS is "the urban and suburban development of Oahu beginning in the 1940s" (EIS, 2008, 4-169). It is described as increasing urban pressure through the relevant corridor from West Oahu to downtown Honolulu, driven by the construction of H-1 and H-2 Freeways and other linking highway systems. This is then described in terms of changes in land use, economic activity, displacements, provision of community facilities and public services, and neighborhood development. This also had impact on issues relating to environmental justice, visual and aesthetic effects, noise pollution, hazardous material, ecosystems, flora and fauna, water resources, street trees, and archaeological, cultural and historic resources. There is no mention within the cumulative impact section of energy consumption or air quality indicators. In addition, all cumulative impacts are presented in a qualitative manner and thus the EIS does not attempt to quantify impacts over time.

Given the global nature of greenhouse gas emissions as well as the descriptive manner in which cumulative impacts are described in the EIS, it does not appear to be the most appropriate section in which to include greenhouse gas emissions impacts. To only include greenhouse gas emissions within the cumulative impacts section would likely preclude more thoughtful analysis within primary environmental impacts.

Financial Considerations

Section 6 of the EIS provides a cost and financial analysis of the various route alternatives in contrast to the baseline scenario. Regardless of whether greenhouse gas emissions are a required area of inquiry within an EIS, it is important to consider the costs associated within pending market-based greenhouse gas emissions reduction schemes. For example, if a national cap-and-trade program is implemented, the near-term price of liquid fossil fuels and electricity is likely to increase substantially in the transition to cleaner energy resources. This will affect the cost of both building and operating the rail line. At the same time, however, the cost of operating private passenger

vehicles will also increase and thus may have a positive impact on ridership. This information is crucial to understanding the full cost of the Project as well as provide insight into future ridership scenarios. Even if the national program does not come to fruition in the near-term, State commitments to renewable energy will change the cost profile of energy within the State and thus business-as-usual should not rely solely on historic cost trends.

If greenhouse gas emissions were included within the EIS, particularly with the requirement that emissions be mitigated or offset above a designated threshold, the cost of mitigation and offset options should also be considered.

VI. Discussion and Conclusions

The nation, states, and counties are grappling with building credible and effective greenhouse gas emissions reduction policies. The simultaneous pursuit of policies targeting greenhouse gas emissions has raised a host of questions about the appropriate role of various levels of government and various policy levers. Many states, several discussed within this study, are asking the question: should greenhouse gas emissions be brought down to the project level? California's analysis states, "In addition to the national and international efforts ... many local jurisdictions have adopted climate change policies and programs. However, thus far little has been done to assess the significance of the affects new development projects may have on climate change" (CAPCOA, 2008, 6). Massachusetts is so far the only state to incorporate greenhouse gas emissions reporting at the project level within their ER system. King County, Washington, has also adopted greenhouse gas emission reporting mechanisms. They took very different approaches. Whereas Massachusetts provides very general guidance on greenhouse gas emissions modeling and disclosure within an EIS on a case-by-case basis, King County provides a greenhouse gas emissions worksheet (see Appendix I). User-friendly tools such as this are often seen as necessary because current guidance on project-by-project analysis is at this point very general, best provided by the WRI GHG Protocol for Project Accounting. More detailed modeling tools need to be developed for various project types.

In addition, there is little consensus on the scope of greenhouse gas emissions impacts that should be included in an EIS at the project-level. For example, emissions impacts could be included for solely operations (which also includes direct and indirect impacts) but also for construction period impacts (which could be substantial for large development projects). Typically the ER system is viewed as a disclosure tool for a wide array of environmental impacts. There are, however, thresholds of acceptable environmental impacts beyond which projects are required to mitigate their effects. In this case, the development of credible and certified carbon offset projects would likely be necessary.

The benefit of including greenhouse gas emissions within the ER system is to tap into a relatively transparent process meant to encourage understanding of full environmental impacts and build understanding for decision-making. The current reliance of greenhouse gas emissions inventories at the state and federal level largely precludes an understanding of how day-to-day actions contribute to climate change. By bringing

emissions inventorying techniques to the project level, a better understanding of human-environment interactions and relevant mitigation measures can be developed. This would serve as a complimentary measure to more top-down greenhouse gas emissions reduction policies (such as cap-and-trade) and serve to "fill the gap" while national and international policies are developed and properly tuned. Moreover, increased transparency at the project level will provide a decision-making tool by which to highlight the impact of market-based mechanisms such as carbon taxes and avoid market penalties by poor up-front planning and decision-making. Project-level inventories, however, are no substitute for state and national inventories because of issues of double-counting and scope.

There are, however, administrative downsides to incorporating greenhouse gas emissions in the ER system. Most notably, a stringent threshold of significance for greenhouse gas emissions could mean that many more projects are subject to full EIS (which could be considered an environmental positive yet an administrative negative). In addition, it requires sophisticated modeling of both baseline and alternative scenarios for energy consumption and greenhouse gas emissions in order to quantify the impact of the proposed project.

