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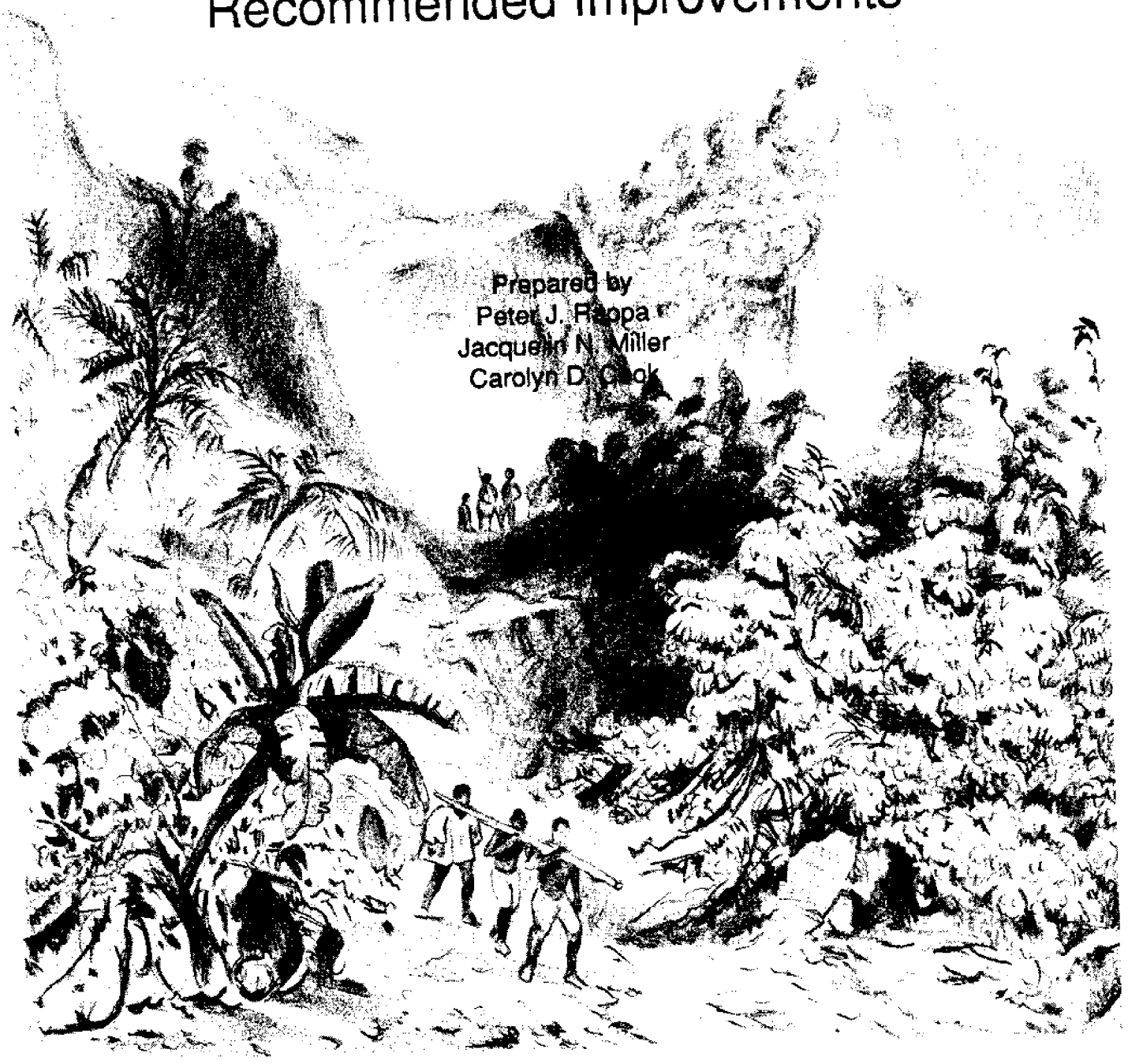
The Hawaii State Environmental Impact Statement System: Review and Recommended Improvements



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for
Office of Environmental Quality Control
Department of Health
State of Hawaii

University of Hawaii Environmental Center
July 1991

ACKNOWLEDGMENTS

The Review of the State Environmental Impact Statement System was a long and arduous process and at times the complexity of the opinions and bulk of material to sort through seemed overwhelming. However, the task was made possible by the dedicated help and cooperation of an incredible number of people, all willing to devote their time and talents toward the betterment of Hawaii's environment.

We first would like to thank our "Council of Elders" (who are not all "that" old) for their help in the initial scoping of the project and getting us started on the "Issues".

Next of course, and actually most important, were all those who participated in the very lengthy interviews (see the list on pages 4, 5) and then came through once again with extensive written comments on our first rough draft. Your efforts and dedication really deserve some extraordinary mahalos.

Special thanks and credit must go to Terry Revere, a second year law student at the Richardson School of Law, who waded through all the environmental laws from every State in the Union and provided us with the appendix report consisting of a synopsis of environmental impact assessment laws throughout the United States. William Grannis, Master's Candidate in the U.H. School of Public Health, diligently read through 12 years of OEQC Bulletins and distilled from them the statistics we presented as to the number of EAs, EISs, Negative Declarations and Preparation Notices. Jim Morrow, Director of Environmental Health, American Lung Association of Hawaii provided us with the appendix report on Appeals.

We also must thank the staff and students at the Environmental Center. Their help in the typing, editing, chart making, record keeping, and all those other unsung tasks was essential to getting the project completed. Specifically we would like to recognize first and foremost, Charlotte Kato, Secretary of the Environmental Center, who directed the support effort. Next was Sonia Chan Hui, our Computer Specialist, who edited our tables and temporarily gave up one of her computers for our word processing. We also thank the following Environmental Center students: Zenaida Alvares, Peggy Painter, Jean Nakanishi, William Grannis and Kathleen Aki (from Sea Grant) for all their help over these past months.

The U.H. Sea Grant Program has contributed to this project by providing editorial services. We thank Diane Nakashima and Naomi Nakakura, Publication Specialists, for their editorial efforts and the preparation of the final manuscript.

This work is partially funded by the Sea Grant Extension Service, (A/AS-1) sponsored by the University of Hawaii Sea Grant College Program under Institutional Grant No. NA89AA-D-SG063 from NOAA Office of Sea Grant, Department of Commerce. This is Sea Grant publication UNIHI-SEAGRANT-MR-91-02.

TABLE OF CONTENTS

Part 1: Introduction

Part 2: The Hawaii State EIS System, NEPA, and EIS Systems of Other States

Part 3: Administrative Aspects of the Hawaii State EIS System

Part 4: The Multiple Screening Process

Part 5: EIS Preparation

Part 6: Other Relevant Issues

Part 7: Summary and Conclusions

Tables and Figures

Appendixes

PART 1: INTRODUCTION

Statement of Purpose

The state's Environmental Impact Statement (EIS) system is a process by which physical and social environmental information concerning a proposed action is compiled so that these factors, along with traditional economic considerations, can be incorporated into government decision making. The various steps that make up the process require an expenditure in time and money that ultimately adds cost to a proposed action. The chief benefit of the EIS system is that it will yield better decisions and improve the quality of the physical, natural and social environment. However, a legitimate concern of policy-makers, and to a certain extent developers and the general public, is whether the present system is the best means of collecting and presenting environmental information. Periodic review and evaluation of the EIS system process is a means of addressing that concern. The purpose of this study is to evaluate the information gathering process created by the state's EIS law, chapter 343 HRS, and to make recommendations for improvements if needed.

In 1977 the Environmental Center undertook a study of the State EIS system at the request of the state Office of Environmental Quality Control (OEQC). The purpose of that study was to:

> ...investigate how the environmental impact statement (EIS) system of the State of Hawaii has operated since its establishment in 1970, what changes have been made in this period, how well it has served to provide decision makers with information on the environmental effects of actions subject to their approval before their decisions were reached, how it might better be integrated with various permit processes, in what ways it has failed, what costs it has entailed, and how it might be improved.

As a result of this request, the Environmental Center undertook a comprehensive review of the EIS system, specifically chapter 343 HRS, and published its findings and recommendations in January, 1978.

The study resulted in a number of changes to the EIS system that were incorporated into the law during the 1979 legislative session. Since that last comprehensive review, numerous amendments have been added periodically in response to issues and problems identified by both the public and private sectors. In addition, the rules governing the system have been amended, and the administrative locus of the two entities that administer the system, the OEQC and the Environmental Council (Council), was changed from the Office of the Governor to the Department of Health.

The Task: Review of the State EIS System

In 1989 the State Legislature, recognizing the need to update the 1978 study, allocated funds to OEQC for a study by the Environmental Center which would review and evaluate the state EIS system in order to ensure the effectiveness of the provisions of the law.

Specifically the study would:

1. Review the provisions of chapter 343 HRS and the substance of the 1978 EIS System Report;
2. Evaluate the efficacy of the present system in achieving its legislatively intended objectives;
3. Analyze EIS system structures from other states insofar as they offer guidance applicable to Hawaii's needs; and,
4. Make recommendations for amendments to improve the efficacy of the EIS system.

Methodology and Procedures

Justification

It is extremely important that the methodology used in an evaluation study be widely accepted and recognized in the field as the method of choice if the results are to be accepted. In this regard, it should be noted that the nature of much of EIS systems makes meaningful quantitative evaluations difficult, if not impossible. For example, the

underlying concept of the EIS system, that the provision of better information will lead to better decisions, would be difficult to test empirically, since it is difficult to know what decisions would have been made if not for the provision of such information. Another benefit of the EIS system which is especially difficult to document is "the extent to which the existence of an EIS system affects the planning and design of proposals for which EISs are not prepared" (Hollick,1986).

Research Procedures

This review focuses on the process required by the EIS system. Process evaluations according to Patton (1987, page 24) "are particularly useful for revealing areas in which programs can be improved as well as highlighting those strengths of the program which should be preserved." This type of evaluative study is also useful in "permitting people not intimately involved in the program — for example external funders, public officials and external agencies...to understand how a program operates" (Patton, 1987, p. 24). Patton suggests that the use of qualitative data gathering methods is better suited for the process oriented evaluative study. Program details and interaction can be understood in more depth and detail by questioning those most closely involved and by observation of the program in action. Our qualitative approach used four procedures to gather information on which we based our preliminary findings and later, our final recommendations. These four procedures are described in the sections below.

Review of HRS 343 and Substance of the 1978 EIS Report

The first of the four procedures was a two part review of chapter 343 HRS. First, we prepared a list of all legislative actions since 1978 pertinent to chapter 343 HRS. This list included notation of the arguments both for and against each proposed amendment. Second, we solicited the expertise of a group of individuals with long standing professional and governmental experience with chapter 343 HRS. A meeting was arranged, and with guidance from this group, which we named our "Council of Elders" (Table 1), we sought to further identify issues and areas of special concern with regard to both the EIS statute and, to some extent, the rules for implementing the law. The Council included the current and former chairpersons of the Environmental Council, former members of the OEQC staff, and staff and former staff of the Environmental Center. Most members of this informal group had worked with the system for at least 10 years. A summary issues paper (Appendix A) was prepared based on the legislative review and discussions with the Council of Elders, and a list of 13 specific questions (Appendix B) was drawn up from the issues identified.

Table 1. Council of Elders

George Krasnick	Parsons Hawaii. (Former Chair of Environmental Council.)
Richard Scudder	Hawaii Heptachlor Foundation. (Former OEQC employee.)
James Morrow	American Lung Association. (Former Chair of Environmental Council.)
Jacquelin Miller	University of Hawaii, Associate Coordinator, Environmental Center. (Legislative Coordinator, Researcher and Environmental Studies Advisor. Co-Investigator for 1978 EIS Review.)
Peter Rappa	University of Hawaii, Extension Agent, Sea Grant. (Environmental Center Co-Investigator for 1978 EIS Review.)
Terry Revere	University of Hawaii, Environmental Center. (Graduate Student, UH William S. Richardson School of Law.)
Carolyn Cook	University of Hawaii Environmental Center. (Graduate Research Assistant and Ph.D. candidate.)

Interviews with Current Users

According to Patton (1987) "many process evaluations focus on how the program is perceived by participants and by the Staff." These evaluations usually contain a perception of how well the program is doing from those closest to it. In the 1978 review of the EIS system, the Environmental Center determined that the best way to evaluate the efficacy of the EIS system was to undertake "extensive consultation with representatives of the staff of government agencies, legislative committees, and other organizations with special knowledge and experience in the

use of the system" (Cox et al., 1978, page 3). Such interviews were the prime source of information in other studies of the effectiveness of EIS systems both nationally and internationally. Muller and Christensen (1976), for example, interviewed 50 local officials and state staffers from Florida and California in their study of those two state systems. More recent support for the interview method is cited by Ross (1987) who interviewed representatives of the Federal Environmental Assessment Review Office and other related organizations in his study of the Canadian EIS system. Lowry (1989) has suggested that for multi-objective environmental management programs, it is possible to make qualified judgements about a program through the use of interviews with persons most familiar with the program of concern.

Given our previous experience with the use of interviews and the more recent confirmation of the validity of the interview methodology for evaluation of non-quantifiable programs, we chose it as the primary method of obtaining information in our present study about the state EIS system.

There are many "clients" of the state EIS system including government agencies, public interest groups, private consultants, landowners, developers, and the general public who ultimately receive the benefits as well as bear the cost of the system. However, because of constraints on our time we limited the interview sessions to those we felt had the most intimate knowledge or "hands-on" experience in the EIS system, which included government agency personnel, private consultants, public interest groups and those with academic or research interest in the process.

A series of 45 interview sessions (table 2) was held involving 83 people from these identified groups. A copy of the summary issues paper and the 13 questions were sent to each interviewee to facilitate the subsequent personal meetings. Each interviewee was asked to respond to each of the 13 questions and was given the opportunity to provide additional pertinent information.

Interview sessions lasted an average of 2.5 hours. Each interviewee was asked to represent his/her own point of view and not what was perceived to be the department or organization's viewpoint. With the exception of those interviews held on the neighbor islands, each interview session was attended by at least two members of the study team.

Review of Federal and Other State EIS Systems

A survey of the federal EIS system under the National Environmental Policy Act (NEPA) and the EIS laws of other states and U.S. territories was undertaken for comparison with Hawaii's law. A search of the relevant literature was conducted at the University of Hawaii's Hamilton Library.

Review of Preliminary Findings

Based on information gathered using the first three procedures, we prepared an initial set of recommendations which were contained in a preliminary report. This report was circulated to interview participants and other specific individuals with particular expertise in the EIS process for their review, comments, and recommendations. Based on the review comments received, we revised the text and where appropriate the nature of our recommendations for amendments to improve the efficacy of the EIS system.

Issues of Concern

Our initial efforts to define the areas of concern within the EIS system led us to identify 13 issues which were used as the basis of our interview questions. Interviewees were encouraged to add any significant issues not covered by the interview questions. Two additional issues were frequently mentioned by participants as problem areas: the EIS system's poor performance in dealing with cumulative impacts and the "shelf life" or the length of time that the information in an EIS was considered valid when development did not occur immediately. The 15 issues we address in this report are:

1. Management and Placement of the EIS System
2. Findings and Purposes Statement
3. Definitions of Key Terms
4. Public Notification Provision
5. Applicability of Chapter 343 to Public and Private Actions

Table 2. EIS Review Participants HRS 343 Interviews

Person(s)	Affiliation	Date
	FEDERAL AGENCIES	
Allen Chin Helene Takemoto	U.S. Army Corps Engineers	10/5/90
Jay Silberman	U.S. Coast Guard	8/07/90
John Bedish	U.S. Department of Agriculture Soil Conservation Service	9/26/90
	STATE OF HAWAII	
Brian Choy	Office of Environmental Quality Control	9/28/90
Stanley Shin	Department of Accounting and General Services Public Works and Planning	8/06/90
Kim Kadooka	Department of Human Services	8/09/90
Roger Evans	Department of Land and Natural Resources	8/16/90
Kelvin Sunada	Department of Health Environmental Planning Office	8/21/90
Ed Hirata Dan Tanaka Elton Teshima Dean Nakagawa Douglas Orimoto	Department of Transportation	8/31/90
Lynn Lee Linda Delaney	Office of Hawaiian Affairs	9/04/90
Robert Boesch Earl Yamamoto Paul Schwind	Department of Agriculture	9/05/90
Tom O'Brien Dean Anderson Phil Estermann Gerald L'esperance	Department of Business, Economic Development and Tourism Energy Division	9/11/90
Hardy Spoehr Charles Ice Joe Chu	Department of Hawaiian Homelands	9/17/90
	CITY AND COUNTY OF HONOLULU	
Herbert Minakami Bert Kunioka George Hiu Satoro Metsuda	Board of Water Supply	8/09/90
Doug Meller	Department of Parks and Recreation	8/20/90
Alex Ho Chew Lun Lau Jay Hamai	Department of Public Works	8/21/90
Faith Miyamoto Robert Sumitomo Elizabeth Chinn	Department of Transportation Services	8/22/90
Melvin Hirayama	Department of Transportation Services, Traffic Engineering	9/06/90
Randy Hara Gary Okino Matthew Higashida	Department of General Planning	9/12/90
Art Challacombe	Department of Land Utilization	9/14/90
	COUNTY OF HAWAII	
Alice Kawaha Rodney Nakano Connie Kiriu	Department of Planning	9/18/90
Gary Kawasaka Quirino Antonio Jr.	Department of Water Supply	9/18/90

Table 2. EIS Review Participants HRS 343 Interviews (Continued)

Person(s)	Affiliation	Date
	COUNTY OF KAUAI	
Peter Nakamura	Department of Planning	9/20/90
Kiyogi Masaki	Dept of Public Works	9/20/90
Wayne Hinazumi	Department of Water	9/20/90
Greg Fujikawa		
	COUNTY OF MAUI	
Christopher L. Hart	Department of Planning	9/27/90
John Min		
Colleen Suyama		
Rory Frampton		
Ed Kagehiro	Department of Water	9/27/90
	CONSULTING FIRMS	
Eric Guinther	AECOS Inc.	7/26/90
S. Jacqueline Mello		
Chester Koga	R. M. Towill Corp.	8/01/90
Al Lyman	CH2M Hill	8/30/90
Paul Luerson		
John Goody	Belt Collins and Associates	9/07/90
Perry White		
Anne Mapes		
Sue Rutka		
Lee Sichter		
Earl Matsukawa	Wilson Okamoto and Associates	10/1/90
	PUBLIC INTEREST GROUPS	
Susan Miller	Natural Resources Defense Council	8/02/90
Pat Tummons	League of Women Voters	8/16/90
Dana Kokubun	National Audubon Society	9/12/90
Lola Mench	Sierra Club	9/19/90
Cyndy Chung		
Joanie Dobbs	Nature Conservancy	9/24/90
Marjorie Ziegler	Hawaii Audubon Society	9/28/90
Dan Davidson *	Land Use Research Foundation of Hawaii	5/17/91
	UNIVERSITY OF HAWAII AND EAST-WEST CENTER	
James Maragos	Environment and Policy Institute, East-West Center	7/25/90
Kem Lowry	UH Department of Urban and Regional Planning	7/27/90
Richard Carpenter	Environment and Policy Institute, East-West Center	8/08/90
Karl Kim	UH Department of Urban and Regional Planning	10/4/90
Charles Lamoureux	UH Department of Botany/College of Arts & Sciences, Academic Affairs	7/30/90
Ed Murabayashi	UH Water Resources Research Center	7/30/90
Bryce Decker	UH Department of Geography	9/26/90
	WRITTEN RESPONSES FROM PEOPLE NOT INTERVIEWED	
Doak Cox	Emeritus Director, UH Environmental Center	5/14/91
Bob Grossman	Department of Health	4/25/91
Kenneth Kaneshiro	U.S. Department of Agriculture Soil Conservation Service	8/17/90
John Knox	Community Resources Inc.	5/31/91
Robert K. Yanabu	Department of Public Works, City and County of Hawaii	9/17/90

*Interview based on preliminary report not on the issues paper.

6. Exemptions Provisions
7. Environmental Assessments and Determinations
8. Consultation and Scoping
9. Preparation of EISs
10. Review of Draft EISs
11. Acceptability Determinations
12. Judicial Proceedings
13. Use of Mitigative Measures
14. Treatment of Cumulative Impacts
15. Shelf Life of the EIS

Each of these 15 issues is discussed in parts 3 through 6 of this report. In addition, part 2 presents a description of the Hawaii State EIS system, the federal system mandated by NEPA, and the EIS systems in other states; part 3 examines the administrative aspects of the Hawaii State EIS system, including the issues dealing with the management of the EIS system, findings and purpose, definitions, and public notification sections of the law; part 4 examines the multiple screening process for determining what type of environmental scrutiny public and private actions will receive, and includes the applicability of the state EIS system to actions, exemption provisions, and assessment determinations; part 5 examines the procedure for preparing an EIS, including the consultation period, responsibility for document preparation, review of the draft EIS, and the acceptability determination. Part 6 examines other related issues including judicial proceedings, use of mitigative measures, cumulative impacts, and EIS shelf life.

Each issue dealt with in this report constitutes a separate section within the report. Each section contains a description of the issue, major opinions related to each issue, and recommendations for changes.

A seventh and final part summarizes the information presented in the first six parts, discusses some general conclusions and makes recommendations or suggests work for future studies.

PART 2: ENVIRONMENTAL IMPACT STATEMENT SYSTEMS

Introduction

In this part we examine some of the reasons why federal and state EIS systems have been established. We describe the evolution of the Hawaii State EIS system in detail and briefly compare it to EIS systems in other states.

The Environmental Movement: Background

The "Environmental Movement" of the 1960's was responsible for the passage of much of the environmental legislation in place today, including the National Environmental Policy Act (NEPA) of 1969. Although the roots of the movement stretch far back to the turn of the century, a series of environmental disasters occurring in 1969, including the Cuyhoga River fire in Cleveland, Ohio and the Santa Barbara oil spill off the coast of California, catalyzed the movement towards developing of a national environmental policy.

According to Cox et al. (1978), the environmental movement can be characterized as involving four premises:

1. Actions which were undertaken for the sake of short-term tangible benefits accruing to individuals or small groups of people, have often turned out to have environmental consequences that were detrimental in the long run to people in general.
2. Some of the intangible environmental consequences of such actions have been significantly detrimental.
3. Something should be done to curb the undertaking of actions that would result in detrimental environmental consequences.
4. Improvements in environmental management may be achieved by stimulating the injection of more and better information regarding the environmental consequences of actions into the decision-making process.

These four premises formed the principles underlying the State's EIS system. The fourth premise was very important. It was generally agreed that adverse environmental impacts were the consequence of project decisions made without adequate information or knowledge as to their impacts. If decision makers could be provided with adequate information about the consequences of proposed actions they could make more environmentally sound decisions. This underlying principle can be summed up as: Better information leads to better decisions which in turn produce better results.

The Role of the EIS System in Environmental Management

It is important to place the role of the EIS system within the larger context of environmental management. Environmental management includes the preservation of important plant and animal species and the wise use of these and nonliving resources for the benefit of the people. Environmental management is carried out by federal, state and county government agencies and a number of private institutions such as the Nature Conservancy. Environmental management encompasses a wide array of techniques including land use zoning, permit processes, and land banking among others.

The EIS system is one of the tools environmental managers use to aid them. It is a formalized process for systematically gathering information so that managers can make better informed decisions or advise decision makers of the consequences of their choices.

The information gathered by the EIS process can be used to satisfy the environmental information requirements of federal, state, and county mandated permits. Thus, the EIS is not another approval procedure, but a disclosure process that complements existing permits and their procedures.

Goals and Objectives of the EIS System

The goals and objectives of the EIS system must be understood if we are to accurately evaluate its efficacy. The goal of the EIS system can be simply stated as:

> ...to establish a system of environmental review that will ensure that the environment is given appropriate consideration in decision making along with economic and technical considerations.

Two frequently cited objectives (Rosen, 1976; Orloff, 1978) of EIS systems are to:

1. Provide physical and social environmental information to decision makers necessary to improve their decisions.
2. Improve the public's participation in environmental decision making.

Thus, the underlying logic in establishing a process by which actions can be systematically evaluated was to assure that the ramifying consequences of actions would be fully known prior to making decisions to proceed with those actions. It was concluded that providing information to decision makers would lead to better decisions. Furthermore, allowing the public to participate in the EIS process would encourage open, honest, data gathering and disclosure by government and would help with the identification of potential impacts that might be known only to those with intimate experience or knowledge of a particular area. It would allow the public to scrutinize agencies' decision-making processes and to insure that agencies were adhering to federal and state environmental policies. It also would force agencies to consider public opinion as a source of information.

The mechanisms for attaining the objectives are the steps mandated in the EIS process. If the steps in the process are not carried out properly or are ignored, then the process fails. Thus, it is essential to examine the procedure required by law as a starting point in determining the efficacy of the system.

Establishment of NEPA and the Hawaii State EIS System

The establishment of EIS systems in Hawaii and other states can be directly linked to the establishment of a national EIS system under the National Environmental Policy Act (NEPA). Although state systems were inspired by NEPA, most differ from NEPA and each other in their authority and application. Examining key features of NEPA and EIS systems of other states provides useful information for comparison with the Hawaii state system.

National Environmental Policy Act

The legislative history of NEPA has been thoroughly documented by a number of authors (Yarrington, 1974; Corwin et al., 1975; Cox et al., 1978; Fairfax and Ingram, 1981). The Act has three main provisions:

1. the establishment of a national environmental policy
2. the establishment of a Council of Environmental Quality which advises the President of the United States on the overall health of the environment
3. the creation of an environmental impact review process including provision for public review (Orloff, 1978)

These provisions are considered to be the most unique and important part of the Act because they require federal agencies to conduct environmental impact studies for major federal projects and to encourage public participation in that process. Through the EIS process, federal agencies are forced to follow the environmental policy established by the Act and to give equal consideration to both environmental and economic factors when evaluating projects and policies.

The actual requirement for EISs set out in NEPA is contained in subsection 102C. In part it states that all federal agencies shall:

> Include in every recommendation or report or proposal for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on ...
>
> i. the environment of the proposed action
>
> ii. any adverse environmental effects which cannot be avoided should the proposal be implemented

iii. alternatives to the proposed action

iv. the relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity

v. any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented

NEPA Regulations

The regulations promulgated by the CEQ for complying with section 102 are an important feature of the EIS system under NEPA. The regulations took effect in June 1979 and superceded the CEQ guidelines adopted in 1973. The NEPA regulations are perhaps the single best example of clearly and concisely written procedures for environmental impact assessment. They go beyond elaborating the steps needed to comply with statutory requirements by mandating the format to be used for presenting the findings so that the most important issues are emphasized. They are easy to read and contain page limitations that substantially reduce the size of the documents. Finally, they focus on analyses that are directly useful to decision makers. We recognize the importance of NEPA regulations as a guide for the rules governing the Hawaii state EIS system and have included references to the regulations where appropriate.

Hawaii State EIS System

Concerns similar to those that led to the passage of NEPA led to the passage of the Hawaii Environmental Quality Control act in 1970. The purpose of this act was to:

> ...stimulate, expand, and coordinate efforts to determine and maintain the optimum quality of the environment of the state.

To accomplish this purpose the act created an Office of Environmental Quality Control (OEQC) within the Office of the Governor; an Environmental Center at the University of Hawaii to facilitate contributions from the University community to other state and county offices in matters dealing with the environment; and an Environmental Council (Council) to serve as a liaison between the director of OEQC and the general public. Each of these organizations was to play, and continues to play, an important role in the state EIS system.

First Hawaii State EIS System

The first EIS system in Hawaii was established by executive order issued by Governor John A. Burns on August 23, 1971. Modeled after section 102 of NEPA, it directed state and county agencies to include a detailed environmental impact statement for every recommendation and proposal for major state actions or projects utilizing state funds and/or state lands that significantly affected the environment (Tabata, 1974).

State and county agencies were also directed to submit Draft EISs to the newly created Office of Environmental Quality Control for coordination of public review. No plan or program subject to the executive order would be allowed to proceed until its EIS had been accepted by the governor. The OEQC was given the responsibility for advising the Governor on the acceptability of the EIS.

Present Hawaii State EIS System

The history of the present state EIS prior to 1979 is well documented in our previous review of the EIS system (Cox et al., 1978) and will be summarized only briefly here.

A Temporary Commission on Statewide Environmental Planning (TCEP) was established in 1973 to develop a plan to protect Hawaii's environment. The resulting report (Hawaii. Temporary Commission, 1973) called for, among other things, an environmental policy act and an act establishing an EIS system.

It was originally conceived that the policy act and EIS system would be integrated into a single legislative bill along the lines of NEPA. However, the policy act and the EIS system were passed as separate bills. The environmental policy act proposed by TCEP passed the Hawaii State legislature in 1974 and was signed into law by the Governor as Act 247, subsequently becoming chapter 344 HRS. The EIS law was also passed during the 1974

legislative session and was signed by the Governor as Act 246 and was subsequently placed into the statutes as chapter 343 HRS. Separation of the environmental policy act from the EIS system meant that the EIS system would not be guided by a specific environmental policy as was the case with NEPA and other state EIS laws such as the California Environmental Quality Act.

Chapter 343 HRS originally included seven sections:

Section 1: Definitions - Defined terms used in the law
Section 2: Public Records and Notice - Set forth requirements for public notification of the availability of system documents
Section 3: Environmental Quality Commission - Created the Commission to manage the EIS system
Section 4: Applicability and Requirements - Detailed actions that require an EIS and outlined the general steps in the process
Section 5: Rules and Regulations - Assigned rulemaking authority to the Commission
Section 6: Limitations of Actions - Set time limits for legal action for certain provisions of the chapter
Section 7: Severability - Saving clause

Chapter 343 HRS remained in its original form from 1974 to 1979.

1979 Amendments to Chapter 343 HRS (Act 197)

In 1979 substantial revisions were made to the EIS law by Act 197. Act 197 passed in the legislature as SB 1591: "A Bill for an Act Relating to Environmental Quality Commission and Environmental Impact Statements." Amendments made to chapter 343 in this act were primarily changes that were meant to "clarify and conform the statutes to present practices instituted through Environmental Quality Commission regulations" (SCR 979). These amendments also enjoyed wide support as they were the result of informal discussions held among persons connected with environmental and land use agencies, environmental groups, the construction industry, and the Environmental Center (Hawaii. University, Environmental Center, 1979). Amended sections included the following:

Changes to 343-1

Act 197 added a "Findings and Purpose" section to describe and clarify the purpose of the State EIS law. A Findings and Purpose section had been included in the original version of HB 2067 (1974), the bill that eventually became the EIS statute, but was deleted by the House Committee on Judiciary and Corrections. A statement of purpose that was similar to the Findings and Purpose section contained in HB 2067 was included in the committee's report but not in the bill. In the 1978 EIS study (Cox et al.) the authors pointed out that since there was no policy to guide the application of the law, a statement of purpose for the EIS system is of "vital importance in defining the context within which the significance of environmental impacts is to be judged as a criterion for determining whether an action" is subject to the law. They recommended that a Findings and Purpose section be added to the law, which Act 197 accomplished.

Changes to 343-2

The definition for "discretionary consent" was amended, and definitions for the terms "Approval" and "Environmental Assessment" were added. The definition of "discretionary consent" was amended by changing the phrase "ministerial approval" to "ministerial consent" so as to avoid a circular definition of the word "approval" which, for the purposes of chapter 343, is defined as discretionary consent required from an agency prior to actual implementation of an action.

A definition for "approval" meaning "discretionary consent required from an agency prior to actual implementation of an action" was added to distinguish this term from the term "acceptance." Acceptance is a formal determination that an EIS has met all the requirements of the statute and rules. EIS acceptance and project approval are two concepts often confused with one another. This amendment attempted to address this confusion.

The addition of a definition of "Environmental Assessment" legitimized the existence of a step in the EIS process that was not recognized in the statute but had been recognized in the EQC regulations. Under the EQC regulations Sub-Part A 1:4 (h) Environmental Assessments (EAs) were the evaluation that agencies used to determine whether an action may have a significant effect on the environment. Sub-Part D 1:31 (b) and (c) required

agencies to "assess each proposed action and determine whether the anticipated effects constitute a significant effect" and to "file a notice of determination with the Commission." The inclusion of the definition of an "Environmental Assessment" in chapter 343-2 HRS and the language under 343-5(b) and 343-5(c) that specifically called for an EA under certain circumstances finally brought the statute and regulations into conformance.

Changes to 343-5(c)

The provision requiring an agency to either accept or not accept an EIS within 60 days of its receipt was amended to allow extension of the 60 day period for a period not to exceed 30 days at the request of the applicant.

Changes to 343-5(f)

Act 197 also revised HRS 343 to reduce the duplication of effort that occurred at the state, county and federal levels of government when the environmental review requirements of both NEPA and chapter 343 HRS applied to the same project. Section 343-5 (f) was amended to require agencies to "cooperate with federal agencies to the fullest extent possible to reduce duplication between federal and state requirements." Furthermore such cooperation was to include, to the fullest extent possible, joint environmental impact statements with concurrent public review and processing.

Changes to 343-7(a)

Act 197 also addressed actions meeting the EA applicability criteria in section 343-5, but for which no assessment was prepared. It reduced the time period within which judicial proceedings could be initiated to challenge such agency decisions from 180 days to 120 days.

1980 Amendment to HRS 341 (Act 302)

In 1980 the OEQC and the Council were transferred from the Office of the Governor to the Department of Health for administrative purposes. This transfer was part of a reorganization that moved a number of programs from the Office of the Governor to other existing state agencies for the purposes of enhancing efficiency and accountability. The move was not intended to decrease or otherwise change the statutory authority of the transferred programs.

1980 Amendment to HRS 343 (Act 22)

Section 343-5 subsections (a) and (b) were amended by Act 22 to exempt the acquisition of unimproved real property from the requirement of having to prepare an EA. However, the amendment failed to define the term "unimproved".

1983 Amendment to HRS 343 (Act 140)

In 1983 major changes were made to the management of the EIS system. Chapters 341 and 343 were amended by Act 140 to abolish the Environmental Quality Commission (EQC), and transfer its duties to the OEQC and the Council. The primary responsibility of the EQC was to make and amend the regulations and rules of the EIS process. The Council's primary duty was to produce an annual report on the state of Hawaii's environment. The similarity of the names of the Council and EQC and the unclear nature of the responsibilities of each body led to confusion about their roles in the management of the EIS system. Consolidation of the EQC and the Council into one working body named the Environmental Council was intended to end the confusion.

In addition to consolidating the Council and the EQC, the Act also made the position of Council Chairperson elective rather than having the OEQC Director serve automatically as chairperson. It also changed section 343-6 by deleting the word "Regulations" from the title and subsections in favor of the term "Rules" which accurately reflected what the EQC had been promulgating.

1986 Amendment to HRS 343 (Act 186)

In 1986 Act 186 added the definition of "Negative Declaration" and deleted the numbering system used in Section 343-2. Negative Declaration was a term that was first used in the EIS regulations but had no basis in the

statute. Negative Declarations resulted from the judgement by an agency based on an EA that a particular action would have no significant environmental impact and therefore would not require an EIS. The inclusion of "Negative Declaration" in the statute provided a statutory basis for a practice that had been in existence since the inception of the EIS system.

Section 343-6 was amended by Act 186 to replace the term "make" with the term "adopt" in reference to the Council's authority to make, amend and repeal rules to implement chapter 343 HRS. A new area of rulemaking authority was added to the seven existing under subsection 343-6(a) HRS. Subsection 343-6(a) (8) HRS was inserted to require rulemaking to "Prescribe the contents of an Environmental Assessment." Language requiring that "at least one public hearing shall be held in each county prior to the final adoption, amendment, or repeal of any rule" was moved from subsection (a) to a new subsection (b). Finally, language was added prescribing that rulemaking would include, but not be limited to, the guidelines as presented in section 343-6 HRS.

1987 Amendments to HRS 343

The statute was amended by Acts 187, 195, 283, and 325 in the 1987 legislative session.

Act 187 extended the coverage of the EIS system to the reclassification of lands placed in the conservation district by the State Land Use Commission under chapter 205. It also made changes to sections 343-2, 5, and 6 HRS, dealing with definitions of key terms; the applicability and requirements of the EIS system; and, rulemaking.

It amended section 343-2 HRS by distinguishing between "Draft" EIS and "Final" EIS. Language was added to the definition of Environmental Impact Statement by defining the "draft statement" as, "the initial statement filed for public review." The "final statement" was defined as the document that has "incorporated the public's comments and the responses to those comments," and "that shall be evaluated for acceptability by the respective accepting authority."

Act 187 also added a new subsection 343-5(a) (7), which closed a loophole in the system. Previously private developers could seek to secure a land use boundary amendment from conservation district to urban district from the State Land Use Commission, before proposing an action on that land and thereby avoid the requirement to prepare an EA under subsection 343-5(a) (2) HRS.

Act 187 amended subsection 343-5(a) (3) HRS by changing the reference for the definition of the shoreline from subsection 205-31 HRS to subsection 205A-41 HRS, reflecting changes made in the state Coastal Zone Management Act (HRS 205A). It also amended subsection 343-5(a) (5) HRS by changing the definition of the "Waikiki-Diamond Head" area to the area defined in the Waikiki Special District. Both changes helped to better define the area of coverage intended by chapter 343.

Act 187 amended the period for public review of the draft EIS under subsection 343-5(b) HRS and 343-5(c) HRS from 30 to 45 days. OEQC was given the responsibility to notify the public of the availability of the Draft EIS. These subsections were also amended by requiring the agency receiving the request for acceptance to notify the applicant of the determination of acceptability of the Final EIS within 30 days instead of the previous 60 day requirement. The 30 day extension initiated at the request of the applicant was amended to 15 days.

Act 187 also added language to section 343-6 HRS requiring the council to develop rules which "prescribe procedures for the preparation and contents of an environmental assessment" as well as for the withdrawal of a statement; public notice of the availability of a Draft EIS; and acceptance or nonacceptance of the Final EIS.

Act 195

Act 195 amended section 343-5 HRS subsections (b) and (c) by transferring the authority for making recommendations as to the acceptability of an EIS from the Council to the OEQC.

Act 283

Act 283 made some inconsequential housekeeping amendments to chapter 343 HRS.

Act 325

Act 325 amended section 343-2 HRS by adding a new definition of "Helicopter facility" and amended section 343-5(a) by requiring the preparation of an EA for actions proposing the construction or expansion of helicopter facilities which may affect conservation districts, shoreline areas, or historic sites on the National or State Registers.

EIS Rules

Establishment and Basic Content of the Rules

The EIS Rules, first adopted by the EQC as Regulations on April 3, 1975 and approved by the Governor on June 2, 1975 (Cox et al., 1978), provided a framework for compliance with the law. The rules set forth in greater detail the definition of significance; listed classes of exempt actions; created the 30 day consultation period; listed the content requirements for EISs; established appeals for nonacceptance of EISs; and set forth the criteria and procedure for acceptance of EISs.

Updating the Rules

The EIS Rules were updated over a 6 year period from 1979 to 1985. During this time, changes in the law resulted in sections of the Rules becoming inconsistent with the statute. An amendment to chapter 343 HRS in 1983 for example, removed the EQC and split its duties between the Council and the OEQC. However, the Rules continued to reference the EQC until 1985.

No new rule changes have been made since 1985, though the statute was amended in 1986 and 1987. As a result, consistency between the law and the rules has again become a problem.

1985 Changes in the EIS Rules

Aside from legislation, one of the more significant changes in the EIS system was the completion in 1985 of the updated EIS Rules. The 1985 amendments to the EIS Rules reflected all the changes to chapters 341 and 343 HRS prior to the 1985 legislative session. Changes made to the rules included:

1. A requirement for agencies to file an exemption notice whenever they determine that an action is exempt from chapter 343 HRS
2. The deletion of "continuing administrative activities, such as the purchase of supplies and personnel-related actions;" (class 6) from exempt classes of action and the inclusion of these activities in the definition of "action" under 11-200-2
3. Setting forth content requirements for draft as well as final EISs

In addition, the amendments deleted all references to the EQC and replaced them with the Council or OEQC where applicable.

County EIS Systems in Hawaii

Two counties, Hawaii County and the City and County of Honolulu, have established EIS systems under their own county ordinances.

Hawaii County System

An ordinance establishing an EIS system in Hawaii County was passed in May 1974. The ordinance was in the form of an amendment to the County Zoning Code. It required developers to prepare and submit an EIS to the County Planning Commission for actions involving proposed hotels, apartment-hotels, condominiums, or any action requiring Planned Development Permits. As prescribed in the ordinance, the content requirements were similar to those required by the National Environmental Policy Act (NEPA) except that a Hawaii County EIS was also required to include an economic and social analysis (Cox et al., 1978). This amendment was deleted in the early 1980s because it duplicated other requirements according to county officials.

Honolulu County System

The City and County of Honolulu requires the submission of an EA for major actions proposed within the county's Special Management Area (SMA). The SMA is a strip of land at least 300 feet inland from the shoreline. Within this area counties are required to establish a special management regime under the state Coastal Zone

Management Act (Chapter 205A HRS). The Department of Land Utilization (DLU) has management responsibility over the City and County of Honolulu's SMA. Development within the SMA requires an SMA use permit. Applicants must file a written description of the development, including a description of the affected environment, and address the technical and environmental aspects of the project. The Director of the DLU may issue an EIS preparation notice when he finds that the proposal may significantly affect the SMA and when sufficient information to evaluate the impact is not available. The EIS must be filed pursuant to chapter 343 HRS and its applicable rules. The ordinance provides that the decision of the DLU regarding the acceptability of these EISs may be appealed to the Honolulu City Council.

EIS Systems in Other States

EIS systems and/or their equivalents have been instituted in 31 states and the Territory of Puerto Rico. The present study prepared a comparison of the Hawaii state EIS law and the laws upon which each of the 31 state and territory EIS systems are based, as well as a model state act drafted at the National Symposium on State Environmental Legislation sponsored by the Council of State Governments in 1973. A summary of this research is shown in Table 3. A detailed account of each of these state laws can be found in Appendix C.

Key Similarities and Differences

Fourteen states and the Territory of Puerto Rico have mandated the use of environmental impact assessment as part of their comprehensive environmental management strategy. Although a thorough comparison is included in the appendix report, several key similarities and differences are worth noting:

1. **Applicability**: All of the states with comprehensive systems, with the exception of Virginia, require a test for significance to determine whether an EIS will be required. Virginia calls for an environmental impact report for all "major state projects."
2. **Preparation and Financing of Documents**: In all states with comprehensive systems the private applicants pay the costs of the environmental analysis. In California and New York the agencies prepare the environmental report and may be reimbursed by the applicant. In Washington the lead agency may prepare the environmental report or may require the applicant or an outside consultant to prepare the report. It is probable that in these cases the applicant pays for the environmental report, although the statutes don't specifically state that.
3. **Public Hearings**: Wisconsin requires a public hearing for every project for which an EIS is prepared. In Washington, New York, and California the lead agency may hold a public hearing at its discretion. Connecticut requires a public hearing after an agency prepares an evaluation and declares a finding of no significant impact if a group of 25 or more people request a hearing. Hawaii has no requirement for public hearings.
4. **Alternatives to proposed actions**: A key difference between the Hawaii law and the EIS laws of Minnesota, New York, and California is in the statutes and regulations regarding alternatives to proposed actions. In all cases, alternatives to proposed actions must be explored in the EIS, but in Minnesota, New York, and California, if a reasonable alternative is judged to be less environmentally detrimental than the preferred alternative, that alternative must be used. How this concept is applied in these states is not clear from a reading of their statutes or regulations, however, in one case in New York, the courts ruled on the superiority of an alternative (Town of Henrietta v. DEC 430 N.Y.S. 2d 440 1980). It is pertinent to note that in those states with provisions in the statutes that require the adoption of a reasonable, less detrimental alternative, the EIS systems are converted from simply disclosure systems, to something with much more substance.
5. **NEPA Requirements and the Hawaii System**: The Hawaii State EIS system differs from that required by NEPA in a number of significant ways. As noted earlier, NEPA contains both an Environmental Policy Statement and the EIS system, whereas, in the State statutes, the policy statement is separate from the EIS system. This segmentation in the state code means that the EIS system may not be viewed as a method for enforcing the state environmental policy which is a premise of the federal EIS system. Thus, in Hawaii, the EIS may be viewed as an end in itself rather than as a means to force agencies to comply with state environmental policy.

Table 3. Synopsis of State EIS Laws

STATE	ENABLING	TYPE	PREPARES/PAYS Agency/Applicant	TRIGGERS	PRIVATE	NEPA
Alabama	4 Stats.	S	Agn/Agn Agn/Agn	Mining, Eminent Domain, Solid waste, radioactive		
Arkansas	2 Stats.	S	Agn/Agn App/App	Timber, Utility Sites	yes	
California	1 Stat.	C	Agn/Agn Agn/App	Significant impacts (SI)	yes	NEPA is substitute
Colorado	2 Stats.	S	App/App	Utility Site, Fed. Water Diversion	yes	
Connecticut	1 Stat.	C	Agn/Agn	Significant Effects (SE)	no	
Delaware	1 Stat.	S	App/App	Coastal Zone Development	yes	
Florida	1 Stat.	S	Agn/App	Utility Site	yes	
Hawaii	1 Stat.	C	Agn/Agn App/App	SE's in designated areas	yes	joint preparation
Illinois	1 Stat.	S	Agn/Agn	Limited to annual report	no	
Indiana	1 Stat.	C	Agn/Agn	SE's of major actions	rarely	NEPA not substitute if state funds used.
Maryland	1 Stat.	S	Agn/Agn	SE's of legislative actions	no	
Mass.	1 Stat.	C	Agn/Agn App/App	Significant damage	yes	NEPA is substitute
Michigan	Ex.	C	Agn/Agn	SI's of major actions		joint preparation
Minnesota	1 Stat.	C	Agn/Agn Agn/App	SE's of major actions	yes	joint preparation
Mississippi	1 Stat.	S	Agn/App	EIS when apply for permit for regulated activity in coastal zone	(NA)	NEPA is substitute
Montana	1 Stat.	C	Agn/Agn	SE's of major actions	yes	
Nebraska	4 Stats.	S	Agn/Agn	SE's of some actions	no	
Nevada	1 Stat.	S	(NA)	Utility site	yes	
New Jersey	Ex. 4 Stats.	S	Varies	Solid waste facility Legislative proposals, coastal zone development, turnpikes, buying land	varies	
New Mexico	Repealed 1 Stat.	R				
New York	1 Stat.	C	Agn/Agn Agn/App	Significant effect	yes	Joint with Agency
N. Carolina	1 Stat.	C	Agn/Agn Agn/App	Significant effect	can*	NEPA is substitute
N. Dakota	1 Stat.	S	Agn/Agn	Only when state transfers land to Federal government	no	
Oregon	1 Stat.	S	Agn/App	Utility site	yes	
Pennsylvania	4 Stats.	S	App/App	Part of process for solid waste, mining, industrial waste, air pollution permits	yes	

Table 3. Synopsis of State EIS Laws (Continued)

STATE	ENABLING	TYPE	PREPARES/PAYS Agency/Applicant	TRIGGERS	PRIVATE	NEPA
Rhode Island	1 Stat.	S	Agn/Agn App/App	Coastal zone development	yes	
S. Dakota	1 Stat.	C	Agn/Agn Agn/App	May prepare for actions w/ significant effects	yes	NEPA is substitute
Texas	Ex.	C	(NA)	(NA)	(NA)	
Virginia	1 Stat.	S	Agn/Agn	Significant effects of major state projects	no	
Washington	1 Stat.	C	Agn/Agn Agn/App	SE's of major state actions	yes	NEPA is substitute
W. Virginia	7 Stats.	S	Agn/Agn Agn/Agn	Part of permit process for private facilities in state parks, solid waste, hazardous waste, mining, radiation and the building of some roads.	yes	
Wisconsin	1 Stat.	C	Agn/Agn Agn/App	Significant effects	yes	joint preparations
Puerto Rico	1 Stat.	C	Agn/Agn	Significant effects	no	
Model act	1 Stat.	C	Agn/Agn Agn/App	Significant effects	yes	NEPA is substitute

KEY TO CHART

Enabling: The legal device that created the EIS system.
Ex. = EIS requirements created by Governor's executive order.
Stat. = EIS requirements created by statute(s)

Type: S = EIS required only for specific actions.
C = Comprehensive EIS system.

Prepares/Pays: Party responsible for preparing the EIS/Party responsible for paying for the EIS.

Agency/Applicant: Agn = Agency; App = Applicant
Where there are two pairs of abbreviations the left pair refers to agency actions and the right pair to applicant actions.

Triggers: Situations that trigger an assessment or EIS.
SI = Significant Impacts
SE = Significant Effects

Private: Whether the EIS requirements apply to private actions.
can* = Under North Carolina's law, an EIS will be required if a local government passes an ordinance requiring an EIS. No local government has passed such an ordinance yet.

NEPA: How NEPA and the state EIS are coordinated
NEPA is substitute = An EIS prepared under NEPA may be substituted for the state EIS requirement.

(NA): Information not available.

Another difference between NEPA and the Hawaii EIS system is in the treatment of alternatives. NEPA requires equal comparison among all feasible alternatives before any one is selected. Hawaii state EIS documents focus on a selected alternative and briefly discuss other alternatives that were considered and reasons for not choosing them. The difference in the treatment of alternatives is very crucial. It changes the types of information gathered and consequently, what decisions will be made. By treating alternatives equally the federal EIS deals with all potential alternatives to a project at an earlier phase than the state EIS system. It cannot gather the same level of detailed information that can be obtained in the state system that is primarily looking at one site. Thus the federal EIS leads to choosing the best alternative from among many while the state system leads to decisions about how best to mitigate impacts of a project at a particular site.

Differences with other states as compared to Hawaii will be noted throughout the report where applicable.

PART 3: ADMINISTRATIVE ASPECTS OF THE HAWAII STATE EIS SYSTEM

Introduction

Part 2 of this report covered the background and historical development of the Hawaii State Environmental Impact Statement (EIS) system, other Hawaii EIS systems, the EIS system under the National Environmental Policy Act (NEPA) and EIS systems in other States. In Part 3 we will examine administrative aspects of the State EIS system including: management roles and decision making authority; legislative findings and purpose; definitions of key terms; and public notification requirements. In each of these 4 aspects of the administration of the EIS system we will describe the major issues, summarize the opinions of the interview participants, and make recommendations for improvements when appropriate.

Management of the EIS System

Introduction

While responsibility for the flow of documents through the State EIS system is centralized at the Office of Environmental Quality Control (OEQC), discretionary authority in terms of rule making and decision making is primarily decentralized among the Environmental Council (Council), agencies, and the governor or county mayors. The Council is responsible for: rule making; the authority to create exempt classes of actions; and, acceptance or rejection of the inclusion of specific actions proposed by agencies in each of the exempt classes. Agencies have the authority to determine whether an action is subject to chapter 343 HRS review, whether an EIS is required for an action, or whether an EIS prepared for an applicant action is acceptable. The governor has the authority to determine the acceptability of an EIS prepared for an agency action that proposes the use of either state lands or funds, and the mayors have the authority to determine the acceptability of an EIS prepared for an agency action proposing the use of county lands or funds. Neither the Council nor the OEQC has the authority to overturn the governor's, mayor's or agency's decisions in these areas.

The OEQC has discretionary authority in two areas: choosing the lead agency whenever an applicant requests approval from two or more agencies simultaneously for a proposed action; and, making a recommendation that an EIS is or is not acceptable if requested by an agency or an applicant. All of its other duties under chapter 343 HRS are ministerial, ie. functions that are prescribed by statute or rule and that require no discretionary judgement.

The distinction between discretionary and ministerial functions in the management of the EIS system is important. The performance of the system is guided to a large extent by those agencies with discretionary management authority. The perception of how well the EIS system performs thus depends on how well these agencies perform their respective tasks. The OEQC, because its role is mainly ministerial, has had much less authority to direct the performance of the EIS system than other agencies. However, because its ministerial functions are important to the process and because so many interview participants recognized the potential for the OEQC to provide even more guidance, we have examined its role in some detail. The Council, because of the importance of its rule making authority, should be considered a major contributor to the overall performance of the EIS system.

The Role of the Commission, Council, and OEQC in the EIS System

The OEQC and the Council were not given specific management functions for the state EIS system in the act creating chapter 343 HRS. The early legislation called for the creation of an Environmental Quality Commission (EQC) as the central administering agency of the EIS system. In the evolution of the state EIS system, the EQC was abolished and its duties were divided between the OEQC and the Council. The reason for the abolition was to streamline statewide environmental management and to eliminate or reduce the level of confusion caused by the similarity in the names of each of the three entities. As a result, both the OEQC and the Council now have specific roles designated to them in chapter 343 HRS.

The Environmental Quality Commission

The EQC was created in 1974 by Act 246, the act creating the Hawaii state EIS system, to administer the EIS system through the adoption and amendment of regulations. The Commission was composed of ten members appointed by the Governor for 4 year terms. At least part of the Commission membership was to be representative of labor, management, the construction industry, environmental interest groups, real estate groups, and the architectural, engineering, and planning professions. The OEQC Director served as an ex-officio voting member. The Chairman of the Commission was appointed by the Governor.

As prescribed by Act 246 (1974) and the EQC Rules and Regulations, the Commission:

1. Had the authority to promulgate regulations governing the state EIS system.
2. Was to be notified of all assessment determinations, EISs ready for review, and EISs accepted, and was to publish notices of these in a semimonthly bulletin.
3. Made recommendations as to the acceptability of an EIS at the request of an applicant or a proposing agency.
4. Heard appeals by applicants whose EISs were judged to be unacceptable by an approving agency.
5. Had the authority to consider such appeals and petitions for declaratory rulings on interpretations of the EIS law or regulations.
6. Set the conditions under which a previous EIS may be incorporated, either in whole or in part, into an EIS for a newly proposed action.
7. Identified the approving authority if an applicant requested approval from more than one agency.
8. Made additions, amendments, or deletions to existing classes of exempt actions.
9. Reviewed and concurred with or denied, agency lists of types of actions which fall within the exempt classes, and periodically reviewed agency lists.

The EQC was abolished in 1983, and its functions were transferred to the Council and OEQC.

The Environmental Council

The Council was originally created in 1970 by Act 132 as a citizen's panel to serve as a liaison between the OEQC Director and the general public. The act called for a Council of not more than 15 members including representatives from: the mass media; relevant disciplines, such as environmental design, the natural, physical, and social sciences, technologies, social ethics and philosophy; business and industry; the university; public and private schools and colleges; and voluntary community groups and associations. The act did not specify the length of the terms for individual Council members. The Director of OEQC was designated to serve as chairman. The Council met at the call of the Director (Cox, 1981).

The duties of the Council were revised in 1974 by Act 248. This amendment to section 341-6 HRS required the Council to "...monitor the progress of the state, county, and federal agencies in achieving the State's environmental goals and policies and that it...shall make an annual report...no later than January 31 of each year."

When the EQC was abolished in 1983 by Act 140, most, but not all, of its authority was transferred to the Council. The Council was given authority in the two most significant duties assigned to the EQC: the authority to adopt, amend, and repeal EIS rules; and the authority with respect to exemptions. The responsibility for publishing the periodic bulletin to notify the public of EIS system documents and the authority for determining the approving agency for applicant actions in which more than one agency is approached to obtain permits was transferred to OEQC.

Act 140 (1983) also amended section 341-3(c) HRS dealing with the membership and makeup of the Council. It set the term of membership at 4 years and it staggered the terms of the members. It also called for a balanced representation from among a number of disciplines.

Office of Environmental Quality Control

The OEQC is an executive branch government office created to advise the governor on environmental matters and to assist in the administration of the EIS system. It was originally placed in the Office of the Governor but was

moved to the Department of Health (DOH) for administrative purposes in 1980 as part of a reorganization of the Office of the Governor.

Under the Governor's Executive Order of 1971, the OEQC was to act as a clearing house for EISs and review comments on them, to advise and assist the Governor in reviewing EISs, to reflect state positions and to advise state departments on appropriate procedures (Cox, et al., 1978). Under Act 246 (1974) most of OEQC's responsibilities for the administration of the EIS system were transferred to the EQC. OEQC continued to advise and assist the Governor in the review of EISs. However, this was the result of the Governor delegating discretionary authority to the Director of OEQC and was not a result of statutory or regulatory requirements.

After the abolition of the EQC in 1983, OEQC was given several ministerial responsibilities formerly assigned to EQC. Specifically, OEQC was to:

1. Be notified of all assessment determinations, EISs ready for review, and EISs accepted, and to publish notices of these in a semimonthly bulletin;
2. Identify the approving authority if an applicant requested approval from more than one agency.

OEQC was also required by subsection 341-4(b) (7) HRS to "Offer advice and assistance to private industry, governmental agencies, or other persons upon request." It is possible under this subsection that OEQC may provide guidance for meeting the intent of chapter 343 HRS when requested.

Discussion: Performance of the OEQC and the Council

Introduction

Interview questions (Appendix B) concerning the management of the EIS system focused on how well the OEQC and Council were fulfilling their statutory roles concerning the EIS system and whether the placement of these organizations in the Department of Health for administrative purposes had an effect on their performance. We also asked the participants if any additional EIS system responsibilities should be given to OEQC and the Council and whether there was an alternative to their placement in the DOH for administrative purposes. It should be noted that many of the interviews were conducted prior to the appointment of the present Director of OEQC. Hence, many of the criticisms of the operations of OEQC, particularly as they apply to lack of leadership, are now being addressed. However, it is appropriate to reflect the comments of the participants interviewed prior to the appointment of the new Director, as they serve to call attention to the problems experienced when leadership is lacking.

OEQC

Most interview participants pointed out that the OEQC has little managerial responsibility for those aspects of the EIS system that require discretionary judgement. They said that the OEQC's responsibilities were primarily ministerial and that it was doing an adequate job in meeting them. Several complaints were voiced that the OEQC Bulletin was frequently late in its distribution and that OEQC staff had not been giving consistent responses to procedural questions about the EIS system. These shortcomings were attributed primarily to lack of leadership and the absence of experienced personnel.

Several participants expressed the opinion that OEQC could (and should) be given a greater role in the EIS process. They pointed out that in the past OEQC personnel had commented on the contents of EIS system documents and had advised the governor of the acceptability of final EISs for state agency actions. However, several agency participants commented unfavorably on recent OEQC reviews of draft EISs, saying that the reviewers lacked depth of understanding of the information being presented.

An additional suggestion was that the OEQC might provide oversight for agency determinations of whether an EIS is, or is not, required for an action. OEQC staff should be mandated to review each Environmental Assessment (EA) and either concur or disagree with the agency's decision. In the case that OEQC disagreed with an agency's decision to issue a Negative Declaration, it could either request additional information from the agency, or require the preparation of an EIS. Supporters of this idea usually added that the level of expertise and size of the OEQC staff would have to be increased before it could be given this role.

Another opinion expressed was that the OEQC could do more under present statutory authority, particularly with regard to educating both agency personnel and the public in statewide environmental management issues and

concerns. One idea often mentioned was that OEQC could develop detailed guidelines to assist agencies in their preparation of EISs. Another suggestion was that OEQC should hold periodic workshops to update agencies and consultants on the workings of the system.

Environmental Council

A majority of the interview participants said that the Council, as presently constituted, lacks the necessary expertise or time to make judgements on technical issues presented in EAs and EISs. They noted that the various specialities that members should represent, as cited in chapter 341-3 HRS, are only suggestions and not requirements. Furthermore, since the Council only meets once a month, their ability to make timely comments on many documents is often impossible. Thus, our participants said that it would be difficult to have the Council, as presently structured, take a more active role in making determinations on EAs and draft EISs. Questions were raised about the Council's ability to hear appeals (if appeals were allowed). A solution frequently mentioned was to require council members to have particular technical expertise as a qualification for being appointed to the Council.

Another issue noted by us and by several participants was the Council's delay in amending the Administrative Rules of the EIS system to make them consistent with the statute. The rules were last amended in 1985. Since then amendments to Chapter 343 HRS have brought about some important changes in EIS procedures. Yet the rules have not been revised to account for these changes. For example, the time limit for review of a draft EIS was extended to 45 days in the statute but is still listed as being 30 days in the rules. Making and amending the rules is one of the primary functions of the Council. Failure to amend the Rules in a timely manner can result in confusion over procedural requirements and undermines confidence in the Council's ability to execute its management responsibilities.

Changes in the OEQC and the Council

The general opinion expressed by the interview participants was that both the OEQC and the Council are doing an adequate job in managing the ministerial aspects of the EIS system. However, it was widely acknowledged that while the letter of the law was perhaps being met (from the ministerial point) there was significantly more that both the OEQC and the Council could do to meet the intent of the law and to improve the quality of the EIS system. There was generally strong support to encourage OEQC and the Council to provide more leadership. Participants stated that OEQC formerly provided a thorough review of EAs and EISs and offered better procedural guidance to agencies and applicants than at present. We also concluded from our discussions with the participants that the Council should be more diligent in meeting their administrative responsibilities with regard to exemptions from EA and in updating the rules.

One of the problems that many participants cited was the apparent difficulty that has been experienced in recent years by OEQC in hiring and retaining high quality, permanent staff. Participants attributed this problem to the lack of provisions for career development, inadequate salaries, and lack of objective leadership dedicated to improving environmental management. Many identified the appointment of a permanent director of the OEQC as the key element for bringing about changes to the office. A strong, well informed and dedicated director can provide the leadership and set the tone of the Office to assure that not only the letter but the intent of the EIS law is carried forward and that opportunities for employee training and advancement are encouraged.

Reviews of EAs and EISs by OEQC staff were mentioned as tasks that should be required of the office. Reviews by well qualified staff would act as a quality control mechanism. The OEQC staff review need not focus solely on technical issues. It should include issues such as the readability of the documents, the extent to which the documents meet the content requirements set out in the EIS rules and the adequacy of the analyses. Technical issues could be flagged by OEQC staff and sent to appropriate experts within state agencies or at the University of Hawaii through the Environmental Center. We consider this to be an appropriate and necessary role of OEQC and one that is consistent with the intent of chapter 341 HRS.

An issue frequently cited by the participants was the need for more effective ways to improve the quality of the EAs and EISs. An oft repeated suggestion was to give the OEQC the authority to reject inadequate EIS documents. Giving the OEQC the authority to reject poor quality work would help to achieve a measure of quality control. However, authorizing OEQC to exercise this power is only feasible if appropriate staff could be hired and retained.

Discussion: Placement of the OEQC and the Environmental Council

Another area of concern was the placement of the OEQC and the Council in the Department of Health for administrative purposes. The question was raised as to whether this placement had impaired OEQC's ability to carry out its duties under chapter 343 HRS. The efficacy of the move from the Office of the Governor has been questioned by various groups and individuals ever since this decision was made. As early as 1982 suggestions to move the OEQC to another executive department or back to the Governor's Office surfaced (Cox, 1982). It has been argued that in the 70's, the OEQC staff carried out quality control of the EIS system through careful monitoring of EAs and EISs. OEQC, with strong internal leadership and with support from the administration, not only served to enforce the EIS system but also provided guidance to other state agencies in its application. OEQC also assumed an active role in educating agency staff and the public in the ways of the EIS system and environmental management in general.

Most of the participants felt that the move to DOH has made little or no difference in the way the system has been administered. A prevailing opinion was that since OEQC and the Council now had primarily ministerial responsibilities with respect to the EIS system it made no difference where they were placed within the government structure.

A number of participants suggested that OEQC be removed from the DOH. The rationale provided was that DOH has its own environmental agenda, which could influence the OEQC and the Council. In addition, several people mentioned that no matter which agency OEQC and the Council were attached to administratively, that agency would exert its influence on them via bureaucratic means such as interference with hiring, budgets, and contracting procedures. A number of alternate administrative arrangements were suggested including:

1. Move OEQC back to the Governor's Office
2. Make OEQC part of the Office of State Planning
3. Move OEQC to an environmentally neutral office such as the Department of Budget and Finance or the Department of Accounting and General Services
4. Upgrade the status of the OEQC making it an independent agency similar to the U.S. Environmental Protection Agency. Upgrade the Council to a Commission similar to the President's Council on Environmental Quality (CEQ)
5. Create a separate Department of the Environment and transfer the duties of the OEQC and Council to the Department

Most agencies and some consultants expressed the opinion that the EQC and Council could be effective remaining in the DOH for administrative purposes but only if their functions continued to be primarily ministerial. Should either be required to carry out more discretionary functions, such as the quality control of EIS system documents, a new locus should be found.

Others thought that the management of the EIS system might improve if the OEQC and the Council were put under a new administrative arrangement. The consensus of this group was that the efforts of the OEQC and the Council to manage the EIS system were hamstrung by being in the DOH. Five options for moving the OEQC and the Council were mentioned as possible new loci. We looked at each of these options in determining our recommendations and they are discussed below.

Return to the Office of the Governor

According to the rationale presented at the legislative hearings during consideration of Act 403, the reason for moving OEQC and the Council out of the Governor's Office was the lack of adequate administrative staff in the Governor's office to support all the programs that were placed there. This argument can still be made today. Furthermore, several participants expressed the opinion that moving OEQC and the Council back to the Governor's office might politicize the OEQC and Council thereby further decreasing their effectiveness. In addition to the formal interviews undertaken as part of this review, many informal discussions have been held over the past years with various legislators and agency staffers regarding the return of OEQC and the Council to the Governor's office. The general consensus is that because of the limitations of staff and the number of programs already assigned, there is a reluctance on the part of the Governor to assume responsibility for OEQC and the Council and a reluctance on the part of the legislature to increase the staffing of the Governor's office to take on additional responsibilities. Hence, the return of OEQC and the Council to the Governor's Office does not seem likely.

Move to the Office of State Planning

One of the more intriguing possibilities was the suggestion to move the OEQC and the Council to the Office of State Planning (OSP). Although cited by only a few participants, this move seems to have some potential. First, OSP is in the office of the Governor, a move which a number of people endorsed. It has a statewide mandate over a broad subject area which requires a multidisciplinary approach and an interest in cumulative effects, much like the EIS system should have. It is also the locus of the Coastal Zone Management Program another Statewide system which has a decentralized management. However, the possibility of the EIS system becoming politicized would still remain.

Move to an Environmentally Neutral Department

Suggestions to move the OEQC and the Council to an environmentally neutral department such as the Department of Budget and Finance (B&F) or to the Department of Accounting and General Services (DAGS) were discussed. Both of these departments have an impact on environmental management in the state but are not directly involved in the administration of environmental programs. Because they both have some authority to veto state funded projects, both departments could gain by having a closer link with the production of environmental information. However, we believe that these departments, or others that could be substituted, are not likely to support the operation of OEQC and Council. With no mandate to provide environmental management, and no staff trained in the appropriate fields, it is unlikely that either of these agencies would, or could, effectively consider anything more than procedural issues relating to the EIS system.

Independent OEQC and Council

The option to strengthen the OEQC and the Council by increasing the size and expertise of OEQC's staff is a possible alternative. This option would simply upgrade the Office to an independent environmental agency in much the same way that the U.S. Environmental Protection Agency is independent of other federal departments. The office could qualify for additional staff, depending on the functions assigned to it. Its chief responsibilities would be to review EAs and EISs to support the Council, and to compel agency compliance with the law.

Environmental Department

Recent indications are that a new department of the environment may be created as soon as July 1992 according to Senate bill 9 (1991), which recently passed the 1991 legislature and is currently awaiting the Governor's signature. As presently drafted, the bill would establish a task force to develop the scope and responsibilities of the new department. Initial versions of SB 9 would have assigned the OEQC and the Council to the new Department of Environmental Protection, with OEQC's functions being assumed by the new department, and the Council continuing to carry out its present functions under chapter 343 HRS. With the larger organization, the director of the new department would be able to better carry out the review functions suggested for the OEQC and to provide more staff to the Council.

Recommended Changes in the Placement of the OEQC and the Council

The creation of a new environmental department may provide the proper locus for the OEQC and the Council. Certainly the criticisms with regard to conflicts and competition within a parent agency not specifically mandated for environmental protection would be silenced by attaching the OEQC and the Council to a separate Department of the Environment. As indicated above, the initial draft of SB 9 would have abolished OEQC and transferred its powers and duties to the new department. The Council would have retained its EIS authority; however, it would have been advisory to the director of the environmental department. While this may be a workable solution to many of the perceived problems with the present placement of OEQC and the Council, there remains a potentially serious flaw in this arrangement. Environmental management cuts across the jurisdiction of many departments and it is only at the chief executive level that competition for environmental resources can be resolved. While we can agree that the new department should be given the ministerial functions of the EIS system and be required to review EIS system documents, there also needs to be a mechanism for executive level guidance when actions involve multiple agencies or departments. The Environmental Council should be upgraded to a Commission with OEQC serving as the independent staff of the Commission. The Commission, with the aide of OEQC, could then be responsible for policy level input directly to the Governor, thus facilitating interagency coordination of environmental management practices.

Findings and Purpose

Introduction

As discussed in Part 2, the Findings and Purpose section of the EIS law was included in the original form of HB 2067 (1974) (which eventually became chapter 343 HRS), but the section was deleted in subsequent versions. Chapter 343 HRS was later amended to include a Findings and Purpose section by Act 197 in 1979. This was one of the changes recommended by the authors in the 1978 EIS Study. The reason given for adding this section was to "Indicate context in which significance of impact is to be judged" (Cox, et al., 1978, p. 145). At the same time the authors suggested that other Findings and Purposes be added as necessary to reflect changes in the "collateral purposes of the EIS System" (Ibid. p.145)

Each of the participants was asked whether the Findings and Purpose section required any change or update to reflect changes in the purposes of the EIS system. We were particularly interested in obtaining opinions as to whether a clause should be added to state that one of the purposes of the state EIS system was to promote a healthful environment.

The Constitutional Convention of 1978 amended Article XI: Conservation, Control and Development of Resources; by adding a section on Environmental Rights. The Constitution guarantees that "each person has the right to a clean and healthy environment" (Article X Section 9). It could be argued that one of the purposes of the state EIS system is to maintain and safeguard a healthful environment. From this it could be concluded that a clause stipulating that each person has the right to a healthful environment should be added to the Findings and Purpose section of the EIS law.

Discussion: Findings and Purpose

The great majority of those interviewed were not familiar with the Findings and Purpose section or had no opinion as to whether it should be amended or changed in any way. Many were of the opinion expressed by one agency's staff member that the section contained "motherhood statements" and not anything of substance.

A number of those who did comment felt that one of the purposes of the EIS system should be to protect the right of citizens to a healthful environment and thus asserted that this purpose should be reflected in the law. One dissenter however, commented that the concept of a healthy environment was not well defined in the constitution and would add nothing to chapter 343 HRS by its inclusion.

Several participants suggested that the stated purpose to enhance the coordination among agencies should be made stronger. By and large though, the majority of those interviewed had given the topic no thought and when asked, felt that no change was needed.

Improvements to the Findings and Purpose

The question of including some form of the right to a healthful environment may be problematic. The section in the State Constitution that grants individuals the right to a healthy environment also gives them the right to sue to enforce this right. Would reference to this right in the EIS law invite legal challenges to projects that may degrade environmental quality as pointed out in an EIS? Would inclusion change the intent of the EIS system from one of disclosure to one of disclosure and regulation by forcing a proposer to accept mitigative measures as a condition of permit acceptance? Further study of the statement of this right is suggested and we make no recommendation on its inclusion in the Findings and Purpose section in this report.

As presently worded, the expressed "purpose" as stated in the Findings and Purpose section of Chapter 343 HRS emphasizes the need for "a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations." However, the first paragraph of this section expressly calls attention to the need to "integrate the review of environmental concerns with existing planning processes of the State and counties..." and that this review process "...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 our opinion that these needs for agency coordination and public participation should be added to the existing stated purpose of Chapter 343 HRS. These needs are at least as important as information disclosure, so appropriate wording to emphasize the importance of the coordination and review purposes should be added to this section.

Definitions

Introduction

Definitions give the precise meanings to the terminology used in the statute. Act 246 (1974) defined eight terms: "acceptance", "action", "agency", "applicant", "commission", "environmental impact statement", "person", and "significant effect" in the section on definitions. The key terms among these were "action", those things that would be subject to the law; and "significant effect", those conditions that would require that an EIS would be prepared. Missing from this list was the definition of the term "Environmental Assessment". This was rectified by the passage of Act 197 in 1979, which added definitions for the term "environmental assessment", "approval", and "discretionary consent."

In 1983, with the abolition of the Environmental Quality Commission and the transfer of its duties to the OEQC and the Environmental Council, the definition of the Commission was replaced by the definition of Council and the definition of Office was added.

The definition of "negative declaration" was added by Act 186 in 1986. Negative Declaration, meaning a finding that an action would not have a significant effect on the environment, had been part of the EIS system since the Governor's Executive order of 1971. Its definition and inclusion in the law gave a statutory basis for its use.

Finally in 1987, the section was amended by Act 187 to redefine the term "environmental impact statement" by labeling the initial statement filed for review as the "draft EIS" and distinguishing it from the "final EIS" which is the statement that has incorporated public comments and the responses to those comments. Act 187 (1987) also added the definition of the term "heliport" which had just been added as a category for requiring an environmental assessment.

Discussion: Definitions

Interview participants were asked if any of the definitions in section 343-2 should be changed, updated, or deleted. In particular they were asked if they were satisfied with the definition of "significant effect" both in the law and the rules (11-200-12 EIS Rules), where the concept is defined in greater detail. Surprisingly, most interview participants felt that little or no change was necessary or had no comments. Other than "significant effect", on which we specifically asked participants to comment, the terms "cumulative impact", "unimproved lands", "preparation notice", and "supplemental statements" were requested for inclusion in section 343-2 HRS. Requests for redefinition or expansion of existing terms included; "action", "agency", "applicant", "environmental assessment", and "environmental impact statement". However, much of the discussion of definitions focused on the term "significant effect".

Significant Effect

The state EIS system clearly requires the type of scrutiny and disclosure called for in an Environmental Impact Statement (EIS) for only those actions that may have a significant effect. Significance however, according to Cox et al. (1978, p. 42), "is a relative characteristic, not an absolute one; and is a characteristic not amenable to unequivocal determination." Attempts to precisely define significance have proven to be unsuccessful according to many of those interviewed. However, leaving the term open to interpretation could make the EIS system irrelevant by allowing too few actions to be subject to full EIS scrutiny. Deleting the term altogether and making all actions subject to an EIS could overburden the EIS system and make cheating more likely.

The definition of "significant effect" is found in two parts; first it is defined under "significant effect" in the statute (section 343-2 HRS), and secondly, in the EIS rules (11-200-12 EIS Administrative Rules) where examples of what is meant by significance are given. The statutory definition states:

> "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 or social welfare.

There are several key elements in the definition that determine what actions are considered significant. There are those types of actions that:

irrevocably commit the use of a natural resource; curtail the range of beneficial uses of the environment; are contrary to state policy as outlined in Chapter 344 HRS; or adversely effect economic or social welfare.

It is clear from these elements that the intent of the EIS statute was to focus on significant effects to both the natural and social environments. It should also be noted that with the exception of the reference to "adversely affect economic or social welfare", there is no reference, either specific or implied, to significance being determined by "adverse" effects. A significant effect can and does apply equally to positive or beneficial impacts as well as to what might be considered negative or adverse impacts.

Interview participants suggested the inclusion of several other elements in the definition of significance. Several people thought that the definition should include an element of cumulativity. For example, an action could be judged to be significant when it is combined with other activities in a defined area or when it contributes to a statewide problem such as water degradation. Others thought that significance should be defined in terms of whether or not an action would be exceeding applicable standards. Other participants called attention to the issue that actions may have significant impacts on sensitive ecosystems, endangered and threatened species and their habitats, cultural sites, or a unique physical feature such as an anchialine pond, even though those resources may not be located in the immediate vicinity of the action. Finally, several people thought that significance should be defined in terms of cultural context; if an action would change the life style of the people of a geographic area, then it should be judged significant.

A number of interview participants argued that the definition of "significant effect" needed to be vague and should be defined by agencies in context. Among those who held that opinion, many favored the publication of a guide book or other educational material that would give more guidance to agencies for judging significance.

One participant raised the question of how to determine when multiple projects in the same or adjacent areas become significant due to cumulative effects. This participant also mentioned the problem of determining responsibility for the costs of an EIS required solely because of the cumulative criteria. In determining the significance of a project in terms of cumulative effects one must look at the full complement of physical, natural, and human/cultural resources in the area that may be affected by the proposed action. This might include, for example, an evaluation of the maximum "reasonable" development permitted in the area given the existing zoning and resources. In the case of private actions, the State and County departments should be taking greater responsibility for providing information on proposed or pending actions in the area of the action being assessed. For agency actions, greater coordination among agencies and departments is needed to identify proposed or pending plans. As for who bears the cost, the procedure would continue as it does at present. The agency or applicant is responsible for preparation of the documents.

Improvements to Significant Effect Definition

Although it is difficult to define precisely the qualitative concept of "significance", an attempt at such a definition is important since this is the single most critical element in the process of determining what actions will require the full EIS disclosure. Many agency personnel pointed out that their experience and judgement plays a major role in making a determination of significance. While it is unlikely that the perfect definition can be drafted, this is not to say that improvements can not be made. To the contrary, changes in the definition may well lead to improved analysis of actions and their effects on the environment. Hence, we recommend that the following elements be added to the definition of "significant effect":

1. The inclusion of wording that would require consideration of an action in light of its location.

Actions that ordinarily have insignificant effects may be considered significant if they take place in areas where other activities are being considered or undertaken. Because of the aggregate effects of multiple activities or actions in sensitive areas (i.e. endangered and threatened species and their habitats) even actions that ordinarily would have no significant impact may be significant.

2. The inclusion of wording to the effect that a significant effect occurs when an action by its development may exceed environmental standards as set forth by appropriate statutes and applicable regulations.

We recognize that not all potential pollutants have established standards for their emissions. However, if standards have been set for acceptable limits of pollution and a proposed action causes one or more of the standards to be exceeded, then that action must be judged to be significant.

3. The inclusion of language that would consider the effects of an action on the cultural heritage of an area or changes to traditional life styles of an area's residents as a measurement of significance.

As a final suggestion, the reader is referred to the definition and discussion of "significantly" as used in NEPA (40 CFR 1508.27). The NEPA definition may be an appropriate model for refining the definition of significant in the State system.

Suggested Additions to Definitions Section

Cumulative Impact

"Cumulative Impact" was a term often mentioned in the interviews as needing definition. In several of the interview sessions, groups of people commented that EIS content requirements (11-200-17(g) EIS rules) require preparers to examine cumulative impacts, yet there is virtually no guidance offered as to what that term actually includes. However, none of the participants were able to provide any specific suggestions for possible language. One suggestion received during the review process was that the state should be required to undertake carrying capacity studies in regions involving valuable natural resources prior to permitting activities in those areas. We concur with the intent of this suggestion in terms of developing a baseline of information regarding sensitive areas. Such information would certainly be of value in establishing priorities for various activities, uses, or areas to be protected. However, we do not concur with the need for "carrying capacity studies" in the strict sense of the term. Carrying capacity is a term originally coined to reflect the number of livestock that could be grazed over some period of time on some sized parcel of land under established climatic conditions. It is poorly applied to human endeavors as the non-quantifiable "quality of life" concept becomes a more important consideration. For example, it may be quite possible to physically house and feed 20 million people in Honolulu, hence, it could be argued that the carrying capacity of Honolulu would not be exceeded by that population. Yet, there are few among us that would agree that a population of 20 million people in Honolulu is desirable. Criteria for acceptance of activities that affect human resources are not always quantifiable, thus it is our opinion that carrying capacity studies would not be the appropriate focus on which to base estimates of cumulative impacts.

Unimproved Property

An automatic exemption from having to prepare an Environmental Assessment for actions that propose the use of state or county lands or funds under section 343-5 HRS is given to the purchase of unimproved lands. Agency people called attention to the need for a clearer definition of unimproved lands pursuant to the requirements under section 343-5 HRS. We note that varying opinions exist as to what constitutes an improvement to real property.

Preparation Notice

The term "preparation notice" is not defined in chapter 343, HRS. As one of the two decisions resulting from the EA (the other being Negative Declaration), it seems appropriate to define "preparation notice." Furthermore, such a definition would clarify the statutory basis for the term now incorporated in the rules.

Supplemental Statement

Supplemental EISs are required under Sub chapter 10 of the EIS Rules for actions that will require any major change from the previous action covered by an EIS in characteristics such as size, scope, location, and timing, among other things. It may be appropriate to include a definition of "supplemental statement" in the statute.

Suggested Changes to Existing Definitions

Action

As presently defined in chapter 343 HRS, "action" means "any program or project to be initiated by any agency or applicant." The definition under the rules however is further qualified to mean, "any program or project to be initiated by an agency or applicant, other than a continuing administrative activity such as the purchase of supplies and personnel-related actions."

Our participants have raised the question of whether "action" should include new or revised agency rules, regulations, plans, policies, procedures and legislative proposals, as found in the definition of "action" under the National Environmental Policy act (NEPA).

At the same time others have expressed concern that if all agency rules, regulations, plans, etc. were subject to EA that many such "actions" would have minimal or no significant impacts to the environment and the environmental benefits that would accrue would not justify the added effort and costs involved with the assessment process.

Agency

Several participants mentioned that the term "agency" should be better defined. They asked, for example, if organizations such as the Environmental Council and the Neighborhood Boards on Oahu are considered agencies. Participants from a federal agency suggested that "federal agency" be included as an agency under this definition.

Applicant

Several participants felt that the definition of "applicant" needed to be more specific. For example, in the case of joint state-private projects such as the Aloha Tower redevelopment, it is unclear whether the developer would be considered an agency or an applicant.

Environmental Assessment

One county planning official felt that the definition of "environmental assessment" should include reference to those responsible for conducting assessments. As we note in more detail in part four of this report, the preparation of an EA is the responsibility of the agency proposing an action or of the agency with the discretionary power to approve a permit for a private or applicant action. The commenter felt that including a clause relating to the agency's responsibility in preparing the EA would clarify the law.

Environmental Impact Statement

One person commented that the definition of an "environmental impact statement" focused too much on the physical aspects of the environment and not enough on social and cultural factors. According to the participant, the EIS system is clearly intended to examine the impacts on the social and to some extent the cultural environment, but this is not reflected adequately in the definition.

Improvements to the Definitions Section

Cumulative Impacts

Defining what is meant by "cumulative impact" may help agencies and applicants to focus on these issues in the EIS. A number of participants have related their concern about the lack of attention given to cumulative impacts. EISs frequently do little more than list other projects in the area. We are certain that much more is required for an adequate analysis of cumulative impacts than is presently the norm for an EIS.

We suggest that the definition used under the NEPA be incorporated into the State EIS law. That definition (40 CFR 1508.27) states:

> "Cumulative Impact" is 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...[Federal or non- Federal] or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

Unimproved Real Property

Defining the term "unimproved real property" or "unimproved lands" is appropriate in general, but may not be appropriate in this section. It would be wise to seek a determination of what constitutes improved and unimproved lands from the Attorney General's Office. An AG's opinion would create a definition that could be used by both state and county agencies. In the absence of a statewide definition, officials from at least one county have requested a ruling from their corporate counsel. It would be wise to agree on a single definition recognized statewide for purposes of chapter 343 HRS, otherwise eventually there could be four definitions for the term.

If the unimproved real property is being acquired for a specific action/project, it should be considered as part of that action/project and included in the EA/EIS process.

Preparation Notice

We recommend that a definition of "preparation notice" be included in section 343-2 HRS since its counterpart, the "negative declaration" is defined. This could be easily accomplished by using the reverse of the existing definition of "negative declaration."

Supplemental Statements

Supplemental Statements are not defined in the law. Since there is no reference to Supplemental Statements in the law there is no need to define them in Chapter 343 HRS. However, the conditions needed for preparing a supplemental statement are cited in the Administrative roles (Sub chapter 10). We believe that Supplemental Statements should be defined in the rules.

Action

Inasmuch as rules, plans, policies and certain legislative proposals can have major (significant) implications to the environment, it would seem logical to include them in the definition of Action and thereby subject them to assessment under chapter 343 HRS. As presently defined their coverage is not excluded by chapter 343 HRS, yet by practice they have not been subject to assessment, presumably under the impression that they could be considered "administrative activities." However, they do not meet the examples of administrative activities as provided in the rules. Hence, it seems likely that these activities could be subject to assessment under the existing statute unless individual activities have been approved by the Council for exemption. Clarification of the definition of "action" should be sought to specifically include as actions such activities as new or revised agency rules, regulations, plans, policies, or procedures, similar to the definition of "action" under the National Environmental Policy act regulation (40 CFR 1508.18).

Agency

We agree that the definition of "agency" should be clarified to determine if governmental organizations such as councils should be included. We suggest that this may be made the subject of an Attorney General's opinion which could then be codified into law by amendment.

We would like to see a ruling on whether quasi-governmental entities such as the Aloha Tower Redevelopment Agency would be considered an agency or an applicant for the purpose of conducting an EA. We believe that in the case where state or county lands and/or funds are involved, regardless of the percentage of involvement, the proposed project should be considered an agency action. We suggest that in the case of joint government/private developments that some clarifying language could be added to the rules regarding lead responsibility.

Applicant

We suggest that the Environmental Council request an Attorney General's opinion to clarify what constitutes an applicant.

Environmental Assessment and Environmental Impact Statement

We do not recommend any changes in the definition of "environmental assessment" or "environmental impact statement". It is clear from other sections of the law who has the responsibility for preparing an EA. The definition of environmental assessment should tell what it is, not who should prepare it.

The definition of "environmental impact statement" includes language that makes it clear that an EIS must cover impacts on the social and cultural environment. We do not know how we could improve on the existing definition.

Notification Provision

Introduction

In Act 246 (1974), the Environmental Quality Commission (EQC) was given the responsibility for notifying the public of "statements and other documents prepared under the provisions of this chapter." The EQC was

directed to publish a "periodic bulletin to be available to persons requesting information through its office and through the library." The EQC was required to publish notice of "determinations that statements are or are not required, of the availability of statements for review and comments, and of the acceptance or nonacceptance of statements." The semimonthly publication was named the EQC Bulletin.

This section of the act has had only one significant change since 1974. When the EQC was abolished in 1983 the public notification responsibility was transferred to the OEQC. The periodic EQC Bulletin was renamed the EC Bulletin and later the OEQC Bulletin, but the format and publication schedule remained essentially the same.

Discussion: Public Participation

One of the primary objectives of the EIS system is to involve the public in decision-making under the assumption that encouraging such participation would provide a more comprehensive document and consequently would lead to better informed regulatory agencies. However, public participation is dependent on the mechanisms developed to inform the public of proposed actions. Chapter 343 HRS established a minimum level of public notification by requiring a semimonthly bulletin to announce key decisions and the availability of documents. Those who receive the Bulletin can easily participate in the EIS process. Unfortunately, the overwhelming majority of the public are unaware of the existence of the Bulletin.

Approximately two-thirds of the participants expressed the opinion that public notification required by the EIS statute could be improved. Within this group, some thought that the statutory provision for notification was inadequate and more avenues for publication should be required, particularly at the preparation stage of the EIS, while others thought the public notification provision was adequate, but could be improved. The remaining one-third of the participants either considered the notification provision adequate with no improvements necessary or had no comments. Some participants suggested that promoting a greater public awareness of the EIS process in general may be the key to greater participation in reviews.

Typical of the feelings of many were those of one academic who remarked, "Publishing the information solely in the bulletin in this age of technology seems inadequate." A number of alternative methods for public notification were suggested by the participants including: publishing in the newspapers; making announcements or commercial television and radio; notifying adjacent landowners by mail; creating and maintaining specialized lists;conducting public meetings; contacting neighborhood boards (on Oahu); and using computerized bulletin boards and information services. Most participants said cost was the main drawback to implementing any of these suggestions. Several others claimed that few people read legal notices in newspapers so it would be a waste of time and money to publish legal notices.

Undoubtedly implementing any or all of the above suggestions would increase public awareness of pending actions. We question, however, whether it would increase public participation. One representative of a consulting firm claimed "most people don't care most of the time", thus efforts to increase awareness may not be cost effective. Several agency personnel related stories of poorly attended public hearings. Many of those interviewed indicated that only a very few highly controversial projects should require extraordinary methods of notification. A different opinion was offered by one academic who claimed, "people do want to participate, but are not sure their opinions count." However, a majority of agencies said that citizen input was important to their agencies. They pointed out that many projects have been changed on the basis of citizen testimony.

Others stated that non governmental organizations (NGOs) such as environmental groups are watchdogs on behalf of the general public. According to one representative of an environmental group "we are well informed about decision-making in the EIS process and can participate intelligently." However, another representative of an environmental group said that reliance on NGOs is not enough since networking between group leadership and its members and among groups is sometimes poor, and some information is not disseminated rapidly.

One other division of opinion was noted during the interviews, regarding who should be responsible for increasing awareness about EIS related projects. Some thought it was the task of the action's proposers to seek greater awareness and participation. Others thought that it was the job of OEQC and the Council to recommend ways to increase awareness. In favor of the former opinion, its proponents stated that the proposer has the most to gain from increased participation. Indeed, many people pointed out that private developers and some agencies seek to inform and educate a wide variety of people about their projects to avoid costly delays at a later time. Some participants were of the opinion that a number of agencies tried to minimize information about their projects in order

to avoid criticism and that leaving the responsibility of additional public notice to proposers creates an inconsistent means of public notification. These dissenters favor requiring OEQC or some agency to set up standards for public notification that exceed the current minimum requirements.

Improvements to the Public Notification Provision

One of the objectives of the EIS system is to increase public participation in environmental decision-making. It seems logical to assume that an EIS system that maximizes public participation would be considered to be superior to one that does not. The Hawaii State EIS system sets the minimum requirement for public notification through publication of notices of availability of documents in the Bulletin. However, for many actions the minimum has become the maximum, much to the detriment of the process. We note that other states require public hearings for all EISs or a wider scoping process that requires a greater amount of notification.

More can and should be done to increase public awareness of EIS related matters by requiring both the OEQC to increase its effort and proposers to increase their notification to the public about impending actions. We note that in section 343-6(8) HRS the Council is given the authority to make rules that prescribe procedures for informing the public about decisions and documents generated by the EIS process. No limitations are set as to what should be required. We recommend that the Council, under its rule-making authority, require the OEQC to develop a system for routinely routing information to interested state, county, and federal agencies, interested NGOs, and representatives of the affected communities. The Council should also require proposers to follow the notification strategy adopted by OEQC.

In addition to increasing public awareness through improvements in the notification process, we also recommend that the content of existing public notice documents, particularly the Bulletin, provide at the least, minimal information as to the anticipated impacts of projects.

We suggest that a two-tiered system of information requirements be developed by the OEQC. Actions that would be considered to be of major importance or of a potentially controversial nature, to be determined by OEQC, would require maximum public notification including newspaper advertising, radio and television public service announcements, and mail outs to communities in affected areas. Public input to these actions could also be encouraged by having informal public scoping meetings. Actions which are of a minor nature would have less stringent public notification requirements. We recognize that it may be difficult to define precisely what actions would be considered major and which ones would be considered minor. However, other determinations based on judgement are required in the EIS process and in other laws such as the state CZM Act (205A HRS), wherein a distinction is made between major and minor actions.

Greater public notification will not guarantee more public participation but it is a starting point. Guaranteeing that public input will be used in decision-making will perhaps do more to increase participation than notification alone.

We also suggest that more can and should be done to inform the public on the reasons for the philosophical underpinning of the state EIS law. It is one that invites public participation and thus should be understood by the public. We urge the OEQC to produce more public-focused educational material on the EIS system.

PART 4: THE MULTIPLE SCREENING PROCESS

Introduction

In this part, we examine the process by which actions are reviewed to determine the extent to which they impact the environment and the level of environmental analysis that will be performed.

In the 1978 report of the state EIS system (Cox et al., 1978), it was recognized that:

> "...all human actions have environmental impacts, but that the impacts of most are so minor, so well recognized, or so universal that their special appraisal is not warranted. The most cost-effective EIS system is one that provides for successive stages of appraisal through which actions are eliminated successively from further concern on the basis of improbabilities that they will have significant impacts, the appraisals becoming more intense in the successive stages" (p. 43).

These successive stages of appraisals of actions, which are so important to an efficient and effective EIS system, are found in most EIS systems in other states. The authors of the 1978 EIS study identified the successive stages of appraisal that were found in the Hawaii EIS system as the multiple screening procedure.

> "The procedures for actions proposed by agencies differs in detail from that for actions proposed by applicants. However, the principal steps in both procedures are identical and may appropriately be described as constituting a multiple-screening procedure" (p. 45).

The state EIS system utilizes multiple screens in an effort to determine which actions may have a significant impact on the environment and would thus require the level of information disclosure called for in an EIS, and which actions will require a less detailed disclosure of information or no disclosure at all, because they will have little or no environmental impact. The first screen determines whether an action is subject to chapter 343 HRS. There are eight criteria listed in section 343-5 HRS that generally determine what actions are subject to the law. Actions meeting any of the eight criteria go to the next level of screening. Each of these conditions will be reviewed in detail below.

The second screen determines if an applicable action falls within one of the exempt categories. Section 343-6(a) (7) directs the Environmental Council to 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 assessment." The classes of exemptions are found in section 11-200-8 of the EIS Rules. Exemptions will be discussed in detail in a later section of this part.

The third screen determines if an applicable action not otherwise exempt may have a significant effect on the environment. Determining whether an action may have a significant effect on the environment is a two step process. The preparation of an initial document, called an Environmental Assessment (EA) is required by section 343-5(b) and 343-5(c) HRS. The EA is an initial examination of the environmental effects of an action. Based upon the written assessment, agencies determine whether an action may have a significant effect and therefore will require an EIS, or will not have a significant effect and hence will not require an EIS.

For actions that meet the applicability requirements, the purpose of the screening process is to eliminate those projects that will have little significant effect on the environment. The results are that the requirement for full disclosure of environmental impacts is reserved for those actions that may have a significant effect. Table 4 lists the number of assessments made and EISs required from January 1979 through 1990.

Table 4. Environmental Assessment Determinations from 1979 through 1990: the ratio of EIS Preparation Notices to the Environmental Assessment Determinations issued under the Hawaii State EIS system

Year	Environmental Assessment Determinations (EA)	Preparation Notices (PNs)	Negative Declarations (NDs)	Ratio PN/EA
1979	306	39	267	.127
1980	272	19	253	.070
1981	252	31	221	.123
1982	233	25	208	.107
1983	221	23	198	.104
1984	227	15	212	.066
1985	250	19	231	.076
1986	298	38	260	.128
1987	272	37	235	.136
1988	289	35	254	.121
1989	284	30	254	.106
1990	311	34	277	.109
Total	3,215	345	2,870	.107 (avg)

Source: OEQC Bulletin

The Applicability Screen

Introduction

The initial screen deals with the applicability of the law to proposed actions. Section 343-5 HRS lists eight criteria, any one of which can trigger an action's inclusion in the EIS process. An action is subject to chapter 343 HRS coverage if it: 1) proposes a use of state or county lands or monies; 2) proposes a use within the conservation district; 3) proposes a use within the shoreline area; 4) proposes a use within any historic site designated in the National or Hawaii Register; 5) proposes a use within the Waikiki area; 6) proposes an amendment to existing county general plans except those initiated by the county; 7) proposes a reclassification of any lands classified as conservation; or 8) proposes the construction of a new or modification to an existing heliport under certain conditions.

Background

Under the Governor's Executive Order of 1971, coverage of the EIS system was limited to those projects using state lands or state funds. Subsequently, Act 246 (1974) specified distinct criteria for coverage of actions proposed by agencies and actions proposed by private concerns. According to Act 246 coverage of the EIS system was extended to public actions "which will probably have significant effects and which 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 which the agency has not approved, adopted, or funded..."

Actions proposed by applicants (private concerns) were subject to coverage of the EIS system if they would have significant effects and if they proposed:

i. any use within lands classified as conservation district by the State Land Use Commission

ii. any use within the shoreline area as defined in section 205-31 HRS

iii. any use within any historical site as designated in the National Register or Hawaii Register as provided for in the Historic Preservation Act of 1966, Public Law 89-665

iv. any use with the Waikiki area of Oahu

v. any amendment to existing county general plans where such amendments would result in designations other than agriculture, conservation, or preservation, ... except all actions proposing any new county general plan or amendments to any existing county general plan initiated by a county

The EIS study (Cox et al., 1978) listed a number of bills introduced as legislation which called for a variety of coverages for both public and private acts. The bills and their coverages are summarized in table 5.

Table 5. Comparison of Applicability Critera for Requiring Environmental Review as Proposed in Various Legislative Bills Prior to the Passage of Act 246 (1974)

Legislation (year introduced)	Proposed Applicability Criteria for Requiring Enviornmental Review
SB 36 (73): SB 576 (73)	All major Actions
SB 1841 (73):	Construction projects subject to county permits and slaughter house construction subject to state permits.
HB 111 (73):	Public construction projects and private construction projects on conservation lands.
HB 113 (73): HB 1794 (73)	Major private actions.
HB 1522 (73):	Public and private projects, except as exempt under regulations.
HB 1522 : HD 1 (73)	Public and private projects, without provision for exemption.
HB 1792 (73): SB 2110 (74)	Actions as defined in NEPA.
SB 1826 (74):	Building construction and land development projects other than those for single family residence, except as exempt under regulations.
SB 893 (74):	Changes in land-use classification or county general plans.
SB 2040 (74): HB 2067 (74) HB 2857 (74)	Projects using state or county lands or funds, and projects requiring government agency approvals.

Amendments to the Applicability Section

In 1979, section 343-5(a) HRS was amended by Act 197 for primarily editorial purposes. The distinction between public and private actions was removed by combining the criterion concerning the use of state or county lands or funds with those that govern applicant actions.

In 1980, the use of state or county lands or monies criterion, section 343-5(a)(1) HRS, was amended by adding a clause exempting the acquisition of unimproved lands from further EIS consideration.