There are several proposed means of minimizing additional administrative and technical requirements. Given the existing shortfalls in standardized quantification methodologies and models, it is also possible to provide qualitative analysis. This may provide insight into greenhouse gas emissions impacts as well as reduce the burden of developing technical expertise in greenhouse gas emissions modeling. In addition, it is also possible to exempt projects that are consistent with larger regional plans. This has the additional benefit of allowing flexibility and the prioritization of projects not only based on greenhouse gas criteria but of a larger vision of environmental stewardship and community impacts. This stipulation requires that regional plans include greenhouse gas emissions and that the plans be consistent with state goals for greenhouse gas emissions reduction targets.

A more detailed inquiry into the State of Hawaii and, in particular, a recently completed EIS (in Draft form) for the implementation of a electric steel-wheel train system connecting West Oahu and downtown Honolulu (from Kapolei to the University of Hawaii at Manoa), provides insight into why incorporating greenhouse gas may be important for both large scale projects and given Hawaii's aggressive pursuit of renewable energy technologies. Conclusions from this analysis are as follows:

1) The direct impact of the Project is the substitution of private passenger and bus transportation with electrified transportation. The State and the electric utility are currently pursuing aggressive renewable energy targets, mandated by a renewable portfolio standard of 40% renewable energy for electricity by 2030. While there is considerable uncertainty in modeling both the baseline scenario ("no build") and alternatives, the electric utility's plans for renewable energy penetration should be incorporated. The EIS estimation that the Project could reduce energy consumption by 2% would possibly be made more compelling if greenhouse gas emissions were included

because the impact would likely be greater. Projections about ridership, however, should be made more transparent in order to better understand the range of greenhouse gas emissions impacts and to take a more cautious approach to environmental scenarios.

2) There are likely to be substantial greenhouse gas emissions impacts as a result of the construction phase of the Project, particularly for the import and use of cement. At a minimum, construction material impacts should be assessed (in comparison to the baseline scenario) in order to better understand the life-cycle impacts of the Project.

3) Regardless whether mitigation measures are required to be adopted based on an accepted threshold, a full discussion of mitigation measures would prove to be useful in better planning for walking, biking, and integration with existing bus transit systems. Because energy is not the primary motivation for the Project, the benefits of non-motorized modes of transportation are also not at the forefront of the EIS. In addition, a more than cursory mention of renewable energy systems and their integration on-site would provide insight into how the Project site might be used to improve environmental outcomes (not just be a conduit) as well as a more complete assessment of mitigation costs.

4) If a zero or positive threshold of significance is adopted such that net emissions above the threshold are required to be offset, it would be beneficial to the State to also develop and certify relevant carbon offset projects. This may also be beneficial to take advantage of developing carbon markets.

5) Financial considerations should also be made for developing carbon markets, regardless of whether greenhouse gas emissions are incorporated into the ER system.

6) The distinction between greenhouse gas emissions and other environmental impacts is that there are no real-time effects or region-specific cumulative impacts. Thus it does not seem relevant to incorporate analysis of greenhouse gas emissions into the cumulative impacts section of EIS.

While there are clearly a host of unresolved questions and issues regarding how and whether greenhouse gas emissions should be incorporated into the ER system, there are no environmental or jurisdictional downsides of doing so. The negative qualities of incorporating greenhouse gas emissions at the project level are administrative and technical in nature. As more locales adopt project-level greenhouse gas accounting, however, the tools of analysis will develop and become more mainstream (similar to other accounting protocols). As an island with a vested interest in reducing global greenhouse gas emissions, it seems a compelling reason to pioneer the process.

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Appendix 13. UH Environmental Review Study Bibliography

The study team prepared a review of the literature related to environmental impact assessment. The review identified themes, trends, strengths, and weaknesses of environmental review throughout the world since the 1990s. Primary journal sources include, but are not limited to, the *Environmental Impact Assessment Review*, *Environmental Management*, *Environmental Science & Policy*, *Impact Assessment & Project Appraisal*, *Journal of Applied Ecology*, *Journal of Environmental Planning and Management*, *Journal of the American Planning Association*, *Journal of Urban Planning and Development*, *Land Use Policy*, and *Trends in Ecology and Evolution.*

The bibliography included here also contains "gray" literature: state, federal, and other nation's guidance documents; national and international reports on EIA by government organizations and non-governmental organizations; and professional documents by organizations such as the National Association of Environmental Professionals and the International Association of Impact Assessment.

The literature review helped frame the national and international context for reforming Hawaii's environmental review system. Although Hawaii has a unique history and unique needs, this larger context was helpful in identifying "model" systems and trends in other jurisdictions that are worthy of consideration in Hawaii.

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