In 1987, a seventh and eighth criteria were added to the existing six criteria by Act 187 and Act 325. One of the new criteria called for an EA for actions that proposed any reclassification of any land classified as conservation district by the state land use commission under chapter 205 (Act 187). The other criterion called for an EA for actions that proposed the construction of new, or modification of existing helicopter facilities within the state which by way of their activities may affect any land classified as conservation district by the state land use commission under chapter 205; the shoreline area as defined in section 205A-41; or 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 found by field reconnaissance of the area affected by the helicopter facility and which is under consideration for placement on the National Register or the Hawaii Register of Historic Places. (Act 325)

Expanding the coverage to actions that propose changes in the land use designation from conservation land was one of the changes to the law recommended in the 1978 EIS study (Cox et al. 1978). This closed a loophole that existed under previous provisions of chapter 343 HRS. Applicants could initiate a request for a land use boundary change from conservation without applying for a discretionary permit from any agency explaining what they proposed to do on the land. If the boundary change was approved and proper zoning could be obtained from the county, an applicant could avoid EIS system requirements because the land on which the proposed action was to take place would no longer be in the conservation district. This amendment was also in accord with a court decision regarding the applicability of the EIS system to reclassification of conservation land noted in an Environmental Center review of similar legislation (Hawaii. University. Environmental Center, 1985).

Expanding the coverage of the EIS system to actions dealing with heliports is potentially a more significant development. The EIS process is triggered when an action is either proposed by a state agency or is proposed in one of several broad categories of actions listed in section 345-5(a) HRS. The addition of the eighth criterion (the building or modification of a heliport) set the precedence for an individual action as a "trigger" for inclusion in the EIS system.

Two additional changes were made to the applicability section (section 343-5 a) of chapter 343 HRS. The first change was of an editorial nature, which changed the citation for the definition of the shoreline in criterion 3, from section 205-31 HRS to section 205A-41 HRS, to reflect a major rewrite of the Shoreline Protection Act. This change appeared in Act 187, Act 283 and Act 325.

The second change appeared as part of Act 187 and dealt with the delineation of the Waikiki area. The delineation in criterion 5 was changed from specific areas of Waikiki as designated on the development plan for Honolulu to the area established as the Waikiki Special District. This amendment seemed appropriate because, as noted by the Environmental Center in a review of SB 70 (1985) Relating to Environmental Quality, the former delineation of the Waikiki area referred to an out-of-date version of the General Plan for Honolulu. The review went on to point out that coverage under the definition of the Waikiki Special District would be "consistent with" that under the former definition.

Classes of Applicability

The eight applicability criteria listed in section 343-5 can be grouped into three categories: geographic, administrative, and specific-action, according to how they "trigger" scrutiny under Chapter 343 HRS. The geographic category, as its name implies, includes applicability criteria that "trigger" the EIS system because the actions proposed are located near particular places that are considered environmentally sensitive. Four of the applicability criteria fall within the geographic category: (1) Lands classified as conservation; (2) Shoreline area; (3) Historic sites; and (4) Waikiki area.

The administrative category groups the criteria that include actions that "trigger" consideration by the EIS system because they fall within a governmental jurisdiction. Three of the applicability criteria fall within the administrative category: (1) use of state or county lands and/or funds; (2) changes from conservation designation; and (3) changes made to county general plans.

The third category for applicability criteria is for specific actions. These are types of actions that "trigger" consideration by the EIS system because of the nature of the action itself. This category was created with the addition, in 1987, of the criterion to require an EA for construction or modification of a heliport. Heliports are the only action in this category at present but several others have been proposed including golf courses and aquaculture facilities.

The inclusion of heliports as an action that automatically "triggers" the EIS system introduces an intriguing possibility for changing the way of determining the applicability of actions to 343 HRS. In place of broad geographic and administrative categories that encompass a number of actions that "trigger" the EIS system, there could be a list of actions that would require the preparation of an EA. For any action proposed, it would only be necessary to examine the action list to determine whether it requires an EA. Because of this possibility, the study team was particularly interested in determining what EIS system users thought about listing specific actions as EIS system "triggers."

Proposed Changes to the Applicability Section

A number of ideas for improving the applicability section of chapter 343 HRS were discussed by interview participants including proposed revisions in geographic categories, revisions to administrative categories, deletions of categories, provision for county options, substitution of permit based criteria for all geographic criteria, and generalizing the applicability of Chapter 343 HRS to include all projects not otherwise exempt. We summarized the leading opinions expressed by the interview participants and present them below within the category they effect.

Discussion: Changes and Additions to the Geographic Criteria

According to most participants, the rationale that should guide the selection of the types of actions that are subject to the EIS system is the protection of environmentally sensitive areas. Many suggestions were made for changes and additions to the existing geographic categories based on that rationale. We have summarized them below.

Special Management Areas

Foremost among the suggested extensions to the geographic category was the Special Management Area or SMA. SMAs were created by the Shoreline Protection Act of 1975 and later retained in the amended Shoreline Act which became the State's Coastal Zone Management Act, chapter 205A HRS. SMAs are strips of land along the coast of each island stretching inland for not less than 300 feet, to which special requirements for development are imposed by counties.

SMAs were so designated because they are known to be areas most subject to rapid growth, development, population pressure, recreation needs, and the economic basis for tourism, the primary industry in the state. Extension of this consideration or regulatory process to cover proposed actions taking place in the SMA is a logical conclusion. The primary reason cited by the counties for not including actions in the SMAs as one of the triggers for HRS 343 is that requirements for environmental disclosure are already, or can be included, in some county SMA ordinances making state mandated EA duplicative and unnecessary.

Wetlands

Wetlands are another area of concern identified by those interviewed. In the past five years wetland protection has become a high priority within the federal government. A number of participants suggested that this national concern for wetlands should also be reflected at the state level in state policy. However, the need for a consistent definition of what constitutes a wetland was recognized as a key requirement before "wetlands" could be included as a triggering action.

Agricultural Lands

Lands in the agricultural districts, especially prime agricultural lands, as defined by the State Department of Agriculture, were thought to be another area which should be included. Prime agricultural lands, said some participants, are an important resource and merit special consideration before allowing non-agricultural uses to take place.

Marine Life Conservation Districts, Sanctuaries, and Special Streams

Marine Life Conservation Districts (MLCD), Marine and Estuarine Sanctuaries, and streams with unique or outstanding characteristics were proposed for inclusion in the geographic applicability criteria. Areas designated as MLCD or as sanctuaries are considered to have unique characteristics worth preserving. Hawaii's streams have been recently surveyed by the State Department of Land and Natural Resources (DLNR) and the National Park Service. At least 40 have been rated as special streams "which are important based on their diversity of resources, blue ribbon values or special areas" according to the draft report (Hawaii Stream Assessment, 1990). These areas, because they are judged to be environmentally sensitive, fit into the guiding rationale of the EIS system.

Historic Sites

Historic sites are already included as an applicability criterion. However, the criterion is limited to only those sites that are listed on the National or Hawaii Historic Register. These represent only a small percentage of significant historic sites in Hawaii. Places of cultural importance that may have insignificant physical remains or none at all, are not covered in the law. However, according to representatives of native Hawaiians, many areas of cultural significance can be tied to specific locations. Extending the coverage of the EIS system generally to any area of cultural or historical importance would leave open to controversy the interpretation of what is considered important. Broadening the criterion to include specific sites that the Office of Hawaiian Affairs (OHA), State Historic Preservation Office, or the Bishop Museum propose as being significant, may be a reasonable alternative to a more generally defined criterion. OHA has completed a study on ways to preserve Hawaiian Historic places, and it could be used as a basis for amending the historic site criterion. Care must be taken, however, that other ethnic cultures or historic sites are given appropriate recognition.

Historic, Cultural, and Scenic Districts

Areas defined as historic, cultural, and scenic districts by the City and County of Honolulu, and its counterparts on the neighbor islands might constitute another criterion for triggering the EIS system. The rationale is that if the Waikiki Special Design District is included, others might be also. Sites most often mentioned for inclusion include the Punchbowl Special Design District, the Civic Center and the Kakaako Special Design District. In the 1978 EIS report (Cox et al., 1978) the authors stated that Waikiki was an area of statewide importance that required special protection. Another area recommended for inclusion in that report was the Civic Center. Inclusion of county mandated special design areas as a trigger for the EIS system may be better handled through a provision to allow counties the latitude to include these areas under a county enabling provision in the law, which will be discussed in a later section.

Endangered and Threatened Species and Their Habitats

Endangered and threatened species and their habitats are those plants or animals that are in danger of becoming extinct. Hawaii has a disproportionate number of endangered and threatened plants and animals when compared to the rest of the country. Hawaii has more endangered birds, for example, than all the other states combined (Morris, 1991). Protecting the habitat of an endangered or threatened species is a critical factor in their preservation. Thus, habitats of endangered or threatened species are environmentally sensitive areas needing protection. An action located in or close to one of these habitats may negatively impact it, thereby significantly reducing the chances of survival of the resident species.

Triggering the EIS system for any action proposed near an endangered or threatened species' habitat could have the effect of enhancing their protection by both calling attention to their existence near the site as well as assuring that mitigation measures, required as part of the EIS, will be addressed.

Improvements in the Geographic Criteria

We carefully considered each of the suggested additions or changes to the geographic criteria and we based our recommendations on our judgement of (1) the environmental sensitivity of the area suggested for inclusion; and (2) the ability to clearly define the area to be included. The first measure of environmental sensitivity is admittedly subjective. Here we relied upon comments we received during the interviews as well as our knowledge of the rationale for creating each of these special areas. The second measure, the ability to clearly define boundaries, is of secondary importance but still necessary when considering criteria based on protecting an identifiable place.

A number of reviewers took issue with our second measure. Their reasoning was that the EIS system should be extended based on the sensitivity of the area not necessarily limited by a lack of specific boundary delineation. Identifying boundaries should be the responsibility of agencies with jurisdiction over sensitive areas. Furthermore, inclusion of sensitive geographic areas as a criteria for requiring an EIS may provide an incentive to better define interim boundaries.

Special Management Areas

We recommend that actions taking place in the SMA be included as a criteria for triggering the EIS process. The SMA requires a different management regime than other lands because it is expressly recognized as an environmentally sensitive area. The SMAs are also well defined throughout the state, thus they meet both our measurements for inclusion.

Valid arguments exist that actions occurring in the SMAs are already covered by existing requirements for environmental documentation. This documentation, however, is not consistent among counties, despite the recognition of the need to protect coastal resources as a common heritage to all the people of the state as exemplified in the federal and state CZM legislation. Furthermore, the inconsistency in environmental evaluation between counties creates confusion in the development process that seeks to use these resources. Protection of the SMAs as important statewide resources merits the formalized documentation as provided by the state EIS system. The EIS does more than list probable impacts, it calls for a justification for the use of irreplaceable resources, and an examination of mitigative measures to reduce the effects of negative impacts.

Several county officials objected to the inclusion of the SMAs on the grounds that they already require environmental documentation that is in some cases more stringent than what is required by chapter 343 HRS. We have no doubt that this is the case with many projects proposed in sensitive areas within each of the counties. However, the EIS law is sufficiently flexible to include county concerns in the content of the EA or EIS. The scoping process allows county officials to dictate what topics should be addressed in those documents. The EIS system is designed to be an information gathering and disclosure process that should apply to all actions requiring environmental documentation. If the information generated by the EIS system does not fully address county concerns, county officials should note this shortfall during the review of prepared documents and may require additional information as they deem necessary.

If the SMAs were included as a trigger for the EIS system it would make the shoreline criterion redundant. That criterion could then be dropped as a trigger. Inclusion of the SMAs as an applicability criterion might create the situation where an action takes place both in a conservation district and the SMA. Thus, the action would be subject to two separate criteria, and permits administered by two separate agencies. Section 343-5(d) addresses this situation. In the case where an applicant seeks a permit from two separate agencies for the same action, the OEQC determines which agency will be responsible for the EIS process.

Wetlands

Our recommendations for inclusion of wetlands is similar to our recommendations for endangered and threatened species. There may be wetlands that are found outside the conservation district land classification that are not covered by the EIS system. Wetlands are an important environmental resource and an extremely sensitive one. To the extent that they can be defined geographically by state or federal agencies using a commonly acceptable definition of wetlands, they should be included as a trigger. In this regard, we note that recent agreement on the definition of wetlands has been reached among the U.S. Army Corps of Engineers, the Soil Conservation Service, the U.S. Environmental Protection Agency, and the U.S. Fish and Wildlife Service (U.S. Federal Interagency Commission, 1989).

Prime Agricultural Land

Changes in land use boundaries from agriculture to urban or rural requires the approval of the Land Use Commission (LUC), which may include documentation of environmental impacts. However, the documentation may be significantly less than that required by the state EIS system. The public participation in reviewing the documentation is considerably less in the LUC boundary change process than in the EIS process.

Permitted uses within agricultural lands do not require any environmental documentation. Some uses may have significant impact on agricultural lands defined as prime by the state Department of Agriculture (DOA). They are the very lands that the state wished to protect by creating the state land use law. It is reasonable to extend the coverage of the EIS system to prime agricultural land. These are environmentally important areas and their boundaries are delineated on DOA maps. Their inclusion would allow the EIS system to be used to examine the environmental impacts of golf courses, for example, as well as other activities if they were being proposed on prime agriculture lands. A number of bills have been introduced recently in the legislature calling for an extension of the EIS system to actions proposing the development of golf courses.

Marine Life Conservation Districts, Sanctuaries, Special Streams

MLCDs and sanctuaries are already covered under the applicability criterion 2 which extends EIS coverage to proposed actions in the conservation zone. Special streams listed in the draft Hawaii Stream Assessment Study may benefit by coverage under the EIS system but their inclusion is premature at this time. We do not know for example, what type of management regimes if any, will be placed on each of the classes of streams listed in the draft stream assessment. If the use of land near a protected stream will require a permit, or if the permit will require gathering environmental information, then extension of the EIS system to streams would be a logical step in assuring that these special fresh water areas receive adequate attention for proper management. At this juncture, we have insufficient information to make a definitive recommendation with respect to inclusion of streams as a trigger for the EIS system. However, we believe an EA should be prepared for those uses of any Hawaiian stream that already requires approval by the State Commission on Water Resource Management.

Historic and Cultural Sites

We recommend that the applicability criteria for inclusion of sites of historic and cultural importance be broadened. We note that under federal law the EIS system covers not only sites listed on the Federal Register of Historic places but those eligible to be listed. We recommend that an analogous provision be inserted into the Hawaii law, so as to include sites of historic and cultural significance. Sites of historic and cultural significance should be included with the proviso that they be clearly depicted on a map and be proven to be of genuine significance as indicated by their eligibility for inclusion on an inventory undertaken by DLNR, Historic Sites Office or the Office of Hawaiian Affairs. It is clearly the intent of chapter 343 HRS to treat historical sites as important environmental resources.

Historic, Cultural, or Scenic Districts

We do not recommend that historic, cultural, or scenic districts be included as criteria for triggering the EIS system. Decisions to create such districts are made by county governments and may not have statewide significance. Additional requirements for allowable development are normally incorporated as part of the special district. Requiring the preparation of an EA may be beneficial to the preservation of these districts, but we believe that the decision to make that requirement should rest with the county. The county could, if they chose to do so, require the submission of environmental information using the chapter 343 HRS process in much the same way as the City and County of Honolulu requires SMA permit applicants to meet some of those requirements.

Endangered and Threatened Species and Their Habitats

We recommend that endangered or threatened species and their critical habitats listed, or eligible for listing, on the federal and state lists be included as criterion for triggering the EIS process. Both state and federal law recognize the importance of protecting endangered or threatened species. Actions that occur in conservation lands and/or are proposed by state or county agencies must consider the impacts of the action on endangered or threatened

species. However actions proposed by private developers in lands classified as agriculture, rural, or urban that may have a significant impact on endangered or threatened species do not trigger the EIS system. We believe that these actions should trigger the EIS system. The applicability criteria should be based on an action's proximity to the habitat and range of an endangered or threatened species. We note that documentation of habitats and ranges for both plants and birds are not complete for all endangered and threatened species and their habitats. However, documentation does exist in some cases, for example, in recovery plans for endangered bird species and in the Hawaii Heritage program database maintained by the Nature Conservancy and DLNR. Another essential reference source is the *Forest Bird Communities of the Hawaiian Islands: Their Dynamics, Ecology and Conservation* (Scott, et al., 1986). Documentation of range and habitat mandated by the federal and state acts concerning endangered and threatened species and their habitats will mean that in the future this type of information will be available to State and County planning agencies. We are aware that without adequate documentation, the provision to require an EA for actions impacting endangered or threatened species would be difficult to enforce. In addition, if a permit is not required to undertake an action, then enforcement of the provisions of the EIS system may be hampered. However, these issues can be adequately resolved given existing knowledge and a willingness to develop interim guidelines until documentation becomes available and widely distributed. The urgency of the need for protection precludes delays in implementation.

Discussion: Changes to the Administrative Criteria

Several changes to the administrative criteria were suggested as a result of the interviews and subsequent review comments on the Draft EIS report including: dropping the proviso for excluding general plan amendments introduced by county councils or planning commissions from requirements of an EA; requiring assessments for only those projects that require permits; requiring an assessment for actions which by their nature may be controversial; and requiring an assessment for those actions that propose the introduction of alien or genetically altered species.

County Plan Amendments

In the 1978 EIS report, it was recommended that all actions requiring a general plan amendment be subject to chapter 343. The argument for this recommendation remains valid today. Amendments to county general plans initiated by county councils are excluded from coverage by the EIS system, while those initiated by private developers are subject to coverage. An applicant may avoid the EIS process by finding a sympathetic council person to initiate an amendment to a county general plan. This potential loophole would be closed if the exception were dropped. It is inconsistent to have actions initiated by a county council requiring less environmental documentation than is required for the same action in the same location initiated by a private party.

Permit Only Option

The idea of limiting coverage of the EIS system to those projects which require some type of discretionary permit was examined in the 1978 EIS report. The rationale for this suggestion is that without the necessity to apply for some type of permit from an agency, it would be difficult to monitor and enforce compliance of the law. However, if an action is subject to any discretionary state or county permit it would be subject to chapter 343 HRS.

Controversial Actions

In NEPA, there is language that suggests that "controversial actions" (i.e., those that elicit broad public concern and inquiry) are subject to assessment regardless of the presence or absence of other criteria. A provision requiring coverage of the state EIS system for those actions that may be deemed controversial was suggested a number of times during the interviews. The rationale for inclusion of "controversy" as a criterion lies in the assumption that if a community views an action as having a significant effect on the environment, it is far better to get the community involved in the decision making process through the EIS system, than in the courts at some later stage. Inclusion of this criterion would mean expansion of the EIS system to private actions which may not now require a permit. For example, golf courses developed in agriculture lands or private lands cleared for pastures are not subject to chapter 343, but might be if a controversy criterion were added to the law. Defining what would qualify as a "controversy" with respect to chapter HRS 343 HRS would require careful definition however.

Introduced Species

Although stringent controls through screening and quarantine provisions imposed by the Department of Agriculture are applied to deliberate introductions of new plant and animal species to Hawaii, no assessment of possible environmental impacts under Chapter 343 is required. However, whether introduced deliberately or inadvertantly, some exotic species have exerted a devastating effect on native Hawaiian species and habitats through predation, competitive exclusion, or displacement by overexploitation of critical resources. In a recent survey of academic and environmental management professionals conducted by the Environmental Center, the depletion of natural habitat and extinction of native species were judged to be the most significant environmental issues facing the State.

Because of a number of factors, including geographic isolation, extended growing season, and diversity of climate, Hawaii recently has become a focal location for the newly burgeoning biotechnology industry. Applications for field testing and release of genetically engineered organisms in Hawaii are increasing rapidly. Because of widespread concern for the integrity of remaining endemic species and habitat viability, there is strong support for some means of reviewing and evaluating potential threats to the environment which might result from such releases. Reflecting this concern, several participants suggested that any proposed biotic introductions to the Hawaiian environment should be included as a trigger for the EIS system.

Improvements to the Administrative Criteria

County Plan Amendments

We do not believe the legislature intended to create the potential for a loophole to the EIS law by exempting those amendments to county plans initiated by county councils. We believe the intention for including this exemption was to take into account yearly reviews of county general plans undertaken by planning authorities and approved by county councils. For this reason we recommend that the last part of this criterion (343-5(a)6 HRS) "or amendments to any existing county general plan initiated by a county" be amended to "or amendments to existing county general plans that are part of a periodic review under county ordinance."

Permit Only Option

Applicant actions are already tied to existing permit processes sufficiently. We see no way of coupling the EIS system and discretionary permits any more closely than what is already in the law. We do not support the suggestion that coverage of the EIS system should relate solely to discretionary permits. We believe that such a change would lead to an expansion of the EIS system for actions it was not intended to cover. We favor retaining a rationale of environmental protection as the basis of the EIS system application.

Controversial Actions

The addition of a controversy criterion for triggering the EIS system is an intriguing idea. Each year several large scale actions that do not fall under the applicability criteria of section 343-5 have very significant impacts, yet they are not covered by the EIS system. Golf courses in agricultural lands are one type of action that is often cited as being controversial, but other examples including logging on privately owned lands, or clearing range lands. Both of these examples are permitted uses of agricultural lands which may not be subject to chapter 343 but may have significant impacts.

We do not recommend the inclusion of a controversy criterion as an administrative criteria for triggering the EIS system. Most controversial projects would be covered by an administratively clearer extension of the EIS system to geographic areas, for example, by extending EIS coverage to prime agricultural lands.

The amount of controversy an action engenders may be better suited as a yardstick to determine whether identified impacts of an action are significant. This idea will be discussed in a later section of this chapter.

Introduced Species

We recommend that a new administrative criterion be added to the applicability section to require an EA for actions that propose the introduction of new species including genetically altered organisms. Despite the number of actions which may be produced by this extension of the EIS system, introduced species have the potential for inflicting significant impacts on Hawaii's flora and fauna. In point of fact, if significant changes were not anticipated, there would be no point in carrying out the introductions. While negative impacts have been more often recognized by the media, there have been a number of very beneficial introductions in Hawaii. However, the point of the EIS system is to disclose information about proposed actions so that a better informed decision can be made. In the case of introduced species, much information is already gathered and considered by agencies prior to decision making. What is missing is the opportunity for public review and comment on the documents justifying the introduction. If the justification is sound it should pass public scrutiny. If the number of actions becomes a rationale for not preparing an EA, then perhaps several or many similar introductions may be covered by a single program EIS.

Proposed Provision for County Option

Counties designate areas of county wide importance with special restrictions for development. The City and County of Honolulu's special design districts are examples of areas which receive special development controls. Other areas such as Lahaina on Maui and Kailua-Kona on West Hawaii are considered to be important regions within their counties. These areas, because of their location or historical significance, are considered important resources. One of the special development controls could be the extension of the EIS system. It may not be appropriate for the state to extend blanket coverage to the areas. The rationale for creating a special design area may have nothing to do with environmental considerations. Some mechanism should exist, however, to allow counties to extend the coverage of the EIS system to these areas if they deem it advantageous.

One option recommended in the 1978 EIS report (Cox et al.) was to amend the applicability section to authorize the counties to include areas of county wide concern as a criterion for EIS system coverage. This would enable counties to extend the EIS system coverage by county ordinance rather than by amendment to state statute. This would also enable counties to delete these same specially created districts from coverage if it proves unnecessary or unproductive.

While this option is appealing since it would allow counties to retain control over an extension of EIS coverage, it is likely to bring about little or no change. County representatives have expressed little desire to extend coverage of the EIS system to county projects. For example, counties could extend EIS coverage in their SMAs but with the exemption of the City and County of Honolulu. County regulation of the SMAs already requires the disclosure of environmental impacts of proposed development. These impacts could be disclosed by requiring a chapter 343 EA as did the City and County of Honolulu under ordinance 4529. However, none of the other counties have done so, and the City and County has amended its code to make the use of the chapter 343 process discretionary.

Another option would be to leave decisions of applicability to the counties in much the same way as the managements of the SMAs is done under the state CZM act. At least one county planning official favored this option because it would better integrate the counties' information gathering with their permit decisions. However, as pointed out by the Environmental Center (Hawaii University Environmental Center, 1977) this would unwisely leave to county discretion the requirements for EIS preparation even in the case of actions subject to state permits.

Deletions to Existing Criteria

A number of suggestions for the deletion of existing criteria were discussed. Deletions proposed included the requirement for an EA for proposed actions in the Waikiki Special District, the shoreline setback area, and areas near historic sites, as well as those actions involving heliports.

Waikiki Special District

The Waikiki district is one of the state's most densely populated urban areas. Some of our participants expressed the opinion that the environment has been distorted so drastically in these areas that further development

cannot have a significant impact. A requirement to conduct EAs in this area is unnecessary and a waste of time, according to the reasoning of these critics.

While undoubtedly the area is urban, Waikiki is an important statewide resource that may be approaching its limits to development. For this reason it seems prudent that each new development be scrutinized closely to determine how many critical factors, such as traffic and aesthetics, will be impacted. Because this area continues to be a focus of development pressures, we recommend that it remain as one of the triggering criteria for HRS 343.

Shoreline Setbacks

Shoreline setbacks are contained wholly within the counties' SMAs and are subject to their regulatory regime. The SMAs regulation provide all the environmental protection the shoreline setback needs according to those that favor deletion of the application of HRS 343. However, deletion of this criterion from the state law could lead to an uneven provision of environmental information in a very critical area. The state has legitimate concerns about the shoreline that are protected to a degree by the EIS system. If the SMAs were included as an applicability criterion, then removal of the Shoreline area criterion would make sense. Without this inclusion we recommend against deletion.

Historic Sites

Effective remedies for protecting historic sites are contained in chapter 6E HRS. However, we maintain that the uniqueness and irreplaceability of historic treasures and the social importance of cultural sites dictates that extraordinary care be taken in their protection. Furthermore, many of these types of resources may be poorly documented in the traditional scientific literature but the extent and importance of their location and traditions are more likely to be identified during the public review process of the EIS system. Hence, we urge that they not be deleted from the EIS law.

Heliports

The removal of criterion 8 (the construction, expansion, or modification of heliports) has received considerable attention from the Environmental Center as well as many participants. The inclusion of heliports as a triggering mechanism was in response to a problem of excessive noise being emitted from helicopters during their operation. The rationale for its inclusion can be summarized as follows:

> Tour helicopters tend to fly low in areas that are scenic. This type of flight often causes considerable distress for people and wildlife on the ground. The State Helicopter and Tour Aircraft Advisory Board, in cooperation with various government agencies, has been focusing on the problem. The subject bill, [HB 1583-87] then, is part of a 3-pronged strategy designed to cope with the helicopter noise problem (Perez, 1987).

The problem caused by noise emitted by helicopters over scenic areas occurs throughout the United States especially in areas near state and national parks. Many conservationists as well as casual campers trying to attain the "wilderness experience" have complained bitterly about having that experience ruined by the intrusion of helicopters and small aircraft. The solution to this problem seems to lie in the regulation of aircraft over wilderness areas.

Trying to solve the noise problem by requiring an EA has two drawbacks. First, the EIS process will not ban the building of a heliport. At best, it may reveal information on which a denial of a building permit may be based. At worst, it may be viewed as a method to harass potential heliport developers, something critics of the EIS system have long claimed is an unrecognized purpose of the EIS system, although EIS proponents have been denying this accusation. Second, prior to the addition of helicopters to the triggering categories, applicability of HRS 343 had been based on broad geographic or administrative categories. The inclusion of the heliports as a triggering action has altered this basis by requiring an EA for a specific type of action. This creates the potential for special interest groups to lobby for inclusion of any number of specific actions depending on what is popular or unpopular for the time. We see this as having the ultimate potential of weakening the EIS system. It may make EIS coverage subject to the whims of the day rather than being based on a solid foundation of broad categories which emphasize geographic/administrative concerns rather than specific actions. For these reasons, we recommend that subsection 343-5(8) be deleted.

The Exemption Screen

Introduction

The second screen in the multiple-screening process is the exemption screen. The exemption screen provides a way to eliminate actions from the requirement to prepare an environmental assessment when the action will probably have minimal or no significant effects on the environment. The authority to allow exemptions comes from section 343-6(7) HRS which calls on the Council to:

> 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 assessment.

Background

Two changes were made in the original statute concerning exemptions. Chapter 343-6 originally called for the EQC to establish a list of exempt classes of action (section 343-6(6)) and a list of exempt classes of public service actions (section 343-6(7)). Act 197-79 amended the statute by combining the requirement for two separate lists of exempt actions into a single one. The second change was to abolish the EQC and the transfer of its rule making authority, including its administration of the exemption action procedures, to the Council.

Ten categories of exempt classes of actions were created by the EQC in the EIS regulations promulgated in 1975. They included:

1. operations, repairs, or maintenance of existing structures
2. replacement of existing structures
3. construction of single, new small structures, including single-family residences
4. minor alterations to land, water, or vegetation
5. basic data collection
6. administrative activities
7. construction of accessory structures
8. interior alterations
9. demolition of structures with certain exceptions
10. zoning variances, with some exceptions

The regulations were revised by the Council and became part of the Department of Health's Administrative Rules in 1985. One change was made in the classes of exempt actions in the 1985 revisions. Exempt class 6 (1.33 (a) (6) EIS regulations) concerning actions that were primarily administrative activities was deleted. The definition of "Action" was amended in the 1985 revision to specifically exclude administrative activities as an action, thus obviating the need to retain a separate exempt class for these activities.

The rules require that each agency submit to the Council a list of actions that the agency believes fall into one of the exempt classes. Agency exemption lists and proposed amendments to existing lists must be submitted to the Council and require their approval before they can be implemented.

Discussion: Exemption Issues

Issues Raised by the Environmental Center

The 1978 EIS report found fault with both the classes of exemptions and agency lists submitted. It noted that "the EQC has actually designed several of these classes in such a way as to include certain types of actions that will generally have significant environmental impacts and hence should not be exempt." One of the regulations cited as an example of a class too broadly defined was section 1.33a 1: "Operations, repairs, or maintenance of existing

structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing." The rationale was that:

> "Topographical features are natural features subject to natural change. An interference with a natural change is just as much an environmental impact as is an inducement of a change to a natural feature. In some cases the artificial maintenance of a topographic feature is appropriate — in other cases it is not." (Cox et al., 1978, page 51)

Examples cited included reconstruction of shoreline structures where they have been shown to adversely affect the coastal resources. These prior structures that are to be replaced may have been erected in the past without adequate recognition of the optimum designs that avoid causing long term impacts to adjacent properties. This exempt class, however, was not changed and remains today as one of the nine exempt classes. Several examples of exempt types of actions that agencies proposed were cited by the Environmental Center as being too broadly defined. One in particular that was proposed by the State Department of Transportation (DOT) requested an exemption from assessment under HRS 343 for beach sand replenishment actions. This exemption was judged to be inappropriate by the Environmental Center. In the first place, beach sand replenishment would not be undertaken unless a "significant effect" improvement was anticipated. Furthermore, the source of sand and the quality of that source relative to the beach to be replenished are extremely important to the successful completion of the project. Impacts to the environment at the site of the source may be as significant to consider as impacts to the receiving shore. The Center had this to say about the proposed exemption:

> "No sand replenishment program should be undertaken at any beach without assessment of the environmental impact of the program. The exemption is inappropriate." (Cox et al., 1978, page 53)

The Council denied the request. This particular example has added significance because it was recently proposed in October 1990 by the State DOT for inclusion as an exemption. The Environmental Center once again objected to the exemption as being defined too broadly (Harrison, 1990).

Issues Raised by Interview Participants

The consensus of those interviewed reflected little concern with exemptions. Only a few issues were mentioned and there were no problems cited dealing with actual exempt actions listed by agencies or the classes of exempt actions developed by the Council. Two concerns that were expressed by interview participants dealt mostly with administrative matters: first, the lack of a master list of exemptions; and second, the infrequency of review by agencies, or the Council, of existing exemption lists.

Other Concerns

Two other concerns, cited rarely by the participants but raised by the authors, are the lack of specifics under which exemptions are ruled to be inapplicable and the lack of record keeping for actions that are found exempt under agency exemption lists. Each of these concerns are discussed in detail below.

Exemption Master List

According to the EIS rules (section 11-200-8 (d)) "Each agency, through time and experience, shall develop its own list of specific types of actions which fall within the exempt classes of actions..." These actions will be judged exempt, because they will have minimal or no significant effect on the environment. These lists are approved individually, for each agency, by the Council after discussion at a meeting open to the public. There has been no attempt to relate exemptions to existing lists or to list all the actions considered exempt in one master list. Most agencies have little idea of what other agencies consider exempt. Agencies exchange little or no information concerning what types of actions are listed. Furthermore, an action considered exempt by one agency may not be considered exempt by another agency with different responsibilities or jurisdiction in more environmentally sensitive areas. Thus, exemption lists are not and should not be uniformly applied. However, each agency's exemption and its rationale for inclusion could be listed on a single list. This would make periodic review easier and would enhance public access to this important part of the EIS system.

Review of Exemption Lists

Section 11-200-8(d) requires that agency exemption lists be reviewed periodically by the Council. However, no time frame for this review is set aside in the law or rules. In addition most agencies reported that they have not reviewed their own lists for "several" years. A review of the exemption lists was attempted by the OEQC several years ago according to agency personnel interviewed, but no documentation of the review or its results were available.

Inapplicability of Exemptions

Section 11-200-8(2) contains two conditions under which exemptions are considered inapplicable: "when the cumulative impact of planned successive actions of the same type, in the same place, over time, is significant; or when an action that is normally insignificant in its impact on the environment may be significant in a particularly sensitive environment." However, no process is outlined that requires agencies to determine whether either of these two conditions exists. Furthermore, there is no public notification requirement for either the lists of exempt actions of individual agencies that have been approved by the Council or the specific actions undertaken by the various agencies that they have considered exempt. From time to time, lists of proposed exemptions or amendments to existing lists, have been published in the Bulletin at the discretion of its staff. However, there is no statutory or regulatory requirement for such publication. As for lists of specific actions that have been determined to be exempt from Chapter 343 HRS by the agency, these lists are not easily available to the public. With no public notification of exemption decisions and very little recordkeeping of exemptions of individual actions, it is difficult to see how agency compliance of these little known exceptions to the exemption provision can be monitored.

Maintaining Records of Exempt Actions

One of the issues discussed in the summary report (Appendix A) dealt with reporting exempt actions. It was suggested "it may also be appropriate to require agencies to file a list of activities which they have determined fall within their exempt actions, with the Council or OEQC. In this way the Council or OEQC may monitor the use of exemptions to safeguard against the possibility of abuse." Keeping records of exempt decisions is mandated by section 11-200-8(5) which states, "Each agency shall maintain records of actions which it has found to be exempt from Chapter 343, Hawaii Revised Statutes." Section 11-200-2 of the EIS rules defines the term "exemption notice" to mean"... a brief notice filed by the proposing agency, in the case of a public action, or the agency with the power of approval, in the case of a private action, when it has determined that the proposed project is an exempt or emergency project." This indicates that it was the intent of the Council to have agencies not only keep records of actions they considered exempt but that a notice must also be filed. However, there is no explanation of what should be contained in the notice or with which agency it should be filed. One reviewer suggested that the creation of exemption notices was a misnomer and that it really refers to the record of exempt decision called for in section 11-200-8(e). We are not sure that this is the case, but if the Council had intended that exemption notices should be filed, it should have indicated more clearly the contents and requirements in the exemption section of the rules. If it is the intent of the Council to require record keeping only, then based on interviews with state and county agencies, it is being overwhelmingly ignored. Most departments reported that they do not keep records of the judgements that an individual activity is exempt from chapter 343 HRS. A number of agency officials claimed there were too many activities that they considered exempt to record them all. If our interpretation of this section is correct, then a number of agencies may be in violation of the EIS rules.

Improvements to the Exemption Provisions

Recordkeeping and Exemption Inapplicability

Requiring agencies to maintain a record of actions considered exempt is not only a requirement of the EIS rules, it is also an essential component of the EIS system's management process. If no records are kept of actions that are considered exempt, then there is no way to monitor for compliance with either of the two conditions that render exemptions inapplicable (11-200-8(b)): cumulative impacts and sensitive environments. What is missing is the enforcement of this provision. We recommend that the OEQC be designated, in the rules, to monitor for agency

compliance of recordkeeping requirements. Each agency should maintain a record of actions they have deemed to be exempt. Notices of exempt decisions should be forwarded to OEQC within 30 days of their determination and be made available to the public on request, or published in the Bulletin. The notice may be brief, containing only a description and location of the project and the reason why it is considered exempt. OEQC should be given the authority to request an agency to review its exempt decision for the following reasons: (1) the action is not on the agency exempt list or does not fall within the 9 categories, and (2) one more of the conditions rendering an exemption inapplicable is met. OEQC should maintain a list of actions considered exempt which could be made available to the public on request or published periodically in the Bulletin.

Publication and Review of Exemptions

We also recommend that the rules be amended to require annual publication in the Bulletin of exemption lists for each agency; timely publication of any amendments to the lists; and a periodic review of agency exemption lists by the Council. One suggestion was to require a biennial review of agency lists while another was to require review every 10 years. Two years would be too frequent while 10 years may be too long a period. Very few additions have been made to agency exemption lists in the past 10 years (Table 6). We suggest a time period of not less than five years is appropriate.

Table 6. Proposed Additions to Agency Exemption Lists Since 1979

Date	OEQC Bulletin	Proposing Department
08/08/79	15	City and County of Honolulu: Department of Housing & Community Development
08/08/79	15	State Department of Transportation
05/23/85	10	City and County of Honolulu: Department of Parks & Recreation
06/08/85	11	City and County of Honolulu: Department of Housing & Community Development
06/08/85	11	Department of Transportation
05/23/87	10	County of Maui
06/08/87	11	City and County of Honolulu: Department of Parks & Recreation
10/23/87	23	Housing Finance & Development Corp.
11/23/88	22	City and County of Honolulu: Department of Parks and Recreation
10/26/90	*	Department of Transportation

* not found in OEQC Bulletin

We suggest that the Council prepare a master list of agency exemptions to allow for easier review of exempt actions. This could be done by the OEQC under existing statutory authority.

A revision of the exemptions should be part of a larger revision of the EIS rules. The rules have not been updated since 1985 and they are no longer consistent with provisions in the statute in several sections. We recommend that the Council immediately undertake a revision of the EIS rules. In the section dealing with exemptions we have recommended several changes which we urge the Council to consider. In addition to these changes we suggest that the Council use the rule revision process to undertake a review of the exempt classes of actions.

A review of the exempt classes of actions will provide a chance to reexamine whether all nine categories are appropriate. Another concern over the classes of exemptions raised during the interviews was that the present exemptions may reinforce bad decisions made in the past by allowing renovation or replacement of existing structures to be exempt from environmental scrutiny, even if they are built in environmentally sensitive areas. By reviewing the classes of exempt actions and the lists of actions submitted by agencies, the Council can begin a reappraisal of this section of the rules.

The Assessment Screen

Introduction

Actions subject to HRS 343 that are not otherwise exempt from further consideration must be assessed to determine the extent of their environmental impacts. The law provides that whenever an agency proposes an action that is not exempt, the "agency shall prepare an environmental assessment for such action at the earliest practicable time to determine whether an environmental impact statement shall be required" (section 343-5(b)). Whenever an applicant proposes an action subject to Chapter 343 HRS and not otherwise exempt, the law provides "the agency receiving the request for approval shall prepare an environmental assessment of such proposed action at the earliest practicable time to determine whether an environmental impact statement shall be required" (section 343-5(c)) HRS. The process of assessing actions to determine whether their impacts are significant constitutes the third and final screen of the multiple screening process.

The final screen, in the multiple screening process, separates those actions that will require an EIS from those that do not. This is the first step in the EIS process that requires gathering information about the environmental impacts of an action. This information is compiled into a document called an Environmental Assessment or EA. The EA is used to make a preliminary estimate of the extent of a particular action's impact on the environment. Those actions that may have a significant effect, based on the EA, will require an EIS. Actions that are deemed not to have a significant affect on the environment will require no further documentation.

Actions requiring an EIS will incur additional costs to prepare the documentation and may experience costs associated with delays in undertaking the action. It is in the interest of private developers, government agencies, and the public who ultimately bear the cost of these actions, to create a screen that will require an EIS for only those actions that will benefit by the additional information gathered. Determining when an EIS is required is a matter of judgement and the exercise of this judgement is often the most difficult task in the EIS system.

Determination Process

For agency actions (section 11-200-9 1.(a) EIS Rules), the agency proposing the action shall make an assessment at the earliest practicable time but prior to adopting a plan of action. The assessment shall:

1. Identify potential impacts
2. Evaluate the potential significance of each impact
3. Provide for detailed study of major impacts
4. Determine the need for a statement

For applicant actions (section 11-200-9 1.(e), the approving agency or agencies from which the applicant must receive a permit to carrying out the action shall assess and determine the need for an EIS. The assessment for the applicant action must address the same four areas as the agency assessment plus an additional area if an EIS is required. If a statement is required, the approving agency or agencies must prescribe the information necessary to assure adequate discussion and disclosure of environmental impacts.

According to the statute, agencies are required to prepare the EA whether an action is proposed by an agency or by an applicant. In practice though, most agencies have accepted information prepared by the applicant in lieu of preparing an assessment in house. A common practice is for an EA to be prepared by private consultants for both agency and applicant actions.

Regardless of who prepares the EA, the proposing or approving agency must make the determination of whether an EIS is required. The agency must file a notice of the determination and 4 copies of the EA with the OEQC. The notice is published in the Bulletin. If the agency determines that an action may have a significant effect on the environment as outlined in section 11-200-12 of the EIS rules, it must file a Preparation Notice (11-200-11 (a)(1)). If the agency determines that an action will not have a significant impact on the environment, it must file a Negative Declaration.

Agencies may publish the contents of their EA and solicit comments from other agencies and the public, but they are not required to do so (11-200-9(c)). Determinations are not subject to review or oversight by OEQC or the

Council and are considered final when printed in the Bulletin. Section 343-7(b) indicates that judicial appeal of the agency determination is possible within 60 days of publication of the determination in the Bulletin.

Adequacy of the Assessment Screen

The determination of whether an EIS is required is a key decision point in the EIS process. Those actions receiving a Negative Declaration require no further environmental documentation and may proceed onto the next phase of the regulatory process. Those actions receiving a Preparation Notice must go through additional steps which at a minimum will take approximately 3 months to complete. For this reason, government agencies and private developers consider receiving a Negative Declaration to be beneficial.

The process by which a determination is reached has raised questions about the adequacy of the assessment screen. Critics charge that the present process allows agencies to make determinations on projects they have proposed and applicants to prepare their own EAs on behalf of the approving agency, thus insuring favorable results. There is no provision for review of the assessment determination except through judicial proceedings.

In the past, determinations have been appealed to the Council. However, there is no established procedure for making such an appeal. If a person wished to file an appeal there was no guidance available as to whom he/she should appeal to, or on what grounds and what factors would be considered in the decision. Critics claim the potential for abuse exists. Based on Environmental Center reviews of about 10 percent of the Negative Declarations at the time, the authors of the 1978 EIS study reported that "although most of the determinations made on assessments have been appropriate, misuses of the assessment screen represents a major failure of the EIS system" (Cox et al., 1978, page 61).

An examination of the number of actions which are covered by the EIS system indicates that an overwhelming majority of them are determined to have no significant impact on the environment. From January 1979 through July 1990 there have been 3,100 actions for which a determination was made. Of this total 2,768 actions, or about 89 percent, received a Negative Declaration and 332 actions or about 11 percent received an EIS Preparation Notice (Table 4). On the average, there have been 20 Negative Declarations issued and 2.4 EISs required each month since January 1979.

Case Studies

Since 1979, the Environmental Center has conducted 243 reviews of EAs that have received a Negative Declaration (Table 7). In general, we found that most of the EAs were adequate but could have been improved by including additional information. In a number of cases, the reviewers recommended that an EIS should have been required. The Environmental Center has documented a number of what it considers inappropriate determinations. We will briefly examine two projects where the issuance of a Negative Declaration was considered to be highly inappropriate. The projects are the Marine Cultural Enterprise's proposal to construct an open drainage ditch at a site in Kahuku in 1984 and the Kahului Airport Development Plan, in Kahului, Maui in 1989.

Marine Culture Enterprises Drainage Ditch

Marine Culture Enterprises (MCE) was a high technology penaeid shrimp aquaculture facility. It was located in Kahuku, on the north shore of the island of Oahu, on 45 acres of land approximately 1,500 feet inland of the coast east of Kalaeuila point near the site of the abandoned Kahuku Airstrip. The planned facility consisted of 48,500 square meter growout raceways covered by inflated, polyethylene fabric cover, a seawater pumping facility from six wells located on the property, a shrimp processing and cold storage building, and a 2,530 foot drainage ditch approximately 21 feet wide. The drainage ditch was built to discharge an estimated 33 million gallons a day (mgd) of effluent from the facility to the ocean. Because a portion of the ditch was built through the 40 foot shoreline setback area an EA was required (MCE, 1983). The EA was completed in October 1983 and a Negative Declaration was issued by the Department of Land Utilization (DLU), City and County of Honolulu, December 28, 1983. The Negative Declaration was subsequently listed in the January 8, 1984, Bulletin (vol. 1, no. 1).

In February 1984, the Environmental Center began a review of the EA/Negative Declaration and a Zone of Mixing (ZOM) application for the effluent produced by MCE. The review was completed on March 13, 1984 and

Table 7. Results of Reviews undertaken by the Environmental Center of potentially problematic Environmental Assessments

Year:	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	Total
DLI	3	6	4	0	0	18	15	8	11	7	14	14	100
ND/NS	9	3	2	0	3	2	6	2	6	7	7	8	55
Exp.EA	1	0	0	1	1	2	0	0	1	0	3	1	10
EIS	2	1	2	1	2	3	1	0	1	10	2	4	29
SEIS	0	0	0	0	0	0	0	0	1	1	0	1	3
OK+INFO	2	1	0	0	4	8	5	5	7	3	10	1	46
Total	17	11	8	2	10	33	27	15	27	28	36	29	243

Key: DLI = The Document Lacks sufficient information.

ND/NS = The Negative Declaration is not supported by Environmental Assessment or an improper procedure has been taken.

Exp.EA = The Environmental Assessment should be expanded or an EIS should be required.

EIS = An Environmental Impact Statement should be required.

SEIS = A Supplemental Environmental Impact Statement should be required

OK+INFO = The Environmental Assessment/Negative Declaration is appropriate but additional information has been added.

sent to Shinji Soneda, Department of Health's Environmental Protection Division, for the ZOM application; to Robert Jones, Director of Department of Land Utilization to request a reconsideration of the Negative Declaration; and to James Morrow, Chairman of the Environmental Council to request that the Environmental Council consider taking action to request that an EIS be prepared. The review concluded that based on the amount and make up of the materials in the effluent and the size and characteristics of the receiving waters the "discharge of some 33 mgd of effluent from the Marine Culture Enterprises shrimp rearing facility at Kahuku, Oahu .... will result in significant impacts to the coastal marine environment at Kahuku" (Hawaii. University, Environmental Center, 1984).

The conclusions reached in the Environmental Center review were contested by MCE and its consultants. A series of responses and rebuttals were exchanged between the Environmental Center, MCE's consultants, and state and county offices involved, between March and May 1984. On May 2, 1984 the Council concluded that the Negative Declaration was inappropriately issued by the DLU and that an EIS should have been required. On May 24, 1984 the DLU responded to the Council by upholding its original decision. Since the final decision rests with the approving agency to make determinations, the DLU decision was final.

Among the reasons cited for upholding its decision on the issuance of a Negative Declaration, DLU cited two as being crucial: (1) that there were no objections voiced by state agencies that reviewed the EA; and (2) most critically, the time frame of the objections that were raised was too long after the announcement of the Negative Declaration. DLU went on to say that it might have been more inclined to reverse its decision had the issues surfaced on a more timely basis.

Kahului Airport Development Plan

The Kahului Airport Development Plan was proposed in 1989 to provide guidance for future expansion and improvement of facilities at Kahului Airport to meet aviation demands to the year 1990. Continual expansion of

tourism facilities on the island of Maui during the past decade has caused existing airport facilities to be overburdened, according to the EA (Hawaii DOT, 1989, page 1.1). The improvements to the airport outlined in the development included: repair to runways and extension of safety area, improvements to roads leading into the airport, and improvements to terminal facilities. The plan lists a total of 24 short-term improvement projects to be carried out under the proposed action.

The DOT filed a Negative Declaration for the Kahului Airport Development Plan with the OEQC, published in the May 23, 1989 Bulletin (vol. 6, no. 10). The Environmental Center reviewed the EA and requested that the DOT reconsider its determination that the action receive a Negative Declaration. The Environmental Center's review cited failure to adhere to the regulatory requirements of an EA as the general reason why a Negative Declaration was inappropriate for this action (Hawaii, University, Environmental Center, 1989). Chief among the reasons was DOT's failure to consider this action as a phase of a much larger proposal. Section 11-200-7, of the EIS Rules state: "A group of actions proposed by an agency or an applicant shall be treated as a single action when: "they are ...phases or increments of a larger total undertaking...," or when, "An individual project is a necessary precedent for a larger project;" The EA states that the short term projects proposed and discussed in the EA document are part of a long term development plan for the airport. The Environmental Center also produced a list of 27 proposed airport development projects for the Kahului Airport dating back to 1976 (Table 8), all of which had received Negative Declarations, to illustrate the long term nature of the airport expansion proposal.

The Sierra Club Legal Defense Fund on behalf of two local citizen groups, Maui Air Traffic Association and Hui Alanui O Makena, filed suit against the DOT on the basis that the EA was inadequate and the Negative Declaration was inappropriate. The case was settled without going to trial when DOT agreed to prepare an EIS covering the planned expansion of the Kahului Airport.

Discussion of Cases

The two cases are not intended to be representative of all EA/Negative Declaration decisions. However, they do point out several problems often cited as leading to abuses. In the case of the MCE drainage ditch, DLU cited two reasons for upholding its decision to file a Negative Declaration: 1) failure of agencies to raise any objections to the findings in the EA, and 2) failure of the objecting parties to proceed in a timely manner. However, both these failures have their roots in the fact that there is no provision for review of the EA once a determination is made.

An agency is directed to consult with "other agencies having jurisdiction or expertise as well as citizen groups and individuals in preparing an environmental assessment" (section 11-200-9 (a) EIS Rules). However, there is no requirement as to which citizens, individuals, and/or agencies must be consulted. Furthermore, there is only a suggestion that agencies publish the contents of their EAs and solicit comments (section 11-200-9 (c) EIS Rules), a suggestion that is rarely implemented. Very few people know that an assessment is being prepared until the Negative Declaration is published in the Bulletin. There is no opportunity to point out problems prior to the publication of the Negative Declaration if an agency is not consulted. Agencies and individuals who may have information contrary to the EA's findings may not have been contacted during the preparation of the EA and thus have no opportunity to provide their expertise.

After the Negative Declaration is published, acquiring copies of the assessment document, sending them out for review, coordinating the responses, and preparing a reply is a lengthy process. In the MCE case, the Environmental Center sent out copies of the assessment to potential reviewers on February 2, 1984, 25 days after the Negative Declaration notice was published. In those 25 days, the review staff had to receive the Bulletin by mail, note the Negative Declaration notice, call OEQC to receive copies of the assessment, receive the copies, and send them out to appropriate reviewers. There is also no prescribed time frame for review of Negative Declarations thus no guidance as to when "too much" time has passed.

The Kahului Airport improvements case illustrates another problem of the EIS process. Agencies and applicants may seek to avoid the requirement to prepare an EIS by breaking up large projects into smaller components and claiming they will have no significant impacts. The intent of the EIS system is to judge multiphase development as a single project. Among the criteria stated in the EIS rules for judging the environmental significance of an action, is the statement, "is individually limited but cumulatively had considerable effect upon the environment or involves a commitment for larger actions" (section 11-200-12(b)(8) EIS Rules).

Table 8. Negative Declarations issued over a period of 13 years for Improvement and Expansion of the Kahului Airport

Obstruction Clearance and Disposal	04/08/76
Airport Access Road Improvements	05/23/76
Relocate Outer Marker Facility Instrument Landing System	07/08/76
Aloha Airlines Holding Room and Other Additions	01/08/77
Maintenance Baseyard Facilities	04/23/77
Crash/Fire Rescue Bldg.	04/23/77
Passenger Terminal Expansion	04/08/78
Airfield Pavement Strengthening and Related Work	06/08/78
Alii Jewels, Inc. Sales and Manufacturing Bldg.	09/08/78
Improvements to General Aviation Facilities	04/08/80
Kahului Airport Terminal Complex Expansion	09/08/81
Air Cargo Facilities, East Ramp	03/08/82
Maintenance of Kalialinui Stream	07/08/82
Restoration of Kalialinui Gulch and Related Work	08/08/82
Kalialinui Gulch Improvements	09/08/82
Periodic Maintenance of Kalialinui Gulch and Stream	12/08/82
Kahului Airport Expansion-Relocation of Ground Transportation Operators	07/23/83
Interim Modifications to Existing Terminal	02/08/84
Improvements to East Ramp	12/23/84
Construction of Improvements on Lot E-Expansion for Relocation of Ground Transportation Operators	07/23/85
Runway Safety Area for Runway 2-20	08/23/86
Alamo Rent-A-Car Baseyard Facilities	10/08/86
Keolani Place Improvements at Kahului Airport	04/23/88
Maui Service Facility for Sunshine Hawaii Rent-a-Car Systems, Kahului Airport	02/08/89

In the Kahului Airport improvement case, a number of improvements and expansions had been proposed prior to what was proposed in 1989, and a number of related projects were being proposed to take place sometime in the future. Eventually, the proposed projects, including some of the ones listed in the Negative Declarations, were included in a master plan for the airport that was submitted as an EIS. With no opportunity for review and no mechanism to appeal a determination decision, the matter had to go to judicial review before it could be resolved.

Discussion: Changes to the Assessment Screen

Many participants said that the Negative Declaration or Preparation Notice determination was the most problematic part of the EIS system. Though few claimed that extensive abuse exists, most recognized the potential for its existence. Most participants presented some suggestions on how this part of the EIS system might be changed. Four categories of alternatives to the present process were suggested: 1) A review period for EAs; 2) appeals of determinations; 3) OEQC/Council oversight; and 4) third party determinations. Each is discussed in detail below.

Review Period

Providing for a review period for EAs was the most frequently suggested change to the way determination decisions are made. Many participants felt that the proposing or approving agency must be given the authority to make determinations, but that other agencies and citizens should have the right to comment on the adequacy of the EA and the appropriateness of the determination decision. A number of people suggested 30 days as an appropriate time period for comments, others suggested 45 days. One participant suggested that agencies make the determination and publish their intent in the Bulletin followed by a 30 day review period to allow dissenters to offer

an alternate viewpoint. The common element in all the proposed variations was that no determination decision should be final until the review period is completed and all comments received replies.

Appeals of Determinations

Another often suggested remedy was the institution of an administrative appeals process for the determination decision. Several variations of this suggestion were offered, including appeals to the Council or the OEQC, appeals to the agency making the determination, and appeals to a third party such as a professional board or commission set up to hear appeals.

Those that favored an appeal to the Council or OEQC felt that these organizations are the most involved in the EIS process and would be able to respond in the most expeditious manner. Most proponents of this type of appeal felt that both the Council and OEQC would require an increase in staff or re-focus of member competence, above that currently present. Appeals to the Council would be hindered by their infrequent meeting schedule.

Proponents of the appeals to the agency making the determination felt that this idea would be more palatable to agencies since their authority would not be threatened. However, most recognized an inherent conflict in appealing to an agency that has already made its decision.

A few participants felt that a professional board or commission could be formed to hear appeals. The board or commission could be composed of professionals in a number of fields related to environmental issues. The board or commission would review contested Negative Declarations. Suggestions on how such a board would be constituted varied, but in all cases it was concluded that service as a board member would be by appointment and voluntary.

Several reviewers stated that appeals may already be allowed under the Administrative Procedures Act, Chapter 91 HRS, Section 9-9, that outlines the procedure for a contested case hearing. Presumably agencies or interested parties that disagree with another agency's determination on whether an EIS is required for an action, can request a contested case hearing to have the determination overturned. Each agency must develop its own procedures for requesting and holding contested case hearings. The hearing would apparently be held by the agency which made the determination.

To our knowledge only one contested case hearing has been held dealing with agency determinations. We have only recently learned that a contested case hearing was held by the Maui Planning Commission (see Appendix H). Because this procedure has been used so rarely, we are uncertain as to the exact nature of how it functions in the case of appeals of EA determinations.

It is our understanding that appeals under chapter 91 HRS must be undertaken as a contested case hearing. This can be a costly and time consuming process, not the cooperative approach we envision for an administration appeal process under chapter 343 HRS.

Though the idea of the institution of an administrative appeals process was popular among those who felt this part of the EIS process needed change, it was also an unpopular suggestion for many, even among those who suggested other changes to the Negative Declaration/Preparation Notice determination. The arguments against an administrative appeals process included concerns that it could be used by opponents to delay a decision on an action and it would undermine agencies' authority. Opponents of this proposal also argued that existing provisions for appeal through the courts provided an adequate mechanism to address improperly made determinations.

Environmental Council/OEQC Oversight

A third suggestion was that the Council or the OEQC could be given the authority to override an agency's determination and require an EIS or Negative Declaration. According to this suggestion, agencies would continue to make determinations but these would be subject to Council or OEQC review. The authority for the Council to review agencies' determinations may already exist, in a limited capacity, through its power to issue declaratory rulings on determinations made under chapter 343 HRS, if petitioned by an interested person or agency (section 11-201-21(a) Environmental Council Rules of Practice and Procedure). The limitation is that they must be petitioned to review an agency's determination before the Council can act. The Council's authority to issue declaratory rulings was questioned by the state Attorney General's Office and, as a result has been exercised only seven times since 1984, and not at all after 1988 (see Appendix H).

Amending chapter 343 HRS to give the Council or OEQC specific statutory authority to provide oversight of the determination decision would render moot questions on the legality of the use of declaratory rulings to overturn agency determinations. However, empowering the Council and/or OEQC to provide oversight on this part of the EIS process has some problems for both proponents and opponents. Chief among them is the lack of expertise available among Council members and OEQC. Most participants said that the Council and OEQC would require additional technical staff if they were to judge the quality of EAs. In the case of the Council, members would need environmentally relevant specialties before the Council could be judged to be qualified as an oversight body. In the case of OEQC, the ability to hire and retain a qualified staff would depend upon the long term career opportunities offered by the office and the classification of its positions. In addition, some participants felt that the OEQC staff would have to be expanded to handle the task of reviewing determination decisions.

Another problem concerned jurisdiction. Most state and county agencies feel that their personnel have more expertise in the jurisdiction being impacted by a proposed action than any oversight agency or Office, therefore, their determination decisions should not be subject to oversight by another agency.

Third Party Determinations

Several participants proposed that a neutral third party organization could be formed to make the determination decision. This organization's sole responsibility would be to make the determination decisions based on EAs submitted by agencies. Experts in relevant fields would be chosen to sit on this panel and would meet as often as necessary to make the determination decisions. With the exception that this neutral third party organization would focus solely on one task, this option is similar to the preceding Council or OEQC oversight option and has many of the same problems.

Alternative Dispute Resolution

An excellent suggestion was submitted during the review of the draft which merits careful consideration. The suggestion called for the use of the Alternative Dispute Resolution (ADR) program of the judiciary which is actively being pursued by the state as a means of avoiding litigation. ADR has potential as a means for resolving questions of an agency's determination of whether an EIS is required for a particular action. The ADR program brings together all parties involved in a dispute and assists the parties in finding a mutually satisfactory solution. It attempts to do this in a non-confrontational manner. Its use in environmental disputes has been limited but not by any of the program criteria.

Improvements to the Assessment Screen

EA Review Period

This part of the EIS process was cited as being the most problematic. The potential for abuse of this third screen in the multiple screening process was recognized even among those not favoring any change. A potentially quicker path to project implementation as provided by the issuance of a Negative Declaration provides an incentive for abuse. Judicial review, the safeguard against abuse, is seldom invoked, because of its cost in terms of time and money. We believe that an alternative to the present process needs to be implemented. Allowing inappropriate Negative Declarations to go unchallenged causes undue skepticism, undermines the entire EIS system, and can lead to costly project delays when significant impacts arise during construction.

We recommend that chapter 343 HRS and the EIS Administrative Rules be amended to institute a 30 day review period for all EAs for which a notice of Negative Declaration is being contemplated. One of the underlying principles of the EIS system is to have the public be involved in the decision making process for actions that may have an impact on the environment. The present process curtails public input for 89 percent of the actions by not providing a mandated review of those EAs that receive Negative Declarations. We believe that line agencies should continue making the determinations based on the EA. That determination should be subject to review by interested parties or agencies in a manner similar to the review of EISs. After making a preliminary determination, an agency should publish it in the Bulletin. Comments on the assessment and the preliminary determination decision should be

accepted for a period of not less than 30 days. Comments received during the review period would have to be addressed in a final EA along with an explanation of the reasoning for the agency's final determination.

Administrative Appeals

We do not recommend the creation of an administrative appeals process at this time. The use of a 30 day review period followed if necessary by the ADR or a similar program offers a better avenue to address the problem of disagreement over agency determination decisions. The contested case hearings contained in section 91-9 HRS are nearly as complicated as judicial proceedings and do not truly increase the likelihood that determinations would be appealed. However, if the ADR or similar program proves inadequate to address the perceived problem with the present determination, then an administrative appeals procedure should be instituted.

We suggest that standing to request any administrative appeals under this process be strictly limited to those who have commented on the EA. This limit should reduce the number of appeals intended to delay projects because it would require early disclosure of concerns to the determining agency during the review period. This disclosure offers the potential for project modification or compromise on issues raised.

The additional time necessary to institute an appeals process could be offset by a shortening of the 60 day statutory limit found at Section 343-7(b). Since most prudent proposing agencies and applicants that have received Negative Declarations wait the full 60 days to see if legal action is filed before proceeding with their project, it would seem logical and fair to reduce that time by the same number of days allowed for the administrative appeal.

Administrative appeals could be made to the Council or some other body formed for this purpose. However, we feel that the Council membership could be so constituted as to make it the appropriate body to hear appeals. The Council need not have technical expertise in the issues being appealed as long as they have access to competent technical support which could be provided by OEQC.

OEQC's role in the determination decision should be limited to reviewing EAs for adequacy and compliance with applicable statutes and supporting the Council on technical matters. This will leave the staff of OEQC to concentrate on developing expertise in technical issues while avoiding conflicts with state and county agencies.

Administrative Oversight

An alternate to an administrative appeals process that could be instituted if mediation proves to be unsatisfactory is to involve an oversight agency. This is not our preferred alternative. We believe that an appeals process allows those who disagree with an agency's determination to work directly to change that decision. However, in lieu of an appeals process, we find this alternative acceptable with some conditions. First, the oversight function should not be exercised by the Council. While this body may be suited to judge appeals it does not have the expertise to perform a technical review. In its role of an appeals board the Council should rely on the OEQC for technical assistance. Second, we believe the OEQC should provide oversight for those actions involving state land or funds or approval from state agencies. The oversight of EA determination for county actions should be assigned to an agency designated by the county's mayor. This would eliminate disputes that may arise over issues of home rule and interference with county jurisdiction which may come about if a single state agency is designated as an oversight authority.

Neutral Third Party

The alternative of having a neutral third party determine all EAs is unworkable. At the average rate of 20 determinations per month such a body would have a large work load. Asking an appointed and uncompensated body to spend the amount of time that would be necessary to make a careful judgement of these determinations is, in our view, unreasonable.

Dispute Mediation

To address cases where disagreement over the final determination decision still exists after a review and response period, we recommend that chapter 343 HRS and the EIS Administrative Rules be amended to require the use of ADR or other similar program. We note that the non-confrontational setting which the ADR program

achieves often leads to situations where all parties come away satisfied. The use of mediation is much less costly than judicial appeals and much less formal than administrative appeals under chapter 91 HRS or those proposed for chapter 343 HRS.

We suggest that mediation take place within a similar time period as was previously proposed for the EA review period or within 30 days of the publication of the determination in the Bulletin. The ADR or similar program should be used for a trial period of 3 years. If the use of the program proves beneficial during that period than its use could be made permanent. OEQC could be the monitoring agency during the trial period, to determine the participating parties degree of satisfaction with the results.

Changes to the Content of Environmental Assessments

Changes to the form and content of the EA were also considered as part of our review. Several content changes suggested would lead to a more useful EA and a decrease in the criticisms of that document.

The first change we recommend would be to expand the scope of those who are consulted during the preparation of an EA. In general, we have found that the more widely an action is circulated for comment the more likely that major concerns will be identified and mitigated in the early planning stages of the project. OEQC could develop circulation lists (if they have not already done so) and make them available to agencies. Agencies could develop their own lists based on their experience. We also believe that a scoping meeting that brings together projects proponents, opponents and other interested parties might be used during the EA stage of the EIS system particularly if a Negative Declaration is anticipated.

The second change we recommend is to treat all alternatives, including the proposed action, equally in performing the analysis in the EA. At this stage there should not be a single action chosen over all others since an environmentally less damaging alternative may be available. A thorough analysis that discusses the favorable and unfavorable points of each alternative and then chooses one alternative over the other would lead, in our opinion, to a more adequate and comprehensive EA.

Third, we recommend that the EA include an expanded mitigation section. Each EA should recognize that even minor impacts may be mitigated to the betterment of the project as a whole.

These changes can be made to the content requirements of EAs, section 11-200-10 EIS rules without changes in the statute. Taken together with the addition of a review period for EAs receiving a preliminary Negative Declaration would make the final EAs much more useful documents.

PART 5: EIS PREPARATION

Introduction

Actions that may have a significant effect on the environment require the preparation of an Environmental Impact Statement (EIS). This process is begun with the publication of a Preparation Notice listed in the OEQC Bulletin (Bulletin). Subsequently, the documents produced must go through several procedural steps outlined in the statute and Administrative Rules, a process that can eventually lead to the acceptance of a Final EIS. These four procedural steps were discussed with our participants and are examined in detail in this part of the report:

1. Definition of the scope or coverage of the EIS. In the Hawaii State EIS system scoping is accomplished through a 30 day consultation process.
2. Preparation of a Draft EIS based on the issues defined during the consultation process along with topics required by the rules (section 11-200-17 EIS Rules).
3. Submission of the Draft EIS for public review as prescribed in the statute and rules.
4. Incorporation of the comments received from the public and government agencies during the review period into the document and preparation of the Final EIS. The Final EIS must be accepted by the governor or mayor for state or county agency actions or the approving agency for applicant actions. The accepted EIS is listed in the Bulletin.

The Consultation Process

Introduction

An action's impacts on the environment can vary from one site to another. Physical features such as climate and topography, or social features such as population density and income distribution, differ depending on location. Impacts on physical and social features differ depending on the type of action being proposed. Deciding what impacts must be discussed in an EIS is a matter of examining the proposed action in its anticipated setting and determining by technical expertise, experience, instinct, or some other process what is likely to occur.

Potential impacts can be categorized into those that are likely to be of a minor nature and that require very little examination and those that will be of potentially very serious consequence and will require detailed examination. Identifying and separating the minor impacts from the consequential impacts is an important part of the EIS process because it facilitates assigning each the appropriate amount of attention it will receive in the EIS document. This categorization process would allow the EIS document to be focused on issues that are of greatest concern to the community and/or issues that would create the greatest change to the existing environment. Determining the major issues and separating them from the minor issues relies to a large extent on subjective judgement because each action has its own unique situation. Some actions involve a large number of impacts or a set of complex impacts; others have fewer but more significant impacts. Thus, it is usually better to use a process that taps the expertise of a group of people to identify the key issues rather than depending on the resident knowledge of one or two individuals. Scoping is the term given to the process used to make the determination of the type and magnitude of the impacts that are likely to occur due to the implementation of a proposed action.

NEPA Scoping Process

For actions requiring assessment under the National Environmental Policy Act (NEPA), federal agencies proposing a major action are required to consult with and obtain comments from other federal, state, and local agencies that have legal jurisdiction or special expertise with respect to potential environmental impacts. Each federal agency determines its own guidelines for how the consultation requirement will be satisfied. In general, according to a federal participant, federal agencies call together interested parties for a scoping meeting which can range from informal discussions/briefings to formal public hearings, depending on the nature of the project.

Hawaii Consultation Process

The consultation process is carried out in the Hawaii state EIS system during a 30 day period that begins following the publication in the Bulletin of the issuance of an EIS Preparation Notice for a proposed action. During the 30 day period, any interested party may "request to become a consulted party" and can suggest the inclusion of issues that must be covered in the EIS (section 11-200-15 (b), EIS Rules). The proposer of the action is required to submit to parties who request consultation a copy of the Environmental Assessment (EA) along with any other information that the proposer may deem necessary to describe the action. Consulted parties must submit their comments within 30 days of the date of publication of the Preparation Notice. The proposer must respond in writing to any substantive comments received during the consultation period and take the comments into account in preparing the EIS. A proposer may also initiate contact with agencies, groups, or individuals for the purpose of determining which issues should be covered in the EIS.

The use of the consultation period is subject to a general exemption. At the request of the proposer, the approving agency or accepting authority may choose to waive the consultation process if the action involves minor environmental concerns. It should be noted that actions which constitute minor concerns are not defined in this section.

Discussion: Changes to the Consultation Process

The overwhelming majority of participants felt that the present consultation process was adequate. They felt that 30 days was sufficient time to comment on the Preparation Notice. A number of participants did feel that proposers could do a better job of contacting people who might be impacted by the action. However, this was not due to any constraint placed on them by the existing law or rules.

Although most participants favored the status quo as far as the statutory language or rules were concerned, several suggestions were made for changes or improvements concerning the timing and format of the consultation process. The most frequently suggested idea was incorporating a "scoping meeting" within the context of the existing consultation period and prior to preparing the Environmental Assessment (EA). Another suggestion was to change the time period for the consultation process.

Scoping Meeting

Many participants felt that an informal scoping meeting incorporating agencies with jurisdiction and the interested public should be held within the 30 days set aside for consultation. The meeting should have two parts: presentation by proponents and input from agencies and interested parties. The meeting should be held after a tentative decision is made to prepare an EA or an EIS. To benefit both the proponents and participants in the scoping process, a scoping package should be prepared prior to the meeting and be made available to the attendees. The package would include:

1. purpose, need, description and magnitude of the proposed action
2. alternatives to be analyzed
3. likely permits needed
4. studies to be undertaken
5. list of significant resources that are present in the area
6. list of likely impacts

This listing would give participants a basis upon which to discuss the issues and to offer suggestions.

The scoping meeting should be followed by a narrative summary of the comments and issues raised at the meeting. Copies of the summaries should be circulated to all participants to insure that there are no misunderstandings regarding input. The most important point is for the proponent to take the process seriously and use the results to produce better EAs or EISs.

Proponents also pointed out that a scoping meeting would not lengthen the overall consultation time period and it could result in a more finely tuned EA or EIS. The scoping meeting would enhance the input of verbal comments. Many people find it easier to express their concerns verbally than in written form. Proponents also point

out that a meeting would help preparers more easily understand the comments they receive and thus be better prepared to address them in the EA or EIS. They also pointed out that the option for including written comments would still be available.

Opponents called to our attention the fact that many public meetings are poorly attended and that the benefits may not justify the costs. Some felt that if meetings were too formal, dialog could be stifled. One point everyone seemed to agree on was that meetings should not be held in a public hearing format where testimony is taken but dialogue is not encouraged. Several participants pointed out that a mandatory scoping meeting may have a negative effect on the staff and budget of participating agencies by requiring attendance at the meetings.

Consultation Prior to EA

Consultation prior to the preparation of an EA was discussed briefly in part four of this report. The discussion here explores the idea in greater detail.

The federal EIS process requires scoping prior to the preparation of the EA although it does not specify the time frame for its occurrence. Prior consultation for EA preparation is also required in the Hawaii state EIS system for agency actions but not for applicant actions. Section 11-200-9(b) EIS Rules states: "[the proposing] agency must consult with other agencies having jurisdiction or expertise as well as citizen groups and individuals." Several participants suggested that prior consultation through a scoping meeting should be required prior to the preparation of EAs for both agency and applicant actions.

One of the benefits of requiring a formal consultation process prior to the EA would presumably be a more complete EA. As a result, proponents argue, fewer EAs would be challenged as being inadequate and perhaps fewer EISs would be required. Having the scoping completed early in the process would allow agencies to make determinations on whether an action would require only an EA or an EIS and proceed directly to the preparation of the appropriate document.

The majority of participants opposed having a formal, mandated scoping meeting for the EA because they thought it would delay the processing of an action. Many consultants and agency representatives said that they already consult prior to preparing an EA. Not having a mandatory period gives them the flexibility to adjust the time needed for consultation.

Consultation Time Period

In our interviews, it was suggested that the 30 day consultation period should be as long as the 45 day review period for Draft EISs. Proponents felt that the 30 day consultation period does not allow sufficient time to obtain the necessary information from the proposer, read it, and send comments back to the proposer.

However, a majority of the participants felt that the 30 day period was reasonably adequate, time tested, and required no further change. Some claimed that agencies did not strictly adhere to the 30 day period and often accepted late comments.

Other Consultation Issues

In addition to issues raised by the participants, three other issues required some discussion. The first deals with the lack of a statutory basis for the consultation period. Section 343-6 HRS is given as the authority under which the consultation is written into the rules. However, no mention is made of a consultation process in section 343-6 HRS or section 343-5 HRS. The overwhelming majority of EIS practitioners, agencies, and citizen groups felt that formal consultation was a useful and necessary part of the process. Having a statutory basis for consultation could avoid future challenges to its legality.

The second issue deals with clarification of the conditions leading to waiving the consultation period. If only those actions that may have significant environmental impacts require the preparation of an EIS, then how is it possible for the consultation period to be waived for actions that have only minor environmental concerns? What constitutes minor environmental concerns for an action that may have significant environmental impacts?

The third issue deals with the situation that occurs when 2 agencies are approached simultaneously for permits for an action covered by the EIS system. In these cases the EIS law requires that the OEQC choose the lead agency.

However, a potential problem arises in assuring that the information gathered in the EIS will be adequate to meet the informational requirements of both agencies' permits. The consultation period is the appropriate time for the two permitting agencies to decide what issues will need to be discussed in the EIS so that both agencies' needs are met. Ideally the lead agency will work with what might be called a cooperating agency to make sure the latter's informational requirements are dealt with satisfactorily in the EIS. The cooperating agency may also review the EIS during the review period to assure that the issues they expressly requested are adequately discussed. This process can be executed under present statutory authority and requires no modification to chapter 343 HRS. Our only recommendation might be to suggest that OEQC encourage such interagency cooperation as part of their educational responsibilities or in the text of guidelines developed to assist EA/EIS preparers.

Improvements to the Consultation Process

Scoping Meeting

The most significant issue we addressed concerning the consultation process was the idea of a mandatory scoping meeting initiated prior to the preparation of the EIS. Our recommendation in our preliminary report that such a meeting be required within the 30 day consulation period elicited many comments of both praise and opposition. Those who agreed with our preliminary recommendation felt that a mandatory meeting would not change the overall time frame of the consultation period. It would also significantly improve dialogue between agencies and interested citizens since exchange of this type does not usually occur with the written comment-response procedure now in use. A scoping meeting would lead to a better understanding of the issues to be covered in the EIS which would help sharpen its focus.

Comments in opposition raised many legitimate concerns about the use of staff time and funds to conduct these meetings. Others questioned the benefit over the existing process that seems to work well much of the time. Some suggested that the scoping meetings be made optional.

Accordingly, we have changed our recommendation from a mandatory scoping meeting to an optional one. We recommend that the Council amend the EIS rules by inserting a section outlining an optional scoping meeting process which may be instituted at the discretion of the proposer.

Consultation Prior to EA

Consultation should take place prior to the preparation of an EA for applicant as well as agency actions, although we do not recommend that a specific time period be set aside. We have noted that provisions presently exist in the rules for agency actions requiring consultation with other affected agencies and citizens in the preparation of EAs. Agencies and citizens consulted prior to the preparation of an EA must be listed in the EA. Better review of EAs will encourage preparers to conduct more comprehensive consultation prior to producing their document.

Time Period

The 30 day consultation time period for EISs was judged to be adequate by most of the participants. The rules provide for a 30 day extension of the consultation period by the accepting authority or approving agency upon written request by the consulted party (section 11-200-15(b) EIS Rules). Thus, we do not recommend that the consultation period be extended.

Other Consultation Issues

We recommend that section 343-5(a) and 343-5(b) HRS be amended to include reference to a consultation process. We also recommend that section 343-6(a)8 HRS be amended to give the Council statutory authority to create a consultation process in the rules. Including the consultation process in the statutes would provide the specific statutory authority for requiring it in the rules. We also recommend the deletion of the waiver of the consultation period granted approving agencies or accepting authorities in section 11-200-15(a) of the EIS rules. Deleting this waiver is appropriate because only those actions having significant environmental impacts require the

preparation of an EIS. EISs are not triggered by actions that have only minor environmental concerns, thus such actions should be screened out during the EA stage. Therefore, there can be no EIS that contains only minor environmental concerns.

EIS Preparation

Introduction

Responsibility for preparing an EIS in the Hawaii state EIS system rests with the proposing agency for agency actions and with the applicant for private actions. In its placement of responsibility for preparing EISs on agency actions, Hawaii is consistent with NEPA and other comprehensive state EIS systems. However, Hawaii differs from NEPA and most other states in its placement of EIS responsibility for applicant actions. Under NEPA, approving agencies are responsible for preparing the EIS for a privately proposed action. They may, however, require that the applicant furnish environmental information to be used by the agency in preparing an environmental impact statement as long as the origin of such information is cited (40 CFR 1506.5). In practice, federal agencies may require an applicant to provide information that would essentially be the equivalent of preparing the EIS. However, the approving federal agency is responsible for the contents of the EIS once they accept and release the public version of the document.

Responsibility for the preparation of the EIS for private actions varies among the states with comprehensive EIS systems. Hawaii and Massachusetts require the applicant to prepare the EIS. In New York, North Carolina, Washington, and California the approving agency has the responsiblity for preparing the EIS, although they may charge the applicant a fee for the preparation or in some cases actually delegate preparation to the applicant.

The Municipal Code for Seattle, Washington for example, indicates that "the lead agency may have an EIS prepared by agency staff, an applicant or its agent, or by an outside consultant retained by either an applicant or the lead agency" (Seattle Municipal Code, 1988, section 25.05.420(B)). Thus, in practice, many states and municipalities can and do require the applicant to prepare the EIS.

EIS Preparation in Hawaii

The steps for preparing an EIS are broadly outlined in the statute in section 343-5(b) and (c) HRS. The specifics of preparing an EIS are detailed in subchapter 7 of the EIS Rules.

Actions which are subject to chapter 343 HRS and not otherwise exempt are assessed by the proposing agency for agency actions or by the approving agency for applicant actions, to determine if they may have significant effects. The determination is made on the basis of information gathered in a document called an EA. The outcome of the determination is listed in the Bulletin. If the action is judged to have minimal impact, a notice of a finding of no significant impact known as a "Negative Declaration" is listed for that action in the Bulletin. If the proposing agency or approving agency finds that the action may have a significant impact, a notice that an EIS must be prepared (called a "Preparation Notice") for the action is listed in the Bulletin.

The 30 day consultation period begins on the date the Preparation Notice is published in the Bulletin. After consultation, a Draft EIS is prepared by the action's proposer or his agent. A notice that a Draft EIS has been completed is listed in the Bulletin to inform the public of its availablity for review. The Draft EIS is available for public review for a total of 45 days after the date it is listed in the Bulletin. A Final EIS is prepared in which a response to each substantive comment received during the review period is included. The Final EIS is accepted by the Governor for all actions proposing the use of state lands or funds, by the appropriate mayor if the action involves only county land, or county funds, or by the approving agency if it was a private action. In the case that the EIS is not accepted, those areas of the Draft EIS that were found to be inadequate must be revised (unless the Draft EIS is withdrawn). After revisions, the Draft EIS can be resubmitted for public review. If the EIS is found to be acceptable then an acceptance notice is listed in the Bulletin.

One change to the EIS preparation procedure instituted by Act 187 (1987) was to increase the time period allowed for the review of the Draft EIS from 30 to 45 days. The review period will be dealt with in greater detail in a later section of this chapter.

Placement of Responsibility for EIS Preparation

Placement of the responsibility for EIS preparation is a major issue for discussion. Under the present Hawaii state EIS system, the proposer is responsible for the preparation of the EIS. The authors of the 1978 EIS study (Cox, et al., page 67) reported that "there are those who believe strongly that the proposer of a project, whether an agency or a private party, should not prepare the EIS for the project." Responses elicited to our questions dealing with EIS preparation indicate that similar concerns exist today.

Opinions vary in the EIS literature as to who should have the responsibility for preparing the EIS. Corwin (1975, pages 232-233) believes that EISs "tend to be most impartial when not prepared by the proponent" because when the proponents prepare the EIS, they "may consciously or unconsciously at best use the EIS as a promotional tool." Bardach and Pugliaresi (1977, page 33) believed that if an "EIS writer participates in designing a development project they might have a stake in getting it approved," however, they argued that more would be lost if the EIS preparer and project developer were separate. Ross (1987, page 142) unequivocally states that the "proponents should be clearly responsible for the EIS in order to demonstrate a commitment to its contents."

Cox et al. (1978) summarized the leading opposing opinions at that time on who should have the responsibility for preparing the EIS. The major argument against the proposer preparing the EIS is the recognition that he/she will, in all probability, have a strong bias toward the project and will tend to minimize the impacts presented in the EIS. Two major arguments were submitted in favor of allowing the proposer of a project to prepare the EIS:

1. The expense of preparing the EIS is borne by the project's principal beneficiary.
2. The placement of EIS preparation responsibility on the proposer of the action best promotes the intimate coupling of the consideration of environmental impacts and the development of project plans.

Discussion: Changes in the Responsiblity for EIS Preparation

The question of who should have the responsibility for preparing the EIS elicited a flood of comments from the interview participants. Respondents offered a number of suggestions on who should have the responsibility for preparing the EIS as well as who actually prepares the document. Their opinions fell into three categories:

1. retaining the status quo
2. agency responsibility
3. neutral third party preparers

Each is discussed in detail below.

Retaining the Status Quo

A majority of those interviewed said that the proposer must be responsible for EIS preparation, therefore, retaining the status quo would be the best course of action at the present. This position was justified by most respondents who stated that this was the most cost effective system. Furthermore, in the case of agency actions, the proposing agency could be in the best position to estimate the cost of meeting EIS requirements and could budget accordingly. In the case of private actions, developers would include EIS system costs as part of transaction costs and pass them on to the ultimate consumer/user of their developments.

Another major benefit to having the proponent of an action responsible for the EIS content is that EIS preparers can work with the design team (planners, economists, architects, engineers, etc.) to minimize environmental detriments. The design criteria and standards are also better known by the proponent's technical team. Proposers would also be better disposed to accept changes in design suggested in an EIS that they were responsible for preparing.

Another consideration was time. Most participants said that the EIS could be completed in a more timely manner if proposers were doing the EIS work. They argued that any delays in preparing the EIS would be the responsibility of the proposer and not a third party preparer.

Among participants who favored having the action's proposer be responsible for preparing the EIS, most recognized an inherent potential problem in that arrangement: critics will always claim that EISs prepared by the proposer of an action are self serving and biased. However, a thorough review by agencies and the public should

assure the adequacy and accuracy of the information contained in the document and help to counter any real or perceived bias. Thus, the rationale for maintaing the status quo includes many advantages and the major concern is addressed by ensuring that a strong and technically adequate review component is maintained.

Agency Responsibility

A number of the participants felt that preparing the EIS should be an agency responsibility for private as well as public actions. In the case of private actions, participants were of the opinion that government agencies would be more impartial preparers than an action's proponent. Furthermore, agencies have technical expertise in areas where they have jurisdiction and potential access, as needed, to other technical expertise from sister agencies. Proponents of total agency responsiblity pointed out that many other states, including California, New York, Washington and Minnesota, assign the responsibility for the preparation of the EIS to the lead agency. In some cases the lead agency can recover the costs by charging a fee to prepare the EIS. New York regulations, for example, require that when "an action subject to [the EIS law] involves an applicant, the lead agency may charge a fee to the applicant in order to recover the actual cost of preparing or reviewing the Draft EIS." (New York, SEQR Regulations, 1987). In other states, the agency directs the applicant to provide the information to be used in the EIS.

A potential impediment that might hinder an agency carrying out EIS responsibilities for private actions is a lack of access to a project's technical information. One solution suggested was to have the project description prepared by the proponent and turned over to the agency responsible for preparing the EIS. Some participants disagreed, stating that it would be in the best interest of applicants to cooperate with the lead agency to the fullest extent possible so as to minimize delays.

Opponents of the idea to charge agencies with the responsibility to prepare applicant action EISs pointed out that agencies do not have enough staff to do the review work required by the system in a timely manner. To ask them to do more would tax already overburdened agencies. Others suggested that the agencies might not have the technical expertise necessary to prepare meaningful documents. For example, it was argued that in the case of highly technical projects, non-engineers in an environmental agency having no familiarity with the project or with engineering processes could not develop a technically reliable document or make meaningful suggestions for alternative technical schemes to mitigate impacts.

Opponents also pointed out that this solution addresses only applicant actions, yet one-half of all EISs are for actions proposed by agencies, which would continue to prepare their own EISs. Those who opposed agency responsibility and did not favor the status quo argued that EISs should be prepared by a neutral third party.

Neutral Third Party Preparers

Six participants suggested that EISs be prepared by neutral third parties. The neutral party could be a government agency created for the express purpose of preparing EISs or, more commonly, private consultant firms that specialize in the preparation of environmental reports. Payment for the third party EIS would come from monies paid into a revolving fund account by the proposers or from other similar transfer payments. Consultant firms could be hired by an agency to do the preparation and could either be chosen from a list of qualified consultants or be mutually agreed upon by the proposer and approving agency for private actions.

Two key features of this suggestion were that consultant firms would work for the agency and not for the proposer and that the firms could be screened and found to be qualified prior to being permitted to prepare EISs. Opponents of this idea questioned how the firms would be screened and what criteria would be used to determine their level of competence. Others thought that the decision to include firms on a qualifying list may be subject to political manipulation.

A number of participants commented that EISs are commonly prepared by third parties such as environmental consulting firms. They pointed out that most EISs and many EAs are prepared by private consulting firms that are not the proposers of the action and in many cases do not have a direct investment in an action's approval even though they work as representatives of proposing agencies or private developers. This is especially true in recent years, as noted in a comparison of the numbers of EISs prepared by consultants vs. proposers in 1976-77 and 1989-90. In the earlier two year period, (January 1976 through December 1977), 69 percent of EISs were prepared by consultants and 31 percent by the project proposers. In the later two year period, (January 1989 to December 1990), 89.5 percent of all EISs were prepared by private consultants while only 10.5 percent were prepared directly by the proposer (Table 9).

Table 9. A comparison of the number of EISs prepared by consultants vs. project proposers over two time periods for agency and applicant actions

	Agency Actions		Applicant Actions	
	Consultant	Agency	Consultant	Applicant
1976	13	7	6	0
1977	17	10	5	1
Total	30	17	11	1
1989	9	4	14	1
1990	14	1	14	0
Total	23	5	28	1

According to the reviewers, the use of consultants is not inherently positive or negative. Rather, it reflects an attitude that agencies have neither the time nor the manpower to prepare EISs for most of the projects they propose, and that private developers either lack the specialized skills required to prepare adequate EISs, or find it too expensive to hire their own skilled staff for a single project. According to a number of people interviewed, the use of consultants can be very beneficial to the EIS process. Over time, consulting firms have become familiar with the type of information an agency needs to make informed decisions. They understand the EIS process and can save their clients valuable time by guiding them through the various steps. Furthermore, the use of consultants frees the agency's staff to concentrate on other matters. Consultants can also offer an independent appraisal of the client's project with suggestions for change.

As mentioned earlier, many of the participants pointed out that under the Hawaii State EIS system, consultants represent the proposer and cannot be considered disinterested neutral parties. Some firms are involved in the design and/or engineering of the project as well as assisting their client in meeting environmental requirements, and thus have much to gain by quick approval of the action. One suggestion offered earlier in this section was to separate the consultant preparing the EIS from the actions's proposer by various means. While this might assure an unbiased EIS it does not address the issue of competence. Several participants felt that unqualified consultants can and do enter the EIS preparation business. The use of consultants has the potential to improve the quality of EISs or to degrade it. The key to making consultant contributions beneficial is to assure that they are competent and exercise unbiased judgement.

Licensing of Environmental Consultants

Another suggestion that addressed both bias and competence was the licensing of EIS preparers. The following discussion applies to licensing of preparers of both EAs and other EIS-like documents.

Proponents of licensing assert that it would improve the EIS system by assuring that preparers of EISs and related environmental documents had sufficient technical competence to adequately assess the environmental effect of certain projects. The level of proficiency required to obtain a license would be analogous to that required of a licensed professional engineer. If an appropriate test of competency could be devised, this solution would provide a method for selecting qualified consultants to prepare EAs and EISs. It could also have important positive effects relating to the problem of bias because licensing could encourage strict adherence to ethical standards.

Despite the positive aspects of licensing noted in the preceeding paragraph, licensing was opposed by many of the people interviewed. Most said it would be difficult if not impossible to devise a test of competency that would fairly and accurately determine the basis for granting a license. Others said that the granting of a license would infer a level of expertise which has yet to be defined particularly in light of the multitude of disciplines involved. Other participants wondered if licensing would imply that the practitioners could prepare EAs and EISs for all types of actions or if they would they be limited to a particular specialty. Others questioned whether agency personnel

preparing EAs and EISs would also be required to be licensed. Several reviewers added that regardless of licensing requirements, project proposers should not be barred from preparing their own EAs and EISs if they so wish.

Discussion: Improving the Quality of EIS Documents

Throughout the interview process it became evident that to many participants the important question was not who should prepare the EIS but how to ensure quality EISs. A representative of one county agency summed it up best when he said, "it is important to recognize what one is trying to accomplish. If it is improving the contents of the documents, then there are several options that may be implemented that do not require amendments to the statute or rules." The participants offered the following suggestions for improvements while retaining the present practices for EIS preparation.

Review of EIS Documents

To a number of agency related participants, consulting firms, and citizen groups, the most important and effective method of improving the quality of EIS documents is to improve the review process. Representatives of one agency stressed that an EIS should not be accepted until the review comments are answered completely and satisfactorily. However, another participant said that agencies do not have enough time to adequately review and comment on EISs, resulting in a tendency to participate in the review process at a minimal level. Many participants felt that motivating agencies to spend more time and resources reviewing EISs would be more beneficial than making changes in the responsiblity for preparation. Many participants stated that OEQC should be more active in reviewing EISs to screen for obvious bias. According to one official, OEQC could significantly improve the quality of EISs by setting standards for EISs and recommending rejection of those that do not meet those standards.

EIS Guidelines

NEPA guidelines and those prepared for other states such as California (California, Office of Planning, 1986) offer a detailed outline for preparing EISs. A number of respondents suggested that the quality of EAs and EISs could be improved if a set of detailed guideline for EA/EIS preparation were prepared and distributed to agencies, consultants, citizen groups, and developers. The guidelines would outline the steps for preparing the EA and EIS documents and would address issues such as the responsibilities of the lead agency and review agencies; how to address cumulative impacts; scoping the issues; stylistic considerations; and examples of criteria for significance. Several participants suggested that preparing the guidelines would be an appropriate task for the OEQC or the Council.

Post EA/EIS Audits

Another way to improve the content of both EA and EIS documents would be to conduct post EA/EIS audits of selected documents. Periodically, past EA/EISs could be reviewed and a comparision made between the predicted impacts and actual impacts, and the predicted effectiveness of mitigative measures and their actual effectiveness. The experience gained from conducting these audits would facilitate the evaluation and forecasting of the various predictive methods and mitigative measures in order to assess their utility. Over time, EAs and EISs could be improved by employing methodology or measures that have proven to be effective.

Education

A small number of respondents felt that more workshops and other educational opportunities should be available to agency staff with responsiblity for EIS preparation and/or review as well as to interested members of the public that deal with the process. Those calling for more educational opportunities felt that bias in the EIS system could be reduced if preparers and reviewers were better informed about the importance of EISs and if they were given better models to work with.

Improvements in EIS Preparation

EIS Preparation Responsibility

We agree with the majority opinion that the responsibility for EIS preparation should be given to the proposer of the action. However, most thought that more could be done to encourage the preparation of higher quality EISs. We also agree with this opinion. We recommend that agencies become more involved in the review of EISs and that an EIS guidebook be prepared. We also recommend that the OEQC consider funding post EA/EIS audits to evaluate current and forecast methodologies employed in EAs and EISs. We recommend that the OEQC and the Council develop more educational materials and provide more assistance to agencies and the public in participating in EIS reviews. Finally, we address the issue of licensing Environmental Consultants.

Providing a Better Review

The most direct means of improving the quality of EISs is to ensure that each document receives a thorough review from all government agencies as well as interested parties among the general public. A large reservoir of technical expertise is found in government agencies. Tapping this source of expertise to review the contents of EIS documents is one way to assure a good review. Several reviewers stated it was the duty of cooperating state agencies to provide comments in a timely manner on EAs and EISs prepared by others. Each agency should have a budget and staff person responsible for this function. We concur with this opinion.

One reviewer pointed out that there may be a problem with finding adequate resources to fund EIS review activities. We agree that allocating either scarce fiscal or human resources is a problem with any endeavor. However, if the integrity of the EIS system is important to government agencies, they will allocate appropriate resources to review activities.

Several participants commented that OEQC had previously been more involved in the review of EIS documents and had encouraged participation by other state agencies in the review process. These participants said that OEQC should resume this function. We agree that OEQC should become an integral part of the review process. They could, for example, review EIS documents and flag issues to be reviewed by line agencies as well as serve to coordinate the responses of several agencies on a single EIS document. Through this "flagging" approach, they could carry out their review tasks with minimal in-house technical expertise. One participant commented that if OEQC is not already serving in this capacity, then they are not carrying out their functions as mandated by statute and administrative rule. However, we note that OEQC is only generally and not specifically required by statute or rule to participate in the review of EIS documents. We recommend that chapter 341 HRS and chapter 343 HRS be amended to give OEQC the responsibility for reviewing all EIS documents for adequacy and monitoring other agencies' participation in the review process.

Finally, we note the importance of the public's role in reviewing EIS documents. Many individuals have specialized expertise or knowledge acquired through a lifetime of experience or employment. It is as important to consider the viewpoints of these individuals as it is to consider those made by agencies. We suggest that the OEQC monitor the various agencies' responses to public comments to ensure that they are given appropriate consideration.

EIS Guidebook

Many participants recommended that a detailed set ofguidelines for EAs and EISs be developed by OEQC for use by EIS preparers and reviewers. This guidebook could be incorporated into an expanded version of the EIS rules or published under separate cover. We favor the latter because a separate guidebook is more easily updated. If such a guidebook were to be developed, we suggest that the following topics be included:

1. detailed explanations and examples of the EIS statute and rules
2. reasons why particular steps are required
3. roles that agencies and citizen groups play in the EIS process
4. explanations and examples of important concepts such as significant effects, cumulative impacts, and mitigation

We recommend that section 343-6 HRS be amended to give the Council the responsibility for the publication and periodic update of an EIS guidebook.

Post EA/EIS Audits

We recommend that the OEQC undertake periodic studies to evaluate the reliablity of forecasts made in previously prepared EAs and EISs. An examination of past EIS system documents will lead to better predictive capabilities in future documents. OEQC has the authority to conduct or to arrange for conducting these audits under existing statutes.

Increased Educational Opportunities

Almost all participants favored increased educational opportunities for all those involved with the EIS system. Most said they would participate in workshops, seminars or training opportunities if they were offered. Most felt that educational opportunities must be made available to interested members of the general public so that they might have a better understanding of the EIS process. We suggest that the OEQC take the lead in providing these types of educational opportunities.

Licensing Environmental Consultants

Licensing is an intriguing idea that deserves greater consideration. We agree that it would be difficult to determine the basis for licensing. We also agree that licensing should not be made a prerequiste for preparing EAs or EISs. However, we see nothing wrong with encouraging professionalism among those involved in the preparation of EIS system or related documents. Certification through some form of professional organization can achieve many of the benefits of licensing without the detriments. Professional certification is one way of encouraging self-policing of the industry.

Agency Responsibility for EIS Preparation

Shifting the responsibility for EIS preparation from the proposer to an agency will have limited impact. In the case of agency actions, the proposing agency would retain EIS preparation responsibility. A shift in EIS preparation responsibility will impact only applicant actions.

Shifting the responsibility to the approving agency for applicant actions may on the surface change the locus of responsibility from the proponent to a neutral party but may in fact have no real effect. Agencies would continue to require the applicant to furnish the information needed for the EIS. If the approving agency attempted to prepare an EIS without the participation of the applicant it would disrupt the intimate coupling between the consideration of project impacts and the development of project plans.

The proposer of the project is in the best position to adopt changes based on information in the EIS. It is the quality of that information that is of concern. A strong review component in the EIS sytem coupled with the willingness of approving agencies to reject biased or self serving EISs is the best way to insure quality information. Thus we recommend no changes to the placement of EIS responsibility.

Neutral Third Party

We do not recommend this alternative. No single agency can have the expertise necessary to prepare EISs for all possible projects. We can think of no system that would fairly distribute EIS preparation responsibility among qualified consultants or for that matter what would constitute a "qualified consultant." The present system, with the safeguard of a strong review component, functions well and should be maintained.

Review Period

Introduction

In the previous section the importance of the review period to the EIS process was discussed. In the Hawaii EIS system, if an EIS is required the proposer of the action is responsible for the preparation. Without an independent review of the EIS document the temptation would be strong to produce a self serving promotional EIS. Thus, in the Hawaii system a comprehensive review is the counterbalance to the biases that may appear in an EIS. The state EIS statute allows for a 45 day review period for both agency and applicant action EISs.

Background

Original Provisions

Under Act 246 (1974), no time limit was set for the review of agency actions. In the case of applicant actions a total of 60 days from the time a Draft EIS was submitted was set aside for completion of the document, including public review, response to review questions, and the determination of acceptability. The EQC regulations, however, provided a timetable for both agency and applicant actions. It allowed for a 30 day public and agency review period followed by a 14 day response period. For applicant actions, the remaining 16 days of the 60 day limit were to be used for making a determination on the adequacy of the EIS. The 30 day review period began when a notice of the availability of the Draft EIS was listed in the Bulletin, and the 14 day response period began at the conclusion of the review period. No time limit was set for accepting agency EISs.

Amendments to the Review Section

Act 197 (1979)

The section of the statute dealing with the review period was first amended by Act 197 in 1979. The amendment added to section 343-5 (c) HRS an optional 30 day extension of the 60 day review-determination period for applicant actions at the discretion of the applicant. The change was based on a recommendation made in the EIS study (Cox et al., 1978). The rationale for providing the extension was that in some cases applicants felt they needed more than the 14 days allowed to respond to comments received during the review period. Providing the extension at the option of the applicant guarded against its potential use by agencies as a punative measure.

Act 187 (1987)

Act 187 (1987) provided a comprehensive overhaul of section 343-5 (b) and (c) concerning the review of Draft EISs. The amendment created a 45 day review period for agency and applicant actions; changed the acceptance period for applicant actions from 60 days from the receipt of the Draft EIS to 30 days from the receipt of the Final EIS; and cut the extension that an applicant could request from 30 days to 15 days. The amendment gave statutory authority to the practice of limiting the review of agency EISs. The 45 day review period created by this legislation matched the time period allotted by NEPA for federal actions, and enhanced the opportunity to file joint federal-state EISs for overlapping requirements.

Discussion: EIS Review Time Period

The importance of the review of EISs was discussed in detail in the section on EIS preparation and several suggestions for improvements were offered. In addition to participation in the review process, the primary concern with EIS review is the time length alloted.

One of the questions that was asked of the interview participants was, "Is there adequate time set aside for the review of EISs?" The overwhelming answer was "yes." Consultants, agency personnel, academics, and most representatives of public interest groups found the time adequate. Several respondents mentioned that the time period favored residents of Oahu over neighbor islanders but this was not a major issue. Several people mentioned that the review period was adequate as long as notice of the availability of the document, (namely, the Bulletin), was received in a timely manner.

Suggestions were made to extend the review period from the current 45 day to 60 days. One rationale for the increase was the difficulty volunteer groups had in finding the right people to review EIS documents. Another was the work load which prevented some agency personnel from reviewing EISs within the current time period. A third suggestion was to have a tiered approach, where more complex EISs would be assigned a longer review period than the current 45 days, the rationale being that EISs for large projects or for those in extremely sensitive areas may require more time to be adequately reviewed.

Time periods in other states varied. Minnesota allows for a 10 day period following a public review meeting held no earlier than 15 days after the EIS is filed (Minnesota EQB 4410.2600, 1989), while California allows 45 days for the review (California CEQA Guidelines 15205). None of the states surveyed allowed more than 45 days.

Improvement of the EIS Review Time Periods

Based on our experience and that of the interview respondents the 45 day review period seems adequate for most EISs. However, as several people noted, some EISs are large, technically complex documents that may require more time to review. In these cases, we recommend that a provision be added to the statute to allow an extension of the review period. The extension could be granted at the discretion of the proposing agency for public actions or of the approving agency for private actions after receiving a written request for the extension. We do not know the ideal length of time for the extension, but we suggest that an additional 15 days be considered.

We also note that the 45 day review period is the same for both the state and NEPA EIS systems. Requirements that encourage conformance between the state and NEPA EIS systems are advantageous because they allow for more opportunities to prepare joint EISs when actions are subject to both state and federal EIS statutes.

Discrepancies Between the Statutes and EIS Rules: Time Periods

The lack of conformance of the EIS rules to the statute is a problem. For example, the review section of the statute was amended in 1987 while the rules have not been updated since 1985. The potential for confusion is illustrated in the discrepancy between the time periods listed for review in the statute and those listed in the rules. The rules (section 11-200-22(b)(c) EIS Rules) call for a 30 day review period for the Draft EIS followed by a 14 day period to respond to the review comments. The statute (343-5(b) and (c) HRS) allows for a 45 day review period for the Draft EIS and contains no time limit on the response. We recommend that the Council move quickly to update the rules to reflect the language in Chapter 343-5(b) and (c) HRS.

Acceptance Decisions

Introduction

The final step in the state EIS process is the determination of whether an EIS is acceptable. An acceptable EIS is a condition precedent to approval of the project and implementation of a proposed action but is not in itself an approval of the action. Thus, acceptance is a necessary but not the only condition for implementation of an action. An acceptable EIS is one that "represents an informational instrument which fulfills the definition of an EIS and adequately discloses and describes all identifiable environmental impacts and satisfactorily responds to review comments" (section 11-200-23 (a) EIS Rules).

Acceptance Criteria

There are three criteria that must be satisfied before a document is deemed to be acceptable (section 11-200-23 (b) EIS Rules):

1. Procedures for assessment, consultation process, a review responsive to comments, and the preparation and submission of the statement, have all been completed satisfactorily as specified in this chapter.
2. Content requirements described in this chapter have been satisfied.
3. Comments submitted during the review process have received responses satisfactory to the accepting authority, and have been incorporated or appended, at the discretion of the applicant or proposing agency, to the statement.

For EISs prepared for agency actions that propose the use of state lands or funds, the accepting authority is the governor. For actions that solely utilize county lands or funds, the accepting authority is the mayor of that county (section 343-5(b) HRS). For EISs prepared for applicant actions, the accepting authority is the agency that has received the request for approval of the action (section 343-5(c) HRS). There is no time limit for accepting an

agency prepared Final EIS. However, a 30 day time limit is imposed on the approving agency for the acceptance of an applicant prepared Final EIS. This period may be extended by 15 days at the request of the applicant. The governor and mayors may delegate the authority to accept agency EISs to an authorized representative (section 11-200-23(c) EIS Rules).

Once the determination is made by the accepting authority or approving agency, both the action's proposer and OEQC must be notified of the decision. In the case of non-acceptance of the Final EIS, the notice to the proposer and OEQC must contain the reasons for non-acceptance. OEQC is directed to publish the results of the determination in the Bulletin (section 343-5(b) and (c) HRS). Within 60 days after the notice of non-acceptance is published in the Bulletin, an applicant may appeal the decision to the Council. The Council has 30 days to consider the appeal and render a decision on the acceptability (section 343-5(c) HRS). No other appeal is provided for.

EISs that are determined to be non-acceptable can be revised by the proposer and resubmitted to OEQC and treated in much the same manner as a Draft EIS. A notice of the availability for review of the revised EIS must be listed in the Bulletin. It must then be made available for public review and finally go through the determination process (section 11-200-23(g) EIS Rules).

A seldom used option allows both agencies and applicants to request that OEQC make a recommendation as to the acceptability of the Final EIS (section 343-5(b) and (c) HRS). The recommendation, if OEQC decides to make one, is not binding on the accepting authority or approving agency.

Discussion: Acceptance Issues

Our participants were asked to comment on the advisability of initiating an administrative appeals procedure with respect to acceptance determinations. However, several other issues were brought to our attention during the interview sessions including the confusion between EIS acceptance versus project approval and the possible institution of a review period for Final EISs. Each is discussed in detail below.

Administrative Appeals of Determination Decisions

The acceptance of a Final EIS is the last step in the state EIS process. The determination that an EIS is acceptable by the accepting authority or approving agency is considered final, subject only to judicial review. The determination by the accepting authority not to accept an agency EIS is also final, subject to judicial review. However, the determination by an approving authority that an applicant EIS is not acceptable may be appealed to the Council. Our participants questioned why appeals to the Council in the case of favorable acceptance determination are not allowed.

Many of the same arguments that were used in support of or against appeals in the determination of whether an EIS is required have been addressed in part 4 of this report and apply similarly to administrative appeals of the acceptance determination. The reader is referred to Appendix H for an in-depth discussion on the history of appeals relative to the Hawaii state EIS system and to the appropriate section in part 4 of this report.

However, the issue of appeals of the acceptance determination differs from the issue of appeals as to whether an EIS is required in two important features. First, as we have mentioned, section 343-5(c) HRS provides for an administrative appeal to the Council for determinations that an applicant's EIS is not acceptable. Second, if an appeals process were instituted for agency actions, an administrative appeals body could be put in the position of having to overturn the governor's or a mayor's acceptance determination since they are the accepting authorities for agency EISs.

Administrative appeal proponents pointed out that the EIS process should treat those who disagree with a determination in the same manner, regardless of whether the project is an applicant or agency action. If an applicant had the right to appeal, so should others. They also felt that the threat of appeals alone would create more pressure to prepare higher quality Final EISs.

Opponents asked who would hear the administrative appeal. If it were a state agency would its jurisdiction include county projects, which are usually approved by the mayors, or would there be an appeals body at the county level as well as at the state level? The idea of overturning a governor's or mayor's decision was also discussed by opponents. Most could not believe that a government agency would be likely to do this, or that the governor would even allow such a process to exist.

Many participants commented on the inappropriateness of allowing applicants to appeal a non-acceptance determination, rather than discussing the appropriateness of instituting a more encompassing appeal procedure for determinations of acceptance. Their solution was to delete the applicants' right to an appeal.

EIS Acceptance Versus Project Approval

No other part of the EIS system is as misunderstood as the EIS acceptance decision. Many equate EIS acceptance with project approval, though the definition of acceptance states that it applies only to a document and not to the project. Thus, it is conceivable to write an acceptable EIS for an environmentally questionable project. The effect of the acceptance of an EIS is clearly that an agency is free to proceed, in consideration of the environmental impacts described, with making the decision as to whether the action should be undertaken or approved.

Though the EIS is clearly an information disclosure document, several participants pointed out that an acceptable EIS is viewed by the public and many planning officials as being synonymous with project approval. Part of the misunderstanding is due to the political nature of the acceptance determination. The determination of whether an EIS is acceptable is made by the governor or the mayor for agency actions. Neither the governor nor the mayor actually reviews the EIS documents. They delegate that task to an appropriate agency for its review and recommendations. Thus, the acceptance determination is, in reality, determined by an agency for both applicant and agency actions. However, having the chief executive officer of the state or counties involved in the final step of the EIS process conveys the idea to some that the project has been approved.

Another part of the misunderstanding between EIS acceptance and project approval may be due to the misconception on the part of some of the public as to the role of the EIS system in environmental management. It is easy to imagine that with all the types of permits required, people would confuse the EIS disclosure process as a permit process.

Review of the Final EIS

Comments received during the 45 day review period are frequently answered in an appendix to the Final EIS. Those commenting on EISs may not see the responses to their comments until after the Final EIS has been filed with the OEQC. If they disagree with the response, the only recourse is to request the accepting authority or approving agency to withhold acceptance of the document. However, in practice, Final EISs are almost always accepted. Once the acceptance determination has been made there is no recourse for corrections. Several participants felt that reviewers should see the response to their comments prior to the acceptance determination. They suggested that a period be set aside after completion of the Final EIS and before the acceptance determination is made to allow for a review of the comments.

Other states have mandatory waiting periods before an action may proceed from acceptance of a Final EIS to the next step in the implementation process. The Washington State EIS system, for example, allows a seven day waiting period before any permit or approval can be issued (Washington 197-11-460 SEPA Rules). Opponents to permitting a review of the Final EIS or the institution of a waiting period point out that it would unduly delay the permit process. Many asked how many iterations would be needed before all comments could be answered satisfactorily. Most felt that an open-ended review period could last for a very long time for controversial projects, such as the proposed H-3 highway construction. In the case of private actions, the approving agency has 30 days in which to make a determination of acceptability, which some argued already constitutes a long waiting period. There are no time limits set on acceptance of agency EISs but rarely are their EISs accepted before 30 days.

Improvements to the Acceptance Process

The acceptance determination is the final step in the EIS process and provides the point from which the implementation or permit process may proceed. The acceptance determination requires an evaluation of both the technical validity of the document as well as a subjective judgement of the adequacy of the information contained. The acceptance determination process might be improved by the development of guidelines (by OEQC or the Council) on what constitutes an adequate level of information to assure an acceptable document.

Review of the Final EIS

We do not believe that an appeals process is necessary or actually appropriate for disagreements that arise over the acceptability of the Final EIS. At this stage in the EIS process, disagreements should only arise over the adequacy of the responses to the review comments. Other issues such as subjects covered, appropriateness of methodologies or conclusions should have been addressed in the review of the Draft EIS.

The present system does not allow for adequate review of the responses to comments submitted on the Draft EIS by the reviewers. The EIS system, as we have said before, was instituted to bring about a full disclosure of the environmental impacts of a project. Full disclosure means that review comments are answered satisfactorily. We recommend a waiting period be instituted to allow those who have made comments on the draft document to review the responses to the comments. We recommend that a 30 day waiting period be instituted before a project can commence, beginning from the notice of the public release of the Final EIS in the Bulletin. This would be equivalent to the provisions in NEPA regulations (40 CFR 1506.10). During this period, reviewers may call upon the preparer, accepting authority, or approving agency to seek clarification of the response to their comments.

If the reviewer fails to receive an adequate response to his/her comments and if other methods for appeal such as mediation are unavailable or have been exhausted, we recommend that a procedure be established to allow the matter to be referred to the Council. We recommend a state equivalent to the "Referral" process in the federal system as outlined in the CEQ regulations (40 CFR 1504). The Referral process is invoked by participating agencies if the lead agency cannot respond satisfactorily to substantive review comments.

Administrative Appeals

We do not recommend the institution of an administrative appeal process for determinations that an EIS is acceptable. We feel that disagreements between the accepting authority/approving agency and other agencies or interested parties over the acceptability of an EIS can be better addressed through the use of a review period for the Final EIS.

As with our earlier recommendation on administrative appeals of whether an EIS is required, we believe that disputes over acceptance determinations may be resolved through mediation programs, like that of the Alternate Dispute Resolution program in the judiciary. We suggest that the use of such a program be recommended in the rules and tried for a period of perhaps 3 years.

We note that as long as the accepting authority continues to be the governor or mayor that an administrative appeals agency, regardless of whoever may be delegated with the responsibility, will find it difficult to overturn determinations made by an accepting authority. We also recommend the deletion of the appeal to the Council for the non-acceptance of applicant EISs. We believe that all final EIS should be subject to review and that applicants should not be given the option to appeal the acceptance determined.

EIS Acceptance Versus Project Approval

The concepts of EIS acceptance and project approval must remain separate and should not be confused with one another. The EIS process is technical in nature and the determination that an EIS is acceptable should be made on technical grounds. Having the chief executives of the state and county participate to an extent in some determination may blur the distinction between acceptance and approval. We note that for applicant actions the approving agency makes the determination of acceptability. We also note that in the case of agency actions that agencies designated by the governor or mayor actually make the recommendation of EIS acceptability. We recommend that the section 343-5(b) HRS be revised to allow a designated agency to make the acceptance determination for agency EISs and that reference to the governor or mayor as the accepting authority be deleted.

PART 6: OTHER RELEVANT ISSUES

Introduction

In addition to discussing issues related to the management and procedural aspects of the EIS system, a number of other relevant issues were covered in the interview sessions. Four were of particular interest.

Issues from the original list of questions (see Appendix B):

1. limitations of judicial proceedings
2. use of mitigative measures identified in the EIS document

Issues suggested by participants:

3. discussion of cumulative impacts in the EIS
4. time limits on the acceptability of a Final EIS

Limitations of Judicial Proceedings

Introduction

The EIS statute sets limitations on three types of legal actions that may be brought by aggrieved parties. The limitations listed in chapter 343-7 HRS apply to the time frame for initiating judicial appeals and those of standing to bring suit under this chapter. The subjects of the limitations for judicial proceedings are:

1. Lack of assessment required under section 343-5 HRS for a proposed action or lack of a formal determination by an agency on whether a statement is required shall be initiated within 120 days of the agency's decision to carry out or approve the action, or within 120 days after the proposed action is started.
2. The determination of whether an EIS statement is required shall be initiated within 60 days with the Council and the applicant being judged aggrieved and others by court action being judged aggrieved.
3. The acceptance of an EIS required under section 343-5 HRS shall be initiated within 60 days with the Council, agencies and persons who provided written comments during the designated review period being judged aggrieved.

This section has been revised twice since 1974. The revisions made by Act 197 in 1979 decreased the number of days from 180 to 120 for judicial proceedings to be initiated for lack of assessment or lack of a formal determination. It gave the Environmental Quality Commission automatic standing in all three types of actions; standing to agencies in the case of a lack of assessment; and standing to applicants in the determination of whether a statement is required. Act 140 (1983) subsequently changed all references to the Commission to the Council in order to reflect the dissolution of the Environmental Quality Commission.

Discussion: Limitations of Judicial Proceedings

The 1978 EIS study noted that legal actions brought under the provision of chapter 343 HRS have been very infrequent. This trend has continued to the present with few cases being brought to court. One possible explanation is that the limitation placed on judicial proceedings has made it difficult to initiate court actions. A part of each interview session was devoted to asking people's opinions on whether the prescribed limitations were too restrictive.

The surprising answer was that most people do not consider the limitations placed on standing and timing to be the major cause of the low number of court challenges. Most considered that cost and the difficulty in getting the courts to overturn agencies' decisions to be the major factors limiting the number of court cases. One respondent thought that if one could afford a law suit then time would not be a factor. When asked if time limits should be abolished an overwhelming majority favored no change. Most agency representatives and private consultants felt that the 120 and 60 day limits were reasonable, allowing time to initiate judicial proceedings but not creating any undue delay in getting a project underway.

Dissent from the majority opinion was expressed mainly by members of citizen groups who said that the time limits should, in most cases, be lengthened. However, several expressed the opinion that an increase in the time limit would be tactical, allowing more time for the private citizen or a non-governmental group to encourage and negotiate with an agency or developer to file the proper documentation.

Discussion: Time Limits and Administrative Appeals

Several suggestions were offered for administrative appeals of determinations on whether an EIS is required or is acceptable. These suggestions called for a limited time to initiate these appeals and a corresponding reduction in the number of days in which to initiate judicial proceedings, so as not to lengthen the overall time for legal action. These suggestions were based on the reasoning that an administrative appeals process would be sufficient to solve most disagreements with the determination decisions, with judicial appeals less likely to occur. If a judicial appeal is initiated, most of the information gathered for the administrative appeal would be useful for bringing legal proceedings.

Similar recommendations were made in the 1978 EIS study. In the case of an administrative appeal that required more than 30 days to complete, "the time limit for initiating a judicial appeal might appropriately be limited to 30 days following the decision on the [administrative] appeal" (Cox, et al., 1978, p. 97). By reducing the time limit for judicial appeals to 30 days and concomitantly instituting an administrative appeal process limited to 30 days, the time period for appeals would remain approximately the same as now set aside for judicial appeals. In some cases, if the administrative appeals body took more than 30 days to hear the appeal and render a decision, the total number of days from the time a determination is made until the time limit expired for judicial proceedings would be greater than the 60 days now set aside.

Improvements to the Limitation of Actions

Limits on standing and the time allowed to initiate judicial proceedings are not perceived as the primary reasons for the small number of lawsuits brought forth under chapter 343. Other factors such as cost and the difficulty in getting the courts to overturn agencies' decisions were seen as being more important reasons for the small number of appeals. Many thought that the time limits were reasonable. Several people pointed out that the time periods to initiate judicial proceedings are viewed as waiting periods by proposers and lengthening them would cause delays.

A number of participants suggested that an administrative appeals process should be instituted to correct perceived deficiencies in the determination of some EAs and final EISs. This would provide an avenue to question agency decisions without the expense and time commitment needed to initiate judicial proceedings. To offset potential resistance caused by lengthening the EIS process, proponents of an administrative appeals have suggested a decrease in the time limits for judicial proceedings relative to the time frame for appeals.

We do not concur with the suggestion to institute a limited administrative appeals process at this time. However, if an administrative appeal is instituted, the time limit for any subsequent judicial appeal should not be less than 30 days, regardless of the length of time needed to hear the administrative appeal. Decreasing to 30 days the time allotted for judicial appeals of determination decisions should leave sufficient time to file a lawsuit since the information required for a judicial appeal would likely be similar to that used in the administrative appeal.

We recommend that the 120 day limit for appeals regarding the lack of an assessment remain.

Mitigative Measures

Introduction

The consideration of mitigative measures is not a procedural aspect of the EIS system but a content requirement of the EIS document. However, their identification and eventual implementation is an important outcome of the EIS process because mitigative measures can be used to eliminate or reduce potential environmental impacts. Identifying and discussing mitigative measures is a requirement of both the EA and EIS (Section 11-200-10(7) and 11-200-17(m)). The importance of attempting mitigation is that it may make an unacceptable

project acceptable by protecting some aspect of the environment that might otherwise have been destroyed, or by compensating those that might otherwise suffer undue negative effects of the action.

Mitigative measures are only useful if they are realistic and are eventually implemented. Both of these aspects are important. If the measures identified are not realistic they will not accomplish their purpose. If they are not implemented then it is certain they will not accomplish anything. We asked the interview participants to comment on both of these aspects.

Discussion: Mitigative Measures

Realistic Mitigative Measures

Many of the mitigative measures listed in EAs and EISs are required by statutes, regulations, or ordinances. For example, mitigative measures protecting historic sites are mandated by chapter 6E HRS and the appropriate administrative rules. The likelihood that these mitigative measures will be successful is thought to be very good, therefore their implementation is mandated. These measures are listed to confirm that the proposer recognizes the necessity of their implementation.

Yet another type of mitigative measure is one that has been shown by experience to be highly effective. For example, mitigation of traffic congestion might be addressed by expansion in the number of road lanes, a reconfiguration of access ramps, or special traffic control signal coordination. These measures are not mandated by law but have been demonstrated to be effective in eliminating or reducing negative impacts. Other mitigative measures are highly speculative. The use of van pools to reduce traffic congestion caused by residential development in high density areas, for example, has not proven to be significantly effective in Hawaii. Generally, the more speculative the method the less realistic is the likelihood that it will succeed. Unfortunately, unsuccessful mitigation measures do more than just fail to protect some aspect of the environment, they contribute to or cause the making of poor decisions. This defeats one of the underlying principals of the EIS system, the provision of better information for the purpose of making better decisions.

On the other hand, the institution of mitigative measures should not be rejected based on lack of thorough testing. New and innovative approaches to mitigation may work as well or better than established methods. A judgement must be made by reviewers as to how likely it will be that the proposed method will accomplish its intended task. If it is deemed likely to fail, then the proposer should substitute another method or admit that the impact cannot be mitigated.

Many participants were of the opinion that determining realism among proposed mitigative measures requires considerable judgement. Most did not want to deny the implementation of new or unfamiliar methods, unless they seemed inappropriate or inconceivable. They said that there should be no penalty for the institution of methods that proved to be unsuccessful. Most reasoned that it would be difficult to determine whether the proposer was to blame for any failures or other intervening factors over which the proposer had no control. Other participants disagreed, saying that the proposer should be held responsible for failed mitigative measures. In the actions proposed by agencies, the state or county government is responsible for dealing with the unmitigated impacts. Participants stated that private developers should have the same responsibility and should be made responsible by having to post a bond to cover the cost of mitigation.

Implementation of Mitigative Measures

Regardless of how effective a measure may be in mitigating a particular impact, it will have no effect if it is not implemented. Chapter 343 HRS and the EIS rules require only that possible mitigative measures be identified. No mention is made of a mechanism to require implementation of these mitigative measures. Each of the interview participants was asked if the EIS statute should contain language to make the implementation of mitigative measures mandatory.

The participants responses were mixed. Many people were of the opinion that because EAs and EISs were primarily disclosure documents that disclosing all possible mitigative measures should be required in the Draft EIS. The Final EIS should augment the Draft document by focusing on the specific measures that are to be pursued, taking into considered mitigation an evaluation of the comments received during the review period. The rationale

for the selection of the specific measures for implementation and the basis for rejection of others should be given. Finally, forcing implementation of the selected measures should be the responsibility of the permitting agency which has the authority to append conditions to a permit. The information contained in the EAs and EISs should be used by the permitting agency as the basis for requiring mitigation. The agency could also use the information to specify what actions must be taken if the mitigation measures fail. Another argument against using the EIS as a vehicle to mandate mitigation was that it would inhibit the discussion of more innovative mitigative measures since few would want to be responsible for implementing speculative methods at the risk of being liable for their failure.

A smaller number of participants argued that the discussion of mitigative measures should focus only on those methods that are at least possible and therefore implementable. Mandatory implementation of mitigative measures that appear in EAs and EISs would be a mechanism for weeding out more speculative and less realistic measures, which give the appearance of ameliorating the impact but really have little chance of working. Proponents of making implementation of mitigative measures mandatory said that the information gathered in the EIS process should be used in the decision making processes including the issuance of a permit. The mandatory implementation of mitigative measures identified in the EIS would be one way to force proposers to carry out their proposed mitigation plans.

Other participants suggested that mitigative measures might be considered to be of two types: those provided by the proposer of an action; and those that might be suggested by others or that were merely studied as possibilities. Mitigative measures of the first type should be considered as an essential part of the proposed action. Therefore, an accepted EIS incorporating mitigative measures of this first type should not be considered to satisfy the EIS system requirements if the action undertaken does not include these measures. This is concomitant to the rationale that an accepted EIS for an action planned in a certain way can not be considered to satisfy the system requirements for an action planned in an entirely different way.

These participants stated that it should be the responsibility of the proposing agency, in the case of an agency action, or the approving agency, in the case of a private action, to require that an action be undertaken in accordance with the plans as proposed in the EIS. It should also be their respective responsibilities to see that any mitigative measures of the first kind are actually undertaken. In the case of agency actions, it was suggested that the requirements should be built into the contracts for the action. In the case of private actions, the requirements should be made as conditions to the required permits.

Recommendations for the Use of Mitigative Measures

The opinion of the study team is that the EIS system documents are primarily to disclose environmental information. How that information is used should not be solely at the discretion of the proposing agency or private applicant. The discussion on mitigative measures should be frank, open, and realistic, and must have some provision for implementation. In the case of agency actions, the agency should adopt the mitigative measures identified in its EAs and/or EISs. In the case of applicant actions the applicant should be required by statute to come to agreement on the method(s), duration, and monitoring of mitigative measures and to present a plan to deal with possible failures. This agreement should be in the form of a mitigation plan submitted to the permitting agency for approval and should be subject to public review. The requirement to file a mitigation plan after the completion of the EIS process should force the discussion of mitigative measures to focus on the more realistic methods while assuring that mitigation is at least attempted.

Cumulative Impacts

Introduction

One of the most poorly defined issues relating to the EIS system is cumulative impacts. EIS rules require that "specific reference to related projects, public and private, existent or planned in the region shall be included [in the EIS] for purposes of examining the possible overall cumulative impacts of such actions" (Section 11 200-17(g) EIS rules). The intent of this requirement is to encourage proposers to examine how their action, along with other existing or planned actions in a region, will impact the environment. This language prevents the proposer from examining the environmental impacts of an action as if they existed in a vacuum. However, most EISs contain little

more than a listing of other projects planned for the area. Most fail to perform any analysis of the accumulation of impacts of all projects in a given region.

An appreciation of cumulative impacts is required at two other important decision points in the EIS process. First, in determining exempt actions, "All exemptions under the classes in this section are inapplicable when the cumulative impact of planned successive actions of the same type, in the same place, over time, is significant, or when an action that is normally insignificant in its impact on the environment may be significant in a particularly sensitive environment" (Section 11-200-8(b) EIS Rules). Second, in determining the significance of an action, actions that are individually limited but cumulatively have considerable effect should be judged to be significant (Section 11-200-12(b)(8)).

Although the requirement for addressing cumulative impacts in the EIS differs from the use of these impacts as threshold indicators in both the exemption and significance determinations, they have one thing in common: both are given minimal consideration.

Discussion: Application of Cumulative Impacts

The concept of cumulative impacts seems easy enough to understand. The more projects that are developed in an area (or that affect limited resources) the greater will be the total impact. One single residence built on a 5 acre lot may have little impact on the environment, but the impact would be far different if 20 single family residences were built on the same five acres. The problem comes in the application of the concept to real situations. Cumulative impacts are more than just the addition of the impacts of individual actions, they are the sum of all the impacts judged against some criteria. For example, consider the impact of an action that affects population on traffic. The addition of a single family house may have little impact on traffic flow. Each additional house (i.e. increase in population) increases traffic slightly in that area. At some point the capacity of the road is exceeded and the level of service is reduced. Without knowing the threshold between fast flowing traffic and gridlock, it is difficult to judge the significance of each additional house/car/family.

In the absence of threshold values it is difficult to judge cumulative impacts. How many individually limited actions must take place before cumulative impacts are defined as significant? Neither guidelines nor explanations are offered in the statute or the rules to assist those who may be trying to make a determination as to whether a group of exempt actions is cumulatively significant; whether a group of individually limited actions is significant; or how great the magnitude of impacts of a group of actions is on an area. Lacking threshold values or any regulatory guidance, the treatment of cumulative impacts is left to individual interpretation and as many pointed out in the interviews, is not handled well.

Suggestions for Improving the Treatment of Cumulative Impacts

The most significant improvement would be to define the terms "cumulative" and "region" in the statute and the EIS rules. In our discussion on definitions in an early section of this report we suggested that the definition for "cumulative" found in NEPA regulations form the basis of the definition in the Hawaii State EIS system. In addition we believe that "cumulative" should be considered in reference to an action's effect on existing state or county plans or zoning for the area. For example, will the action, or the results of the action, exceed existing state or county plans for the area either in terms of structural characteristics, population, or infrastructure requirements? What portion/fraction of the limits presently placed on the area/region by zoning or state or county plans will be consumed by the proposed action? The definition of a region should include reference to some acceptable planning division such as a neighborhood, watershed, town, judicial district, county, or island.

The next improvement to the treatment of cumulative impacts would be to provide guidelines on how to judge the significance of cumulative actions within the context of the EIS system. These guidelines could be written into the EIS rules or in a companion publication that would expand on these and other concepts, such as mitigative measures and criteria for significance.

Finally, we suggest that more stringent attention to the adequacy of the description and discussion of cumulative impacts be encouraged during the EIS review process and that documents with inadequate attention to cumulative impacts be summarily rejected during the acceptance process.

Time Limit on the Acceptability of An EIS

Introduction

An accepted EIS is a necessary condition for the implementation or approval of an action. During the interview sessions, it was brought to our attention by several people that a number of EISs were accepted many years ago for actions that have not yet been implemented. Because many changes may occur in a community over a given period of time, issues will also change, especially cumulative impacts. Therefore, the question was raised as to how much time can elapse between the acceptance of an EIS and the beginning of work on a project before making it necessary to update the EIS. We refer to the issue as the "shelf life" of an EIS.

Discussion: EIS Shelf Life

There is nothing in the statute or the rules that puts a limit on the shelf life of an EIS. Yet, there is a recognition by most of the people who commented on this topic that the environmental setting is a dynamic process in which the physical as well as the social environment can change over a given period of time. Just as Conservation District Use Permits have a "lifetime" for implementation of the permitted use, it was probably not the intention of the framers of the EIS law to allow an accepted EIS to stand in perpetuity. The lawmakers and regulators may have reasonably assumed that if an agency or applicant spends the time, effort, and funds to prepare an EIS, then the project would most likely be implemented as soon as possible.

However, this has not always been the case. Expected funding for an agency action may not materialize and a project may sit on the shelf for a number of years before funding does become available. Even applicant actions may be delayed as the available financing is lost or as development rights change ownership. Clearly, long delays in the implementation of an action may call for a new or Supplemental EIS. The question we find difficult to answer is, what is an appropriate shelf life for an EIS?

We received a number of opinions on this issue. Most of the participants were quite emphatic in their responses and concluded that some shelf life should be set. Some suggested that after 5 years the EIS should no longer be valid. Others opted for 3 years. However, one participant called attention to large scale projects that have a 5, 10, or even 20 year construction schedule. Surely, he argued, there should be no limit on the shelf life of the EIS in those cases.

Perhaps the best solution to this issue was provided by one of our reviewers who suggested that the only test of the continued applicability of an EIS is whether conditions have changed in the intervening years. Hence, his suggestion was to establish procedures for determining the process to update or prepare a supplemental statement so as to take into consideration whether factors affecting the project have changed to a degree that warrants a new or supplemental statement.

Suggestions for EIS Shelf Life Limits

We suggest that language be added to the EIS rules governing the preparation of Supplemental Statements (11-200-26 EIS Rules) to require the accepting authority or approving agency to examine EIS's that are more than 5 years old if substantive implementation of the project has not yet been initiated and to make a determination whether a supplemental statement is required. The criteria for this determination would be the same as is presently provided in the EIS rules 11-200-26.

PART 7 : SUMMARY AND CONCLUSIONS

Introduction

Part 7 summarizes the findings and recommendations made in the first six parts of this report. We have added a section on areas that were not addressed in our report and need further study. Table 10 at the end of this section provides a summary of recommendations presented in the following text.

Summary of Part 1: Introduction

Purposes of the EIS System

The state's Environmental Impact Statement (EIS) system is a process for compiling physical and social environmental information concerning a proposed action so that decision-makers can weigh these factors along with traditional economic considerations when making decisions. The various steps that make up the process require at the very least an expenditure in time and money that ultimately adds cost to a proposed action. The main benefit of the EIS system is to yield better decisions and improve the quality of the physical, natural, and social environment. However, a legitimate concern that policy-makers and to a certain extent developers and the general public have is whether the present system is the best means of collecting and presenting environmental information. Periodic review and evaluation of the EIS system process is a means of addressing that concern. The purpose of this study is to evaluate the information gathering process created by the state's EIS law chapter 343 HRS.

Clientele of the EIS System

The clientele of the EIS system includes the proposers of actions, the decision makers with final approval power and others concerned with the environmental effects of proposed actions, including the environmentally concerned public.

Methodology

Evaluating a program's process lends itself well to qualitative analysis methods, especially those that include interviews with those intuitively familiar with the program (Patton, 1987). Accordingly, we interviewed those we felt were most familiar with the EIS system — agency personnel, consultants, members of public interest groups, and researchers — as the prime method for soliciting information about the Hawaii EIS system. We also augmented this technique with a literature search of pertinent information on EIS systems in general and in the U.S. in particular, and a review of EIS systems required in other states.

Our study took part in four phases:

1. search of state and federal laws pertaining to EIS requirements
2. consultation with a core group of people knowledgeable in the state EIS system and subsequent preparation of a summary of issues of concern and interview questions
3. interviews with EIS users
4. review of comments provided by participants and selected reviewers on a preliminary report of the results of this study

The fourth phase provided us with valuable feedback and many changes were made to the preliminary report in response to the reviewers' comments. While we considered each comment carefully, it was impossible for us to incorporate all of them into our final report. Some comments were conflicting while others required analysis outside the scope of the study. We believe our study will be considered reasonably thorough and the conclusions will prove useful to those in the position to make changes in the EIS system. If this report also stimulates further study and discussion, it will have served in another way to improve our EIS system and environmental awareness.

We have developed three kinds of recommendations or suggestions on the basis of this study. These pertain to:

1. improvements that do not require amendment of the EIS chapter 343 HRS or the D.O.H. Admin. rules 11-200 EIS Rules
2. recommended amendments to chapter 343 HRS and rules that would result in improvements to the system
3. suggestions for changes that might result in improvements

Organization of the Report

During the initial phases of our study, 13 issues were identified and addressed. Our interview participants called attention to two additional issues. The 15 issues were:

1. Management and Placement of the EIS System
2. Findings and Purpose Statement
3. Definitions of Key Terms
4. Notification Provisions
5. Applicability of chapter 343 to Public and Private Actions
6. Exemption Provisions
7. Assessments and Determinations
8. Consultation and Scoping
9. Preparation of EISs
10. Review of Draft EISs
11. Acceptability Determinations
12. Judicial Proceedings
13. Use of Mitigative Measures
14. Treatment of Cumulative Impacts
15. Shelf life of EISs

These 15 issues are discussed in Parts 3 through 6 of this report. Part 3 covered administrative aspects of the EIS system and included issues 1 through 4. Part 4 examined the multiple screening process and included issues 5, 6, and 7. Part 5 dealt with EIS preparation and included issues 8 through 11. Part 6 dealt with issues 12 through 15.

Summary of Part 2: NEPA, The Hawaii State EIS System, and the EIS Systems of Other States

Genesis of EIS Systems

The first EIS system in the U.S. was created by the National Environmental Policy Act (NEPA) of 1969. Section 102C of NEPA called for the preparation of an EIS whenever a federal action was proposed that may have environmental impact. The EIS system under NEPA was the inspiration for the creation of many state mandated environmental review systems.

First Hawaii State EIS System

The first Hawaii EIS was mandated by a Governor's Executive Order in August 1971. It called for the preparation of an EIS when the use of state lands or funds might have a significant effect on the environment.

Present Hawaii State EIS System

The present Hawaii system was passed as Act 246 during the 1974 legislative session and became chapter 343 HRS. As amended, it requires the preparation of an Environmental Assessment (EA) for all actions utilizing state or county lands or funds, and certain private actions which fall into any one of several administrative, geographic or specific action criteria (chapter 343-5 HRS). Unless otherwise exempt, an EIS is required for actions that may have a significant effect, based on the findings of the EA. After it is determined that an EIS is required, a Draft EIS is prepared by the proposer of an action and is submitted for public review. EISs are found acceptable if they meet the

content requirements set out in the EIS administrative rules (11-200 EIS Rules) and satisfactorily respond to all review comments. An acceptable EIS is required before an action may proceed to the next step in the approval process.

Other EIS Systems in Hawaii

Formal EIS systems in Hawaii include not only the State system established under the Environmental Impact Statement Act of 1974, but also a federal system established under the National Environmental Policy Act of 1970 and a system established by the City and County of Honolulu under their Special Management Area (SMA) ordinance.

Comparison of the Hawaii State EIS System with Other State EIS Systems

A comparison of the EIS laws in Hawaii with those in other states was conducted for this study. A summary of the findings is shown in table 3 and elaborated on in Appendix C of this report. One of the key differences between Hawaii's law and that of several other states is that Hawaii does not provide requirements and procedures for full exploration of alternative actions. We also noted differences in applicability criteria; the preparation and financing of documents; and requirements for public hearings.

Summary of Part 3: Administrative Aspects of the Hawaii State EIS System

Placement of OEQC and the Environmental Council

As designated in chapter 343 HRS, the Office of Environmental Quality Control (OEQC) is currently responsible for the flow of documents through the state EIS system, and the Environmental Council (Council) is responsible for rule making and the creation and deletion of exempt classes of actions. Both OEQC and the Council are attached to the Department of Health for administrative purposes. This attachment has been the subject of considerable discussion since it was instituted in 1980.

Recommendation for Changes in Placement

We recommend that OEQC and the Council be combined into a single organization and be made advisory to the governor. A recently created Department of the Environment should be given the ministerial responsibility to oversee the EIS system and should be required to review EIS system documents. The Council should retain its rule making authority and discretionary authority in the area of exemptions. We believe a Council with an independent staff provided by OEQC could provide valuable input to the environmental management issues that cross departmental lines.

While an independent Council and OEQC merged within the new Department of Environment Protection (DEP) is a viable option, it is not our preference. We conclude that the Council would have more authority to compel cooperation and compliance from other departments if it and OEQC are made advisory to the governor and placed outside the DEP.

Findings and Purpose

Little interest was shown in changes to the findings and purpose section. We considered the addition of phrases linking the EIS to the provision of an individual's right to a healthy environment as found in the Hawaii State Constitution. We concluded, however, that the addition of a citation to the constituted right would do little to improve the EIS system. Hence, no changes are recommended to the Findings and Purpose section of chapter 343 HRS.

Definitions

Definitions give precise meaning to the terms used in chapter 343 HRS. We examined each of the existing definitions and determined that those referring to "significant effect," and "agency" required some modification. In addition several new terms should be defined, including "cumulative impact", "unimproved real property" and "preparation notice."

Changes in the Definitions Section

Significant Effect

The definition of "significant effect" is critical to the implementation of the Hawaii EIS system. EISs are required only for actions that may have a "significant effect" on the environment. The present definition is found both in the statutes (section 343-2 HRS) and in the Rules (11-200-2) and focuses on the natural and social environment. Because the term is such an important element in the EIS system, we examined its definition in considerable detail and now offer the following recommendations for amendments to its definition.

We recommend that the definition of "significant effect" be amended by the inclusion of wording to require consideration of an action in light of its location. Actions that ordinarily would not have significant impacts may be judged to be significant if they take place in areas where other activities are being considered or undertaken. The wording should note that actions having a significant effect include actions which exceed environmental standards set forth in chapter 342B-N and applicable regulations. An action would be judged to be significant if acceptable limits for pollution are exceeded. Finally, we recommend the inclusion of language in the definition that would include consideration of the effects of an action on the cultural heritage of an area or changes to traditional life styles of an area's residents as indicators of significance.

Agency

The definition of "agency" should be clarified to determine if governmental organizations such as boards or Councils should be included, or should include a reference to a more definitive definition of agency found elsewhere in the revised statute. It is our opinion that in the case where both private applicant lands or monies and state or county lands and/or funds are involved, the proposed project becomes an agency action. A ruling should be made on whether quasi-governmental entities such as the Aloha Tower redevelopment agency would be considered an agency or an applicant for the purpose of conducting an EA, and clarifying language should be added to the rules.

Cumulative Impact

Defining cumulative impact may help agencies and applicants focus on these issues in the EIS. We suggest that the wording used in the NEPA regulation (40 CFR 1508.27) be considered for use in a definition of cumulative impacts in the state EIS statute and rules.

Unimproved Land

An automatic exemption from preparing an EA under HRS 343 is given in the case of state or county funds to be used for the purchase of unimproved lands (section 343-5(1) HRS). However, no definition of unimproved land is provided. For example, would even a small structure, of no monetary value, change the designation of unimproved to improved? "Unimproved land" needs to be defined, but may be more appropriately defined by an opinion rendered by the State Attorney General (AG) Office. An AG's opinion would provide a common definition for use by both state and county agencies and would avoid development of separate, and possibly conflicting, definitions.

Preparation Notice

We recommend that a definition of "Preparation Notice" be included in chapter 343-2 HRS since its counterpart, the Negative Declaration, is defined.

Notification Provision

Public awareness of EIS related matters is provided by the publication of the semimonthly OEQC Bulletin (Bulletin). We believe that public notice should be improved by requiring OEQC and proposers to increase their efforts to improve public notification of impending actions. The Council is given authority (chapter 343-6(8)) to make rules that prescribe procedures for informing the public about decisions and documents generated by the EIS process. No limitations are set as to what should be required.

Changes to Public Notification Provision

We recommend that the Council require the OEQC to develop a system for routinely routing information to interested state, county, and federal agencies, public interest groups, and representatives of the affected communities. The Council should also require proposers to follow the notification strategy adopted by OEQC.

We suggest that a two-tiered system of information requirements be developed by the OEQC. Actions of major importance or of a potentially controversial nature should require maximum public notification including newspaper advertising, radio and television public service announcements, and mailing of information to communities in affected areas. Actions of a minor nature may have less stringent public notification requirements. Defining major and minor actions may be problematic. However, other determinations of major and minor actions based on judgement are required in the EIS process and in other laws such as the State Coastal Zone Management Act (205A HRS).

Summary of Part 4: The Multiple Screening Process

The process by which actions go through successive levels of scrutiny is referred to as the multiple screening process. The purpose of the multiple screening process is to separate those projects that have little or no environmental impacts from those that may have significant environmental impacts and would therefore require the preparation of an EIS.

Applicability

The applicability screen is the first one in the multiple screening process. It determines whether an action is subject to chapter 343 HRS. There are eight criteria listed in section 343-5 HRS which determine generally what actions are subject to EIS system requirements. We divided applicability criteria into three categories: geographic, administrative, and specific action criteria.

Geographic Criteria

Actions proposed for environmentally sensitive areas are subject to EIS system requirements if they meet one of the geographic criteria. These criteria are found in section 343-5 HRS and include actions proposing the use of:

1. conservation lands
2. The Waikiki area
3. historic sites
4. shoreline areas

Administrative Criteria

Administrative criteria are those that include actions that trigger consideration by the EIS system because they fall under certain governmental jurisdictions. These are actions that:

1. utilize state or county lands or funds
2. propose changing lands from conservation to any other classification
3. propose changes in county plans under certain conditions

Specific Action Criteria

Actions that because of their nature trigger consideration of the EIS system fall in the third category called specific action criteria. There is at present only one action that falls within this category: the proposed development of heliports under certain conditions.

Improvements to Geographic Criteria

Special Management Areas

The Special Management Area (SMA) is a strip of coastal land that extends a minimum of 300 yards inland of the shoreline. We recommend that the SMA be included as an applicability criteria for triggering the EIS system. The rationale for creating the SMA was to protect an environmentally sensitive area. The submission of environmental information is required for receiving a permit to develop in this area. The EIS is a process for gathering and presenting environmental information. We find it a logical extension of the EIS to include actions in the SMA.

Prime Agricultural Land

One of the rationales for instituting Hawaii's land use classification system was the protection of prime agricultural land. Because of their potential for agriculture productivity, these lands are considered to be an important environmental resource. We recommend inclusion of a criteria that would require coverage under chapter 343 HRS for actions proposing the use of prime agricultural lands for uses other than agriculture, as designated by the State Department of Agriculture.

Historic and Cultural Sites

Historic sites trigger the EIS system if they are listed on the Federal and State Register of Historic Places. We recommend that coverage by the EIS system be extended to those historic sites that may be eligible for inclusion on either list. In addition, we recommend that coverage be extended to sites of historic and cultural significance provided that they are clearly depicted on maps and included in recognized inventories.

Endangered and Threatened Species and Their Habitats

Both federal and state governments provide for the protection of endangered and threatened species and their habitats, recognizing them as an important environmental resource. We recommend that actions proposed near an endangered and threatened species and their habitats be included as a criteria for triggering the EIS system. Plants and animals added to the federal and state endangered and threatened species and their habitats list include descriptions of their habitat. Other standard references may be used to determine the range of those not already delineated.

Wetlands

Wetlands are an important environmental resource. We recommend that action occurring in or adjacent to a wetland area trigger the EIS system.

Streams

Certain streams in the State are recognized as having unique, important, or special characteristics. Some were identified in the Draft Hawaii Stream Assessment report. We recommend that actions requiring approval from the State Commission on Water Resource Management should trigger coverage of the EIS system. Extension of the EIS system to other streams should await the final outcome of the Hawaii Stream Assessment study.

Shoreline Setback

If SMAs are included as an applicability criteria, we recommend the deletion of the shoreline setback to avoid redundancy.

Marine Life Conservation Districts and Marine Sanctuaries

There are marine areas that have unique environmental characteristics deemed worth preserving. These areas lie within the conservation district. Actions taking place in these areas already trigger the EIS system.

Historic, Cultural, and Scenic Districts

These are areas where counties may impose additional development guidelines in order to protect some unique historic cultural or scenic feature. We do not recommend inclusion of these districts because they are county designations and may not be of statewide importance. They are not necessarily designated for environmental reasons.

Improvements to Administrative Criteria

Amendments to County General Plans

Criterion 6 (chapter 343-5 HRS) states that an EA shall be required for actions which:

> ...propose any amendments to the existing county general plans where such an amendment would result in designations other than agricultural, conservation, or preservation, except actions proposing any new county general plan initiated by a county.

A loophole exists in the present law that permits the avoidance of the EIS process by administrative maneuvering. If a county council member submits an amendment to a county general plan on behalf of a private developer, the amendment will not be subject to EIS system review. We recommend the deletion of the exemption of EIS system requirements for county initiated general plan amendments with the exception of county initiated changes which are part of mandated county reviews.

Permit Only Criteria

We examined, but do not recommend, the option of expanding the EIS system coverage to all projects which require some type of discretionary permit. At present, most if not all actions subject to chapter 343 HRS require some type of discretionary permit. We note that there are other actions that require discretionary permits that may not have environmental relevance. To require an EA for these actions would be an unnecessary expansion of the EIS system.

Controversial Actions

We considered the addition of a criteria for triggering the EIS system for controversial actions. We do not recommend this addition because we believe that potential controversial actions will be covered by expansion of the EIS system in other areas and that controversy is better addressed as a determinant of significant effect.

Changes to Specific Action Criteria

At present the only specific action criteria that triggers an EA is the proposed development of heliports.

Heliports

Trying to solve the helicopter noise problem by requiring an EA or EIS has two drawbacks. First, the EIS process will not ban the building of a heliport. At best it may reveal information on which a denial of a building permit may be based. At worst, it may be viewed as a method of harassing potential heliport developers. Secondly,

the inclusion of heliports as a triggering action has altered the previous geographic or administrative basis for triggering mechanisms by requiring an EA for a specific type of action. It creates the potential for special interest groups to lobby for inclusion of any number of specific actions. We recommend that this eighth criterion be deleted from subsection 343-5(8) because of its potential for weakening the system by providing the first category not based on broad geographic or administrative triggers.

Exemptions

The exemption screen, the second in the multiple-screening process, allows actions that will have minimal or no significant environmental effects to bypass the preparation of an EA. We found general agreement that exemptions are a necessary part of the EIS system. However, several issues discussed dealt with the review and update of exemption lists, reporting, and record keeping of exempt actions.

Review of Exemption Lists

We recommend that the Council amend the EIS rules to require annual publication of agency exemption lists and publication of amendments to exemption lists in the Bulletin. We also recommend that the Council amend the rules to require a review of all agency exemption lists at least every five years.

We suggest that the Council prepare a master list of exemptions to facilitate their review. We also suggest that the Council review each of the nine classes of exemptions as part of an update of the EIS rules.

Recordkeeping

The rules require that each agency maintain a record of the individual actions it has exempted. The rules suggest, though not clearly, that a notice of exempt action must be forwarded to the Council. We suggest that the Council clear the ambiguities in the EIS rules over the requirement to file a notice of exemption. This could be done by either deleting the reference to the notice in the definitions section of the rules (11-200-EIS Rules) or by clarifying the process for submitting the notices in the exemption section of the rules (11-200-8 EIS Rules). We also suggest that the Council amend the rules to designate OEQC as the monitor for compliance of exemption recordkeeping.

Assessment

Actions subject to chapter 343 HRS that are not otherwise exempt from further consideration must be assessed to determine the extent of their environmental impacts. Environmental Assessments must be prepared by agencies for projects they initiate and for applicant projects for which they are the approving agency (HRS 343-5(b) and (c). Actions that may have significant environmental effects, as determined by the agency with the responsibility to prepare the EA, require the preparation of an EIS. Actions determine to have minimal or no significant effects to the environment require no other EIS system documentation. Determinations are published in the bimonthly OEQC Bulletin. Actions that have minimal impact are listed as Negative Declarations. Actions requiring an EIS are listed as Preparation Notices. Determinations are not reviewable except by the courts.

Improvements to Assessment Determinations

We recommend that section 343-5(b)-(c) and applicable EIS rules be amended to institute a 30 day review period for EAs for which a Negative Declaration is anticipated prior to making the final determination.

The underlying principle of the EIS system is to allow for public review of environmental decision making. However, there is no public review in 89 percent of the cases where the EA for an action receives a Negative Declaration. A review period required for Negative Declarations will help eliminate suspicion that some determinations may be incorrect. This issue was mentioned by many of our participants as a problem with this part of the EIS system.

Dispute Mediation

We recommend that chapter 343 HRS and the EIS rules be amended to require the use of the Alternative Dispute Resolution program (ADR) or other similar mediation program to address cases where disagreement remains after the final determination has been made. The use of mediation is much less formal and less costly than judicial appeals or the contested case hearings provided for in Administrative Procedures Act chapter 91 HRS. We suggest that the chosen dispute mediation program be used for a trial period of three years. If the use of the program proves beneficial during that period, its use could be made permanent. OEQC could be the monitoring agency during the trial period and could be charged with the responsibility of evaluating the degree of satisfaction with the results through discussions with the parties involved.

Administrative Appeals

We do not recommend the creation of an administrative appeals process at this time. However, if dispute resolution does not prove adequate to address perceived problems with the present determination process, we would recommend the institution of administrative appeals. In which case appeals should be limited to those who have commented on the EA. This proviso should reduce the number of frivolous or dilatory appeals. The additional time allotted to the administrative appeals could be offset by shortening to 30 days the 60 day statute of limitations for bringing judicial action as found in section 343-7(b) HRS.

OEQC Oversight Role

OEQC's role in the determination decision should be limited to reviewing EAs for adequacy and compliance with applicable statutes and supporting the Council on technical matters. This will allow OEQC to concentrate on developing expertise while avoiding conflicts with state and county agencies.

However, as a less preferred alternative, should the review period and administrative appeals be rejected, the OEQC could act as an oversight agency for actions involving state agencies or state approvals. Oversight for EA determinations for county actions should be assigned to an agency designated by the county's mayor. This would eliminate disputes that may arise over issues of home rule and interference with county jurisdiction which could occur if a single state agency were the designated oversight authority.

Neutral Third Party

We do not recommend having neutral parties make all EA determinations. At the average rate of 20 determinations per month, such a body would have a large work load. It would be unreasonable to ask an appointed and uncompensated body to spend the amount of time that would be necessary to make careful judgements.

Improvements to Environmental Assessment Content Requirements

We considered several changes to the content requirements of EAs, listed in section 11-200-10 EIS Rules. We recommend expanding the range of those consulted during the preparation of an EA. We have found that the more widely an EA is circulated for comment, the more likely that major concerns will be identified and mitigated in the early planning stages of the project. OEQC should develop and make circulation lists available to agencies. Agencies could also develop their own lists based on experience. A scoping meeting that brings together project proponents, opponents, and other interested parties might be used during the EA stage of the EIS system.

We recommend that the EIS rules be amended to require that the proposed action and all alternatives should be treated equally in the EA. At this stage there should not be a single alternative chosen over all others since careful analysis may indicate that one alternative to the proposed project is more environmentally sound than another. A thorough analysis discussing positive and negative points of each alternative and subsequent choice of best alternative would lead to more comprehensive and informative EAs and EISs.

We suggest that the mitigation section included in EAs provide information that addresses even minor impacts and recognizes that these may be mitigated to the betterment of the project.

Summary of Part 5: EIS Preparation

Actions subject to environmental assessment that may have a significant effect on the environment require the preparation of an EIS. The process of preparing the EIS is divided into four steps:

1. defining the range of topics that need to be addressed
2. preparing a Draft EIS based on issues defined during a 30 day consultation period
3. public review of the Draft EIS as prescribed in the statute and rules
4. preparation of the Final EIS

Acceptance of the Final EIS is carried out by the governor or mayor for state or county agency actions, or by the approving agency for applicant actions. The accepted EIS is listed in the Bulletin.

The Consultation Process

Impacts on physical and social environmental features differ depending on the type of action proposed and the nature of the physical and social setting. Deciding which impacts must be discussed in the EIS requires a determination of which impacts will be major and which will be minor. The process of determining which impacts will be major and minor is called scoping. In the state EIS system scoping is completed primarily during a 30 day consultation period.

After it is determined that an action may have a significant impact, an EIS Preparation Notice is listed in the Bulletin to indicate that an EIS will be prepared. Interested parties may ask to receive a copy of the EA and provide suggestions for issues to be covered in the EIS during a 30 day period following the publication of the Preparation Notice. Substantive comments must receive a reply and the issues they raised must be discussed in the EIS.

Improvements to the Consultation Process

We examined the issues and practices carried out during the consultation process: whether there should be a scoping meeting held during the consultation process, whether the time period should be changed; and whether scoping should be held prior to the preparation of an EA. We also discussed the need for inclusion of a reference to the consultation process in the EIS statutes and the existing language in the rules that allows agencies to waive the consultation process.

Optional Scoping Meeting

Our major recommendation is that the Council amend the EIS rules to include a section outlining an optional scoping meeting to be held prior to EIS preparation. The scoping meeting would be instituted at the discretion of the proposer. It would provide a forum for dialogue among agencies, interested citizens, and the proposer that may not exist in the present system. We recommend that the option for the submission of written comments be maintained.

Scoping Prior to EA

Although we do not recommend instituting a formal process, we encourage more consultation in the preparation of an EA. We believe that our recommendation for a 30 day review period for all EAs for which a notice of Negative Declaration is being contemplated would also help improve the consultation undertaken during the preparation of the EA. We believe that it would be in the best interest of EA preparers to consult widely so that most issues are addressed during the preparation stage rather than during the proposed 30 day review period.

Change in Time Period

We recommend keeping the consultation period at 30 days.

Statutory Reference to the Consultation Process

There is no reference in chapter 343 HRS to a consultation process. This omission may tempt some to challenge its creation in the rules. We believe that the consultation process is a useful and necessary part of the EIS system. We recommend that section 343-5(a) and 343-5(b) HRS be amended to include reference to a consultation process in the EIS statute. We also recommend that section 343-6(a)8 HRS be amended to give the Council statutory authority to define the consultation period in the rules.

Waiver of Consultation Process

The present EIS Rules (11-200-15(a)) grant the approving agencies or accepting authorities the option of waiving the consultation process when actions involve only minor environmental concerns. The use of the waiver is contradictory to the reason for EIS preparation. EISs are only prepared for actions that may have significant environmental concerns. Thus, there can be no EIS that has solely minor environmental concerns. We recommend the deletion of this waiver option from the rules.

EIS Preparation

The responsibility for preparing the EIS in the Hawaii state system rests with the proposer of the action, i.e., the proposing agency for agency actions and the applicant for private actions. Many have questioned the wisdom of allowing a project proponent to prepare the EIS, claiming the resulting document may be biased. We examined several proposed alternatives including improvements to the present method, making preparation an agency responsibility, designating a neutral third party preparer, and licensing preparers.

Improvements in EIS Preparation Responsibility

We recommend no change in the responsibility for EIS preparation. However, we believe more could be done to improve the quality of EISs.

Better Review

The most direct means of improving EIS quality is to ensure that each document receives a thorough review from all relevant government agencies as well as the general public. We suggest the OEQC and the Council encourage agencies to participate in the EIS review. OEQC should recommend to the governor that each state agency should have a budget and personnel responsible for this function. Although allocating funds and people to accomplish this task may be difficult, it will be an important step in insuring the integrity of the EIS system.

The present statute and rules do not require OEQC to participate in the review of EIS documents. We recommend that this duty be added to either chapter 343 HRS or chapter 341 HRS.

OEQC should become a more integral part of the review process. The staff could review EIS documents and flag issues to be reviewed by line agencies. They could coordinate responses of several agencies on a single EIS.

Guidebook Preparation

A guidebook to preparing EISs should be compiled or coordinated by the Council or OEQC. The guidebook should contain a detailed set of guidelines for EA and EIS preparation. A guidebook should provide:

1. detailed explanations and examples of the EIS statute and rules
2. reasons why particular steps are required
3. roles that lead and review agencies and citizen groups play in the process
4. explanations and examples of important concepts such as significant effects and mitigation

Increased Educational Opportunities

We suggest that OEQC take the lead in providing educational opportunities for state and county agency personnel and interested community members. EIS workshops, seminars, and other training opportunities should be

designed to train agency personnel and should be made available to interested members of the general public so that they can gain a better understanding of the EIS process. The training effort should also expose agency personnel to NEPA and its regulations. State and county agencies are often required to prepare documents that must meet both state and federal EIS requirements.

Post EA/EIS Audits

Post EA or EIS audits or studies of the predictive capacities of past EAs or EISs are a valuable tool for improving their quality. We recommend that OEQC undertake such studies as part of their annual program.

Licensing

Licensing is not recommended as a requirement for EIS preparers, but certification through some professional organization may provide a way of self-policing the EIS consulting profession.

Agency

We do not believe that shifting the responsibility of the EIS preparation for private actions to agencies would be an improvement over the existing process. The most crucial information would still be obtained from the proposers. We found that in other states that require agency responsibility for EIS preparation, those agencies are allowed to use information gathered by the proposer.

Neutral Third Party Preparation

We can think of no way to objectively establish a neutral third party. We do not recommend this alternative.

EIS Review Period

Section 343-5(b) and (c) HRS provide for a 45 day review period for Draft EISs. During this time, interested parties may obtain a copy of the Draft EIS and comment on its contents. The agency or applicant preparing the EIS must respond to all comments received during this period before the Draft EIS can be finalized. Our major concern was with the time period for review and inconsistencies between the time period listed in the statute and in the rules.

Improvements to the Review Period

We recommend no change in the length of the review period. Since the 45 day review period is presently the same for both the state and NEPA EIS systems, preparation of joint documents is facilitated. However, in cases where EISs are large and technically complex we recommend that a provision be added to the statute to allow an extension to the review period. The extension could be granted at the discretion of the proposing agency or approving authority for private actions after receiving a written request from any reviewer. We suggest that the extension be limited to 15 days. This period could be revised later if it is found to be inadequate.

Review Period Inconsistencies

EIS rules dealing with the review period for the Draft EIS do not conform to the EIS statutes. The potential for confusion is illustrated in the different time periods for review of Draft EISs listed in the two documents. The rules (section 11-200-22(a)) still call for a 30 day review period and a 14 day response period while the statute (343-5(b) and (c) HRS) allows a 45 day review period with no time limit on the response. We recommend that the Council move quickly to update the rules to reflect statutory changes.

Acceptance Process

The acceptance determination is the final step in the EIS process and provides the point from which the implementation or permit process may proceed. This determination is made by the governor or his designee for actions that propose the use of state lands, or funds, or by the mayor for actions that propose the use of county lands

or funds, or by the approving agency for applicant actions. The determination that an EIS is acceptable is considered to be final. Though acceptance is precedent for implementation of an action, it does not signal approval of the project.

Improvements to the EIS Acceptance Process

Our concerns with the acceptance of a Final EIS focused on the institution of a review period for the final EIS prior to its acceptance; a review of the institution of an administrative appeal; and EIS acceptance vs. project approval.

Review of Final EIS

The determination to accept a Final EIS is a subjective judgement with which there may be disagreement. At this stage, however, disagreement is normally limited to the response to review comments. These disagreements can be addressed during a review period set aside to allow reviewers to receive responses to their comments. We suggest that this period be similar to that found in NEPA's requirements. We recommend that a review period of thirty days be established for the Final EIS. The final review period would give Draft EIS reviewers the opportunity to judge if their comments were adequately addressed. If unresolved issues remain, they could be resolved within that time period. If an issue cannot be satisfactorily resolved, then the matter could be referred to the Council. If all comments receive satisfactory responses by the end of the 30 day period, the EIS would be considered accepted.

Administrative Appeals

A review of the Final EIS comments and responses would address many of the same problems that would otherwise be subject to an administrative appeal. We do not recommend the institution of administration appeals at this time.

EIS Acceptance vs. Project Approval

EIS acceptance should be a technical issue. Introduction of the chief executives of the state and counties to participation in the acceptance determination blurs the distinction between EIS acceptance and project approval. We recommend that section 343-5(b) be amended to allow agencies to accept EISs for agency as well as applicant actions. The governor or mayor would have responsibility for project approval.

Summary of Part 6: Other Relevant Issues

In part 6, we considered four issues:

1. limitations of actions
2. cumulative impacts
3. mitigative measures
4. EIS shelf life.

Limitation of Actions

The EIS statute sets limitations on three types of legal actions that may be brought by aggrieved parties for actions subject to the EIS law. Judicial proceedings must be initiated within 120 days for lack of assessment required under section 343-5 HRS for a proposed action; 60 days for appeals concerning determinations on whether or not EISs are required; and, 60 days regarding acceptance of an EIS.

Improvements to the Limitation of Actions

No changes are recommended to the 120 day limit for appeals regarding the lack of an assessment.

We recommend that the 60 day limitation for judicial appeals pertaining to determinations as to whether or not EISs will be required and the 60 day limitations on acceptance of Final EISs be changed if an administrative appeals

process is instituted. We recommend that the limit for judicial appeals be changed to 30 days in the case where a 30 day administrative appeal process is allowed. Providing 30 days for judicial proceedings regarding determination decisions would be sufficient since the information required for a judicial appeal would likely be similar to that used in the administrative appeal.

Mitigative Measures

Mitigative measures are a required portion of both EISs and EAs (section 11-200-17(m) and 11-200-10(7) EIS Rules. Many of the mitigative measures listed in EAs and EISs are required by statutes, regulations, or ordinances. All mitigative measures outlined in the documents need to be realistic and usable. The discussion of mitigative measures should be frank, open, realistic, and have some provision for implementation.

Recommendations for the Use of Mitigative Measures

In the case of agency actions the agency should adopt the mitigative measures identified in its EAs and/or EISs. If this is not done, the environment, the public interest, and the project suffer. In the case of applicant actions, the applicant should be required by statute to present a mitigation plan including method(s), duration, and monitoring of proposed mitigative measures and procedures to deal with possible failures. This mitigative plan should be submitted to an agency for approval and subject to citizen review during the permit process. The requirement to file a mitigation plan after the completion of the EIS process should force the discussion of mitigative measures to focus on the more realistic methods and assure that mitigation is at least attempted.

Cumulative Impact

The subject of cumulative impacts is one of the most poorly defined areas in the EIS system. EIS rules require that specific reference to projects related to the proposed action be included in the EIS for purposes of examining the possible overall cumulative impacts (section 11-200-17(g) EIS Rules). The intent of this requirement is to encourage proposers to examine how their action, along with other existing or planned actions in a region, will impact the environment. It is difficult to determine at what point cumulative impacts are going to become important, (i.e., reach a threshold) and how they should be measured. No guidelines exist in the statute or in the rules to assist those who may be trying to determine whether or not cumulative impacts are going to be significant.

Definition of Cumulative Impact

The terms "cumulative" and "region" need to be defined in the statute and the EIS rules. The definition of "cumulative" could be similar to that found in NEPA regulations and should be considered in reference to an action's effect on existing state or county plans or zoning for the area. The definition of a "region" should include reference to some acceptable planning division such as a neighborhood, watershed, town, judicial district, county, or island.

Time Limit on EIS Acceptability

After an EIS is accepted, it is assumed that implementation will take place on a timely basis but in some cases this does not happen. Several years can lapse between the acceptance of the document and the implementation of the project. Because of the changes that can occur in a community over a period of time, issues addressed in the EIS may also change, especially those regarding cumulative impacts. How much time can lapse before it is necessary to update an EIS prior to proceeding with the project? The present system provides no limit.

Suggested Time Limits for EIS Acceptability

We suggest that language be added to the EIS rules governing the preparation of supplemental statements (section 11-200-26 EIS Rules) in order to require the accepting authority or approving agency to examine EISs that are more than 5 years old if substantive implementation of the project has not yet been initiated, and to make a determination whether a supplemental statement is required. The criteria for this determination would be the same as is presently provided in the EIS Rules (section 11-200-26).

Table 10. Summary of Proposed Improvements to the EIS System

No.	Recommendation (R) or Suggestion (S)	Pertaining to EIS Act (A) or Rule (R)	Recommendation or Suggestion	Rationale
A.	Administrative Aspects of the EIS System			
1.	R		Combine OEQC and Council into one organization to be advisory to the Governor. They should retain rule making authority and discretionary authority in the area of exemptions. This organization or board needs to be independent of any line agency.	An independent organization or board will have time and expertise to focus on environmental issues and authority to compel cooperation and compliance from other departments.
2.	R		The recently created Department of the Environment should be given responsibility to oversee the EIS system and to review EIS documents.	
B.	Definitions (section 343-2 HRS and section 200-2 EIS rules)			
1.	R	A,R	Redefine "significant effect" to clarify how it relates to geographic area, threshold capacity and cultural heritage of an area. Wording should note that actions having significant effects include those which exceed environmental standards set in chapter 342 B - 342-N and applicable regulations.	All aspects of significant effects need to be taken into consideration. These concepts are not clear in the present definitions.
2.	R	A,R	Redefine "agency" to clarify whether or not governmental organizations such as councils and quasi-governmental entities are included.	When preparing an EA, it must be clear whether these agencies are considered applicants or agencies.
	S		Request an Attorney General opinion on the definition of "agency."	Clarify whether councils, boards, or quasi-governmental entities are considered to be agencies under the present definition.
3.	R	A,R	Add definition of "cumulative impact".	Facilitates use of an important concept by agencies
	S	R	Use definition of cumulative impact in NEPA regulations (40 CFR 1508.27) as guide for definition in the state EIS system.	NEPA definition of cumulative is comprehensive.
4.	R	A,R	Add a definition for "region" that includes reference to some acceptable planning division such as neighborhood, watershed, town, judicial district, county, or island.	The word "region" will be an important part of the definition of "cumulative impact".
5.	R	A,R	Add the definition of "unimproved real property" and/or "unimproved lands".	No definition is provided in HRS 343. An EA is not required for actions which propose the use of state or county funds for acquisition of unimproved real property [section 343-5(1)]. However, an EA will be required for actions which involve other triggers under section 343-5 and which occur on unimproved lands.

Table 10. Summary of Proposed Improvements to the EIS System (Continued)

No.	Recommendation (R) or Suggestion (S)	Pertaining to EIS Act (A) or Rule (R)	Recommendation or Suggestion	Rationale
5.	S		Request an Attorney General's opinion on the definition of "unimproved land."	Provides definition that would be acceptable statewide.
6.	R	A,R	Add the definition of "preparation notice".	Preparation Notice is not defined in the statute.
C. Notification Provision				
1.	R	A,R	Require OEQC and project proposers to increase public notification efforts. Major or controversial actions should require maximum public notification.	Provision of additional notice above that now required in the statutes would encourage more public participation.
2.	R	A,R	The Council should develop a system for routinely routing information to interested state, county and federal agencies.	Awareness of projects will be increased.
D. Multiple Screening Process: Applicability Criteria				
1. Geographic Criteria				
	R	A,R	Actions taking place in SMAs should be included as a criterion for triggering the EIS system.	SMAs are environmentally sensitive areas, but do not necessarily require the preparation of an EA.
2. Prime Agricultural Land				
	R	A,R	Actions other than agricultural taking place in land classified as prime agricultural land should be included as a criterion for triggering the EIS system.	Potential productivity of these lands make them an important environmental resource.
3. Historic and Cultural Sites				
	R	A,R	EIS coverage of historic sites should be modified to include those eligible to be listed on either the State or Federal Register.	Sites determined eligible should enjoy same coverage as those already included in the state or federal lists.
	R	A,R	Coverage should be extended to sites of historic and cultural significance provided they can be clearly depicted on maps or listed in standard inventories.	Logical extension of historical site protection.
4. Endangered and Threatened Species and Their Habitats				
	R	A,R	Actions taking place in areas near threatened and endangered species and their habitats should be included as a criterion for the EIS system.	Threatened and endangered species and their habitats are recognized to be an important but extremely sensitive environmental resource.
5. Wetlands				
	R	A,R	Actions occurring in or near wetland areas should be included in the criteria for triggering the EIS system.	Wetlands are important environmental resources.
6. Streams		A,R	Actions requiring approval from the State Commission on	Certain Hawaii streams have unique, important, or
	R		Water Management should trigger the EIS system.	special characteristics.

Table 10. Summary of Proposed Improvements to the EIS System (Continued)

No.	Recommendation (R) or Suggestion (S)	Pertaining to EIS Act (A) or Rule (R)	Recommendation or Suggestion	Rationale
7. Administrative Criteria: County General Plans				
	R	A,R	Delete the exemption of county generated general plans from the requirements to prepare an EA, unless the plans are part of an annual review.	Private developers can request county members to submit amendments to a county general plan and the amendment will not be subject to EIS system review.
8. Specific Action Criteria				
	R	A,R	Delete the requirement to prepare EAs for heliports.	Specific action should not be used as criterion to trigger the EIS system. Potential will exist to include other controversial projects as automatic triggers.
E. Multiple Screening Process: Exemptions				
1.	R	R	Council should amend EIS rules to require annual publication of agency exemption lists and publication of amendments to exemption lists.	Public awareness is a necessary part of monitoring exempt projects.
2.	R	R	Council should amend the rules to require a review of all agency exemption lists at least every five years.	This will strengthen the system by increasing agency and Council awareness of exemptions.
3.	S		The Council should prepare an exemption master list.	This would allow for easy review of all exempt actions.
4.	S	R	Update of EIS rules could include a review of each of the nine classes of exemptions.	Current technical knowledge needs to be a basis for exemptions.
5.	S	R	The Council needs to clarify how and where exemptions are to be recorded. Either delete the reference to a notice in the definition section of 11-200 EIS Rules or clarify the process for submitting the notices in the exemption section of rules (11-200-8).	Ambiguity exists in present form of the rules (11-200 EIS Rules).
6.	S	R	The Council could amend the rules to designate OEQC as the monitor for compliance with exemption record keeping.	The present system is not carefully monitored.
F. Multiple Screening Process: Assessment				
1.	R	A,R	Section 343-5(b)and (c) should be amended to require a 30 day review period for EAs for which a Negative Declaration is anticipated.	Although one of the underlying principles of the EIS system is to allow for public review, no public review period for Neg Decs exists in the present EIS system.
2.	R	A,R	Chapter 343 HRS should be amended to require the use of an alternative dispute resolution process when disagreement occurs after a determination has been made.	This method would facilitate finding solutions to disputes that arise over EA determinations.
	S		A trial period of three years could be set aside to try the chosen alternative dispute resolution program.	This method is still relatively new and will require monitoring and revision to adapt it to Hawaii's needs.
	S		OEQC could monitor the dispute resolution program.	Records of the new program's successes and difficulties need to be made so as to have a basis for making a decision to retain or reject it after the trial period.

Table 10. Summary of Proposed Improvements to the EIS System (Continued)

No.	Recommendation (R) or Suggestion (S)	Pertaining to EIS Act (A) or Rule (R)	Recommendation or Suggestion	Rationale
3.	R	A,R	If the dispute resolution program does not work, an administrative appeals process should be instituted.	If dispute resolution proves unworkable an administrative appeals process could be instituted to settle disputes arising over EA determinations.
	R	A,R	Limit standing to appeal to those who have commented	This will reduce frivolous or dilatory appeals.
4.	S	A,R	on the EA. The 60 day statute of limitations in 343-7(b) should be reduced to 30 days if an appeals process is instituted.	This would keep the total period for bringing judicial proceedings for disagreement over EA determinations to 60 days.
5.	S	A,R	Administrative appeals could be made to the Council.	This group already has discretionary authority in some EIS matters.
G. OEQC's Role in EA Review				
1.	R	A,R	OEQC's role in EAs should be limited to reviewing their adequacy and compliance with applicable statutes and supporting the Council on technical matters.	This will allow OEQC to concentrate on developing expertise while avoiding conflict with state and county agencies.
2.	R	A,R	If dispute resolution and the appeals option are rejected, OEQC could act as an oversight agency for actions involving agencies or state approvals. Oversight for EA determinations on county actions should be assigned to an agency designated by the county's mayor.	This would eliminate disputes that may arise over issues of home rule and interference with county jurisdiction.
H. EA Content Requirements				
1.	R	A,R	The proposed action and all alternative actions should receive equal analysis and consideration in the draft EIS.	Examining all alternatives will lead to more environmentally sound project proposals.
2.	S	A,R	Mitigation sections of EAs should provide information that mitigate even minor impacts.	Proposers will become more aware of all impacts of projects and be forced to examine environmental issues.
I. EIS Preparation				
1.	R	R	Council should amend rules to include an optional scoping meeting to be held prior to EA/EIS preparation at the EA/EIS preparer's discretion.	This would allow an option for expanding the consultation process.
2.	S		A guide book for EA and EIS preparation should be compiled by the Council or OEQC.	This would amplify EIS preparation requirements listed in EIS rules.
3.	S		OEQC should take the lead in providing educational opportunities such as workshop, and training opportunities.	Quality of EISs will be improved and knowledge of participants will be increased.
4.	S		EIS consultants should be certified through a professional organization.	Provides self policing of the industry to control quality in preparation of EIS documents.
J. EIS Review				
1.	R	A,R	OEQC should be required to participate in the review of EIS documents.	Coordination and coverage will be improved, particularly between agencies.

Table 10. Summary of Proposed Improvements to the EIS System (Continued)

No.	Recommendation (R) or Suggestion (S)	Pertaining to EIS Act (A) or Rule (R)	Recommendation or Suggestion	Rationale
2.	S		OEQC and the Council should encourage all agencies to participate in the EIS review process.	Quality of EISs will be improved.
3.	R	A,R	Add an optional provision for extending the review period for EISs dealing with large or very complex actions.	Additional time is needed to review documents for certain projects.
4.	R	R	EIS rules need to be updated to include a 45 day review period as defined in 343-5(b) and (c).	Rules in present form are not consistent with the statute.
K. Post EA/EIS Audit				
1.	R		OEQC could undertake an annual audit of predictive capacity of EAs or EISs.	This will improve quality of documents produced in the future.
L. Acceptance Process				
1.	R	A,R	Establish a 30 day period for review of Final EISs.	Reviewers would have a chance to make sure their comments had been satisfactorily addressed.
2.	S	R	Establish a referral process whereby unresolved issues arising from disputes over responses to comments during during the 30 day review period would be referred to the Environmental Council for resolution.	Gives Council authority to settle only those disputes tthat cannot be resolved during the review period.
3.	R	A,R	Delete the governor and mayor as accepting authorities for agency actions. Substitute agency as accepting authority for both agency and applicant actions.	Requiring chief executives of state and county to participate in the acceptance determination blurs distinction between EIS acceptance and project approval.
M. Mitigative Measures				
1.	R	A,R	The agency should adopt mitigative measures identified in EISs for agency actions.	The mitigative measure requirement is an important part of the system, but can do no good if not implemented.
2.	R	A,R	Require applicant to come to agreement with agency on mitigation methods, duration, monitoring, and alternatives. This should be submitted in the form of a mitigation plan after the completion of the EIS process.	Discussion of mitigative measures will be assured. Measures will be more realistic.
N. Time Limit on Acceptability				
1.	R	R	Language regarding shelf life of an EIS should be added to the rules (section 11-200-26) to require the accepting authority or approving agency to examine EISs that are more five years old. If the project has not been initiated, a determination needs to be made as to whether or not it will require a supplemental EIS. Criteria would be the same as in the present form of the EIS Rules (section 11-200-26).	The environment at the location of the proposed project can change, outdating old EIS information, especially in the case of cumulative impacts.

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SUMMARY REPORT:

AN EVALUATION OF THE EIS PROCESS AND AREAS OF CONCERN

Summary Report:
An Evaluation of the EIS Process and Areas of Concern

In 1978 the Environmental Center completed an evaluative study of the the State Environmental Impact Statement (EIS) System. Recommendations made in the study formed the basis for a number of changes made to the system. Since that original study no other studies have been undertaken, however a number of major changes have been made to the state's EIS system including a revamping of the Environmental Impact Statement Rules. In 1989 the State Legislature recognized the need to update the 1978 study and allocated money to the Office of Environmental Quality Control (OEQC) to fund a study by the University of Hawaii's Environmental Center to evaluate the efficacy of the EIS system. The purpose of the study is to update the 1978 study and to report problem areas and potential solutions to the Legislature. The current evaluation study, as proposed by the Environmental Center, aims to parallel the 1978 study in methodology and coverage. In the earlier study the authors sought to cover a broad and comprehensive range of issues. The present investigators will strive to examine all aspects of the EIS process. In the earlier study the main technique for determining problem areas and uncovering potential solutions to the problems was through interviews with knowledgeable users of the system including: federal, state, and county agency personnel; leaders of environmental groups; and representatives of consulting firms and construction industry groups. The authors of this study will conduct interviews with a similar cross section of EIS system users. In order to facilitate user interviews the authors have prepared a preliminary list of issues that were developed to guide the initial stages of the study. This list of issues was drawn from past Environmental Center reviews of EIS legislation, current literature on the topic of EIS evaluation, a survey of EIS practices in other states, and the results of a meeting with a group which we refer to as the "Council of Elders". This council included the current and former Environmental Council chairperson, former OEQC staffers, and staff and former staff of the Environmental Center. Most of the members of this informal group had worked with the system for at least 10 years or more, thus the name "Council of Elders". This group helped articulate and define the issues that are dealt with in detail below. The list of issues is not intended to be exhaustive, and reviewers are asked to make additions, or deletions, or expand the topic areas according to their perspective. Each topic presented will include a brief background and the major issues related to the topic.

TOPICS

1. Management and Placement of the EIS System

Background

The management of the State EIS system is shared by the Office of Environmental Quality Control (OEQC) and the Environmental Council. OEQC is an executive branch government office established to advise the governor on environmental matters and to assist in the management of the the EIS system. It is placed in the Department of Health (DOH) for administrative purposes. The Environmental Council is a citizen panel created to serve as a liaison between the OEQC Director and the general public and to make, amend, or repeal rules pertaining to the EIS system. OEQC was originally placed in the Office of the Governor but was moved to the DOH in 1980. The functions of the Environmental Council were originally carried out by two separate bodies, the Environmental Council created in Chapter 341 HRS and the Environmental Quality Commission (EQC) created in Chapter 343 HRS. The original Council was advisory to the Director of OEQC, while the EQC was commissioned to develop rules to implement and manage the EIS system. In 1983 the functions of the two were combined into the Environmental Council.

Issues

A concern of the EIS study team is whether the placement of the OEQC and the Environmental Council in the DOH has impaired their ability to carry out their duties under Chapter 343 HRS. The efficacy of moving both the

office and the council has been subject to some question. As early as 1982 suggestions to move the OEQC and the council's predecessor bodies to another executive department surfaced. Questions have also been raised regarding the qualificaitons and interests of the individuals appointed to serve as the Council.

2. Findings and Purpose

Background

A findings and purpose section was included in the Act that created Chapter 343 but was not included as part of the law. This section was later added to Chapter 343 in 1980 based on a recommendation made in the 1978 EIS Study. The reason for adding this section was to clarify the intent of the law.

Issue

The findings and purpose section predated the Constitutional Convention of 1978. An amendment to the constitution guaranteeing the residents of Hawaii the right to a healthy environment was passed as a result of the Constitutional Convention. One of the purposes of the state EIS system is to maintain and safeguard a healthful environment. Thus, it could be argued that a clause alluding to the right to a healthful environment should be added to the findings and purpose section.

3. Applicability of Chapter 343

Background

In the 1978 EIS study the authors discussed a multiple screen process that each project must go through to determine whether an EIS is required. The "screens" included these questions:

1. Does the action fall within the categories set in Chapter 343-5?
2. Is the action exempt?
3. Does it have a significant impact?

A number of issues are associated with each of the screens. These are discussed in detail below.

The first screen deals with the applicability of the law to proposed actions. Section 343-5 sets the criteria for an action's inclusion in the EIS process. The principal criterion is whether a proposed action utilizes state or county lands or monies. Private actions are included in the EIS process if they:

1. propose use within the conservation district
2. propose use within the shoreline area
3. propose use within any historic site designated in the National or Hawaii Register
4. propose use within the Waikiki area
5. propose amendment to existing county general plans except those initiated by the county
6. propose reclassification of any lands classified as conservation
7. propose the construction of a new or modification to an existing heliport under certain conditions

In the 1978 study, applicability criteria for private actions were classified as either geographical (1 through 4 above) or administrative (5 and 6 above). Another criterion was added in 1986 as a result of Act 325, which requires an Environmental Assessment (EA) for the construction or modification of a heliport. This is defined as a specific action criterion. Although heliports are the only category within this classification, several others have been considered for inclusion into the section 343-5, including golf courses and aquaculture facilities.

Issues

The inclusion of heliports in section 343-5 signals the beginning of the use of specific actions as criteria to determine the applicability of the EIS law. This development has been questioned by the Environmental Center on the grounds that it set a precedence for creating a list of actions in the law that must undergo scrutiny under Chapter 343. This could prove unwieldy since there are potentially hundreds of actions that could be included in such a list.

Designating specific actions for inclusion raises the question of whether there would need to be a list of

specific actions that would be exempt from Chapter 343 scrutiny. There is a process for identifying exempt actions addressed in the Environmental Impact Statement Rules. However, if the law allows the listing of specific actions that must be included, then there seems to be little reason not to include a list of those specific actions that are exempt from Chapter 343 scrutiny. Then there could be two sets of specific action criteria to be drafted into the law, one including projects that must undergo consideration and another that includes exempt projects. Attempts have been made already to spell out specific action exemptions in the law, for example, the attempt to exempt some small scale aquaculture development projects.

Proponents of specific action criteria argue that the specificity is needed to include potentially damaging projects that might not be otherwise included in the geographic or administrative criteria. The use of these criteria would capture private actions that might be developed in permitted areas but might otherwise have a significant environmental impact.

Another issue is the exclusion of several geographic categories from section 343-5 including lands classified as agriculture, and lands within the Special Management Area (SMA) under Chapter 205A. If the state EIS law was established to protect areas of particular concern, then it would seem logical that land set aside for agricultural purposes, especially prime agricultural land, and land placed in the SMA by the counties would require scrunity under Chapter 343 for actions (including boundary changes in the case of agricultural lands) proposed in those areas.

A final issue is whether the use of criteria is needed at all. If the state EIS law is meant to reduce significant environmental impacts caused by actions, then why not base the determination of the applicability of Chapter 343 on whether an action, public or private will have significant impact as defined. All actions would then require consideration under Chapter 343. Groups of actions that prove to have minimal or no significance could be exempted under existing provisions.

4. Exemptions

Background

The second screen in the EIS process is the determination of exempt verses non-exempt actions. The Environmental Council is given authority in section 343-6(a)(7) to adopt rules that "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 assessment." Each agency is responsible for submitting a list of exempt actions within designated classes to the Council for approval. The Council files each list separately and each agency is required to update its own list. Once an action has been declared exempt, each agency makes its own determination as to whether a particular activity being proposed will fall within the specific exempt action and class. There is no requirement to notify the Council or the public of activities it considers exempt.

Issues

A frequent complaint concerning exemptions is that the submission of individual agency lists causes a great deal of duplication. Frequently, several agencies will list the same action as exempt, making it appear that there are in fact many more actions exempted than is actually the case. A related issue is the lack of standardization; one agency may consider an action exempt and include it on its list while another agency carrying out the same action does not. One solution would be to create a master list of exempt actions to which all agencies contribute. Having a master list should reduce both instances of duplication and variation. It may also be appropriate to require agencies to file with the Council or OEQC a list of activities, which they have determined fall within their exempt actions. In this way the Council or OEQC may monitor the use of exemptions to safeguard against the possibility of abuse.

5. Significance Criteria

Background

The final screen is to determine whether an action may have significant environmental impacts. If an agency finds that an action may have a significant effect, then an EIS is required. Actions which constitute significant effects are defined in section 343-2 and further amplified in Title 11-200-12 of EIS rules.

The procedure for determining whether or not an EIS is necessary requires that an EA of the action be prepared at the earliest practical time by a "lead" agency. Based upon the agency's finding after the assessment has been reviewed, a determination is made and notice is sent to OEQC. The determination, either a Preparation Notice or a Negative Declaration, is published in the OEQC Bulletin.

Whether or not an EIS is required depends on how the concept of significance is interpreted. Agencies are given discretion in interpreting significance and very few negative declarations are challenged. The only appeal of an agency's decision is through the courts.

Attempts have been made in the past to establish an administrative appeals procedure to challenge Negative Declarations. In 1984 and again in 1987 legislation was passed but vetoed by the governor. The vetoes were based on the rationale that administrative appeals procedures already existed within each agency under Section 91-6 HRS.

Issues

Few determinations that an EIS is or is not required have been challenged through the judicial system. It is questionable that such a high degree of concurrence with agency determinations would exist if it were easier to challenge them by instituting an adminstrative appeals procedure. There are two related issues concerning appeals of the decision of whether an EIS is required: does each agency have an appeals procedure under Chapter 91 which can be used to challenge agency determinations, and if not should one be created? The authors of the 1978 report concluded that such an appeals process was needed. However, they did not explore the possibility of using existing procedures under Chapter 91. A survey of state agencies conducted by the Environmental Council found that only about half the agencies had appeals procedures under Chapter 91.

It is arguable whether a procedure under Chapter 91 would satisfy the perceived need for appeals of significance determinations. In many cases agencies are making determinations on actions that they themselves are proposing. It is difficult to believe that those challenging such determinations would feel they would get a fair hearing from an appeal to that agency. Thus there remains a strong argument for a neutral body to hear and decide appeals.

Another issue is the definition of "significance" itself. Participants of a 1982 OEQC sponsored workshop felt that the significance criteria in the rules should be re-examined with more specificity added. Few complaints have been expressed in the literature dealing with the state EIS system but some discussion is warranted for this key concept.

Another issue concerns the review of EAs on which Negative Declarations have been issued. The assessments are not widely available and usually not adequately reviewed. Many people familiar with the EIS system feel a better process for the distribution and review of EAs could be instituted to allow for an adequate review of these documents. A revised process might include a review period for assessments with no determination made until comments and replies to them are received.

6. Consultation

Background

The rationale behind the consultation process is that it is essential to develop a list of major issues to be examined in the EIS in order to make the draft EIS as complete as possible. The consultation process serves as a scoping session in that it allows agencies and interested parties to advise EIS preparers of the major issues concerning a proposed action.

Following notice of the issuance of an EIS Preparation Notice, anyone may request to be consulted in the preparation of an EIS. The proposer of the action is required to submit the assessment to consulted parties to request their comments. The consulted parties have 30 days in which to comment. Preparers must respond to all substantive comments in writing prior to filing a draft EIS.

Issues

The problems caused by late publication of the "OEQC Bulletin" were one issue raised. The consultation process begins on the publication date of the Bulletin, and several days can be lost in transit through the mail system. A possible solution would be to have the Bulletin accessible by computer through an online service.

Another issue deals with the use of a public hearing either as a substitute for or in conjunction with the present consultation process. NEPA regulations encourage the lead agency to bring together all the parties which may be involved or impacted to determine the scope and the significant issues to be analyzed in depth in the EIS. This may be done through a formal scoping meeting or a public hearing. Other states' EIS rules could be adopted to formalize a scoping process. Such a process may encourage more participation because it might be easier to express viewpoints verbally than to have to write them and submit them to preparers. It would also allow the preparer to question the consulting party to clear up any misunderstandings that may be caused by their comments.

7. Notification Provision

Background

All documents prepared for Chapter 343 must be made available to the public in a timely manner. OEQC is responsible for informing the "public of notices filed by the agencies 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." OEQC publishes a semi-monthly bulletin to meet the notification requirements of section 343-3.

Issue

Several states require public hearings as part of their public notification process. Informational hearings prior to the preparation of the EIS are thought to keep the public better informed of actions taking place in their immediate area and provide a forum for discussing the action so that opposing viewpoints may be expressed.

Other ways to notify the public may also be considered, including mailing notices to residents in close proximity to the project and publishing notices in the local media. While there seems to be no strong opinion favoring any one particular method, there is some feeling that improvement over the present form of notification can and should be made.

8. Determinations of Acceptability

Background

An EIS is subject to acceptance by the governor for state agency actions, the mayor for county agency actions, or the lead agency for private or applicant actions. EIS acceptance is required before the proposed action can proceed.

There are no time limits placed on acceptance by the governor or mayor. For applicant actions the lead agency must make its determination within 60 days of the receipt of the draft EIS or the EIS will be deemed acceptable provided that the applicant can ask for an extension not to exceed 30 days.

Section 11-200-23 of the EIS Rules outlines the criteria for the acceptance of the EIS. An applicant may appeal an agency's decision of nonacceptance of an EIS to the Environmental Council within 60 days of the receipt of the agency's determination. The Council has 30 days in which to respond to the appeal by either upholding or overturning the agencies determination. Section 11-200-24 of the Environmental Impact Rules outlines the procedure for appealing an agency's determination that an EIS is not acceptable. A non-accepted EIS can be revised and resubmitted for consideration in the same manner as a draft EIS.

Issue

Applicants may appeal an agency's determination that an EIS is not acceptable to the Environmental Council, but if agencies and/or the public believes that an EIS is inadequate, there is no way to appeal its acceptance, except through the courts. Because judicial appeals are potentially lengthy and costly, few of this type of determinations have been challenged.

The institution of a provision to allow agencies and/or the public to appeal the acceptance of an applicant EIS to the Environmental Council was one of the suggestion made by the Environmental Center in their 1978 study. The rationale for this suggestion was that if the applicant can appeal a non-acceptance ruling then aggrieved parties should be able to appeal an acceptance ruling. There is some agreement with this rationale among people familiar with the EIS system as evidenced by the continual support for this type of legislation.

The case for administrative appeal of acceptability determinations for agency actions has not been widely discussed. The accepting authority for an agency action EIS is the Governor or the Mayor depending on whether the action requires the use of state or county lands or funds. The difficulty in suggesting an appeals procedure for an agency action is that it would give the Environmental Council (or any other administrative body designated to hear the appeal) the authority to overturn the Governor's or Mayor's decision; a scenario not likely to be embraced by the state and county chief executives.

Another issue concerning EIS acceptability that has been discussed is the lack of a time limit between the acceptance of an EIS and the actual undertaking of an action. If the time period is too long between acceptance and project commencement, conditions outlined in the EIS may have changed making it necessary to re-examine the conclusions drawn in the EIS. However, any time limit would be subjective, since it would be difficult to objectively derive a meaningful time limit. The questions raised by this issue are:

1. Should there be a limit on the amount of time an EIS is considered valid?
2. What should that limit be?

9. Review

Background

Review of EISs by parties other than their preparers is essential to the preparation of adequate EISs. In the Hawaii EIS system all EISs are prepared by the proposers of the action. A thorough review by parties other than the proposer is necessary to prevent the statement from becoming a self-serving promotion of the proposed action. The original version of Chapter 343 set a 30 day public review period of the draft EIS. EIS preparers were given 14 days in which to respond to comments made during the review. The section on public review was amended in 1978 to allow for a 45 day review and response period.

Issue

Although the review of draft EIS's is an important part of the system, there seems to be little controversy concerning the time periods set in the law or the rules. The inclusion of the 45 day limitation in the law brought it in conformance with NEPA requirements, making it easier to prepare a single document to satisfy overlapping state and federal requirements. No other outstanding issue concerning time limits has been identified.

10. Mitigative Measures

Background

One of the more important results of the EIS review is identification of mitigative measures designed to lessen the environmental impacts of a proposed action. Consideration of mitigative measures is required by section 11-200-17(m) of the Content Requirements; Draft EIS Rules.

Issues

Although mitigative measures must be considered in the draft and final EISs, it is not clear whether their implementation is binding on the proposer. If they are not, how can the proposer be made to carry them out? One solution is to make the mitigative measures recommended in the EIS conditions for receiving a permit for the action.

A related issue deals with enforcement; are the activities recommended as mitigative measures being carried out? Mitigative measures for short-term impacts, especially those that occur during the facility's construction, are easily enforceable since action can be halted and the proposer made to pay a penalty. Longer term mitigative measures are harder to enforce since the proposer, especially in the case of applicant actions, may no longer exist. A method to insure the implementation of mitigative measures which must be applied over a long term should be agreed upon prior to acceptance of the EIS or permit approval.

Another issue is whether the mitigation actually works. Measures designed to mitigate long term complex impacts may not be effective. However, without monitoring their effects, it is difficult to determine if mitigation has taken place thus validating the method. A way to monitor the efficacy of mitigative measures should be agreed upon prior to the acceptance of the EIS or permit approval.

11. EIS Preparers

Background

The state EIS system requires the proposing agency to prepare the EA for agency actions and the proposer of an action to prepare the EIS in all cases. In the case of applicant actions, agencies required to prepare EAs can and often do accept an assessment prepared by the applicant. The potential for bias in favor of the proposed action has been recognized in such a process. In other states different methods are used. Minnesota for example requires the applicants to pay the cost of the EIS preparation but uses "third parties" to prepare the EIS.

There are no special qualifications required of an EIS preparer. Anyone with knowledge of the requirements of the system and the ability to attract clients can become an EIS preparer. During the past several year-legislation had been introduced to require some type of licensing or certification of EIS preparers. However, no legislation has been approved.

Issues

There are several related issues involving the preparation of documents required by the EIS system and those who prepare them. The first is the issue of bias. It is assumed that even if an EIS is biased in favor of the proposed action, a thorough review will counteract such bias. This may be true in the case of EISs which are subject to broad public review. The same is not true for EAs, most of which are not publically reviewed. A great majority of the actions for which an EA is prepared are found to have no significant impact and thus receive a Negative Declaration. There are concerns that some Negative Declarations are inappropriate. One sugestion to alleviate this concern was to have OEQC or some other neutral agency conduct an independent review of all assessments and to concur or dissent with the agency's determination of whether or not an EIS shall be required.

Another suggestion along the same lines is to allow for a public review period similar to that of the draft EIS. No determination would be made until comments are received and answered or the time limit expires.

A second issue is that of cost, particularly who should pay for the preparation of EAs and/or EISs. Although various studies have shown that EIS cost is usually a small part of the total project cost it is still considerable for large projects. Typically construction costs for highway, resort, and mass transit development projects cost in the multimillions of dollars. An EA or EIS preparation that costs even one percent of these projects would cost many thousands of dollars.

In the state's EIS system the proposer has the responsibility for preparing the EIS and with the exception of review, bears all the associated costs. Lead agencies have the responsibility for preparing EAs for actions proposed by them and those proposed by private developers, though in the latter case it is common practice for the private developer to conduct the assessment and submit the EA to the agency for determination. If the responsibility for preparing EAs and/or EISs were shifted to a designated government agency or neutral third party, who would be liable for the cost incurred? If it were the government's liability, sufficient funds would have to be allocated to cover the cost though it might be difficult to predict how much would be needed in any fiscal year. If it were the proposers liability then EIS system costs could be built into the projects costs. In the case of private actions, developers could be charged for the cost, though the mechanism for assessing cost may be a difficult one to agree upon.

A third issue is competence. Environmental Impact Statement and to a lesser extent Environmental Assessment preparation requires knowledge in many subject areas. Few individuals are knowledgeable in enough subject areas to prepare an adequate document on their own. Most EA and EIS preparation requires integration among several different specialties. Preparation is usually a group effort with one person chosen as the principal author or editor. Critics frequently question whether preparers have the right mix of experienced knowledgeable people to reach the conclusions that are made in the EIS system documents.

Two solutions have been proposed to insure that preparers of Environmental Assessments and Environmental Impact Statements are competent. One would be to require certification or licensing of EIS/EA preparers either through an existing association or a government regulatory body. A difficulty with this solution would be the determination of requirements for certification or licensing. Another difficulty might arise in applying certification and licensing to agency personnel as well as consulting firms, since some agencies prepare EIS's for their own projects.

The second proposal suggested to insure preparer competence would be to form inter-agency teams of specialists to prepare the EA/EIS. The teams would be made up of experienced, knowledgeable specialists drawn from existing agencies by a coordinating agency, with each EA/EIS team geared to meet its specific needs. The specialists would be relieved of their regular work load to participate and would return to their agency when the EA/EIS was completed.

The difficulty with this solution is that it may disrupt the normal function of agencies that release their workers to prepare the EA/EIS, especially if several EA/EISs were being prepared simultaneously for similar actions. Another difficulty may be that government agencies may lack competent specialists for a particular action.

The final issue is that of acceptability. Will the proposer adopt or agree with the conclusions reached by a third party? For the EIS system to work as it was intended, there must be a coupling between the results of the environmental analysis and the final design of an action. In cases dealing with applicants (and in some cases, agencies) that coupling might not take place if design changes are dictated from the outside.

CONCLUDING REMARKS

We have attempted to present the issues we hope to deal with in our EIS study. They are by no means exhaustive, as we have said before. We hope this will create a framework for discussing the many issues involved in the present EIS system. Discussion of the system during the interview will not be limited to these issues and we hope the reviewer will add to the list as he/she finds necessary. Written comments will be appreciated.

ENVIRONMENTAL CENTER EIS SYSTEM REVIEW:

INTERVIEW QUESTIONS

Environmental Center EIS System Review: Interview Questions

We have developed the following list of questions to help focus the interview session. Please feel free to raise questions or discuss issues not listed.

1. Management of the EIS system was placed with the Office of Environmental Quality Control (OEQC) and the Environmental Council (EnvC). The OEQC and the EnvC are placed within the Department of Health for administrative purposes. How has this affected OEQC's and EnvC's ability to manage the EIS system? Do you favor any other management arrangement?
2. Is there anything that should be added or deleted to the Findings and Purpose section (343-1) or does it accurately reflect what you feel is the intent of the system?
3. Should any of the definition section (343-2) be changed? Are there other concepts that should be defined?
4. Are the present public notification provisions adequate to keep the public informed? What other ways might be available to OEQC to keep the public abreast of the EIS process?
5. Are there types of actions that should be covered in the applicability requirements section? Are there types of actions that should be deleted from this section?
6. Are there too many or too few exemptions? Should agencies be required to report on the actions which they consider exempt? Should OEQC, EnvC, or any other agency review agency determinations that actions are exempt? In your opinion are exemptions misused to avoid the preparation of environmental assessments?
7. Determination that an EIS is required is made by the agency with jurisdiction over the area proposed for use. Often, this turns out to be the same agency that is proposing the action. Should this determination be made by the OEQC or some other third party? Have there been any actions which wrongfully received a Negative Declaration? Should there be a provision for an administrative appeal procedure for disagreement with this type of determination decision?
8. EIS's are prepared by the proponents of actions. Questions have been raised that this practice may lead to unobjective or biased EIS's. Should EIS's be prepared by an agency or other third party created for the purpose of conducting Environmental Assessments, or should the present method continue? Should EIS preparers be licensed or otherwise certified?
9. Is the consultation process an adequate means to determine the most relevant issues concerning an action? Would the institution of public hearings provide a better method of scoping a proposed action? Could both methods be used together to provide a more complete scoping? Are there other ways to determine the scope of coverage of an EIS? Is 30 days adequate for the consultation period?
10. Is the 45-day period adequate for the review of a draft EIS? Should there be a time period set aside for the review of a final EIS?
11. Administrative appeals to the EnvC are allowed for applicants whose EIS is not accepted. Should there be a procedure to allow those who disagree with a determination that an EIS is acceptable to appeal the decision?
12. Identification of mitigative measures to lessen the effects of unavoidable impacts is an important product of the EIS system. However, the action's proposer is not bound to implement the measures identified in the EIS. Should the proposer be required to implement mitigative measures listed in the EIS? A related issue is, do the mitigative measures actually work? Should the proposer or some other entity monitor the application of mitigative measures to ensure that they work? If they do not work should the proposer be liable for environmental damages caused by the action?
13. Should limitations on actions subject to Environmental Assessment be changed in any way?

ENVIRONMENTAL IMPACT STATEMENT SYSTEMS OF OTHER STATES

Prepared for the University of Hawaii Environmental Center's
Review of HRS Chapter 343

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August 1990

ENVIRONMENTAL IMPACT STATEMENT SYSTEMS OF OTHER STATES

1. Introduction

As part of its study of the Hawaii State EIS system, the Environmental Center examined legislation from 31 states and the territory of Puerto Rico as well as a proposed model state act and the National Environmental Policy Act (NEPA) to compare them with Hawaii EIS Statutes in terms of scope and responsibilities. In addition, the laws of other states were examined to search for any innovations that may be useful for environmental information gathering and planning in Hawaii.

The Federal Government, fourteen states and the territory of Puerto Rico have mandated the use of Environmental Impact Assessment as part of their comprehensive environmental management strategy. Many states have limited environmental planning laws that call for environmental evaluation of specific actions, such as mining or coastal zone development. Further Environmental planning not mentioned here does go on as a result of state agency regulations and Governor's executive orders. The following section of the report summarizes important aspects of comprehensive EIS statues. These statutes cover a wide variety of actions and usually require an EIS only for those actions that significantly effect the environment.

2. The National Environmental Policy Act (NEPA)

NEPA (42 USC 4331) was the first EIS system in the United States and provided a model for the state systems that followed. The statute was created in 1969 because congress recognized (according to the preamble) the profound impact of humans on the environment. NEPA's preamble declares it to be the policy of the United States to help "create and maintain conditions in which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans." In order to achieve this end, NEPA directs federal agencies to consider the environmental effects of their actions. For every report or recommendation on proposals for legislation or other "major" federal actions "significantly" affecting the environment, responsible officials are to provide a detailed statement which includes:

1. The environmental impact of the proposed action
2. Any adverse environmental effects which cannot be avoided should the proposal be implemented
3. Alternatives to the proposed action
4. The relationship between local short term uses of mans environment and the maintenance and enhancement of long-term productivity
5. Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented

The President's Council on Environmental Quality is responsible for the promulgation of regulations governing the implementation of NEPA.

3. The Model Act

The Model State Environmental Policy Act was drafted in 1973 by participants at the Second National Symposium on State Environmental Legislation. The symposium was sponsored by the Council of State Governments. The act can be found at 33 Suggested State Legislation 3 (1974). This model act closely follows the simple format of NEPA preferring individual states to fill in the details in agency regulations. It declares the purpose of an EIS to be to provide detailed information on the environmental effects of a proposed action, to list ways to minimize the averse effects of a proposed action, and to suggest alternatives to the action. In addition to the five NEPA requirements for the EIS, (see above), the model act calls for the following when agencies must approve or propose actions which may significantly effect the environment:

1. A description of the proposed action and its environmental setting
2. Mitigation measures proposed to minimize the environmental impact
3. The growth-inducing aspects of the proposed action

The responsible agencies are to prepare the EISs and may charge a fee to the applicant for the preparation. Agencies are also instructed that to "the maximum extent possible they shall take actions and choose alternatives

which, consistent with other essential considerations of state policy, minimize or avoid adverse environmental effects." The act applies to both public and private actions.

4. The California Environmental Quality Act (CEQA)

CEQA, California Public Resources Code section 21000 (1970), applies to both public and private actions and is administered by the California Resources Agency. The act encompasses direct actions by agencies, actions monetarily supported by agencies, and activities involving a lease, permit license or certificate that is required by an agency. The lead agency is responsible for the preparation of the EIS (called environmental impact reports, EIR) but they may contract out the EIR or accept an EIR written by the applicant. Any person (including the applicant) may submit information to the preparer. Agencies are to prepare an EIR if after an "initial study" it is determined that the proposed project may have significant effect on the environment. "Significant effect" is defined as a substantial or potentially substantial effect on the environment. A scoping procedure is mandated in the regulations so that the involved agencies can determine the important factors to be discussed in the EIR.

Besides the five NEPA requirements (see NEPA above) a California EIR must contain a summary of the statement, a description of the project (including the purpose), the environmental setting, significant environmental effects of the project, proposed mitigation measures and the growth inducing aspects of the project. Economic and social effects may be discussed. A brief statement must be included explaining why various effects were determined to be non-significant.

CEQA mandates that a public agency should not approve a project if there are feasible alternatives available that will avoid or substantially lessen significant environmental effects. The statute also contains a clause that says a project may be approved if specific economic, social or other conditions make such alternatives or mitigative measures infeasible.

5. Connecticut Environmental Policy Act (CEPA)

CEPA, Connecticut General Statues section 22a-1 (1970), applies only to State "actions affecting the environment", which are defined as individual activities or a planned sequence of activities which could have "a major impact" on land, air, water or historic structures or landmarks. If an agency prepares an evaluation and makes a finding of no significant impact (FONSI), it must hold a public hearing if an organization or group of 25 or more people requests it within 10 days after publication of the FONSI.

The statute requires the EIS to include a description of the action, consequences (direct and indirect) during and after the action, unavoidable adverse effects, alternatives to the action (including not proceeding with the action), proposed mitigative measures, analysis of short and long term costs and benefits of the project and the effects on energy use and conservation. The Office of Policy and Management reviews all evaluations made under the statute, and administration of the EIS system is carried out by the Department of Environmental Protection.

6. Indiana Environmental Policy Law (IEPL)

IEPL, Indiana Statutes Title 13 Article 10 (1972), is similar to NEPA. EISs are required only for pieces of legislation or other "major" state actions that significantly affect the environment. The air, water and solid waste control boards are to define which actions are significant effects. There is no provision regarding private actions (permits are not included) but state actions which clear the way for private actions are included. The Environmental Management Department is responsible for the administration of the EIS system.

7. Maryland Environmental Policy Act (MEPA)

MEPA, Annotated Code of Maryland Natural Resources Title 1, Subtitle 3 (1973), applies only to proposed State legislation significantly affecting the quality of the environment. The agency designated to do so by the legislature is responsible for the preparation of the EIS. The EIS must contain statements regarding both the benefits and adverse effects of the project, measures designed to mitigate adverse effects on the environment and increase beneficial aspects of the project, and recommended alternatives which might have less adverse and more beneficial aspects. The Department of Natural Resources is responsible for the administration of the EIS process.

8. Massachusetts Environmental Policy Act (MEPA)

MEPA, General Laws of Massachusetts chapter 30, section 61 to 62h (1972) applies to state agencies and applicants who make proposals that will cause "not insignificant" damage or impairment to resources. Applicants must pay for and prepare their EISs. The lead agency must approve the action and the secretary of the agency must make public a recommendation that "in his judgement" the EIS complies with the statute's requirements. The EIS must contain a statement of the nature and extent of the impacts of the project, mitigating measures, alternatives to the action and adverse short and long term effects of the project. A decision to go forward with a project may be overturned on appeal if the plaintiff can show that an agency or applicant knowingly submitted false information or concealed material facts. The Executive Office of Environmental Affairs is responsible for the administration of the EIS process.

9. Michigan EIS System

Michigan's EIS system was created by a 1974 Governor's executive order and applies only to all "major" state actions that have a significant impact on the environment, including the quality of human life, or proposed actions which create significant public controversy. This executive order is very limited and there has been no law review article written about it, probably because much attention has been focused on the more controversial "citizen's right to sue polluters" law, the Michigan Environmental Protection Act.

10. Minnesota Environmental Policy Act (MEPA)

MEPA, Minnesota Statutes Annotated volume 9, chapter 116-D (1973) departs from the NEPA model to a greater extent than most states. The EIS process is triggered when: 1) projects which are funded, conducted, assisted, permitted, regulated or approved by government (including federal government) have the potential to cause significant effects; 2) material evidence of potential significant effects accompanying a petition of 25 or more people is presented to the Environmental Quality Review Board; and 3) the Environmental Quality Review Board orders an agency to prepare an environmental assessment. Agencies are responsible for the preparation of EISs for their own projects and for those of private applicants. Agencies charge applicants a fee for EIS preparation; the regulations contain procedures for the settlement of fee disputes. The lead agency is responsible for the adequacy of the EIS unless the board chooses to accept the responsibility.

An "Environmental Assessment Worksheet" is used to assist in the evaluation of the nature and extent of the impacts. If an EIS is required, it must contain a description of the action, an analysis of the significant environmental impacts, alternatives and their impacts and mitigation measures. The act mandates that no action may be approved or permit granted where such action is likely to cause pollution, impairment or destruction of land and water resources if there is a feasible and prudent alternative that is more environmentally sound. "Economic considerations shall not justify such conduct." The statute calls for the EIS to be prepared as early and as openly as possible.

11. Montana Environmental Policy Act (MEPA)

MEPA, Montana Code Annotated Title 75 (1975) is nearly identical to NEPA. The only major difference between the two is that the Montana statute declares that every person has a right to a healthful environment. EISs are required for "major state actions affecting the quality of human environment." State agencies are allowed to charge fees to private applicants if a lease, permit, license or contract requires an agency to prepare an EIS.

12. New Mexico Environmental Quality Act (EQA)

In 1972 New Mexico repealed its EIS law, and is the only state to ever have done so. The EQA paralleled the 5 requirements in NEPA (see above). The legislature repealed the statute as a result of lobbying by businesses and state agencies who thought the system was ineffective and was a waste of time and money. Environmental groups also favored repeal of the statute rather than having a "watered down" or environmentally harmful EIS system. A thorough analysis of EQA demise can be found in McCash, "The Rise and Fall of the New Mexico Environmental Quality Act, 'Little NEPA'" in 14 Natural Resources Journal 401, 1974.

13. New York State Environmental Quality Review Act (SEQRA)

SEQRA New York Environmental Conservation Law, Article 8 (1972) applies to both public and private actions which may have a significant effect on the environment. The regulations contain a non-exhaustive list of "Type I" actions that are more likely to cause significant effects than other types of actions. Agencies are allowed to add to this list and unlisted actions may require an EIS if their effects are significant. The statute does not define significant effect, but does define environment.

The lead agency must prepare both draft and final EISs and may charge a fee to the applicant. An applicant may choose to prepare the draft, but the agency must prepare the final EIS. The lead agency must make an explicit finding that the requirements of the statute have been met and that "to the maximum extent" adverse effects revealed in the EIS process will be minimized or avoided.

A SEQRA EIS must contain a description of the action and its environmental setting, unavoidable adverse effects, alternatives, irreversible and irretrievable commitments of resources, mitigation measures, growth inducing aspects, effects on the use of energy and other information as may be prescribed by the Department of Environmental Conservation.

SEQRA requires agencies to choose alternatives that are the most environmentally favorable unless these alternatives are clearly outweighed by social and economic factors. A SEQRA EIS must also contain a statement of the analysis and judgement of an agency decision. The Department of Environmental Conservation is responsible for the administration of the EIS process.

14. North Carolina Environmental Policy Act (NCEPA)

NCEPA, Article I chapter 113A, General Statutes of North Carolina (1971), is only concerned with government actions, but local governments are empowered to pass ordinances that will require EISs for private actions. Agencies prepare EISs for legislation and projects "significantly affecting the quality of the environment." The statute defines significant effect to include projects that "may" cause significant effects. An EIS must contain the environmental impact of the project, significant unavoidable impacts, mitigation measures, alternatives, and the relationship between short and long term uses and productivity, and irreversible and irretrievable environmental effects. The regulations say that the purpose and need of the project must be discussed as well as how these will be satisfied by each of the alternatives. The regulations refer to alternatives as the "heart" of the EIS process. Administration of the EIS system is carried out by the Department of Administration.

15. Puerto Rico Public Policy Environmental Act (PRPPEA)

PRPPEA, Laws of Puerto Rico Annotated Title 12 section 11121 (1970) contains EIS requirements that are nearly identical to NEPA. The Environmental Quality Review Board is responsible for the administration of the EIS process.

16. South Dakota Environmental Policy Act (SDEPA)

SDEPA, South Dakota Codified Laws Title 34A- Environmental Protection, chapter 9 (1974) is also similar to NEPA. An EIS must contain a description of the action and its environmental setting, short and long term impacts, unavoidable adverse effects, alternatives, irreversible and irretrievable commitments of resources, mitigation measures, and the growth inducing aspects of the action. If an agency decides to go forward with an action it must make an explicit finding that the requirements of SDEPA have been met and that all feasible action will be taken to minimize or avoid environmental problems. The Department of Water and Natural Resources is responsible for the administration of the EIS process.

17. Texas

Texas does not have a statutory EIS system , but environmental evaluation is required by an administrative order from the Interagency Council for Natural Resources entitled "The Texas Response" (1973).

18. Utah

Utah requires environmental evaluation via an August 27, 1976 executive order.

19. Virginia Environmental Quality Act (VEQA)

VEQA, Code of Virginia, Title 10.1 chapter 12 (1973) requires an Environmental Impact report for all "major state projects" which are defined as the acquisition of any land for a state facility, the construction of a facility or the expansion of an existing facility. The EIR must contain the environmental impact of the project, unavoidable adverse effects, mitigation measures, alternatives, and any irreversible environmental changes. The EIR must state what alternatives were considered and why they were rejected. If the report does not contain alternatives the agency must explain why. VEQA is administered by the Council on the Environment.

20. Washington State Environmental Policy Act (SEPA)

SEPA, Revised code of Washington 43.21C (1971), has requirements similar to NEPA's. An applicant or agency may discuss the beneficial aspects of the project if they desire to do so. The statute applies to both public and private actions that have a significant impact on the environment. Applicants can prepare the EIS, but a designated official from the lead agency is responsible for its content. The regulations contain an environmental checklist for the purpose of scoping potential significant impacts of a project. The Washington Department of Ecology is responsible for the administration of the EIS system.

21. Wisconsin Environmental Impact Law (WEIL)

WEIL, Wisconsin Statutes Annotated, Title 1 chapter 1.11(1971) applies to both public and private actions that significantly affect the environment. Applicants must pay for the EIS but may prepare any part of it. The lead agency is responsible for the content of the EIS no matter who prepares it. The EIS must contain the five NEPA requirements as well as the effect the project will have on energy conservation and usage. Agencies are also to consider short and long term beneficial aspects of the project and the economic advantages and disadvantages of the project. The Department of Natural Resources is responsible for the administration of the EIS process.

22. Environmental Evaluation in Other States

Some states do not have a comprehensive EIS system; environmental evaluation is limited to specific actions in these states. The following list is not comprehensive, other environmental evaluation may exist in various states as the result of agency regulations, administrative and executive orders, or on an informal basis.

22.1 Alabama

Alabama requires evaluation of solid waste, radioactive waste, mineral resources exploitation and service territories for utilities. Alabama has also called for an evaluation of the State's energy consumption and its effect on the environment.

22.2 Arizona

The Radiation Regulatory Agency can conduct studies to obtain information on radiation for the legislature, or for those seeking a permit. The Power Plant and Transmission line Siting Committee must issue a certificate of environmental compatibility for new plant proposals.

22.3 Arkansas

Cutting timber on game and fish commission land and major utility plant siting require environmental evaluation. Utility plant siting requires environmental compatibility and public need.

22.4 Colorado

Regional service authorities must prepare impact statements to show how their planning activities will impact the environment. When an applicant for water diversion needs approval from the federal government it must inform the Water Conservation Board and the Wildlife Commission and must submit a "mitigation proposal".

22.5 Delaware

The Delaware Coastal Zone Act prohibits all "heavy" industrial use in the coastal zone and uses allowable by permit require an EIS. EISs must contain evaluation of the effect of the project on water pollution, flora and fauna, erosion and drainage, and the emission of heat, glare and noise. Delaware has similar EIS requirements for wetlands activities. The Department of Natural Resources and Environmental Control requires an EIS to be a detailed description of the effect of the proposal on the immediate and surrounding environment and natural resources such as the water quality, wildlife, and aesthetics of the region. The Department will also consider, when deciding to grant a permit, the economic effect of the project, the effect on neighboring land and the number of supporting facilities and their impact.

22.6 Florida

On notice of intent to build a new power plant, the Department of Environmental Regulation evaluates the site in question and includes "environmental impacts" as part of its evaluation.

22.7 Mississippi

The Mississippi Coastal Wetlands Protection Law requires any person proposing to carry out a regulated activity in the coastal wetlands area to file an application for a permit with the Department of Wild Life Conservation which must include an EIS. The EIS must contain a description of the project's impacts on coastal wetlands and the life dependent on the wetlands.

22.8 Nebraska

Nebraska requires environmental evaluation of permits to use water in another state and for radioactive waste disposal.

22.9 New Jersey

An EIS is required for a piece of legislation if the majority of the legislative committee considering the bill orders it to be done. An EIS is also required for the construction of a solid waste management facility, for construction of a facility in the coastal zone or when the turnpike authority seeks to acquire or alter land. An EIS must contain a description of existing environmental conditions, unavoidable impacts, mitigative measures, and alternatives.

22.10 Oregon

An impact study is required for permission to build an electric generating facility.

22.11 Pennsylvania

Any project which may discharge industrial waste into streams requires a public hearing and the Bureau of Water Management may subpoena documents and investigate the area in question. Surface mining permits require a detailed plan for land reclamation, a public hearing and a statement on the environmental impact of the project.

22.12 Rhode Island

The Coastal Resources Management Law requires that any person desiring to do certain activities (including dredging, desalinization, sewage treatment etc.) in the coastal area must show that the use does not conflict with any

resources management plan, make the area unsuitable for other reasonable uses, or significantly damage the environment.

22.13 Vermont

Permit processes for development (10 acres or more, a more than 10 unit housing project, drilling oil or gas wells, construction on elevations above 2,500 feet) require environmental evaluation by the Environmental Board. Permits for wetlands will not allow a use if any party shows that the proposed project would destroy or significantly effect a necessary wildlife habitat and if the economic and social benefits do not outweigh the environmental concerns; or that all feasible mitigating measures have not been taken; or a reasonable alternative site for the project is available.

22.14 West Virginia

West Virginia requires environmental evaluation as part of the permitting process for waste management facilities, surface coal mining, road and highway construction and high voltage power line construction.

23. HRS 343 in Comparison With Other Comprehensive Systems

23.1 Overlap with NEPA

Situations arise in which an action may require both a review under NEPA and a number of state systems. In Hawaii, section 343-4 (f) and the regulations call for the joint preparation of Environmental Impact Statements. Wisconsin, New York, Michigan and Minnesota also call for joint preparation. California, Maryland, North Carolina, South Dakota, Washington and the Model Act allow a document prepared for NEPA to act as a substitute for the state EIS as long as the statute's requirements have been met.

23.2 Applicability

The comprehensive systems above are triggered when projects have significant "impacts" or "effects" except for Virginia which calls for environmental impact reports for all "major state projects." Hawaii is the only state whose legislation limits the assessment of private actions to specific geographic areas or projects. The states vary in whether or not they define significant effects that trigger EISs and where and how they do so. California defines significant effects in a definition section of the statutes, while Connecticut defines "actions affecting the environment". Minnesota and New York's statutes do not define significant effect but New York's statute defines "environment" as "the physical conditions that will be affected by a proposed action including aesthetic significance, existing patterns of population concentration, distribution or growth and existing community and neighborhood character." North Carolina defines "environmental effect" rather than significant effect. Indiana leaves this definition to the appropriate boards and agencies. Washington's law requires agencies to analyze only those impacts that are significant, but does not provide a definition of "significant".

23.3 Preparation and Financing of Documents

In Hawaii and Massachusetts private applicants prepare and pay for the environmental studies of their actions. In California the agencies prepare applicant EISs, but may request the applicant to reimburse them for estimated preparation costs. Washington state agencies have the option of requiring the applicant to prepare the EIS. Minnesota, New York, South Dakota, Wisconsin and the Model Act call for the Agency to be responsible for the preparation of the EIS and the applicant to pay for it. Almost all states with comprehensive systems allow the person or agency responsible for the preparation of the EIS to contract with consultants to do the necessary studies.

23.4 EIS Preambles

The preambles of the various EIS acts vary in their scope and detail. Nearly all make some reference to the state being a trustee or guardian of the environment for this and future generations of citizens and encourage long term consideration of the environmental effects of actions. Washington, Indiana and Montana's preambles state that

every person has a right to a healthy environment. Virginia says that EISs are to be used to help in the wise use of the environment. New York mentions that the environment's resources are limited and that state agencies are to regulate in consideration of preventing environmental damage. The Maryland act specifies that a diverse environment is necessary for the maintenance of public health and the economy. Minnesota, in a particularly long preamble, mentions the effects of high-density urbanization, population growth and resource exploitation. The Minnesota statute's stated purpose is to encourage growth only in an environmentally acceptable manner. California and other states say that it is every citizen's responsibility to contribute to the enhancement and preservation of the environment.

23.5 Public Hearings

There are no requirements in chapter 343 H.R.S. for public hearings. Wisconsin requires a public hearing for every project that an EIS is prepared for prior to a final decision. In Washington the regulations encourage applicants to hold public hearings. In New York and California the lead agencies may hold public hearings on the impact of proposals if they deem it appropriate. Connecticut requires a public hearing after the department prepares an evaluation or declares a finding of no significant impact, if a group of 25 or more people requests a hearing.

23.6 Requirements

The five NEPA requirements form the backbone of most EISs. The summaries above contain the basic EIS requirements for each state with an EIS system.

23.7 Exempt and Excepted Actions

The actions that are exempt from the various statutes are too numerous and diverse to be discussed here, but nearly all, like Hawaii, specifically call for emergency actions to be exempt from the EIS process and for an agency or agencies to list other actions that because of their negligible effects are exempt from EIS consideration.

24. Analysis

24.1 The Role of the Judiciary

The courts have played an extremely important role in the scope and effectiveness of state EIS systems. For example, Montana and Washington have nearly identical EIS acts. However, Washington's system has been praised for being a "leader" in the area of environmental protection while Montana has been highly criticized. (See Rodgers, "The Environmental Policy Act": 60 Wash. L. Rev. 33 and Tobias and McLean, "Of Crabbed Interpretations and Frustrated Mandates: The Effect of Environmental Policy Acts on Pre-existing Agency Authority" 41 Mont. L. Rev. (1980).

The Washington courts have interpreted their EIS Act to provide "maximum mitigation" according to Rodgers, who praises the willingness of the courts to use the "clearly erroneous" standard to overturn agency declarations of non-significance. "This skeptical oversight is sustained, no doubt, by the theoretical and empirical convictions that agencies doing what is best for them may not be doing what is best for the environment and its public constituency" (Rodgers 1980).

On the other hand, The Montana Supreme Court has ruled that their EIS act does not authorize agencies to consider the content of the EIS in their decision making process unless the legislature has specifically directed to do so, by the legislatures for the particular legislative bill under consideration. The court ruled that failure to comply with the EIS requirements was not a basis on which to deny a permit. See Montana Wilderness Association v. Board of Health and Environmental Sciences 171 Mont. 477 (1976).

The courts have played an important role in other jurisdictions as well. The only limiting factor on most courts is their lack of technical expertise. The lack of scientific background among judges makes them reluctant to overrule the decisions of state agencies who are perceived as experts in the area in question. There may also be constitutional problems (separation of powers) in the judicial branch substituting its decision over executive branch agencies (see Selmi "The Judicial Development of CEQA" 18 U.C. Davis L. Rev. 112, 1984). Several

commentators believe that judicial reluctance leads to a lack of substantive oversight of agencies and that an executive office environmental ombudsman agency be granted the power to evaluate agency decisions on appeal. This appeal process may cut down on court expenses and the ombudsman agency staff may have or do have access to the technical expertise that the courts lack. The decisions of watchdog agencies could be appealed in court (see Hoffinger, "EISs - Instruments of Environmental Protection or Endless Litigation?" 11, Fordham Urban L. Journal 527, 1982-83 and Andreen, "In Pursuit of NEPA's promise: the Role of Executive Oversight in the Implementation of Environmental Policy" 64 Indiana L. Journal 205, 1989).

24.2 Readability

Nearly all EIS statutes and regulations including HRS 343 call for EISs to be clearly written and to be informative rather than encyclopedic in nature. However many EISs are both bulky and incomprehensible to the public (and possibly even to the agency head, who is supposed to be using the EIS documents to make decisions on projects). One solution offered is that all documents be run through a standard computerized "readability" test. Any document that would not be understood by half of the adult public would have to be edited. Opponents argue that highly educated experts are the only ones who read EISs and that EISs contain complex material that can not be presented in a simple manner.

24.3 Substance Versus Procedure

The United States Supreme court as well as state courts have ruled that their EIS acts are procedural and not substantive. This means that an agency or applicant must comply with the procedures of the EIS system but that the end result of the EIS process is only to provide information to the decision makers and not to dictate what the decision will be. This is not true of Minnesota, New York and California systems whose acts specifically mandate that unless the other factors clearly dictate a different result, agencies are to use alternatives and mitigation measures that are the most environmentally sound. Thus the EIS process, in addition to being an environmental information providing process, is transformed into a decision mandating process. A New York court ruled that if an outside intervenor or agency suggests reasonable alternatives for design or technical aspects of a project that are superior to the applicant's in meeting SEQRA's goals, those alternatives must be incorporated into the project's plans and be conditions for a permit (see Town of Henrietta versus DEC 430 N.Y.S. 2d 440, 1980). This goes far toward the goal of environmental protection but may cause resentment on the part of developers and agencies.

24.4 Public Hearings

Public hearings are seen as a positive way to encourage public participation in the EIS process by allowing interaction and information sharing among applicants, agencies and the public. There is some concern that the issues to be discussed related to the project in question may take a back seat to individuals who wish to use the forum as a "soapbox" for their own political agendas. This problem could be minimized by having persons who wish to present testimony or evidence provide that testimony to the agency prior to the hearing.

CHAPTER 343

HAWAII REVISED STATUTES

ENVIRONMENTAL IMPACT STATEMENTS

CHAPTER 343
ENVIRONMENTAL IMPACT STATEMENTS

SECTION

Note

Effect of 1983 amendments, see L 1983, c 140, §§11 to 14.

§343-1 Findings and purpose. The legislature finds that the quality of humanity's environment is critical to humanity's well being, that human 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 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 the environmental concerns are given appropriate consideration in decision making along with economic and technical considerations. [L 1979, c 197, § (1); am L 1983, c 140, §4]

§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, office, board, or commission of the state or county government 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 consent required from an agency prior to actual implementation of an action.

"Council" means the environmental council.

"Discretionary consent" means a consent, sanction, or recommendation from an agency for which judgement and free will maybe exercised by the issuing agency, as distinguished from a ministerial 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 discloses the environmental effects of a proposed action, effects of a proposed action on the economic and social welfare of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and 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.

"Helicopter facility" means any area of land or water which is used, or intended for use for the landing or take-off of helicopters; and any appurtenant areas which are used, or intended for use for helicopter related activities or rights-of-way.

"Negative declaration" means a determination based on an environmental assessment that the subject action will not have a significant effect, therefore, will not require the preparation of an environmental impact statement.

"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.

"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 or social welfare. [L 1974, c 246, pt of §1; am and ren L 1979, c 197, §1(2); am L 1983, c 140, §5]

Revision Note

Numeric designations deleted.

Attorney General Opinions

"Action" includes a subdivisional proposal. Att. Gen. Op. 75-14
"Action" includes issuance of building permits. Att. Gen.Op. 75-15.

Case Notes

Sufficiency of an environmental impact statement. 59 H. 156, 577 P.2D 1116.

§343-3 Public records and notice. All statements and other documents prepared under this chapter shall be made available for inspection by the public during established office hours.

The office shall inform the public of notices filed by agencies 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. 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. [L 1974, c 246, pt of §1; ren L 1979, c 197, §1(3); am L 1983, c 140, §6]

§343-4 REPEALED. L 1983, c 140, §7.

§343-5 Applicability and requirements. (a) Except as otherwise provided, an environmental assessment shall be required for actions which:

(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 which 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

(2) Propose any use within any land classified as conservation district by the state land use commission under chapter 205

(3) Propose any use within the shoreline area as defined in section 205 A-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 such 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 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 which by way of their activities may affect any land classified as conservation district by the state land use commission under chapter 205; the shoreline area as defined in section 205 A - 41; or 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 found by a field reconnaissance of the area affected by the helicopter facility and which is under consideration for placement on the National Register or the Hawaii Register of Historic Places

(b) Whenever an agency proposes an action in subsection (a), other than feasibility or planning studies for possible future programs or projects which the agency has not approved, adopted, or funded, or other than the use of state or county funds for the acquisition of unimproved real estate property, which is not a specific type of action declared exempt under section 343-6, that agency shall prepare an environmental assessment for such action at the earliest practicable time 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 such determination with the office which, in turn, shall publish the agency 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 comments 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. The final authority to accept a final statement shall rest with:

(1) 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)
(2) The mayor, or the mayor's authorized representative, of the respective county whenever an action proposes only the use of county lands or county funds

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) which requires approval of an agency, and which is not a specific type of action declared exempt under section 343-6, the agency receiving the request for approval shall prepare an environmental assessment of such proposed action at the earliest practicable time 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 such 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 comments 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 comments 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 receiving the request for approval. Acceptance of a required final statement shall be a condition precedent to approval of the request and commencement of 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 as 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 an 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 simultaneously requests approval for a proposed action from two or more agencies and there is a question as to which agency has the responsibility of preparing the environmental assessment, the office, after consultation with the agencies involved, shall determine which agency shall prepare the assessment.

(e) In preparing an environmental assessment, an agency 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. The council, by rules, 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 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) A statement that is accepted with respect to a particular action shall satisfy the requirements of this chapter and no other statement for that proposed action shall be required. [L 1974, c 246, pt of §1; am and ren L 1979, c 197, §1(5) and (6); am L 1980, c 22, §1; am L 1983, c 140, §8; am imp L 1984, c 90, §1]

Case Notes

Law contemplates consideration of secondary and non physical aspects of proposal, including socio-economic consequences. 63 H. 453, 629 P.2d 1134.

Requirements not applicable to project pending when law took effect unless agency requested statement. 63 H. 453, 629 P.2d 1134.

Construction and use of home and underground utilities near Paiko Lagoon wildlife sanctuary. 64 H.27, 636 P.2d 158.

Environmental assessment required before land use commission can reclassify conservation land to other uses. 65 H. 133, 648 P.2d 702.

Hawaii Legal Reporter Citations

Decision on Preparation of EIS. 79 HLR 790667.

Attorney General Opinions

Amendments to county development plans; when environmental assessments required. Att. Gen. Op. 85-30.

Applicable to housing developed under chapter 359 G. Att. Gen. Op. 86-13.

§343-6 Rules. (a) After consultation with the affected agencies, the council shall adopt, amend, or repeal necessary rules for the purposes of this chapter in accordance with chapter 91 including, but not limited to, rules which shall:

(1) Prescribe the contents of an environmental impact statement
(2) Prescribe the procedures whereby a group of proposed actions may be treated by a single statement
(3) Prescribe procedures for the preparation and contents of an environmental assessment
(4) Prescribe procedures for the submission, distribution, review, acceptance or nonacceptance, and withdrawal of a statement
(5) Prescribe procedures to appeal the nonacceptance of a statement to the environmental council
(6) Establish criteria to determine whether a statement is acceptable or not
(7) Establish procedures whereby specific types of action, because they will probably have minimal or no significant effects on the environment, are declared exempt from the preparation of an assessment
(8) 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 statements for review and comments, and for informing the public of the acceptance or nonacceptance of the final statement
(9) Prescribe the contents of an environmental assessment

(b) At least one public hearing shall be held in each county prior to the final adoption, amendment, or repeal of any rule. [L 1974, c 246, pt of §1; am and ren L 1979, c 197, §1(7); am L 1983, c 140, §9, am L 1986, c 186, §2; am L 1987, c 187, §3]

Case Notes

Court has no jurisdiction over actions initiated after time limit. 64 H. 126, 637 P.2d 776.

§343-7 Limitation of actions. (a) Any judicial proceeding, the subject of which is the lack of assessment required under section 343-5, 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 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 or is not required for a proposed action, shall be initiated within sixty days after the public has been informed of such 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 days after the public has been informed pursuant to section 343-3 of the acceptance of such 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. [L 1974, c 246, pt of §1; am and ren L 1979, c 197, §1(8); am L 1983, c 140, §10]

§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. [L 1974, c 246, pt of §1; ren L 1979, c 197, §1(9)]

TITLE 11

DEPARTMENT OF HEALTH

CHAPTER 200

ENVIRONMENTAL IMPACT STATEMENT RULES

Subchapter 1 Purpose

Subchapter 2 Definitions

Subchapter 3 Periodic Bulletin

Subchapter 4 Responsibilities

Subchapter 5 Applicability

Subchapter 6 Determination of Significance

Subchapter 7 Preparation of Draft and Final EIS

Subchapter 8 Appeals

Subchapter 9 NEPA

Subchapter 10 Supplemental Statements

Subchapter 11 Severability

Historical Note: Chapter 11-200, Administrative Rules, is based substantially on the Environmental Impact Statement Regulations of the Environmental Quality Commission. [Eff. 6/2/75; R 12/6/85]

SUBCHAPTER 1

Purpose

§11-200-1 Purpose. Chapter 343, Hawaii Revised Statutes, establishes a system of environmental review at the state and county levels which shall ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations. The purpose of this chapter is to provide agencies and persons with procedures, specifications of contents of environmental impact statements and criteria and definitions of statewide application. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-1, 343-6)

SUBCHAPTER 2

Definitions

§11-200-2 Definitions. As used in this chapter:

"Acceptance" means a formal determination that the document required to be filed pursuant to chapter 343, Hawaii Revised Statutes, fulfills the definitions and requirements of an environmental impact statement, adequately describes identifiable environmental impacts, and satisfactorily responds to comments received during the review of the statement. Acceptance does not mean that the action is environmentally sound or unsound, but only that the document complies with chapter 343, Hawaii Revised Statutes, and this chapter.

"Accepting authority" means the final official or agency that determines the acceptability of the EIS document.

"Action" means any program or project to be initiated by an agency or applicant, other than a continuing administrative activity such as the purchase of supplies and personnel-related actions.

"Agency" means any department, office, board, or commission of the state or county government which is part of the executive branch of that government.

"Applicant" means any person who, pursuant to statute, ordinance, or rule, officially requests approval from an agency for a proposed action.

"Approval" means a discretionary consent required from an agency prior to actual implementation of an action. Discretionary consent means a consent, sanction, or recommendation from an agency for which judgment and free will may be exercised by the issuing agency, as distinguished from a ministerial consent. Ministerial consent means a consent, sanction, or recommendation from an agency upon a given set of facts, as prescribed by law or rule without the use of judgment or discretion.

"Council" or "EC" means the environmental council.

"Emergency action" means a sudden unexpected occurrence demanding immediate action to prevent or mitigate loss or damage to life, health, property, or essential public services.

"Environment" means humanity's surroundings, inclusive of all the physical, economic and social conditions that exist within the area affected by a proposed action, including land, human and animal communities, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance.

"Environmental assessment" means a written evaluation to determine whether an action may have a significant environmental effect.

"Environmental impact" means an effect of any kind, whether immediate or delayed, on any component of the whole of the environment.

"Environmental impact statement" or "statement" or "EIS" means an informational document prepared in compliance with chapter 343, Hawaii Revised Statutes, and this chapter and which discloses the environmental effects of a proposed action, effects of a proposed action on the economic and social welfare of the community and state, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects and alternatives to the action and their environmental effects.

"Environmental impact statement preparation notice" or "EIS preparation notice" means a document informing the office of an agency determination, after an environmental assessment, that the preparation of an environmental impact statement is required.

"Exempt classes of action" means exceptions from the requirements of chapter 343, Hawaii Revised Statutes, for a class of actions, based on a determination that the class of actions will probably have a minimal or no significant effect on the environment.

"Exemption notice" means a brief notice filed by the proposing agency, in the case of a public action, or the agency with the power of approval, in the case of a private action, when it has determined that the proposed project is an exempt or emergency project.

"NEPA" means the National Environmental Policy Act of 1969, Public Law 91-190, 42 U.S.C. §§4321-4347, as amended.

"Negative declaration" means a determination by an agency that a given action not otherwise exempt does not have a significant effect on the environment and therefore does not require the preparation of an EIS.

"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.

"Significant effect" or "significant impact" 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 and guidelines as established by law, or adversely affect the economic or social welfare, or are otherwise enumerated in section 11-200-9 of this chapter. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-2, 343-6)

SUBCHAPTER 3

Periodic Bulletin

§11-200-3 Periodic bulletin. (a) The office shall inform the public through the publication of a periodic bulletin of:

(1) Notices filed by agencies of determinations that statements are required or not required

(2) The availability of statements for review and comments

(3) The acceptance or non-acceptance of statements

(4) Other notices required by the rules of the council

(b) The bulletin shall be made available to any person upon request. Copies of the bulletin shall also be sent to the state library system and other depositories or clearinghouses. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-3, 343-6)

SUBCHAPTER 4

Responsibilities

§11-200-4 Identification of accepting authority. (a) Whenever an agency proposes an action, the final authority to accept a statement shall rest with:

(1) The governor, or an 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 section 11-200-6(b); or

(2) The mayor, or an authorized representative, of the respective county whenever an action proposes only the use of county lands or county funds.

(b) The authority for requiring statements and for accepting any required statements that have been prepared shall rest with the agency initially receiving the request for an approval. In the event that an applicant simultaneously requests approval from two or more agencies and these agencies are unable to agree as to which agency has the responsibility for complying with section 343-5(c), Hawaii Revised Statutes, the office, after consultation with the agencies involved, shall determine which agency is responsible. In making the determination, the office shall take into consideration, including but not limited to, the following factors:

(1) The agency with the greatest responsibility for supervising or approving the action as a whole;

(2) The agency that can most adequately fulfill the requirements of chapter 343, Hawaii Revised Statutes, and this chapter;

(3) The agency that has special expertise or access to information; and

(4) The extent of participation of each agency in the action. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-5, 343-6)

SUBCHAPTER 5

Applicability

§11-200-5 Agency actions. (a) In determining which agency proposed actions are subject to chapter 343, Hawaii Revised Statutes, the agency shall assess at the earliest practicable time the significance of environmental impacts in its action, including the overall, cumulative impact; related actions in the region; and further actions contemplated.

(b) The applicability of chapter 343, Hawaii Revised Statutes, to specific agency proposed actions is conditioned by the agency's proposed use of state or county lands or funds. Therefore when an agency proposes to implement an action to use state or county lands or funds, it shall be subject to the provisions of chapter 343, Hawaii Revised Statutes, and this chapter.

(c) Use of state or county funds shall include any form of funding assistance flowing from the state or county, and use of state or county lands includes any use (title, lease, permit, easement, licenses, etc.) or entitlement to those lands.

(d) For agency actions, chapter 343, Hawaii Revised Statutes, exempts from applicability any feasibility or planning study for possible future programs or projects which the agency has not approved, adopted, or funded. Nevertheless, if an agency is studying the feasibility of a proposal, it shall consider environmental factors and available alternatives and disclose those considerations in any assessment and subsequent statement. If, however, the planning and feasibility studies involve testing or other actions which may have a significant physical impact on the environment, then an environmental assessment shall be prepared. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-5(b), 343-6)

§11-200-6 Applicant actions. (a) Chapter 343, Hawaii Revised Statutes, shall apply to persons who are:

(1) Proposing to implement actions which are either located in certain specified areas

(2) Proposing certain types of amendments to existing county general plans and which require approval of an agency prior to proceeding with its action.

(b) Chapter 343, Hawaii Revised Statutes, establishes certain classes of action which subject an applicant to an EIS requirement, provided that approval of an agency shall be required and that the agency finds that the proposed action may have significant environmental effects. Chapter 343, Hawaii Revised Statutes, refers to five geographical designations and two administrative categories.

(1) The five geographical designations are:
   (A) The use of state or county lands
   (B) Any use within any land classified as conservation district by the state land use commission under chapter 205, Hawaii Revised Statutes
   (C) Any use within the shoreline area as defined in section 205-31, Hawaii Revised Statutes
   (D) Any use within any historic site as designated in the national register or Hawaii register
   (E) Any use within the Waikiki-Diamond Head area of Oahu, the boundaries of which are delineated on the development plan for the Kalia, Waikiki, and Diamond Head areas, as shown on the map designated as portion of the 1967 City and County of Honolulu General Plan Development Plan Waikiki-Diamond Head (Section A)

(2) The two administrative categories are:
   (A) Any amendment to existing county general plans where the amendment would result in designations other than agriculture, conservation, or preservation (actions initiated by a county which proposes a new county general plan or amendments to any existing county general plan are excepted)
   (B) The use of state or county funds, other than funds to be used for feasibility or planning studies for possible future programs or projects which 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.

[Eff.12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-5, 343-6)

§11-200-7 Multiple or phased applicant or agency actions. A group of actions proposed by an agency or an applicant shall be treated as a single action when:

(1) The component actions are phases or increments of a larger total undertaking.
(2) An individual project is a necessary precedent for a larger project.
(3) An individual project represents a commitment to a larger project.
(4) The actions in question are essentially identical and a single statement will adequately address the impacts of each individual action and those of the group of actions as a whole. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §343-6)

§11-200-8 Exempt classes of action. (a) Chapter 343, Hawaii Revised Statutes, states that a list of classes of actions shall be drawn up which, because they will probably have minimal or no significant effect on the environment, shall generally be exempted from the preparation of an environmental assessment. Actions exempt from the preparation of an environmental assessment under this section are not exempt from complying with any other applicable statute or rule. The following list represents exempt classes of action:

(1) Operations, repairs or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing
(2) Replacement or reconstruction of existing structures and facilities where the new structure will be located generally on the same site and will have substantially the same purpose, capacity, density, height, and dimensions as the structure replaced
(3) Construction and location of single, new, small facilities or structures and the alteration and modification of same and installation of new, small, equipment and facilities and the alteration and modification of same including but not limited to:
    (A) Single family residences not in conjunction with the building of two or more such units
    (B) Multi-unit structures designed for not more than four dwelling units if not in conjunction with the building of two or more such structures
    (C) Stores, offices and restaurants designed for total occupant load of twenty persons or less, if not in conjunction with the building of two or more such structures
    (D) Water, sewage, electrical, gas, telephone, and other essential public utility services extensions to serve such structures or facilities; and accessory or appurtenant structures including garages, carports, patios, swimming pools, and fences
(4) Minor alterations in the conditions of land, water, or vegetation
(5) Basic data collection, research, experimental management, and resource evaluation activities which do not result in a serious or major disturbance to an environmental resource
(6) Construction or placement of minor structures accessory to existing facilities
(7) Interior alterations involving things such as partitions, plumbing, and electrical conveyances
(8) Demolition of structures, except those structures located on any historic site as designated in the national register or Hawaii register as provided for in the National Historic Preservation Act of 1966, Public Law 89-665, 16 U.S.C. §§470, as amended, or chapter 6E, Hawaii Revised Statutes
(9) Zoning variances except: use, density, height, parking requirements and shoreline set-back variances

(b) All exemptions under the classes in this section are inapplicable when the cumulative impact of planned successive actions of the same type, in the same place, over time, is significant, or when an action that is normally insignificant in its impact on the environment may be significant in a particularly sensitive environment.

(c) Any agency, at any time, may request that a new exemption class be added, or an existing one amended or deleted. The request shall be submitted to the council, in writing, and contain detailed information to support the request.

(d) Each agency, through time and experience, shall develop its own list of specific types of actions which fall within the exempt classes, as long as these lists are consistent with both the letter and intent expressed in these exempt classes and chapter 343, Hawaii Revised Statutes. These lists and any amendments to the lists shall be submitted to the council for review and concurrence. The lists shall be reviewed periodically by the council.

(e) Each agency shall maintain records of actions which it has found to be exempt from Chapter 343, Hawaii Revised Statutes.

(f) In the event the governor declares a state of emergency, the governor may exempt any affected program or action from complying with this chapter, provided a state of emergency need not be declared to exempt emergency repairs for public service facilities from complying with chapter 343, Hawaii Revised Statutes. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §343-6)

SUBCHAPTER 6

Determination of Significance

§11-200-9 Early assessment: agency actions, applicant actions. (a) For agency actions, agencies shall assess proposed actions at the earliest practicable time in order to assure thoughtful and deliberate evaluation in determining the significance of various environmental impacts. Subsequent to the conception of an agency-proposed action, but prior to the adoption of a plan of action, the agency shall:

(1) Identify potential impacts.
(2) Evaluate the potential significance of each impact.
(3) Provide for detailed study of major impacts.
(4) Determine the need for a statement. In the assessment process, the agency shall consult with other agencies having jurisdiction or expertise as well as citizen groups and individuals.

(b) For applicant actions, the approving agency shall assess and determine the need for an EIS within thirty days from the submission of the request for approval. An informal assessment can occur prior to the official submission of the approval request. Chapter 343, Hawaii Revised Statutes, does not prohibit assessment prior to the submission of an official request for approval. In the assessment process, the agency shall:

(1) Identify potential impacts.
(2) Evaluate the potential significance of each impact.
(3) Indicate areas which require further study.
(4) Determine the need for a statement.
(5) If a statement is required, prescribe the statement information necessary to assure adequate discussion and disclosure of environmental impacts. The applicant shall provide whatever information the approving agency deems necessary to facilitate the assessment process and shall include, but not be limited to, the following:
    (A) Identification of applicant
    (B) Description of proposed action and statement of objectives
    (C) Description of affected environment, including a detailed map (preferably the United States Geological Survey topographic map) and related regional map
    (D) General description of the action's technical, economic, social, and environmental characteristics

(c) In either case, the agency shall document its assessment of a proposed action for future reference. The actual determination shall be filed with the office and published in the periodic bulletin, but if the agency desires, it may also publish the contents of its environmental assessment and solicit comments from other agencies and the general public. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-5, 343-6)

§11-200-10 Contents of environmental assessment. Agencies or applicants shall prepare an environmental assessment of each proposed action and determine whether the anticipated effects constitute a significant effect in the context of chapter 343, Hawaii Revised Statutes, and section 11-200-12. The environmental assessment shall contain the following information:

(1) Identification of applicant or proposing agency
(2) Identification of approving agency, if applicable
(3) Identification of agencies consulted in making assessment
(4) General description of the action's technical, economic, social, and environmental characteristics
(5) Summary description of the affected environment, including suitable and adequate location and site maps
(6) Identification and summary of major impacts and alternatives considered, if any
(7) Proposed mitigation measures, if any
(8) Determination
(9) Findings and reasons supporting determination
(10) Agencies to be consulted in the preparation of the EIS, if applicable [Eff.12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-5(c), 343-6)

§11-200-11 Notice of determination. (a) After preparing an environmental assessment, the agency shall file a notice of determination and four copies of the supporting environmental assessment with the office.

(1) If the agency determines that an action requires the preparation of a statement, the notice will be considered to be an environmental impact statement preparation notice and shall be filed as early as possible after determination; or

(2) If the agency determines that an EIS is not required, the notice shall be considered to be a negative declaration and shall be filed as early as possible after determination.

(b) In addition to being filed with the office, all notices of determination for any applicant action shall be mailed to the requesting applicant by the approving agency. The office shall publish all notices of determinations in the periodic bulletin following the date of receipt by the office, provided that the notice is received by the office at least five working days prior to the date of publication of the bulletin; otherwise the notice shall be published in the next bulletin.

(c) The notice of determination shall indicate in a concise manner:

(1) Identification of applicant or proposing agency
(2) Identification of accepting authority
(3) Brief description of proposed action
(4) Determination
(5) Reasons supporting determination
(6) Name, address, and phone number of contact person for further information [Eff.12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-5(c), 343-6)

§11-200-12 Significance criteria. (a) In considering the significance of potential environmental effects, agencies shall consider the sum of effects on the quality of the environment, and shall evaluate the overall and cumulative effects of an action.

(b) In determining whether an action may have a significant effect on the environment, the agency shall consider every phase of a proposed action, the expected consequences, both primary and secondary, and the cumulative as well as the short and long-term effects of the action. In most instances, an action shall be determined to have a significant effect on the environment if it:

(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 or goals and guidelines as expressed in chapter 344, Hawaii Revised Statutes, and any revisions thereof and amendments thereto, court decisions or executive orders
(4) Substantially affects the economic or social welfare of the community or State
(5) Substantially affects public health
(6) Involves substantial 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 effect upon the environment or involves a commitment for larger actions
(9) Substantially affects a rare, endangered and threatened species and their habitats
(10) Detrimentally affects air or water quality or ambient noise levels
(11) Affects an environmentally sensitive area such as a flood plain, tsunami zone, erosion-prone area, geologically hazardous land, estuary, fresh water, or coastal waters [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-2, 343-6)

§11-200-13 Consideration of previous determinations and accepted EISs. (a) Chapter 343, Hawaii Revised Statutes, provides that whenever an agency proposes to implement an action or receives a request for approval, the agency may consider and, when applicable and appropriate, incorporate by reference, in whole or in part, previous determinations of whether a statement is required, and previously accepted EISs.

(b) Previous determinations and previously accepted EISs may be incorporated by applicants and agencies whenever the information contained therein is pertinent to the decision at hand and has logical relevancy and bearing to the action being considered.

(c) Agencies shall not, without considerable pre-examination and comparison, use past determinations and previous EISs to apply to the action at hand. The action for which a determination is sought shall be thoroughly reviewed prior to the use of previous determinations and previously accepted EISs. Further, when previous

determinations and previous EISs are considered or incorporated by reference, they shall be substantially similar to and relevant to the action then being considered. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-5, 343-6)

SUBCHAPTER 7

Preparation of Draft and Final EIS

§11-200-14 General. Chapter 343, Hawaii Revised Statutes, directs that in both agency and applicant actions where statements are required, the preparing party shall prepare the EIS, submit it for review and comments, and revise it taking into account all critiques and responses. Consequently, the EIS involves more than the preparation of a document; it involves the entire process of research, discussion, preparation of a statement and review. The EIS process shall involve at a minimum: identifying environmental concerns, obtaining various relevant data, conducting necessary studies, receiving public and agency input, evaluating alternatives, and proposing measures for minimizing adverse impacts. 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 a rationalization of the proposed action. Agencies shall assure the preparation of EIS's at the earliest opportunity in the planning and decision-making process. This shall assure an early open forum for discussion of adverse effects and available alternatives, and that the decision makers will be enlightened to any environmental consequences of the proposed action. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §343-6)

§11-200-15 Consultation prior to filing EIS. (a) In the preparation of an EIS, proposing agencies and applicants shall assure that all appropriate agencies, noted in section 11-200-10(10) and other citizen groups and concerned individuals as noted in section 11-200(b) are consulted. To this end, agencies and applicants shall endeavor to develop a fully acceptable EIS prior to the time the EIS is filed with the office, through a full and complete consultation process, and shall not rely solely upon the review process to expose environmental concerns; provided the approving agency or accepting authority, at the request of the applicant or proposing agency, may waive the entire consultation process, if the action involves minor environmental concerns.

(b) Upon publication of a preparation notice in the periodic bulletin, agencies, groups or individuals shall have a period of thirty days in which to request to become a consulted party and to make written comments regarding the environmental effects of the proposed action. Upon written request by the consulted party and upon good cause shown, the approving agency or accepting authority may extend the period for comments for a period not to exceed thirty days.

(c) Upon receipt of such request, the proposing agency or applicant shall make a written request to the agencies, groups or individuals who wish to be consulted for comments and shall accompany said request with a copy of the environmental impact statement preparation notice. Additionally the proposing agency or applicant may provide any other information it deems necessary. The proposing agency or applicant may also contact other agencies, groups or individuals which it feels may provide pertinent additional information.

(d) Any substantive comments received by the proposing agency or applicant pursuant to this section shall be responded to in writing by the proposing agency or applicant prior to the filing of the EIS with the approving agency. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §343-6)

§11-200-16 Content requirements. The environmental impact statement shall contain an explanation of the environmental consequences of the proposed action. The contents shall fully declare the environmental implications of the proposed action and shall discuss all relevant and feasible consequences of the action. In order that the public can be fully informed and that the agency can make a sound decision based upon the full range of responsible opinion on environmental effects, this statement must include responsible opposing views, if any, on significant environmental issues raised by the proposal. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-2, 343-5, 343-6)

§11-200-17 Content requirements; Draft EIS. (a) The draft EIS, at a minimum, shall contain the information required in this section.

(b) The draft EIS shall contain a summary sheet which concisely discusses the following:

(1) Brief description of the action
(2) Significant beneficial and adverse impacts
(3) Proposed mitigation measures
(4) Alternatives considered

(5) Unresolved issues
(6) Compatibility with land use plans and policies, and listing of permits or approvals.

(c) The draft EIS shall contain a table of contents.

(d) The draft EIS shall contain a statement of purpose and need for action.

(e) The draft EIS shall contain a project description which shall include the following information, but need not supply extensive detail beyond that needed for evaluation and review of the environmental impact:

(1) A detailed map (preferably United States Geological Survey topographic map) and related regional map
(2) Statement of objectives
(3) General description of the action's technical, economic, social, and environmental characteristics
(4) Use of public funds or lands for the action
(5) Phasing and timing of action
(6) Summary technical data; diagrams; and other information necessary to permit an evaluation of potential environmental impact by commenting agencies and the public
(7) Historic perspective

(f) The draft EIS shall contain any known alternatives for the action. These alternatives which could feasibly attain the objectives of the action—even though more costly—shall be described and explained as to why they were rejected. For any agency actions, this discussion shall include, where relevant, those alternatives not within the existing authority of the agency. A rigorous exploration and objective evaluation of the environmental impacts of all reasonable alternative actions, particularly those that might enhance environmental quality or avoid or reduce some or all of the adverse environmental benefits, costs, and risks shall be included in the agency review process in order not to prematurely foreclose options which might enhance environmental quality or have less detrimental effects. Examples of the alternatives include:

(1) The alternative of no action or of postponing action pending further study
(2) Alternatives requiring actions of a significantly different nature which would provide similar benefits with different environmental impacts
(3) Alternatives related to different designs or details of the proposed actions which would present different environmental impacts
(4) Alternative measures to provide for compensation of fish and wildlife losses, including the acquisition of land, waters, and interests therein

In each case, the analysis shall be sufficiently detailed to allow the comparative evaluation of the environmental benefits, costs, and risks of the proposed action and each reasonable alternative.

(g) The draft EIS shall contain a description of environmental setting, including a description of the environment in the vicinity of the action, as it exists before commencement of the action, from both a local and regional perspective. Special emphasis shall be placed on environmental resources that are rare or unique to the region and the project site (including natural or man-made resources of historic, archaeological, or aesthetic significance); specific reference to related projects, public and private, existent or planned in theregion shall be included for purposes of examining the possible overall cumulative impacts of such actions. Proposing agencies and applicants shall also identify, where appropriate, population and growth characteristics of the affected area and any population and growth assumptions used to justify the action and determine secondary population and growth impacts resulting from the proposed action and its alternatives. In any event, it is essential that the sources of data used to identify, qualify or evaluate any and all environmental consequences be expressly noted.

(h) The draft EIS shall contain a statement of the relationship of the proposed action to land use plans, policies, and controls for the affected area. Discussion of how the proposed action may conform or conflict with objectives and specific terms of approved or proposed land use plans, policies, and controls, if any, for the area affected shall be included. Where a conflict or inconsistency exists, the statement shall describe the extent to which the agency or applicant has reconciled its proposed action with the plan, policy, or control, and the reasons why the agency or applicant has decided to proceed, notwithstanding the absence of full reconciliation. The draft EIS shall also contain a list of necessary approvals, required for the action, from governmental agencies, boards, or commissions or other similar groups having jurisdiction. The status of each identified approval shall also be described.

(i) The draft EIS shall contain a statement of the probable impact of the proposed action on the environment, which shall include consideration of all phases of the action and consideration of all consequences on the environment; direct and indirect effects shall be included. The interrelationships and cumulative environmental

impacts of the proposed action and other related projects shall be discussed in the draft EIS. It should be realized that several actions, in particular those that involve the construction of public facilities or structures (e.g., highways, airports, sewer systems, water resource projects, etc.) may well stimulate or induce secondary effects. These secondary effects may be equally important as, or more important than, primary effects, and shall be thoroughly discussed to fully describe the probable impact of the proposed action on the environment. The population and growth impacts of an action shall be estimated if expected to be significant, and an evaluation made of the effects of any possible change in population patterns or growth upon the resource base, including land use, water, and public services, of the area in question. Also, if the proposed action constitutes a direct or indirect source of pollution as prescribed by any governmental agency, necessary data shall be incorporated in the draft EIS. The significance of the impacts shall be discussed in terms of subsections (j) to (m).

(j) The draft EIS shall address the relationship between local short term uses of humanity's environment and the maintenance and enhancement of long-term productivity. A brief discussion of the extent to which the proposed action involves trade-offs between short term losses and long-term losses, or vice versa, and a discussion of the extent to which the proposed action forecloses future options, narrows the range of beneficial uses of the environment, or poses long-term risks to health or safety shall be included. In this context, short term and long-term do not necessarily refer to any fixed time periods, but shall be viewed in terms of the environmentally significant consequences of the proposed action.

(k) The draft EIS shall address all irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented. Identification of unavoidable impacts and the extent to which the action makes use of non-renewable resources during the phases of the action, or irreversibly curtails the range of potential uses of the environment shall also be included. The possibility of environmental accidents resulting from any phase of the action shall also be considered. Agencies shall avoid construing the term "resources" to mean only the labor and materials devoted to an action. "Resources" also means the natural and cultural resources committed to loss or destruction by the action.

(l) The draft EIS shall address all probable adverse environmental effects which cannot be avoided. Any adverse effects such as water or air pollution, urban congestion, threats to public health or other consequences adverse to environmental goals and guidelines established by chapters 342 and 344, Hawaii Revised Statutes, shall be included as a brief summary including those effects discussed in other actions of this paragraph which are adverse and unavoidable under the proposed action. Also, rationale for proceeding with a proposed action, notwithstanding unavoidable effects, shall be clearly set forth in this section. The draft EIS shall indicate what other interests and considerations of governmental policies are thought to offset the adverse environmental effects of the proposed action. The statement shall also indicate the extent to which these stated countervailing benefits could be realized by following reasonable alternatives to the proposed action that would avoid some or all of the adverse environmental effects.

(m) The draft EIS shall consider mitigation measures proposed to minimize impact. Description of any mitigation measures included in the action plan to reduce significant, unavoidable, adverse impacts to insignificant levels, and the basis for considering these levels acceptable shall be included. Where a particular mitigation measure has been chosen from among several alternatives, the measures shall be discussed and reasons given for the choice made.

(n) The draft EIS shall contain a summary of unresolved issues and either a discussion of how such issues will be resolved prior to commencement of the action, or what overriding reasons there are for proceeding without resolving the problems.

(o) The draft EIS shall contain a list identifying all governmental agencies, other organizations and private individuals consulted in preparing the statement, and the identity of the persons, firms, or agency preparing the statement, by contract or other authorization, shall be disclosed.

(p) The draft EIS shall contain reproductions of all substantive comments and responses made during the consultation process. A list of those who had no comment shall be included in the draft EIS. No written response is necessary. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-2, 343-5, 343-6)

§11-200-18 Content requirements; Final EIS. The final EIS shall consist of:

(1) The draft EIS or a revision of the draft.

(2) Comments and recommendations received on the draft EIS either verbatim or in summary.

(3) A list of persons, organizations and public agencies commenting on the draft EIS.

(4) The responses of the applicant or proposing agency to significant environmental points raised in the review and consultation process. The response of the applicant or proposing agency to comments

received may take the form of a revision of the draft EIS or may be an attachment to the draft EIS. The response shall describe the disposition of significant environmental issues raised (e.g., revisions to the proposed project to mitigate anticipated impacts or objections). In particular, the major issues raised when the applicant's or proposing agency's position is at variance with recommendations and objections raised in the comments shall be addressed in detail giving reasons why specific comments and suggestions were not accepted, and factors of overriding importance warranting an override of the suggestions. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-2, 343-5, 343-6)

§11-200-19 EIS style. In developing the EIS, preparers shall make every effort to convey the required information succinctly in a form easily understood, both by members of the public and by public decision makers, giving attention to the substance of the information conveyed rather than to the particular form, or length, or detail of the statement. The scope of the statement may vary with the scope of the proposed action and its impact. Data and analyses in a statement shall be commensurate with the importance of the impact, and less important material may be summarized, consolidated, or simply referenced. Statements shall indicate at appropriate points in the text any underlying studies, reports, and other information obtained and considered in preparing the statement, including cost benefit analyses and reports required under other legal authorities. Care shall be taken to concentrate on important issues and to ensure that the statement remains an essentially self-contained document, capable of being understood by the reader without the need for undue cross-reference. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §343-6)

§11-200-20 Filing of EIS. (a) The proposing agency or applicant shall file the original (signed) draft EIS with the accepting authority, along with a minimum number of copies determined by the accepting authority. Simultaneously, a minimum number of sixty copies of the draft EIS shall be filed with the office.

(b) The proposing agency or applicant shall file the original (signed) final EIS with the accepting authority, along with a minimum number of copies determined by the accepting authority. Simultaneously, twenty-five copies of the final EIS shall be filed with the office.

(c) An EIS may be deposited at any time by the proposing agency or applicant but the deadlines for bulletin notification of an EIS filing shall be the fifth and twentieth days of each and every month unless these days are weekends or state holidays, in which case the EIS shall be filed on the next working day following the weekend or state holiday. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-3, 343-6)

§11-200-21 Distribution. The office shall be responsible for the publication of the notice of availability of the EIS in its bulletin, and for distribution of the EIS for agency and public review. The office shall develop a list of reviewers (i.e., persons and agencies with jurisdiction or expertise in certain areas relevant to various actions) and a list of public depositories where copies of the EIS's shall be available, and to the extent possible, the office shall make copies of the EIS available to individuals requesting the EIS. The office's distribution list may be developed cooperatively among the applicant or proposing agency, the accepting authority, and the office; provided the office shall be responsible for determining the final list. The applicant or proposing agency may directly distribute any portion of the required copies to those on the list, provided that the office is informed at the time the EIS is filed. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-3, 343-5, 343-6)

§11-200-22 Public review. (a) Public review shall not substitute for early and open discussion with interested persons and agencies, concerning the environmental impacts of a proposed action. Review of the EIS shall serve to provide the public and other agencies an opportunity to discover the extent to which a proposing agency or applicant has examined environmental concerns and available alternatives.

(b) The period for public review and for submitting written comments shall commence as of the date notice of availability of the EIS is published in the periodic bulletin and shall continue for a period not to exceed thirty days. Written comments to the approving agency or accepting authority, whichever is applicable, with a copy of the comments to the applicant or proposing agency, shall be received or postmarked to the approving agency or accepting authority, within said thirty-day period. Any late comments need not be considered or responded to by the applicant or proposing agency, whichever is applicable.

(c) The proposing agency or applicant shall respond in writing to the comments received or postmarked during the thirty-day review period and incorporate or append the comments and responses in the final EIS within fourteen days from the end of the thirty-day review period. The response to comments shall include:

(1) Point-by-point discussion of the validity, significance, and relevance of comments

(2) Discussion as to how each comment was evaluated and considered in planning the proposed action. The response shall endeavor to resolve conflicts, inconsistencies, or concerns. Comments and responses shall be incorporated or appended in the final EIS. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-5, 343-6)

§11-200-23 Acceptability. (a) Acceptability of a statement shall be evaluated on the basis of whether the statement, in its completed form, represents an informational instrument which fulfills the definition of an EIS and adequately discloses and describes all identifiable environmental impacts and satisfactorily responds to review comments.

(b) A statement shall be deemed to be an acceptable document only if all of the following criteria are satisfied:

(1) Procedures for assessment, consultation process, a review responsive to comments, and the preparation and submission of the statement, have all been completed satisfactorily as specified in this chapter.

(2) Content requirements described in this chapter have been satisfied.

(3) Comments submitted during the review process have received responses satisfactory to the accepting authority, and have been incorporated or appended, at the discretion of the applicant or proposing agency, to the statement.

(c) For actions proposed by agencies, the proposing agency shall prepare the EIS in accordance with chapter 343, Hawaii Revised Statutes, and this chapter. Following the official receipt of the EIS by the office, the proposing agency may request the council to make a recommendation regarding the acceptability or non-acceptability of the EIS. If the council decides to make a recommendation, the council may do so and submit the recommendation within thirty days after the end of the response period. The office shall inform the public of the council's recommendation in the periodic bulletin. In all cases involving state funds or lands, the governor or an authorized representative shall have final authority to accept the EIS. In cases involving only county funds or lands, the mayor of the respective county or an authorized representative shall have final authority to accept the EIS. In the event that the action involves both state and county lands or funds, the governor or an authorized representative shall have final authority to accept the EIS. Upon acceptance or non-acceptance of the EIS, a notice shall be filed by the appropriate accepting authority with both the proposing agency and the office. For any non-accepted EIS, the notice shall contain specific findings and reasons for non-acceptance. The office shall publish the determination of acceptance or non-acceptance in the bulletin. Acceptance of a required statement shall be a condition precedent to the use of state or county lands or funds in implementing the proposed action.

(d) For actions proposed by applicants requiring approval from an agency, the applicant shall prepare the EIS in accordance with chapter 343, Hawaii Revised Statutes, and this chapter. Following the official receipt of the draft EIS, the applicant or accepting authority may request the council to make a recommendation regarding the acceptability or non-acceptability of the statement. If the council decides to make a recommendation, the council may do so and submit the recommendation within ten days after the end of the response period, provided however, that in no event shall the period of time exceed sixty days from the official receipt of the draft EIS. The office shall inform the public of the council's recommendation in the periodic bulletin.

(e) Upon acceptance or non-acceptance by the approving agency, the agency shall file notice with a copy of the final EIS attached of its determination with the office, along with specific findings and reasons. The agency shall also notify the applicant determination of acceptance or non-acceptance in the periodic bulletin. Acceptance of the required EIS shall be a condition precedent to approval of the request and commencement of the proposed action.

(f) An approving agency shall take prompt measures to determine the acceptability or non-acceptability of the applicant's statement. Chapter 343, Hawaii Revised Statutes, directs the agency to notify the applicant and the office of the acceptance or non-acceptance of the final EIS within sixty days of the official receipt of the draft EIS, provided that the sixty-day period may be extended at the request of the applicant for a period not to exceed thirty days. The request shall be made to the accepting authority in writing. Upon receipt of an applicant's request for an extension of the sixty-day acceptance period, the accepting authority shall notify the office and applicant in writing of its decision to grant or deny the request. The notice shall be accompanied by a copy of the applicant's request. An extension of the sixty-day acceptance period shall not be allowed merely for the convenience of the accepting authority. In the event that the agency fails to accept or not accept the statement within sixty days of the official receipt of the draft EIS, then the statement shall be deemed accepted.

(g) A non-accepted EIS may be revised by a proposing agency or applicant. The revision shall fully document the inadequacies of the non-accepted EIS and shall completely and thoroughly discuss the changes made. The requirements for filing, distribution, publication of availability for review, acceptance or non-acceptance, and notification and publication of acceptability, of a revised non-accepted EIS shall be the same as the requirements prescribed by sections 11-200-20, 11-200-21, 11-200-22, and 11-200-23 for an EIS submitted for acceptance. In addition, a revised non-accepted EIS shall be evaluated for acceptability on the basis of whether it satisfactorily addresses the findings and reasons for non-acceptance.

(h) A proposing agency or applicant may withdraw an EIS by sending a letter to the office. Subsequent resubmittal of the EIS shall meet all requirements for filing, distribution, publication, review, acceptance, and notification as the original EIS. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-5, 343-6)

SUBCHAPTER 8

Appeals

§11-200-24 Appeals to the council. Pursuant to section 343-5(c), Hawaii Revised Statutes, an approving agency which is considering the acceptance or non-acceptance of a statement submitted by an applicant shall render its determination within sixty days from official receipt of the draft EIS and explain the determination through specific findings and reasons. An applicant, within sixty days after non-acceptance of a statement by an agency, may appeal the non-acceptance to the council, which within thirty days of receipt of the appeal, shall notify the applicant of its determination. In any affirmation or reversal of an appealed non-acceptance, the council shall provide the applicant and the agency with specific findings and reasons for its determination. The agency shall abide by the council's decision. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-5, 343-6)

SUBCHAPTER 9

NEPA

§11-200-25 NEPA actions: applicability to chapter 343, Hawaii Revised Statutes. When the situation occurs where a certain action will be subject both to the National Environmental Policy Act of 1969 (Public Law 91-190, as amended by Public Law 94-52 and Public Law 94-83; 42 U.S. Code 4321-4347) and chapter 343, Hawaii Revised Statutes, the following shall occur:

(1) The applicant or agency, upon discovery of its proposed action being subject to both chapter 343, Hawaii Revised Statutes, and NEPA shall notify the responsible federal agency, the office and any agency with a definite interest in the action (as prescribed by chapter 343, Hawaii Revised Statutes) of the situation.

(2) NEPA requires that draft statements be prepared by the responsible federal agency. When the responsibility of preparing an EIS is delegated to a state or county agency, this chapter shall apply in addition to federal requirements under NEPA. The office and agencies shall cooperate with federal agencies to the fullest extent possible to reduce duplication between federal and state requirements. 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 the requirements so that one document shall comply with all applicable laws.

(3) In all actions where the use of state land or funds is proposed, the final statement shall be submitted to the governor or an authorized representative. In all actions when the use of county land or funds is proposed, the final statement shall be submitted to the mayor, or an authorized representative. The final statement in these instances shall first be accepted by the governor or mayor (or an authorized representative), prior to the submission of the same to the Environmental Protection Agency.

(4) Any acceptance obtained pursuant to paragraphs (1) to (3) shall satisfy chapter 343, Hawaii Revised Statutes, and no other statement for the proposed action shall be required. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-5, 343-6)

SUBCHAPTER 10

Supplemental Statements

§11-200-26 General. A statement that is accepted with respect to a particular action is usually qualified by its size, scope, location and timing, among other things. If there is any major change in any of these characteristics, the original statement shall no longer be completely valid because an essentially different action would be under consideration. As long as there is no substantial change in a proposed action, the statement associated with that action shall be deemed to comply with this chapter. If there is any major change, a supplemental statement shall be prepared and reviewed as provided by this chapter. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-5, 343-6)

§11-200-27 Determination of applicability. The accepting authority shall be responsible for determining whether a supplemental statement is required. This determination will be submitted to the office for publication in the periodic bulletin. Proposing agencies or applicants shall prepare for public review supplemental statements whenever the proposed action for which a statement was accepted has been modified to the extent that new or different environmental impacts are anticipated. A supplemental statement shall be warranted when the scope of an action has been substantially increased, when the intensity of environmental impacts will be increased, when the mitigating measures originally planned are not to be implemented, or where new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-5, 343-6)

§11-200-28 Contents. The contents of the supplemental statement shall be the same as required by this chapter for the EIS and may incorporate by reference unchanged material from the same; however, in addition, it shall fully document the proposed changes from the original EIS and completely and thoroughly discuss the EIS process followed for these changes, the positive and negative aspects of these changes, and shall comply with the content requirements of section 11-200-16 as they relate to the changes. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §343-6)

§11-200-29 Procedures. The requirements of consultation, filing public notice, distribution, public review, comments and response, and acceptance procedures, shall be the same for the supplemental statement as is prescribed by this chapter for an EIS. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §343-6)

SUBCHAPTER 11

Severability

§11-200-30 Severability. If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application; and to this end, the provisions of this chapter are declared to be severable. [Eff. 12/6/85] (Auth: HRS §343-6) (Imp: HRS §§343-6, 343-8)

STATUTORY REFERENCES

FOR STATE EIS SYSTEMS

Statutory References for State EIS Systems

States	Statutory References
California	California Public Resources Code Section 21000 (1970)
Connecticut	Connecticut General Statutes Section 22a-1 (1970)
Hawaii	Hawaii Revised Statutes, Title 19, Health, Chapter 343 - Environmental Impact Statements (1974)
Indiana	Indiana Statutes Title 13 Article 10 (1972)
Maryland	Annotated Code of Maryland Natural Resources Title 1 Subtitle 3 (1973)
Massachusetts	General Laws of Massachusetts Chapter 30, Section 61 to 62h (1972)
Michigan	Michigan Environmental Protection Act of 1970. Michigan Compiled Laws, Chapter 691, Revised Judicature Act of 1961 - Supplemental Chapter; Enacted by Public Acts of 1970, Act 127; effective October 1, 1970. Governors Executive Order, 1974.
Minnesota	Minnesota Statutes Annotated Volume 9 Chapter 116-D (1973)
Montana	Montana Code Annotated Title 75 (1975)
New Mexico	Environmental Quality Act 74 N.M.S. Article 7. Repealed in 1972
New York	SEQRA New York Environmental Conservation Law, Article 8 (1972) Environmental Quality Review Act.
	Environmental Conservation Law, Article 8 (1972). Environmental Quality Review Act.
North Carolina	Article I, Chapter 113A, General Statutes of North Carolina (1971)
Puerto Rico	Laws of Puerto Rico Annotated Title 12 Section 11121 (1970)
South Dakota	South Dakota Codified Laws Title 34A-Environmental Protection, Chapter 9 (1974)
Texas	Interagency Council for Natural Resources entitled the "Texas Response" (1973)
Virginia	Code of Virginia, Title 10.1 Chapter 12 (1973)
Washington	Revised code of Washington Chapter 43.21C State Environmental Policy Act (1971)
Wisconsin	Wisconsin Statutes Annotated, Title 1 Chapter 1.11 (1971)

LEGISLATION RELATING TO THE HAWAII STATE EIS SYSTEM

Table of Legislatiion Relating to the State EIS System

Year	Act No.	Bill No.	Bill Title
1974	Act 246	H.B. No. 2067	A Bill for an Act Relating to Environmental Impact Statements
1979	Act 197	S.B. No. 1591	A Bill for an Act Relating to Environmental Quality Commission and Environmental Impact Statements
1980	Act 22	S.B. No 3085	A Bill for an Act Relating to Environmental Impact Statements
1983	Act 140	S.B. No. 1279	A Bill for an Act Relating to Environmental Quality
1986	Act 186	H.B. No. 2168	A Bill for an Act Relating to Environmental Impact Statements
1987	Act 187	H.B. No. 379	A Bill for an Act Relating to Environmental Quality
1987	Act 325	H.B. No. 1583	A Bill for an Act Relating to Environmental Impact Statements
1987	Act 195	H.B. No. 1028	A Bill for an Act Relating to Environmental Impact Statements
1987	Act 283	S.B. No. 431	A Bill for an Act Relating to Statutory Revision: Amending or Repealing Various Provisions of the Hawaii Revised Statutes and the Session Laws of Hawaii for the Purpose of Correcting Errors, Clarifying Language, Correcting References, and Deleting Obsolete or Unnecessary Provisions.

NOTES ON CHAPTER 343 HRS APPEALS

by

J.W. Morrow
Former Chairman, Environmental Council
Director of Environmental Health, American Lung Association of Hawaii

Introduction

One of the most controversial issues pertaining to the Environmental Impact Statement (EIS) system is the subject of appeals of determinations. These determinations include whether an action is subject to Chapter 343; whether an action requires an EIS; and whether a final EIS is judged to be adequate. Appeals were discussed in the previous 1978 review. Subsequently, they have become even more of an issue. The following paragraphs present a chronology of events pursuant to appeals initiated or attempted under the existing provisions of Chapter 343 HRS.

1976

The American Lung Association of Hawaii (ALAH) challenged a negative declaration issued by the City and County of Honolulu Department of Land Utilization (DLU). The case involved a proposed shopping center and its parking area which the ALAH showed would have a "significant" impact on air quality, i.e., possible violation of state and federal air quality standards. The DLU had not addressed air quality in its Environmental Assessment (EA) and claimed that it did not have to because it was assessing the project under the provisions of the county's shoreline management ordinance No. 4529. The ALAH noted that Ordinance 4529 specifically cited Chapter 343 and was therefore tied to the "significance criteria" listed in the Environmental Impact Statement (EIS) Rules. DLU believed it had only to use the specific criteria of Ordinance 4529 in assessing significance. The matter went to circuit court where Judge Arthur Fong remanded the issue back to DLU in June 1978 with instructions to demonstrate that they had considered Chapter 343. DLU did so with an affidavit from one of its staff which simply stated that Chapter 343 had been considered. In a subsequent hearing, Judge Fong then ruled in favor of DLU, saying that the legal requirements had been met. The ALAH appealed to the State Supreme Court which in 1982 ruled against the ALAH saying that the complaint had not been filed within the 60 days specified in HRS 343-7(b).

NOTE: The City Council subsequent to this case also amended Ordinance 4529 to remove any reference to Chapter 343, HRS, thereby preventing any future appeals such as the aforementioned.

1984

One of the early legislative efforts to institute a formal administrative appeals process was Representative Tom Okamura's H.B. 2075 in the 1984 legislative session. This bill originally had three major elements:

- allow any person or agency to appeal an agency determination that an EIS is or is not required to the Environmental Council;
- directed the Environmental Council to establish procedures for such appeals; and
- defined the proposing agency and the person or agency appealing the determination as aggrieved parties for the purposed of bringing judicial action.

Subsequent revisions in the House and Senate added the following:

- the council was directed to also promulgate rules defining the circumstances under which an appeal could be filed;
- the appeal had to be filed within 30 days after publication of the agency determination; and the appellee to abide by the Council's decision.

On June 12, 1984, then Governor George Ariyoshi vetoed H.B. 2075 making the following points:

- judicial appeal is not the only option available;
- administrative appeals can be taken in accordance with each agency's administrative appeal procedures and then appealed judicially as provided in Chapter 91, HRS;
- the bill "engenders vagueness and ambiguity" since it is unclear whether the appeal would be in lieu of or in addition to the existing agency appeal procedures;
- Sec 343-7 is not a judicial appeal process per se, but rather simply a statute of limitations; and
- the appeal would give the Council unwarranted veto power over other agencies; and
- the appeal process would be time-consuming and prevent agencies from acting on permit applications within statutorily prescribed time limits.

The Governor's arguments appear somewhat unfounded upon closer examination. Following receipt of the veto message, the Environmental Council chairman directed the staff to conduct a telephone survey of key agencies which make EIS determinations and found that not one had an administrative appeals procedure for such determinations. This included the State DLNR and the C&C Honolulu DLU which make a large number of determinations. The Governor's comments about "vagueness" and "ambiguity" become irrelevant if there are no agency appeal procedures. While HRS 343-7 is simply a statute of limitations, it has been liberally interpreted by the courts, including the State Supreme Court, as authority to bring judicial action. The allegation of "unwarranted veto power" is itself unwarranted since HRS 343-5 already gives the Environmental Council veto power over agency decisions on EIS acceptability and this provision has not proven burdensome. Finally, the Governor's concern about "time-consuming appeals" was unnecessary since the Environmental Council's intention was to keep such appeals within the existing 60-day period specified in HRS 343-7.

1984 PETITIONS TO THE ENVIRONMENTAL COUNCIL

Three petitions for declaratory ruling were received and acted upon by the Environmental Council (EC). A summary of each may be found in Appendix A of the 1984 Annual Report of the EC.

1986

During the 1986 legislative session, Representative Mark Andrews introduced H.B. 2729 which again would have established an administrative appeal to the Environmental Council within 30 days of public notification of an agency determination.

1987

Representative Andrews introduced H.B. 380, a bill very similar to H.B. 2729, but which also attempted to respond to concerns about time and delays by requiring the Council to make its decision within 30 days of receipt of an appeal. This bill was passed by the legislature but once again was vetoed, this time by the new Governor, John Waihee, on June 22, 1987. The language of the veto message was almost identical to that of former Governor Ariyoshi and thus subject to the same deficiencies noted above.

RESPONSES TO THE ENVIRONMENTAL COUNCIL INQUIRY ABOUT AGENCY APPEAL PROCESSES

In a June 30, 1987 letter to state and county agencies involved in the EIS system, then chairman James Morrow asked those agencies to describe their administrative appeal processes and indicate how many such appeals had been filed in recent years. The responses, as indicated below, were somewhat disparate:

- No admin appeals process. LUC stated its belief that appeals must go to the Circuit Court pursuant to Chapter 91, HRS; in 1985-86, there were no such appeals.
- No admin appeals process. Kauai Planning Department stated that it follows HRS 343-5 and -6 in directing such appeals to the Environmental Council and courts; there were no appeals in 1985-86.
- No specific answer to the question was provided. DLNR stated that it allows any citizen the "specific appeal process on Chapter 343 action that which is expressly provided for in the law." No response was received on the number of such appeals during 1985-86.
- Petition for declaratory ruling. The C&C Honolulu DGP stated that it has an appeal process for declaratory rulings by which the department would encompass determinations made pursuant to HRS 343-5 and EIS Rules 11-200-9(b). It went on to explain how a person may petition for a declaratory order as to the applicability of any statute or ordinance relating to the Department, in accordance with HRS 91-8. During 1985-86, no such petitions were filed. COMMENT: One must wonder how the DGP claims authority to issue rulings on Chapter 343 or the EIS Rules which are promulgated by the State Environmental Council.
- Admin appeal procedures provided. The Maui County Planning Commission provides for appeals of any of its orders or decisions in its Rules of Practice and Procedure. During 1985-86, one such appeal was filed.

In summary, out of the five responses from key agencies involved in making EIS determinations, three had no administrative appeal procedures, one used a questionable declaratory ruling procedure, and only the County of Maui appeared to have a legitimate administrative appeal process. And of all five agencies, only one appeal of an EIS determination had been received in the 1985-86 period.

1986 PETITIONS TO THE ENVIRONMENTAL COUNCIL

Three petitions for declaratory ruling were received and acted upon by the Council in 1986. Summaries of each may be found in Appendix A of the 1986 Annual Report of the EC.

1987 PETITIONS TO THE ENVIRONMENTAL COUNCIL

On December 23, 1987, the ALAH submitted a petition for declaratory ruling to the Environmental Council regarding a negative declaration issued by the C&C Honolulu Department of Housing and Community Development for the proposed Chinatown Gateway project. The association's chief argument was that the EA itself demonstrated potential violations of state and federal air and noise standards. This would appear to meet the statutory test of "...may have a significant effect on the environment," and thus require an EIS. At its meeting of January 19, 1988, the Council refused to consider the petition on advice of its attorney who said the Council had no jurisdiction. On January 21, 1988 following meetings between ALAH and the City, the City agreed to do a full EIS for the project.

1987 PETITIONS TO THE ENVIRONMENTAL COUNCIL

One petition for declaratory ruling was acted upon by the Council in 1987 and its summary may be found in Appendix B of the 1987 Annual Report of the EC.

1988

In the 1988 legislative session, Representative Andrews introduced H.B. 2860 adding a new section to Chapter 343 which clearly stated the Environmental Council's authority to issue declaratory rulings or advisory opinions regarding any provision of Chapter 343 or any rule or order adopted by the council pursuant to Chapter 343.

This bill would have seemed to have been unnecessary since HRS 91.8 already clearly provides authority for rulemaking agencies to issue declaratory rulings and the Environmental Council met the definition of "agency" [HRS 91.1(1)] and had rulemaking powers (HRS 343-6). Nevertheless, the bill was introduced and eventually passed out in hopes of putting to rest any further questioning of the Council's powers.

On June 14, 1988, however, Governor John Waihee vetoed the bill. While the Governor recognized the Council's authority to issue declaratory rulings under HRS 91-8, he also cited a Hawaii Supreme Court decision (Fasi v. HPERB, 1979) limiting such rulings to matters upon which the Council might act under its statutory powers. The Governor went on to note that allowing the Council to issue rulings on Chapter 343 provisions or "any and all relevant rules or orders" would be authorizing the Council to issue rulings on matters over which the Council is "otherwise powerless to act."

In the Fasi v. HPERB case, the Supreme Court rightfully noted that the language of HRS 91-8 regarding "any statutory provision" is too broad and is clearly limited by its context. An agency must restrict its rulings to those statutory provisions which pertain to the agency and its powers. For example, HPERB is granted powers under HRS Chapter 89, the Land Use Commission has powers granted by HRS Chapter 205, and the Environmental Council has powers granted by HRS Chapter 343. Obviously, the Council could not issue rulings on the applicability of Chapter 205 anymore than the LUC could issue rulings on Chapter 343.

The Fasi v. HPERB case was a specific case with specific issues. The justices ruled that HPERB had the right to issue a declaratory ruling because the issue upon which it ruled was relevant to its powers under Chapter 89. The general opinion of the court was that:

> "an administrative agency may provide a declaratory ruling only with respect to a question which is relevant to some action it might take in the exercise of its powers."

The high court used the Fasi v. HPERB case to clarify the obvious, i.e., that HRS 91-8's broad language should not be interpreted to mean that an agency could issue declaratory rulings on statutory provision, but rather only on those that were relevant to that agency's own authority and powers. It is difficult to imagine that the Supreme Court justices intended to deny a rulemaking agency the authority to issue declaratory rulings on the applicability of the agency's own rules.

In addition to its power to act on appeals of non-accepted EIS's (HRS 343-5), the Council's principal authorized "actions" involve its essentially unlimited power to adopt rules to accomplish the purposes of the chapter (HRS 343-6). For example, it must "prescribe procedures for the preparation and contents of an environmental assessment" (HRS 343-6(a)(3). Since that is an "action" authorized under Chapter 343, one must conclude that the Council can issue declaratory rulings on any question "relevant" to that action.

Since the Council has the clear authority pursuant to HRS 343-6 to adopt all necessary rules to accomplish the purposes of Chapter 343, it seems equally clear that the Council has the authority to issue declaratory rulings on the applicability of its own rules as well as the statutory provisions from which they arise.

Another indication of the uncertainty concerning Chapter 343 appeals shows up in the February 16, 1988 letter of Deputy AG Sonia Faust to EC Chairman George Krasnick, in which she states:

"...if a person believes that an agency should prepare an environmental assessment for an action and the agency does not do so, the recourse provided to the person under chapter 343 is to seek judicial review pursuant to section 343-7."

This appears to contradict governors' veto messages of June 12, 1984 and June 22, 1987, in which it was stated that section 343-7 is not a judicial appeal process per se, but simply a statute of limitations. Since such messages are often written or reviewed by Deputy AG's, it makes for an interesting situation.

1988 PETITIONS TO THE ENVIRONMENTAL COUNCIL

On March 10, 1988, the ALAH filed a petition for declaratory ruling with the Environmental Council regarding a negative declaration issued by the C&C Honolulu DLU for the Halawa Center Project. The association's key arguments were that the EA indicated significant increases in traffic (25%) and reduction in level of service (LOS) from Level C (stable flow) to Level E (unstable flow with long queues, yet included no air quality impact assessment whatsoever. DLU Director John Whalen required the developer to prepare an air quality impact assessment and the petition was withdrawn thereby obviating the need for action by the Environmental Council.

On June 2, 1988, the ALAH filed a petition for declaratory ruling with the Environmental Council regarding a negative declaration issued by the C&C Honolulu Building Department for the NBC Parking Structure. The ALAH cited HRS 343-5(b) regarding the absolute requirement for an EIS if a proposed action may have significant impact and HRS 343-6 regarding the Council's authority to adopt rules. ALAH cited Sec 11-200-12(3), (8), and (10) from the significance criteria. It provided evidence that state and federal air quality standards might be violated in the vicinity of the project and that the project would clearly contribute to such violations. Projected violations of state and federal health standards would appear to meet the statutory test of "..may have significant effect on the environment," and thereby require EIS preparation. The Council again refused to act on the petition based on their attorney's advice of no jurisdiction.

In early 1988, the Council refused to act on a Life of the Land petition to issue a declaratory ruling answering the question of whether DLNR should prepare an EA prior to adoption of instream flow standards which "affect" streams on state lands or on lands within the Conservation District. This seemed like a perfectly legitimate question for the Council to answer, i.e., do the Council's own rules apply to the adoption of other agency's rules which "may have a significant effect on the environment" when they are implemented? The Council once again claimed no jurisdiction based on their attorney's opinion. In this case, Deputy Attorney General Sonia Faust in her letter of February 16, 1988 to Council chairman George Krasnick, cited the Council's "limited authority" but failed to recognize the essentially unlimited rulemaking powers of the Council (HRS 343-6) to implement Chapter 343.

On June 15, 1988, the Conservation Council for Hawaii and the ALAH petitioned the Council to issue a declaratory ruling on the following issues pertaining to a proposed Sand Island Shore Protection project:

- the authority of the Office of Environmental Quality Control (OEQC) to waive the EIS preparation notice requirement;

- the use of a 5-6 year old National Environmental Policy Act (NEPA) EIS as a Chapter 343 EIS; and
- an inherent conflict in EIS Rules Sec 11-200-15 which allows for a waiver of the consultation process if the proposed action involves "minor environmental concerns" if the requirement for an EIS is based on a finding of potential significant impact.

Again, these seemed like pertinent questions to pose to the agency that writes the rules. In fact, the answers to these questions seemed quite easy upon a simple reading of the statute and rules. Yet the Council once again declined to act on the basis of lack of jurisdiction.

1989

In late 1988, the Hawaii Bar Association's Natural Resources Section took an interest in the issue. Section Chairperson, Judy S. Givens, wrote a letter to fellow member Mr. Larry Gilbert, describing the dilemma:

"It is unclear, under present law, whether an aggrieved person's means of obtaining judicial review is Chapter 91 or Chapter 343. Chapter 343 does not appear to create a right of action, but the Hawaii Supreme Court has remanded some cases for judicial review under 343-7. The procedure for such review (under 343-7) is not at all clear. Chapter 91 provides a relatively clear procedure, however, it comes into play only after an agency has held a contested case hearing. That requirement has been stretched to the limit by the courts, but there comes a point at which the record on appeal is simply too sparse for intelligent review."

A bill was drafted with the following major provisions:

- provide a 30-day period after publication of a determination during which any aggrieved person might petition the agency for reconsideration;
- require the agency to consider all submitted evidence and issue a determination upon reconsideration which would be published by OEQC;
- establish standing to appeal under Chapter 91; and
- reduce the 60-day statutory limit to 30 days for judicial appeal.

On January 12, 1989, a meeting was held between Representative Wayne Metcalf (Chairman, House Judiciary Committee), Attorney General Warren Price, and James Morrow (ALAH Environmental Health Director). At that meeting, the following major points were made:

- Price: an administration appeal would require a contested case hearing to establish a record; administration appeal procedures would encourage many frivolous appeals on negative declarations and thus impede development; administration appeals would extend the process and delay projects; simpler appeals would not establish an adequate record; Fasi v. HPERB decision limits issuance of declaratory rulings;
- Morrow: "many frivolous appeals" is simply conjecture and not supported by historical evidence since hundreds of negative declarations go unquestioned every year; lengthy contested case hearings are not desired; simpler, third party reviewed is wanted within the 60 day period; want to clean up judicial uncertainty as well; want Environmental Council to issue declaratory rulings, if possible;
- Metcalf: Price and Morrow to work on "fixing" judicial appeal procedure; if possible, develop simpler, acceptable administrative appeal; to avoid numerous or frivolous appeals, try to develop criteria for limiting appeals, such as who, project size, etc.

The outcome of the meeting was that Price said he would have his deputy Leslie Chow contact Morrow to work on mutually acceptable language. A copy of the Bar Association's draft bill was subsequently provided to Price and Metcalf for their review. A memorandum was sent on January 13, 1989 from Morrow to Price explaining that Morrow would be out-of-state for several weeks and requesting that Chow contact Judy Givens in his absence. Since neither Chow nor anyone else from the AG's office made contact with either Givens or Morrow until shortly before the legislative deadline for submitting bills on February 2, Representative Metcalf introduced the Bar Association bill as drafted. It became H.B. 1685 and was eventually passed by the 1989 Legislature.

Once again, however, the Governor vetoed a bill designed, this time by a section of the State Bar Association, to clarify any uncertainty that existed about appeal procedures related to Chapter 343 determinations. This time the Governor's major points were:

- uncertainty about whether the reconsideration was only on the prior proceedings or would allow introduction of new information (if the latter, it would double the entire process);
- if new information were allowed on reconsideration, it would encourage persons to withhold information from the original determination and submit it only if that first determination was adverse to their position;
- no notice to interested parties was required;
- no process for "interested parties" to rebut evidence submitted by a petitioner;
- "monumental" practical and legal problems in making the OEQC an "aggrieved" party; and
- the concept of permitting any person to ask for reconsideration could have "far-reaching ramifications" for the entire economy of the state.

With regard to the first point, the petitioner would likely be introducing new information or evidence to demonstrate that the agency's determination was based on erroneous or incomplete information regarding the potential impacts of the proposed action. The statutory test which triggers the EIS requirement is simply a showing that a proposed action "may" have significant environmental impact (HRS 343-5). The expressed fear of a doubling of the entire process seems highly unrealistic since hundreds of agency determinations are made every year with only about 1 - 2% ever questioned or challenged.

The second point about encouraging persons to withhold information is certainly not a unique or inherent part of the proposed legislation. That could just as easily be occurring under the existing system as proponents and opponents wait to see how agencies make their decisions.

The third and fourth points about notification and participation of "interested" parties should probably have been more specific. Applicants and parties affected by a petition for reconsideration should be notified and permitted to submit evidence.

We are very curious as to the Governor's concerns about the "monumental" practical and legal problems associated with making OEQC an aggrieved party since the OEQC already has such status under HRS 343-7(a). One must ask what makes this situation so different?

And finally, one must also wonder how an occasional petition for reconsideration of a questionable agency determination is going to have such a serious impact on the entire State's economy. At best, it sounds like an unfounded fear and at worst, an unsubstantiated scare tactic.

1990

During the 1990 legislative session, H.B. 2217 was introduced in yet another attempt to address the problem of agency determinations. In addition to administrative appeal provisions, it took the innovative step of introducing a review of proposed negative declarations. Major provisions of the bill were:

- OEQC publishes availability of EAs for review and comment;
- EAs which result in proposed negative declarations would be subjected to a 30-day review and comment period; and
- statutory limit for filing of judicial appeals on negative declarations would be reduced from 60 to 30 days to offset the 30-day review period.

The bill passed the House but was held in the Senate by Chairman Donna Ikeda of the Agriculture Committee. Ikeda's decision was apparently based on the expressed opposition of the City & County of Honolulu and the State's DLNR as well as the legislatively mandated review of Chapter 343 being conducted by the UH Environmental Center.

CONCLUSIONS

Based on 15 years of wrestling with this issue, I believe that a review of proposed negative declarations offers the perfect compromise in that it is "preventive" oriented. Rather than debate the need for and the form of an administrative appeal process, the Environmental Council simply should be empowered to adopt rules prescribing procedures for review of proposed negative declarations. Furthermore, subtracting whatever number of days is required for the review from the 60-day statutory limit for judicial action would prevent extension of the system.

As for declaratory rulings, it remains my firm belief that under HRS 91-8, the Environmental Council, as a rulemaking agency, has every right to issue declaratory rulings regarding the applicability of Chapter 343 provisions and any rules or order adopted by the Council pursuant to its statutory powers. The Council should not hesitate to exercise its authority if petitioned to rule on issues relevant to Chapter 343 and Chapter 11-200, EIS Rules. To my knowledge, no previously issued declaratory ruling by the Council has been overturned in the courts. If a future ruling is challenged and taken to the State Supreme Court, we shall find out if Fasi v. HPERB really was intended to prevent a rulemaking agency from issuing declaratory rulings on its own statute and rules.